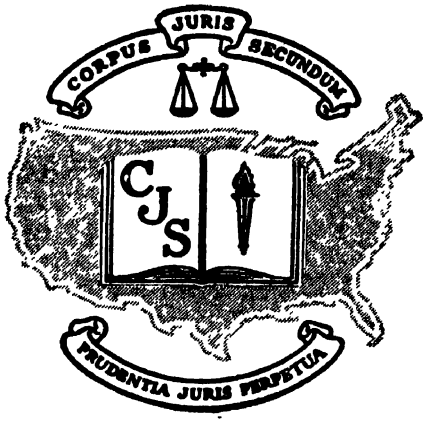

CORPUS JURIS SECUNDUM
CJS
PRUDENTIA JURIS PERPETUA

CITE BY TITLE AND SECTION

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43 C.J.S. Infants § 21

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

DONALD J. KISER, LL. D.

Editor in Chief

Assisted by
The Combined Editorial Staffs
of
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
A.2d	Atlantic Reporter Second Series
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
AdamsL.J.	Adams County Legal Journal (Pa.)
A.D.2d	Appellate Division Second Series (N.Y.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
A.L.R.2d	American Law Reports, Second Series
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&Eng.Pat. Cas.	American & English Decisions in Equity
Am.&E.Eq.D.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.O.S.	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
App.Div.2d	Appellate Division, Second Series (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia
B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)

Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaver	Beaver County Legal Journal (Pa.)
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
Berks	Berks County Law Journal (Pa.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Black L.D.	Black's Law Dictionary
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland's Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown's Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Bucks	Bucks County Law Reporter (Pa.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cases (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

C.	California Reports
C.2d	California Reports, Second Series
C.A.	Court of Appeals (U.S.)
C.A.	California Appellate Reports
C.A.2d	California Appellate Reports, Second Series
Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cald.	Caldecott (Eng.)
Cal.Rptr.	California Reporter
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cambria	Cambria County Legal Journal (Pa.)
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)
Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)

C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark & Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke&S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller, Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Sup.	Connecticut Supplement
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtney & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.& Pat. App.	Court of Customs and Patent Appeals
Cumb.	Cumberland Law Journal (Pa.)
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D. & C.	District and County (Pa.)
D. & C.2d	District and County, Second Series (Pa.)
D.Chipm.	D. Chipman (Vt.)
D.C.Mun.App.	Municipal Court of Appeals (D.C.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)
D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)

Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.& L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Em.App.	Emergency Court of Appeals (U.S.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Erie	Erie County Law Journal (Pa.)
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
Fay.L.J.	Fayette Legal Journal (Pa.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.2d	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fiduciary	Fiduciary Reporter (Pa.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)
Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)

Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.Del.	Harrington (Del.)
Harr.Mich.	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii Fed.	Hawaiian Federal
Hawaii Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Hening & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den.Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt's Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.Miss.	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
I.L.E.	Indiana Law Encyclopedia
Ill.	Illinois Reports
Ill.2d	Illinois Reports, Second Series
Ill.App.	Illinois Appellate Court Reports
Ill.App.2d	Illinois Appellate Court Reports, Second Series
Ill.Cir.	Illinois Circuit Court
I.L.P.	Illinois Law and Practice
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law& Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for Year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)

Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keil.	Keilwey (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Bar	Lackawanna Bar (Pa.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
Law.L.J.	Lawrence Law Journal (Pa.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
Lebanon	Lebanon County Legal Journal (Pa.)
L.Ed.	Lawyers' Edition United States Supreme Court
L.Ed.2d	Lawyer's Edition United States Supreme Court, Second Series
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Leh.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh&C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times, New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)
L.T.O.S.	Law Times, Old Series (Pa.)
L.T.Rep.N.S.	Law Times Reports, New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Luz.L.J.	Luzerne Law Journal (Pa.)
Lycoming	Lycoming Reporter (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports

MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Man.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.	Martin (N.C.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Marv.	Marvel (Del.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule & S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous Reports (N.Y.)
Misc.2d	Miscellaneous Reports, Second Series (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.L.P.	Michigan Law and Practice
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
M.A.L.	Modern American Law
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Monroe L.R.	Monroe Law Reports (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.	Municipal Law Reporter (Pa.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.2d	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.Unoff.	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law
Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
NewRep.	New Reports in all Courts (Eng.)
NewSess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.	New Jersey Reports
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.J.Super.	New Jersey Superior Court Reports
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)

N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.	Northampton County Reporter (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Northumb.L.J.	Northumberland Legal Journal (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Neville & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.W.2d	North Western Reporter Second Series
N.Y.	New York
N.Y.2d	New York Second Series
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.S.2d	New York Supplement Second Series
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. Reprint	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio O.2d	Ohio Opinions, Second Series
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Ohio Supp.	Ohio Supplement
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor Dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.2d.	Pacific Reporter Second Series
[1891] P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.Corp.	Pennsylvania Corporation Reporter
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.D.&C.	Pennsylvania District and County
Pa.D.&C.2d	Pennsylvania District and County Second Series
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Pa.Rec.	Pennsylvania Record
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
P.&K.	Perry & Knapp (Eng.)
P.L.E.	Pennsylvania Law Encyclopedia
P.L.J.	Pittsburgh Legal Journal (Pa.)
P.L.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)
Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)

[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
Queensl.L.	Queensland Law
Queensl.L.J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev.Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap.Jud. Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R.C.L.	Ruling Case Law
R.&Can.Cas.	Railway & Canal Cases (Eng.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)
Redf.Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep.t.Finch	Cases temp. Finch (Eng.)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng.)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev.de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S.C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S.C.)
R.&M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports
Rom.Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert, Nova Scotia
Russ.&M.	Russell & Mylne (Eng.)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S.)
Saxt.	Saxton (N.J.)
Say.	Sayer (Eng.)
S.C.	South Carolina
[1907]S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch.&Lef.	Schoales & Lefroy (Ir.)
Sch.Leg.Rec.	Schuylkill Legal Record (Pa.)
Sch.Reg.	Schuylkill Register (Pa.)
[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Sc.Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
ScotL.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr.L.T.	Scranton Law Times (Pa.)
Sc.Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
S.E.2d	South Eastern Reporter Second Series
Searle & Sm.	Searle & Smith (Eng.)
Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc.)
Shaw & D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw,Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N.Y.)
Shep.Abr.	Sheppard's Abridgment
Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv.A.	Silvernail's Appeals (N.Y.)
Silv.Sup.	Silvernail's Supreme (N.Y.)
Sim.	Simons (Eng.)
Sim.N.S.	Simons New Series (Eng.)
Sim.&St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale&G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
Smith K.B.	Smith's King's Bench (Eng.)
Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss.)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
So.2d	Southern Reporter Second Series
Sol.J.	Solicitor's Journal (Eng.)
Som.	Somerset Legal Journal (Pa.)
Sp.	Speers (S.C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)
Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)

Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.2d	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trint.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Truemann's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.App.D.C.	United States Appeal Cases (D.C.)
U.S.Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah Reports
Utah 2d	Utah Reports Second Series

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.& B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall.Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.2d	Washington Reports, Second Series
Wash.	Washington (Va.)
Wash.St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.Co.	Washington County Reports (Pa.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B.&W.I. P.& M.	Webb, A'Beckett & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web.Pat.Cas.	Webster's Patent Cases (Eng.)
Webster New Int.D.	Webster's New International Dictionary
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West	West (Eng.)
West.	Westmoreland County Law Journal (Pa.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917]West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)
Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin Reports
Wis.2d	Wisconsin Reports, Second Series
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)

Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly.Rep.	Weekly Reporter (Eng.)
Wms.Saund.	Williams Notes to Saunders' Reports
W.N.	Weekly Notes (Eng.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr.Pa.	Wright (Pa.)
W.Va.	West Virginia
W.W.Harr.	W. W. Harrington (Del.)
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy.&W.	Wyatt & Webb (Vict.)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal
Ala.L.Rev.	Alabama Law Review
Albany L.Rev.	Albany Law Review
Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
Ark.L.Rev.	Arkansas Law Review
Aust.L.J.	Australian Law Journal
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif.L.Rev.	California Law Review
Camb.L.J.	Cambridge Law Journal
Chi.-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Q.Rev.	Law Quarterly Review
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
La.L.Rev.	Louisiana Law Review
Loyola L.Rev.	Loyola Law Review
Marq.L.Rev.	Marquette Law Review
Md.L.Rev.	Maryland Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Miami L.Q.	Miami Law Quarterly
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Mo.L.Rev.	Missouri Law Review
Montana L.Rev.	Montana Law Review
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev.	North Carolina Law Review
Okla.L.Rev.	Oklahoma Law Review
Oreg.L.Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt.L.Rev.	Rocky Mountain Law Review
Rutgers U.L.Rev.	Rutgers University Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washton University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Southwestern L.J.	Southwestern Law Journal
Stanford L.Rev.	Stanford Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Cin.L.Rev.	University of Cincinnati Law Review
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U.Florida L.Rev.	University of Florida Law Review
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U.Pa.L.Rev.	University of Pennsylvania Law Review
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CORPUS JURIS SECUNDUM

VOLUME FORTY-THREE

INDUSTRIAL. A very large word,[1] defined as meaning consisting in, or pertaining to, industry;[2] relating to industry.[3] The term is also often employed as referring to something relating to manufactures, or to the product of industry or labor.[4]

It is the direct antithesis of "domestic," when the latter is used in its primary sense, see 27 C.J.S. p 1319 note 53.

Phrases employing the word are listed in the note.[5] Other phrases as to which more recent adjudications have not been found see 31 C.J.S. p 888–960 notes 66–76.

1. U.S.—Wells v. Northern Pac. R. Co., C.C.Or., 23 F. 469, 474, 10 Sawy. 441.
Okl.—Chicago, R. I. & P. Ry. Co. v. State, 201 P. 260, 264, 83 Okl. 161.

2. Mont.—Carver Mercantile Co. v. Hulme, 19 P. 213, 7 Mont. 566, 571.
Okl.—Chicago, R. I. & P. Ry. Co. v. State, 201 P. 260, 264, 83 Okl. 161.

3. Kan.—State v. Howat, 198 P. 686, 693, 109 Kan. 376.

4. Ala.—Louisville & N. R. Co. v. Fulgham, 8 So. 803, 804, 91 Ala. 555.

5. Phrases construed

(1) "Industrial activity" commonly means the treatment or processing of raw products in factories.—North Whittier Heights Citrus Ass'n v. National Labor Relations Board, C.C.A., 109 F.2d 76, 80.

(2) "Industrial blindness," described as less than 20/200 vision; and a person is said to be "industrially blind" if he has less than one-tenth normal vision, that is, if he does not have useful vision, although he may have light perception.—Cunya v. Vance, 197 N.E. 737, 739, 100 Ind. App. 687.

(3) "Industrial design" described as a profession which, in its brief career, has developed a technique for analyzing the function of a product, has set up standards for judging functional fitness, and has applied these methods and standards to innumerable objects ranging from domestic and office appliances to automobiles, ships and trains; and to industrial and commercial buildings, offices and shops, and the expositions in which industry explains itself to the public.—Teague v. Graves, 27 N.Y.S.2d 762, 764, 261 App.Div. 652.

(4) "Industrial diamonds" in contrast with "gem diamonds" are those used for a number of purposes in mechanical work, such as lapping, truing, grinding wheels, making diamond saws, cutting vitreous ware, lapping tools, boring tools, and the like. Their value depends upon the degree of hardness.—Goodman v. U.S., C.C.A.Cal., 128 F.2d 854, 855.

(5) "Industrial disease," or "occupational disease," within compensation statutes see the C.J.S. title Workmen's Compensation Acts § 169, also 71 C.J. p 599 note 69–p 603 note 90.

(6) "Industrial dispute," construed as not necessarily restricted to a dispute between employer and employees, but as a dispute that may be between employees and their union or bargaining agency, provided it involves the employer and affects the terms or conditions of employment.—Miller v. Unemployment Compensation Board of Review, 31 A.2d 740, 742, 152 Pa.Super. 315—31 C.J. pp 888–960 note 69.

(7) "Industrial enterprise," "industrial establishment," "industrial operation," and "industrial work" within the purview of compensation statutes, see the C.J.S. title Workmen's Compensation Acts § 36, also 71 C.J. p 381 notes 71–87.

(8) "Industrial establishment," distinguished from "commercial establishment" see 15 C.J.S. p 576 note 10, and defined generally as a place of business which employs much labor and capital and is a distinct branch of trade.—State ex rel. Kansas City Power & Light Co. v. Smith, 111 S.W.2d 513, 515, 342 Mo. 75—31 C.J. p 888–960 note 71.

(9) "Industrial insurance" see the C.J.S. title Insurance § 20, also 31 C.J. p 966 note 1–p 974 note 5.

(10) "Industrial loan companies" see Banks and Banking § 1045 a.

(11) "Industrial purpose," as inapplicable to the use of distilled spirits for the fortification of wine.—Monllor & Boscio v. Sancho, C.C.A.Puerto Rico, 136 F.2d 114, 115.

(12) "Industrial rate," compared with "domestic rate."—Pejebscot Paper Co. v. Town of Lisbon, 142 A. 194, 196, 127 Me. 161.

(13) "Industrial relations," construed in its context as referring to affairs relating to industry, and involving government departments devoted to public service.—State v. Howat, 198 P. 686, 693, 109 Kan. 376, 50 A.L.R. 1210.

(14) "Industrial school" see the C.J.S. title Reformatories § 1, also 53 C.J. p 1058 note 4.

(15) "Industrial services" with reference to carrier's charges see Carriers § 314 in Pocket Parts.

(16) "Industrial track" and "team track" distinguished see Railroads § 1, also 61 C.J. p 1751 note 26 [a].

(17) "Industrial use," as not including the use of a driveway lying within a commercial district merely for the passage of trucks hauling supplies to a brick manufactory located in an industrial district, and hauling the finished product therefrom.—Borough of Prospect Park v. McClaskey, 30 A.2d 179, 181, 151 Pa. Super. 467.

(18) "Industrial Workers of the World," an international organization, or movement, commonly known and designated as the "I. W. W."

Cal.—People v. Malley, 194 P. 48, 53, 49 Cal.App. 597.

Iowa.—State v. Tonn, 191 N.W. 530, 532, 195 Iowa 94.

(19) "Useful or mechanical or industrial arts," distinguished from "fine art" see 6 C.J.S. p 772 note 25.

INDUSTRIAL CO-OPERATIVE SOCIETIES

This Title includes co-operative associations and corporations formed for the purpose of carrying on in common an industry, trade, or business for mutual benefit, such as the production and distribution of commodities and products; rights, duties, and liabilities of such societies and of their members.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Work Index

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See also descriptive word index in the back of this Volume

§ 1. Nature and Classes

An industrial co-operative society, incorporated or otherwise, is a society formed by individuals to carry on in common an industry, trade, or business for their mutual benefit, and such societies have received legislative approval.

An industrial co-operative society, incorporated or otherwise, is a society formed by individuals to carry on in common an industry, trade, or business for their mutual benefit. Societies of this character fall generally into three classes, productive, marketing, and distributive. A productive society is one formed for the production of commodities by its members in common, the profits of the enterprise being shared in accordance with the amount of capital or labor contributed by each member.[1] A marketing society is one formed to market and sell commodities produced by its members either individually or in common, its purpose being to increase the profits of its members by means of their selling in common.[2] A distributive society is one formed for the procuring of commodities for distribution among its members without pecuniary profit to the society, its purpose being to economize by their buying commodities in common.[3]

The term "association" as hereinafter used in this title includes co-operative associations whether they are corporations or mere voluntary unincorporated societies, except where it is necessary to a clear understanding of the principles of law involved that the distinction be noted.

Legislative approval. The formation and development of co-operative societies or associations, especially for the marketing of agricultural commodities, has been encouraged both by federal and state laws,[4] and such statutes reveal widespread legislative approval of such plans for protecting scattered

1. Minn.—Finnegan v. Noerenberg, 53 N.W. 1150, 52 Minn. 239, 38 Am.S.R. 552, 18 L.R.A. 778.

2. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Origin and growth

Co-operative marketing associations, composed of the growers or producers of agricultural or fruticultural products, are now to be found in many of the states and in every section of the country, and their origin and growth are founded on a pressing economic necessity.

Ala.—Warren v. Alabama Farm Bureau Cotton Ass'n, 104 So. 264, 213 Ala. 61.

Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.

3. Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, 109 S.W.2d 862, 194 Ark. 779.

4. U.S.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643—In re Wisconsin Co-op. Milk Pool, D.C.Wis., 35 F.Supp. 787, reversed on other grounds, C.C.A., 119 F.2d 999.

Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.

Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.

Tex.—Ex parte Tigner, 132 S.W.2d 885, 139 Tex.Cr. 452, affirmed Tigner v. State of Texas, 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124, petition denied 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422.

Public policy

It is public policy to aid co-operative marketing.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469.

producers and advancing the public interest.[5] The statutes have been generally held not invalid,[6] and they are given a liberal construction in order to accomplish the purposes for which they were enacted.[7]

§ 2. Organization, Consolidation, and Dissolution

Where the organization of co-operative societies is authorized and regulated by statute, there must be a substantial compliance with such provisions.

Where the organization of co-operative societies is authorized and regulated by statute, there must be a substantial compliance with such provisions.[8] While the principle of co-operative associations is not by any means new,[9] as corporations, these organizations are relatively recent.[10] Although it has been held that such corporations may be legally organized under general statutes providing for nonprofit corporations,[11] they may not be organized under a statute providing for the organization of eleemosynary and educational institutions,[12] but under some statutes a co-operative association may be organized as a corporation and carried on as such with each phase of its business determined under the statute without reference to the laws applicable to other business corporations,[13] and under such statutes, there comes a new form of corporation not

5. U.S.—In re Wisconsin Co-op. Milk Pool, D.C.Wis., 35 F.Supp. 787, reversed on other grounds, C. C.A., 119 F.2d 999.
Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.
"It has been well said that such associations, wisely and economically administered, tend to work to the advantage of the producers, and that the pooling arrangement tends to stabilize prices and, in the long run, to secure to the members better prices by affording them better and cheaper warehouse facilities and by enabling them, when necessary, to sell direct to the manufacturers."—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 422, 171 Ark. 1155.

Purpose of legislation

(1) The enactment of the co-operative marketing statute manifests an effort to aid the agricultural producers of the state to co-operate to the end that the prices of their products might be stabilized, that waste might be eliminated, and that general prosperity might be promoted.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614—State ex rel. Attorney General v. Burley Tobacco Growers Co-operative Ass'n, 2 Tenn.App. 674.
Tex.—Ex parte Tigner, 132 S.W.2d 885, 139 Tex.Cr. 452, affirmed Tigner v. State of Texas, 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124, petition denied 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422.
41 C.J. p 166 notes 42-56.

(2) The spirit and purpose of legislation authorizing the incorporation of nonprofit, co-operative agricultural associations were to create a system of group handling and marketing of produce of the farms as a part of the farmer's agricultural industry for the benefit of both producers and consumers.—California Employment Commission v. Butte County Rice Growers Ass'n, Cal.App., 138 P.2d 347.

6. U.S.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643.
Fla.—Jellesma v. Tampa Better Milk Producers' Co-operative, etc., 147 So. 463, 109 Fla. 200.
Kan.—Kansas Wheat Growers' Ass'n v. Rowan, 254 P. 326, 123 Kan. 169.
Ky.—McFall v. Burley Tobacco Growers' Co-op. Ass'n, 17 S.W.2d 432, 229 Ky. 432.
Minn.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.
Ohio.—Burley Tobacco Grower's Co-Operative Ass'n v. Gardner, 25 Ohio N.P.,N.S., 1.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.
Wis.—Northern Wisconsin Co-Op. Tobacco Pool v. Bekkedal, 197 N. W. 936, 182 Wis. 571.
Validity of co-operative marketing act:
As to constitutional guaranty of open court and remedy for injuries see Constitutional Law § 711.
As to due process see Constitutional Law § 707.
As to equal protection of laws see Constitutional Law § 511 f.

Discriminatory provisions of act relating to co-operative associations, not within police power, are invalid. —Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294.

Prohibiting credit

A statute authorizing the formation of co-operative associations, productive and distributive, is not invalid as conferring special privileges or immunities because of a provision therein that no credit shall be either given or taken by such associations, and that any credit given them in violation of such provision shall be forfeited.—In re Wyoming Valley Co-op. Ass'n, D.C.Pa., 198 F. 436.

7. Minn.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.
Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.
Tex.—State v. Standard Oil Co., 107 S.W.2d 550, 130 Tex. 313, reversing, Civ.App., 82 S.W.2d 402—Ex parte Tigner, 132 S.W.2d 885, 139 Tex.Cr. 452, affirmed Tigner v. State of Texas, 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124, petition denied 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422.

Strained interpretation

A co-operative marketing statute should not receive a strained and technical interpretation for the purpose of defeating its manifest purposes.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.

8. N.C.—Pittman v. Tobacco Growers' Co-op. Ass'n, 121 S.E. 634, 187 N.C. 340.

9. Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, 109 S.W.2d 862, 194 Ark. 779.

10. Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, supra.

11. Ill.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.

12. Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

13. Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, 109 S.W.2d 682, 685, 194 Ark. 779.
"It was not the purpose of the Legislature in providing for the organization of associations as corporations to destroy that unity producing the groups, nor was it the purpose of the Legislature to destroy the beneficial effects of voluntary associations, of allied interests, but rather to supply a legal agency to take the place of the former almost futile and more dangerous volun-

hitherto known.[14] Where the association is incorporated, it has a distinct existence separate and apart from its stockholders.[15]

A statute authorizing the incorporation of agricultural associations does not authorize the incorporation of such an association for the purpose of operating electric light[16] and telephone[17] systems for its members, or of conducting a store to furnish them with groceries,[18] but the formation of an electric co-operative association is authorized under a statute authorizing co-operatives to conduct a mercantile, manufacturing, mechanical, or mining business.[19] Under a statute authorizing the incorporation of co-operative societies only where they are organized, not for pecuniary profit, but for the mutual benefit of their members, the fact that the by-laws of a marketing society impose on any member a charge of a fixed per cent of the gross sales of his produce made through others than the society does not indicate that the society is organized for pecuniary profit.[20]

If the declaration of incorporation recites that the corporation is incorporated under a particular act authorizing the incorporation of co-operative societies, and its charter confers on it the powers granted by that statute, the corporation is deemed a corporation organized under the act, although its charter provisions as to powers may in some particulars be more general in their scope than the act authorizes.[21]

The absence of some of the members of the organization committee at the time it was determined to incorporate is immaterial where more than a quorum were present,[22] and irregularity in organizing before the date authorized in the proposal cannot be urged by members who failed to withdraw within the time limit set for withdrawal.[23]

De facto corporation. Where there is an apparent attempt to perfect an organization under the law, but a failure to comply with some substantial requirement thereof, followed by user of corporate powers, a corporation de facto exists.[24]

Dissolution and receivership. The fact that an association has ceased to function for several years has been held not to mean that it has become dissolved,[25] and whether an inactive co-operative association should be held intact for future developments has been held to be within the sound discretion of the directors.[26] A mere showing that an association had collected large sums of money and refused to account therefor to its members,[27] or the fact that agents of the association, in violation of their instructions, made misrepresentations to secure contracts of members,[28] has been held insufficient to justify an ouster of the corporation. An association, chartered under a national organization, by subsequent application for a charter from a state organization and acceptance thereof ipso facto repudiated and surrendered its charter from the national organization.[29] A receiver may be appointed for a co-operative association in a proper case,[30] but a receiver will not be appointed when the acts complained of may be remedied by injunction, or are capable of redress by other available means.[31] Members are not entitled to a receiver-

tary associations."—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, supra.

14. Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, supra.

15. Md.—Rutledge Co-op. Ass'n v. Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.

16. Pa.—In re Co-operative Agricultural Ass'n, 29 Pa.Dist. 321.

17. Pa.—In re Co-operative Agricultural Ass'n, supra.

18. Pa.—In re Co-operative Agricultural Ass'n, supra.

19. Iowa.—State ex rel. Winterfield v. Hardin County Rural Electric Co-op., 285 N.W. 219, 226 Iowa 896.

20. Ala.—Ex parte Baldwin County Producers' Corp., 83 So. 69, 203 Ala. 345, reversing 81 So. 862, 17 Ala.App. 84.

21. Ala.—Ex parte Baldwin County Producers' Corporation, supra.

22. Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, Civ.App., 16 S.W.2d 413.

23. Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, supra.

24. Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

25. Or.—Hendrickson v. Bloom, 80 P.2d 868, 159 Or. 428.

Title held not to revert

Although a local grange unit, to which property had been conveyed under a deed vesting title in trustees of the unit as long as the unit should exist and providing for reversion, had ceased to function or elect officers for several years, the grange unit remained in existence and title to property did not revert to the original grantors, where the unit had never surrendered its charter or disposed of its property, but had reorganized and was functioning under the original charter.—Hendrickson v. Bloom, supra.

26. Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 11 S.W.2d 119, 227 Ky. 297.

27. Tenn.—State ex rel. Attorney General v. Burley Tobacco Growers Co-operative Ass'n, 2 Tenn.App. 674.

28. Tenn.—State ex rel. Attorney General v. Burley Tobacco Growers Co-operative Ass'n, supra.

29. Tex.—Ryan v. Witt, Civ.App., 173 S.W. 952.

30. Ala.—Leyden v. Calhoun Co-op. Creamery Co., 135 So. 317, 223 Ala. 289.

31. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Mistaken construction of contract

Since mismanagement arose only through mistaken construction of a rice growers' association's contract, a receiver would not be appointed.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, supra.

ship and an accounting on the ground that the association had operated without technically adopting by-laws where the evidence showed that the association had always operated under by-laws and had formally adopted by-laws before the suit,[32] or because of an act or conduct which was not ultra vires.[33]

§ 3. Charter of Incorporation, Articles of Association, and By-Laws

The charter, articles of association, and by-laws of a co-operative society are governed by statutes specifically relating thereto, or in the absence of such provisions, by the general rules applicable to corporations or voluntary associations.

The charter of an incorporated society and the articles of association of an unincorporated society are governed by statutes specifically relating thereto, or in the absence of such provisions, by the general rules applicable to corporations or voluntary associations.[34] While the society has power to adopt all necessary and proper by-laws and rules for its government and operation,[35] the by-laws must be adopted in the mode prescribed by statutory or charter provisions in order to be valid,[36] and the by-laws may be amended only on substantial compliance with the formalities prescribed.[37] Where a by-law operates as a contract between the society and its members, such contract cannot be abrogated by repealing the by-law.[38] The failure to enact by-laws within the time required by statute has been held not to render acts of the association illegal.[39]

General rules apply in the construction of by-laws,[40] and valid by-laws are binding on the as-

32. Wash.—Boyle v. Pasco Growers' Ass'n, 17 P.2d 6, 170 Wash. 516.

33. Wash.—Boyle v. Pasco Growers' Ass'n, 17 P.2d 6, 170 Wash. 516.

34. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

Construction in light of statute

Articles of incorporation of a nonprofit association for distribution of a product of its members must be construed in the light of the statute. —Alfalfa Growers of California v. Icardo, 256 P. 287, 82 Cal.App. 641.

Recital in amendment of articles of incorporation of a farm bureau that the articles were amended on due notice being given was sufficient although details of the notice and procedure followed were not shown. —Appanoose County Farm Bureau v. Board of Sup'rs of Appanoose County, 256 N.W. 687, 218 Iowa 945.

Articles of incorporation held valid

Powers given to a power association incorporated by county rural electric co-operatives under an article authorizing the association to manage transmission lines, to acquire property, franchises, licenses, and easements, to borrow money, to make advances and extend credit, and to do all things permitted by law, were merely incidental to accomplishing the single purpose of association to procure and distribute electric energy, and the article did not violate the statute authorizing co-operatives to form associations to conduct a mercantile, manufacturing, mechanical, or mining business; and a statement in the articles of incorporation wherein county rural electric co-operatives formed an association to generate and distribute electric energy, that the association could purchase electric energy, was not invalid as a statement of a separate purpose or business where the whole object of association was to furnish co-operatives, their members, nonmembers, governmental bodies, and other patrons with an uninterrupted supply of electric current.—State ex rel. Winterfield v. Hardin County Rural Electric Co-op., 285 N. W. 219, 226 Iowa 896.

35. Neb.—Whitney v. Farmers' Co-op. Grain Co., 193 N.W. 103, 110 Neb. 157.

31 C.J. p 962 note 24.

Abrogating contracts

A co-operative grain company may not adopt any by-law abrogating its existing contracts with its members. Whitney v. Farmers' Co-op. Grain Co., supra.

36. Cal.—Tapo Citrus Ass'n v. Casey, 115 P.2d 203, 45 Cal.App.2d 796—Noble v. California Prune & Apricot Growers' Ass'n, 276 P. 636, 98 Cal.App. 230.

Signature by agent

The fact that the name of the holder of a certificate in an association was signed by an authorized agent is not fraud authorizing an injunction inhibiting the recognition of the validity of such certificate.—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.

Long delay in filing the by-laws in a public office does not invalidate them where the statute prescribes no time for filing.—Willis v. Lauridson, supra.

37. Cal.—Willis v. Lauridson, supra—Noble v. California Prune & Apricot Growers' Ass'n, 276 P. 636, 98 Cal.App. 230.

Special statute applicable

Since a statute providing a mode of amendment of the by-laws of a non-profit co-operative marketing association was specifically written to apply to a nonprofit co-operative association, it, and not the general law, would be followed.—Tapo Citrus Ass'n v. Casey, 115 P.2d 203, 45 Cal. App.2d 796.

Majority of shares or majority of members

The purpose of a statute providing that a majority vote of members of a nonprofit co-operative marketing association or shares of stock outstanding entitled to vote, or written assent of a majority of members or of stockholders representing a majority of all shares of stock outstanding and entitled to vote, is necessary to adopt by-laws or to repeal or amend any by-laws, or to adopt additional by-laws, is to provide a mode of amendment of the by-laws for associations both with and without shares of stock, and where a nonprofit co-operative marketing association had no shares of stock outstanding, the mode of amending its by-laws was by vote or written assent of a majority in number of its members.—Tapo Citrus Ass'n v. Casey, supra.

38. Kan.—Loch v. Paola Farmers' Union Co-op. Creamery & Store Ass'n, 287 P. 269, 130 Kan. 522, denying rehearing 285 P. 523, 130 Kan. 136.

39. Tenn.—Tennessee Cotton Growers Ass'n v. Hanson, 2 Tenn.App. 118.

40. **Quorum**

A by-law of an association, providing that any meeting of the majority of the members present in person or represented by proxy shall constitute quorum, means that a majority of the members of the association shall constitute a quorum.—Everts v. Kansas Wheat Growers' Ass'n, 237 P. 1030, 119 Kan. 276.

sociation and its members.[41] They are not ordinarily binding on third persons dealing with the society;[42] but if a third person has actual notice of a by-law at the time he deals with the society, he is bound by it.[43]

§ 4. Legality

Although there is authority to the contrary, it has been held that a by-law or contract, requiring members of a marketing society to deliver to it all their produce, and to pay liquidated damages in case of breach, is not invalid as in restraint of trade or contrary to public policy.

In the absence of special provisions relating thereto, the legality of the objects of industrial co-operative societies and of their by-laws are governed by the principles of law applicable to associations or to corporations in general; and such associations have been held not illegal.[44] Activities of a legally organized association within the powers granted to the association are not open to attack as being against the public policy of the state.[45]

While it is usually held, sometimes by virtue of statutory provisions, that a by-law or contract requiring members of a marketing society to deliver to it all their produce, and to pay liquidated damages in case of their breach, is not invalid as in restraint of trade or contrary to public policy,[46] it has also been held that such a contract or by-law is invalid as in restraint of trade,[47] at least where the contract was made prior to the enactment of a statute which legalizes such contracts.[48]

Co-operative societies and contracts between them and their members as creating or tending to create a monopoly are considered in the C.J.S. title Monopolies § 78, also 41 C.J. p 166 note 57-p 168 note 88.

§ 5. Rights, Powers, Duties, and Liabilities

a. In general
b. Contracts

41. Mich.—Cole v. Southern Michigan Fruit Ass'n, 245 N.W. 534, 260 Mich. 617.
Or.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.

Reasonable amendments

An agreement by member of co-operative dairy organization to be bound by its by-laws and subsequent amendments thereto is valid, and such member is bound by all reasonable amendments that may be thereafter adopted.—East-West Dairymen's Ass'n v. Dias, 138 P.2d 772, 59 Cal.App.2d 437.

42. Mich.—Harley v. Hartford Fruit Growers' & Farmers' Exch., 184 N. W. 507, 216 Mich. 146.
31 C.J. p 962 note 30.

43. Mich.—Rundell v. Farmers' Co-op. El. Co., 178 N.W. 21, 210 Mich. 642.
31 C.J. p 962 note 31.

44. Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469—Dark Tobacco Growers' Co-op. Ass'n v. Robertson, 150 N.E. 106, 84 Ind. App. 51.

45. Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, 191 A. 326, 122 Conn. 482.

46. Ala.—Bishop v. Alabama Farm Bureau Cotton Ass'n, 110 So. 711, 215 Ala. 388—Warren v. Alabama Farm Bureau Cotton Ass'n, 104 So. 264, 213 Ala. 61.
Colo.—Rifle Potato Growers' Co-op. Ass'n v. Smith, 240 P. 937, 78 Colo. 171.
Fla.—Lee v. Clearwater Growers' Ass'n, 111 So. 722, 93 Fla. 214.
Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469—Dark Tobacco Growers' Co-op. Ass'n v. Robertson, 150 N.E. 106, 84 Ind.App. 51.
N.H.—Manchester Dairy System v. Hayward, 132 A. 12, 82 N.H. 193.
Ohio.—Brannan v. Ohio Poultry Producers' Co-op. Ass'n, 162 N.E. 453, 27 Ohio App. 426.
Tex.—Lennox v. Texas Cotton Co-op. Ass'n, Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S. W.2d 331.
Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.
31 C.J. p 962 note 36, p 963 note 41—13 C.J. p 481 note 15—41 C.J. p 168 note 76.
Damages on breach of contract see infra § 9.

No interference by courts

General control conferred on a dairy co-operative marketing association by contract will not be interfered with by courts, in the absence of arbitrary action, unfair discrimination, fraud, or similar misconduct.—Olympia Milk Producers' Ass'n v. Herman, 29 P.2d 676, 176 Wash. 338.

Unfairness immaterial

Marketing contract, by which accused agreed to sell his potatoes to plaintiff only, was supported by a consideration, where plaintiff was required to buy, resell, and on certain conditions give accused something out of the proceeds, it being immaterial that the contract was unfair to accused, and that he received no benefit therefrom.—Rifle Potato Growers' Co-op. Ass'n v. Smith, 240 P. 937, 78 Colo. 171.

Validity of statute

A statute authorizing co-operative associations, by contract with its members, to become the exclusive agency for the sale and purchase of certain commodities has been held not invalid.—Clear Lake Co-op. Live Stock Shippers' Ass'n v. Weir, 206 N.W. 297, 200 Iowa 1293.

General statute modified

A contract between a co-operative association and its members, whereby the members agree to sell all products grown by them to the association for five years, the contract to be effective when seventy-five per cent of the growers in the state signed similar agreements and to be self-renewing from year to year, and providing for liquidated damages in case of breach, is authorized by statute, and hence is not to be tested, in determining whether it constituted an unlawful restraint of trade, by the general provisions of the statute relating to contracts in restraint of trade.—Northern Wisconsin Co-Op. Tobacco Pool v. Bekkedal, 197 N.W. 936, 182 Wis. 571.

47. Iowa.—Reeves v. Decorah Farmers Co-op. Soc., 140 N.W. 844, 160 Iowa 194, 44 L.R.A.,N.S., 1104.
31 C.J. p 962 note 38, p 963 note 39.

48. Colo.—Atkinson v. Colorado Wheat Growers' Ass'n, 238 P. 1117, 77 Colo. 559.

Where association a de facto corporation

A co-operative marketing association's contract was held not valid, although the association was a de facto corporation.—Colorado Wheat Growers' Ass'n v. Thede, 253 P. 30, 80 Colo. 529.

a. In General

The rights, powers, duties, and liabilities of a co-operative society depend on statutory provisions and its charter or articles of association.

In accordance with general rules of law applicable to corporations or to voluntary associations, the rights, powers, duties, and liabilities of a co-operative society depend on statutory provisions and its charter or articles of association,[49] and ordinarily a co-operative association is authorized to exercise all powers, rights, and privileges necessary or incidental to the purposes for which it was formed and to the activities in which it should engage.[50] In accordance therewith, it has been held that such a society may, within the exercise of a reasonable discretion, refuse an offer for commodities held by it,[51] employ an attorney,[52] incur debts,[53] use deductions for credits and commercial purposes to pay certain operating costs,[54] engage in the distribution of supplies purchased by agricultural producers,[55] expend reasonable sums to present, by fair and open means, the merits of a matter advocated before a legislative body,[56] make an assignment of funds due,[57] accept assignment of member's interest in commodities in the association's custody,[58] and may recover damages from a person converting property of the association.[59] The assets of the association, although belonging to the members, are subject to

49. Ark.—McCarroll v. Ozarks Rural Electric Co-op. Corporation, 146 S.W.2d 693, 201 Ark. 329.
Cal.—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.
Ill.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.
Iowa.—State ex rel. Winterfield v. Hardin County Rural Electric Co-op., 285 N.W. 219, 226 Iowa 896.

Notice of powers

Persons dealing with a co-operative association are bound to take notice of the powers of the association.—Kansas Wheat Growers' Ass'n v. Rowan, 266 P. 101, 125 Kan. 710.

Manufacturing ice cream

A co-operative marketing association organized under the Cooperative Marketing Act is authorized to manufacture ice cream from milk supplied by its members.—Forrester v. Georgia Milk Producers Confederation, 19 S.E.2d 183, 66 Ga.App. 696.

Pledging credit of members

An agricultural co-operative marketing association was held to have power to purchase crates for members, pledge members' credit therefor to the extent of the amounts due to members, and to pay the seller therefor.—Bank of Aurora v. Aurora Co-op. Fruit Growing & Marketing Ass'n, Mo.App., 91 S.W.2d 177.

Pooling grain

A nonstock, nonprofit, co-operative marketing association duly organized may adopt and carry out a plan of marketing by pooling grain, and may do each and every thing reasonably necessary therefor.—Lexington Mill & Elevator Co. v. Browne, 219 N.W. 13, 116 Neb. 753.

Filing annual report

An incorporated society has been held required to file an annual report of its condition under a statute relating to corporations generally.—Anderson v. Equity Co-op. Ass'n of Roy, 215 P. 802, 67 Mont. 291.

Referendum under Agricultural Adjustment Act

Under a statute requiring the secretary of agriculture to consider approval or disapproval by a co-operative as the approval or disapproval of the producers represented by it, the secretary has the burden of ascertaining whether a co-operative meets the statutory requirements and he may not make additional qualifications for voting.—U. S. v. Rock Royal Co-op., D.C.N.Y., 26 F. Supp. 534, modified on other grounds 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526 and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

50. Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, 191 A. 326, 122 Conn. 482.

51. Colo.—Mountain States Beet Growers' Marketing Ass'n v. Monroe, 269 P. 886, 84 Colo. 200.

52. Mo.—Bank of Aurora v. Aurora Co-op. Fruit Growing & Marketing Ass'n, App., 91 S.W.2d 177.

53. Minn.—In re Farmers' Dairy Co.'s Receivership, 225 N.W. 22, 177 Minn. 211.

54. Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Brown, 17 S.W.2d 1002, 229 Ky. 696.

Indebtedness under arbitration award

That a marketing association's fund for credits and commercial purposes was a trust fund which, when invested in warehousing corporations' bonds, could only be used for obligations arising directly in connection with the fund, is too narrow a construction of the contract, and the fund may be used to settle the indebtedness from a violation of the contract with the warehousing corporations, as settled by an arbitration agreement and award.—Burley Tobacco Growers' Co-op. Ass'n v. Brown, supra.

Provision for distribution of any surplus in fund for credits and commercial purposes did not prevent director's use of fund.—Burley Tobacco Growers' Co-op. Ass'n v. Brown, supra.

55. Va.—Rockingham Co-op. Farm Bureau v. City of Harrisonburg, 198 S.E. 908, 171 Va. 339.

Peculiar connection with agricultural production

The word "supplies," as used in a statute providing that a co-operative marketing association may engage in the distribution of supplies purchased by agricultural producers, is confined to things which have a peculiar connection with agricultural production as defined in the statute, in contradistinction to the conduct of other businesses.—Rockingham Co-op. Farm Bureau v. City of Harrisonburg, 198 S.E. 908, 171 Va. 339.

56. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

57. Mo.—Bank of Aurora v. Aurora Co-op. Fruit Growing & Marketing Ass'n, App., 91 S.W.2d 177.

Transfer not shown

The fact that an agent of an unincorporated voluntary association later became the manager and secretary of an incorporated co-operative association was held not to transfer to the corporation an account of the association in the possession of the agent so that the corporation could sue thereon.—Idaho Apple Growers' Ass'n v. Brown, 7 P.2d 591, 51 Idaho 540.

Equitable lien created

Mo.—Bank of Aurora v. Aurora Co-op. Fruit Growing & Marketing Ass'n, App., 91 S.W.2d 177.

58. Cal.—Robinson v. Harry, 46 P.2d 806, 7 Cal.App.2d 312.

59. Cal.—California Grape Control Board v. Boothe Fruit Co., 29 P.2d 857, 220 Cal. 279.

claims of creditors of the association,[60] and a transfer thereof by the association to its members pending an action against it has been held to be in fraud of creditors.[61]

However, it has also been held that such a society is without authority to engage in transactions on credit,[62] devote unexpended funds to research where an agreement provides for the return thereof on expiration of such agreement,[63] or to close up or interfere with private business inimical to, and standing in the way of, accomplishment of the purposes of the association.[64]

Knowledge of one assisting in organizing a co-operative association has been held not to constitute notice to the corporation subsequently organized,[65] and notice to an officer or agent is not imputable to the association where the circumstances raise a clear presumption that he will not communicate his knowledge to the association, as where he acquires it while acting adversely to the association and entirely for his own purposes.[66]

Compliance with general regulatory statutes. It has been held that a statute requiring a certificate of convenience and necessity of public service corporations does not apply to an electric membership corporation where the statute under which it was organized is complete in itself and states that the provisions of other laws shall not apply to a corporation formed thereunder.[67] However, it has also been held that a co-operative association is not exempted from statutory provisions requiring certificates or permits where they perform the functions of a public utility,[68] and where an association has received a permit, it has no right, by accepting new members, to enter into competition with a competitor without procuring an extension of its permit.[69] Where the statute under which the association was organized does not authorize the operation of public markets, the association does not have the right to conduct a public market independently of statutes relating to such markets.[70] Where a license or certificate of convenience and necessity is necessary, each individual application must be considered on its own merits.[71]

Under some statutes, a foreign co-operative association, not a corporation for profit, need not file a copy of its charter with a designated state officer as a prerequisite to doing business within the state.[72]

Local and general associations. The contractual relation between a state co-operative union and a national union from which it had secured a charter was held to be fixed by the several documents existing between them and the action taken there-

60. Idaho.—Associated Fruit Co. v. Idaho-Oregon Fruit Growers' Ass'n, 256 P. 99, 44 Idaho 200.

Reserve fund of a cotton marketing association was available for the payment of debts.—Texas Farm Bureau Cotton Ass'n v. Lennox, 297 S. W. 743, 117 Tex. 94.

61. Idaho.—Associated Fruit Co. v. Idaho-Oregon Fruit Growers' Ass'n, 256 P. 99, 44 Idaho 200.

62. U.S.—In re Wyoming Valley Co-op. Ass'n, D.C.Pa., 198 F. 436.

63. U.S.—Speh v. Bullard, C.C.A. Fla., 90 F.2d 227.

64. Ky.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, 86 S.W. 2d 1046, 261 Ky. 25.

May refuse to sell

A co-operative milk distributing association organized and operated under the Co-operative Marketing Act was held authorized to refuse to sell milk of members to an independent distributor and to refuse to permit members to sell milk to such distributor direct.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, supra.

65. Ky.—Dark Tobacco Growers' Co-op. Ass'n v. Alexander, 270 S.W. 677, 208 Ky. 572.

66. Miss.—American Cotton Co-op. Ass'n v. Union Compress & Warehouse Co., 7 So.2d 537, 193 Miss. 43.

Director or officer chargeable with knowledge of matters relating to affairs of association see infra § 6.

67. Ala.—Alabama Power Co. v. Cullman County Electric Membership Corporation, 174 So. 866, 234 Ala. 396, adhered to 178 So. 919, 235 Ala. 694.

N.C.—Carolina Power & Light Co. v. Johnston County Electric Membership Corporation, 192 S.E. 105, 211 N.C. 717.

68. Md.—West v. Tidewater Express Lines, 179 A. 176, 168 Md. 581—Parlett Co-operative, Inc. v. Tidewater Lines, Inc., 165 A. 313, 164 Md. 405—Rutledge Co-operative Ass'n v. Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.

Exemption statute invalid

A statute authorizing a public utility co-operative association without an adjudication of necessity has been held invalid.—Frost v. Corporation Commission of State of Oklahoma, Okl., 49 S.Ct. 235, 278 U.S. 515, 73 L.Ed. 483, reversing, D.C., 26 F.2d 508.

69. Md.—Madonna & Shawsville Co-op. Co. of Harford County v. West, 176 A. 611, 168 Md. 95.

70. W.Va.—West Central Producers Co-op. Ass'n v. Commissioner of Agriculture, 20 S.E.2d 797, 124 W. Va. 81.

71. Okl.—Pannell v. Farmers Union Co-op. Gin Ass'n of Sterling, 138 P.2d 817.

Lack of competition

(1) A corporation commission's order granting a license to a co-operative gin association to maintain and operate a cotton gin, on the ground that the two gins at the point in question were owned and operated by the same owners and lack of competition created a discrimination in prices, was supported by substantial evidence.—Pannell v. Farmers Union Co-op. Gin Ass'n of Sterling, supra.

(2) A commission is not confined to the question whether gins already located afford adequate facilities, but may consider facts affecting the reasonableness of existing facilities regarding the ultimate cost of ginning cotton.—Southwestern Cotton Oil Co. v. Farmers' Union Co-operative Gin Co., 24 P.2d 658, 165 Okl. 31.

72. Miss.—American Cotton Co-op. Ass'n v. Union Compress & Warehouse Co., 7 So.2d 537, 193 Miss. 43.

under by them.[73] Charges by an association against subsidiaries for a fund used to redeem subsidiaries' bonds is a valid obligation which the association may not cancel,[74] and a local association, although not a member of a general association, may be liable to the latter under a contract therewith under which obligations were incurred.[75] Ordinarily a national union is not liable to a third person because of an alleged tort of a local union, in the absence of a showing of a special interest or connection therewith.[76]

b. Contracts

An industrial co-operative society may make contracts in furtherance of its purposes.

An industrial co-operative society may make contracts[77] for the sale and future delivery of commodities,[78] and may provide for pooling proceeds of sales in a common fund, paying each producer in proportion to the quantity of his products to the entire amount sold by the association without regard to the amount obtained for the particular product.[79] Under some statutes, co-operative soci-

73. Neb.—Farmers Educational & Co-operative Union of America v. Farmers Educational & Co-operative State Union of Nebraska, 275 N.W. 464, 133 Neb. 397.

Payment of dues collected

A farmers educational and co-operative state union which had secured a charter from the national union and had paid annual dues to the national union for each member for about fifteen years was liable to pay to the national union dues collected and set apart, but not paid during a particular year, even though the articles of incorporation of the state union did not provide for such payment, since, by incorporating under charter, the state union acquiesced in its terms, and the contractual relation was fixed by several documents and action taken thereunder by the unions.—Farmers Educational & Co-operative Union of America v. Farmers Educational & Co-operative State Union of Nebraska, supra.

74. Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 11 S.W.2d 119, 227 Ky. 297.

75. N.Y.—New York Canning Crops Co-op. Ass'n v. Slocum, 212 N.Y.S. 534, 126 Misc. 30.

"Cost" and "overhead"; estoppel

Under a statute authorizing contracts between such associations and providing for a charge for "the actual cost thereof, including the pro rata part of all overhead expenses," the terms "cost" and "overhead" mean expenses and obligations incurred in connection with operation of the general association; and the local co-operative association is estopped from setting up the defense of ultra vires as to obligations in carrying out a contract with the general association, after accepting benefits thereof.—New York Canning Crops Co-op. Ass'n v. Slocum, supra.

76. Personal injuries

A motorist could not recover from a farmers' cooperative union incorporated in a foreign state, for injuries sustained when the motorist stepped into a hole in the driveway in a gasoline service station operated by a local union which was chartered by the foreign union, in the absence of evidence that the latter operated or was interested in the operation of the filling station, or was in any way concerned in the maintenance of driveway, or was in any way responsible for the defective condition thereof, and in the absence of evidence that the local union operated the gasoline station as agent of the foreign union.—Farmers' Educational and Co-operative Union of America v. Eakins, 108 P.2d 182, 188 Okl. 324.

77. Cal.—Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 16 P.2d 1040, 128 Cal.App. 265.

Neb.—Lexington Mill & Elevator Co. v. Browne, 219 N.W. 12, 116 Neb. 753.

Uncertainty

Contract between a wheat marketing association and an owner of elevator facilities for the latter to handle wheat, although not designating the amount, was held not void for uncertainty, in view of the practical construction by the parties.—Fred Mosher Grain v. Kansas Co-op. Wheat Marketing Ass'n, 15 P.2d 421, 136 Kan. 269.

Agent of association

(1) Agreement between fruit growers' association and fruit exchange for marketing of deciduous fruits was held not to constitute the exchange the exclusive selling agent of the association, and the association, under a marketing agreement with the fruit exchange, was entitled to patronage dividends on withholdings from proceeds of ripe fruits and grapes delivered to the exchange.—Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 16 P.2d 1040, 128 Cal.App. 265.

(2) A contract with a co-operative marketing association was held to make the other parties the association's agents for handling grain through elevator.—Lexington Mill & Elevator Co. v. Browne, 219 N.W. 12, 116 Neb. 753.

Duty to ascertain authority

Where a third person contracting with an association as agent of the growers is charged with knowledge that the authority of the agent is in writing, the third person has the duty to ascertain the extent and nature of the authority conferred and whether the agent is acting within the scope thereof.—Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398.

78. Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 270 S.W. 946, 168 Ark. 504, supplemental opinion 270 S.W. 1119, 168 Ark. 504.

Fixing prices on seller's call

Contracts for sale of cotton, as modified, fixing prices on seller's call before or after delivery with mutual agreement to protect against fluctuations of the market were not "ultra vires" as to a co-operative marketing corporation.—South Carolina Cotton Growers' Co-op. Ass'n v. Weil, 126 So. 637, 220 Ala. 568.

Exemption of members from liability

That part of the statute which exempted the members of a co-operative marketing association from individual liability for debts of the association was held not to restrict the power of the association, if properly exercised, to contract for the sale and future delivery of the cotton.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 270 S.W. 946, 168 Ark. 504, supplemental opinion 270 S.W. 1119, 168 Ark. 504.

Possibility of loss

That the plan of a co-operative marketing association, to effect orderly marketing of cotton throughout the whole year, so as to prevent the forcing of cotton on the market during the short gathering season, or "dumping," as such condition is called, may result in loss to the association by reason of mistakes of judgment in connection with the sale of contracts of commodities for future delivery, was held not to render the plan illegal or beyond the scope of a member's contract with the association.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, supra.

79. N.Y.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N.E. 171, 239 N.Y.S. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

eties are not restricted as to the locality of their operations,[80] and they may contract for the purchase and sale of commodities outside the state where organized.[81]

Although it has been held that a co-operative society may contract with others than co-operative associations and members thereof[82] for the marketing of their produce,[83] but that it has no capacity to contract with nonmembers in conflict with statutory provisions relating to such contracts,[84] under some statutes it has been held that a co-operative marketing society can make contracts for delivery of produce only with its members.[85] Estoppel of a party to an ultra vires contract with a co-operative association to question its validity in so far as it is executed does not work against that part of the contract wholly unexecuted.[86]

Where the contract contains an option to terminate, notice of termination must be given in accordance with the terms thereof.[87]

Contracts of a co-operative association with its members are considered infra § 7 c.

§ 6. Officers and Agents

Matters relating to the election, appointment, authority, and removal of officers and agents of co-operative societies are frequently left to the discretion of the societies.

Matters relating to the election, appointment, authority, and removal of officers and agents of a co-operative society are frequently left to the discretion of the society itself.[88] The duly elected offi-

80. Tex.—Hollingsworth v. Texas Hay Ass'n, Civ.App., 246 S.W. 1068.

81. Kan.—Clark v. Murphy, 49 P.2d 973, 142 Kan. 426.

Validity; federal or local statute

The legality of purchases and sales of grain made by a co-operative grain company on Kansas City board of trade was held governed by the Federal Grain Futures Act, and not by a local "bucket shop" statute.—Clark v. Murphy, supra.

82. Minn.—In re Farmers' Dairy Co.'s receivership, 225 N.W. 22, 177 Minn. 211.

Revocation

If a marketing society is authorized by its members to enter into contracts for the sale of all their produce during a number of seasons, and it enters into such a contract with a third person and thus subjects itself to liability in damages for failure to make deliveries, it has such a power, coupled with an obligation, as prevents a revocation of its agency as to future deliveries within the period of years specified.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090, rehearing denied 205 P. 970, 103 Or. 514, 25 A.L.R. 1090.

83. N.Y.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N.E. 171, 239 N.Y. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

Meeting of minds

A provision of an exclusive marketing contract with a co-operative association for future loans, to be deducted from producers' share of proceeds, which did not prescribe the amount, duration, or interest, but left those elements to be determined by the association, was held invalid, because there was no meeting of the minds.—Dairymen's League Co-op. Ass'n v. Holmes, supra.

84. N.Y.—Dairymen's League Co-op. Ass'n v. Holmes, supra.

Share of overhead expenses

Although under a statute, no charges including a profit could be made by a co-operative association for services, either to members or nonmembers, the charges could include a pro rata share of the association's "overhead" expenses, which include continuous expenses of a business, irrespective of the outlay on particular contracts, but general losses of a co-operative association must be borne by the members, and cannot be shared by nonmembers under an exclusive marketing contract with the association, as the fact that the statute gives the association the status of a juridical person raises no implication of capacity to contract, in conflict with the provision of the statute limiting charges to nonmembers to the actual cost of its services.—Dairymen's League Co-op. Ass'n v. Holmes, supra.

Provision ultra vires

A contract for exclusive marketing of products by nonmembers through a co-operative association, authorizing it to make deductions, unlimited in amount, for the retirement of loans, erection of buildings, etc., from proceeds of products sold, although such deductions were treated as loans, was held ultra vires, in view of the fact that the time of repayment and the amount of interest was in the discretion of the association.—Dairymen's League Co-op. Ass'n v. Holmes, supra.

85. U.S.—American Live Stock Commission Co. v. U. S., D.C.Okl., 28 F.2d 63, reversed on other grounds U. S. v. American Livestock Commission Co., 49 S.Ct. 425, 279 U.S. 435, 73 L.Ed. 787.

Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Okl.—Tulsa Milk Producers' Co-op. Ass'n v. Hart, 292 P. 558, 145 Okl. 263.

Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S.W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320—Lennox v. Texas Cotton Co-op. Ass'n, Com. App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W.2d 331.

Attempted contract not enforceable

A contract for the delivery of milk, signed by accused before organization of the co-operative marketing association, was held not enforceable against him, where he never thereafter became a member of organization.—Tulsa Milk Producers' Co-op. Ass'n v. Hart, 292 P. 558, 145 Okl. 263.

86. N.Y.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N.E. 171, 239 N.Y.S. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

87. Kan.—Fred Mosher Grain v. Kansas Co-op. Wheat Marketing Ass'n, 15 P.2d 421, 136 Kan. 269.

88. Mich.—Rundell v. Farmers' Co-op. Elevator Co. of Corunna, 178 N.W. 21, 210 Mich. 642.

31 C.J. p 963 note 57.

Rule as to voting

Where the by-laws of a co-operative association, incorporated under a statute, authorized the directors to determine the election rules, a rule adopted by the directors, that, if a man voted twice, the ballot cast first should be counted, was held valid and applicable to a case where voters voted for one candidate for director, and later filed other ballots, containing written directions to cancel the first ballots and count their votes for the last candidate designated.—Davis v. South Carolina Cotton Growers' Co-Op. Ass'n, 121 S.E. 260, 127 S.C. 353.

cers of an association are entitled to the charge and control of its property, books, etc.,[89] and while their valid acts are binding on other members of the organization,[90] ordinarily an officer or agent of the association may represent and bind the association in transactions with third persons only to the extent that authority to do so has been expressly or impliedly conferred on him.[91] In the absence of conduct creating an estoppel, a co-operative association may deny the authority of an alleged agent to represent and bind it in dealings with third persons.[92]

In the absence of statutes imposing liability under specified circumstances,[93] directors or officers of the association usually are not liable for debts incurred or sums lost by the association in lawful transactions.[94] Under some statutes, directors may be liable where they permit the association to exceed the limit of its indebtedness,[95] but one making a sale to an association with knowledge that the latter had exceeded its charter indebtedness would not be entitled to recover from the directors of the association.[96] As a general rule a director or officer is chargeable with knowledge of all matters relating to the affairs of the association which he actually knows or which it is his duty to know,[97] and directors are required to take notice of statutory and charter powers and limitations of the corporation whose affairs and business they control, and cannot plead ignorance thereof to protect them from individual liability imposed by statute.[98]

That an officer used funds of the association in violation of his trust has been held a good defense, to the extent of funds so diverted, to his action for salary accruing under a contract after he was discharged.[99]

Right to question validity. A person who is not a member of a co-operative corporation cannot challenge the validity of any action of the board of directors of such corporation in the management of the corporation business or the conduct of its affairs, on the ground that such action was unlawful or has unlawfully deprived him of a right, since he has no legal right which may be affected,[1] and

Removal

Where neither the articles of incorporation, the by-laws, nor the statutes, authorize removal of directors or officers of the association, the stockholders may not remove them at a meeting called for such purpose.—State v. Kylmanen, 226 N.W. 401, 178 Minn. 164, reargued 226 N. W. 709, 178 Minn. 164.

89. Tex.—Ryan v. Witt, Civ.App., 173 S.W. 952.

90. Tex.—Ryan v. Witt, supra.

91. Cal.—Christian v. Rice Growers Ass'n of California, 123 P.2d 534, 50 Cal.App.2d 617.

92. Mich.—David Stott Flour Mills v. Saginaw County Farm Bureau, 213 N.W. 147, 237 Mich. 657.

93. Mont.—Anderson v. Equity Co-op. Ass'n of Roy, 215 P. 802, 67 Mont. 291.

Failure to file annual report

Under a statute relating to corporations generally, the directors and trustees of a co-operative association are liable for all corporate debts or judgments existing, or which may be incurred, where no annual report of the condition of the association has been filed as required by statute.—Anderson v. Equity Co-op. Ass'n of Roy, supra.

94. Kan.—Clark v. Murphy, 49 P.2d 978, 142 Kan. 426.

Conversion

The officers of an association contracting to sell a grower's produce are not liable as for conversion because of the association's failure to pay over the proceeds before receivership.—Winans v. Brue, 248 P. 62, 140 Wash. 56.

95. Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

When debts created

Directors who permitted farm bureau to exceed its charter debt limit could not escape liability to seller of fertilizer on the ground that the directors sued were not directors when antecedent debts were created, where their liability did not arise solely from the fact that the bureau was indebted before sales of the fertilizer but arose out of their permitting purchase of the fertilizer when the bureau had already exceeded its debt limit.—Federal Chemical Co. v. Paddock, supra.

96. Ky.—Federal Chemical Co. v. Paddock, supra.

Time knowledge acquired

In determining whether a seller of fertilizer to a farm bureau had knowledge at the time of sale or delivery that the bureau had exceeded its charter debt limit, the issue must be decided on proved facts known to the seller or its salesman at the time of the meeting of minds of the salesmen and the general manager of the bureau in making the contracts for the sales of the fertilizer.—Federal Chemical Co. v. Paddock, supra.

97. Kan.—Darling & Co. v. Petri, 27 P.2d 255, 138 Kan. 666.

Notice to officer or agent imputed to association see supra § 5.

Director obtaining consigned property from the association cannot escape liability to the consignor because he had no actual knowledge of the consignment contract, since he was chargeable with notice thereof. —Darling & Co. v. Petri, supra.

Conversion by manager

Directors of farmers' co-operative grain company were not personally liable for conversion by manager of grain stored in company's elevator under secret agreement with manager of which directors had no knowledge and which they could not have discovered in the exercise of ordinary and reasonable supervision. —Lowell Holt & Co. v. Detig, 50 N. E.2d 602, 320 Ill.App. 179.

98. Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

99. Tex.—South Texas Cotton Co-op. Ass'n v. Burgess, Civ.App., 103 S.W.2d 1095.

1. N.C.—Bailey v. Carolina Power & Light Co., 195 S.E. 64, 212 N.C. 768.

Resident of community

That a person is a member of the community or a resident of the territory in which an electric membership corporation is authorized to operate or that such person attended meetings preliminary to organization of such a corporation or might be eligible to membership therein does not entitle him to service by such corporation or give him any rights which may be affected by organization of corporation or by management of its business or conduct of its affairs by its board of directors.—

where the business of the association was done in a corporate manner and under a corporate franchise, the directors may not question the existence of the corporation to escape their liability, which would exist if the act done in the corporate name had been authorized by the pre-existence of a corporate capacity.[2]

§ 7. Members and Stockholders

a. In general
b. Rights and liabilities in general
c. Contracts
d. Advances and deductions; accounting
e. Termination of membership or contract

a. In General

Eligibility and admission to membership or ownership of stock in co-operative associations are commonly governed by statute, the articles of incorporation, by-laws of the society, and the contract of subscription.

Eligibility and admission to membership or ownership of stock in a co-operative society are commonly governed by statute, articles of incorporation, by-laws of the society, or the subscription contract.[3] A person may become a member of a co-operative association by signing an organization agreement or a contract of membership,[4] and sometimes by the execution of a marketing contract with the association,[5] but where membership is a question of intent, it cannot be established by facts which fail to show the existence of such intent.[6] Contracts of subscription and for the purchase of

Bailey v. Carolina Power & Light Co., supra.

2. Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

3. N.D.—Chaffee v. Farmers' Co-op. El. Co., 168 N.W. 616, 39 N.D. 585.

By-law held valid

A provision of a charter or by-law that the stock of a warehousing corporation, organized as part of a co-operative association, shall be issued only to the members of the association has been held valid.—Carpenter v. Dummit, 297 S.W. 695, 221 Ky. 67.

Ownership of property

A provision in a subscription agreement for the purchase of one share of stock for every one thousand hens or a majority fraction of one thousand owned by each subscriber, the minimum subscription in any event being one share where the corporation was organized to include every producer in marketable quantities of hens, refers to the basis for the issuance of the stock, and is not a limitation on those entitled to subscribe, so that subscriptions by holders of minority fractions of one thousand hens were proper.—Poultry Producers of Central California v. Nilsson, 239 P. 1086, 197 Cal. 245.

Consent of managers

The statute may provide that no person may become a stockholder except by consent of the managers of the society.—Healey v. Steele Center Creamery Ass'n, 133 N.W. 69, 115 Minn. 451—Finnegan v. Noerenberg, 53 N.W. 1150, 52 Minn. 239, 38 Am.S.R. 552, 18 L.R.A. 778.

An infant may become a member under the statutes and by-laws, if he has attained a prescribed age.—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.

Note in payment of stock

A note given to make good impaired capital stock of an association is not uncollectable on the ground that if it be held that the note was given for stock it violated a general statute requiring a statement that it was given for shares, etc., as the securities of a co-operative association are exempted from such provision.—Clark v. Pargeter, 52 P.2d 617, 142 Kan. 781.

Number of shares

The issuance of more than one share to a member does not constitute fraud, where the member assigns his excess shares to persons qualified to hold them before he attempts to benefit by the excess issue.—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.

4. Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109—Lennox v. Texas Cotton Co-op. Ass'n, Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ. App., 37 S.W.2d 331.

Membership not shown

A recital in a contract giving a dealer an option to purchase milk from producers from year to year that there existed an additional consideration for producers' promises to deliver milk to dealer, although not conclusive, was evidence of a fact supporting the trial court's conclusion that the producers did not become bound as members of a co-operative league which knew of the contract and procured membership contracts from producers on the theory that their identification with the league would induce others to join and thus strengthen it.—Cooperative Dairymen's League v. Hansen, 73 P. 2d 627, 23 Cal.App.2d 493.

Notification

Where an organization contract was not to be binding until notification of incorporation, etc., a notice sent in the manner prescribed in the agreement has been held to constitute sufficient notice.—Tennessee Cotton Growers Ass'n v. Hanson, 2 Tenn.App. 118.

5. Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.

Contract inoperative

Where membership is based solely on a marketing contract, if the contract is inoperative then the grower's membership in the association is likewise inoperative.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

Membership and marketing fused elements

Membership in the association cannot be separated from the obligation to fulfill a marketing agreement. Membership and marketing are fused elements of the co-operative scheme.—Kansas Wheat Growers' Ass'n v. Massey, 253 P. 1093, 123 Kan. 183.

6. Cal.—Johanson v. Riverside County Select Groves, 40 P.2d 530, 4 Cal.App.2d 114.

Agent signing as individual

That a fruit owner's foreman signed a membership card in a co-operative marketing association was held not to create a membership relationship between the owner and the association, where the card was signed by the foreman as an individual and the foreman informed the association's manager that a foreman had no authority to contract for membership.—Johanson v. Riverside County Select Groves, supra.

Constructive notice

Information conveyed to the owner's general manager that proceeds

stock are governed by the usual rules applicable to the construction of contracts,[7] and a membership subscription becomes irrevocable after the expenditure of money or the bestowing of labor on the faith of it.[8] Fraud, inducing the execution of a membership contract, may be waived.[9]

Transfer of stock; purchase by association. The right of stockholders of a co-operative association to transfer their stock may be regulated and limited.[10] If, in violation of the restrictions of a by-law, a stockholder sells and assigns a stock certificate containing a recital that it is issued and transferable subject to the restrictions prescribed by the by-laws, the transferee cannot compel the officers of the society to transfer the stock to him on its books.[11]

While, under some statutes and charters, a co-operative association may purchase, or contract to purchase, or adopt a by-law authorizing repurchase of, its own shares of stock provided it acts in good faith and without intent to injure creditors or stockholders,[12] in the absence of statutory or charter authority it has been held that an incorporated society formed to furnish its stockholders with supplies at cost has no power to agree with them, in consideration of their contributing a certain sum of money each on becoming members, that they may withdraw from membership at any time and receive back from the society, either in cash or in supplies, the amount of their contributions.[13] Since a fiduciary relationship exists between the managing officers of the association and its stockholders,[14] on purchase of outstanding stock by the association it is the duty of the officers to disclose to stockholders all known facts bearing on the value of the stock.[15]

Members of parent association. Members of local co-operative producers' corporations have been held members of the parent association so that the latter was bound by the acts of members of the locals.[16]

b. Rights and Liabilities in General

Subject to special statutory provisions relating thereto, the by-laws of the association, and the contract of membership, the rights and liabilities of members of co-operative associations are governed by the rules applicable to corporations and voluntary associations generally.

The relationship between a co-operative association and its members is that of a trustee to his beneficiary or between a principal and his agent.[17] Members of a co-operative association are bound to take notice of the powers of the association,[18]

in payment of fruit were derived from certain pools where there was no proof that the association's practice in pooling fruit marketed was different from the method of marketing fruit employed by commercial concerns engaged in business for profit, or the fact that a fruit owner's general manager was informed that the fruit was being mingled with fruit of other growers and that funds received were derived from the proceeds of pools was held not to give the manager constructive notice that the association which marketed the fruit was strictly a co-operative institution furnishing service only to its members, where such information was not received until a month after the alleged contract of membership was entered into.—Johanson v. Riverside County Select Groves, supra.

7. Cal.—Poultry Producers of Central California v. Nilsson, 239 P. 1086, 197 Cal. 245—Irwindale Citrus Ass'n v. Semler, Cal.App., 140 P.2d 716.

8. Ill.—Jefferson County Farm Bureau v. Stewart, 235 Ill.App. 370.

Association, functioning as a de facto corporation at the time a subscription agreement was executed, and subsequently incorporated, is entitled to recover thereon.—Jefferson County Farm Bureau v. Stewart, supra.

9. Kan.—Kansas Wheat Growers' Ass'n v. Rowan, 266 P. 104, 125 Kan. 657.

Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559, 8 Wash.2d 79.

Participation in meetings of the association, as by executing a proxy for use at the meetings, has been held to constitute a waiver of any fraud in inducing the execution of a membership contract.—Kansas Wheat Growers' Ass'n v. Oden, 257 P. 975, 124 Kan. 179, followed in Kansas Wheat Growers' Ass'n v. Heter, 257 P. 979, 124 Kan. 76—Kansas Wheat Growers' Ass'n v. Massey, 253 P. 1093, 123 Kan. 183.

10. N.D.—Chaffee v. Farmers' Co-op. El. Co., 168 N.W. 616, 39 N.D. 585. 31 C.J. p 963 note 63.

Certificates not negotiable

Certificates of stock of some associations are in no sense negotiable. They are rather certificates of membership, but indicate also a voluntary contribution in funds by the member.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, 109 S.W.2d 862, 194 Ark. 779.

11. N.D.—Chaffee v. Farmers' Co-op. El. Co., 168 N.W. 616, 39 N.D. 585.

12. Kan.—Loch v. Paola Farmers' Union Co-op. Creamery & Store Ass'n, 285 P. 523, 130 Kan. 136, rehearing denied 287 P. 269, 130 Kan. 522.

Neb.—Whitney v. Farmers' Co-op. Grain Co., 193 N.W. 103, 110 Neb. 157.

13. N.Y.—G. H. McGill Co. v. Underwood, 146 N.Y.S. 362, 161 App.Div. 30.

14. Iowa.—Snyder v. Colwell Co-op. Grain Exchange, 3 N.W.2d 507, 231 Iowa 1210.

15. Iowa.—Snyder v. Colwell Co-op. Grain Exchange, supra.

Rescission

Where an incorporated co-operative grain exchange, pursuant to a reorganization plan, offered a stockholder twelve dollars and fifty cents per share for her stock, and stated that the stock represented an investment equal to the amount of the offer, whereas the stock was worth at least twenty-four dollars and fifty cents per share, the stockholder was entitled to rescind sale of the stock.—Snyder v. Colwell Co-op. Grain Exchange, supra.

16. N.Y.—Barns v. Dairymen's League Co-op. Ass'n, 222 N.Y.S. 294, 220 App.Div. 624.

17. Colo.—Mountain States Beet Growers' Marketing Ass'n v. Monroe, 269 P. 886, 84 Colo. 300.

18. Kan.—Kansas Wheat Growers' Ass'n v. Rowan, 266 P. 101, 125 Kan. 710.

and are not entitled to attack the validity of the statute under which the association was incorporated or organized,[19] and they are not in a position to attack the exercise of powers by the association which were reasonably within the scope of provisions of the contracts with the members.[20] The members are entitled to inspect the books, records, and papers of the association in proper cases and under reasonable circumstances,[21] notwithstanding a statutory requirement that the association file annual reports with a public official.[22]

While the net profits or the surplus of the society is ordinarily divisible among the members,[23] in the absence of a declaration of a dividend, a member is not entitled to recover a dividend alleged to be due him,[24] and a person to whom the issue of stock was void as an overissue is not entitled to recover a share of the profits of the association.[25] Although, under a statute relating to apportionment of earnings of the association, the word "may" has been held to mean that the directors may or may not apportion earnings, but that if they choose to do so, they must follow the statutory method of apportionment,[26] under a substantially similar statute it has been held that the statutory method of apportionment was not binding on the directors and stockholders.[27] Where an agreement between a co-operative association and its members provides for the return of contributions on the expiration thereof, unexpended funds must be so distributed.[28] A stockholder has the right to dispose of dividends due on his certificate;[29] and the payment of a dividend by the society to a third person is not necessarily invalid because no authority from the stockholder to do so is on file with the society.[30] A member, receiving certificates for products delivered to a co-operative association, after assignment of such certificates has no interest therein which is subject to

By-laws binding on members see supra § 3.

19. Ga.—Johnson v. Georgia-Carolina Retail Milk Producers Ass'n, 186 S.E. 824, 182 Ga. 695.

Collateral attack

The validity of a co-operative association which has been organized under a valid statute cannot be assailed in a collateral attack; and, even if a member of a co-operative association could bring a collateral attack to vitiate its incorporation, by alleging that the number of signers required by the statute had not been obtained, the burden was on him to produce evidence to that effect.—Pittman v. Tobacco Growers' Co-Op. Ass'n, 121 S.E. 634, 187 N.C. 340.

20. Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, 191 A. 326, 122 Conn. 482.

Sale, transfer, or consolidation

(1) Where a new dairy co-operative association organized to acquire assets of old association protected the general purpose for which old association was organized, there was a fair transfer, and prospects of shareholders did not appear to have been detrimentally affected, minority members of old association were bound, since they entered into the relation with association subject to power of sale, transfer, merger, and consolidation in the majority members.—Pearson v. Clam Falls Co-op. Dairy Ass'n, 10 N.W.2d 132, 243 Wis. 369.

(2) Where a resolution approving a plan for consolidation of dairy associations declared dividends to patrons of old association payable in stock of new association, dissenting patrons had no right to insist on being paid their patronage dividends in cash.—Pearson v. Clam Falls Co-op. Dairy Ass'n, supra.

21. Minn.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, 273 N.W. 603, 200 Minn. 1.

Common-law right

A statute authorizing inspection of books, etc., of stock corporations has been held not to affect the common-law right of a member of a co-operative corporation to inspect books, records, and papers of the corporation in proper cases.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, supra.

Legislative intent

A statute providing for the organization of co-operative marketing corporations with capital stock manifests legislative intent to make the right of stockholders in a stock corporation to inspect the books of the corporation applicable to such co-operatives as have capital stock.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, supra.

22. Minn.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, supra.

23. Kan.—McClure v. Co-operative Elevator & Supply Co., 181 P. 573, 105 Kan. 91.

31 C.J. p 964 note 72.

Advances, deductions, and accounting see infra subdivision d of this section.

Assets as subject to claims of creditors see supra § 5.

Rights on withdrawal see infra subdivision e of this section.

24. Neb.—Callaway v. Farmers' Union Co-op. Ass'n of Fairbury, 226 N.W. 802, 119 Neb. 1.

25. Wis.—Graf v. Neith Co-op. Dairy Products Ass'n, 257 N.W. 618, 216 Wis. 519.

Unjust enrichment

Where a co-operative association's issuance of stock to a farmer was void as overissue, but the farmer had sustained no loss by delivering his milk to the association's cheese factory under the belief that he was a shareholder, the farmer was held not entitled to recover his share of the profits from the operation of factory on theory of money had and received, since establishing a loss of profit did not prove unjust enrichment of the association.—Graf v. Neith Co-op. Dairy Products Ass'n supra.

26. U.S.—Gallatin Farmers Co. v. Commissioner of Internal Revenue, C.C.A., 132 F.2d 706.

27. Okl.—Doss v. Farmers Union Co-op. Gin Co. of Texola, Okl., 46 P.2d 950, 173 Okl. 70.

Dividends on capital stock

Where net earnings of a co-operative corporation organized under a statute providing for formation of corporations for conducting agricultural, mercantile, or industrial business on the co-operative plan are to be distributed, it is discretionary with the directors, subject to revision by the stockholders, whether a dividend shall be declared on the capital stock.—Doss v. Farmers Union Co-op. Gin Co. of Texola, Okl., supra.

28. U.S.—Speh v. Bullard, C.C.A. Fla., 90 F.2d 227.

29. Cal.—Wills v. Lauridson, 118 P. 530, 161 Cal. 106.

30. Cal.—Willis v. Lauridson, supra. 31 C.J. p 964 note 77.

attachment by his creditors.[31]

Meetings; voting. The subject of meetings of stockholders and members is commonly regulated by statute or provided for by the rules of the society.[32]

Liabilities. The liability of members for debts of a co-operative association depends on statutory provisions, the articles of incorporation or association, the by-laws of the society, the contracts with the association, and general rules relating to corporations and associations.[33] A certificate of incorporation of an association limiting a member's liability for indebtedness to a nominal sum has been held not to relieve the members from their statutory liability,[34] and where a statute provides a method of limitation of the members' liability by charter provisions, a by-law limiting the liability of members is void and ineffective in the absence of any limitation in the charter.[35]

Although an association may have no power to levy assessments where it has no capital stock,[36] or to levy assessments on members in excess of the amount paid or promised, or on members who have paid all that is required by their contract of membership, or by the constitution or by-laws of the association,[37] under some statutes, an association may levy assessments on their members.[38] Where neither the statutes nor by-laws specifically state the purposes for which assessments might be laid on members, the validity of assessments depends on whether they were made in the exercise of a power necessary or incidental to the purposes for which the association was formed or the activities in which it engaged,[39] and in determining what is necessary or incidental to carrying out its purposes and activities, in the absence of any provision in the stat-

31. Ky.—Stivers v. Steele, 20 S.W.2d 717, 230 Ky. 700.

32. **Notice of meeting** of a marketing society does not charge a stockholder with action taken at the meeting to apportion among stockholders the losses occasioned by the refusal of a large consumer to accept shipments unless it definitely states that such action is to be considered at the meeting, or unless the stockholder attends and affirmatively participates therein.—Steelman v. Oregon Dairymen's League, 192 P. 790, 97 Or. 535.

One vote for each member

Under the provisions in some cases, shares of stock are not voted at meetings, but the holder of stock may have one vote as a member without regard to the number of shares he may hold.

Ark.—Stuttgart Co-op. Buyers Ass'n v. Louisiana Oil Refining Corporation, 109 S.W.2d 862, 194 Ark. 779.

Minn.—Finnegan v. Noerenberg, 53 N.W. 1150, 52 Minn. 239, 38 Am. S.R. 552, 18 L.R.A. 778.

33. N.J.—Lewis v. Monmouth County Farmers' Co-op. Ass'n, 147 A. 550, 105 N.J.Eq. 257.

Wash.—Meikle v. Wenatchee North Central Fruit Distributors, 225 P. 819, 129 Wash. 619.

Original and additional liability

Under some statutes, the original liability of a member for debts of a co-operative association, in the absence of a limitation in the charter, is his per capita share based on the total membership, and his additional liability is his per capita share of defaulting members' liability.—Lewis v. Monmouth County Farmers' Co-op. Ass'n, 147 A. 550, 105 N.J.Eq. 257.

Farmers' union store

Mere membership in a farmers' co-operative union would not impose liability for goods sold to a union store conducted by some of the members, since no one could bind the members of the organization as partners or parties to an enterprise or contract of such character of which they did not assent, although those engaging in the business, that is, becoming members of the association for the purpose of carrying on the store or reaping profit from its business, became thereby liable for its obligations.—Dinsmore v. J. H. Calvin Co., 108 So. 583, 214 Ala. 666.

34. N.Y.—Lockport Co-op. Dairy Ass'n v. Buchner, 221 N.Y.S. 433, 129 Misc. 73, affirmed 216 N.Y.S. 865, 217 App.Div. 784, affirmed 155 N.E. 907, 244 N.Y. 585.

35. N.J.—Lewis v. Monmouth County Farmers' Co-op. Ass'n, 147 A. 550, 105 N.J.Eq. 257.

36. Cal.—Alfalfa Growers of California v. Icardo, 256 P. 287, 82 Cal. App. 641.

Under contract

Nonprofit association, to distribute product of members, could not enforce contract for assessments, where exactions would result in unjust discrimination.—Alfalfa Growers of California v. Icardo, supra.

37. Wash.—Meikle v. Wenatchee North Central Fruit Distributors, 225 P. 819, 129 Wash. 619.

38. Ala.—Ex parte Baldwin County Producers' Corp., 83 So. 69, 203 Ala. 345, reversing 81 So. 862, 17 Ala. App. 84.

Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, 191 A. 326, 122 Conn. 482.

39. Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, supra.

Attempt to find market

Attempt by a co-operative marketing corporation to find a market for products of its members was within the scope of the purposes of the corporation stated in its articles to promote and encourage co-operative marketing, to eliminate or minimize speculation and wastful methods of production, distribution, and marketing, and to act co-operatively in handling products and problems of its members.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, supra.

Financing excessive milk

Assessments of a co-operative milk marketing corporation on each hundred pounds of milk furnished it by its members to be placed into a fund for financing excessive milk which could not be sold as fluid milk, but which was required to be sold for manufacture of butter, cheese, ice cream, and like products, were reasonably within the statutory authority given the corporation to exercise all powers necessary or incidental to carry out the purposes for which it was created and the activities in which it engaged.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, supra.

Interference with milk control board

Assessments which were lawfully imposed by a co-operative milk marketing corporation on each hundred pounds of milk furnished by members of the corporation were held not illegal as being in derogation of the power of the milk control board to fix a minimum price which should be paid producers in the state for milk which they sold.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, supra.

utes, articles of association, or by-laws, the terms of the contracts between the association and its members would be the best guide.[40] Where an association is in receivership, the court may order an assessment of stockholders.[41]

The members of an incorporated society are not individually liable on contracts made by it in its name,[42] and the liability of members of a co-operative corporation beyond the statutory limits can arise only when the corporation is authorized to make contracts for them,[43] and if an incorporated society enters into a contract as agent of its members, they are bound thereby.[44] Ordinarily a member of an incorporated society is not individually liable on its contracts as an undisclosed principal, although he may become liable as such by ratification and adoption of a contract of the society.[45] Members of an unincorporated association are liable for authorized loans made to the association,[46] and where an unincorporated association acts as agent for the members, the latter are jointly liable to a commission merchant for excess advances made to the association on shipment of their products in bulk, and a demand on the association is a demand on the members.[47]

Where an association seeks to charge members with liability of the association incurred to third persons under a contract between the latter and the association, it is necessary that a valid claim against the association should have been established.[48] Unless authorized by its charter or by-laws, a marketing society cannot, as against a member with whom it is under special contract, apportion losses among the stockholders because of the refusal of a large consumer to accept the shipments ordered by him; and this is so, notwithstanding an agreement among stockholders generally to apportion losses.[49]

Members are not liable to the association or its receiver on notes given to the association where they were given under an agreement attached thereto that they should be used only for collateral security and must be indorsed to creditors of the association to be effective, none of them having been indorsed to a third person.[50]

c. Contracts

(1) In general
(2) Recording
(3) Construction
(4) Performance or breach
(5) Discontinuance of production; interests of third persons
(6) Effect of sale to third person

(1) In General

Contracts between a co-operative association and its members relating to the delivery of the members' produce to the association have generally been held valid.

Under the provisions of some contracts between co-operative associations and members or proposed members, they do not become operative until speci-

40. Conn.—Connecticut Milk Producers Ass'n v. Brock-Hall Dairy, supra.

41. **Notice**
Neither obvious misprint in the year of the published notice of the hearing nor a lack of proof of personal service defeated jurisdiction to assess stockholders of an insolvent co-operative corporation.—In re Farmers' Dairy Co.'s Receivership, 225 N.W. 22, 177 Minn. 211.

Justification of order
Showing that a co-operative corporation had no assets out of which to pay existing claims justified an assessment against the stockholders, and the liability and responsibility of an individual stockholder of a co-operative corporation need not be determined when making the assessment.—In re Farmers' Dairy Co.'s Receivership, supra.

Desire of creditors
The court, in fixing an assessment against stockholders need not consider a creditor's expressed desire that double liability should not be enforced, where the creditor had not filed a legal release or satisfaction.—In re Farmers' Dairy Co.'s Receivership, supra.

42. N.Y.—Mandell v. Cole, 155 N.E. 106, 244 N.Y. 221, reversing 216 N.Y.S. 870, 217 App.Div. 800.
Wash.—Barnett v. Lynn, 203 P. 387, 118 Wash. 308.

43. N.Y.—Mandell v. Cole, 155 N.E. 106, 244 N.Y. 221, reversing 216 N.Y.S. 870, 217 App.Div. 800.

Statute in effect at time of contract governs the legal effect of a contract by a co-operative marketing association.—Mandell v. Cole, supra.

44. Or.—Phez Co. v. Salem Fruit Union, 205 P. 970, 103 Or. 514, 25 A.L.R. 1090, denying rehearing 201 P. 222, 103 Or. 514, 25 A.L.R. 1090.
31 C.J. p 965 note 90.

Contract held binding
A fruit union which, with authority from the growers of berries, contracted to sell and deliver all the berries raised by them during a number of years and subjected itself to liability for damages for failure to make such deliveries, had such a power, coupled with an obligation, as prevented a revocation of the agency, and where the union, organized by growers of berries to facilitate the sale and delivery of their fruit products, as their agent, made a contract for the sale of their berries to plaintiff, defendants were bound thereby, although the contract was in writing, and executed in the name of the agent alone, where its body clearly showed that the party executing it was acting as agent and for whom he was acting.—Phez Co. v. Salem Fruit Union, supra.

45. Wash.—Barnett v. Lynn, 203 P. 387, 118 Wash. 308.
31 C.J. p 965 note 89.

46. Ky.—Tomlin v. Petty, 51 S.W. 2d 663, 244 Ky. 542.

47. N.Y.—Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

48. N.Y.—Fietz v. Central Milk Producers Co-op. Ass'n, 32 N.Y.S.2d 574.

49. Or.—Steelman v. Oregon Dairymen's League, 193 P. 790, 97 Or. 535.

50. Mich.—Runciman v. Brown, 193 N.W. 880, 233 Mich. 298.

fied conditions precedent have been performed,[51] in the absence of a waiver of performance of the conditions.[52]

Contracts between a co-operative association and its members relating to the delivery of the latter's produce to the association are generally held valid[53] as against objections of want of consideration,[54] or lack of certainty,[55] or that they are un-

51. Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

Decision of organization committee

(1) A provision in the contract that the decision of the organization committee that conditions prerequisite to enforcement had been complied with should be final has been held valid and binding in the absence of any showing of fraud in the decision of the officials.

Ky.—Rowland v. Burley Tobacco Growers' Co-op. Ass'n, 270 S.W. 784, 208 Ky. 300.

N.C.—Pittman v. Tobacco Growers' Co-Op. Ass'n, 121 S.E. 634, 187 N. C. 340.

Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, Civ.App., 16 S.W.2d 413.

Wash.—Northwest Hay Ass'n v. Chase, 239 P. 1, 136 Wash. 160—Washington Wheat Growers' Ass'n v. Leifer, 232 P. 339, 132 Wash. 602.

(2) In a suit by a co-operative marketing association for damages and for specific performance of a marketing contract, a finding by court that contract was not to be in force until seventy-five per cent of growers signed, but that in fact only forty-five per cent signed, justified a defense of constructive fraud.—Northwest Hay Ass'n v. Chase, supra.

(3) In action by co-operative fruit association for breach of contract, where contract was to be inoperative unless four thousand two hundred cars of apples were signed, tonnage to be conclusively ascertained by association, it was held that although board of trustees acted in good faith in finding in tonnage ascertainment that four thousand two hundred cars had been signed, yet, where such finding was actually based on false and fraudulent data and tonnage was but half of that declared, trustee's finding was not conclusive on defendants.—Wenatchee Dist. Co-Op. Ass'n v. Mohler, 237 P. 300, 135 Wash. 169.

Community of interest

Where contract with fruit growers' association was to be binding when there were one thousand cars subscribed, and signers subscribed nine hundred forty-five cars, and other parties, subscribing two hundred cars, signed an identical contract, but there was no evidence of community of interest, the first contract never became binding.—Ozark Fruit Growers' Ass'n v. Erb, Mo.App., 182 S.W. 1048.

Duty to sign under subscription contract

Condition in produce sale agreement attached to subscription agreement, requiring corporation to secure contracts from owners of at least one million hens is complied with where sufficient number signed subscription agreement, although owners of fewer than one million signed the produce sale agreements, since subscription signers, being under a duty to sign such produce sale agreements, they are regarded as signed.—Poultry Producers of Central California v. Nilsson, 239 P. 1086, 197 Cal. 245.

Signing articles of incorporation

In action to enforce association and marketing agreement which designated committee of fifteen to incorporate but also provided for election by committee of new members in place of those not acting, signing of articles by original fifteen was held not condition precedent to suit.—Washington Wheat Growers' Ass'n v. Leifer, 232 P. 339, 132 Wash. 602.

Adoption after incorporation

A contract with an association to be formed becomes effective on adoption by the association after incorporation.—Hart Potato Growers' Ass'n v. Greiner, 211 N.W. 45, 236 Mich. 638.

52. Wash.—Wenatchee Dist. Co-op. Ass'n v. Thompson, 255 P. 918, 143 Wash. 657.

53. La.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294—Louisiana Farm Bureau Cotton Growers' Co-operative Ass'n v. Banister, 2 La.App. 620.

Tenn.—Tennessee Cotton Growers Ass'n v. Hanson, 2 Tenn.App. 118.

Tex.—Lennox v. Texas Cotton Co-op. Ass'n, Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W. 2d 331—Hollingsworth v. Texas Hay Ass'n, Civ.App., 246 S.W. 1068.

Co-operative marketing contracts as not lacking mutuality see Contracts § 100 a.

Validity of contract as in restraint of trade or violative of public policy see supra § 4.

Contract with foreign association

Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469.

Representation not authorized

Circular letter exhibited by agent when making contract with member, regarding financing, did not authorize agent's representation that association would pay for pecans when delivered.—Natchez Pecan Marketing Ass'n v. Bramlett, 143 So. 429, 163 Miss. 596.

Contract presumed fair

Under contract with co-operative marketing association, whereby dairyman continued to distribute to retailers, but was required to account to association, it would be presumed, in absence of contrary showing, that arrangement was fair, tending to preserve market.—Olympia Milk Producers' Ass'n v. Herman, 29 P.2d 676, 176 Wash. 338.

54. Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469—Dark Tobacco Growers' Co-op. Ass'n v. Robertson, 150 N.E. 106, 84 Ind.App. 51.

Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.

Sufficiency of consideration

While a promise by the association to receive or arrange for the receipt of all products, and to use reasonable efforts to make sales at reasonable market prices, might be implied, so that the contract was not unilateral and without consideration, a recital that it was in consideration of undescribed expenses to be incurred by the association in handling, manufacturing, and marketing such products, did not show a sufficient legal consideration, and past expenses of a co-operative association are no consideration for a contract to market products through the association exclusively.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N.E. 171, 239 N.Y.S. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

55. Ga.—Brown v. Georgia Cotton Growers' Co-op. Ass'n, 139 S.E. 417, 164 Ga. 712.

La.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294.

Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.

Consideration of by-laws

A provision in a contract, that it is to be effective when the signatures of a certain per cent of the producers in a township or trade territory are obtained, has been held not un-

just, unreasonable, or inequitable.[56] A contract purporting to bind members by the provisions of the by-laws, rules, and regulations of the association has been held valid and binding,[57] and contract provisions authorizing an injunction[58] or specific performance,[59] or providing for the forfeiture of stock[60] and for attorney's fees in case of suit,[61] on breach of the contract have been held not invalid.

However, such contracts are invalid where obtained by such duress as to destroy the element of free and mutual consent essential thereto,[62] or where, through fraud of an officer or agent of the association, the contract does not express the real intention of the parties,[63] but a charge of fraud in obtaining a member's signature to the contract cannot be based on representations which were in the nature of future promises and expectations,[64] and fraud in the procuring of the contract may not be set up where the contract was ratified after discovery of the fraud.[65] While in some jurisdictions, sometimes by virtue of statutory provisions, a contract made before the association had a legal existence is not invalid,[66] a contract may be invalid where, at the time it was entered into, the association was not organized under the statutes relating to co-operative associations,[67] or where the contract is with a foreign association which had not filed its charter before the contract was made.[68]

The fact that the contract contains an illegal or invalid provision does not invalidate the entire contract where such provision is not so mingled and bound with the other valid promises that they cannot be separated.[69] Where the contract is void, it

certain where the contract and by-laws provide for the determination of the trade territory.—Farmers' Educational & Co-Operative Union of America, Illinois Division, v. Langlois, 258 Ill.App. 522.

Description of land

A contract for the sale to a co-operative marketing association of products raised on a certain piece of land need not describe the land with such accuracy that it can be identified from the contract alone, the description being sufficient if it can be identified by extrinsic proof.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.

56. Ala.—Warren v. Alabama Farm Bureau Cotton Ass'n, 104 So. 264, 213 Ala. 61.

57. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391, denying rehearing 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391.

By-laws as binding on members generally see supra § 3.

58. Colo.—Rifle Potato Growers' Co-op. Ass'n v. Smith, 240 P. 937, 78 Colo. 171.

Tex.—Lennox v. Texas Cotton Co-op. Ass'n, Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W. 2d 331.

59. Colo.—Rifle Potato Growers' Co-op. Ass'n v. Smith, 240 P. 937, 78 Colo. 171.

Tex.—Lennox v. Texas Cotton Co-op. Ass'n, Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W.2d 331.

60. Vt.—Bessette v. St. Albans Co-op. Creamery, 176 A. 307, 107 Vt. 103.

61. Ga.—Brown v. Georgia Cotton Growers' Co-op. Ass'n, 139 S.E. 417, 164 Ga. 712.

Ill.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.

62. Cal.—Sun-Maid Raisin Growers of California v. Papazian, 240 P. 47, 74 Cal.App. 231.

Responsibility of association

Mutual association of raisin growers, as assignor of contract, requiring defendant to deliver his crop of raisins to association, which had full knowledge of unlawful acts that were practiced by some of its members, or those "jointly interested," to secure defendant's signature thereto, held responsible for such acts.—Sun-Maid Raisin Growers of California v. Papazian, supra.

63. Cal.—Placentia Co-op. Orange Growers' Ass'n v. Henning, 5 P. 2d 444, 118 Cal.App. 487.

Ga.—Georgia Cotton Growers' Co-op. Ass'n v. Smith, 137 S.E. 233, 163 Ga. 761.

Time to raise objection

Where defendant who had agreed to sign a produce sale agreement was sent a copy which differed somewhat from the one attached to his subscription agreement, but to which no objections were made during the negotiations, he could not raise such objection for the first time at the trial, since if made timely it could have been cured.—Poultry Producers of Central California v. Nilsson, 239 P. 1086, 197 Cal. 245.

64. Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469.

Ohio.—Brannan v. Ohio Poultry Producers' Co-op. Ass'n, 162 N.E. 453, 27 Ohio App. 426.

S.C.—South Carolina Cotton Growers' Co-op. Ass'n v. English, 133 S.E. 542, 135 S.C. 19.

Existing facts

False representations as to purchase of tobacco warehouses by co-operative association held to relate to existing facts.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469.

65. Kan.—Kansas Wheat Growers' Ass'n v. Rowan, 254 P. 326, 123 Kan. 169—Kansas Wheat Growers' Ass'n v. Massey, 253 P. 1093, 123 Kan. 183.

Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559, 8 Wash.2d 79.

66. Mich.—Hart Potato Growers' Ass'n v. Greiner, 211 N.W. 45, 236 Mich. 638.

67. Colo.—Colorado Wheat Growers' Ass'n v. Thede, 253 P. 30, 80 Colo. 529.

68. Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Mason, 263 S.W. 60, 150 Tenn. 228.

Contract valid and binding

Foreign co-operative marketing association filing charter in the local state several days before mailing notice to tobacco grower of its acceptance of marketing contract, which provided that signature thereof should be deemed acceptance as of date of mailing notice, was held to have complied with state law when contract was made, even though it was signed by grower before charter was filed.—Dark Tobacco Growers' Co-op. Ass'n v. Mason, supra.

69. Cal.—Poultry Producers of Southern California, Inc. v. Barlow, 208 P. 93, 189 Cal. 278—Poultry Producers of Central California v. Murphy, 221 P. 962, 64 Cal.App. 450.

Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

may not be validated by a subsequent statute.[70]

Where a preferential contract is authorized as to a specified class of members of the association, only those members within such class are entitled thereto,[71] and, where a contract as reformed was in accord with the legislative policy of the state, the fact that it was prohibited by the by-laws of the association has been held not to entitle the association to avoid it and compel enforcement of a standard agreement by which the parties did not originally intend to be bound.[72] The fact that a grower, who had entered into a marketing agreement, was a director and former officer of the association has been held not to change his rights under the contract in the absence of any showing that he abused his confidential position.[73] A provision in the contract with the association requiring written notice of a minimum price acceptable by the grower may be waived by the association.[74]

While preliminary agreements and negotiations are merged in the written contract,[75] a written marketing contract may sometimes be modified by a subsequent oral contract,[76] at least where such oral contract is fully executed,[77] and, where a person subscribes to a marketing agreement as modified, he is bound by the agreement and modification.[78]

Contract between members. A member's oral offer at a meeting of the association to purchase the crop of other members has been held binding on delivery of the produce by such members, irrespective of whether all such members were present at the meeting,[79] and recovery thereunder was held not precluded by the prior written contract among the members.[80] Under such a contract, no liability attached to the association or other members.[81]

Estoppel. A member of a co-operative association may be estopped to allege that he did not know the contents of a contract with the association,[82] and, as one of the favored class, a member is not entitled to attack the validity of the contract as discriminatory in favor of a certain class.[83] Also, where the contract is executed, the defense of ultra vires is not available.[84] However, performance under a void contract has been held not to estop a member to assert its invalidity,[85] and the fact that a person operated under the contract, in the absence

70. Colo.—Atkinson v. Colorado Wheat Growers' Ass'n, 238 P. 1117, 77 Colo. 559.
Okl.—McLain v. Oklahoma Cotton Growers' Ass'n, 258 P. 269, 125 Okl. 264—Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77, followed in Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24 and Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238.

71. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

72. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—Stafford v. California Canning Peach Growers, 78 P.2d 1150, 11 Cal.2d 212—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188.

Member's knowledge of by-laws

Where by-laws of co-operative association prohibited association from classifying its membership or dealing in products of nonmembers and provided for amendment of by-laws by majority vote of members, a resolution passed by board of directors authorizing management to deal with renters on different basis from that applicable to regular members was in excess of powers of board although not violative of statutory provisions; and a member of the association in entering into marketing agreement was not chargeable with greater knowledge of provisions of by-laws of association than that possessed by directors and managing agents who believed that they had power to enter into such an oral agreement in violation of by-laws.—California Canning Peach Growers v. Harkey, supra.

Alleged disasterous effect

A co-operative association could not avoid its obligations under oral contract giving peach grower preference as to rented land, on ground that upholding contract would have disastrous effect on affairs of co-operatives and that only basis upon which they could survive was that of equality of treatment of all members, where legislature had determined that it was in the public interest to permit co-operatives to enter into preferential contracts.—California Canning Peach Growers v. Harkey, supra.

73. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221.

74. Ark.—Standard Rice Milling Co. v. Scott, 295 S.W. 401, 174 Ark. 1180.

75. Ind.—Burley Tobacco Growers' Co-op. Ass'n v. Rogers, 150 N.E. 384, 88 Ind.App. 469.

76. Tex.—Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W.2d 331, reversed on other grounds Lennox v. Texas Cotton Co-op. Ass'n, Com. App., 55 S.W.2d 543.

77. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221.

78. Kan.—Kansas Wheat Growers' Ass'n v. Goering, 256 P. 119, 123 Kan. 508.

79. Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, Civ. App., 1 S.W.2d 725.

80. Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, supra.

81. Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, supra.

82. N.C.—Pittman v. Tobacco Growers' Co-Op. Ass'n, 121 S.E. 634, 187 N.C. 340.

83. Ga.—Johnson v. Georgia-Carolina Retail Milk Producers Ass'n, 186 S.E. 824, 182 Ga. 695.

84. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188.
Ill.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.

General law applicable

A co-operative association, in entering into oral contract with peach grower ultra vires its by-laws, could claim no greater rights thereunder than a corporation under similar circumstances, as against contention that law applicable to ultra vires contracts of corporations did not apply to co-operatives.—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188.

85. Okl.—McLain v. Oklahoma Cot-

of knowledge of failure of performance of the conditions precedent, has been held not to estop him to deny that the contract was in force,[86] but a member of the organization committee of the association, to show the invalidity of his contract, has been held estopped to set up the nonperformance of conditions precedent and fraud, notwithstanding lack of actual notice, where he was intrusted with the duty of seeing that such conditions were fully met before the association was organized.[87] A member may be estopped to assert the invalidity of a marketing contract because of failure of the association to comply with statutory conditions precedent to the commencing of business.[88] Parties to a marketing agreement, optional with one party, are not estopped to deny being bound until the holder of the option exercises his right in the manner specified,[89] and the other party, not having any right to demand its acceptance, has no right that he can waive until it is accepted.[90]

(2) Recording

Under some statutes, marketing agreements between a co-operative association and its members may be recorded in which case they constitute notice to all persons of the interest of the association to the property covered thereby.

In at least one jurisdiction, statutes, which have been held valid, provide that a marketing contract between a co-operative association and its members may be recorded and that after the date of filing, it shall constitute notice to any and all persons that an interest in the title to all property agreed to be sold by the maker of the contract is vested in the association, and in case of a purchase thereafter of any such property by a third person, no title of any kind or nature shall pass to such purchaser and the property may be recovered by the association or the latter may sue for an injunction.[91] However, in order for such filing so to operate, the provisions of the statute must be substantially complied with,[92] and, where the copy of the contract filed was not the contract entered into with most of the members of the association, it does not constitute a substantial compliance with the statute, and amounts to notice only with reference to those who had in fact signed such a contract.[93] Where the statute prohibits third persons from buying the products of such members until a certificate of termination is filed, the fact that the contract filed does not show the exact time when it becomes effective does not impair the effectiveness of constructive notice.[94]

(3) Construction

The cardinal rule in construing contracts between co-operative associations and their members is to ascertain the intention of the parties.

Although where a contract between a co-operative association and a member thereof is free from ambiguity it needs no interpretation,[95] where such a contract is ambiguous the cardinal rule of construction is to ascertain the intention of the parties.[96] The meaning of the contract is to be gath-

ton Growers' Ass'n, 258 P. 269, 125 Okl. 264.

86. Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

87. Kan.—Kansas Wheat Growers' Ass'n v. Windhorst, 292 P. 777, 131 Kan. 423, rehearing 283 P. 638, 129 Kan. 528, and reheard 294 P. 928, 132 Kan. 21.

88. Wash.—Pierce County Dairymen's Ass'n v. Templin, 215 P. 352, 124 Wash. 567.

89. Idaho.—Idaho Grimm Alfalfa Seed Growers' Ass'n v. Stroschein, 242 P. 444, 42 Idaho 12, 47 A.L.R. 916.

90. Idaho.—Idaho Grimm Alfalfa Seed Growers' Ass'n v. Stroschein, supra.

91. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

Agency contracts

Contracts of association with members, although contracts of agency, are within the co-operative marketing statutes and may be filed in the office of the register of deeds for the purposes and effect prescribed by statute, such contracts being coupled with substantial vested interest in such stock, not merely in proceeds of sale thereof.—Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 245 N.W. 99, 209 Wis. 344.

Inducing breach of contract

The section of a statute, relating to co-operative associations, creating liability for inducing the breach of a contract of a producer with a co-operative association has been held intended to reach those who attempt to bring about breaches of contracts between the association and its members, but who have not subjected themselves to the remedies prescribed by the section set forth in the text above.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

92. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., supra.

93. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., supra.

94. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391, denying rehearing 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391.

Right to certificate

Where a member of a co-operative association validly terminates his contract, he is entitled to a certificate from the association that his contract is terminated, which he may place on file, and if the certificate is refused he is in the position of those who are entitled to performance of a duty on the part of another.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391, denying rehearing 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391.

95. Cal.—Silveira v. Associated Milk Producers, 219 P. 461, 63 Cal.App. 572.

96. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S.

ered from the instrument as a whole,[97] and the contract should be so construed as to give, if possible, full force and effect to every part of it.[98] Words are to be given their usual and ordinary meaning when this can be done,[99] and the court should place itself in the same situation as the parties to the contract so as to view the attendant circumstances as they viewed them in order to ascertain the intention of the parties from the language used in the contract.[1] In case of ambiguity the contract will be construed most strongly against the party preparing it or employing the words concerning which doubt arises,[2] and it has been broadly stated that a co-operative association has no rights other than those given in the contract.[3] However, rights created by statute relating to co-operative associations enter into and become a part of all contracts made under authority and within the provisions of such statute,[4] and some contracts have been construed, sometimes by virtue of express provisions therein, as embracing the articles of incorporation of the association and the provisions of the standard marketing agreement,[5] and also to include pertinent provisions of the by-laws of the association.[6]

A provision in the contract requiring a grower to sell all his products to or through the association has been held intended for the benefit of the association, each of the members, and, even beyond that, to be one involving the interests of the public.[7] Under some contracts and rules and regulations of the associations, an association need not keep the identical products of a member intact.[8] A statute providing that a marketing contract contain a date for settlement with members for the crop marketed has been held not to prevent the association from carrying over a crop if considered wise because of marketing conditions.[9] Under some contracts the association, acting in good faith, may sell the products of members through the ordinary market agencies.[10]

W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320.

Particular contracts construed

(1) In general.

Cal.—Irwindale Citrus Ass'n v. Semler, App., 140 P.2d 716.

Or.—Rhoten v. Dairy Co-op. Ass'n, 64 P.2d 523, 155 Or. 402.

(2) A marketing plan, whereby the growers pool their products and ship through a company, is not a joint venture that makes members responsible to company for its dealings with other members, where by its contract the company agreed to furnish each grower a complete itemized statement of his account.—Hudnall v. Pennington & Co., 239 P. 2, 136 Wash. 155.

(3) Association's method of pooling rice in the clean was proper under contract making matter discretionary.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Admission

Where letter to co-operative association written by peach grower's father referred to land rented by grower, which was also mentioned in memorandum on cover of marketing contract, by stating that land belonging to father had apparently been included in contract, that statement did not constitute admission that contract actually covered that land.—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188.

97. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.
Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S. W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320.

98. S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S.E. 422, 181 S.C. 295.

Provisions held not repugnant

Section of contract relating to marketing of cotton and providing for pools and option prices on cotton delivered thereunder held not repugnant to section of contract placing title to cotton in association and authorizing it to borrow money thereon.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, supra.

99. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S. W. 419, 171 Ark. 1155.

1. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, supra.

2. Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

3. Va.—Layne v. Tobacco Growers' Co-operative Ass'n, 133 S.E. 358, 147 Va. 878.

4. Okl.—Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77, followed in Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24 and Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238.

5. Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.

6. Neb.—Nebraska Wheat Growers' Ass'n v. Smith, supra.
Or.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.
Vt.—Bessette v. St. Albans Co-op. Creamery, 176 A. 307, 107 Vt. 103.

Successor in interest bound

As respects liability of co-operative fruit growers association to vendors of realty under contracts requiring purchasers to market their fruit with association, for alleged misappropriation of proceeds of fruit, vendors were at best in position of a successor in interest of the purchasers, and hence were bound not only by terms of contracts between purchasers and association, but also by association's by-laws.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.

7. Cal.—California Canning Peach Growers v. Harris, 267 P. 572, 91 Cal.App. 654.

8. **Sale before order to sell**

Cotton marketing association selling cotton received subject to grower's order before order to sell, but retaining equal amount of similar cotton subject to grower's order, was not guilty of conversion.—Alabama Farm Bureau Cotton Ass'n v. Dale, 134 So. 646, 223 Ala. 164.

9. Wash.—Northwest Hay Ass'n v. Hanson, 236 P. 561, 135 Wash. 47.

Applies only to portion sold

Co-operative marketing contract, requiring payments to members in due proportion until accounts in each pool of season are settled, and requiring final settlement for each season by a specified date for products marketed before such date, held to require payment to producers in proportion to amounts in pool, not later than such date following year crop is produced, for portion sold on or before such date.—Northwest Hay Ass'n v. Hanson, supra.

10. Neb.—Nebraska Wheat Growers'

Contract of sale or agency. While some marketing agreements have been held to constitute a sale or contract to sell the products of the members,[11] the time when title passes, depending on the terms of the contract,[12] other contracts have been held not to constitute a present,[13] absolute[14] sale,[15] it being held that they create a fiduciary relationship, such as that of principal and agent or beneficiary and trustee.[16] A contract with a credit corporation granting a lien on a crop to be marketed through a growers' corporation has been held not to pass title to the growers' corporation as against a third person levying execution on the crop.[17]

(4) Performance or Breach

Ordinarily the parties to a marketing contract are required to perform it according to its terms and are liable for breach thereof.

Ordinarily the parties to a marketing contract are required to perform it according to its terms,[18] and are liable for a breach thereof.[19] The doing of an

Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.

11. Colo.—Colorado-New Mexico Wool Marketing Ass'n v. Manning, 40 P.2d 972, 96 Colo. 186.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.

Contract to buy at minimum fixed price

Oral contract by party to written marketing agreement that such party would guarantee growers fifteen dollars a ton for prunes, and pay in addition such sum per ton as the prunes might bring net above fifteen dollars, was held not a contract of guaranty which was ultra vires corporation making contract, but a contract to buy the prunes at a minimum fixed price.—Yakima Fruit Growers' Ass'n v. Hall, 40 P. 2d 123, 180 Wash. 365.

Between general and local association

A contract between a co-operative association and a local providing for the purchase of all the products of the local at an average price, less a uniform charge to cover marketing expenses, payment to be made at a time specifically set forth, with reasonable advances in the discretion of the association, has been held a contract of purchase and sale.—Neith Co-op. Dairy Products Ass'n v. National Cheese Producers' Federation, 257 N.W. 624, 217 Wis. 202.

12. Colo.—Colorado-New Mexico Wool Marketing Ass'n v. Manning, 40 P.2d 972, 96 Colo. 186.

Potential existence

Contract whereby wool marketing association purchased all wool produced by grower, with provision that wool should be at grower's risk until delivery at point directed by association, did not pass title to wool after shearing, prior to association's direction for delivery thereof, even though contract provided that title should pass as soon as wool had a "potential existence."—Colorado-New Mexico Wool Marketing Ass'n v. Manning, supra.

Acceptance by association

Ownership of milk purchased by farmers' and dairymen's co-operative association from its members and customers held to be in producer while in transit to association's plant with title not passing until final acceptance of milk by association.—West v. Tidewater Express Lines, 179 A. 176, 168 Md. 581.

13. N.C.—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S.E. 545, 189 N.C. 494.

14. Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S.W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320.

Insurance in favor of association

Under contract between breeder and co-operative marketing association, where price which breeder received for cottonseed was not determined until products were sold, the fact that cottonseed delivered by breeder to co-operative marketing association was insured in favor of association and amount of insurance collected therefor by association did not change relation between breeder and association so as to make delivery an absolute sale.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, supra.

15. Me.—Haarparinne v. Butter Hill Fruit Growers' Ass'n, 119 A. 116, 122 Me. 138.
N.Y.—Rhodes v. Little Falls Dairy Co., 245 N.Y.S. 432, 230 App.Div. 571, reversing 243 N.Y.S. 92, 137 Misc. 579, and affirmed 177 N.E. 140, 256 N.Y. 559.

16. Cal.—Bogardus v. Santa Ana Walnut Growers Ass'n, 108 P.2d 52, 41 Cal.App.2d 939.
Ind.—Department of Treasury v. Ice Service, 41 N.E.2d 201, 220 Ind. 64.
Ky.—Tomlin v. Petty, 51 S.W.2d 663, 244 Ky. 542.
Me.—Haarparinne v. Butter Hill Fruit Growers' Ass'n, 119 A. 116, 122 Me. 138.
N.Y.—Rhodes v. Little Falls Dairy Co., 245 N.Y.S. 432, 230 App.Div. 571, reversing 243 N.Y.S. 92, 137 Misc. 579, and affirmed 177 N.E. 140, 256 N.Y. 559.
Wis.—Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 245 N. W. 99, 209 Wis. 344.

17. Ga.—A. J. Evans Marketing Agency v. Federated Fruit & Vegetable Growers, 152 S.E. 49, 170 Ga. 30.

18. Fla.—Winter Garden Citrus Growers' Ass'n v. Willits, 151 So. 509, 113 Fla. 131.
Tex.—Central Texas Dairymen's Ass'n v. Jones, Civ.App., 67 S.W. 2d 896.

Special contract

Where a distributor, who was the exclusive agent for the sale of all products controlled by contracts between an association and growers and was authorized to make advances and corresponding deductions from the returns due growers, made a special contract with a grower and the association for particular products of the grower, returns to be made within a specified time, the distributor was held required to remit either to the grower who was not indebted for advances, or to the association as the grower's agent, and it could not satisfy the obligation of the association or other growers by merely crediting the amount due on the general account of the association.—Sullivan v. American Fruit Growers, Inc., of Illinois, 260 P. 1029, 45 Idaho 153.

Purchase of products on open market

Association of rice growers under co-operative marketing act had power, under contract, to handle only mortgaged rice without profit or loss, and purchase of rice by association for profit was held violation of contract with members.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Produce to be delivered

Members are required to deliver only the type of produce called for by the contracts.—Brame v. Dark Tobacco Growers' Co-op. Ass'n, 278 S.W. 597, 212 Ky. 185.

19. Kan.—Kansas Wheat Growers' Ass'n v. Massey, 253 P. 1093, 123 Kan. 183.
Discontinuance of production see infra subsection c (5) of this section.

Modifying method of computing price

Dairy corporation's arbitrary mod-

authorized act,[20] or the doing of an act which is not prohibited by the contract,[21] or the failure to do a particular act, not required by the contract,[22] does not constitute a breach of contract. Under the usual marketing contract, the association is bound to accept products of members unless it can show a legal excuse for its refusal,[23] and the association, properly refusing to accept a member's product, breaches its contract where it prevents him from selling it in the open market.[24] Conversely, the failure or refusal of a member of a co-operative association to deliver his products to the association, pursuant to his contract, may constitute a continuing[25] breach[26] of the contract.

Where a co-operative association is authorized to exercise discretion with respect to marketing the products of its members, it is not liable for a mere mistake of judgment,[27] especially, in the absence of fraud or gross mistake, where the contract provides that the judgment of the association is conclusive.[28] However, the discretion given the association, under the standard form of marketing contract, to sell a member's crop to the best advantage according to the dictates of good judgment and business prudence must not be exercised arbitrarily, but fairly and reasonably, having due regard to the purposes of the organization and the conditions prevailing at the time,[29] and the association is obligated to exercise the same diligence and good faith to market the product of one member that it exercises to market the product of the other members and it cannot deliberately eliminate from the market a portion of the producers who are members in order that the remaining members may enjoy more favorable prices, and the contract is violated where it does so discriminate.[30] Where members, breaching their contracts, relied on a purported amendment to a by-law, the association is estopped to forfeit the members' property interest under the original by-law.[31]

Where a marketing contract was signed by persons "as joint tenants" they may, under some circumstances, be jointly and severally liable on breach of the contract.[32]

Excuses. An inability to carry out an improvidently made contract between a co-operative association and a member does not necessarily work a discharge of the contract itself as a legal obligation,[33] but a demand by the association that a member perform some act, which makes it impossible for him to comply with his contract, has been held to relieve him of the duty to deliver his product to the association.[34] A member is not justified in re-

ification of method of computing price to be paid stockholders for milk constituted breach of contract, entitling stockholder to recover damages.—Rhodes v. Little Falls Dairy Co., 243 N.Y.S. 92, 137 Misc. 579, reversed on other grounds 245 N.Y.S. 432, 230 App.Div. 571 and affirmed 177 N.E. 140, 256 N.Y. 559.

20. Me.—Cunningham v. Long, 135 A. 198, 125 Me. 494.
Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

Disposal of products of members by the association in conformity with a provision of the contract does not constitute a breach thereof.—Rifle Potato Growers' Co-op. Ass'n v. Smith, 240 P. 937, 78 Colo. 171.

21. Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

22. Kan.—Kansas Wheat Growers' Ass'n v. Oden, 257 P. 975, 124 Kan. 179, followed in Kansas Wheat Growers' Ass'n v. Heter, 257 P. 979, 124 Kan. 76.

Pooling and grading
A provision that the association shall pool the products of the members and grade them has been held not to impose a mandatory duty on the association, violation of which constitutes a breach of the contract.—Cunningham v. Long, 135 A. 198, 125 Me. 494.

23. Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.

Returns insufficient to pay for marketing
Co-operative marketing association was held not bound to accept member's product, where returns of sale would not even pay costs of marketing.—Guglielmelli v. Walla Walla Gardeners' Ass'n, supra.

24. Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, supra.

25. N.Y.—Parker v. Dairymen's League Co-op. Ass'n, 226 N.Y.S. 226, 222 App.Div. 341.

26. Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 270 S.W. 946, 168 Ark. 504, supplemental opinion 270 S.W. 1119, 168 Ark. 504.

Sale to landlord
Tenant's sale of wheat to landlord for debt held breach of tenant's co-operative marketing contract.—Kansas Wheat Growers' Ass'n v. Brooks, 263 P. 787, 125 Kan. 296.

27. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

28. Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 16 S.W.2d 177, 179 Ark. 338.

29. N.C.—Tobacco Growers' Co-Op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.

Releasing member from obligation
Refusal of co-operative marketing association to release member from his obligation to deliver his product to the association where it was unable to secure a satisfactory marketing contract with third persons was held arbitrary and abuse of discretion.—Mountain States Beet Growers' Marketing Ass'n v. Monroe, 269 P. 886, 84 Colo. 300.

30. Wis.—Wheelright v. Pure Milk Ass'n, 242 N.W. 486, 208 Wis. 40, denied motion 240 N.W. 769, 208 Wis. 40.

31. Cal.—Buford v. Florin Fruit Growers' Ass'n, 291 P. 170, 210 Cal. 84.

32. Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, Civ.App., 16 S.W.2d 413.

33. Fla.—Miami Home Milk Producer's Ass'n v. La Course, 158 So. 117, 117 Fla. 345.

34. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 799, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

fusing to deliver his product to the association because he cannot learn at the time of delivery the price he will receive therefor,[35] nor, in some cases, may a member take advantake of alleged mismanagement of the association as a defense.[36] Also a member is not justified in violating the contract because a lienor demands a sale of the products on the open market.[37]

Breach by opposite party to contract. Not every breach of a marketing contract by the opposite party will operate as a discharge and justify an entire refusal to perform,[38] and whether a breach of a marketing contract justifies a suit for rescission or for damages for breach of the entire contract, or whether it merely gives rise to a claim for compensation, must be determined by the terms of the contract and the circumstances of each case.[39] On an unjustified refusal of the association to accept the products of a member in accordance with the marketing contract, the member is not liable as for a breach of contract because of his selling his products on the open market,[40] and refusal by the association of further performance of a contract, except on condition that a member sign a supplemental contract, is a material breach which will justify the member's refusal of further performance.[41] Also a breach of a marketing contract by the association, by employing brokers and failing properly to grade products of members, etc., has been held to warrant denial of relief to the association because of the breach of a contract by a member,[42] and where the association fails to sell the produce at the best price obtainable, as provided in the contract, the growers have been held to have the right to refuse to permit it to sell any more of their produce.[43] However, the failure of the association to test the product of a particular member, before classifying it, is not ground for complaint in the absence of a showing that the classification made was inaccurate,[44] and, a fortiori, a breach of the contract by the association is no excuse for a prior breach of the contract by a member.[45]

Where the total deductions made by a co-operative association on the sale of products of a member are within the amount authorized by the contract and by-laws, a member is not justified in breaching his contract,[46] and the withholding of a small amount due a member without warrant in law or in the provisions of the contract has been held not a breach of sufficient importance to justify an entire severance of the contract relations.[47] Although, where the association refuses to pay for all the products delivered in one year, it has been held that the grower is released from further performance on his part,[48] under some contracts payment by the association, on the sale of a crop, has been held not a condition precedent to a member's obligation to deliver the crops of subsequent years,[49] and deficiencies in credits to a member during a particular month have been held not to justify his refusal to make deliveries in later months, where he had continued to deliver for some time following such months and made no suggestion of irregularities during such time.[50] A slight delay in making payment for products delivered to the association has been held not a sufficient ground for the

35. Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672.

36. N.C.—Pittman v. Tobacco Growers' Co-Op. Ass'n, 121 S.E. 634, 187 N.C. 340.
Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

37. N.C.—North Carolina Cotton Growers' Co-op. Ass'n v. Bullock, 132 S.E. 154, 191 N.C. 464, 47 A.L.R. 924.

38. N.C.—Tobacco Growers' Co-op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.

Injury to whole membership
A breach of a marketing contract by the association will not, in all cases, excuse performance by a member, because of the ensuing injury to the whole membership.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

39. Neb.—Nebraska Wheat Growers' Ass'n v. Smith, 212 N.W. 39, 115 Neb. 177.

40. Kan.—Kansas Wheat Growers' Ass'n v. Toothaker, 278 P. 716, 128 Kan. 469.
N.Y.—Frame v. Trenton Milk & Cream Co., 210 N.Y.S. 591, 125 Misc. 86.
Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.
Wis.—Wisconsin Co-operative Milk Pool v. Saylesville Cheese Mfg. Co., 263 N.W. 197, 219 Wis. 350.

41. Wis.—Myrold v. Northern Wisconsin Co-op. Tobacco Pool, 239 N.W. 422, 206 Wis. 244.

42. N.J.—New Jersey Poultry Producers' Ass'n v. Tradelius, 126 A. 538, 96 N.J.Eq. 683.

Director-member held not estopped to set up such breach by association.—New Jersey Poultry Producers' Ass'n v. Tradelius, 126 A. 538, 96 N.J.Eq. 683.

43. Ga.—Georgia Peach Growers' Exchange v. Reeves, 167 S.E. 315, 46 Ga.App. 229.

44. Kan.—Kansas Wheat Growers' Ass'n v. Oden, 257 P. 975, 124 Kan. 179, followed in Kansas Wheat Growers' Ass'n v. Heter, 257 P. 979, 124 Kan. 76.

45. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

46. Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

47. N.C.—Tobacco Growers' Co-Op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.

48. Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.

49. Cal.—California Prune & Apricot Growers v. Baker, 246 P. 1081, 77 Cal.App. 393.

50. N.Y.—Parker v. Dairymen's League Co-op. Ass'n, 226 N.Y.S. 226, 222 App.Div. 341.

breach of the contract by a member,[51] and an unreasonable delay in accounting for the returns of a crop is not a defense to an action for a prior breach of contract by such member.[52]

Release; breach by other members. While the release by the association of certain members from the operation of their marketing agreements providing for the delivery of all their products to the association has been held a breach of contract by the association, releasing the other members from adhering thereto,[53] permitting members to withdraw crops from a pool has been held no excuse for another member's breach of contract, where it was not shown that the association suffered any detriment or that such withdrawal did not occur at a time when they had a right of withdrawal under the contract,[54] and, a fortiori, the issuance of a permit to some members to market their products outside the association in accordance with provisions of a by-law of the association does not constitute a breach by the association.[55] A third person, to whom the association had assigned the crop of a member, has no authority to release the member from delivery under the terms of the agreement between the association and its members,[56] and, notwithstanding such a release by a third person, a member is required to account for products sold to persons other than the association.[57] Unless such power is expressly conferred by the association on its officers or agents,[58] the officers of the association have been held not to have the power to release products grown by a member so as to exonerate him from accounting for the proceeds,[59] and the association is not estopped to recover damages against a member by reason of a letter informing the member it had sold his crop to a third person from whom the member procured a release of his crop.[60]

The fact that a member of the association had breached his contract and no action had been commenced against him is no defense to an action for a breach by another member.[61]

(5) Discontinuance of Production; Interests of Third Persons

In the absence of special statutory or contractual provisions, a member may cease production without incurring liability to a co-operative association under his marketing contract. The effect of mortgages and liens on products covered by marketing contracts depends on the provisions of the statutes and the marketing contract.

Marketing contracts have been held to include only the produce of the member produced on land either owned or rented by him,[62] and, since a mem-

51. Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

52. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

53. Miss.—Staple Cotton Co-op. Ass'n v. Borodofsky, 108 So. 802, 143 Miss. 558.

Termination of membership or cancellation of contract see infra subdivision e of this section.

Conduct in past years

In co-operative marketing association's action against member thereof for breach of marketing contract by defendant's failure to deliver his orange crop to plaintiff for marketing, plaintiff's permission to other members to sell their fruit to others than plaintiff in previous years held no defense.—Irwindale Citrus Ass'n v. Semler, Cal.App., 140 P.2d 716.

54. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

55. Wash.—Washington Co-op. Egg & Poultry Ass'n v. Taylor, 210 P. 806, 122 Wash. 466.

56. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 76 Cal.App. 1.

Knowledge of elements of contract

Members are held to have knowledge of all the elements entering into marketing agreements.—California Canning Peach Growers v. Downey, supra.

57. Cal.—California Canning Peach Growers v. Downey, supra.

58. Cal.—California Canning Peach Growers v. Harris, 267 P. 572, 91 Cal.App. 654.

Director or assumed agent

The fact that a person solicited membership in the association or was a director thereof has been held not to empower him to release a member from his marketing agreement; the test as to authority of a director to state that the association would refuse the crop of a member of the association is what a reasonable man would be justified in believing under the circumstances.—California Canning Peach Growers v. Harris, supra.

59. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 76 Cal.App. 1.

60. Cal.—California Canning Peach Growers v. Downey, supra.

61. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

62. Cal.—Pacific Fruit Exchange v. Barkhaus, 298 P. 965, 212 Cal. 328

N.C.—Tobacco Growers' Co-Op. Ass'n v. Bissett, 121 S.E. 446, 187 N.C. 180.

Subsequent lease by wife

Where a lease of land by a wife covering land theretofore leased to her husband, a member of a co-operative association, was made in good faith, the husband is not liable for failure to deliver the products to the association.

Kan.—Kansas Wheat Growers' Ass'n v. Lucas, 278 P. 6, 128 Kan. 350.

Va.—Layne v. Tobacco Growers' Co-operative Ass'n, 133 S.E. 358, 147 Va. 878.

Gift to wife

Where member of tobacco growers' co-operative association had orally given wife tobacco on small plat held by him under oral lease for year, which was personal property, sale of tobacco outside of association was held breach of agreement, in view of a statute requiring gifts between husband and wife to be in writing, to be valid against third persons, and knowledge of one assisting in organizing tobacco growers' co-operative association that tobacco on land leased by member was claimed by wife was not notice to corporation subsequently organized. —Dark Tobacco Growers' Co-op.

ber of a co-operative association may not be required by his contract to continue to produce the commodity called for by the contract for the full term of the contract,[63] he may cease production without incurring any liability to the association,[64] and members of an association who, in good faith, sell, or lease for cash, their land or business and discontinue production ordinarily are not liable for the failure to deliver the commodity thereafter produced on such property.[65] However, a member may not escape liability to the association by raising the crops in the name of another,[66] as by a pretended sale or lease which is a mere device or subterfuge to avoid carrying out his agreement with the association.[67]

Where a lease by a member of a co-operative association provides that the tenants shall pay rent by delivering a portion of the crop, the member's share of the crop is subject to the marketing agreement,[68] but it has been held that the landlord is not liable for the penalty for nondelivery of produce by his tenant who was not a member of the association and who called for an actual division with him and declined to deliver his part of the produce to the association, since the landlord did not acquire or own any interest in the tenant's crop.[69] Also it has been held that a marketing contract cannot be enforced against produce raised on a share system in which tenants, not members of the association, had an undivided interest.[70] However, under some statutory provisions which have been held to constitute an essential part of a lease to a tenant knowing of the landlord's marketing contract,[71] the landlord has been held to violate the contract by failure to see that the product raised on land leased to another is marketed according to the contract,[72] and a co-operative association has been held entitled to recover against a tenant disposing of his crop in violation of the marketing contract of his landlord.[73] A statute authorizing replevin by co-operative associations to obtain the possession of property to the immediate possession of which they may be entitled has been held not to change the rule that replevin will not lie in favor of a co-tenant.[74]

Liens, mortgages, etc. The standard form of contract of some associations has been held not to prohibit a member from placing a mortgage or crop lien on his crop for the current year to enable him to cultivate and produce it.[75] While, under a marketing agreement providing that if the grower shall place a mortgage on the crop the association has the right to take delivery of the crop and pay off all or part of the mortgage and charge the grower's account, the association is entitled to delivery of the crop notwithstanding it refused to

Ass'n v. Alexander, 270 S.W. 677, 208 Ky. 572.

63. Kan.—Kansas Wheat Growers' Ass'n v. Garnett, 278 P. 5, 128 Kan. 337.

64. Kan.—Kansas Wheat Growers' Ass'n v. Garnett, supra.
Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Devine, 289 S.W. 253, 217 Ky. 320.
Va.—Layne v. Tobacco Growers' Co-operative Ass'n, 133 S.E. 358, 147 Va. 878.

65. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.
Kan.—Kansas Wheat Growers' Ass'n v. Garnett, 278 P. 5, 128 Kan. 337.
Or.—Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398.
Wash.—Inland Empire Dairy Producers' Ass'n v. Casberg, 235 P. 13, 134 Wash. 702—Inland Empire Dairy Producers' Ass'n v. Melander, 235 P. 12, 134 Wash. 145.

66. Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Devine, 289 S.W. 253, 217 Ky. 320.

67. Colo.—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.
Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
S.C.—South Carolina Cotton Growers' Co-op. Ass'n v. English, 133 S.E. 542, 135 S.C. 19.

68. Tex.—Texas Farm Bureau Cotton Ass'n v. Kyle, Civ.App., 281 S.W. 629.

Authorizing tenant to sell and pay in money

A landlord's interest in a crop under a lease for a portion of the crop raised or produced by tenants has been held produced or acquired by or for him, notwithstanding he authorized the tenants to sell his part and pay him his share in money.—Main v. Texas Farm Bureau Cotton Ass'n, Tex.Civ.App., 271 S.W. 178—Long v. Texas Farm Bureau Cotton Ass'n, Tex.Civ.App., 270 S.W. 561.

Signing marketing agreement after rental contracts was held a practical construction by member of rental contracts with tenants, as giving him such interest in crops as would enable him to deliver cotton to association.—Texas Farm Bureau Cotton Ass'n v. Kyle, Tex.Civ.App., 281 S.W. 629.

69. N.C.—Tobacco Growers' Co-op. Ass'n v. Bissett, 121 S.E. 446, 187 N.C. 180.

70. La.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Bacon, 113 So. 790, 164 La. 126—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Bannister, 109 So. 776, 161 La. 957—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294.

71. Colo.—Wilson v. Monte Vista Potato Growers' Co-op. Ass'n, 260 P. 1080, 82 Colo. 428.
Ky.—Dark Tobacco Growers' Co-op. Ass'n v. Daniels, 284 S.W. 399, 215 Ky. 67.

72. Ky.—Dark Tobacco Growers' Co-op. Ass'n v. Daniels, supra.

73. Colo.—Wilson v. Monte Vista Potato Growers' Co-op. Ass'n, 260 P. 1080, 82 Colo. 428—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.
Ky.—Feagain v. Dark Tobacco Growers' Co-op. Ass'n, 261 S.W. 607, 202 Ky. 801.

74. Miss.—Staple Cotton Co-op. Ass'n v. Hemphill, 107 So. 24, 142 Miss. 298.

Outstanding title in tenants

Member of marketing association may defend replevin by association by showing outstanding title in tenants.—Staple Cotton Co-op. Ass'n v. Hemphill, supra.

75. N.C.—Tobacco Growers' Co-Op. Ass'n v. Patterson, 121 S.E. 631, 187 N.C. 252.

take a mortgage or advance money and the crop was mortgaged to a third person,[76] under some statutes a lien on a crop for the year in which advances are expended in cultivating the crop has been held superior to a co-operative association's rights under a marketing contract with the grower, notwithstanding the contract authorized the association to take the crop and pay the lien according to its regular method of distribution;[77] and where, under the laws of the state, pledges, with reference to each other, rank in the order of recordation, the pledge of the furnisher of money, recorded, primes an unrecorded marketing agreement as to the right of possession of the product pledged,[78] and the association cannot demand delivery of a member's product covered by a recorded pledge without payment of the debt or consent of the pledgee.[79] However, the fact that a member mortgaged his product has been held no defense to an action by a co-operative association for a breach of contract.[80] Products purchased by a member, a mortgage being executed as part of the transaction in which negotiable warehouse receipts were delivered to the mortgagee, have been held not subject to a marketing contract as such member had never acquired the products so as to enable him to comply with the contract.[81] A mortgagee, who took his mortgage with knowledge of the marketing contract of the mortgagor and actively consented to marketing the crop through the association, receiving advances made by the association, has been held liable for the difference between the advances made and the amount ultimately determined to be due the mortgagor.[82]

Under the provisions of some contracts a member may be estopped to assert that his product was previously mortgaged, and the existence of a prior mortgage in such case has been held not to relieve him of his obligation to deliver the product to the association.[83]

(6) Effect of Sale to Third Person

The passage of title to a commodity from a producer to a co-operative association under a marketing contract has been held not conclusive as against subsequent bona fide buyers from the producer.

The passage of title from a producer to a co-operative association under a marketing contract has been held not conclusive as against subsequent bona fide buyers from the producer, and does not preclude the defense of equitable estoppel. Where prospective purchasers know that a producer has executed some kind of marketing agreement with a co-operative association, it is incumbent on them to make further inquiry as to the contractual relations of the parties, unless by some act or word of the association they were induced not to do so.[84] Under the uniform sales act, a person buying from a producer in possession, for value and in good faith without notice of a previous sale to a co-operative association, has been held to acquire a good title.[85]

d. Advances and Deductions; Accounting

In making advances, a co-operative association should treat all members alike, and it may make only such deductions from the proceeds of the sale of members' produce as are authorized by statute or contract. The association may be required by its by-laws or by a suit in equity to render an account to its members.

While co-operative associations are generally authorized by statute or their contracts with producers to make deductions from the amount owing to the latter from the sum received on the sale of their produce,[86] a co-operative association may make only such deductions as are authorized by such stat-

76. Ky.—Redford v. Burley Tobacco Growers' Co-op. Ass'n, 266 S.W. 24, 205 Ky. 515.

77. N.C.—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S.E. 545, 189 N.C. 494.

Lien securing other indebtedness

That amount secured by crop lien includes indebtedness not incurred for advances to grower does not entitle co-operative association to order enjoining enforcement of liens to extent of amounts advanced for current year to enable grower to cultivate and produce crops, amount being determinable in such action, if disputed.—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S. E. 545, 189 N.C. 494.

78. La.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294.

79. La.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, supra.

80. Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, Civ.App., 16 S.W.2d 413.

81. Tex.—Lennox v. Texas Farm Bureau Cotton Ass'n, supra.

82. U.S.—Baird v. Gleason, C.C.A. Ark., 53 F.2d 785.

83. Kan.—Kansas Wheat Growers' Ass'n v. Leslie, 271 P. 284, 126 Kan. 694.

84. Or.—Pacific Wool Growers v. Draper & Co., 73 P.2d 1391, 158 Or. 1.

85. Or.—Pacific Wool Growers v. Draper & Co., supra.

Effect of recording marketing contract see supra subdivision c (2) of this section.

Effect of co-operative marketing act

The provisions of uniform sales act concerning rights of bona fide purchasers were not repealed by the subsequent enactment of the co-operative marketing act.—Pacific Wool Growers v. Draper & Co., supra.

86. U.S.—Van Dyke v. Mid-South Cotton Growers Ass'n, D.C.Tenn., 12 F.Supp. 138.

Reserve fund

Statute providing for the sale of cotton held by co-operative growers' association to the secretary of agriculture, but which did not compel payment for the cotton to be made directly to the growers, was held not to preclude the association from making a reasonable deduction from the sums received for reserves and pledging such reserves for debts due by the association to the United

utes or contracts,[87] and a deduction for items not authorized has been held to constitute a breach of contract.[88] An association is not liable as for wrongful deductions where the total amount deducted was within the amount authorized to be deducted by the contract and by-laws,[89] and a member is not entitled to object to the retroactive effect of by-laws relating to the method of computing deductions for reserves where he had acquiesced in the practice.[90] A liability of the association because of a deficit under a contract with a third person has been held not an expense, so as to authorize the association to deduct the amount thereof from the producers' monthly checks for products delivered,[91] especially as to persons who were not members when the liability for such deficit occurred.[92]

Marketing contracts with co-operative associations frequently provide for advance payments to members and notification of an advance payment does not constitute a new oral contract with a member superseding the original agreement.[93] All members of a co-operative association are subject to the same regulations concerning advances.[94] A provision that advances may be deducted from the receipts on the sale of the grower's products necessarily implies that the grower will reimburse the association for all such advances,[95] and a co-operative association may recover excess advances to members.[96] Where the contract is one of purchase and sale, payment to be made at a time set forth, with reasonable advances in the discretion of the association, payments made at the designated times have been held not advances subject to revision by the association, notwithstanding surpluses were distributed at times among the members, the distribu-

States government, where the contract with the growers provided for a deduction for reserves.—Van Dyke v. Mid-South Cotton Growers Ass'n, supra.

87. Cal.—Reinert v. California Almond Growers Exchange, 70 P.2d 190, 9 Cal.2d 181, rehearing 63 P.2d 1114—Silveira v. Associated Milk Producers, 219 P. 461, 63 Cal. App. 572.

No discretion

Contract requiring a marketing association to pay a grower the net amount received less the cost of handling did not give the association discretion in deducting such cost.—Brown v. Georgia Cotton Growers' Co-op. Ass'n, 139 S.E. 417, 164 Ga. 712.

Limitation necessarily implied

The fact that the association is authorized to make deductions for certain items necessarily implies that deductions should be made only for such items.—Dryden Local Growers v. Dormaier, 2 P.2d 274, 163 Wash. 648.

Retention of money not ratified

The fact that fruit growers retained stock certificates of a growers corporation on which the corporation unauthorizedly applied money wrongfully withheld from the growers was held not to constitute ratification of wrongful withholding and application.—Dryden Local Growers v. Dormaier, supra.

88. Wash.—Dryden Local Growers v. Dormaier, supra.

Improper deductions as justifying breach by member see supra subdivision c (4) of this section.

89. Or.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.

90. Cal.—Reinert v. California Almond Growers Exchange, 63 P.2d 1114, reheard 70 P.2d 190, 9 Cal.2d 181.

91. N.Y.—Fietz v. Central Milk Producers Coop. Ass'n, 32 N.Y.S.2d 574.

Deduction arbitrary

A milk producers cooperative association's deduction from producers' milk checks to cover a deficit incurred by the association under a contract with distributors was an arbitrary act, entitling producers to recover the amount deducted, since, if the association's assets were insufficient to discharge its obligations, then there might be a remedy to a limited extent against individual producers who would be entitled to their day in court to make their defenses.—Fietz v. Central Milk Producers Co-op. Ass'n, supra.

92. N.Y.—Fietz v. Central Milk Producers Co-op. Ass'n, supra.

93. Cal.—Meyer v. California Prune & Apricot Growers' Ass'n, 109 P.2d 726, 42 Cal.App.2d 632.

Notification by general association

Where a membership agreement between a prune grower and a county co-operative marketing association authorized the state cooperative marketing association to act for the county association, the fact that the state association notified the grower that it would make advance payment for his prune crop did not indicate a new oral contract superseding the membership agreement which provided for advance payments.—Meyer v. California Prune & Apricot Growers' Ass'n, supra.

94. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

Interest

In making advances, the association should do so to each member at the same percentage, or, if this is not done, a member should pay interest on the amount of advances received.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, supra.

95. Cal.—California Bean Growers' Ass'n v. Williams, 255 P. 751, 82 Cal.App. 434.

Owner liable as guarantor on tenant's contract

Where an owner of land, leased on a share rental basis, signed the tenant's marketing contract with an association, it has been held that he is liable as guarantor as against a contention that the contract was a chattel mortgage as to him and that action thereon could not be brought until the security was exhausted, allegedly at the end of the contract period.—McDonald v. Gravenstein Apple Growers Co-op. Ass'n of Sonoma County, 108 P.2d 936, 42 Cal. App.2d 329.

96. Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 16 S.W.2d 177, 179 Ark. 338.

Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S.W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320.

Voluntary association

Where a voluntary association is an agent of the growers under their contracts, and authorized to pay advancements to members and incur expenses, it may demand an accounting from the members and recover a deficit.—Tomlin v. Petty, 51 S.W.2d 663, 244 Ky. 542.

tees receiving the surpluses because they were members and not because they were vendors.[97]

Accounting. While an association may be required by its by-laws to render statements to members,[98] in the absence of provisions relating to the time for accounting, a co-operative association should render an account to its members as to the sale of their products within a reasonable time,[99] and an action therefor is maintainable in equity.[1] In arriving at a proper accounting, all items owing by a member to the association and credits properly allowable to the member should be considered,[2] and a member of the association is liable for amounts paid him for his produce in excess of the amount to which he was entitled.[3] A member has been held not entitled to have his claim for the proceeds of crops preferred to those of other members, where he allowed the association to mingle the proceeds of his produce with the proceeds of other members.[4] Where the by-laws provide for pro-rating each day's shipments, a grower delivering produce for shipment on a day when no deliveries were made by any other grower is entitled to payment after deduction of the association's charge for service rendered, as against a contention that the money received should be pro-rated by the association.[5]

The right of a person to participate in a reserve fund of a co-operative association depends on the provisions of the contract, the association's by-laws, and statutes relating thereto.[6] Under some contracts an unexpended fund deducted for credit and general purposes from the amounts received for crops has been held a continuous, permanent, reserve fund of the association and an annual distribution thereof is not required,[7] but it has been held that a year's profits are to be distributed completely at the year's end where no accumulation of a surplus fund, except the reserve fund provided for, is contemplated by the contract.[8] Under a by-law providing for pro rata division of any surplus from deductions, members are not entitled to share in the absence of a surplus.[9] Where the products of the members were destroyed by fire, the proceeds of an insurance policy were held to take the place

97. Wis.—Neith Co-op. Dairy Products Ass'n v. National Cheese Producers' Federation, 257 N.W. 624, 217 Wis. 202.

98. Cal.—Reinert v. California Almond Growers Exchange, 63 P.2d 1114, reheard 70 P.2d 190, 9 Cal.2d 181.

Matters to be shown

(1) A by-law, requiring an association to render statements to its members, has been held to require statements that will inform the member as to the amount of the proportion of the gross proceeds of the pools to which he had contributed produce and the amount available for distribution to him, or as to the total tonnage and the gross proceeds of each pool.—Reinert v. California Almond Growers Exchange, 63 P.2d 1114, reheard 70 P.2d 190, 9 Cal.2d 181.

(2) The account should give complete information concerning credits to, and charges against, all pools in which products delivered by a member were packed and sold, and the detail by which the corporation arrived at the net amount to be credited to each grower.—Reinert v. California Almond Growers Exchange, 70 P.2d 190, 9 Cal.2d 181, rehearing 63 P.2d 1114.

99. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

Equalization requirements

Under a statute providing that nothing shall prevent a marketing co-operative, subject to an order issued by the secretary of agriculture, from making distribution of net proceeds in accordance with the contract with its members, the term "net proceeds" refers to the result of the co-operative sales in the marketing area after complying with the equalization requirements contained in the order.—U. S. v. Rock Royal Coop., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F. Supp. 534.

1. N.Y.—Rhodes v. Little Falls Dairy Co., 245 N.Y.S. 432, 230 App. Div. 571, reversing 243 N.Y.S. 92, 137 Misc. 579, and affirmed 177 N. E. 140, 256 N.Y. 559.

2. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

Changing method of computation

A resolution changing the method of computing an assessment for depreciation of plant and equipment with reference to a particular year's produce may not be applied in computing the assessment against crops of prior years.—Reinert v. California Almond Growers Exchange, 63 P.2d 1114, reheard 70 P.2d 190, 9 Cal.2d 181.

3. Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233.

4. Wash.—Winans v. Brue, 248 P. 62, 140 Wash. 56.

5. Mich.—Cole v. Southern Michigan Fruit Ass'n, 245 N.W. 534, 260 Mich. 617.

6. Cal.—Rusconi v. California Fruit Exchange, 281 P. 84, 101 Cal.App. 750.

Assets as subject to claims of creditors see supra § 5.

Failure to deliver percentage of crop

A grower under a marketing contract, having failed to deliver the percentage of crop required to the marketing corporation, was held not entitled to participate in reserve fund accumulated from earnings.—Rusconi v. California Fruit Exchange, supra.

Inconsistent position

Where a husband became a member of, and acquired some retain certificates issued by a citrus growers association and contracted to sell, through the association, fruit which was the wife's separate property, and later breached the contract, the wife was not entitled to recover on the certificates, on the theory that they were her property and that the contract was that of her husband, and thus to be relieved from the penalty imposed on members for breach of contract.—Proodian v. Plymouth Citrus Growers Ass'n, Fla., 13 So.2d 15.

7. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 287 S.W. 419, 171 Ark. 1155.

8. Ark.—McCauley v. Arkansas Rice Growers' Co-op. Ass'n, supra.

9. Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 11 S.W.2d 119, 227 Ky. 297.

of the products among the assets of the association, to be considered in the final accounting of assets.[10]

A local association, acquiescing in the central association's unauthorized retention, as a reserve fund, of the cash excess over the estimated net return of sales and entering into a contract authorizing such retention for a definite period as a trust fund, is not entitled to demand a portion of the fund until the contract is lawfully terminated.[11]

e. Termination of Membership or Contract

Termination of membership in, or cancellation of contracts with, a co-operative association and the rights and liabilities in consequence thereof usually are dependent on statutory or charter provisions, the by-laws of the association, and the contracts with the members.

The right of a member to withdraw from, or to terminate a contract with, a co-operative association and the power to expel members or stockholders thereof are sometimes regulated by statutory or charter provisions, the by-laws of the association, and the contracts with members,[12] and, where the power of expulsion is in the members or stockholders, directors are not entitled to expel members in the absence of a by-law expressly authorizing them to do so.[13]

A statute providing that the filing of a co-operative contract is notice of the validity thereof until its expiration according to its terms has been held not to destroy a member's absolute right of cancellation under the terms of the contract,[14] but where a contract specifies that it is to be in force until a specified date and thereafter until canceled it is not terminable at the option of one party until after the date specified.[15] An agreement between a member of the association and a third person waiving the member's right to withdraw from the association has been held not to constitute a binding contract between the member and the association,[16] and even if the contract be held to be for the benefit of the association the latter cannot enforce it where the member and third person had expressly rescinded it before an attempt was made to enforce it.[17] There must be substantial compliance with the provisions of marketing contracts with respect to the termination thereof,[18] and a marketing agreement, specifying exactly how it may be terminated, cannot be abrogated or modified by any one in violation of the rights of others to the contract.[19] Although, where a condition precedent to the contract becoming operative had not been performed, alleged members are entitled to withdraw from further participation in the undertaking,[20] the right to rescind for fraud must be exercised within a reasonable time.[21] On a substantial breach of the contract by the association, a member has been held entitled to

10. Tex.—Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 61 S.W.2d 79, 122 Tex. 464, reversing, Civ.App., 59 S.W.2d 320.

11. Cal.—Mountain View Walnut Growers' Ass'n v. California Walnut Growers Ass'n, 65 P.2d 80, 19 Cal.App.2d 227.

12. Minn.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, 273 N.W. 603, 200 Minn. 1.
Neb.—Whitney v. Farmers' Co-op. Grain Co., 193 N.W. 103, 110 Neb. 157.

Necessity of providing for purchase of interest
Courts are reluctant to construe statutes so as to destroy co-operative associations without the consent of a majority of their members, and a statute providing that an association, under its by-laws, may provide for the manner of determining the value of a member's interest and make provisions for its purchase by the association on withdrawal or death of a member has been held not to require the association to do so.—Driscoll v. East-West Dairymen's Ass'n, 126 P.2d 467, 52 Cal.App.2d 468, prior opinion 122 P.2d 379.

Establishing market place elsewhere
Under a by-law authorizing withdrawal and payment back of money for stock on establishing a market place elsewhere, a member leaves the community and establishes a market place elsewhere when, for any valid reason, he is so located that another market place becomes more accessible to him and he acts honestly in the matter.—Whitney v. Farmers' Co-op. Grain Co., 193 N.W. 103, 110 Neb. 157.

13. Minn.—State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n, 273 N.W. 603, 200 Minn. 1.

14. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391, denying rehearing 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391.

15. Ill.—Egyptian Seed Growers' Exchange v. Hollinger, 238 Ill. App. 178.

16. Cal.—Hillside Packing Ass'n v. Cowles, 66 P.2d 451, 20 Cal.App.2d 26.

17. Cal.—Hillside Packing Ass'n v. Cowles, supra.

18. Wash.—Grays Harbor Dairymen's Ass'n v. Engen, 226 P. 496, 130 Wash. 169.

Effect of by-laws
By-laws of a co-operative marketing association providing that a member might withdraw from the association any time between January 1 and February 1 following of any year, were held not to affect the contract requirement that a written notice of intention to terminate contract must be given not later than thirty days before February 1.—Grays Harbor Dairymen's Ass'n v. Engen, supra.

19. Cal.—Meyer v. California Prune & Apricot Growers' Ass'n, 109 P.2d 726, 42 Cal.App.2d 632.

Notification of advance payment
Where membership agreement between prune grower and county co-operative marketing association provided for termination thereof by either party solely by registered mail notice between certain days of year, notification of grower by state co-operative marketing association, authorized by agreement to act for county association, that state association would make advance payment for grower's prune crop, did not supersede membership agreement.—Meyer v. California Prune & Apricot Growers' Ass'n, supra.

20. Wash.—Wenatchee Dist. Co-op. Ass'n v. Mohler, 237 P. 300, 135 Wash. 169.

21. Kan.—Kansas Wheat Growers' Ass'n v. Rowan, 254 P. 826, 127 Kan. 169.

withdraw.[22] Compromise agreements for cancellation and termination of marketing contracts of some members have been held valid and binding although made by the officers and directors without the consent of all the members,[23] and, while the execution of contracts releasing some members from their obligation to deliver their products to the association has been held to entitle other members to cancel their contracts,[24] it has also been held not to constitute a breach of contract with other members entitling them to cancel and rescind their contracts, where the association received a considerable amount of money under such compromise agreements and the other members participated as members after having knowledge thereof.[25] Growers are not entitled to cancellation of their marketing contracts because the association refused to permit them to withdraw in accordance with a by-law where such by-law had not been properly adopted.[26]

Rights on withdrawal. The rights of withdrawing members of a co-operative association depend on their contracts, statutory provisions, and the by-laws of the association.[27] A credit in the reserve fund in favor of a retiring owner of stock must be disposed of in accordance with the by-laws of the association,[28] and, under a by-law providing that in the event a member retires from the association all his rights and privileges shall thereupon cease and determine, a member who retires ordinarily is not entitled to a pro rata share of the reserve fund,[29] although where the association ceased to function soon after the grower resigned it has been held that he could recover his pro rata share of the reserve fund,[30] but he is not entitled to a pro rata part of the assets of the association where his practice was to join in the fall and resign in the spring after his produce had been disposed of and he was not responsible for the policy, obligations, or transactions of the association.[31] However, although a by-law of a marketing society provides that cancellation of membership terminates all benefits and all right and interest of the member, yet, if the contracts of the society with its members entitle them to share pro rata in any amount remaining in its hands after payment of its charges and expenses in the handling of produce for them, a member holding such a contract is entitled thereunder to share in the surplus notwithstanding he has canceled his membership.[32] Under a by-law providing that reserves shall be paid to withdrawing members coincident with like payments to nonwithdrawing members, a withdrawing member has been held not entitled to immediate repayment where it would have required liquidation of the association's affairs.[33]

22. Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.

Refusal to accept products of member

On an unjustified refusal of the association to accept the products of a member in accordance with the contract, the member is entitled to cancellation of the contract.—Central Texas Dairymen's Ass'n v. Jones, Tex.Civ.App., 67 S.W.2d 896.

23. Wash.—Washington State Hop Producers v. Eglin, 108 P.2d 329, 6 Wash.2d 585.

24. Miss.—Staple Cotton Co-op. Ass'n v. Borodofsky, 108 So. 802, 143 Miss. 558.

25. Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559, 8 Wash.2d 79.

Release of other members as justifying breach of contract see supra subdivision c (4) of this section.

26. Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559, 8 Wash.2d 79.

27. **Interest not forfeited**

Where by-laws of co-operative marketing association provide that withdrawing stockholder can dispose of his stock by unanimous consent of board of directors, and that board shall provide for purchase of stock if stockholder cannot find a purchaser satisfactory to board, interest of stockholder is not forfeited on his retirement, but stockholder must find a purchaser for his stock satisfactory to the board, or the board must provide for the purchase of the stock.—Adams v. Sanford Growers Credit Corporation, 186 So. 239, 135 Fla. 513.

Payable on liquidation

A by-law of a cooperative association which provided that interests of members in the association's property should be payable on liquidation of association was valid, and members, who voluntarily withdrew from association which was a solvent, going concern and was not in process of liquidation, could not recover their share of money paid in and remaining in the funds of the association.—Driscoll v. East-West Dairymen's Ass'n, 126 P.2d 467, 52 Cal.App.2d 468, prior opinion 122 P. 2d 379.

Membership fee

On withdrawal, because of a substantial breach of the contract by the association, a member was held entitled to recover his membership fee.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.

28. Fla.—Adams v. Sanford Growers Credit Corporation, 186 So. 239, 135 Fla. 513.

29. Fla.—Ozona Citrus Growers' Ass'n v. McLean, 165 So. 625, 122 Fla. 188.

30. Fla.—Ozona Citrus Growers' Ass'n v. McLean, supra.

31. Fla.—Ozona Citrus Growers' Ass'n v. McLean, supra.

32. Cal.—Bogardus v. Santa Ana Walnut Growers Ass'n, 108 P.2d 52, 41 Cal.App.2d 939.

Method of determining surplus

The rendering of annual statements to the member of a fruit growers' marketing association does not show that he acquiesced in the business methods followed by the association with regard to creating a surplus, where the statements contained nothing more than the amount of sales of his fruit, together with the sum which the association had been paid, not including or in any manner referring to charges made in handling, storage, etc.—Hood River Orchard Co. v. Stone, 191 P. 662, 97 Or. 158.

33. Cal.—Reinert v. California Almond Growers Exchange, 63 P.2d 1114, reheard 70 P.2d 190, 9 Cal. 2d 181.

Interest

Assignee of almond grower member who withdrew from nonprofit

Deductions from a member's net proceeds for reserves may not be recovered by a withdrawing member because such deductions were not authorized by the by-laws where the practice had been followed over a long period of years and was impliedly recognized and ratified by by-laws relating to distribution of such reserves,[34] and a grower who had settled his accounts with the association on his withdrawal has been held not entitled to recover net profits shown by shipment certificates received before such settlement.[35] In a suit to recover assets alleged to be due a retiring member of an association, where its by-laws provided for retirement of such stock at not more than par value, it is for the court to determine the reasonable value of the retiring member's stock.[36] Where members of a co-operative association are entitled to withdraw, they may set up withdrawal as a defense to an action by the association to enforce the contract.[37] However, where the contract provides that, on breach thereof by a member, his membership shall ipso facto cease and terminate, etc., it has been held that a defaulting member is not relieved from liability to deliver products in the future where the association took no steps to cancel his membership.[38]

§ 8. Offenses

Acts which a co-operative association may lawfully perform cannot be considered criminal as to its lawful agents acting within the scope of their authority.

In some jurisdictions various offenses are defined and penalized by statutes governing co-operative societies.[39] However, acts which a co-operative association may lawfully perform cannot be considered criminal as to its lawful agents acting within the scope of their authority.[40]

§ 9. Remedies

a. In general
b. Of, or against, third persons

a. In General

The usual remedies ordinarily are available for the enforcement of rights by or against a co-operative association.

The usual remedies ordinarily are available for the enforcement of rights by or against a co-operative association,[41] and a provision for liquidated damages in a contract between a co-operative association and a member has been held not to provide an exclusive remedy at the option of a member which should be accepted in lieu of performance.[42] In accordance with such rule, and sometimes by virtue of statutory and contractual provisions which have been upheld, an action may be maintained by or against a co-operative association for an injunction,[43] specific performance as shown in the

corporation which marketed almonds by pool system held not entitled to object that corporation did not pay interest on balance of unpaid contributions to reserve for fixed assets as it did on contributions to working capital, where board of directors, under authorization from members, had fixed character of fund as non-interest-bearing reserve.—Reinert v. California Almond Growers Exchange, supra.

34. Cal.—Reinert v. California Almond Growers Exchange, supra.

35. Fla.—Winter Garden Citrus Growers' Ass'n v. Willits, 151 So. 509, 113 Fla. 131.

36. Fla.—Adams v. Sanford Growers Credit Corporation, 9 So.2d 713, 151 Fla. 178.

37. Cal.—Noble v. California Prune & Apricot Growers' Ass'n, 276 P. 636, 98 Cal.App. 230.

38. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904—Milk Producers' Ass'n of San Diego County v. Webb, 275 P. 1001, 97 Cal.App. 650.

39. U.S.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, Ky., 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473.

40. Neb.—Lexington Mill & Elevator Co. v. Browne, 219 N.W. 12, 116 Neb. 753.

41. Ky.—Feagain v. Dark Tobacco Growers' Co-op. Ass'n, 261 S.W. 607, 202 Ky. 801.

Sequestration

An agreement of a grower to sell his produce to a co-operative association may be enforced by sequestration.—Louisiana Farm Bureau Cotton Growers' Co-operative Ass'n v. Banister, 2 La.App. 620.

Accounting not condition precedent

Where each grower agreed to pay his pro rata share of expenses and was entitled to all proceeds from the sale of his individual crop without division with any other grower and without liability for any loss or expenses sustained by other growers, a member of the association could be sued for indebtedness without an equitable accounting.—Idaho Apple Growers' Ass'n v. Brown, 293 P. 320, 50 Idaho 34.

42. Iowa.—Clear Lake Co-op. Live Stock Shippers' Ass'n v. Weir, 206 N.W. 297, 200 Iowa 1293.

N.H.—Manchester Dairy System v. Hayward, 132 A. 12, 82 N.H. 193.

43. Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 270 S.W. 946, 168 Ark. 504, supplemental opinion 270 S.W. 1119, 168 Ark. 504.

Cal.—Colma Vegetable Ass'n v. Bonetti, 267 P. 172, 91 Cal.App. 103.

Colo.—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.

Fla.—Lee v. Clearwater Growers' Ass'n, 111 So. 722, 93 Fla. 214.

Ga.—Johnson v. Georgia-Carolina Retail Milk Producers Ass'n, 186 S. E. 824, 182 Ga. 695.

Ill.—Farmers' Educational & Co-Operative Union of America, Illinois Division, v. Langlois, 258 Ill.App. 522.

Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672.

Ky.—Feagain v. Dark Tobacco Growers' Co-op. Ass'n, 261 S.W. 607, 202 Ky. 801—Potter v. Dark Tobacco Growers' Co-op. Ass'n, 257 S.W. 33, 201 Ky. 441.

La.—Louisiana Farm Bureau Cotton Growers' Co-operative Ass'n v. Banister, 2 La.App. 620.

N.C.—Tobacco Growers' Co-op. Ass'n v. Battle, 121 S.E. 629, 187 N.C. 260.

S.C.—South Carolina Cotton Growers' Co-op. Ass'n v. English, 133 S.E. 542, 135 S.C. 19.

Tenn.—Tennessee Cotton Growers Ass'n v. Hanson, 2 Tenn.App. 118.

Tex.—Texas Farm Bureau Cotton

C.J.S. title Specific Performance §§ 65, 75, also 58 C.J. p 1035 notes 5–13, p 1051 note 50 [a], or for damages,[44] for a breach or threatened breach of contract. While rights of action by reason of a breach of contract must necessarily be determined by the law in force at that time,[45] remedies provided by statute are applicable to past as well as to future contracts.[46] Ordinarily questions of set-off and counterclaim, as between the society and its members, are governed by the rules applicable to set-off and counterclaim generally.[47]

In the absence of special statutory provisions relating thereto, the usual rules apply in actions between a co-operative association and its members with respect to venue,[48] parties,[49] and, likewise,

Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.

Va.—Layne v. Commonwealth, 132 S. E. 306, 144 Va. 684.

Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559, 8 Wash.2d 79—Grays Harbor Dairymen's Ass'n v. Engen, 226 P. 496, 130 Wash. 169.

Preliminary injunction

(1) A co-operative association has been held entitled to a preliminary injunction.

Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672.

Wis.—Wisconsin Co-operative Milk Pool v. Saylesville Cheese Mfg. Co., 263 N.W. 197, 219 Wis. 350.

(2) A statute entitling the association to a temporary restraining order and a preliminary injunction against a member has been held not to entitle the association to a preliminary injunction as a mere matter of right on the allegations of the complaint without a hearing, although the association may be so entitled to a temporary restraining order.

N.C.—Tobacco Growers' Co-op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.

Wash.—State v. Superior Court of Washington for Snohomish County, 228 P. 847, 130 Wash. 668.

Price below cost of production

A co-operative association has been held not entitled to injunction against a member where the price to be paid him for his product was below the cost of production.—Miami Home Milk Producers' Ass'n v. La Course, 158 So. 117, 117 Fla. 345.

44. Ga.—Georgia Peach Growers' Exchange v. Reeves, 167 S.E. 315, 46 Ga.App. 229.

Wis.—Wisconsin Co-operative Milk Pool v. Saylesville Cheese Mfg. Co., 263 N.W. 197, 219 Wis. 350.

On prevention of sale by injunction

Members of co-operative marketing association could not recover damages therefrom for prevention of sale of cotton, not described in writ of injunction against breach of contract to sell all their cotton to association.—Lennox v. Texas Cotton Co-op. Ass'n, Tex.Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W.2d 331.

45. Okl.—Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77, followed in Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24, and Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238.

Condition precedent

Where the right of the association to compel members to sell their products through the association is conditioned on a right being given to members to withdraw from the association, the latter cannot enforce the obligation of members to sell through the association if it has denied them a means of withdrawal. —Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77, followed in Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24, and Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238.

46. Cal.—Colma Vegetable Ass'n v. Bonetti, 267 P. 172, 91 Cal.App. 103.

Application of subsequent statute

In a suit by a foreign corporation against a member for breach of contract for the co-operative and systematic marketing of long staple cotton, entered into before the adoption of the co-operative marketing act, although the substantive rights of the parties are governed by the law as it stood before the adoption of the act, nevertheless such association is entitled to the remedies provided in the act which are applicable to past as well as future contracts, under the principle that a remedy afforded by a statute passed subsequent to the date of the contract may be invoked by a party to such contract, who has been wronged by its nonperformance.—Brown v. Staple Cotton Co-op. Ass'n, 96 So. 849, 132 Miss. 859.

47. Or.—Steelman v. Oregon Dairymen's League, 192 P. 790, 97 Or. 535.

31 C.J. p 965 note 83.

Accrual of damages

Since a contract providing for liquidated damages on failure of a member to sell his produce to the association is valid, such breach may be set up as a counterclaim in an action by the member against the association without alleging that any specific damage accrued or even that any damage did accrue.—Clemo v. Dairymen's League Cooperative Ass'n, Inc., 28 Pa.Dist. & Co. 326.

48. County where products delivered

Suit by member of cheese producers' federation against federation for purchase price of products held properly brought in county wherein products were delivered, instead of in county wherein federation had principal office.—State v. Foley, 245 N. W. 107, 209 Wis. 471, followed in 245 N.W. 108, 209 Wis. 474, and 245 N.W. 108, 209 Wis. 475.

49. Unincorporated association

(1) An unincorporated voluntary co-operative association is not entitled to maintain an action in its own name.—Newton County Farmers' & Fruit Growers' Exchange v. Kansas City Southern Ry. Co., App., 2 S.W. 2d 125, opinion adopted in part 31 S.W.2d 803, 326 Mo. 617.

(2) On default of a member of an unincorporated voluntary association the members thereof are entitled to sue him directly.—Idaho Apple Growers' Ass'n v. Brown, 7 P.2d 591, 51 Idaho 540.

Products raised by wife

An injunction against a member of a co-operative association on breach of a contract has been held not void because the member's wife, who raised products under an arrangement which was a device or subterfuge to avoid carrying out the marketing contract, was not a party.—Layne v. Commonwealth, 132 S.E. 306, 144 Va. 684.

Owner of products

(1) Members of co-operative marketing association could not recover damages therefrom in amount by which price of cotton, covered by warehouse receipts delivered by them to bank as security for debt, decreased between issuance and dissolution of injunction against selling cotton to others than association, where association was not advised of mortgage as contract required and the bank as owner of such cotton was not a party to the action. —Lennox v. Texas Cotton Co-op. Ass'n, Tex.Com.App., 55 S.W.2d 543, reversing Texas Cotton Co-op. Ass'n v. Lennox, Civ.App., 37 S.W.2d 331.

with respect to pleading,[50] and with respect to issues, proof, and variance.[51] Also general rules usually are applicable in such actions with respect to presumptions and burden of proof,[52] admissibility of evidence[53] and the weight and sufficiency thereof,[54] and with regard to matters relating to trial,

(2) Injunction held not to lie to restrain owner of ninety-eight per cent of stock of dairy corporation from breaching contract under co-operative marketing act, which contract was entered into between owner and dairy co-operative association, where legality of act of incorporation was not attacked, and no fraud was alleged or proved beyond preponderating ownership of stock, "corporation" being separate entity from stockholders composing it.—Rapides Dairy Dealers' Co-op. Ass'n v. Mathews, 158 So. 247.

50. Petition or complaint held sufficient

(1) In general.

Ala.—Warren v. Alabama Farm Bureau Cotton Ass'n, 104 So. 264, 213 Ala. 61.

Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, Civ.App., 1 S.W.2d 725.

(2) In suit for injunction.

Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672.

Va.—Layne v. Commonwealth, 132 S. E. 306, 144 Va. 684.

Petition or complaint held insufficient

Cal.—Meyer v. California Prune & Apricot Growers' Ass'n, 109 P.2d 726, 42 Cal.App.2d 632.

Okl.—Cunningham v. Oklahoma Wheat Growers' Ass'n, 250 P. 71, 120 Okl. 19—Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77, followed in Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24, and Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238.

Fraud

Answer alleging improper charges and disbursements sufficiently alleged fraud authorizing repudiation of contract and recovery of improper charge.—Brown v. Georgia Cotton Growers' Co-op. Ass'n, 139 S.E. 417, 164 Ga. 712.

Amendment

In suit to recover assets alleged to be due a retiring member of co-operative marketing association, retiring member would be permitted to amend his petition to show whether association's by-laws provided for retirement of capital stock of withdrawing members.—Adams v. Sanford Growers Credit Corporation, 186 So. 239, 135 Fla. 513.

51. Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, Civ. App., 1 S.W.2d 725.

Proof of allegations

(1) Material allegations in the pleadings, unless admitted, must be proved in order to support the cause of action or defense set up, and plaintiff may recover only on the issues raised by the pleadings.

Cal.—Meyer v. California Prune & Apricot Growers' Ass'n, 109 P.2d 726, 42 Cal.App.2d 632.

N.Y.—Parker v. Dairymen's League Co-op. Ass'n, 226 N.Y.S. 226, 222 App.Div. 341.

N.C.—Tobacco Growers' Co-op. Ass'n v. Chilton, 130 S.E. 312, 190 N.C. 602.

(2) Immaterial matters need not be proved.

Ill.—Farmers' Educational & Co-Operative Union of America, Illinois Division, v. Langlois, 258 Ill.App. 522.

Wash.—Washington Wheat Growers' Ass'n v. Leifer, 232 P. 339, 132 Wash. 602.

52. Statute providing conclusive presumption

(1) A statute providing that products produced by a person on the land of a member, etc., are conclusively presumed to belong to the member has been held invalid.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, 107 So. 115, 160 La. 294.

(2) However, it has been held within the power of the legislature to provide a conclusive presumption of a landlord's power to control delivery of products raised by tenants, etc., where the tenancy was created or the terms changed after the execution of the marketing contract.

Colo.—Wilson v. Monte Vista Potato Growers' Co-op. Ass'n, 260 P. 1080, 82 Colo. 428—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.

Ky.—Feagain v. Dark Tobacco Growers' Co-op. Ass'n, 261 S.W. 607, 202 Ky. 801.

(3) But provisions of this nature have been held not to apply to contracts existing at the time of enactment of the statute.—Staple Cotton Co-op. Ass'n v. Hemphill, 107 So. 24, 142 Miss. 298.

(4) Where such a statute is in force, a landlord who is a member of a co-operative association cannot show that he did not have control of delivery of products raised on his land.

Colo.—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, supra.

Ky.—Dark Tobacco Growers' Co-op. Ass'n v. Daniels, 284 S.W. 399, 215 Ky. 67—Feagain v. Dark Tobacco Growers' Co-op. Ass'n, supra.

Burden of proof

The burden of proof is on plaintiff and defendant, respectively, to establish the material allegations of his cause of action or defense.

Cal.—Johanson v. Riverside County Select Groves, 40 P.2d 530, 4 Cal. App.2d 114—Rusconi v. California Fruit Exchange, 281 P. 84, 101 Cal. App. 750.

Kan.—Kansas Wheat Growers' Ass'n v. Bridges, 1 P.2d 265, 133 Kan. 397.

Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Jewell, 280 S.W. 1105, 213 Ky. 272.

N.Y.—Frame v. Trenton Milk & Cream Co., 210 N.Y.S. 591, 125 Misc. 86.

Va.—Elmore v. Maryland & Virginia Milk Producers' Ass'n, 134 S.E. 472, 145 Va. 42.

Wash.—Washington Wheat Growers' Ass'n v. Leifer, 232 P. 339, 132 Wash. 602.

Burden of going forward

Co-operative association's performance of contract to resell crop and pay additional sum to grower presumed, and payment made held prima facie proof of performance imposing burden on grower to excuse breach.—California Prune & Apricot Growers v. Baker, 246 P. 1081, 77 Cal.App. 393.

53. Cal.—California Bean Growers' Ass'n v. Williams, 255 P. 751, 82 Cal.App. 434.

Evidence held admissible

Cal.—Placentia Co-op. Orange Growers' Ass'n v. Henning, 5 P.2d 444, 118 Cal.App. 487—California Bean Growers' Ass'n v. Williams, 255 P. 751, 82 Cal.App. 434.

Evidence held inadmissible

Kan.—Kansas Wheat Growers' Ass'n v. Windhorst, 283 P. 638, 129 Kan. 528, modified on other grounds on rehearing 292 P. 777, 131 Kan. 423, order supplemented on second rehearing 294 P. 928, 132 Kan. 21—Kansas Wheat Growers' Ass'n v. Leslie, 271 P. 284, 126 Kan. 694.

S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S.E. 422, 181 S.C. 295.

54. Evidence held sufficient

(1) In general.

Cal.—California Canning Peach Growers v. Williams, 78 P.2d 1161, 11 Cal.2d 233—California Canning Peach Growers v. Harkey, 78 P.2d 1137, 11 Cal.2d 188—California Bean Growers' Ass'n v. Sanders, 261 P. 717, 86 Cal.App. 689—California Canning Peach Growers v. Downey, 243 P. 679, 76 Cal.App. 1.

Fla.—Adams v. Sanford Growers Credit Corporation, 9 So.2d 713, 151 Fla. 178.

judgment, and costs, in the absence of statutory or contractual provisions relating thereto.[55]

Damages. Loss of profits to a co-operative association solely from resale of products withheld by a member is not necessarily the measure of damages,[56] and the provisions of statutes, by-laws, or contracts with members authorizing liquidated damages against members on breach of their marketing contracts have been held not invalid,[57] and the association is entitled to recover damages in accordance with such provisions.[58] For a continuing breach of contract the damages may be calculated

Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672—Farmers' Union Co-op. Shipping Ass'n of Natoma v. Schultze, 212 P. 670, 112 Kan. 675.

Ky.—Rowland v. Burley Tobacco Growers' Co-op. Ass'n, 270 S.W. 784, 208 Ky. 300.

(2) To show existence of valid contract.—Elmore v. Maryland & Virginia Milk Producers' Ass'n, 134 S.E. 472, 145 Va. 42.

(3) To show fraud.—Kansas Wheat Growers' Ass'n v. Windhorst, 283 P. 638, 129 Kan. 528, modified on other grounds on rehearing 292 P. 777, 131 Kan. 423, order supplemented on second rehearing 294 P. 928, 132 Kan. 21.

(4) To show breach of contract.

Cal.—Milk Producers' Ass'n of San Diego County v. Webb, 275 P. 1001, 97 Cal.App. 650—California Bean Growers' Ass'n v. Sanders, 261 P. 717, 86 Cal.App. 689.

N.Y.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N. E. 171, 239 N.Y.S. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

(5) To show damages.—California Bean Growers' Ass'n v. Sanders, 261 P. 717, 86 Cal.App. 689.

(6) To sustain finding that lease taken by wife covering land theretofore leased to member of wheat growers' association was made in good faith.—Kansas Wheat Growers' Ass'n v. Lucas, 278 P. 6, 128 Kan. 350.

Evidence held insufficient

(1) In general.

Cal.—California Canning Peach Growers v. Harris, 267 P. 572, 91 Cal.App. 654—California Bean Growers' Ass'n v. Sanders, 261 P. 717, 86 Cal.App. 689—California Canning Peach Growers v. Downey, 243 P. 679, 76 Cal.App. 1.

Kan.—Kansas Wheat Growers' Ass'n v. Bridges, 1 P.2d 265, 133 Kan. 397—Kansas Wheat Growers' Ass'n v. Toothaker, 278 P. 716, 128 Kan. 469.

(2) To show membership or valid contract.

Cal.—Johanson v. Riverside County Select Groves, 40 P.2d 530, 4 Cal. App.2d 114.

Ill.—Farmers' Educational & Co-Operative Union of America, Illinois Division, v. Langlois, 258 Ill.App. 522.

Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.

N.C.—Pittman v. Tobacco Growers' Co-op. Ass'n, 121 S.E. 634, 187 N.C. 340.

Conclusiveness of certificate of organization committee with respect to compliance with conditions precedent to enforcement of contracts see supra § 7 c (1).

55. Questions held for jury

(1) In general.

Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

Fla.—Winter Garden Citrus Growers' Ass'n v. Willits, 151 So. 509, 113 Fla. 131.

Kan.—Kansas Wheat Growers' Ass'n v. Leslie, 271 P. 284, 126 Kan. 694—Kansas Wheat Growers' Ass'n v. Loehr, 264 P. 735, 125 Kan. 491.

Me.—Cunningham v. Long, 135 A. 198, 125 Me. 494.

S.C.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S. E. 422, 181 S.C. 295.

(2) Performance of contract.—Burley Tobacco Growers' Co-op. Ass'n v. Samples, 284 S.W. 1069, 215 Ky. 276.

(3) Whether lease of land was in good faith or was subterfuge to avoid contract obligations.—Kansas Wheat Growers' Ass'n v. Garnett, 278 P. 5, 128 Kan. 337—Kansas Wheat Growers' Ass'n v. Lucas, 262 P. 551, 124 Kan. 773.

Sufficiency of evidence to go to jury

Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 16 S.W.2d 177, 179 Ark. 338.

Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Jewell, 280 S.W. 1105, 213 Ky. 272.

N.C.—Dunbar v. Tobacco Growers' Co-op. Ass'n, 130 S.E. 505, 190 N. C. 608.

Instruction held erroneous

Kan.—Kansas Wheat Growers' Ass'n v. Leslie, 271 P. 284, 126 Kan. 694.

Decree in injunction suit

The decree in a suit for an injunction to restrain a member of a co-operative association from selling his products through others than the association in violation of his membership contract should restrain the sale only of those products covered by the contract.—Pierce County Dairymen's Ass'n v. Templin, 215 P. 352, 124 Wash. 567.

Costs and attorney's fees

Under some statutes or contractual provisions, a co-operative association has been held entitled to attorney's fees in an action against a member for a breach of his marketing contract.

Cal.—California Bean Growers' Ass'n v. Sanders, 261 P. 717, 86 Cal.App. 689.

Ky.—Coyle v. Dark Tobacco Growers' Co-op. Ass'n, 277 S.W. 318, 211 Ky. 162.

La.—Louisiana Farm Bureau Cotton Growers' Co-operative Ass'n v. Banister, 2 La.App. 620.

S.C.—South Carolina Cotton Growers' Co-op. Ass'n v. English, 133 S. E. 542, 135 S.C. 19.

56. N.H.—Manchester Dairy System v. Hayward, 132 A. 12, 82 N.H. 193.

57. Cal.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904—Colma Vegetable Ass'n v. Bonetti, 267 P. 172, 91 Cal.App. 103.

Ind.—Dark Tobacco Growers' Co-op. Ass'n v. Robertson, 150 N.E. 106, 84 Ind.App. 51.

Iowa.—Clear Lake Co-op. Live Stock Shippers' Ass'n v. Weir, 206 N.W. 297, 200 Iowa 1293.

La.—Louisiana Farm Bureau Cotton Growers' Co-operative Ass'n v. Banister, 2 La.App. 620.

N.Y.—Parker v. Dairymen's League Co-op. Ass'n, 226 N.Y.S. 226, 222 App.Div. 341.

Ohio.—Burley Tobacco Grower's Co-Operative Ass'n v. Gardner, 25 Ohio N.P.,N.S., 1.

31 C.J. p 964 note 80.

Provision for liquidated damages on breach of co-operative marketing contract as not in nature of penalty see Damages §§ 108, 113 c.

Failure to fix definite sum

Provision of contract between co-operative association and producer, requiring producer's payment of sum not exceeding one-fifth of value of products withheld as liquidated damages, has been held void.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

58. S.C.—South Carolina Cotton Growers' Co-op. Ass'n v. English, 133 S.E. 542, 135 S.C. 19.

from the date of the first breach to the date of trial.[59] In an action by a member against the association he cannot recover damages for loss on breach of the contract on vague evidence.[60]

b. Of, or against, Third Persons

The usual remedies generally are available for the protection and enforcement of right and liabilities between co-operative associations and third persons.

While a statute providing for liability to a co-operative association for merely buying or handling products under contract to such an association has been held invalid,[61] statutes authorizing an injunction or providing for civil liability to a co-operative association for inducing or attempting to induce a member to breach his marketing contract with such association have been held valid.[62] A co-operative association may sue, sometimes by virtue of statutory provisions, to enjoin and to recover damages from third persons contracting with members with respect to products covered by a marketing agreement or attempting to induce members to breach such agreement,[63] and, in an action to restrain a third person from interfering with contracts of members, defendants may not object that the contracts are ultra vires, since such questions may be raised only by the state or by a member of the association,[64] nor may they challenge the contracts on the ground of representations made by the association in procuring them,[65] although, where a member is a party to the suit, the member has a right to assert as a defense that the conduct of the association prevented his performance of the contract.[66]

A contract between a fruit grower's society and its members whereby they agree to deliver their fruit to a third person to whom the society has contracted to sell it is enforceable by the buyer in an action against the members;[67] and he is entitled to an injunction against sales by the members to others.[68] The action is not barred by the pendency of a suit by the society against the buyer on the contract between the two,[69] and a release of one of the members from his individual contract by

59. N.Y.—Parker v. Dairymen's League Co-op. Ass'n, 226 N.Y.S. 226, 222 App.Div. 341.

60. Wash.—Guglielmelli v. Walla Walla Gardeners' Ass'n, 288 P. 251, 157 Wash. 109, 77 A.L.R. 385.

Method of computation

Damages for breach of contract by cotton growers' association in closing out producer's account in option pool should be computed from price of cotton on future market at date producer exercised price fixation option, and not from price of spot cotton at that date.—Burch v. South Carolina Cotton Growers' Co-op. Ass'n, 187 S.E. 422, 181 S.C. 295.

61. Minn.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Radke, 204 N.W. 314, 163 Minn. 403.

62. U.S.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643.

Colo.—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.

Tex.—Hollingsworth v. Texas Hay Ass'n, Civ.App., 246 S.W. 1068.

Person conducting public warehouse

Under some statutes any person, firm, or corporation conducting a public tobacco warehouse is liable in a civil suit where he or it knowingly solicits or permits any member of any co-operative association to breach his marketing contract with the association, and a warehouse serving the public and selling loose leaf tobacco at auction is "public tobacco warehouse" within the statute.—Tobacco Growers' Co-op. Ass'n v. Danville Warehouse Co., 132 S.E. 482, 144 Va. 456.

Product subject to marketing agreement

Under act prohibiting inducement of member to breach agreement with marketing association one knowingly inducing sale is liable unless such product is not subject to marketing agreement.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S.W. 2d 17, 180 Ark. 484.

63. Cal.—California Grape Control Board v. California Produce Corporation, 40 P.2d 846, 4 Cal.App.2d 242.

Colo.—Wilson v. Monte Vista Potato Growers' Co-op. Ass'n, 260 P. 1080, 82 Colo. 428—Fort v. People, 256 P. 325, 81 Colo. 420—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.

Wis.—Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 245 N.W. 99, 209 Wis. 344—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391—Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 197 N.W. 936, 182 Wis. 571.

Unclean hands

Defense that co-operative association, seeking to restrain interference with members' contracts had unclean hands was held not to warrant denial of relief.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., supra.

Influence or inducement

To make person liable who purchases rice from member of marketing association, evidence must show purchaser influenced or induced sale.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S.W.2d 17, 180 Ark. 484.

64. R.I.—Local Dairymen's Co-op. Ass'n v. Potvin, 173 A. 535, 54 R.I. 430.

Wis.—Northern Wisconsin Co-Op. Tobacco Pool v. Bekkedal, 197 N.W. 936, 182 Wis. 571.

65. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 225 N.W. 209, 199 Wis. 379, 77 A.L.R. 391, rehearing denied 226 N.W. 378, 199 Wis. 379, 77 A.L.R. 391.

66. Wis.—Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., supra.

67. Or.—Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398—Phez Co. v. Salem Fruit Union, 205 P. 970, 103 Or. 514, 25 A.L.R. 1090, denying rehearing 201 P. 222, 103 Or. 514, 25 A.L.R. 1090.

68. Or.—Phez Co. v. Salem Fruit Union, 205 P. 970, 103 Or. 514, 25 A.L.R. 1090, denying rehearing 201 P. 222, 103 Or. 514, 25 A.L.R. 1090.

69. Or.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090, rehearing denied 205 P. 970, 103 Or. 514, 25 A.L.R. 1090.

the buyer and the society does not release the other members from their contracts.[70] While an injunction will lie at the suit of a competitive buyer to restrain the enforcement of an invalid by-law imposing a charge on members for selling products to another than the association,[71] a third person seeking an injunction against an association to prevent its alleged unlawful interference with a private business is bound by general equitable principles regulating the granting of injunctions.[72] The transfer of stock by a co-operative association to members may be attacked in garnishment proceedings against the members because of fraud on creditors.[73] Under the practice in at least one jurisdiction, in an action to recover excess advances to an association which have been distributed to its members, plaintiff cannot be compelled to elect to discontinue the action either against the association's president or against the individual members.[74]

In the absence of special statutory provisions relating thereto, the usual rules apply in actions between a co-operative association or its members and third persons with respect to venue,[75] parties,[76] pleading,[77] and evidence.[78] Also, in the absence of

70. Or.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090, rehearing denied 205 P. 970, 103 Or. 514, 25 A.L.R. 1090.

71. Iowa.—Reeves v. Decorah Farmers' Co-op. Soc., 140 N.W. 844, 160 Iowa 194, 44 L.R.A.,N.S., 1104.

72. Ky.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, 86 S.W. 2d 1046, 261 Ky. 25.

Danger that conduct will continue

In suit by milk distributor to enjoin co-operative milk distributing association from interfering with his business, plaintiff was entitled to injunction restraining association from doing specific and definable acts interfering with plaintiff's procuring milk from nonmembers of association, provided danger existed that such acts of association would be repeated.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, supra.

73. Idaho.—Associated Fruit Co. v. Idaho-Oregon Fruit Growers' Ass'n, 256 P. 99, 44 Idaho 200.

74. N.Y.—Mandell v. Moses, 198 N. Y.S. 583, 204 App.Div. 655.

75. **Where association has principal office**

A statute authorizing the bringing of an action by a co-operative association against a third person alleged to have interfered with a contract between the association and a member in the county where the co-operative association had its principal office has been held not invalid.—State ex rel. Sayiesville Cheese Mfg. Co. v. Zimmerman, 265 N.W. 856, 220 Wis. 682, appeal dismissed 57 S.Ct. 18, 299 U.S. 504, 81 L.Ed. 374.

76. U.S.—Lake Charles Rice Milling Co. v. Pacific Rice Growers' Ass'n, C.C.A.Cal., 295 F. 246, certiorari denied Pacific Rice Growers' Ass'n v. Lake Charles Rice Milling Co., 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

Necessary parties

(1) Co-operative association members, from whom others purchased products in violation of sellers' agency contracts with association, have been held not necessary parties to latters' action against purchasers for injunction and damages.—Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 245 N.W. 99, 209 Wis. 344.

(2) In an action against a co-operative association by a vendor of property under contracts requiring the purchaser of the property to market the produce through the association, the right of the purchaser to an offset will not be determined where the vendor shows no interest therein as to justify such adjudication, the purchaser not being a party to the action.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.

77. **Allegations and proof of right to recover**

(1) A vendor of property, to whom proceeds of sale of produce through the association were to be paid, has been held not entitled to recover a proportionate amount owing from the association for profits realized by the association in the absence of allegations and proof of the amount due.—Davidson v. Apple Growers Ass'n, supra.

(2) In action against co-operative milk distributing association for wrongful diversion from plaintiff of milk produced by nonmembers of association, plaintiff to recover must show that, but for wrongful act of association, he would have procured sufficient milk to meet needs and hence was damaged by association's act.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, 86 S.W.2d 1046, 261 Ky. 25.

Complaint or petition held sufficient

(1) In general.

U.S.—Lake Charles Rice Milling Co. v. Pacific Rice Growers' Ass'n, C.C. A.Cal., 295 F. 246, certiorari denied Pacific Rice Growers' Ass'n v. Lake Charles Rice Milling Co., 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

Tex.—Baker v. Farmers' Welfare Union, Civ.App., 3 S.W.2d 155.

(2) To warrant restraining order without notice.—Fort v. Co-Operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.

Bill held insufficient

Md.—Madonna & Shawsville Co-op. Co. of Harford County v. West, 176 A. 611, 168 Md. 95.

78. **Burden of proof**

(1) The rescission of a contract between the society and its members is an affirmative defense to an action by a third person thereon and the burden of proving it rests on the members.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090, rehearing denied 205 P. 970, 103 Or. 514, 25 A.L.R. 1090.

(2) Where directors defend an action against them for indebtedness of the association because it exceeded its debt limit on the ground that seller knew that association had exceeded its limit of indebtedness, the burden of proof is on the directors. —Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

Admissibility of evidence

(1) In general.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S. W.2d 17, 180 Ark. 484.

(2) In co-operative marketing association's action against a wool dealer to recover damages for conversion of wool purchased from growers who were members of association, evidence that association acted only as a broker in former years because of federal government's mortgages on wool which was inconsistent with present assertion of ownership was admissible under contention that association was estopped by its conduct from asserting title to wool.—Pacific Wool Growers v. Draper & Co., 73 P.2d 1391, 158 Or. 1.

Evidence held sufficient

Cal.—Robinson v. Harry, 46 P.2d 806, 7 Cal.App.2d 312—Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 16 P.2d 1040, 128 Cal. App. 265.

Ky.—Hy-Grade Dairies v. Falls City Milk Producers Ass'n, 86 S.W.2d 1046, 261 Ky. 25.

Mo.—Recording Themometer Co. v. Missouri Fruit Exchange, App., 46 S.W.2d 191.

special regulations, general rules apply with respect to trial[79] and judgments.[80]

Damages. Although the members have disposed of their fruit to others, jurisdiction of an action by the buyer against them for injunction against sales to others may be retained in equity for the award of damages, and the buyer is entitled to recover the difference between the price of fruit sold to others and the lesser amount that he agreed to pay, although the impracticability of ascertaining probable profits may preclude recovery therefor;[81] and, where a third person contracting with the association is charged with the authority of the association is agent of the growers, the growers are liable only for the damages specified on failure to deliver their produce to such third person.[82] Producers are not liable for a penalty imposed by contract where they did not promise to pay the penalty and the evidence shows that they did not become members of the association.[83]

The damages that may be recovered from a person inducing, attempting to induce, or aiding in a breach of a marketing agreement between a co-operative association and a member thereof must be proved and reasonably sustained by evidence, and the association is not entitled to judgment for the actual value of the products purchased from a member.[84]

INDUSTRIAL INSURANCE. See the C.J.S. title Insurance § 20, also 31 C.J. p 966 note 1–p 974 note 5.

INDUSTRIAM, PER. Latin, literally "By industry." A qualified property in animals feræ naturæ may be acquired by man "per industriam," that is by reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty.[1]

INDUSTRY. The art, skill, and knowledge of a person in the practice of his profession or trade;[2] habitual diligence in any employment, either bodily or mental;[3] also any department or branch of art, occupation, or business, especially one which employs much labor and capital and is a distinct branch of trade, as the sugar industry;[4] that branch of trade employing capital and labor;[5] a particular branch of work; a trade; manufacture; occupation or labor employed in agriculture, arts, manufactures, and commerce; productive labor, specifically

Wis.—Wesemann v. Watertown Milk Co-op. Ass'n, 269 N.W. 246, 222 Wis. 475.

Evidence held insufficient

(1) In general.—Davidson v. Apple Growers Ass'n, 79 P.2d 991, 159 Or. 473.

(2) To show defendant induced member of marketing association to sell products in violation of rules.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S.W.2d 17, 180 Ark. 484.

79. Sufficiency of evidence to go to jury

Ky.—Federal Chemical Co. v. Paddock, 94 S.W.2d 645, 264 Ky. 338.

Questions of fact held for jury

Or.—Pacific Wool Growers v. Draper & Co., 73 P.2d 1391, 158 Or. 1.

Instructions must conform to the issues and evidence

Mich.—David Stott Flour Mills v. Saginaw County Farm Bureau, 213 N.W. 147, 237 Mich. 657.

80. Or.—Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398.

Joint judgment

Where liability of members of association to a third person is joint, a single judgment against all the members is proper.—Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

Restraining order not too broad or ambiguous

An order restraining defendants from interfering in any manner with the contracts of plaintiff, or with plaintiff's business matters, and from buying or attempting to buy tobacco, from persons having contracted to sell to plaintiff, or from receiving or attempting to receive tobacco under contract was held not invalid, as too general and ambiguous.—Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 197 N.W. 936, 182 Wis. 571.

Enforcement

A joint personal judgment against the members of a co-operative association is collectable from the property of the members served or any of them.—Mandell v. Cole, 155 N.E. 106, 244 N.Y. 221, reversing 216 N.Y.S. 870, 217 App.Div. 800.

Statute applicable only to members

A statute authorizing a judgment for penalties, costs of executing a bond, and attorney's fees has been held applicable only to judgments against members of a co-operative association.—Coyle v. Dark Tobacco Growers' Co-op. Ass'n, 277 S.W. 318, 211 Ky. 162.

81. Or.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090, rehearing denied 205 P. 970, 103 Or. 514, 25 A.L.R. 1090.

82. Or.—Phez Co. v. Salem Fruit Union, 233 P. 547, 113 Or. 398.

83. Cal.—Co-operative Dairymen's League v. Hansen, 73 P.2d 627, 23 Cal.App.2d 493.

84. Wis.—Neillsville Shipping Ass'n v. Lastofka, 274 N.W. 280, 225 Wis. 280.

1. Black L.D.

2. Puerto Rico.—People v. Beauchamp, 25 Puerto Rico 559, 561—People v. Gillies, 20 Puerto Rico 467, 471.

3. Mont.—Carver Mercantile Co. v. Hulme, 19 P. 213, 214, 7 Mont. 566.
Okl.—Chicago, R. I. & P. Ry. Co. v. State, 201 P. 260, 264, 83 Okl. 161.

4. Ariz.—Southern Pac. Co. v. State Corporation Commission, 3 P.2d 518, 521, 39 Ariz. 1.
Ill.—People v. Maggi, 39 N.E.2d 317, 318, 378 Ill. 595.
Okl.—Chicago, R. I. & P. R. Co. v. State, 201 P. 260, 264, 83 Okl. 161.
Wash.—Dessen v. Department of Labor and Industries of Washington, 66 P.2d 867, 869, 190 Wash. 69.

5. Ill.—People ex rel. Padula v. Hughes, 16 N.E.2d 922, 924, 296 Ill.App. 587.

labor employed in manufacturing; the result of operations whereby man changes and makes fit for his use materials which were unserviceable in their natural state, in which sense industry is the opposite of "agriculture" and "commerce."[6]

The term has been held synonymous with "employment" see 30 C.J.S. p 234 note 67; and has been compared with, or distinguished from, "agricultural pursuit,"[7] "commerce" see Commerce 15 C.J.S. p 251 in Pocket Parts, "domestic employment" see 27 C.J.S. p 1321 note 85, "labor,"[8] and "plant."[9]

Within the purview of municipal zoning regulations see the C.J.S. title Municipal Corporations § 226, also 43 C.J. p 340 note 29, and of compensation statutes see the C.J.S. title Workmen's Compensation Acts § 36, also 71 C.J. p 381 notes 88, 89.

Phrases employing the word are set out in the note.[10]

INEBRIATE. As a noun defined generally as an habitual drunkard see Drunkards § 1 a note 20; and with particular refcrence to mental capacity see the C.J.S. title Insane Persons § 1 d, also 32 C.J. p 623 notes 93, 94; and compared with "addict" see 1 C.J. S. p 1453 note 37.

As an adjective, drunk; habitually given to drink; intoxicated; stupified.[11]

As a verb, to intoxicate; to make drunk.[12]

INEBRIATION and **INEBRIETY.** Act of inebriating, or condition of being inebriated; drunkenness; intoxication.[13] The terms are expressive of that state or condition which inevitably follows from taking into the body by swallowing, or drinking, excessive quantities of intoxicating liquors, and are said to be nearly synonymous with "intoxication."[14]

INE, CODE OF. A code of the West Saxons dating from 688 to 695. Adopted by Alford, probably with alterations.[15]

INEFFECTUAL. Inefficient; ineffective; not producing the proper or usual effect; useless; without effect.[16] The term has been distinguished from "void."[17]

INEFFICIENCY. Inadequacy; incompetency;

6. Puerto Rico.—People v. Beauchamp, 25 Puerto Rico 559, 561—People v. Gillies, 20 Puerto Rico 467, 470.

In economics

"Economic science operates logically in limiting the meaning of the word industry, confining it exclusively to the skill of man as a direct producer of wealth and not to man as an active being generally or to man in the exercise of all the faculties . . . and in the infinite variety of its applications it is not rare that the word industry is used to designate the aggregate or result of human labor without distinction of kind."—People v. Beauchamp, 25 Puerto Rico 559, 561—People v. Gillies, 20 Puerto Rico 467, 470.

Similarly expressed

"Occupation or labor employed in agriculture, manufacturing, commerce or mechanical arts."—People v. Beauchamp, 25 Puerto Rico 559, 561—People v. Gillies, 20 Puerto Rico 467, 470.

Defined in Australian statute

"'Industry' means business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."—Federated Engine-Drivers, etc., Assoc. v. Broken Hill Proprietary Co., Ltd., 12 Austr.C.L.R. 398, 408—31 C.J. p 974 note 7 [b].

7. Puerto Rico.—People v. Beauchamp, 25 Puerto Rico 559, 562.

8. **Distinction discussed**

"In order to avoid confusion and error the word 'industry' is also given a meaning which is not admitted by economic science. In fact, this word is very frequently used as a synonym of labor, when, in reality, these two words have clearly distinct meanings. By labor is understood the pure and simple exercise of the physical forces or the intellectual faculties of man. Hence, when the exercise of these forces or faculties is sufficient to produce wealth, it may be said indiscriminately that the man labors or that he conducts an industry. But this rarely occurs. Generally, in order to produce, not only is labor necessary, but also the combination with it of capital and all natural agencies. Production is, therefore, the result of a unity of combinations of which labor is only one of the elements."—People v. Beauchamp, 25 Puerto Rico 559, 561—People v. Gillies, 20 Puerto Rico 467, 470.

9. Ariz.—Southern Pac. Co. v. State Corporation Commission, 3 P.2d 518, 521, 39 Ariz. 1.

10. **Phrases construed**

(1) "Any industry."—Federated Engine-Drivers, etc., Assoc. v. Broken Hill Proprietary Co., Ltd., 12 Austr.C.L.R. 398, 408.

(2) "In or upon any new industry."—Rex v. Disney, 14 Can.Cr.Cas. 152, 158.

(3) "'Joint industry' of husband and wife," as meaning the industry of a husband and wife, each in his or her recognized sphere of marital activity, as distinguished from industry in the same course of employment and endeavor.—In re Stone, 206 P. 246, 248, 86 Okl. 33.

(4) "Other industry," as referring to an industry different from those already specifically named.—Chicago, R. I. & P. R. Co. v. State, 201 P. 260, 264, 83 Okl. 161.

(5) "Within the plant or industry."—Southern Pac. Co. v. State Corporation Commission, 3 P.2d 518, 521, 39 Ariz. 1.

11. Webster New Int.D.
"Habitual drunkenness" defined see Drunkards § 1 b notes 31–34.

12. Webster New Int.D.

13. Webster New Int.D.

14. Ala.—Standard Life & Acc. Ins. Co. v. Jones, 10 So. 530, 94 Ala. 434, 441.
Ga.—Ring v. Ring, 38 S.E. 330, 332, 112 Ga. 854.
Mass.—Commonwealth v. Whitney, 11 Cush. 477, 479.
Neb.—Freeburg v. State, 138 N.W. 143, 144, 92 Neb. 346, Ann.Cas. 1913E 1101.

15. Black L.D.

16. Webster New Int.D.
N.Y.—Peck v. Ormsby, 8 N.Y.S. 372, 373, 55 Hun 265.

17. Mo.—Noll v. Alexander, 282 S. W. 739, 742.

lack of efficiency.[18] The word has been held sufficiently broad to include inability to read and write the English language.[19]

INEFFICIENT. Inadequate, incapable, incompetent, not producing or capable of producing the desired effect;[20] not efficient.[21] The antonym of "efficient."[22]

INELIGIBILITY. Disqualification or legal incapacity to be elected to an office; it may arise from various causes, and may be perpetual or temporary.[23]

INELIGIBLE. Not eligible, not qualified to be chosen to an office.[24] The term may mean disqualification to hold office as well as disqualification to be elected to an office.[25]

It is synonymous with "disqualified."[26]

"Ineligible" to citizenship under statute relating to loss of citizenship see Citizens § 16; and "ineligible" within meaning of statute relating to election board see Elections § 58.

IN EO, QUOD PLUS SIT, SEMPER INEST ET MINUS.[27]

IN EO QUOD VEL IS QUI PETIT, VEL IS A QUO PETITUR A LUCRI FACTUS EST, DURIOR CAUSA EST PETITORIS.[28]

IN EQUALI JURE MELIOR EST CONDITIO POSSIDENTIS.[29]

INEQUALITY. Disparity, disproportion, diversity, quality of being unequal, want of equality in any respect.[30] In its legal and constitutional sense, as when speaking of inequalities in taxation or assessment, the term refers to substantial, rather than accidental and unintentional, differences, usually in connection with large classes of property rather than cases of individual hardship, and to differences in the system or method of assessing or taxing such property which results in discriminations therein.[31]

"Inequality" of taxation generally see the C.J.S. title Taxation §§ 25–38, also 61 C.J. p 110 note 12–p 137 note 9.

INEQUITABLE. Not according to the principles of equity, not equitable, unjust.[32] "Inequitable" has been held synonymous with the phrase "fraud or fraudulent" see 37 C.J.S. p 199 note 38 (13); with "fraudulent" see 37 C.J.S. p 835 note 5, and "unconscientious."[33] Doctrine of inequitable conduct as bar to divorce see Divorce § 67 b (1); and inequitable and unconscionable transactions within exclusive jurisdiction of equity see Equity § 50 b.

INERT. Not having or manifesting active properties;[34] also useless.[35]

INERTIA. Defined as that property of matter by which it tends when at rest to remain so, and when in motion to continue in motion and in a straight line or direction unless acted on by some external force.[36]

18. Century D.

19. Tex.—Steinback v. . Galveston, Civ.App., 41 S.W. 822, 824.

20. U.S.—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, 162.
N.M.—Thayer v. Denver & R. G. R. Co., 185 P. 542, 545, 25 N.M. 559.

21. N.M.—Thayer v. Denver & R. G. R. Co., supra.

22. N.M.—Thayer v. Denver & R. G. R. Co., supra.
"Efficient" defined see 28 C.J.S. p 840 notes 35–51.

23. Black L.D.
"Ineligibility" within meaning of statute permitting governor to fill vacancies caused by ineligibility of member of levy court see Counties § 75.
Ineligibility of candidate:
Generally as ground for election contest see Elections § 249.
Nominated at party primary as constituting vacancy see Elections § 93.

24. Ind.—Carroll v. Green, 47 N.E. 223, 224, 148 Ind. 362.
31 C.J. p 975 note 29.
"Eligible" defined see 29 C.J.S. p 663 note 69–p 664 note 98.

25. Wis.—State v. Murray, 28 Wis. 96, 99, 9 Am.R. 489.

26. Ind.—Carroll v. Green, 47 N.E. 223, 224, 148 Ind. 362.

27. A maxim meaning "In the greater is always included the less also."—Black L.D.

Similarly rendered
"The greater always includes the less."—Wharton L.Lex.

28. A maxim meaning "In that which either he who seeks, or he from whom it is sought for the sake of gain, the cause of the applicant is the harder."—Morgan Leg.Max.

29. A maxim meaning "In case of equal right, the condition of the party in possession is the better one," as applied in Fisk v. Potter, 2 Abb. Dec., N.Y., 138, 147, 2 Keyes 64, 75.

30. Webster New Int.D.

31. U.S.—Railroad & Telephone Cos. v. Tennessee Bd. of Equalizers, C. C.Tenn., 85 Fed. 302, 306.

32. Century D.

"Inequitable conduct"
Construed as consisting in doing acts, or omitting things, or making representations, tending naturally to deceive as to the true interpretation of a contract, which the court finds to be unconscionable.—American Fruit Product Co. v. Barrett, 128 N. W. 1009, 1011, 113 Minn. 22.

33. U.S.—The Ottumwa Belle, D.C. Iowa, 78 F. 643, 648.

34. Webster New Int.D.

35. U.S.—U. S. v. Thirty Dozen Packages of Roach Food, D.C.Md., 202 F. 271, 273.

36. Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 899, 334 Mo. 278.

Stated in other words
"Inertia is a purely negative though universal property of matter. It is the property that matter cannot of itself change its own state of motion or of rest. If a body is at rest it remains so until some force acts upon it; if it is in motion this motion can only be changed by the application of some force. This property of inertia is what is ex-

IN ESSE. See In 42 C.J.S. p 488 notes 95–97.

IN ESSE POTEST DONATIONI, MODUS, CONDITIO, SIVE CAUSA; UT, MODUS EST; SI, CONDITIO; QUIA, CAUSA.[37]

INEST DE JURE. Latin, it is implied of right; it is implied by law.[38]

INEVITABLE. The word must be considered as a relative term, and construed not absolutely, but reasonably, with regard to the circumstances of each particular case.[39] It has been defined as meaning fortuitous; incapable of being avoided; transcending the power of human care, foresight, or exertion to avoid or prevent, and therefore suspending legal relations so far as to excuse from the performance of contract obligations or from liability for consequent loss;[40] and is sometimes used, not as something bound to happen at all events, but as highly probable.[41]

The term has been held synonymous with "unavoidable."[42]

Phrases employing the word are set out in the note.[43]

INEWARDUS. A guard; a watchman.[44]

INEXCUSABLE. Not admitting excuse or justification; not excusable.[45]

IN EXECUTIONE SENTENTIÆ, ALIBI LATÆ, SERVARE JUS LOCI IN QUO FIT EXECUTIO; NON UBI RES JUDICATA.[46]

IN EXPOSITIONE INSTRUMENTORUM, MALA GRAMMATICA, QUOD FIERI POTEST, VITANDA EST.[47]

IN EXTREMIS. See Extremis 35 C.J.S. p 378 note 13, and In 42 C.J.S. p 385 note 64 and p 488 notes 90, 98.

IN FACT. See Fact 35 C.J.S. p 386 note 37 and In 42 C.J.S. p 477 notes 93, 94.

IN FACTO QUOD SE HABET AD BONUM ET MALUM MAGIS DE BONO QUAM DE MALO LEX INTENDIT.[48]

INFALISTATUS. In old English law, exposed upon the sands or seashore; the name of a species of punishment mentioned in Hengham.[49]

INFALLIBLE. Not fallible unerring, inerrable;[50] indubitable, sure, certain, not capable of erring, entirely exempt from liability to mistake.[51] The word implies something that never fails and that is certain of operation, incapable of error, and free from

pressed by Newton's first law of motion."—Byars v. St. Louis Public Service Co., supra.

37. A maxim meaning "In a gift there may be a manner, condition, or cause; as ut introduces a manner; si, a condition; quia, a cause."—Black L.D.

38. Black L.D.

39. U.S.—Alliance Ins. Co. v. The Morning Light, N.Y., 2 Wall. 550, 560, 17 L.Ed. 862.
31 C.J. p 975 note 45.

40. Black L.D.

41. Kan.—Bradley v. Burgess, 198 P. 967, 969, 109 Kan. 347.

42. Ga.—Fish v. Chapman, 2 Ga. 349, 356, 46 Am.D. 393—Early v. Hampton, 82 S.E. 669, 671, 15 Ga. App. 95.

43. Phrases construed

(1) "Inevitable accident," defined generally and construed as equivalent to, or distinguished from, several other terms see 1 C.J.S. p 440 note 99–p 442 note 14; and more specifically as affecting tenant's liability to repair premises under covenant of lease at termination of tenancy see the C.J.S. title Landlord and Tenant § 412, also 36 C.J. p 200 note 68; or as used in the law of negligence see the C.J.S. title Negligence § 21, also 45 C.J. p 733 note 50–p 735 note 64.

(2) "Inevitable casualty" defined see 14 C.J.S. p 30 note 77, and compared with, or distinguished from, act of God see 1 C.J.S. p 1431 note 21.

(3) "Inevitable dangers of the river" see 25 C.J.S. p 999 note 69.

(4) "Inevitable difficulty" see 26 C.J.S. p 1306 note 81.

(5) "Inevitable necessity," authorizing a departure from a rule adopted to determine the line of a boundary of land held to refer to, or mean an impossibility of locating the lines in accordance with the rule.—Davis v. Commonwealth Land & Lumber Co., 141 F. 740, 755.

44. Black L.D.

45. Webster New Int.D.

Phrases construed

(1) "Inexcusable fault."—Montreal Tramways Co. v. Savignax, 27 Que. K.B. 246, 252—31 C.J. p 976 note 61 [a].

(2) "Inexcusable neglect."
Cal.—Hallett v. Slaughter, 140 P.2d 3, 6.
Tex.—American Casualty & Life Co. v. Malone, Civ.App., 168 S.W.2d 286, 288.
See specifically the C.J.S. titles Judgments §§ 280, 282, also 34 C.J. p 296 notes 3–8, p 302 note 58–p 310 note 93, p 363 note 46; and New Trial § 82, also 46 C.J. p 215 note 87–p 217 note 13.

46. A maxim meaning "In the execution of a judgment, otherwise extensive, the law of the place where the execution takes effect; not where the matter was adjudged shall prevail."—Tayler L.Gloss.

47. A maxim meaning "In the construction of instruments, bad grammar is to be avoided as much as possible."—Black L.D.
Applied in Finch's Case, 6 Coke 38b, 39b, 77 Reprint 310.

48. A maxim meaning "In an action which addresses itself to good and bad, the law looks more to the good than to the bad."—Wharton L. Lex.

Similarly rendered

"In an act or deed which admits of being considered as both good and bad, the law intends more from the good than from the bad; the law makes the more favorable construction."—Black L.D.

49. Black L.D.

50. Webster New Int.D.

51. U.S.—U. S. v. 237½ Bottles, 35-cent size, and 12½ Dozen Bottles, 70-cent size, of an Article of Drugs Labeled in Part "Lee's Save the Baby," D.C.Conn., 44 F.2d 831, 835.

uncertainty or liability to failure.[52]

It is not synonymous with "invaluable."[53]

INFAMADOR. In Spanish law, a defamer, slanderer, libeler.[54]

INFAMIA. In Latin, infamy, ignominy or disgrace.[55]

In Spanish law, the loss of standing, status, honor, and reputation. It was formerly, but is no longer, imposed as a penalty.[56]

INFAMIS. Latin, in Roman law, a person whose right of reputation was diminished, involving the loss of some of the rights of citizenship, either on account of his infamous avocation or because of conviction for crime.[57]

INFAMOUS. Primarily, without fame or good report;[58] hence in its general or common use, detestable, held in abhorrence, odious;[59] shameful or disgraceful.[60] The term "infamous" has been said to have a technical import more extensive than mere degradation or reproach.[61]

It has been held synonymous with "base" see 9 C.J.S. p 1553 note 15, "detestable,"[62] "disgraceful" see 27 C.J.S. p 146 note 66, "ignominious" see 42 C.J.S. p 378 note 50, "odious,"[63] "scandalous,"[64] "shameful,"[65] and "vile."[66]

Infamous punishment. A term which is said to embrace incarceration in a state prison[67] or in a penitentiary with or without hard labor.[68] It may include disqualification for office, if inflicted as a punishment for crime.[69]

Imprisonment in penitentiary for any term as infamous punishment see Criminal Law § 1974. Infamous punishment as used in extradition treaties see Extradition § 26 note 36; and in the law of libel see Libel and Slander § 53, also 36 C.J. p 1193 note 42–p 1196 note 90.

Other phrases employing the word are set out in the note.[70]

INFAMY. Loss of character, public disgrace;[71] that state which is produced by the conviction of crime and loss of honor;[72] that state of incompetency implying such a dereliction of moral princi-

52. U.S.—Hercules Powder Co. v Newton, D.C.N.Y., 254 F. 906, 907, affirmed, C.C.A., 266 F. 169, 171.

Used in describing smokeless powder

The term conveys "the idea that the smokeless powder will invariably do its work, or, putting the thought in another way, that it can be used with certainty for the purpose for which it is desired."—Hercules Powder Co. v. Newton, supra.

53. U.S.—U. S. v. 23 1/12 Dozen Bottles, 35-cent size, and 12 2/3 Dozen Bottles, 70-cent size, of an Article of Drugs Labeled in Part "Lee's Save the Baby," D.C.Conn., 44 F. 2d 831, 835.

54. Escriche Diccionario.

55. Black L.D.

"Infamia facti"

The infamy existing where one is supposed to be guilty of an infamous crime, but it has not been judicially proved.—Commonwealth v. Green, 17 Mass. 515, 541.

"Infamia juris"

Infamy established by law as the consequence of crime.—Commonwealth v. Green, supra.

56. Escriche Diccionario.

57. Black L.D.

58. U.S.—U. S. v. Block, D.C.Or., 24 F.Cas.No.14,609, 4 Sawy. 211, 212.

59. Pa.—Davis v. Carey, 8 Pa.Co. 578, 580.

60. Or.—Stevens v. Wilber, 300 P. 329, 330, 136 Or. 599.

61. Ky.—Sodusky v. McGee, 5 J.J. Marsh. 621, 622.

62. Ind.—Polson v. Polson, 39 N.E. 498, 499, 140 Ind. 310.

63. Ind.—Polson v. Polson, supra.

64. Ind.—Polson v. Polson, supra.

65. Ind.—Polson v. Polson, supra.

66. Ind.—Polson v. Polson, supra.

67. U.S.—Ex parte Wilson, Ark., 5 S.Ct. 935, 940, 941, 114 U.S. 417, 428, 29 L.Ed. 89.
31 C.J. p 977 note 81.

68. U.S.—Mackin v. U. S., Ill., 6 S. Ct. 777, 779, 117 U.S. 348, 29 L.Ed. 909.
31 C.J. p 977 note 82.

Sentence to hard labor not indispensable

"It is not necessary, to make a punishment infamous, that the law shall require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state-prison or penitentiary, either with or without hard labor, his punishment is infamous."—Ex parte McClusky, C.C.Ark., 40 F. 71, 73.

69. Ill.—People v. Kipley, 49 N.E. 229, 239, 171 Ill. 44, 41 L.R.A. 775.

70. **Phrases construed**

(1) "Conviction of infamous crime" see the C.J.S. titles Divorce § 23, as ground for divorce; Executors and Administrators § 46 e, as rendering person incompetent to become administrator, and § 84 c, as ground for revocation of letters of administration; Officers § 24, also 46 C.J. p 949 note 3 [a]–[c], as affecting eligibility to public office; Witnesses §§ 65–68, also 70 C.J. p 105 note 23–p 117 note 57, as affecting competency of witness, and § 507, also 70 C.J. p 850 note 6, impeachment of witness by proof of conviction of infamous crime.

(2) "'Infamous and disgraceful' conduct."—In re Telford, 11 B.C. 355, 359—31 C.J. p 976 note 76 [b].

(3) "Infamous conduct in any professional respect."—Allinson v. General Council Medical Education, etc., [1894] 1 Q.B. 760, 763—31 C.J. p 976 note 76 [a].

(4) "Infamous crime" generally see Criminal Law § 3; and within constitutional requirement of presentment or indictment by grand jury see Indictments and Informations § 9.

(5) "Infamous crime against nature" see the C.J.S. title Sodomy § 1, also 58 C.J. p 788 note 4.

(6) "Infamous persons," defined to be "such persons as may be challenged as juror propter delictum, and therefore shall never be admitted to give evidence to inform the jury, with whom they were too scandalous to associate."—McCafferty v. Guyer, 59 Pa. 109, 116, quoting 3 Blackstone Comm. p 370.

71. Pa.—Commonwealth v. Shaver, 3 Watts & S. 338, 343.

72. Ind.T.—Williams v. U. S., 69 S. W. 849, 852, 4 Ind.T. 204.

ple as carries with it a conclusion of a total disregard to the obligation of an oath.[73]

INFANCY. See Infants § 1.

INFANGENTHEF. In old English law, a privilege of lords of certain manors to judge any thief taken within their fee.[74]

INFANS. Latin, a civil law term signifying a child under the age of seven years, see Infants § 1.

INFANS EST QUIA, PROPTER DEFECTUM ÆTATIS, PRO SE FARI NEQUEAT.[75]

INFANS NON MULTUM A FURIOSO DISTAT.[76]

INFANTADO or **INFANTAZGO.** In Spanish law, the state of infancy; also the territory set aside for the support of a son or daughter of the sovereign.[77]

INFANTE. In Spanish law a minor under seven years, whether male or female. Under the Spanish monarchy, the term "infante" was applied to the legitimate son of the sovereign; and "infanta" to his daughter or to the wife of the "infante."[78]

INFANTES DE DAMNO PRÆSTARE TENENTUR, DE PŒNA NON ITEM.[79]

INFANTIA. Latin, in the civil law, the period of infancy between birth and the age of seven years.[80]

INFANTICIDE and **INFANTICIDIO.** See Homicide § 2.

73. Kan.—State v. Clark, 56 P. 767, 768, 60 Kan. 450.

Classification

"There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent."—Ex parte Wilson, Ark., 5 S.Ct. 935, 937, 114 U.S. 417, 29 L.Ed. 89.

Scope of term

"Infamy extends to forgery, perjury, gross cheats, &c., and disables a man to be a witness or juror."—Commonwealth v. Shaver, 3 Watts & S., Pa., 338, 342.

74. Black L.D.

75. A maxim meaning "He is an infant who, on account of defect of age, can not speak for himself."—Morgan Leg.Max.

76. A maxim meaning "An infant does not differ much from a lunatic."—Black L.D.

77. Escriche Diccionario.

78. Escriche Diccionario.

79. A maxim meaning "Infants are sometimes obliged to performance involving loss, but never punishment."—Morgan Leg.Max.

80. Black L.D.

INFANTS

This Title includes persons not of full age; their rights and disabilities in general; judicial control and protection of their persons and property; and legal proceedings affecting them.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Work Index

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I. WHO ARE INFANTS

§ 1. Definitions

The term "infant" embraces any person who has not attained or arrived at the age of majority as prescribed by law. Related terms are "infancy," "infans," "minor," and "minority".

The term "infant" in its legal signification embraces any person who has not attained or arrived at the age of majority as prescribed by law;[1] a person within age, not of age, or not of full age; a minor;[2] at common law, a person under the age of twenty-one years,[3] although the term does not necessarily imply any definite age limit.[4] It has been distinguished from "child."[5]

Infancy. As used in law the word means minority; nonage; under the age of twenty-one years.[6] According to the sense in which the term is used it may denote the condition of the person merely with reference to his years, or the contractual disabilities which nonage entails, or his status with regard to other powers or relations.[7]

Infans. "Infans" is a civil-law term signifying a child under the age of seven years; so-called "quasi impos fandi," as not having the faculty of speech.[8]

Minor. "Minor" is a term derived from the civil law, which described a person under a certain age as "less than" so many years; an infant or person who is under the age of legal competence.[9]

Minority. "Minority" is the state or condition of a minor; infancy.[10] As applied to the disabilities which nonage entails, "minority" signifies the personal privilege allowed to an infant, by operation of law, to pursue his right.[11]

§ 2. Age of Majority

An infant reaches majority at the age of twenty-one years, except where a different period is prescribed by statute.

At common law the age at which an infant, whether male or female, reaches full majority is fixed at twenty-one years.[12] However, subject to constitutional limitations,[13] the age of minority or majority is a matter of legislative regulation,[14] and it may prescribe a longer period of minority for some purposes than for others.[15] While the common-law rule that an infant, male or female, reach-

1. Ala.—Beavers v. Southern Ry. Co., 103 So. 887, 889, 212 Ala. 600.
Mich.—Keating v. Michigan Cent. R. Co., 53 N.W. 1053, 94 Mich. 219, 221.

2. Black L.D.

Synonymous with "minor"
N.D.—State v. Flath, 228 N.W. 847, 848, 59 N.D. 121.
31 C.J. p 986 note 18 [a].

3. Black L.D.
31 C.J. p 986 note 14.

4. N.D.—State v. Flath, supra.

5. Ga.—Stone v. State, 57 S.E. 992, 1 Ga.App. 292.
N.D.—State v. Flath, 228 N.W. 847, 850, 59 N.D. 121.
"Child" defined see 14 C.J.S. p 1106 note 24-p 1110 note 99.

Child "sui juris" and "non sui juris" contrasted
Or.—Macdonald v. O'Reilly, 78 P. 753, 757, 45 Or. 589.

6. Mo.—Ewart v. Dalby, 5 S.W.2d 428, 436, 319 Mo. 108.

7. Black L.D.

8. Black L.D.

9. Black L.D.
31 C.J. p 986 note 18.

"Child" distinguished
Tex.—Allen v. State, 7 Tex.App. 298, 301.

10. Black L.D.
31 C.J. p 986 note 19.

11. S.C.—Rose v. Daniel, 7 S.C.L. 549, 563.

12. Ala.—Hutchison v. Till, 101 So. 676, 212 Ala. 64.
D.C.—Jones v. Jones, 72 F.2d 829, 63 App.D.C. 373, 95 A.L.R. 352—Interstate Bankers Corporation v. Larsen, Mun.App., 32 A.2d 103.
Fla.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 918, 133 Fla. 195, citing **Corpus Juris**—Riley v. Holmer, 131 So. 330, 331, 100 Fla. 938, citing **Corpus Juris.**
Ill.—Miller v. Miller, 257 Ill.App. 287.
Minn.—State ex rel. White v. Patterson, 247 N.W. 573, 575, 249 N.W. 187, 188 Minn. 492, citing **Corpus Juris.**
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.
31 C.J. p 986 notes 22-24.

This "rule was arbitrary in the sense that it was of convenience and necessity, as distinguished from a substantive rule of law."—Springstun v. Springstun, 229 P. 14, 15, 131 Wash. 109, 40 A.L.R. 595.
What law governs see infra § 20.

13. Vt.—Rafus v. Daley, 154 A. 695, 103 Vt. 426.

Constitutional amendment prescribing twenty-one years as majority in certain cases held not to affect statute providing that females aged eighteen shall be considered of full age.—Rafus v. Daley, supra.

14. Ala.—Hutchinson v. Till, 101 So. 676, 212 Ala. 64.
Cal.—In re Herrera, 143 P.2d 345—Gouanillou v. Industrial Accident Commission, 193 P. 937, 938, 184 Cal. 418—Moore v. Williams, 127 P. 509, 19 Cal.App. 600.
D.C.—Jones v. Jones, 72 F.2d 829, 63 App.D.C. 373, 95 A.L.R. 352.
Fla.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 133 Fla. 195—Riley v. Holmer, 131 So. 330, 100 Fla. 938.
Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.
Minn.—State ex rel. White v. Patterson, 247 N.W. 573, 249 N.W. 187, 188 Minn. 492.
Vt.—Rafus v. Daley, 154 A. 695, 103 Vt. 426.
Wash.—Springstun v. Springstun, 229 P. 14, 131 Wash. 109, 40 A.L.R. 595.
Power to:
Change age for exercising privileges see infra § 19.
Remove disabilities see infra § 28.

15. Cal.—In re Herrera, 143 P.2d 345—Gouanillou v. Industrial Accident Commission, 193 P. 937, 184 Cal. 418.
31 C.J. p 986 note 26.

Delinquent children
Legislature may fix age at which delinquent child shall attain majority different from that fixed for other children.—State ex rel. White v. Patterson, 247 N.W. 573, 249 N.W. 187, 188 Minn. 492.

es majority at twenty-one has been adopted by statute in many states,[16] the legislature may prescribe different ages for attaining majority by the different sexes,[17] and in some states the age of majority as to females, at least for some purposes, has been fixed at eighteen years.[18] Some of the legislatures that formerly fixed eighteen years as the age limit for the majority of females have since increased it to twenty-one years;[19] but such a statute is unconstitutional if it affects the rights of females who were eighteen when the statute was enacted.[20] The fact that a statute defines as minors those who have not attained a certain age merely sets forth an arbitrary rule that minority ends at that age and does not prevent its ending in some other way.[21]

§ 3. —— Attainment

An infant at common law becomes of full age on the day preceding the twenty-first anniversary of his birth.

At common law one becomes of full age on the day preceding the twenty-first anniversary of his birth,[22] on the first moment of that day.[23] Under some statutes, however, the age of majority is calculated from the first minute of the day on which the person was born to the same minute of the corresponding day completing the period of minority.[24]

II. CUSTODY AND PROTECTION

§ 4. In General

A minor, deprived of parental care and control, is a ward of the state, over whom the state may exercise its sovereign power of guardianship; and to effect such power the legislature may make reasonable regulations for the minor's protection and welfare.

A minor, deprived of parental care, control, and oversight, is considered a person under disability,[25] a ward of the state,[26] over whom the state may and should exercise its sovereign power of guardianship, through its duly constituted agencies;[27] and,

16. Mo.—Olsen v. East Side Packing Co., 3 S.W.2d 281, 221 Mo.App. 290.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
Wash.—Hinton v. Carmody, 60 P.2d 1108, 186 Wash. 242—Springstun v. Springstun, 229 P. 14, 131 Wash. 109, 40 A.L.R. 595.
31 C.J. p 987 note 27.

17. Fla.—Riley v. Holmer, 131 So. 330, 100 Fla. 938.
Minn.—State ex rel. White v. Patterson, 247 N.W. 573, 575, 249 N.W. 187, 188 Minn. 492.

18. D.C.—Interstate Bankers Corporation v. Larsen, Mun.App., 32 A. 2d 103.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
Vt.—Rafus v. Daley, 154 A. 695, 103 Vt. 426.
31 C.J. p 987 note 28.

19. Neb.—State Bank of Beaver Crossing v. Mackley, 236 N.W. 165, 121 Neb. 28.
Ohio.—Pickering v. Peskind, 183 N. E. 301, 43 Ohio App. 401.
Wash.—Springstun v. Springstun, 229 P. 14, 131 Wash. 109, 40 A.L.R. 595.

In Minnesota

(1) Under L.1937 c 435 § 24, Mason Minn.St.1938 Suppl. § 8992-185, the word "minor" is declared to mean "a person under the age of twenty-one years," and the former discrimination against masculine youth is thereby removed, so that both sexes now attain majority at twenty-one years.—Vlasak v. Vlasak, 283 N.W. 489, 204 Minn. 331.

(2) Prior to this statute women attained their majority for all purposes at the age of eighteen, and this statutory rule was not changed by probate code, Rev.L.1905 § 3636, defining a minor as a male under twenty-one or a female under eighteen on ground that contextual reference restricted definition of a "minor."—Vlasak v. Vlasak, supra.

Statute not retroactive

Mo.—Nahorski v. St. Louis Electric Terminal Ry. Co., 274 S.W. 1025, 310 Mo. 227.
Ohio.—Pickering v. Peskind, 183 N.E. 301, 43 Ohio App. 401.

20. Mo.—Nahorski v. St. Louis Electric Terminal Ry. Co., 274 S.W. 1025, 310 Mo. 227.
Ohio.—Gigger v. Kelly, 24 Ohio N.P., N.S., 499.

21. La.—Thornton v. Central Surety & Insurance Corporation, App., 191 So. 179.
Emancipation see infra §§ 28-30.

22. Del.—State v. Clarke, 3 Del. 557.
Ga.—Thomas v. Couch, 156 S.E. 206, 209, 171 Ga. 602, citing **Corpus Juris.**
Ind.—Wells v. Wells, 6 Ind. 447.
Ky.—Erwin v. Benton, 87 S.W. 291, 120 Ky. 536, 9 Ann.Cas. 264—Hamlin v. Stevenson, 4 Dana 597.
Me.—Inhabitants of Town of Gouldsboro v. Inhabitants of Town of Sullivan, 170 A. 900, 132 Me. 342.
N.Y.—In re Bardol's Will, 300 N.Y.S. 60, 164 Misc. 907, modified on other grounds 4 N.Y.S.2d 795, 253 App. Div. 498, 254 App.Div. 498, 254 App.Div. 647, affirmed 16 N.E.2d 96, 287 N.Y. 343.
Tex.—Ross v. Morrow, 19 S.W. 1090, 85 Tex. 172, 16 L.R.A. 542.

23. U.S.—U. S. v. Wright, Okl., 197 F. 297, 116 C.C.A. 659.
Ga.—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602.
N.C.—State v. Mason, 66 N.C. 636.

24. Cal.—Ex parte Wood, 90 P. 961, 5 Cal.App. 471—Ganahl v. Sohler, 5 P. 80, 2 Cal.Unrep.Cas. 415.
Okl.—Colby v. Glasco, 257 P. 322, 125 Okl. 224—Bynum v. Moore, 223 P. 687, 101 Okl. 128.

25. Kan.—In re Turner, 145 P. 871, 94 Kan. 115, Ann.Cas.1916E 1022.

26. Ala.—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650.
Ill.—Union Bank of Chicago v. Wormser, 256 Ill.App. 291.
Mich.—In re Volk, 235 N.W. 854, 254 Mich. 25.
N.Y.—In re Rothkowitz, 25 N.Y.S.2d 624, 175 Misc. 948—Application of Pressler, 13 N.Y.S.2d 49, 171 Misc. 559.
31 C.J. p 987 note 34.

Omission from general Children's Court Act, L.1922 c 547, of declaration that destitute or dependent children are wards of state is no evidence of abandonment of doctrine.—People ex rel. Our Lady of Victory Infant Home v. Venniro, 212 N.Y.S. 741, 126 Misc. 135.

27. Ala.—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650.
Neb.—State v. Young, 237 N.W. 677, 121 Neb. 619.

as parens patriæ, may assume for him parental authority and duty.[28] This power is not an unlimited and arbitrary one,[29] and is exercised only in cases where the child is destitute of that parental care and protection to which he is entitled.[30] To effect such power the legislature may and should make reasonable regulations tending toward the protection and welfare of the child;[31] and so important is this governmental function that the limitations of the constitutions are to be so construed, if possible, as not to interfere with its legitimate exercise.[32] Such legislation is beneficial and remedial,[33] not criminal in its nature,[34] and entitled to favorable and liberal construction.[35]

§ 5. Courts and Their Jurisdiction

A court of equity, or a court exercising equity jurisdiction, has jurisdiction over the custody, care, and control of resident infants, and under some constitutional or statutory provisions this jurisdiction is vested in particular courts.

Courts of equity independently of statute,[36] have inherent jurisdiction over the custody, care, and control of infants,[37] even though no property rights are involved.[38] This jurisdiction is continuous dur-

N.Y.—In re Rotkowitz, 25 N.Y.S.2d 624, 175 Misc. 948.
R.I.—Roullard v. McSoley, 172 A. 326, 54 R.I. 232.
Wash.—In re Hudson, 126 P.2d 765, 13 Wash.2d 673.
31 C.J. p 987 note 35.

Not dependent on statute
The right of the state to exercise guardianship over a child does not depend on a statute asserting that power.—In re Hudson, supra.
Commitment of dependent and delinquent juveniles see infra §§ 97–102.

28. Ariz.—Fladung v. Sanford, 75 P. 2d 685, 51 Ariz. 211.
Ill.—People ex rel. Noonan v. Wingate, 33 N.E.2d 467, 376 Ill. 244.
N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.
N.Y.—Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559—Bedrick v. Bedrick, 270 N.Y.S. 566, 151 Misc. 4, affirmed 271 N.Y.S. 949, 241 App. Div. 807—People ex rel. Converse v. Derrick, 261 N.Y.S. 447, 146 Misc. 73.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
31 C.J. p 987 note 36.
Rights of state as parens patriæ see Parent and Child § 10, also 46 C. J. p 1222 note 59–p 1223 note 67.

29. N.C.—In re Watson, 72 S.E. 1049, 157 N.C. 340.
Utah.—Mill v. Brown, 88 P. 609, 31 Utah 473, 120 Am.S.R. 935.

30. N.C.—In re Watson, 72 S.E. 1049, 157 N.C. 340.
Wash.—In re Hudson, 126 P.2d 765, 13 Wash.2d 673.
31 C.J. p 987 note 38.

31. Cal.—Artukovich v. Astendorf, 131 P.2d 831, 21 Cal.2d 329.
D.C.—Bonner v. Moran, 126 F.2d 121, 75 U.S.App.D.C. 156, 139 A.L.R. 1366.
N.Y.—In re Vasko, 263 N.Y.S. 552, 238 App.Div. 128.
31 C.J. p 987 note 39.
Regulations for protection of health and morals see infra §§ 11–16.

32. Mo.—State v. Tincher, 166 S.W. 1028, 258 Mo. 1, Ann.Cas.1915D 696.

33. S.C.—State v. Cagle, 96 S.E. 291, 111 S.C. 548.
As to commitment of juvenile delinquents and dependents see infra § 97.

34. Wis.—In re Alley, 182 N.W. 360, 174 Wis. 85.

35. S.C.—State v. Cagle, 96 S.E. 291, 111 S.C. 548.
Construction of juvenile court acts see infra § 97.

36. Ala.—Clinkscales v. Clinkscales, 97 So. 922, 210 Ala. 358—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669.
Cal.—Foy v. Foy, 73 P.2d 618, 25 Cal.App.2d 543.
D.C.—Emrich v. McNeil, 126 F.2d 841, 75 U.S.App.D.C. 307, 146 A. L.R. 1146.
N.Y.—People ex rel. Glendening v. Glendening, 19 N.Y.S.2d 693, 259 App.Div. 384, affirmed 29 N.E.2d 926, 284 N.Y. 598.
Wyo.—Urbach v. Urbach, 73 P.2d 953, 52 Wyo. 207, 113 A.L.R. 889.
31 C.J. p 988 note 48.

37. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854—Chandler v. Whatley, 189 So. 751, 238 Ala 206—Rosa v. Underwood, 179 So. 530, 235 Ala. 447—Wright v. Price, 147 So. 675, 226 Ala. 468—First Nat. Bank v. Robertson, 127 So. 221, 220 Ala. 654—Thomas v. State, 109 So. 607, 215 Ala. 1, answer to certified questions conformed to 109 So. 608, 21 Ala.App. 533—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650.
Ark.—Crenshaw v. Crenshaw, 160 S. W.2d 37, 203 Ark. 1086.
Cal.—Foy v. Foy, 73 P.2d 618, 25 Cal.App.2d 543.
Fla.—Tenny v. Tenny, 3 So.2d 375, 147 Fla. 672—Duke v. Duke, 147 So. 588, 109 Fla. 325—Fisher v. Guidy, 142 So. 818, 106 Fla. 94.
Ill.—Chapman v. American Surety Co., 104 N.E. 247, 261 Ill. 594—Union Bank of Chicago v. Wormser, 256 Ill.App. 291.
Ky.—Cornett v. Muncy, 15 S.W.2d 251, 228 Ky. 390.
Mich.—Moebius v. McCracken, 246 N. W. 163, 261 Mich. 409—Post v. Grand Rapids Trust Co., 238 N.W. 206, 255 Mich. 436.
Miss.—Mitchell v. Film Transit Co., 13 So.2d 154—Davis v. Davis, 12 So.2d 435.
Mo.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.
Mont.—Haynes v. Fillner, 75 P.2d 802, 106 Mont. 59.
N.Y.—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884—Bedrick v. Bedrick, 270 N.Y.S. 566, 151 Misc. 4, affirmed 271 N.Y.S. 949, 241 App. Div. 807.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
Pa.—Royer v. Royer, 9 Sch.Reg. 193.
Wash.—In re Hudson, 126 P.2d 765, 13 Wash.2d 673.
Wyo.—Urbach v. Urbach, 73 P.2d 953, 52 Wyo. 207, 113 A.L.R. 889.
31 C.J. p 988 note 50—21 C.J. p 154 note 18.

A chancery court takes nothing as confessed against infants, makes for them every valuable election, rescues them from faithless guardians, designing strangers, and even from unnatural parents, and generally takes all necessary steps to protect their interests.—Union Chevrolet Co. v. Arrington, 138 So. 593, 162 Miss. 816.

Any matter affecting a minor is the subject of equity jurisdiction.—First Nat. Bank v. Robertson, 127 So. 221, 220 Ala. 654—Allison v. Cox, 119 So. 675, 218 Ala. 548.
In proceedings for commitment see infra § 99.

38. Fla.—Duke v. Duke, 147 So. 588, 109 Fla. 325.
Mo.—In re Badger, 226 S.W. 936, 286 Mo. 139, 14 A.L.R. 286.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
Tex.—Green v. Green, Civ.App., 146 S.W. 567.
32 C.J. p 274 note 2.
"From the earliest times . . . generally the chancellor acted only when a property right was involved,

ing the infant's minority,[39] and, in the absence of express provision, such jurisdiction is not taken away by statutes conferring like power on other courts.[40]

However, the jurisdiction of the courts in such matters is generally regulated by the constitutions or statutes,[41] and accordingly under some provisions it may be exercised by particular courts therein designated, as for instance, circuit courts,[42] county courts,[43] district courts,[44] probate courts,[45] superior courts,[46] and supreme courts,[47] and the jurisdiction must be exercised by a court which has such authority.[48] By whatever court the jurisdiction is exercised, it generally is of the same character as that exercised by the court of chancery over the persons of infants,[49] and the power may be implied from a general legislative or constitutional grant of chancery powers.[50]

Jurisdiction as determined by residence. Jurisdiction to control, and determine and regulate the custody of, an infant is in the courts of the state where the infant legally resides,[51] and the courts

but this element went only to the exercise of jurisdiction, and not to the jurisdiction itself."—In re Santillanes, 138 P.2d 503, 507, 508, 47 N.M. 140.

Jurisdiction of property rights see infra § 57.

39. Ala.—Rosa v. Underwood, 179 So. 530, 235 Ala. 447—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669.

40. Fla.—Duke v. Duke, 147 So. 588, 589, 109 Fla. 325, citing **Corpus Juris**—Fisher v. Guidy, 142 So. 818, 821, 106 Fla. 94, quoting **Corpus Juris.**

Mont.—Haynes v. Fillner, 75 P.2d 802, 106 Mont. 59.

N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

N.Y.—In re Caposella, 8 N.Y.S.2d 509, 255 App.Div. 987, denying reargument Caposella v. Leonardo, 7 N.Y.S.2d 606, 255 App.Div. 863.

31 C.J. p 988 note 51.

41. N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

31 C.J. p 988 note 52.

Creation and jurisdiction of juvenile courts see infra § 6.

42. Ala.—Ex parte Pruitt, 92 So. 426, 207 Ala. 261—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650.

Fla.—Turner v. Andrews, 196 So. 449, 143 Fla. 88—Hillsborough County v. Savage, 58 So. 835, 63 Fla. 337.

Wis.—In re Stittgen, 86 N.W. 563, 110 Wis. 625.

43. Ark.—Ex parte King, 217 S.W. 465, 141 Ark. 213.

In Pennsylvania, under Act March 19, 1915, P.L. 531, 17 P.S. § 653, a county court may determine question of children's custody in connection with question of maintenance.—Commonwealth v. Miller, 156 A. 734, 102 Pa.Super. 323—Commonwealth ex rel. Berardino v. Berardino, 97 Pa. Super. 381.

44. Iowa.—Mollring v. Mollring, 167 N.W. 524, 184 Iowa 464.

Neb.—Geary v. Geary, 167 N.W. 778, 102 Neb. 511.

N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

31 C.J. p 988 note 55.

In Texas

(1) Under the provisions of Const. art 5 § 8, the district court has original jurisdiction and control over minors under prescribed regulations of the legislature.—Ex parte Reeves, 103 S.W. 478, 100 Tex. 617—Whittenberg v. Craven, Com.App., 258 S.W. 152, reversing Ex parte Grimes, Civ. App., 216 S.W. 251—Hardy v. McCulloch, Civ.App., 286 S.W. 629—Wright v. Wright, Civ.App., 285 S.W. 909—Green v. Green, Civ.App., 146 S.W. 567—Estes v. Presswood, Civ.App., 137 S.W. 145.

(2) Such jurisdiction is not final.—Lawler v. Wray, Civ.App., 8 S.W.2d 524.

(3) The district court has exclusive jurisdiction to determine proper custodian of minor child after death of child's mother, to whom custody had been awarded on divorce.—Bradford v. Lincoln Bank & Trust Co. of Louisville, Ky., Civ. App., 96 S.W.2d 821, error dismissed.

(4) Under Vernon Civ.St. art 4639a, a district court has power to ascertain surroundings and circumstances of minor children in cases in which court's jurisdiction has attached.—Bowyer v. Bowyer, 109 S.W. 2d 741, 130 Tex. 257, affirming, Civ. App., 80 S.W.2d 475.

45. Ala.—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650—Smith v. Smith, 84 So. 870, 17 Ala.App. 357.

Conn.—Dunham v. Dunham, 117 A. 504, 97 Conn. 440.

Ill.—Sippel v. Wolff, 164 N.E. 678, 333 Ill. 284.

Mass.—Schmidt v. Schmidt, 182 N.E. 374, 280 Mass. 216.

N.Y.—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884.

46. N.C.—In re Hamilton, 108 S.E. 385, 182 N.C. 44.

In Georgia

(1) Superior court judge, presiding as chancellor, is especially vested with authority to superintend person of minor.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.

(2) His authority to issue child-placing licenses is not abolished by the transfer to the state department of public welfare of the powers and duties of the board of control of eleemosynary institutions.—Criswell v. Jones, 3 S.E.2d 115, 60 Ga.App. 81, transferred, see 199 S.E. 804, 187 Ga. 55.

47. **In Louisiana,** under Const.1921 art 7 § 10, the supreme court has appellate jurisdiction in a case involving tutorship of a minor or custody of a child.—Hattier v. Martinez, 1 So. 2d 51, 197 La. 121.

In New York

(1) The supreme court, acting as an equity court, has jurisdiction for some purposes over the persons and estates of infants.—Petition of Travers, 32 N.Y.S.2d 742, 177 Misc. 1044—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884—People ex rel. Sisson v. Sisson, 275 N.Y.S. 299, 153 Misc. 434.

(2) Supreme court has succeeded to jurisdiction of chancery over infants.—Weinberger v. Van Hessen, 257 N.Y.S. 738, 236 App.Div. 14, affirmed 183 N.E. 429, 260 N.Y. 294.

As to custody of infant see infra § 7 b.

48. Tex.—Ex parte Reeves, 103 S.W. 478, 100 Tex. 617—Estes v. Presswood, Civ.App., 137 S.W. 145.

49. Fla.—Turner v. Andrews, 196 So. 449, 143 Fla. 88.

Iowa.—Mollring v. Mollring, 167 N.W. 524, 184 Iowa 464.

N.Y.—Petition of Travers, 32 N.Y.S. 2d 742, 177 Misc. 1044.

31 C.J. p 988 note 60.

50. Ark.—State v. Grisby, 38 Ark. 406.

Ind.—McCord v. Ochiltree, 8 Blackf. 15.

31 C.J. p 988 note 59.

51. Fla.—Di Giorgio v. Di Giorgio, 13 So.2d 596—Dorman v. Friendly, 1 So.2d 734, 736, 146 Fla. 732, quoting **Corpus Juris.**

Mass.—Schmidt v. Schmidt, 182 N. E. 374, 280 Mass. 216.

Mich.—In re Volk, 235 N.W. 854, 254 Mich. 25.

Minn.—State ex rel. Larson v. Larson, 252 N.W. 329, 190 Minn. 489.

N.Y.—People ex rel. Sisson v. Sisson, 275 N.Y.S. 299, 153 Misc. 434—People v. Dewey, 50 N.Y.S. 1013, 23 Misc. 267.

of another state are without power in the premises,[52] and cannot obtain jurisdiction for such purpose over persons temporarily within the state.[53] However, if the child is actually within the jurisdiction of the court, the court may determine claims as to his custody, although his legal domicile is elsewhere,[54] and regardless of the domicile of its parents;[55] nor, in case of a nonresident parent, is the court's jurisdiction dependent on a judgment of the foreign state.[56] Where the jurisdiction of the court has attached, it is not affected by the subsequent residential status, in the state, of the custodian or of the infant.[57]

§ 6. —— Juvenile Courts

Juvenile courts are courts of special jurisdiction over delinquent and neglected children, their jurisdiction being limited by the terms of the constitutional or statutory provisions under which they are created.

A juvenile court is a court having special jurisdiction, of a paternal nature, over delinquent and neglected children.[58] It is a special court, having special jurisdiction,[59] and under some statutes is a court of record.[60] It is a statutory tribunal; that is, it is created by statute,[61] it being within the

Tex.—Lanning v. Gregory, 99 S.W. 542, 100 Tex. 310, 123 Am.S.R. 809, 10 L.R.A.,N.S., 690—Wright v. Wright, Civ.App., 285 S.W. 909.
Va.—Rogers v. Commonwealth, 11 S.E.2d 584, 176 Va. 355.

Jurisdiction not exclusive
Va.—Rogers v. Commonwealth, supra.

52. Fla.—Dorman v. Friendly, 1 So 2d 734, 146 Fla. 732.
N.Y.—People v. Dewey, 50 N.Y.S. 1013, 23 Misc. 267.
N.C.—Burrowes v. Burrowes, 188 S. E. 648, 652, 210 N.C. 788, citing **Corpus Juris.**
Tex.—Lanning v. Gregory, 99 S.W. 542, 100 Tex. 310, 123 Am.S.R. 809, 10 L.R.A.,N.S., 690.
31 C.J. p 988 note 66.

53. Fla.—Dorman v. Friendly, 1 So. 2d 734, 146 Fla. 732.
N.M.—Evens v. Keller, 6 P.2d 200, 203, 35 N.M. 659, citing **Corpus Juris.**
N.Y.—People v. Dewey, 50 N.Y.S. 1013, 23 Misc. 267.
Tex.—Lanning v. Gregory, 99 S.W. 542, 100 Tex. 310, 123 Am.S.R. 809, 10 L.R.A.,N.S., 690.
Wash.—Motichka v. Rollands, 253 P. 333, 144 Wash. 565.

As matter of comity courts of one state will refuse to deal with question of future custody of children where court of another state, at instance of their father, assumed jurisdiction, children being within that state, and awarded custody to him, and he in violation of decree took them from such state.—Burns v. Shapley, 77 So. 447, 16 Ala.App. 297.

54. Fla.—Di Giorgio v. Di Giorgio, 13 So.2d 596—Dorman v. Friendly, 1 So.2d 734, 736, 146 Fla. 732, quoting **Corpus Juris.**
Ill.—People ex rel. Noonan v. Wingate, 33 N.E.2d 467, 376 Ill. 244.
Mass.—Woodworth v. Spring, 4 Allen 321.
N.J.—In re Williams, 77 A. 350, 79 A. 686, 77 N.J.Eq. 478.
Tenn.—State ex rel. Hooten v. Hooten, 1 Tenn.App. 154.
Va.—Rogers v. Commonwealth, 11 S E.2d 584, 176 Va. 355.

55. Colo.—People ex rel. Wagner v. Torrence, 27 P.2d 1038, 97 Colo. 47.
N.Y.—People ex rel. Van Dyk v. Van Dyk, 33 N.Y.S.2d 766.
"The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless."—Finlay v. Finlay, 148 N. E. 624, 625, 240 N.Y. 429—People ex rel. Van Dyk v. Van Dyk, 33 N.Y.S. 2d 766, 770.

56. Colo.—People ex rel. Wagner v. Torrence, 27 P.2d 1038, 97 Colo. 47.

57. Ala.—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669.
The subsequent removal of the infant beyond the territorial jurisdiction of the court does not affect its jurisdiction.—Lassiter v. Wilson, supra.

58. La.—State, in Interest of Bolin, v. Bruce, 152 So. 911, 178 La. 1081.
Miss.—Bryant v. Broun, 118 So. 184, 188, 151 Miss. 398, 60 A.L.R. 1335, quoting **Corpus Juris.**
N.M.—In re Santillanes, 138 P.2d 503, 508, 47 N.M. 140.
31 C.J. p 989 note 70.

59. Fla.—In re Whetstone, 188 So. 576, 137 Fla. 712.
La.—State v. Jacobs, 57 So. 905, 130 La. 245.
N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.
Okl.—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.
Tenn.—Cartwright v. Juvenile Court at Nashville, 113 S.W.2d 754, 172 Tenn. 626—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752.
Jurisdiction of juvenile courts:
For neglect to support bastard see Bastards § 20 a.
In bastardy proceedings see Bastards § 56.
Power of juvenile court to punish for contempt see Contempt § 46.

Not a trial court in ordinary sense
Cal.—Ex parte Jones, 93 P.2d 185, 34 Cal.App.2d 77.

Child placing agency
Ga.—Criswell v. Jones, 3 S.E.2d 115, 60 Ga.App. 81, transferred, see 199 S.E. 804, 187 Ga. 55.

Requisites of jurisdiction
A juvenile court has jurisdiction, in the sense that its erroneous action is voidable only and not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and claim set forth in complaint is not obviously frivolous. —In re Stuart, 114 F.2d 825, 72 App. D.C. 389

60. Colo.—Smith v. People, 176 P. 959, 960, 64 Colo. 290—State Home Board of Control v. Mulertz, 154 P. 742, 60 Colo. 468.
Courts of record generally see Courts § 5.

61. Ala.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.
Colo.—Abbott v. People, 16 P.2d 435, 91 Colo. 510.
Fla.—Gore v. Chapman, 196 So. 840, 143 Fla. 438.
31 C.J. p 989 note 75.

Purpose of establishment
(1) "To relieve juvenile defendants under certain circumstances from the rigidity of the law prevailing in courts of more general jurisdiction and for other humane and worthy purposes."—Macon v. Holloway, 96 So. 933, 934, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

(2) "To reclaim, rehabilitate, and salvage, wherever possible, youth that may have violated moral sense, decent conduct and the law."—In re Cotton, 30 N.Y.S.2d 421, 423.

(3) "To supplant parental supervision which has been lacking with view that the minor should not become a criminal, but a useful member of society."—People v. Renteria, Cal.App., 141 P.2d 37.

(4) The determination of civil liability is not a function of juvenile court, but its purpose is to check juvenile's evil tendencies by means of such care, guidance and control

power of the legislature, within constitutional limitations, to create or establish such courts and to confer on them jurisdiction, powers, and duties which do not conflict with organic provisions.[62] Generally, in states where such courts exist, they have jurisdiction over matters relating to the care, control and custody of infants,[63] but can exercise such jurisdiction and powers only as have been conferred on them by the statute creating them;[64] and jurisdiction must be strictly construed,[65] and cannot be enlarged by a provision in the statute requiring the statute to be liberally construed, so that its purposes may be carried out.[66]

The jurisdiction of a juvenile court is exercised as between the state, or, so to speak, the child, and the parents of the child,[67] and is not concerned with a controversy between the parents or relatives of the child with regard to its custody, not affecting its morals, health, or welfare.[68]

Status as independent tribunal. Under some statutes the juvenile court is not an independent tribunal, but is a part of other established courts,[69] it being within the power of the legislature, within constitutional limitations, to designate other courts already established, or parts thereof, to sit as juvenile courts.[70]

as are essential to children in the formative period of life.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142.

Repeal

The authority of juvenile courts to act as child-placing agencies is not withdrawn by a statute providing for the issuance of licenses to persons, hospitals, maternity homes, etc., as child-placing agencies.—Criswell v. Jones, 3 S.E.2d 115, 60 Ga.App. 81, transferred, see 199 S.E. 804, 187 Ga. 55.

62. Fla.—State v. Quigg, 90 So. 695, 83 Fla. 1.
N.C.—State v. Burnett, 102 S.E. 711, 179 N.C. 735.
31 C.J. p 989 note 77.

63. N.Y.—In re Cotton, 30 N.Y.S.2d 421.
N.C.—Winner v. Brice, 193 S.E. 400, 212 N.C. 294.
Ohio.—In re Decker, 28 Ohio N.P.,N.S., 433.
31 C.J. p 989 note 79.
Jurisdiction of juvenile court in:
Proceedings for commitment see infra § 99.
Prosecutions for violating regulations protecting infant see infra § 16.

64. Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal. App. 276.
Colo.—Abbott v. People, 16 P.2d 435, 91 Colo. 510.
Del.—Thompson v. Thompson, 145 A. 9, 4 W.W.Harr. 156.
Fla.—Gore v. Chapman, 196 So. 840, 143 Fla. 438—In re Whetstone, 188 So. 576, 137 Fla. 712.
Mo.—State v. Gregori, 2 S.W.2d 747, 318 Mo. 998.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.J.—Hagopian v. Hagopian, 20 A.2d 436, 130 N.J.Eq. 38—Zito v. Zito, 174 A. 421, 12 N.J.Misc. 712.
N.Y.—In re Montana, 30 N.Y.S.2d 199, 177 Misc. 171—In re Petersen, 269 N.Y.S. 646, 149 Misc. 869—Walsh v. Walsh, 263 N.Y.S. 517, 146 Misc. 604.
N.D.—Ex parte Blackey, 208 N.W. 238, 53 N.D. 852.
Ohio.—State v. Hoffman, 155 N.E. 499, 23 Ohio App. 348.
Okl.—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10.
Tenn.—Cartwright v. Juvenile Court at Nashville, 113 S.W.2d 754, 172 Tenn. 626.
31 C.J. p 989 note 83.

Limitation as to age

Fla.—Gore v. Chapman, 196 So. 840, 143 Fla. 438.

65. Fla.—In re Whetstone, 188 So. 576, 137 Fla. 712.

66. Mo.—State ex rel. Dew v. Trimble, 269 S.W. 617, 306 Mo. 657—Ex parte Label, App., 156 S.W.2d 37.

67. Colo.—Ross v. Ross, 5 P.2d 246, 89 Colo. 536, 78 A.L.R. 313.

68. Del.—Thompson v. Thompson, 145 A. 9, 4 W.W.Harr. 156.
La.—State, in Interest of Bolin, v. Bruce, 152 So. 911, 178 La. 1081—State v. McCloskey, 67 So. 813, 136 La. 739.
N.Y.—People v. Witchley, 284 N.Y.S. 292, 157 Misc. 237.

Courts of general civil jurisdiction, and not the juvenile court, are proper and exclusive tribunal to decide contest between two persons over custody of infant.—In re Owen, 127 So. 619, 170 La. 255.

Determination of jurisdiction

Supreme court, in determining whether juvenile court had jurisdiction, may consider facts found by judge of juvenile court.—State, in Interest of Bolin, v. Bruce, 152 So. 911, 178 La. 1081.

Welfare of child paramount

In proceedings in a juvenile court, the immediate welfare of the child is the paramount, if not the sole and controlling, consideration, and the fundamental purpose of the proceedings is the conservation of the welfare of the child.—In re Whetstone, 188 So. 576, 137 Fla. 712.

69. Cal.—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal.App. 276.
D.C.—In re Stuart, 114 F.2d 825, 72 App.D.C. 389.
N.Y.—In re Caposella, 8 N.Y.S.2d 509, 255 App.Div. 987, denying reargument Caposella v. Leonardo, 7 N.Y.S.2d 606, 255 App.Div. 863.
N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.
Wis.—In re Miedzinowski, 215 N.W. 583, 193 Wis. 635—In re Johnson, 181 N.W. 741, 173 Wis. 571.
31 C.J. p 989 note 80.

In California juvenile court is superior court, with inherent power to transfer case to another department thereof after reaching limits of special powers.—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal. App. 276.

In Ohio

(1) Under Gen.Code §§ 1532, 1639-7, 8034-1, the common pleas court division of domestic relations, as such, has full and exclusive authority to function as the juvenile court in Montgomery county.—Elford v. Elford, Ohio App., 44 N.E.2d 124.

(2) Where distinction is made between action of domestic relations judge as such, and as juvenile judge, after certification of a cause, as relates to custody of a child to juvenile court, the cause reposes in juvenile court permanently and no reservation may be made by domestic relations division of the court to again consider such branch of the cause.—Elford v. Elford, supra.

Exclusive and concurrent jurisdiction of children's courts and juvenile courts with other courts generally see Courts § 490 c.

70. Okl.—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10.
W.Va.—Slater v. Melton, 193 S.E. 185, 119 W.Va. 259.
31 C.J. p 989 note 81.

Children's court division of domestic relations court

N.Y.—In re Montana, 30 N.Y.S.2d 199, 177 Misc. 171.

Criminal jurisdiction. Except to the extent that juvenile courts have statutory jurisdiction of the prosecutions under the laws for the protection of infants, as discussed infra § 16, a juvenile court is not a criminal court,[71] and the grant of jurisdiction to juvenile courts with regard to the custody and protection of the person of an infant is not a grant of general criminal jurisdiction.[72] Its practice and procedure are not governed by the rules applicable to proceedings strictly criminal,[73] but rather by those applicable in civil cases.[74]

Territorial jurisdiction. The territorial jurisdiction of juvenile courts is limited to that conferred by the statutes creating them,[75] and generally is limited to the city or county wherein the infant resides,[76] although, under some statutes, its jurisdiction may be exercised over a child who is actually in the city or county on a visit.[77] Under a statute providing that the juvenile courts may exercise their jurisdiction in their several counties, the juvenile court of one county has no jurisdiction over children before it who are not residents of, and are not in, the county of the juvenile court's jurisdiction,[78] and therefore is without jurisdiction to redetermine the custody of an infant which had been previously determined by the juvenile court of the county of his residence.[79]

§ 7. Custody

a. In general
b. Control of court

a. In General

The state may assume direction, control, and custody of the person of an infant, and may delegate such authority to whom it may see fit.

The primary control and custody of infants is with the government,[80] and the state in its capacity of parens patriæ, as stated supra § 4, may assume direction, control, and custody of his person,[81] and delegate such authority to whom it may see fit,[82] it being delegated generally to the natural[83] or legal[84] guardians as long as they are fit and suitable and the best interests of the child are served. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in assuming control of infants, as this is a legislative function which cannot be delegated to the courts.[85] Moreover, the legislature may impose any conditions, not contravening constitutional limitations, on persons receiving the custody of the state's infant wards.[86]

71. Cal.—Ex parte Jones, 93 P.2d 185, 34 Cal.App.2d 77.
Okl.—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369.
Wis.—Ogden v. State, 156 N.W. 476, 162 Wis. 500, 502.
31 C.J. p 989 note 71.

Children's court division of domestic relations court does not partake of the nature of a court of criminal jurisdiction.—In re X, Y and Z, 43 N.Y.S.2d 361.

72. Colo.—Ex parte Songer, 177 P. 141, 65 Colo. 460—Colias v. People, 153 P. 224, 60 Colo. 230.
Ohio.—State v. Hoffman, 155 N.E. 499, 23 Ohio App. 348.
Character of proceedings for commitment of delinquents or dependents see infra § 99.

73. Ind.—Akers v. State, App., 51 N.E.2d 91.
La.—State v. Bertucci, 87 So. 23, 148 La. 403.
Utah.—Mill v. Brown, 88 P. 609, 31 Utah 473, 120 Am.S.R. 935.
Wis.—State v. Zirbel, 177 N.W. 601, 171 Wis. 498.

74. Wis.—Ogden v. State, 156 N.W. 476, 162 Wis. 500.
Nature of proceedings for commitment see infra § 99.

75. Mo.—State v. Porterfield, 244 S.W. 966, 211 Mo.App. 499.

76. N.C.—Winner v. Brice, 193 S.E. 400, 212 N.C. 294.

77. Va.—Rogers v. Commonwealth, 11 S.E.2d 584, 176 Va. 355.

78. Cal.—Ex parte Edwards, 278 P. 910, 99 Cal.App. 541.
Mo.—State v. Porterfield, 244 S.W. 966, 211 Mo.App. 499.

79. Cal.—Ex parte Edwards, 278 P. 910, 99 Cal.App. 541.

80. Ala.—Tillman v. Roberts, 108 So. 62, 214 Ala. 71, granting certiorari 108 So. 61, 21 Ala.App. 241, and certiorari denied 108 So. 67, 214 Ala. 76—Ex parte Roberts, 85 So. 871, 17 Ala.App. 538.

81. Ky.—Ridgeway v. Walter, 133 S.W.2d 748, 751, 281 Ky. 140, quoting **Corpus Juris**—Shelton v. Hensley, 299 S.W. 979, 981, 221 Ky. 808, quoting **Corpus Juris.**
Wash.—In re Hudson, 126 P.2d 765, 13 Wash.2d 673.
31 C.J. p 990 note 93.

82. Ky.—Ridgeway v. Walter, 133 S.W.2d 748, 281 Ky. 140—Shelton v. Helmsley, 299 S.W. 979, 221 Ky. 808.
31 C.J. p 990 note 94.

83. Ala.—Tillman v. Roberts, 108 So. 62, 214 Ala. 71, granting certiorari 108 So. 61, 21 Ala.App. 241, and certiorari denied 108 So. 67, 214 Ala. 76—Ex parte Roberts, 85 So. 871, 17 Ala.App. 538.
Custody of infants by parents generally see the C.J.S. title Parent and Child §§ 11, 12, also 46 C.J. p 1223 note 69–p 1249 note 76.

84. Ala.—Tillman v. Roberts, 108 So. 62, 214 Ala. 71, granting certiorari 108 So. 61, 21 Ala.App. 241, and certiorari denied 108 So. 67, 214 Ala. 76.
Custody of guardian generally see Guardian and Ward § 56.

85. Ind.—Orr v. State, 123 N.E. 470, 70 Ind.App. 242.

86. Va.—Turner v. Children's Home Soc. of Virginia, 163 S.E. 399, 158 Va. 406, 80 A.L.R. 1125.

Right to attack constitutionality of statute

Persons in whose home society placed infant, committed to it by court, had no property or natural right entitling them to attack constitutionality of statute, requiring child's return to society whenever it deemed best, as depriving them of property without due process.—Turner v. Children's Home Soc. of Virginia, supra.

Bond

A statute requiring a bond to be executed when children of other states are placed in family homes within state requires a bond to be executed in case mother of child leaves state of her legal residence and comes into the state and gives birth to the child within territorial limits of state and thereafter seeks to have child placed in family home within the state.—In re Strininger, 11 Ohio Supp. 60.

b. Control of Court

(1) In general
(2) Preference of child
(3) Religious considerations

(1) In General

The custody of an infant, as a ward of the court having jurisdiction of his person, is subject to the control of such court, in the exercise of its judicial discretion, and in determining such custody the controlling matter to be considered by the court is the best interest and welfare of the infant. The infant should not be removed out of the jurisdiction of the court without its leave.

As stated in Corpus Juris, which has been cited and quoted with approval, an infant is considered as a ward of the court having jurisdiction of his person,[87] particularly of a court of equity;[88] and on the institution of any proceedings invoking the jurisdiction of the court as to the infant's person he immediately becomes a ward of the court.[89] The matter of his custody is subject to control by the court,[90] in the exercise of its broad judicial discretion,[91] although the infant's actual custody is already with the party petitioning for an award of

87. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
Ala.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441—Ex parte Roberts, 85 So. 871, 17 Ala.App. 538.
Fla.—Krivitsky v. Nye, 12 So.2d 595—Riesner v. Riesner, 9 So.2d 108, 151 Fla. 8—Davis v. Davis, 196 So. 614, 143 Fla. 282—Turner v. Andrews, 196 So. 449, 143 Fla. 88—Bourn v. Hinsey, 183 So. 614, 617, 134 Fla. 404, citing **Corpus Juris.**
Ill.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265—Ellison v. Ward, 13 N.E.2d 649, 294 Ill.App. 197.
Ky.—Ridgeway v. Walter, 133 S.W. 2d 748, 751, 281 Ky. 140, quoting **Corpus Juris**—Horney v. Downs, 272 S.W. 728, 209 Ky. 255.
Mo.—Gray v. Clement, 246 S.W. 940, 296 Mo. 497.
N.Y.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case)—In re Kempf's Estate, 289 N.Y.S. 74, 159 Misc. 298, reversed on other grounds In re Kempf's Will, 297 N.Y.S. 307, 252 App.Div. 28, affirmed 16 N.E.2d 123, 278 N.Y. 613—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App. Div. 1016—Leonard v. Home Owners Loan Corporation, 39 N.Y.S.2d 127.
31 C.J. p 990 note 98.
"An infant becomes a ward of the court when he is brought before the court for any purpose, as a party plaintiff or defendant to a suit, petition, order, application, or any other proceeding."—Sangster v. Toledo Mfg. Co., 19 S.E.2d 723, 726, 193 Ga. 685.

88. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854—Rosa v. Underwood, 179 So. 530, 235 Ala. 447—Wright v. Price, 147 So. 675, 226 Ala. 468.
Ark.—Richards v. Taylor, 150 S.W. 2d 32, 202 Ark. 183—Kirk v. Jones, 12 S.W.2d 879, 178 Ark. 583—Ingram v. Raiford, 298 S.W. 507, 174 Ark. 1127.
Cal.—In re Reynolds' Guardianship, App., 141 P.2d 498, 501, quoting **Corpus Juris.**
Ga.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.
Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Anderson v. Anderson, 49 N.E.2d 841, 320 Ill.App. 75—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
Ky.—Ridgeway v. Walter, 133 S.W. 2d 748, 751, 281 Ky. 140.
Miss.—Union Chevrolet Co. v. Arrington, 138 So. 593, 162 Miss. 816.
Wyo.—Urbach v. Urbach, 73 P.2d 953, 958, 52 Wyo. 207, 113 A.L.R. 889, citing **Corpus Juris.**
31 C.J. p 990 note 99.

89. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854—Esco v. Davidson, 193 So. 308, 238 Ala. 653—Rosa v. Underwood, 179 So. 530, 235 Ala. 447—Allison v. Cox, 119 So. 675, 218 Ala. 548—Ward v. Jossen, 119 So. 220, 218 Ala. 530—Clinkscales v. Clinkscales, 97 So. 922, 210 Ala. 358—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669.
Cal.—In re Reynolds' Guardianship, App., 141 P.2d 498, 501.
Ga.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.
Ky.—Ridgeway v. Walter, 133 S.W.2d 748, 281 Ky. 140.
N.J.—In re Cox's Guardianship, 173 A. 602, 603, 12 N.J.Misc. 536, citing **Corpus Juris.**
Wash.—State ex rel. Cummings v. Kinne, 111 P.2d 222, 8 Wash.2d 1.
31 C.J. p 990 note 1.

Necessity of jurisdiction

(1) Court is powerless to act unless jurisdiction of infant is properly acquired.—Melnick v. Laszio, 293 N.Y.S. 261, 161 Misc. 791.

(2) Jurisdiction under constitution of minors, etc., cannot be exercised by district court on its own motion.—Lawler v. Wray, Tex.Civ.App., 8 S.W.2d 524.

90. Ky.—Ridgeway v. Walter, 133 S. W.2d 748, 751, 281 Ky. 140.
Or.—In re Henkle, 56 P.2d 343, 153 Or. 337.
31 C.J. p 990 note 2.

In New York

(1) The control or jurisdiction over the custody of infants is in the supreme court, superior to all junior courts.—Application of Chapin, 35 N.Y.S.2d 302, 264 App.Div. 172—In re Sisson, 274 N.Y.S. 857, 152 Misc. 806.

(2) It is its function, representing the state, to determine their custody.—People ex rel. Converse v. Derrick, 261 N.Y.S. 447, 146 Misc. 73.

(3) It has jurisdiction to enforce production of infant before it and decree child's placement in proper custody with persons designated by court.—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884.

(4) Its inherent powers are not limited by statute concerning habeas corpus proceeding.—People ex rel. Glendening v. Glendening, 19 N.Y.S. 2d 693, 259 App.Div. 384, affirmed 29 N.E.2d 926, 284 N.Y. 598.

(5) The jurisdiction of children's court relates only to temporary disposition of the child's custody in cases where prompt action is necessary or desirable and does not oust the supreme court of jurisdiction which is expressly reserved by statute.—In re Caposella, 8 N.Y.S.2d 509, 255 App.Div. 987, denying reargument Caposella v. Leonardo, 7 N.Y.S. 2d 606, 255 App.Div. 863.

91. Cal.—In re Reynolds' Guardianship, App., 141 P.2d 498, 501.
Fla.—Riesner v. Riesner, 9 So.2d 108, 151 Fla. 8.
Ga.—Awtrey v. Awtrey, 137 S.E. 760, 164 Ga. 69.
Ky.—Ridgeway v. Walter, 133 S.W.2d 748, 751, 281 Ky. 140.
Or.—In re Henkle, 56 P.2d 343, 153 Or. 337.
Tex.—Conley v. St. Jacques, Civ.App., 110 S.W.2d 1238—Pickett v. Bush, Civ.App., 106 S.W.2d 845.
31 C.J. p 990 note 3.

Judgment of trial judge, based on facts disclosed in any given case, is entitled to great weight.—State ex rel. Johnson v. Ashmore, 2 So.2d

its custody.[92] Such discretion, however, is not arbitrary or unlimited,[93] but is guided and governed by the rules of law.[94] The court should not refuse an application for the custody of a child by a person who has the legal right to the custody, if the applicant is a fit person.[95]

The controlling consideration in determining the custody of an infant is the best interest and welfare of the infant,[96] that is, the physical, intellectual, moral, and spiritual well-being of the child,[97] and to this all other considerations are subordinate.[98]

As between relative and stranger. In determining who should have custody of the infant, a relative of the child will usually be preferred as against a stranger,[99] but not always, as where it is not for the best interest and welfare of the child.[1]

Removal from jurisdiction. Infants as wards of the court should not be removed out of its ju-

897, 197 La. 971—State ex rel. Landry v. Robin, 192 So. 349, 193 La. 789.

92. Wyo.—Urbach v. Urbach, 73 P. 2d 953, 52 Wyo. 207, 113 A.L.R. 889.

93. Or.—In re Henkle, 56 P.2d 343, 153 Or. 337.
31 C.J. p 990 note 4.

94. Or.—In re Henkle, supra.
Tex.—Conley v. St. Jacques, Civ. App., 110 S.W.2d 1238.
31 C.J. p 990 note 5.

95. Mo.—Child Sav. Institute v. Knobel, 37 S.W.2d 920, 924, quoting **Corpus Juris**, and transferred, see, App., 29 S.W.2d 725.
Or.—In re Henkle, 56 P.2d 343, 346, 153 Or. 337, quoting **Corpus Juris.**
31 C.J. p 990 note 6.

96. U.S.—Simmons v. Simmons, D. C.S.C., 41 F.Supp. 545.
Ala.—Fletcher v. Preston, 148 So. 137, 226 Ala. 665—Wright v. Price, 147 So. 886, 226 Ala. 591—Ex parte Fletcher, 142 So. 30, 225 Ala. 139—Clinkscales v. Clinkscales, 97 So. 922, 210 Ala. 358—Hall v. Donnelly, 149 So. 867, 25 Ala.App. 481, certiorari denied 149 So. 872, 227 Ala. 289.
Cal.—In re Reynolds' Guardianship, App., 141 P.2d 498, 501, quoting **Corpus Juris**—Fewel v. Fewel, App., 133 P.2d 440.
Colo.—Hodgen v. Byrne, 98 P.2d 1000, 105 Colo. 410—Averch v. Averch, 90 P.2d 962, 104 Colo. 365—People ex rel. Wagner v. Torrence, 27 P.2d 1038, 97 Colo. 47.
Fla.—State ex rel. Bullard v. Clark, 179 So. 657, 131 Fla. 684.
Ga.—Kilgore v. Tiller, 22 S.E.2d 150, 194 Ga. 527.
Ill.—People ex rel. Noonan v. Wingate, 33 N.E.2d 467, 376 Ill. 244.
Ky.—Ridgeway v. Walter, 133 S.W. 2d 748, 281 Ky. 140.
La.—Hattier v. Martinez, 1 So.2d 51, 197 La. 121.
Md.—Maddox v. Maddox, 199 A. 507, 174 Md. 470.
Neb.—In re Herten's Guardianship, 254 N.W. 698, 127 Neb. 88—State v. Young, 237 N.W. 677, 121 Neb. 619.
N.J.—Gardner v. Hall, 26 A.2d 799, 132 N.J.Eq. 64, affirmed 31 A.2d 805, 133 N.J.Eq. 287—In re Elmer's Guardianship, 4 A.2d 387, 125 N.J.Eq. 148—In re Lippincott, 124 A. 532, 96 N.J.Eq. 260, affirmed Lippincott v. Lippincott, 128 A. 254, 97 N.J.Eq. 517.
N.Y.—In re Thoemmes' Guardianship, 264 N.Y.S. 829, 238 App.Div. 541—People ex rel. Converse v. Derrick, 261 N.Y.S. 447, 146 Misc. 73—People ex rel. Van Dyk v. Van Dyk, 33 N.Y.S.2d 766.
Ohio.—In re Decker, 28 Ohio N.P.,N. S., 433.
Okl.—Smith v. Williams, 78 P.2d 808, 182 Okl. 531—Phelps v. Young, 299 P. 461, 149 Okl. 120—Ex parte McDaniels, 289 P. 704, 144 Okl. 65.
Or.—In re Henkle, 56 P.2d 343, 153 Or. 337.
Pa.—Conway v. Preston, 24 A.2d 772, 148 Pa.Super. 182—In re Rumsey, 7 A.2d 43, 135 Pa.Super. 515—Commonwealth v. Kent, 17 Pa.Dist. & Co. 223, 10 Northumb.Co.L.J. 265—Commonwealth ex rel. v. Kovacs, 85 Pittsb.Leg.J. 803—Commonwealth ex rel. v. Brewer, 24 West. Co.L.J. 17.
Tex.—Burckhalter v. Conyer, Com. App., 285 S.W. 606, error dismissed 7 S.W.2d 73, set aside on other grounds 9 S.W.2d 1029, reversing, Civ.App., 275 S.W. 606—Binion v. Mathis, Civ.App., 171 S.W.2d 512—Shoop v. Shoop, Civ.App., 114 S.W. 2d 373—Conley v. St. Jacques, Civ. App., 110 S.W.2d 1238—Pickett v. Bush, Civ.App., 106 S.W.2d 845.
Va.—Rogers v. Commonwealth, 11 S. E.2d 584, 176 Va. 355.
31 C.J. p 990 note 7.

Matters to be considered
In determining welfare of infant in dispute over custody, mutual affection between ward and his would-be custodian as founded upon blood relationship, as well as physical, mental, moral, and financial ability of proposed custodian and surroundings of his home necessary for the obtention of the best results, such as schools, churches, moral atmosphere, and other conditions conducive to the proper and best development of the minor, must be considered.—Ridgeway v. Walter, 133 S.W. 2d 748, 281 Ky. 140—31 C.J. p 990 note 7 [c].

Keeping children together
Generally, in determining custody of minor brother and sister, children should be kept together.—In re Herten's Guardianship, 254 N.W. 698, 127 Neb. 88.

97. Pa.—Commonwealth v. Kent, 17 Pa.Dist. & Co. 223, 10 Northumb. Co.L.J. 265.

98. Md.—Maddox v. Maddox, 199 A. 507, 174 Md. 470.
Pa.—Commonwealth ex rel. Conway v. Preston, 24 A.2d 772, 148 Pa. Super. 182—In re Rumsey, 7 A.2d 43, 135 Pa.Super. 515—Commonwealth ex rel. v. Kent, 17 Pa.Dist. & Co. 223, 10 Northumb.Co.L.J. 265.

Legal and moral rights of each claimant will be regarded, but the paramount consideration is the welfare of the child.—Clardy v. Ford, 26 S.E.2d 20, 203 S.C. 44.

Economic condition of person desirous of custody of child is not controlling, but should be considered in determining what is best for child. —Wright v. Price, 147 So. 886, 226 Ala. 591—31 C.J. p 990 note 7 [e].

Expressed wish of dying father should be given great weight, but does not relieve court of responsibility to determine what is for best interests and welfare of children.—In re Herten's Guardianship, 254 N. W. 698, 127 Neb. 88.

99. Pa.—Commonwealth ex rel. Conway v. Preston, 24 A.2d 772, 148 Pa.Super. 182.
31 C.J. p 992 note 16.

Paternal grandmother may be preferable to institution.—Maddox v. Maddox, 199 A. 507, 174 Md. 470.

1. Fla.—Marshall v. Reams, 14 So. 95, 32 Fla. 499, 37 Am.S.R. 118.
31 C.J. p 992 note 17.

Custody to friendly neighbors
Where the evidence so requires, the child's custody may be awarded to friendly neighbors of the child's family rather than to distant relatives, with right of relatives to visit the child at a proper time.—Commonwealth ex rel. Conway v. Preston, 24 A.2d 772, 148 Pa.Super. 182.

risdiction[2] without leave of the court,[3] and the court may prevent such a removal.[4] Such a removal during the pendency of an action relating to custody is wrongful, and constructively fraudulent, and becomes actually so where it is purposely contrived to defeat jurisdiction.[5] The court, however, may award the custody to a person who resides beyond its jurisdiction, and may authorize or permit the infant to be taken beyond its jurisdiction, but may require the custodian to give a bond for the child's return on a proper occasion and demand.[6]

(2) Preference of Child

The preference of the child, if of sufficient age and intelligence to choose, should be considered in determining his custody, but is not necessarily controlling.

If the infant is of sufficient age and intelligence to choose, his wishes should be taken into consideration, and are entitled to much weight, in determining his custody,[7] and in some cases the court will merely free him from restraint and, while possibly instructing and advising him, permit him to make his own choice.[8] The express wishes of the infant, however, are not necessarily controlling on the court[9] and the court may disregard such wishes,[10] especially where it does not consider the child of sufficient age or intelligence.[11]

(3) Religious Considerations

The religion in which the child is to be brought up is entitled to careful consideration in determining his custody.

The question of the religion in which the child shall be brought up is always entitled to careful consideration,[12] and if the temporal interests of the child will be equally well taken care of when the child is placed in the custody of persons of the same faith as the parents that fact should be considered as controlling.[13] However, if there are clear temporal advantages resulting from other custody, they may well be sufficient to be controlling the other way.[14]

§ 8. —— Proceedings to Determine

A proceeding to determine the custody of an infant may be conducted on any pleading, with notice to interested persons, which shows that the welfare of the infant requires an order as to his custody. The order or judgment should properly safeguard the interests of the infant; and a preliminary order for his custody and care pending the proceedings may be made.

A proceeding to determine custody of an infant is substantially in the nature of a guardianship proceeding,[15] and of an action in rem, the res being the child's status or his legal relationship to another.[16] The proceeding may be by habeas corpus, as discussed in Habeas Corpus §§ 41–47, or in divorce proceedings, as discussed in Divorce §§ 303–311, but such proceedings are not the only ones in which the right to the custody may be adjudicated;[17] it may be adjudicated in a suit for an injunction for the protection of the infant.[18] It may be brought to the attention of the court by bill or petition;[19] but

2. N.Y.—Wood v. Wood, 5 Paige 596, 28 Am.D. 451.
31 C.J. p 992 note 9.
Removal as contempt of court see Contempt § 21.

3. N.Y.—In re Lee, 116 N.E. 352, 220 N.Y. 532.
31 C.J. p 992 note 10.

4. N.Y.—Wood v. Wood, 5 Paige 596, 28 Am.D. 451.

5. Tex.—Burckhalter v. Conyer, Com.App., 285 S.W. 606, error dismissed 7 S.W.2d 73, set aside on other grounds 9 S.W.2d 1029, reversing, Civ.App., 275 S.W. 606.

6. S.C.—Watkins v. Rose, 105 S.E. 738, 115 S.C. 370.

7. Ala.—Wright v. Price, 147 So. 886, 226 Ala. 591.
Neb.—State v. Young, 237 N.W. 677, 121 Neb. 619.
N.J.—Gardner v. Hall, 26 A.2d 799, 132 N.J.Eq. 64, affirmed 31 A.2d 805, 133 N.J.Eq. 287.
Pa.—Commonwealth v. Kane, 30 Del. Co. 431.
31 C.J. p 992 note 19.
Mental capacity, rather than age, is the criterion in determining whether substantial weight should be given to the desire of the child. —Commonwealth v. Kane, supra.
Preference of child as affecting custody as between parents see the C.J.S. title Parent and Child 12, also 46 C.J. p 1241 note 91-p 1242 note 4.
Wishes of infant in appointment of guardian see Guardian and Ward § 17 b.

8. U.S.—U. S. v. Green, C.C.R.I., 26 F.Cas.No.15,256, 3 Mason 482.
31 C.J. p 992 note 20.

9. Ala.—Wright v. Price, 147 So. 886, 226 Ala. 591.
31 C.J. p 992 note 21.

10. Colo.—Wilson v. Mitchell, 111 P. 21, 48 Colo. 454, 30 L.R.A.,N.S., 507.
31 C.J. p 993 note 22.

11. N.M.—Focks v. Munger, 149 P. 300, 20 N.M. 335, L.R.A.1915E 1019.
31 C.J. p 993 note 23.

12. Neb.—State v. Young, 237 N.W. 677, 121 Neb. 619.
Wis.—State v. Franz, 163 N.W. 191, 166 Wis. 32.
Religious convictions as affecting custody as between parents see the C.J.S. title Parent and Child § 12, also 46 C.J. p 1247 notes 54–58.
Religious consideration in appointment of guardian see Guardian and Ward § 17 c.

13. Neb.—State v. Young, 237 N.W. 677, 121 Neb. 619.
Wis.—State v. Franz, 163 N.W. 191, 166 Wis. 32.

14. Colo.—People v. Bolton, 146 P. 489, 490, 27 Colo.App. 39.
31 C.J. p 993 note 28.

15. S.D.—State v. Kelley, 143 N.W. 953, 32 S.D. 526.
Proceeding by or against guardian for custody of child see Guardian and Ward § 57.
Proceedings for commitment see infra § 99.

16. Minn.—State ex rel. Larson v. Larson, 252 N.W. 329, 190 Minn. 489.
Action in rem generally see Actions § 52.

17. Wyo.—Urbach v. Urbach, 73 P. 2d 953, 958, 52 Wyo. 207, 113 A.L.R. 889, quoting **Corpus Juris.**

18. Ga.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.
Tex.—Greene v. Greene, Civ.App., 146 S.W. 567.
32 C.J. p 274 note 2 [a].

19. Ala.—First Nat. Bank v. Rob-

technical rules of pleading and practice generally are immaterial,[20] as any pleading which alleges facts sufficient to confer jurisdiction on the court,[21] and which shows on its face that the welfare of an infant requires that an order be made with regard to his custody is sufficient.[22]

Notice. Ordinarily the proceedings are required to be on notice to persons interested in the infant's custody and control.[23] The giving of such notice is jurisdictional, and an order entered without the required notice is void for want of jurisdiction even though the person entitled thereto is present in the court room, for if the required notice is not given it will not be presumed that the person entitled thereto appeared and waived notice.[24] The proceedings, however, cannot be attacked by a person who is not properly interested therein, on the ground of want of service of such notice.[25]

Investigation and judgment or order. It is the trial court's duty to ascertain all the facts and to make such an investigation as in its judgment will assist in reaching a proper conclusion as to the person who is best qualified to furnish a proper environment and home for the child,[26] and under some statutes a referee may be appointed.[27] The court should make such orders as to the infant's custody as will properly safeguard its best interests and welfare.[28] An order awarding the custody of a child merely adjudicates the rights of the parties on the question of which party should have the custody,[29] and is not res judicata with respect to future acts and conditions.[30] Furthermore the court cannot establish permanent custody of the infant, and thereby assume to foreclose future judicial consideration of action in the premises;[31] any order or decree affecting his custody is subject to future control and modification by the court, as subsequent conditions and circumstances may require for his welfare,[32] but an order decreeing custody may not be changed or modified unless an adequate cause therefor arises from changed conditions.[33] A judgment or decree of a juvenile court in custody proceedings should show the facts on which its jurisdiction rests.[34]

Obedience to a judgment or order relating to the custody of an infant is enforceable by seizure and restraint of the person.[35]

Preliminary orders. Pending the proceedings to

ertson, 127 So. 221, 220 Ala. 654—McDaniel v. Youngblood, 77 So. 674, 201 Ala. 260—Pugh v. Pugh, 111 So. 644, 21 Ala.App. 650.
Mont.—Haynes v. Fillner, 75 P.2d 802, 106 Mont. 59.

20. Tex.—Conley v. St. Jacques, Civ. App., 110 S.W.2d 1238.

21. N.C.—Winner v. Brice, 193 S.E. 400, 212 N.C. 294.

22. Ala.—Bridges v. Bridges, 148 So. 816, 227 Ala. 144, quoting **Corpus Juris**—First Nat. Bank v. Robertson, 127 So. 221, 220 Ala. 654.
Wyo.—Urbach v. Urbach, 73 P.2d 953, 958, 52 Wyo. 207, 113 A.L.R. 889.
31 C.J. p 993 note 34.

23. Wash.—State v. Wheeler, 86 P. 394, 43 Wash. 183.

Temporary custodian
A notice, issued by juvenile court judge and addressed to and duly served on minor children's temporary custodians, that proceedings involving their custody had been commenced and was pending in such court, was sufficient compliance with a statute authorizing issuance of summons to minor child and its parents or persons having child's custody, whether summons should be issued to and served on children being within court's discretion.—Winner v. Brice, 193 S.E. 400, 212 N.C. 294.

Grandmother not interested person
Cal.—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App.2d 831.
Necessity of notice of commitment proceedings see infra § 99.

24. Cal.—People v. Spiers, 62 P.2d 414, 17 Cal.App.2d 477.

Person having legal custody of the child is not divested thereof by order declaring child to be a ward of juvenile court which is so void for want of jurisdiction.—People v. Spiers, supra.

25. Cal.—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App. 2d 831.

26. Fla.—State ex rel. Bullard v. Clark, 179 So. 657, 131 Fla. 684.
Tex.—Conley v. St. Jacques, Civ. App., 110 S.W.2d 1238, error dismissed.

27. Ohio.—Elford v. Elford, App., 44 N.E.2d 124.

Need not be attorney
The statute authorizing juvenile court judge to appoint referees does not require that appointee shall be an attorney at law.—Elford v. Elford, supra.

28. Ark.—Richards v. Taylor, 150 S.W.2d 32, 202 Ark. 183—Kirk v. Jones, 12 S.W.2d 879, 178 Ark. 583.
Fla.—Davis v. Davis, 196 So. 614, 143 Fla. 282.
Protection of infant's interest by court generally see infra § 105.

29. N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.

30. Ala.—Rosa v. Underwood, 179 So. 530, 235 Ala. 447.
N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.

31. Ala.—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669—Decker v. Decker, 58 So. 195, 176 Ala. 299.

32. Ala.—Rosa v. Underwood, 179 So. 530, 235 Ala. 447—Allison v. Cox, 119 So. 675, 218 Ala. 548.
Cal.—In re Reynolds' Guardianship, App., 141 P.2d 498, 501, quoting **Corpus Juris.**
Fla.—Davis v. Davis, 196 So. 614, 143 Fla. 282.
Md.—Maddox v. Maddox, 199 A. 507, 174 Md. 470.
N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.

Any change in circumstances justifying modification of decree awarding custody of child should be addressed to court having assumed jurisdiction.—Allison v. Cox, 119 So. 675, 218 Ala. 548.

33. Utah.—State v. Sorensen, 132 P.2d 132, 102 Utah 474.

34. La.—State v. Bertucci, 87 So. 23, 148 La. 403.
31 C.J. p 990 note 84.

Mere adjudication by court that minor is ward of court without such finding is insufficient.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.
In commitment proceedings see infra § 99.

35. Va.—Buchanan v. Buchanan, 197 S.E. 426, 170 Va. 458, 116 A.L.R. 688.

determine the custody of an infant the court, in its discretion, may, without notice,[36] make such preliminary orders for his temporary custody and care as it may deem fit,[37] and may provide for the maintenance of the child pending the determination of his custody.[38]

Objections. An order awarding the custody of a child, under some statutes, cannot be attacked after the time for appeal and the period for statutory relief has expired, unless a fatal error appears on the face of the record;[39] and if a petition to set aside the order does not disclose any change in the conditions which would demand a change in the order, and the record discloses that notice had been properly given to interested persons, the court may refuse to hear proof on the merits of the petition.[40] A judgment of a juvenile court awarding temporary custody of the child, and assuming permanent custody of him as a ward of the state, is not subject to collateral attack in adoption proceedings.[41] Under some statutes a judgment of a juvenile court determining the right to custody is not superseded by service on the juvenile court judge of notice of intention to apply for a writ of certiorari and the filing of a pauper's affidavit as provided for in the statute, or by the service on such judge of the writ of certiorari duly sanctioned, although the judge in such a case may order that the judgment be superseded.[42]

§ 9. Support and Maintenance

The state may provide for the support and maintenance of a child whose parent is unable to support it, and may place liability therefor on certain public authorities.

The state, as parens patriæ, has the power to provide for the support of a child on the sole ground of the financial inability of the parent to support it,[43] and under some statutes certain public authorities are made liable for the support of dependent children,[44] such as, for instance, the county.[45] Where the statute so provides, a juvenile court may have the power to make an order for appliances or apparatus or devices for a child in need.[46]

36. N.Y.—People v. New York Nursery & Child's Hospital, 129 N.E. 341, 230 N.Y. 119.

37. Ala.—Ex parte Wright, 142 So. 672, 225 Ala. 220—Ex parte Fletcher, 142 So. 30, 225 Ala. 139.
N.J.—In re Cox' Guardianship, 173 A. 602, 603, 12 N.J.Misc. 536, citing **Corpus Juris.**
N.Y.—People v. New York Nursery & Child's Hospital, 129 N.E. 341, 230 N.Y. 119.
Wash.—State v. Reynolds, 110 P. 633, 60 Wash. 12.
31 C.J. p 993 note 38.

Custodian subject to orders
Person having infant's custody by court decree pending appeal becomes court's agent, and is subject to orders thereof that infant's health and best interest be conserved pending litigation and thereafter.—Ex parte Wright, 142 So. 672, 225 Ala. 220.

On a petition for an interlocutory injunction
In proceeding to restrain applications pending in another county for unnecessary administration of estates of which minor was undisputed sole heir, the court may allow grandmother-petitioner to retain custody of minor as temporary guardian.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.

38. Cal.—Foy v. Foy, 73 P.2d 618, 23 Cal.App.2d 543.
Support and maintenance generally see infra § 9.

39. Cal.—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App.2d 831.

40. Cal.—People ex rel. Pollock v. Bogart, supra.

Where fact of service of notice is stated in the record, orders declaring movant's minor grandchildren to be wards of the juvenile court would not be set aside more than a year after their issuance on ground that it could not be presumed that movant claiming to have had custody of the children at the time was served with citation.—People ex rel. Pollock v. Bogart, supra.

As collateral attack
Where record showed nothing inconsistent with recital of orders declaring movant's minor grandchildren to be wards of the juvenile court, that "due and legal notice" had been given to "all parties entitled thereto" recital was accepted as "prima facie truth" and all presumptions not contradicted by the record were in favor of the judgment, and movant's offer of proof that she had not been served with notice of the proceeding was properly refused on ground that motion to set aside orders was a "collateral attack" on orders.—People ex rel. Pollock v. Bogart, supra.

41. Ga.—Criswell v. Jones, 3 S.E.2d 115, 60 Ga.App. 81, transferred, see 199 S.E. 804, 187 Ga. 55.

42. Ga.—Owens v. Watkins, 5 S.E.2d 905, 189 Ga. 311.

43. Minn.—State v. Klasen, 143 N.W. 984, 123 Minn. 382, 49 L.R.A., N.S., 597.
Neb.—Rumsey v. Saline County, 167 N.W. 66, 102 Neb. 302.
Judicial allowances for support see infra § 58.
Liability of:
Guardian see Guardian and Ward §§ 61–63.
Minors for necessaries see infra § 78.
Parent see the C.J.S. title Parent and Child §§ 14–21, also 46 C.J. p 1256 note 88–p 1278 note 50.

44. N.Y.—People v. Nassau County, 153 N.Y.S. 1076, 168 App.Div. 863.

Statute requiring municipality to pay cost of secular instruction of children maintained by it in institutions or boarded out is mandatory.—Domes v. Board of Sup'rs of Erie County, 243 N.Y.S. 640, 230 App.Div. 276.
Illegitimate child as public charge see Bastards § 18 d.

45. N.Y.—People v. Nassau County, 153 N.Y.S. 1076, 168 App.Div. 863.
Ohio.—State v. Wead, 150 N.E. 80, 113 Ohio St. 692.

Infant orphans, or abandoned half orphans, who were boarded out by county as "dependent" and "neglected" children within the meaning of the statute.—Domes v. Board of Sup'rs of Erie County, 243 N.Y.S. 640, 230 App.Div. 276.

County liable to school district for tuition and medical attendance furnished neglected children boarded out in families in district in which children had not previously resided.—Domes v. Board of Sup'rs of Erie County, supra.

46. Special shoes prescribed for child by medical authority may be ordered under Dom.Rel.Ct.Act § 85.

§ 10. —— Mothers' Pensions

Under statutory provisions for mothers' pensions, an indigent widow or abandoned mother, who has resided in a designated subdivision of the state for a specified period, is entitled, on a proper application therefor, to a pension for the support of her children. The right to such pension may be terminated at the will of the legislature; but it cannot be arbitrarily revoked by the tribunal which administers the pension.

The legislature may provide for periodical payments to indigent widows or abandoned mothers for support of their children in their own homes,[47] to be paid out of the funds of designated local subdivisions of the government, according to the provisions of the particular statute.[48] Such legislation has been held constitutional,[49] but not where it provides for the pension regardless of the financial condition of the mothers or the widows.[50] The legislation should receive a broad application[51] and a liberal construction.[52] The pension is in the nature of a compensation by the state for services rendered in rearing future citizens in proper surroundings,[53] and the statute providing therefor is not a poor relief statute,[54] and its operation is not affected by the statutes providing for the relief of the poor generally,[55] nor is it affected by a constitutional provision with regard to a general pension system.[56]

In order to entitle a mother to such pension she must bring herself within the terms of the statute.[57] The right to the pension is not dependent on either the delinquency of the child or on any unfitness on the part of the parent.[58] However, ordinarily the mother is not entitled to the pension where the child has sufficient property of its own for its support.[59]

Residence as element. Residence in the county for a specified period ordinarily is required.[60] The terms "residence," "legal residence," and "legal settlement" in this connection are not synonymous,[61] and a mother's or widow's "residence" within the county may be sufficient to support a petition for the pension although her "legal settlement" is elsewhere.[62] A temporary absence or removal from

—In re Lewis, 15 N.Y.S.2d 708, 172 Misc. 736.

Mother may be required to appear for testimony which may permit order fixing a contribution by her to the cost of orthopedic shoes.—In re Lewis, supra.

Evidence held sufficient to justify order for furnishing orthopedic shoes.—In re Lewis, supra.

47. Minn.—State v. Klasen, 143 N. W. 984, 123 Minn. 382, 49 L.R.A., N.S., 597.
Pa.—In re Mothers' Pension Act, 24 Pa.Dist. 285.
31 C.J. p 993 note 47.

48. N.D.—Pierce County v. Rugby, 181 N.W. 954, 47 N.D. 301.
Utah.—Startup v. Harmon, 203 P. 637, 59 Utah 329.
31 C.J. p 993 note 47 [c].

49. Md.—Mayor and City Council of Baltimore v. Fuget, 165 A. 618, 164 Md. 335, 88 A.L.R. 1058.
Tenn.—State v. Trotter, 276 S.W. 867, 152 Tenn. 217.

50. Ariz.—State Bd. of Control v. Buckstegge, 158 P. 837, 18 Ariz. 277.

51. Pa.—In re Mothers' Pensions, 28 Pa.Dist. 157.

52. Iowa.—In re Newhouse, 9 N.W. 2d 372.
Minn.—In re Koopman, 177 N.W. 777, 146 Minn. 36.
Pa.—In re State Supervisor, Mothers' Assistance Fund, 28 Pa.Dist. 244.

53. N.D.—In re Walker, 193 N.W. 250, 49 N.D. 682.

54. Neb.—Frontier County v. Palmer, 251 N.W. 830, 125 Neb. 716.
N.D.—In re Walker, 193 N.W. 250, 49 N.D. 682.

Statutes distinguished
The mothers' pension act and the pauper statutes were enacted with entirely different objects in view and to remedy conditions altogether different. Their respective subject matters are entirely distinct.—Frontier County v. Palmer, 251 N.W. 830, 125 Neb. 716.

55. Minn.—State v. Klasen, 143 N. W. 984, 123 Minn. 382, 49 L.R.A., N.S., 597.
N.D.—Pierce County v. Rugby, 181 N.W. 954, 47 N.D. 301.

A statute apportioning the expenses of a pauper's care between a county and the township where he has a legal residence, has no application to allowance for mothers' pensions, and a city is not liable for a part of such allowances paid by the county.—City of Bismarck v. Burleigh County, 190 N.W. 811, 49 N.D. 205—Pierce County v. Rugby, 181 N.W. 954, 47 N.D. 301.

Mothers' pension law prevails over prior enacted poor laws to extent of conflict.—State v. Juvenile Court of Wadena County, 246 N.W. 544, 188 Minn. 125.
Support of paupers by local authorities generally see the C.J.S. title Paupers §§ 66–70, also 48 C.J. p 521 note 16–p 535 note 89.

56. Md.—Mayor and City Council of Baltimore v. Fuget, 165 A. 618, 164 Md. 335, 88 A.L.R. 1058.

57. Iowa.—Debrot v. Marion County, 145 N.W. 467, 164 Iowa 208.
Pa.—Commonwealth v. Powell, 100 A. 964, 256 Pa. 470, L.R.A.1917E 1150, reversing 44 Pa.Co. 622.
31 C.J. p 993 note 50.

Mother whose husband is in an insane asylum is not within a statute which applies only to a mother who is widowed or has been deserted. —In re Mothers' Pension Act, 24 Pa. Dist. 285.

Widowed grandmother
Allowance for support of fatherless minor children in charge of widowed grandmother is not authorized, a grandmother not being a "mother" within the statute providing that the child or children for whose benefit the allowance is to be made must be living with the mother.—In re Stone, 204 N.W. 946, 48 S.D. 428.

58. Minn.—State v. Klasen, 143 N. W. 984, 123 Minn. 382, 49 L.R.A., N.S., 597.

59. Or.—Buster v. Marion County, 165 P. 1168, 84 Or. 624.

Under repealed statute
Pa.—In re Reiver's Estate, 10 Som. Leg.J. 134, 54 York.Leg.Rec. 97, reversed after statutory change 22 A.2d 655, 343 Pa. 137.

60. Iowa.—In re Newhouse, 9 N.W. 2d 372.
N.D.—Kost v. Sheridan County, 179 N.W. 703, 46 N.D. 75.
Or.—Ross v. Marion County Court, 35 P.2d 484, 147 Or. 695.
Pa.—In re State Supervisor, Mothers' Assistance Fund, 28 Pa.Dist. 244.
31 C.J. p 994 note 51.

61. Iowa.—In re Newhouse, 9 N.W. 2d 372.

62. Iowa.—In re Newhouse, supra—

the county does not defeat the right to the pension;[63] but, under some statutes, a widow may be barred from securing a pension in a county in which she has established a sufficient residence by the service of notice on her to depart and return to the place of her settlement prior to her filing an application for the pension.[64]

Procedure. The pension is awarded on an application,[65] which may be an informal ex parte application.[66] The application should be made to a court having jurisdiction in the premises,[67] alleging sufficient facts to warrant the granting of the relief.[68]

Subject to the limitation that the relief granted cannot be other than that provided by the statute,[69] the grant or allowance of the pension is within the discretion of the authority on whom the power to grant it has been vested, such as the overseers of the poor, and in the exercise of such discretion it may be refused.[70]

Repeal of statute, and termination of right. A mother's pension is a mere gratuity, in which the pensioner has no vested legal right,[71] and therefore is terminable without notice at the will of the legislature,[72] as by repeal of the statute making provision for its allowance,[73] but such a repeal does not affect an amount due and accrued under the prior act, although no action is taken on an application therefor until after the enactment of the repealing act.[74] The right to the pension cannot be arbitrarily terminated by the tribunal which administers the pension, and, although it may be revoked for a good cause, it cannot be revoked because of a report against the mother's character without giving her notice and an opportunity to be heard.[75]

Recovery against husband and father. Money paid under a mothers' pension law is paid out in pursuance of a sound public policy and is not recoverable in a civil action against the husband and father.[76]

§ 11. Regulations for Protection of Health and Morals

It is within the powers of the legislature to enact regulations for the protection of the health and morals of infants; and under this power various acts detrimental to infants are made punishable as crimes.

It is within the powers of the legislature to enact regulations for the protection of the health and

Adams County v. Maxwell, 212 N. W. 152, 202 Iowa 1327.
Minn.—State v. Juvenile Court of Wadena County, 246 N.W. 544, 188 Minn. 125.

Family's settlement for purpose of poor relief in another county does not bar granting of mother's pension, but is relevant in determining amount allowable.—State v. Juvenile Court of Wadena County, supra.

63. Iowa.—In re Newhouse, 9 N.W. 2d 372.
N.D.—In re Walker, 193 N.W. 250, 49 N.D. 682.
Pa.—In re Mothers' Assistance Fund, 12 Pa.Dist. & Co. 246—In re State Supervisor, Mothers' Assistance Fund, 28 Pa.Dist. 244.

64. Iowa.—In re Newhouse, 9 N.W. 2d 372.

Sufficiency of notice
Fact that notice to depart from county and return of service thereon was not shown to have been filed with county board of supervisors or with auditor as clerk of board was not sufficient to establish that statute relating thereto was not substantially complied with.—In re Newhouse, supra.

Record showing service of notice
Iowa.—In re Newhouse, supra.

65. Minn.—State v. Klasen, 143 N. W. 984, 123 Minn. 382, 49 L.R.A., N.S., 597.
31 C.J. p 994 note 55.

County judge, in preparing application for dependent mothers' assistance, acts for petitioner and not for county court.—Ross v. Marion County Court, 35 P.2d 484, 147 Or. 695.

66. Tenn.—State v. Trotter, 276 S. W. 867, 152 Tenn. 217.

It is not necessary to bring suit and make the county and county judges parties, under a statute providing that allowance shall be made after public hearing by judge of juvenile court on application of mother.—State v. Trotter, supra.

67. N.D.—Cass County v. Nixon, 161 N.W. 204, 35 N.D. 601, L.R.A.1917C 897.
Tenn.—State v. Trotter, 276 S.W. 867, 152 Tenn. 217.
31 C.J. p 994 note 56.

68. Or.—Badura v. Multnomah County, 170 P. 938, 87 Or. 446.
31 C.J. p 994 note 57.

69. Or.—Finley v. Marion County, 159 P. 557, 81 Or. 294, followed in In re Wolfe, 159 P. 558, 81 Or. 297.
31 C.J. p 994 note 62.

Assistance from date of order
Under statute prohibiting giving of any assistance to dependent mother prior to order giving such assistance, petitioner is precluded from obtaining order granting assistance from date of application.—Ross v. Marion County Court, 35 P.2d 484, 147 Or. 695.

70. Mass.—Soper v. Wheeler, 132 N. E. 46, 239 Mass. 327.

71. Wash.—In re Snyder, 160 P. 12, 93 Wash. 59, 3 A.L.R. 1230.
W.Va.—Densmore v. Mercer County Court, 145 S.E. 641, 106 W.Va. 317.

72. W.Va.—Densmore v. Mercer County Court, supra.

73. Wash.—In re Snyder, 160 P. 12, 93 Wash. 59, 3 A.L.R. 1230.
31 C.J. p 994 note 64.

Repeal and reënactment of earlier statute
Md.—Mayor and City Council of Baltimore v. Fuget, 165 A. 618, 164 Md. 335, 88 A.L.R. 1058.

Act not repealed
"Mothers' relief" law as a public general law, is not repealed or affected by a city's adoption of a charter under home rule amendment.—Mayor and City Council of Baltimore v. Fuget, supra.

74. Or.—Finley v. Marion County, 159 P. 557, 81 Or. 294, followed in In re Wolfe, 159 P. 581, 81 Or. 297.

75. W.Va.—Densmore v. Mercer County Court, 145 S.E. 641, 106 W.Va. 317.

76. Neb.—Frontier County v. Palmer, 251 N.W. 830, 125 Neb. 716.
S.D.—Haakon County v. Staley, 243 N.W. 671, 60 S.D. 87.

morals of infants,[77] and to make punishable any act that contributes toward the destruction of their health or morals.[78] Accordingly, under statutes enacted in the exercise of such power, persons are prohibited from, and punishable for, committing lewd and lascivious acts on the body of children under certain ages;[79] taking indecent liberties with children;[80] enticing a child into a room, office, or

77. Ga.—Glen v. State, 72 S.E. 927, 10 Ga.App. 128.
31 C.J. p 994 note 66.
Power of municipal corporation to enact regulations to protect morals of infants see the C.J.S. title Municipal Corporations § 269, also 43 C.J. p 389 notes 68, 69.

The law has special regard for the health of children, and for their moral care, training, and guidance. —In re Vasko, 263 N.Y.S. 552, 238 App.Div. 128—In re Rotkowitz, 25 N.Y.S.2d 624, 175 Misc. 948.

78. Minn.—State v. Rosenfield, 126 N.W. 1068, 111 Minn. 301, 137 Am. S.R. 557, 29 L.R.A.,N.S., 331.
31 C.J. p 994 note 67.

79. Cal.—People v. Maine, 269 P. 194, 93 Cal.App. 141.
Mont.—State v. Kocher, 119 P.2d 35, 112 Mont. 511, citing **Corpus Juris.**
31 C.J. p 994 note 70.

Acts constituting other crimes

(1) Some statutes penalizing lewd and lascivious acts on the body of a child expressly exclude acts constituting crimes against nature and certain other sexual crimes.—People v. Dant, 229 P. 983, 68 Cal.App. 588.

(2) But one who has committed lewd and lascivious acts leading up to the consummation of a crime excluded from the statute may, nevertheless, be punished for his preliminary acts if they are not inseparable from the subsequent crime.—People v. O'Donnell, 81 P.2d 939, 11 Cal.2d 666—People v. Paris, 139 P.2d 671, 59 Cal.App.2d 699—People v. Bush, 133 P.2d 870, 56 Cal.App.2d 877—People v. Hunt, 61 P.2d 1208, 17 Cal. App.2d 284—People v. Epperson, 45 P.2d 359, 7 Cal.App.2d 125—People v. Parker, 241 P. 401, 74 Cal.App. 540—People v. Lind, 229 P. 990, 68 Cal.App. 575.

(3) So, too, one who commits lewd and lascivious acts not constituting excepted crimes after having consummated the commission of one of the excepted crimes, may be punished for such subsequent lewd conduct.—People v. Karpinski, 111 P.2d 393, 43 Cal.App.2d 545.

Elements generally
Mont.—State v. Kocher, 119 P.2d 35, 112 Mont. 511.

Contact as element

(1) Under some statutes, it is not necessary to prove that defendant laid hands on any particular part of the body of the child.—People v. Hartshorn, 138 P.2d 782, 59 Cal.App. 2d 285.

(2) Indeed the crime may be completed without actual contact with the child's body.—People v. Lanham, 31 P.2d 410, 137 Cal.App. 737.

(3) Under other statutes, however, there must be a physical contact between perpetrator and child, although it need not be a "flesh to flesh" contact.—State v. Kocher, 119 P.2d 35, 112 Mont. 511.

Intent as element

(1) The specific intent required to constitute a violation of the statute is that the prohibited acts be accompanied by the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of defendant or of the child involved in the alleged offense.
Cal.—People v. Taylor, 88 P.2d 942, 31 Cal.App.2d 723—People v. Bronson, 230 P. 213, 69 Cal.App. 83.
Mont.—State v. Kocher, 119 P.2d 35, 112 Mont. 511.

(2) Fact that act committed on child is one of intercourse does not alter the actor's intent to arouse his lusts and passions by lewd and lascivious acts.—People v. Bush, 133 P. 2d 870, 56 Cal.App.2d 877—People v. Bronson, 230 P. 213, 69 Cal.App. 83.

(3) In determining the intent, the court is guided by the statutory rule that intent is manifested by the circumstances connected with the offense, and the sound mind and discretion of accused.—State v. Kocher, supra.

Age of child

Prosecutrix, who was born on November 4, 1927, was fourteen years old on November 3, 1941, and hence defendant could not be convicted for violation of the statute based on acts allegedly committed on prosecutrix on such date, in view of provision thereof requiring acts to have been committed on "a child under the age of fourteen years."—People v. Dudley, 127 P.2d 569, 53 Cal.App.2d 181.

Nature of act

A merely licentious act is sufficient to justify conviction of violation of the statute.—People v. Beaty, 130 P.2d 433, 55 Cal.App.2d 258.

Words "lewdly" and "lasciviously" have somewhat the same meaning, and "lewdly and lasciviously playing with a female child" within the statute making such act a misdemeanor means playing or dallying with or touching or handling such child in an indecent and obscene manner calculated to excite passions. —State v. Martin, 183 A. 334, 7 W. W.Harr., Del., 342.

80. Colo.—Martinez v. People, 137 P.2d 690—Koontz v. People, 263 P. 19, 82 Colo. 589.
Minn.—State v. Phillips, 223 N.W. 98, 176 Minn. 249.
31 C.J. p 994 note 79.

Acts constituting other crimes

"A statute punishing any indecent liberty with or on the person of any child, which act under the law does not amount to 'rape or attempt to commit rape, or assault, with the intent to commit rape or sodomy, or other crime against nature,' is a law punishing any and all indecent liberties taken with any child, unless they are within the excepted classes specified, and such indecent liberty need not relate to any of these excepted crimes, nor must it be an 'assault with intent to commit rape, or sodomy, or other crime against nature.' "—State v. Flath, 228 N.W. 847, 59 N.D. 121.

Elements

(1) Under some statutes, neither assault with intent to commit rape nor intent to have carnal knowledge are elements of crime of taking immoral, improper, and indecent liberties with female child.—People v. Gilmore, 150 N.E. 631, 320 Ill. 233.

(2) Under other statutes, however, it is held that assault and battery are necessarily involved in the crime of taking improper liberties with female child, and that the crime is not committed by an intent, short of consummation.—People v. Visel, 265 N.W. 781, 275 Mich. 77.

"Indecent liberties" defined

(1) Liberties referred to are such as common sense of society would regard as indecent and improper.—People v. Lakin, 282 N.W. 149, 286 Mich. 282—People v. Visel, 265 N.W. 781, 275 Mich. 77—People v. Healy, 251 N.W. 393, 265 Mich. 317.

(2) The liberty taken may be indecent, even if consented to by one capable of giving consent, yet not punishable by statute since the term is one of propriety differing with age, code of morals, and generally accepted standards of society.—State v. Hoffman, 2 N.W.2d 707, 240 Wis. 142.

Accomplishment of intent

Under information alleging that defendant committed certain lewd acts on nine year old girl with intent of arousing, appealing to, and gratifying lust and passions and sexual desires of child "and" defendant, the use of word "and" instead of "or," as in the statute, does not require proof that acts gratified

to any other place for the purpose of taking indecent liberties;[81] enticing female children under certain ages into a house of ill fame, or assignation, or elsewhere, for the purpose of prostitution or for individual sexual intercourse;[82] abusing a confidential relationship to facilitate prostitution or corruption of a minor for the purpose of satisfying the lust of another;[83] endangering the morals of a minor;[84] having carnal knowledge of, and sexual intercourse with, a male infant;[85] enticing minors from the person or place of their commitment;[86] permitting minors in prohibited places;[87] purchasing junk from minors;[88] selling or furnishing cigars, cigarettes, or tobacco to minors under certain ages;[89] selling, lending, giving, or exhibiting to minors stories or pictures of bloodshed, lust, or crime;[90] and various other acts considered in the ensuing sections and in other titles of this work. The legislature may authorize a court to order medical or surgical care of children in proper cases.[91] Statutes such as these should be construed

desires both of child and defendant, since gist of crime is intent with which act is done and not its accomplishment.
Cal.—People v. Hunt, 61 P.2d 1208, 17 Cal.App.2d 284.
Wis.—State v. Hoffman, 2 N.W.2d 707, 240 Wis. 142.

Consent of child is no defense in prosecution for taking indecent liberty with child's person.—State v. Flath, 228 N.W. 847, 59 N.D. 121.

Distinguished from attempted rape

In an attempt to commit rape on a female under the age of consent, the intent is the gist of the offense, and is distinguishable from the offense of taking indecent liberties with the person of a female.—Thomas v. State, 95 P.2d 658, 68 Okl.Cr. 1—Hall v. State, 93 P.2d 1107, 67 Okl.Cr. 330.

"Child" has been defined as any human being under age of eighteen. —State v. Flath, 228 N.W. 847, 59 N.D. 121.

Attempt

Prosecution for attempt to take improper liberties with minor is maintainable under statute relative to attempts to commit felony.—Ambrose v. Reichenbach, 229 N.W. 35, 201 Wis. 17.

81. "Any other place"

The statute is not, under the "ejusdem generis" rule, applicable only to children who happen to be in rooms or offices, but under the words "or to any other place" includes an automobile parked on a public street. —Martinez v. People, Colo., 137 P. 2d 690.

82. Pa.—Commonwealth v. Walker, 34 Pa.Super. 14.
31 C.J. p 994 note 72.
Harboring minors for the purpose of prostitution see the C.J.S. title Prostitution § 7, also 50 C.J. p 807 note 2–p 808 note 11.

83. Master and servant

The relation of master and servant is one of confidence, and a master who abuses his female servant's confidence and induces her to lead a life of prostitution is guilty of the offense.—U. S. v. Chu Chang, 6 Philippine 74.

84. Actual impairment of the morals of the minor is not an essential element of the offense under a statute punishing one who knowingly places an infant of less than a specified age in a situation whereby its morals might be impaired.—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133.

85. Ky.—Madden v. Commonwealth, 261 S.W. 273, 202 Ky. 782.

86. Wis.—State v. Meyers, 167 N. W. 255, 167 Wis. 278.
31 C.J. p 994 note 73.

87. Minn.—State v. Rosenfield, 126 N.W. 1068, 111 Minn. 301, 137 Am. S.R. 557, 29 L.R.A.,N.S., 331.
Admission of children to:
Places where liquor is sold see the C.J.S. title Intoxicating Liquors § 231, also 33 C.J. p 590 note 84.
Theaters and other places of amusement see the C.J.S. title Theaters and Shows § 58, also 62 C.J. p 887 notes 19, 20, and 31 C.J. p 994 note 75 [a], [b], [c].
Gaming places see infra § 15.

Accompaniment by parent

Admitting child actually or apparently under sixteen to certain enumerated places is a crime only if the child is unaccompanied by parent or guardian, but admitting such a child to a reputed house of prostitution or assignation, or to a place where opium is smoked, or permitting child to remain therein is forbidden, regardless of whether child is accompanied by parent or guardian.—People, on Complaint of Rosner, v. Rose, 284 N.Y.S. 962, 158 Misc. 508.

88. N.Y.—People v. McGuire, 99 N. Y.S. 91, 113 App.Div. 631.
12 C.J. p 920 note 41.

Stolen

Where the statute prohibits the purchasing of such junk as might have been stolen, it has been held that it is not necessary to prove that defendant knew that it had been stolen if, in fact, it was stolen.—State v. Serritella, 97 A. 770, 89 N. J.Law 127.

89. Ill.—Chicago v. Betti, 192 Ill. App. 87.
N.Y.—People v. Zabor, 76 N.E. 17, 183 N.Y. 242.
Prohibition of sale of intoxicants to minors see the C.J.S. title Intoxicating Liquors § 259, also 33 C.J. p 601 note 3.

Purchase at direction of officer

That sheriff caused minor to make purchase of cigarettes does not prevent sale from being criminal.—State v. Johnson, 246 P. 531, 42 Idaho 381.

Recovery on dealer's bond

Entire penalty of statutory cigarette dealer's bond, conditioned on compliance with law prohibiting sale of cigarettes to minors, was recoverable by state for breach, without regard to damage actually sustained, or proof thereof, and without necessity of previous conviction of dealer for unlawful sale of cigarettes to minor.—State v. Vending Mach. Corporation of America, 51 P.2d 724, 174 Okl. 603, 103 A.L.R. 391.

Statute not repealed by statute punishing contributing to delinquency of minor.—Stone v. State, 41 N.E. 2d 609, 220 Ind. 165.

90. Ill.—Strohm v. People, 43 N.E. 622, 160 Ill. 582, affirming 60 Ill. App. 128.
Pa.—Commonwealth v. Dowling, 14 Pa.Co. 607.

91. Circumstances warranting order

(1) The statute empowers the court to order an operation not only if the parents consent thereto and if the life of the child is at stake, but also if the health, the limb, the person and the future of the child is at stake.—In re Rotkowitz, 25 N. Y.S.2d 624, 175 Misc. 948.

(2) Thus, where an operation on child was necessary to correct and prevent extension of leg deformity induced by poliomyelitis and mother of the child favored such operation, an operation would be ordered by the domestic relations court of the City of New York, over objection of the father.—In re Rotkowitz, supra.

(3) Where parents arbitrarily refused to permit removal of eye of two-year old child as recommended by medical experts, court did not abuse discretion in ordering opera-

liberally to effectuate their purpose,[92] and will not be deemed repealed by a later statute unless such intent is clearly manifested.[93]

§ 12. —— Regulation of Employment

In many jurisdictions the employment of minors is regulated by statute; and frequently such statutes restrict or prohibit the employment of minors in certain occupations or establishments.

It is within the police power of the legislature to make proper regulations as to the employment of children.[94]

Construction. General rules governing the construction of statutes are applicable to statutes regulating the employment of minors.[95] Accordingly, such regulations, in so far as they provide remedies for infants employed in violation thereof, should be liberally construed to effectuate their purpose;[96] but the criminal violations of the regulations, which are considered as mala prohibita[97] and not mala in se,[98] should be strictly construed.[99] However, in the final analysis the meaning of the statute depends on the intention of the legislature as manifested by the language employed and the purpose for which it was enacted.[1]

Particular regulations. Among the various regulations relating to the employment of minors which have been construed and applied are regulations which prohibit or restrict the employment of children under a designated age,[2] in occupations speci-

tion.—In re Vasko, 263 N.Y.S. 552, 238 App.Div. 128.

92. Or.—State v. Eisen, 99 P. 282, 53 Or. 297, rehearing denied 100 P. 257, 53 Or. 297.

Different statutes providing different penalties for offenses against minors are not inconsistent or in conflict with each other where the principal elements thereof are similar but are accompanied by varying circumstances aggravating or affecting the degree of such offenses.—In re Cooper, 15 N.E.2d 634, 134 Ohio St. 40, affirming 16 N.E.2d 954, 58 Ohio App. 519.

93. Ind.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165.
Ohio.—In re Cooper, 15 N.E.2d 634, 134 Ohio St. 40, affirming 16 N.E. 2d 954, 58 Ohio App. 519.
Pa.—Commonwealth v. Walker, 34 Pa.Super. 14.

94. U.S.—Chesapeake & O. Ry. Co. v. Stapleton, 49 S.Ct. 442, 279 U. S. 587, 73 L.Ed. 861, reversing Chesapeake & O. Ry. Co. v. Stapleton's Guardian, 3 S.W.2d 209, 223 Ky. 154, certiorari granted Chesapeake & O. R. Co. v. Stapleton, 49 S.Ct. 8, 278 U.S. 585, 73 L.Ed. 520.
Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied Tampa Shipbuilding & Engineering Co. v. Adams, 181 So. 893, 132 Fla. 419.
Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70—Kowalczyk v. Swift & Co., 160 N.E. 588, 329 Ill. 308.
Iowa.—State v. Erle, 232 N.W. 279, 210 Iowa 974, 72 A.L.R. 137.
Mass.—Commonwealth v. Prince, 46 N.E.2d 755, 313 Mass. 223, affirmed Prince v. Commonwealth of Massachusetts, 64 S.Ct. 438, 321 U. S. 158, 88 L.Ed. ——, rehearing denied 64 S.Ct. 784—Commonwealth v. Riley, 97 N.E. 367, 210 Mass. 387, Ann.Cas.1912D, 388, affirmed 34 S.Ct. 469, 232 U.S. 671, 58 L.Ed. 788.
Ohio.—Kendall v. State, 148 N.E. 367, 113 Ohio St. 111—Collings-Taylor Co. v. American Fidelity Co., 117 N.E. 158, 96 Ohio St. 123.
Pa.—Commonwealth v. Mecca Co-operative Co., 60 Pa.Super. 314—In re Employment Certificates, 25 Pa. Dist. 920—Commissioner of Labor and Industry v. Laskey, 25 Pa. Dist. 907, 43 Pa.Co. 299, 63 Pittsb. Leg.J. 330—In re Employment of Minors, 25 Pa.Dist. 903—Commonwealth v. Swan, 19 Pa.Dist. 624, 38 Pa.Co. 24.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
31 C.J. p 995 note 84.
Statutory regulation of wages of minors see the C.J.S. title Master and Servant § 152, also 39 C.J. p 224 note 36–p 225 note 47.

95. Ill.—Wright v. Stresenreuter Bros., 234 Ill.App. 15.
Mont.—Shaw v. Kendall, 136 P.2d 748.
N.Y.—Balser v. Gammel, 12 N.Y.S. 2d 312, 257 App.Div. 85, appeal denied 14 N.Y.S.2d 496, 257 App. Div. 1044, affirmed 31 N.E.2d 923, 284 N.Y. 797.
Pa.—In re Child Labor Law, 9 Pa. Dist. & Co. 779.

With reference to other statutes
The child labor statute and the workmen's compensation act are not in pari materia and are not to be construed together so as to except agricultural pursuits and employment from operation of child labor act because excepted from provisions of workmen's compensation act. —Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.

Sections read together
To ascertain intent of legislature, sections of child labor law should be considered together.—Carso v. Norwich Union Indemnity Co., Tex. Civ.App., 293 S.W. 306.

96. Ala.—De Soto Coal, Mining & Development Co. v. Hill, 60 So. 583, 179 Ala. 186.
Ark.—Cox Cash Stores v. Allen, 268 S.W. 361, 167 Ark. 364.
31 C.J. p 995 note 86.

97. N.Y.—People v. Taylor, 85 N.E. 759, 192 N.Y. 398—People v. Sheffield Farms-Slawson-Decker Co., 167 N.Y.S. 958, 180 App.Div. 615, affirmed 121 N.E. 474, 225 N.Y. 25.

98. N.Y.—People v. Taylor, 85 N. E. 759, 192 N.Y. 398—People v. Sheffield Farms-Slawson-Decker Co., 167 N.Y.S. 958, 180 App Div. 615, affirmed 121 N.E. 474, 225 N. Y. 25.

99. N.Y.—People v. Taylor, 85 N.E. 759, 192 N.Y. 398.

1. Ark.—Blankenship v. Cox, 162 S. W.2d 918, 204 Ark. 427.
N.Y.—Balser v. Gammel, 12 N.Y.S. 2d 312, 257 App.Div. 85, appeal denied 14 N.Y.S.2d 496, 257 App.Div. 1044, affirmed 31 N.E.2d 923, 284 N.Y. 797.
Pa.—Commonwealth v. Ritch, 14 Pa. Dist. & Co. 722—In re Employment of Minors, 37 Pa.Co. 265, 13 Dauph.Co. 71.

2. Ark.—Terry Dairy Co. v. Nalley, 225 S.W. 887, 146 Ark. 448, 12 A. L.R. 1208.
Ind.—Ping v. Indianapolis Soap Co., 184 N.E. 903, 206 Ind. 287.
N.M.—Nelson v. Hill, 232 P. 526, 528, 30 N.M. 288.

Minor past age specified
Statute prohibiting employment of children "between" ages of fourteen and sixteen was inapplicable to boy sixteen years, eleven months of age, where the statute did not use the word "inclusive."—Hobson v. Postal Telegraph-Cable Co., 32 S.W.2d 1046, 161 Tenn. 419.

Occasional errands
Defendant's sending of stepson on occasional errands, without hiring, payment, or promise of payment, was not unlawful "employment" of child. —People v. Regell, 221 N.Y.S. 537, 220 App.Div. 743.

fied[3] as well as those which prohibit or restrict employment in occupations other than those

Working without owner's knowledge

Factory owner giving adult work to be done at home was not punishable because of work done by child without owner's knowledge.—People on Inf. Flannery v. First American Natural Fern Co., 245 N.Y.S. 270, 230 App.Div. 502.

Activities held prohibited

(1) Artistic or theatrical work.—Commonwealth v. Ritch, 14 Pa.Dist. & Co. 722—In re Child Labor Law, 9 Pa.Dist. & Co. 779.

(2) Caddying.—In re Caddies Under Fourteen, 13 Pa.Dist. & Co. 385.

Activities held not prohibited

Pa.—Commonwealth v. McKaig, 29 Pa.Dist. & Co. 629.

31 C.J. p 995 note 91.

3. U.S.—Chesapeake & O. Ry. Co. v. Stapleton, 49 S.Ct. 442, 279 U.S. 587, reversing Chesapeake & O. Ry. Co. v. Stapleton's Guardian, 3 S.W.2d 209, 223 Ky. 154, certiorari granted Chesapeake & O. R. Co. v. Stapleton, 49 S.Ct. 8, 278 U.S. 585, 73 L.Ed. 520—Sturges & Burn Mfg. Co. v. Beauchamp, 34 S. Ct. 60, 231 U.S. 320, 58 L.Ed. 245, L.R.A.1915A, affirming Beauchamp v. Sturges & Burn Mfg. Co., 95 N.E. 204, 250 Ill. 303.

Ala.—Sloss-Sheffield Steel & Iron Co. v. Bearden, 74 So. 230, 199 Ala. 132.

Cal.—Ex parte Weber, 86 P. 809, 149 Cal. 392.

Ill.—Purtell v. Philadelphia & Reading Coal & Iron Co., 99 N.E. 899, 256 Ill. 110, 43 L.R.A.,N.S., 193, Ann.Cas.1913E 335.

Ind.—Inland Steel Co. v. Yedinak, 87 N.E. 229, 172 Ind. 423, 139 Am. S.R. 389, transferred, see 86 N.E. 503, 42 Ind.App. 629.

Kan.—Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.

Mass.—Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383.

Minn.—Westerlund v. Kettle River Co., 162 N.W. 680, 137 Minn. 24.

N.Y.—People v. Taylor, 85 N.E. 759, 192 N.Y. 398—People v. Butler, Inc., 138 N.Y.S. 1068, 154 App.Div. 311, 28 N.Y.Cr. 465.

S.C.—Newsom v. F. W. Poe Mfg. Co., 86 S.E. 195, 102 S.C. 77.

Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.

Wis.—Squires v. Brown, 174 N.W. 548, 170 Wis. 165—Green v. Appleton Woolen Mills, 155 N.W. 958, 162 Wis. 145—O'Sullivan v. J. S. Stearns Lumber Co., 143 N.W. 160, 154 Wis. 467.

31 C.J. p 995 note 92.

"Occupation"

A statute prohibiting children under a stated age from engaging in the occupation of oiling or cleaning machinery does not include the oiling and wiping of idle machinery, where the oiling and wiping of idle machinery were not an "occupation" in the state at the time of the enactment of the statute.—Blankenship v. Cox, 162 S.W.2d 918, 204 Ark. 427.

"Working" at street trades

(1) Under a statute imposing penalty on custodian of minor who permits minor to "work" in violation of law, the word work, in so far as it refers to provision regulating street trades for children, means selling, exposing, or offering articles for sale, regardless of whether such activity is carried on under technical employment or for a wage, and permitting a minor to sell a religious magazine on the street is a violation of the statute.—Commonwealth v. Prince, 46 N.E.2d 755, 313 Mass. 223, affirmed Prince v. Commonwealth of Massachusetts, 64 S.Ct. 438, 321 U. S. 158, 88 L.Ed. ——, rehearing denied 64 S.Ct. 784.

(2) But in another jurisdiction it has been held that, where boy under ten years of age under his mother's auspices sold magazines devoted to the religion of his paid leader's sect as a Jehovah's Witness for a negligible commission to serve the cause, the boy's services were not a "business enterprise" or "work" and the boy was not a "newsboy" and the leader was not the boy's "employer" and neither permitted nor suffered boy "to be employed or to work" within statute penalizing the sale of magazines by boys under ten.—State v. Richardson, 27 A.2d 94, 92 N.H. 178.

Oiling, wiping, or cleaning machinery

(1) The word "machinery" in statute prohibiting employment of children to oil, wipe, or clean machinery meant a more or less complex combination of mechanical parts operating in such manner as to fascinate or confound a person of tender years.—Blankenship v. Cox, 162 S.W. 2d 918, 204 Ark. 427.

(2) The employment of a minor who is less than eighteen years of age to oil or clean dangerous machinery while it is in action or to permit him to do such work is a violation of statute prohibiting such employment.—In re West, 46 N.E.2d 760, 313 Mass. 146.

Steam machinery, which children are prohibited from operating under the statute, does not include a meat hasher.—Swift & Co. v. Rennard, 128 Ill.App. 181.

Manufacturing tobacco

Prohibition against employment in manufacturing tobacco is not applicable to manufacture of cigars.—Commonwealth v. Wormser, 103 A. 500, 260 Pa. 44—In re Employment Certificates, 25 Pa.Dist. 920.

Selling newspapers

(1) A statute prohibiting the employment of boys under fourteen years of age in cities of the first, second, and third class, in connection with the sale of newspapers, and boys between the ages of fourteen and sixteen in such cities in connection with the sale of magazines, periodicals, or circulars, prohibits the sale of newspapers to a boy under fourteen for resale in such cities.—Commonwealth v. Jarrett, 281 S.W. 805, 213 Ky. 618, followed in Commonwealth v. Schultz, 281 S.W. 806, 213 Ky. 620.

(2) It does not prohibit the sale of newspapers in such cities by boys between the ages of fourteen and sixteen.—Commonwealth v. Lipginski, 279 S.W. 339, 212 Ky. 366.

(3) Nor does it prohibit the employment of a boy under fourteen years for the sale and distribution of newspapers in a city of the sixth class, if such employment does not conflict with the prohibition against employment during school hours.—Cincinnati Times Star Co. v. Clay, 243 S.W. 16, 195 Ky. 465.

Appearing on stage

(1) Some statutes prohibit the employment of children for appearance or exhibition on the stage.—Kendall v. State, 148 N.E. 367, 113 Ohio St. 111—62 C.J. p 886 note 18.

(2) The reason for prohibiting employment of children of tender years from dancing in a public exhibition is that dancing might injure the child's physical condition.—Balser v. Gammel, 12 N.Y.S.2d 312, 257 App. Div. 85, appeal denied 14 N.Y.S.2d 496, 257 App.Div. 1044, affirmed 31 N.E.2d 923, 284 N.Y. 797.

(3) Under a statute prohibiting the exhibition of any child under the age of sixteen years either in singing, or dancing, or playing on a musical instrument, or in a theatrical exhibition, or in any wandering occupation, but providing that it does not apply to the employment of any child as a singer or musician in a church, school, or academy, or in teaching or learning the science or practice of music, or as a musician in any concert, or in a theatrical exhibition, with the written consent of the mayor of the city, the mayor cannot consent to a theatrical exhibition which includes singing or dancing by such child.—People v. Grant, 24 N.Y.S. 776, 70 Hun 233, followed in In re Stevens, 24 N.Y.S. 780, 70 Hun 243.

(4) Nor, under such a statute, can the mayor issue a permit authoriz-

specified,[4] or in certain places or establishments,[5] or under certain conditions,[6] or after certain hours,[7] or when school is in session,[8] or, generally, in occupations which are, or are liable to prove, injurious to morals[9] or health,[10] or which are dangerous, hazardous, or extrahazardous.[11]

Employment certificate. In some jurisdictions, it is unlawful to employ children under a certain age in the prohibited activities without an employment certificate issued and filed as provided by statute.[12]

ing a theatrical exhibition, including a speaking part by such child.—Children's Aid & Society for the Prevention of Cruelty to Children of Erie County v. Schwab, 230 N.Y.S. 206, 132 Misc. 283, appeal dismissed 230 N.Y.S. 814, 224 App.Div. 875.

4. Ky.—Cincinnati Times Star Co. v. Clay, 243 S.W. 16, 195 Ky. 465.
31 C.J. p 995 note 93.

5. Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied Tampa Shipbuilding & Engineering Co. v. Adams, 181 So. 893, 132 Fla. 419.
Iowa.—State v. Erle, 232 N.W. 279, 210 Iowa 974, 72 A.L.R. 137.
Pa.—In re Employment of Minors, 37 Pa.Co. 265, 13 Dauph.Co. 71.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
W.Va.—Jackson v. Monitor Coal & Coke Co., 126 S.E. 492, 98 W.Va 58.
Prohibition of employment of minors in place where liquor is sold see the C.J.S. title Intoxicating Liquors § 231, also 33 C.J. p 890 note 89.
Prohibition by municipal ordinance of employment of minors in houses of prostitution see the C.J.S. title Municipal Corporations § 247, also 43 C.J. p 365 note 82.

"Ejusdem generis"

As used in statute prohibiting employment of minors in, on, or about any mine, mill, smelter, workshop, factory, steam, electric, hydraulic, or compressed-air railroad, or passenger or freight elevator "or where any machinery is operated," quoted words under rule of "ejusdem generis" are intended to include all places similar to those specifically enumerated where machinery is operated, but are not intended to include every place where machinery is operated whether similar to those places enumerated or not.—Shaw v. Kendall, Mont., 136 P.2d 748.

Theaters

(1) The section of the statute prohibiting employment of children under fourteen years has been held to apply to "work" in a theater, as distinguished from an exhibition therein.—Balser v. Gammel, 12 N.Y.S.2d 312, 257 App.Div. 85, appeal denied 14 N.Y.S.2d 496, 257 App.Div. 1044, affirmed 31 N.E.2d 923, 284 N.Y. 797.

(2) So, too, a statute providing that no child under fourteen years shall be "employed" or permitted to "work" in theater, does not forbid proprietor of theater to allow child, casually, under control of teacher or parents, to go on stage voluntarily, without compensation, to entertain public by giving four-minute exhibitions of dancing, acting, or singing.—Taylor v. State, 199 N.W. 22, 112 Neb. 112.

"Collieries and breakers" include the mine proper.—In re Employment of Minors in Coal Mines, 19 Pa.Dist. 846.

"About" specified establishments

The omission of the words "or about" from a statute prohibiting the employment of children to work in specified establishments did not manifest an intention on the part of the legislature to limit the prohibition to work in such places and to permit work "about" them.—Carso v. Norwich Union Indemnity Co., Tex.Civ. App., 293 S.W. 306.

Employment held not prohibited

Assisting in delivering milk from wagon is not employment in mercantile establishment, mine, quarry, or agricultural pursuit, within statute prohibiting employment of minors under certain ages in such pursuits.—Kelleher v. Borden's Condensed Milk Co., 128 A. 866, 3 N.J.Misc. 522.

6. Ark.—Terry Dairy Co. v. Nalley, 225 S.W. 887, 146 Ark. 448, 12 A.L.R. 1208.

7. **Singing and dancing**

Participation by girls in singing and dancing exhibition was "work," within statute prohibiting girls under twenty-one years to work after certain hours.—Commonwealth v. Wallace Y. Hong, 158 N.E. 759, 261 Mass. 226, 55 A.L.R. 640.

8. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.

During recess

Statute did not prohibit the employment of children under fourteen years of age except when schools are actually in session for purposes of instruction, so that under such statute a schoolteacher who required a pupil to sweep the schoolroom floor during noon recess did not violate the statute.—Nelson v. Hill, 232 P. 526, 30 N.M. 288.

9. Ark.—Blankenship v. Cox, 162 S.W.2d 918, 204 Ark. 427.
Iowa.—State v. Erle, 232 N.W. 279, 210 Iowa 974, 72 A.L.R. 137.
Kan.—Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.
Mont.—Shaw v. Kendall, 136 P.2d 748.
31 C.J. p 995 note 94.

10. Ark.—Blankenship v. Cox, 162 S.W.2d 918, 204 Ark. 427.
Kan.—Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.
Mont.—Shaw v. Kendall, 136 P.2d 748.
Pa.—In re Employment of Minors, 25 Pa.Super. 903.
31 C.J. p 995 note 95.

11. Ark.—Blankenship v. Cox, 162 S.W.2d 918, 204 Ark. 427.
Fla.—Kendrick v. Ideal Holding Co., 188 So. 778, 137 Fla. 600.
Ill.—Kowalczyk v. Swift & Co., 160 N.E. 588, 329 Ill. 308.
Iowa.—State v. Erle, 232 N.W. 279, 210 Iowa 974, 72 A.L.R. 137.
Mont.—Shaw v. Kendall, 136 P.2d 748.
Pa.—Johnson v. Endura Mfg. Co., 127 A. 635, 282 Pa. 322.

Approval of industrial board

The industrial board of department of labor may declare certain occupations dangerous or unwholesome and prohibit employment of minors therein.—In re Employment of Minors, 25 Pa.Dist. 903—In re Commissioner of Labor and Industry, 23 Pa.Dist. 217.

"Dangerous machinery"

(1) A log loading machine, track laying outfit, or a locomotive engine propelled by steam, is a "dangerous machine" within a statute prohibiting the employment of certain infants in establishments using dangerous machinery.—Waterman Lumber Co. v. Beatty, Tex.Civ.App., 204 S.W. 448.

(2) An infant employed as a sweeper in a factory is not employed in operating dangerous machinery, within the statute, because he sweeps around the machinery.—Bledsoe v. Bostic Lumber, etc., Co., 73 So. 881, 113 Miss. 118.

On farm

The fact that labor is being performed on a farm does not take employment from operation of child labor statute providing that no person under sixteen years of age shall be employed at any occupation at any place dangerous or injurious to life, limb, health, or morals.—Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.

12. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
Ind.—Ping v. Indianapolis Soap Co., 184 N.E. 903, 206 Ind. 287.
N.Y.—Braiter v. Addie Co., 9 N.Y.S.

The mere fact that the authority to issue such certificates is vested in the school authorities does not make the statute ancillary to the compulsory school attendance law.[13] Where, however, there was another statute regulating the employment of minors generally, it was held that a statute requiring the issuance of a certificate by the school authorities as a condition for the employment of minors was concerned with school attendance rather than with the employment of minors.[14] The issuance of employment certificates or permits by school authorities under school laws is considered in the C.J.S. title Schools and School Districts § 465, also 56 C.J. p 828 notes 28–37.

Parents' consent or supervision. Under some statutes the employment of minors in certain activities does not constitute a violation of the regulations if the stated conditions as to approval, control, and supervision by the parents are fulfilled.[15]

Effect of violation. Violation of child labor regulations may subject the offender to criminal prosecution, as discussed infra § 16; and it may also render the contract of employment illegal.[16]

Persons liable. What persons may be liable for the violations of these regulations depends on the statutes.[17] Ordinarily the owner of the business or establishment in which the infant has been unlawfully employed is liable,[18] whether it is a corporation,[19] a joint association,[20] or a natural person,[21] and wholly without regard to whether the employment is an intentional or willful violation of the regulation.[22] Also the person actually entering into the contract by which a child is employed contrary to the regulations is liable therefor, although such person acts as the agent or employee of another; but an employee of a corporation, who is the superior in authority of another employee, is not individually liable for such employment, when it is made by the subordinate without the knowledge or consent of the person charged with the offense, and contrary to his express direction.[23] Under some statutes, if a minor is employed by a contractor who assigns him to work on the premises or in the establishment of another contrary to the statute, the owner of the establishment for which the work is being done is not liable;[24] but under other statutes, it is no defense to a prosecution for permitting a minor to work contrary to statute that such minor was employed and furnished by an independent contractor.[25] Under some statutes a parent who procures or consents to the employment of the child

2d 280, 256 App.Div. 882, reargument denied 11 N.Y.S.2d 242, 256 App.Div. 1016, affirmed 26 N.E.2d 277, 282 N.Y. 326.

Pa.—Commonwealth v. Wormser, 103 A. 500, 260 Pa. 44—In re Employment Certificates, 25 Pa.Dist. 920.

Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.

W.Va.—Jackson v. Monitor Coal & Coke Co., 126 S.E. 492, 98 W.Va. 58.

31 C.J. p 996 note 96.

Necessity during school vacation

(1) Under some statutes a certificate is required for employment during school vacation.—Ocean Accident & Guarantee Corporation, Ltd., v. Peoples Wet Wash Laundry Co., N.H., 29 A.2d 418.

(2) But under others it is not.—Collings-Taylor Co. v. American Fidelity Co., 117 N.E. 158, 96 Ohio St. 123.

Change of employer

The fact that a certificate for a minor child's employment by other concerns had previously been issued would not excuse the parents permitting such child's employment by another party without the issuance of another certificate.—Cervinka v. Adams, 225 Ill.App. 45.

13. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.

14. Ind.—Ping v. Indianapolis Soap Co., 134 N.E. 903, 206 Ind. 287.

15. Iowa.—State v. Erle, 232 N.W. 279, 210 Iowa 974, 72 A.L.R. 137.

Street trades

Where boy under ten years of age sold, under his mother's auspices, magazines devoted to paid leader's religious sect as a Jehovah's Witness for a negligible commission to serve the cause, the leader was not guilty of an offense on ground that statute making employer of boys under ten for sale of magazines in a public place guilty of a criminal offense was enacted from a design to protect young children's morals by keeping them off the streets and out of public places since the boy was in his mother's custody.—State v. Richardson, 27 A.2d 94, 92 N.H. 178.

16. N.H.—Ocean Accident & Guarantee Corporation, Ltd., v. Peoples Wet Wash Laundry Co., 29 A.2d 418.

N.Y.—Newman v. Rogers, 248 N.Y.S. 297, 139 Misc. 795.

Not void

Contract of hiring minor in violation of child labor law is an illegal contract, but is not void, at least as respects the minor's compensation for injuries sustained in the employment.—Landry v. E. G. Shinner & Co., 176 N.E. 895, 344 Ill. 579.

17. **Member of religious sect**

The statutes providing penalty for furnishing articles to be sold by minor engaged in street trade and permitting minor under one's custody to work at street trade, in violation of law, were properly applied to member of religious sect who furnished minor girl with religious magazines and permitted her to sell them on street.—Commonwealth v. Prince, 46 N.E.2d 755, 313 Mass. 223, affirmed Prince v. Commonwealth of Massachusetts, 64 S.Ct. 438, 321 U.S. 158, 88 L.Ed. ——, rehearing denied 64 S.Ct. 784.

18. Mass.—In re West, 46 N.E.2d 760, 313 Mass. 146.

31 C.J. p 996 note 99.

19. N.Y.—People v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 225 N.Y. 25, affirming 167 N.Y.S. 958, 180 App.Div. 615.

31 C.J. p 996 note 1.

20. N.Y.—People v. Taylor, 85 N.E. 759, 192 N.Y. 398.

21. N.Y.—People v. Sheffield Farms-Slawson-Decker Co., 167 N.Y.S. 958, 180 App.Div. 615, affirmed 121 N.E. 474, 225 N.Y. 25.

31 C.J. p 996 note 3.

22. N.Y.—Buffalo Steel Co. v. Ætna Life Ins. Co., 141 N.Y.S. 1027, 156 App.Div. 453, affirmed 109 N.E. 1067, 215 N.Y. 688.

31 C.J. p 996 note 4.

23. N.Y.—People v. Taylor, 85 N.E. 759, 192 N.Y. 398.

24. Pa.—Rugart v. Keebler-Weyl Baking Co., 121 A. 198, 277 Pa. 408.

25. Mass.—Commonwealth v. Wal-

in the prohibited activity is guilty.[26] The employer's knowledge of the fact that the child employed is within the prohibited age is not an ingredient of the offense;[27] the offense is complete if the employer should have known by the exercise of reasonable diligence that the child was under the specified age.[28] The employer's good faith is no defense, even though the child misrepresented his age[29] and the employer acted on the statement of the child and an affidavit of its father that it was above such age.[30]

§ 13. —— Contributing to Dependency or Delinquency of Children

In many jurisdictions it is a criminal offense to contribute to the delinquency or dependency of a minor. The rules differ under the various statutes with respect to whether it is essential to the crime that the minor shall have actually become or have been adjudged a delinquent.

In many jurisdictions statutes variously worded make it punishable as a crime to contribute to the delinquency or dependency of a child.[31] The offense thus created is a statutory one and unknown to the common law.[32] Such statutes are criminal in nature,[33] and should be construed as criminal statutes by giving their terms a fair import so as to promote justice;[34] but the broad policy of protecting the infant should not be overlooked.[35]

Although under some statutes a contrary rule obtains,[36] it is generally not required that the child shall have been delinquent or dependent prior to the conduct or acts of accused;[37] but in a number of jurisdictions the child must have become delinquent after accused has committed the prohibited acts,[38] and some statutes have been held to require that the minor shall actually have been adjudged delinquent,[39] or have been convicted of an offense or of-

lace Y. Hong, 158 N.E. 759, 261 Mass. 226, 55 A.L.R. 640.

26. Ill.—Cervinka v. Adams, 225 Ill. App. 45.
N.Y.—People v. Ewer, 36 N.E. 4, 141 N.Y. 129, 38 Am.S.R. 788, 25 L.R.A. 794.

27. Ohio.—Kendall v. State, 148 N.E. 367, 113 Ohio St. 111.

Knowledge of minority sufficient
Where a statute penalizes the employment of a child under a specified age by an employer who knows the child is a minor, knowledge of the child's minority is enough to make the employer guilty, even though he honestly believes the child to be over the age specified.—In re West, 46 N.E.2d 760, 313 Mass. 146.

28. Colo.—Overland Cotton Mill Co. v. People, 75 P. 924, 32 Colo. 263, 105 Am.S.R. 74.

29. N.Y.—Braiter v. Addie Co., 9 N.Y.S.2d 280, 256 App.Div. 882, reargument denied 11 N.Y.S.2d 242, 256 App.Div. 1016, affirmed 26 N.E.2d 277, 282 N.Y. 326.
N.H.—Ocean Accident & Guarantee Corporation, Ltd., v. Peoples Wet Wash Laundry Co., 29 A.2d 418.

30. N.Y.—City of New York v. Chelsea Jute Mills, 88 N.Y.S. 1085, 43 Misc. 266.
31 C.J. p 996 note 9.

31. Ariz.—Loveland v. State, 86 P.2d 942, 33 Ariz. 131.
Ark.—Chambers v. State, 270 S.W. 528, 168 Ark. 248.
Cal.—People v. Slenpol, 85 P.2d 474, 30 Cal.App.2d 64—People v. Hemma, 270 P. 457, 94 Cal.App. 25—People v. McDougal, 241 P. 598, 74 Cal.App. 666—People v. Cohen, 217 P. 78, 62 Cal.App. 521.
Ill.—People v. Brosnan, 198 N.E. 708, 361 Ill. 545—People v. Day, 152 N.E. 495, 321 Ill. 552.
Ind.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165—Eckert v. State, 151 N.E. 131, 197 Ind. 412, denying rehearing 147 N.E. 150, 197 Ind. 412.
La.—State v. Scallan, 10 So.2d 885, 201 La. 1026.
Mo.—State v. Johnson, App., 145 S.W.2d 468—Ex parte Fisk, 77 S.W.2d 503, 228 Mo.App. 1028.
Neb.—Bolker v. State, 278 N.W. 377, 134 Neb. 255.
31 C.J. p 996 note 11.
Parent's abandonment of or neglect to support child as offense see the C.J.S. title Parent and Child §§ 91–99, also 46 C.J. p 1347 note 73–p 1365 note 57.

32. N.Y.—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133.
Wash.—State v. Williams, 132 P. 415, 73 Wash. 678.

33. N.Y.—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133.
31 C.J. p 996 note 13.

34. Or.—State v. Dunn, 99 P. 278, 100 P. 258, 53 Or. 304.
Wash.—State v. Adams, 163 P. 403, 95 Wash. 189.

35. N.Y.—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133, 136, citing **Corpus Juris.**
Pa.—Commonwealth v. Jordan, 7 A.2d 523, 136 Pa.Super. 242.
Wash.—State v. Adams, 163 P. 403, 95 Wash. 189.
"The purpose of the juvenile law as now framed . . . is to protect the youth of our state from those evil and designing persons who would lead them astray, and we are not disposed to in any way impair its usefulness by giving any narrow or strained construction to any of its plain and obvious provisions."—People v. Hemma, 270 P. 457, 458, 94 Cal.App. 25—People v. Cohen, 217 P. 78, 80, 62 Cal.App. 521.

36. Tex.—Dunn v. State, 298 S.W. 903, 108 Tex.Cr. 68.

37. D.C.—Frizzell v. U. S., 2 F.2d 398, 55 App.D.C. 103.
Pa.—Commonwealth v. Jordan, 7 A.2d 523, 136 Pa.Super. 242.
31 C.J. p 997 note 24.

38. Ohio.—Peefer v. State, 182 N.E. 117, 42 Ohio App. 276—Edmonds v. State, 164 N.E. 649, 30 Ohio App. 195—Anss v. State, 16 Ohio App. 502.

39. N.Y.—People v. Smith, 41 N.Y.S.2d 512, 266 App.Div. 57, distinguishing People v. Dritz, 18 N.Y.S.2d 455, 259 App.Div. 210.
N.C.—State v. Ferguson, 132 S.E. 664, 191 N.C. 668.

Jurisdiction of juvenile court must have attached.—Commonwealth v. Jordan, 7 A.2d 523, 136 Pa.Super. 242.

Under former California statute
(1) It was held that a showing that the condition of the child as having become impressed with the character of a dependent or delinquent was an indispensable requisite to the maintenance of the charge.—People v. Cohen, 217 P. 78, 62 Cal.App. 521—People v. Pierro, 121 P. 689, 17 Cal.App. 741.

(2) But it was not necessary that the status of the child as such should be adjudicated prior to the prosecution of another person for contributing to his dependency or delinquency; if properly alleged, the facts bringing him within such class could be established at the trial of the prosecution as any other fact.—Edgington v. Yolo County Super. Ct., 124 P. 450, 18 Cal.App. 739, rehearing denied 128 P. 338, 18 Cal.App. 739.

fenses so as to be within the statutory definition of a delinquent,[40] before the prosecution of accused; and in the latter case it is essential to accused's conviction that he shall have caused, or contributed to, the minor's commission of an offense of which the minor has been convicted.[41] There is also authority for the view that to constitute the offense it is not essential that the child shall have been adjudged delinquent;[42] and under some statutes the extreme position is maintained that it is not even necessary that the child shall have become delinquent,[43] it being sufficient if it is shown that the conduct of accused tended toward causing such delinquency.[44] Accused's acts, it has been held, need not be the sole cause of the delinquency or dependency.[45]

One who commits the prohibited acts is guilty irrespective of the success of his efforts or their effect on the child;[46] and the minor's previous unchastity is no defense.[47] Under some statutes knowledge of accused that the child was under the age is an essential element of the crime,[48] but under others it is not.[49] Knowledge of the child's character has been held not to be an essential element of the offense.[50] Under a number of statutes it has been held that criminal intent is not an essential element of the offense.[51] So, under a statute making it a crime willfully to permit an infant female to be placed in such a situation that her morals are likely to be impaired, it is enough if the acts of accused were knowingly done and were such that they were likely to impair the morals of an infant, even though there was no criminal or malicious intent.[52]

Relation to child. Under some statutes it is not necessary that accused stand in loco parentis,[53] anyone who contributes to the dependency or delinquency of a child being guilty of the offense.[54] Under other statutes it has been held that it is necessary that accused occupy toward the delinquent child a relation in loco parentis,[55] at least where the child

40. D.C.—Frizzell v. U. S., 2 F.2d 398, 55 App.D.C. 103.

41. D.C.—Frizzell v. U. S., supra.

Relation to child

Under a statute so providing, a prior conviction must be shown where accused does not stand in loco parentis, but need not be shown where accused is a parent, guardian, or other person having custody of the child. —State v. Ferguson, 132 S.E. 664, 191 N.C. 668.

42. La.—State v. Lewis, 165 So. 1, 183 La. 824—State v. Ramey, 137 So. 859, 173 La. 478.
Mo.—State v. Johnson, App., 145 S. W.2d 468.
W.Va.—State v. Harris, 141 S.E. 637, 105 W.Va. 165.

Ward of court

A married female under twenty-one years who is not a ward of the juvenile court may charge a person with the crime of contributing to her delinquency.—People v. Slepnol, 85 P.2d 474, 30 Cal.App.2d 64.

Where accused is parent

N.C.—State v. Ferguson, 132 S.E. 664, 191 N.C. 668.

43. Ark.—Chambers v. State, 270 S. W. 528, 168 Ark. 248.
Cal.—People v. Calkins, 119 P.2d 142, 48 Cal.App.2d 33.
Ill.—People v. Brosnan, 198 N.E. 708, 361 Ill. 545—People v. Klyczek, 138 N.E. 275, 307 Ill. 150, affirming 225 Ill.App. 658.
La.—State v. Scallan, 10 So.2d 885, 201 La. 1026.
31 C.J. p 996 note 21.

44. Ark.—Chambers v. State, 270 S. W. 528, 168 Ark. 248.
Cal.—People v. Calkins, 119 P.2d 142, 48 Cal.App.2d 33—People v. Cohen, 217 P. 78, 62 Cal.App. 521.
Ill.—People v. Klyczek, 138 N.E. 275, 307 Ill. 150, affirming 225 Ill.App. 658.
W.Va.—State v. Harris, 141 S.E. 637, 105 W.Va. 165.
31 C.J. p 996 note 22.

"It [the statute] is intended to protect and safeguard children from those influences which would manifestly incline them toward entering a state of dependency or delinquency."—People v. McDougal, 241 P. 598, 600, 74 Cal.App. 666.

45. Ariz.—Loveland v. State, 86 P.2d 942, 53 Ariz. 131.
31 C.J. p 997 note 23.

If accused contributed to the cause

for which the minor was adjudged a delinquent he is guilty, even though accused's act alone was insufficient to support such an adjudication.—State v. McCain, 121 So. 583, 168 La. 87.

46. Cal.—People v. Kinser, 279 P. 488, 99 Cal.App. 778—People v. Lamanuzzi, 246 P. 557, 77 Cal.App. 301—People v. Cohen, 217 P. 78, 62 Cal.App. 521.

Seeking rendezvous

Man who delivered note to girl, requesting her presence at night at secluded rendezvous, could be guilty of contributing to minor's delinquency even though the girl never kept the rendezvous.—People v. Hemma, 270 P. 457, 94 Cal.App. 25.

47. Cal.—People v. Griffin, 4 P.2d 592, 118 Cal.App. 18.

48. Va.—Gottlieb v. Commonwealth, 101 S.E. 872, 126 Va. 807.

49. Ind.—Marsh v. State, 8 N.E.2d 121, 104 Ind.App. 377.

50. D.C.—Frizzell v. U. S., 2 F.2d 398, 55 App.D.C. 103.

51. W.Va.—State v. Harris, 141 S.E. 637, 105 W.Va. 165.

Admitting minor to prohibited place

Where the contribution to delinquency consists of admitting a minor to a place where minors are not permitted by law to be admitted, criminal intent on the part of accused is not an essential element of the offense, and the operator of the place is liable for the acts of his servants in admitting the minor while in discharge of their duties within the scope of their employment.—State v. Sobelman, 271 N.W. 484, 199 Minn. 232.

52. N.Y.—People ex rel. Kwiatkowski v. Trenkle, 9 N.Y.S.2d 661, 169 Misc. 687—People ex rel. Tanis v. Benedict, 28 N.Y.S.2d 202—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133.

53. D.C.—Frizzell v. U. S., 2 F.2d 398, 55 App.D.C. 103.
N.Y.—Zambrotto v. Jannette, 290 N. Y.S. 338, 160 Misc. 558.
Tex.—Winters v. State, 139 S.W.2d 789, 139 Tex.Cr. 328.
31 C.J. p 997 note 26.

54. N.Y.—Zambrotto v. Jannette, 290 N.Y.S. 338, 160 Misc. 558.
Pa.—Commonwealth v. Jordan, 7 A. 2d 523, 136 Pa.Super. 242.
Tex.—Winters v. State, 139 S.W.2d 789, 139 Tex.Cr. 328.
11 C.J. p 997 note 27.

55. Colo.—Sass v. People, 109 P. 268, 48 Colo. 125.
31 C.J. p 997 note 28.

has not been adjudged a delinquent.[56]

What constitutes delinquency or dependency is determined largely from the language of the statute and such definitions as it may contain.[57]

§ 14. —— Cruelty to Children

In many jurisdictions it is a criminal offense for anyone to use cruelty to children, or for anyone on whom the law imposes the duty to fail willfully to provide food, shelter, and other necessaries.

In many jurisdictions, under statutes enacted as an incident of the state's power to protect the health and morals of infants, it is a criminal offense for anyone to use cruelty to children;[58] willfully to cause the endangering of the life or injuring of the health of a child in his care or custody;[59] cruelly or unlawfully to punish it;[60] to expose it to the inclemency of the weather;[61] or willfully to omit,[62] without lawful excuse,[63] to perform a duty imposed on him by law[64] to furnish food, clothing, shelter, or medical attendance[65] to a minor. These statutes, being penal in their nature, are, according to the well established rule of construction, to be strictly construed.[66]

56. N.C.—State v. Ferguson, 132 S. E. 664, 191 N.C. 668.

57. Ill.—See People v. Ellis, 185 Ill. App. 417.
Ohio.—Edmonds v. State, 164 N.E. 649, 30 Ohio App. 195.
Wash.—State v. Lehman, 217 P. 15, 125 Wash. 617.
18 C.J. p 475 note 84.
Meaning of delinquency and dependency as respects commitment of children see infra § 98.

Delinquency

(1) Under a statute punishing the crime of contributing to the delinquency of a child and defining a delinquent child in part as one that absents itself from its home or place of abode, it is not necessary in order to come within this definition that the child absent itself for immoral purposes, but it is necessary that there be more than a mere temporary leaving with intention to return.—People v. Day, 152 N.E. 495, 321 Ill. 552.

(2) A liquor dealer, instructing her minor son to watch volunteer bartender while she was gone from her place of business and leaving such son in barroom with strangers late at night when she left place was guilty of misdemeanor of "acting in a way tending to cause delinquency" of minor in selling whiskey to other minors during mother's absence, since a fifteen-year old boy's sale of whiskey to two minors under eighteen years of age constituted an act of "delinquency."—State v. Butler, 11 Ohio Supp. 18.

(3) The statute prohibiting "contributing to delinquency of minor" was not intended to cover and punish a single isolated act of giving a cigarette to a minor.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165.

(4) The fact that certain night club was licensed place, attended by many men, women, and children of community, was irrelevant on question whether it was place where morals of minor girl might be corrupted or impaired, as required to warrant conviction of her father for contributing to her delinquency by encouraging and permitting her to enter such club.—State v. Scallan, 10 So.2d 885, 201 La. 1026.

(5) Other holdings.
Minn.—State v. Sobelman, 271 N.W. 484, 199 Minn. 232.
Mo.—Ex parte Fisk, 77 S.W.2d 503, 228 Mo.App. 1028.
Neb.—Bolker v. State, 278 N.W. 377, 134 Neb. 255.

Dependency

(1) A dependent child has been defined as one "who is dependent on the public for support, or who is destitute, homeless, or abandoned"—Wheeler v. State, 100 N.E. 25, 51 Ind.App. 622.

(2) A child in a public school who refuses to salute the American flag is not a dependent or neglected child within the statute so as to make its parents guilty of contributing to its dependency or neglect by advising and directing such refusal.—People v. Chiafreddo, 44 N.E.2d 888, 381 Ill. 214.

Marriage

(1) Marriage of girl of nearly fifteen to man of forty-one years of age without parent's consent did not constitute her a "delinquent," or render man guilty of contribution to her delinquency.—Peefer v. State, 182 N.E. 117, 42 Ohio App. 276.

(2) But where a female minor was in the habit of wandering about the streets at night and was shown to be incorrigible by the fact that she left home without her parents' knowledge or consent, the acts of accused in inducing her to leave home and marry him were held to constitute the offense of contributing towards her delinquency.—State v. Wilcox, 26 Ohio N.P.,N.S., 343.

Terms synonymous

The terms "dependent child" and "delinquent child," as used in juvenile court law, are largely synonymous.—State v. Clevenger, 296 P. 1054, 161 Wash. 306.

58. Mo.—State v. Evans, 270 S.W. 684.
N.J.—Myslewitz v. Sullivan, 131 A. 57, 102 N.J.Law 61.
31 C.J. p 997 note 31.

Justification

Since a statute providing that whoever shall torture, torment, deprive of necessary sustenance, mutilate, cruelly, unreasonably, and maliciously beat or ill treat any child, shall be guilty of a misdemeanor, makes no mention of justification, justification is therefore an affirmative defense.—Crowe v. Constitution Pub. Co., 11 S.E.2d 513, 63 Ga.App. 497.

59. N.J.—Myslewitz v. Sullivan, 131 A. 57, 102 N.J.Law 61.
31 C.J. p 997 note 32.

60. Mich.—People v. Loomis, 126 N. W. 985, 161 Mich. 651.
N.J.—Richardson v. State Board of Control of Institutions and Agencies, 121 A. 457, 98 N.J.Law 690, affirmed 123 A. 720, 98 N.J.Eq. 690.

61. Ill.—Lyman v. People, 65 Ill. App. 687.

62. La.—State v. Clark, 83 So. 696, 146 La. 421.
N.Y.—People v. Pierson, 68 N.E. 243, 176 N.Y. 201, 98 Am.S.R. 666, 63 L. R.A. 187, reversing 81 N.Y.S. 214, 80 App.Div. 415.

63. N.Y.—People v. Pierson, supra.

64. The phrase "a duty by law imposed," as used in Pen.Code § 288, has reference to persons designated by the common law and by the statute, as parents, guardians, or those who by adoption or otherwise have assumed the relation in loco parentis, and on whom the duty is made obligatory by statute, although not required by the common law.—People v. Pierson, 68 N.E. 243, 176 N.Y. 201, 98 Am.S.R. 666, 63 L.R.A. 187, reversing 81 N.Y.S. 214, 80 App.Div. 415.

65. Minn.—State v. Kasper, 167 N. W. 1035, 140 Minn. 259.
N.Y.—People v. Pierson, supra.
31 C.J. p 997 note 41.

66. Ga.—Justice v. State, 42 S.E. 1013, 116 Ga. 605, 59 L.R.A. 601.

Parents' abandonment of, or neglect to support, child as offense is considered in the C.J.S. title Parent and Child §§ 91–99, also 46 C.J. p 1347 note 73–p 1365 note 57.

§ 15. —— Permitting Minors to Frequent or Play, and Gaming with Minors

When all the statutory conditions are present, it is an offense to allow the presence of minors in places wherein certain games are played, to permit minors to congregate in such places, to allow minors to play at certain games, and to bet with minors.

It is within the power of the legislature to make it an offense to allow the presence of minors in places wherein certain games are played.[67] The elements of the offense depend on the statutory provisions.[68] Under some statutes, it is held that knowledge of the minority of the party is not an element of the offense;[69] thus the keeper of such place cannot avoid his guilt by showing that the offense was only that of his servant, for both are considered guilty of the offense.[70] In some jurisdictions, the offense is limited to cases wherein the minor was permitted to be present without the consent of his parent or guardian;[71] and in such cases it has been held that defendant is entitled to show his want of knowledge that the written order of consent was not genuine.[72] Under other statutes the offense is committed only if the minor is not accompanied by parent or guardian.[73]

Permitting minors to congregate. Under a statute prohibiting the permitting of minors to congregate at a public place where any billiard table, etc., is kept, it is essential to show that the minors did in fact congregate at the place alleged, and that two or more minors were found there together.[74]

Permitting minors to play. It may also be made punishable to allow minors to play at certain games in certain places,[75] as in saloons,[76] or where intoxicating liquors are sold,[77] and where billiard or pool tables are kept.[78] Ordinarily it is necessary that the minor play in the game,[79] mere sport or pastime on a billiard table or playing with the balls not being sufficient;[80] that defendant be the owner or keeper of such table or game;[81] and that he have knowledge that the party playing is a minor.[82] However, in the absence of a statute requiring it, it has been held that knowledge of the minority of the party playing is immaterial;[83] and also that, if defendant, after due diligence, thinks that the person is not a minor, he is not guilty.[84] The operator of such a place who delegates his authority to an agent is liable for the latter's violation of the statute, and the agent's knowledge that the minor was such is imputable to him.[85] Ordinarily it is not essential that the game be played for a wager,[86] or that the minor actually bet.[87] Some of the statutes limit the offense to when it is permitted without the consent of the parent or guardian.[88]

Gaming with minors. Under some statutes it is an offense for a person of full age to bet with a

67. Ind.—Manheim v. State, 66 Ind. 65.
31 C.J. p 997 note 44.

68. Wash.—State v. Anderson, 112 P. 931, 61 Wash. 674.
31 C.J. p 997 note 45.

Applicability to employees

(1) It has been held that such a statute is applicable to employees of public pool and billiard rooms and bowling saloons, no less than to mere frequenters of such places.—Commonwealth v. Climenti, 89 Pa. Super. 195.

(2) But under another statute it has been held that employing a minor in a pool room is not a violation of a statute prohibiting the keeper to permit minors to "frequent or congregate" therein.—Halliday v. State, 179 S.W. 1004, 120 Ark. 482.

69. Iowa.—State v. Probasco, 17 N. W. 607, 62 Iowa 400.
31 C.J. p 997 note 46.

70. Iowa.—State v. Probasco, supra.

71. Mass.—Commonwealth v. Emmons, 98 Mass. 6.
Tex.—Simpson v. State, 125 S.W. 398, 58 Tex.Cr. 253.

72. Tex.—Simpson v. State, supra.

73. N.Y.—People, on Complaint of Rosner, v. Rose, 284 N.Y.S. 962, 158 Misc. 508.

74. Ind.—Powell v. State, 62 Ind. 531.

75. Ky.—Dezarn v. Commonwealth, 243 S.W. 921, 195 Ky. 686.
N.Y.—People, on Complaint of Rosner, v. Rose, 284 N.Y.S. 962, 158 Misc. 508.
31 C.J. p 998 note 53.

76. Ark.—Snow v. State, 9 S.W. 306, 50 Ark. 557.
31 C.J. p 998 note 54.

77. Ind.—Williams v. Warsaw, 60 Ind. 457.

78. Ky.—Justice v. Commonwealth, 281 S.W. 803, 213 Ky. 617—Dezarn v. Commonwealth, 243 S.W. 921, 195 Ky. 686.
W.Va.—State v. Furr, 132 S.E. 504, 101 W.Va. 178.
31 C.J. p 998 note 56.

79. Ind.—Donniger v. State, 52 Ind. 326—Zook v. State, 47 Ind. 463.

80. Ala.—Sikes v. State, 67 Ala. 77.

81. Ind.—Hanrahan v. State, 57 Ind. 527.
31 C.J. p 998 note 59.

82. Ky.—Commonwealth v. Wills, 89 S.W. 144, 121 Ky. 103, 28 Ky.L. 77.
31 C.J. p 998 note 60.

83. W.Va.—State v. Furr, 132 S.E. 504, 101 W.Va. 178.
31 C.J. p 998 note 61.

84. Ga.—Stern v. State, 53 Ga. 229, 21 Am.R. 266.

85. Ky.—Dezarn v. Commonwealth, 243 S.W. 921, 195 Ky. 686.

86. Ind.—Bond v. State, 52 Ind. 457.
31 C.J. p 998 note 63.

87. Ky.—Green v. Commonwealth, 5 Bush 327.

88. Tenn.—Rhodes v. State, 102 S. W. 899, 118 Tenn. 761.
31 C.J. p 998 note 65.

Forged consent

Conviction for permitting minor to play on pool tables could not be sustained, where defendant in good faith relied on forged consent.—Justice v. Commonwealth, 281 S. W. 803, 213 Ky. 617.

minor under certain circumstances.[89] Such statutes are intended to prevent bets with or against a minor, that is, betting with a minor as an adversary, or betting jointly with the minor against others.[90]

§ 16. —— Prosecutions for Violation of Regulations

a. In general
b. Jurisdiction
c. Indictment and information
d. Evidence
e. Province of court and jury
f. Instructions
g. Verdict and sentence
h. Review

a. In General

Prosecutions for violations of laws for the protection of children are criminal in nature and should be conducted in the same manner as other criminal prosecutions.

Prosecutions for violations of the laws for the protection of children are criminal in nature[91] and should be conducted in the same manner as other criminal prosecutions;[92] and statutes denying defendants under these prosecutions the right to trial as for any other crime have been declared unconstitutional.[93]

b. Jurisdiction

Ordinarily the question as to what court has jurisdiction is governed by general rules, but the legislature may confer the jurisdiction on particular courts, such as juvenile courts. The jurisdiction of juvenile courts over prosecutions of this character is no greater than that conferred by statute.

Ordinarily, the question as to what court has jurisdiction in the premises is governed by the general rules applicable to other prosecutions.[94] The legislature, however, may confer the jurisdiction on particular courts,[95] such as, for instance, the juvenile courts.[96] However, as stated supra § 6, the grant of jurisdiction to juvenile courts in regard to the custody and protection of the person of an infant is not a grant of general criminal jurisdiction, and the juvenile court has no greater jurisdiction in criminal prosecutions than is conferred on it by statute.[97] A statute giving jurisdiction to juvenile

89. Mo.—State v. Delmar Jockey Club, 92 S.W. 185, 200 Mo. 34, appeal dismissed 28 S.Ct. 732, 210 U.S. 324, 52 L.Ed. 1080.
31 C.J. p 998 note 66.

90. Ala.—Lang v. State, 50 So. 353, 162 Ala. 85.

91. Cal.—Ex parte Leach, 279 P. 157, 99 Cal.App. 645.

92. Cal.—People v. Thourwald, 189 P. 124, 46 Cal.App. 261.
31 C.J. p 998 note 70.

New trial

Where there are numerous discrepancies in the testimony of the state's witnesses, and the trial is not fairly conducted, defendant is entitled to a new trial.—People v. De Salvo, 294 N.Y.S. 87, 250 App.Div. 292.

93. Utah.—Mill v. Brown, 88 P. 609, 31 Utah 473, 120 Am.S.R. 935.

94. Pa.—Commonwealth v. Lash, 30 A.2d 609, 151 Pa.Super. 601.
Wash.—State v. Strom, 258 P. 15, 144 Wash. 334—State v. Williams, 132 P. 415, 73 Wash. 678.

Superior court had original jurisdiction of prosecution for contributing to delinquency of fourteen-year-old girl, notwithstanding such offense was a misdemeanor.—Loveland v. State, 86 P.2d 942, 53 Ariz. 131.

Municipal court of Los Angeles has exclusive jurisdiction of misdemeanor of contributing to delinquency of minor committed outside city but within county.—Ex parte Leach, 279 P. 157, 99 Cal.App. 645.

Justice's court has no jurisdiction to try one accused of contributing to minor's delinquency.—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal. App. 276.

Police court

Where party was charged by complaint filed in police court with contributing to delinquency of minor girls, police court had preliminary jurisdiction of case.—Butler v. Hastings, 34 P.2d 751, 139 Cal.App. 641.

95. Cal.—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal.App. 276.
31 C.J. p 999 note 74.

Domestic relations court

Provision of statute granting domestic relations court jurisdiction to punish acts contributory to delinquency of minors, whether committed by parents or other persons in which offense is of lesser grade than felony, was held constitutional.—Zambrotto v. Jannette, 290 N.Y.S. 338, 160 Misc. 558.

96. La.—State v. Campbell, 148 So. 708, 177 La. 559.
N.Y.—People v. Smith, 41 N.Y.S.2d 512, 266 App.Div. 57—People v. Dritz, 18 N.Y.S.2d 455, 259 App. Div. 210—People v. Kelley, 243 N.Y.S. 613, 230 App.Div. 249, 251, 252, followed in 244 N.Y.S. 774 (two cases), 230 App.Div. 252.
Ohio.—Petticrew v. Webster, 27 N. E.2d 151, 63 Ohio App. 456, appeal dismissed 24 N.E.2d 455, 136 Ohio St. 158.
31 C.J. p 999 note 75.

Superior court as juvenile court

Under a statute authorizing the superior court to sit as a juvenile court in proceedings for violations of the Juvenile Court Law, and to impose a penalty where defendant pleads guilty, the court, as juvenile court, has no power to try a defendant who pleads not guilty, but it may, as a superior court, try such defendant if there has been a preliminary hearing so as to authorize the filing of an information; hence, where defendant pleads not guilty and the limits of the juvenile court have been reached, it is the duty of the judge to transfer the cause to the superior court if preliminary hearings have been held, defendant held to answer, and an information has been filed.—Ex parte Gamo, 10 P.2d 770, 122 Cal.App. 725—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal. App. 276.

97. Colo.—Abbott v. People, 16 P.2d 435, 91 Colo. 510.
N.Y.—People v. Smith, 41 N.Y.S.2d 512, 266 App.Div. 57—People v. Hopkins, 203 N.Y.S. 653, 208 App. Div. 438.
31 C.J. p 999 note 77.

Power to transfer only

Under Juvenile Court Law, the juvenile court does not have jurisdiction over indictable offenses of adults, involving children, except that, when one is noticed in the course of exercise of appropriate functions of the juvenile court, the case shall be returned to the prop-

courts of such prosecutions is limited to the violation of laws relating to the physical, moral, and mental well-being of children,[98] and does not confer jurisdiction of a prosecution for assault and battery on a child,[99] or for statutory rape.[1] The fact that the acts constituting the offense with which defendant is charged in the juvenile court also constitute a felony under some other law does not divest the juvenile court of its jurisdiction;[2] but it has been held that, where the offense charged consists of acts constituting an offense triable by jury, it cannot be tried summarily under the statute relating to the welfare of children.[3]

c. Indictment and Information

The sufficiency of the indictment or information is governed by the rules applicable in criminal prosecutions generally.

The sufficiency of an indictment or information is generally governed by the rules applicable to informations and indictments in other criminal prosecutions.[4] The indictment or information must set forth with certainty all the facts and circumstances essential to constitute the crime, so as to bring accused within the provisions of the statute;[5] and this rule has been applied in prosecutions for contributing to the dependency or delinquency of a child.[6] In accordance with the rules stated in In-

er court for trial; hence, an adult defendant could be indicted and tried for offense of contributing to delinquency of minor child, in court of quarter sessions, without first having hearing before juvenile court.—Commonwealth v. Lash, 30 A.2d 609, 151 Pa.Super. 601.

98. La.—State v. Jacobs, 57 So. 905, 130 La. 245—State v. Rose, 52 So. 165, 125 La. 1080.

99. La.—State v. Jacobs, 57 So. 905, 130 La. 245.

1. Colo.—Abbott v. People, 16 P.2d 435, 91 Colo. 510.

2. La.—State v. Campbell, 148 So. 708, 177 La. 559.

3. N.J.—Richardson v. State Board of Control of Institutions and Agencies, 121 A. 457, 98 N.J.Law 690, affirmed 123 A. 720, 98 N.J.Eq. 690.

4. Ala.—Reynolds v. State, 125 So. 204, 23 Ala.App. 333.
31 C.J. p 999 note 80.

Sufficiency of evidence to justify

(1) The finding of a grand jury that unsworn testimony of two girls, seven and eight years of age, that accused had carnally abused them, was sufficiently supported by other evidence given under oath so as to justify indictment of accused, was consistent with the powers of the grand jury, since the grand jury is clothed with power to determine both the facts and the law.—People v. Masiano, 3 N.Y.S.2d 766, 253 App. Div. 454.

(2) Evidence held sufficient to justify indictment.—People v. Masiano, 3 N.Y.S.2d 766, 253 App.Div. 454—People v. Ortiz, 40 N.Y.S.2d 680.

(3) Evidence held insufficient to justify indictment.—People v. Cummings, 29 N.Y.S.2d 402, 177 Misc. 111.

Surplusage may be rejected.
Ariz.—State v. Davis, 120 P.2d 808, 58 Ariz. 444.
Mo.—State v. Evans, 270 S.W. 684.
Pa.—Commonwealth v. Lash, 30 A.2d 609, 151 Pa.Super. 601.

5. N.J.—Richardson v. State Board of Control of Institutions and Agencies, 121 A. 457, 98 N.J.Law 690, affirmed 123 A. 720, 98 N.J.Eq. 690.
31 C.J. p 999 note 81.

Indictments held sufficient

(1) Generally.—Madden v. Commonwealth, 261 S.W. 273, 202 Ky. 782—31 C.J. p 999 note 81 [a] (1).

(2) To charge lewd acts on body of child.
Ariz.—Bocchi v. State, 212 P. 463, 25 Ariz. 37.
Cal.—People v. Carskaddon, 11 P.2d 38, 123 Cal.App. 177—People v. Maine, 269 P. 194, 93 Cal.App. 141—People v. Dant, 229 P. 983, 68 Cal.App. 588—People v. Gavin, App., 195 P. 436, 50 Cal.App. 424.
Mont.—State v. Kocher, 119 P.2d 35, 112 Mont. 511.

(3) To charge taking indecent liberties.
Mich.—People v. Stone, 292 N.W. 520, 293 Mich. 658.
Wash.—State v. Stuhr, 96 P.2d 479, 1 Wash.2d 521.
31 C.J. p 714 note 98.

(4) To charge endangering morals.—People ex rel. Tanis v. Benedict, 28 N.Y.S.2d 202.

Indictments held insufficient

(1) Generally.
N.Y.—People v. Lindloff, 18 N.Y.S.2d 695, 259 App.Div. 749.
Ohio.—State v. Eisen, 99 P. 282, 53 Or. 297, rehearing denied 100 P. 257, 53 Or. 297.

(2) To charge cruelty.—Myslewitz v. Sullivan, 131 A. 57, 102 N.J.Law 61—State v. Hankins, 67 A. 1057, 75 N.J.Law 318.

Negating exceptions

Information should negative fact that factory, in which child under prescribed age was employed, was part of work of farm, ranch, dairy, agricultural, or stock-raising pursuit.—Macaleb v. State, 13 S.W.2d 91, 111 Tex.Cr. 318.

Knowledge of minority

Under statute, prohibiting owner to permit persons under particular age to play pool in his place of business, which is silent as to owner's knowledge, indictment need not allege that he knew fact.—State v. Furr, 132 S.E. 504, 101 W.Va. 178.

6. Ala.—Reynolds v. State, 125 So. 204, 23 Ala.App. 333.
Or.—State v. Stone, 226 P. 430, 111 Or. 227.
31 C.J. p 999 note 82.

Alleging dependency or delinquency

(1) If the child against whom the offense is alleged to have been committed has been adjudicated to be a delinquent or dependent child, then it will be sufficient to plead such adjudication.—State v. McCain, 121 So. 583, 168 La. 87—31 C.J. p 999 note 82 [a] (1).

(2) Where the delinquent character of the minor is predicated on a conviction, it is necessary under some statutes to allege that the conviction was for an offense to the commission of which the acts of defendant contributed.
D.C.—Frizzell v. U. S., 2 F.2d 398, 55 App.D.C. 103.
N.Y.—People v. Smith, 41 N.Y.S.2d 512, 266 App.Div. 57.

(3) Unless the statute makes it an essential element, it is not necessary to allege an adjudication of delinquency.
La.—State v. Lewis, 165 So. 1, 183 La. 824—State v. Ramey, 137 So. 859, 173 La. 478.
Mo.—State v. Johnson, App., 145 S.W.2d 468.

(4) Where no adjudication is relied on as showing the delinquency of the child, the facts which make the child a dependent or delinquent must be alleged.
Ariz.—Jackson v. State, 286 P. 824, 36 Ariz. 446, followed in Durgelogh v. State, 292 P. 1116.
Ohio.—Peefer v. State, 182 N.E. 117, 42 Ohio App. 276—Edmonds v. State, 164 N.E. 649, 30 Ohio App. 195.
31 C.J. p 999 note 82 [a] (2).

dictments and Informations § 139, an indictment or information which charges an offense against an infant in the language of the statute is sufficient if the statute sufficiently defines the crime;[7] but, where the statute creating the offense does not describe the act or acts which compose it, such acts must be specifically averred.[8]

Issues, proof, and variance. General rules as to issues, proof, and variance in criminal prosecutions are applicable.[9] Where the indictment charges the commission of the offense in several different ways, each of which constitutes a complete offense in itself, a conviction is sustained by proof that the offense was committed in one of the ways alleged, there being no necessity of proving that it was committed in each of the ways alleged.[10]

d. Evidence

General rules governing evidence in criminal prosecutions are applicable, and determine questions relating to the burden of proof, admissibility of evidence, and the weight and sufficiency thereof.

In prosecutions of this kind, the general rules in regard to evidence apply.[11]

Burden of proof. The burden is on the prosecution to establish every material averment of the indictment or information.[12]

(5) Under some statutes it is not even necessary to allege that the child has actually become delinquent; it is sufficient to allege that defendant committed certain specified acts which tended to cause delinquency.

Ariz.—Loveland v. State, 86 P.2d 942, 53 Ariz. 131.

Cal.—People v. Cohen, 217 P. 78, 62 Cal.App. 521.

Or.—State v. Dunn, 99 P. 278, 53 Or. 304, rehearing denied 100 P. 258, 53 Or. 304.

(6) But if no such acts are alleged, the indictment or information is insufficient.—People v. Wortman, 30 P.2d 565, 137 Cal.App. 339—People v. Giminiani, 232 P. 993, 70 Cal.App. 195.

Negating exceptions

(1) An information charging violation of law condemning acts tending to cause a female under twenty-one to lead an idle, dissolute, and immoral life need not allege that such female is not defendant's wife.—People v. Cohen, 217 P. 78, 62 Cal.App. 521.

(2) Affidavit charging accused with contributing to child's delinquency did not have to negative that accused was parent, tutor, or similar custodian of child.—State v. Ramey, 137 So. 859, 173 La. 478.

Age of defendant

In prosecution for contributing to delinquency of a child, age of defendant is not a matter of defense, but is a matter which must be alleged and proved; thus under a statute condemning acts by an adult contributing to delinquency of a child, the affidavit must allege that defendant is an adult.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165.

Indictment or information held sufficient

Ariz.—State v. Davis, 120 P.2d 808, 58 Ariz. 444—Loveland v. State, 86 P.2d 942, 53 Ariz. 131.

Ark.—Chambers v. State, 270 S.W. 528, 168 Ark. 248.

Cal.—People v. Wortman, 30 P.2d 565, 137 Cal.App. 339—People v. Wilkerson, 278 P. 466, 99 Cal.App. 123—People v. McDougal, 241 P. 598, 74 Cal.App. 666—People v. Cohen, 217 P. 78, 62 Cal.App. 521.

Colo.—Sharp v. People, 9 P.2d 483, 90 Colo. 356.

Ill.—People v. Billow, 30 N.E.2d 795, 307 Ill.App. 546—People v. Walker, 27 N.E.2d 662, 305 Ill.App. 500.

La.—State v. McCain, 121 So. 583, 168 La. 87.

Tex.—Winters v. State, 139 S.W.2d 789, 139 Tex.Cr. 328.

Wash.—State v. Clevenger, 296 P. 1054, 161 Wash. 306.

31 C.J. p 999 note 82 [d].

Indictment or information held insufficient

(1) Generally.

Ariz.—Jackson v. State, 286 P. 824, 36 Ariz. 446, followed in Durgelogh v. State, 292 P. 1116.

Cal.—People v. Perfetti, 264 P. 318, 88 Cal.App. 609—People v. Salisbury, 210 P. 642, 59 Cal.App. 299.

Ind.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165.

Ohio.—Edmonds v. State, 164 N.E. 649, 30 Ohio App. 195.

31 C.J. p 999 note 82 [c].

(2) Information alleging that defendants gave minor intoxicating liquor and left her in man's room.—People v. Kinser, 279 P. 488, 99 Cal. App. 778.

(3) An information, charging that defendant willfully failed to do that which directly tended to prevent her minor children's state of dependency and neglect, "to wit: did eject said children from their home," did not allege that they were dependent and neglected children within statute defining offense of contributing to dependency and neglect of children.—People v. Anderson, 14 N.E.2d 527, 295 Ill.App. 27.

Bill of particulars

Under indictment charging contributing to delinquency by encouraging minor to commit acts, naming them, defendant is not entitled to bill of particulars.—State v. Harris, 141 S.E. 637, 105 W.Va. 165.

7. Ill.—People v. Klemann, 48 N.E. 2d 957—People v. Rogers, 154 N. E. 909, 324 Ill. 224—People v. Billow, 30 N.E.2d 795, 307 Ill.App. 546.

Iowa.—State v. Schumacher, 191 N. W. 870, 195 Iowa 276.

Mo.—State v. Evans, 270 S.W. 684.

31 C.J. p 714 note 98, p 715 note 13, p 717 note 25 [a] (10), p 999 note 80 [a].

8. Ill.—People v. Chiafreddo, 44 N.E. 2d 888, 381 Ill. 214.

N.J.—Myslewitz v. Sullivan, 131 A. 57.

Ohio.—Edmonds v. State, 164 N.E. 649, 30 Ohio App. 195.

9. **Fatal variance not present**

Cal.—People v. Halistik, 230 P. 972, 69 Cal.App. 174.

Ill.—People v. Klemann, 48 N.E.2d 957, 383 Ill. 236.

Utah.—State v. Saunders, 22 P.2d 1043, 82 Utah 170.

10. Wash.—State v. Stuhr, 96 P.2d 479, 1 Wash.2d 520.

Child's guilty knowledge

In prosecution for contributing to daughter's delinquency by requiring her to sell liquor, state was not required to prove that daughter knew that sale was wrongful and hence violated law, where information also charged and state proved that daughter was put in danger of "immoral life."—People v. Ferello, 268 P. 915, 92 Cal.App. 683.

11. N.Y.—Cowley v. People, 21 Hun 415, 8 Abb.N.Cas. 1, affirmed 83 N.Y. 464, 38 Am.R. 464.

31 C.J. p 999 note 83.

12. Or.—State v. Stone, 226 P. 430, 111 Or. 227.

31 C.J. p 1000 note 84.

Lewd and lascivious conduct

Del.—State v. Martin, 183 A. 334, 7 W.W.Harr. 342.

Taking indecent liberties

Wash.—State v. Moss, 108 P.2d 633, 6 Wash.2d 629.

Permitting gaming

N.Y.—People, on Complaint of Rosner v. Rose, 284 N.Y.S. 962, 158 Misc. 508.

Admissibility. Any competent and material evidence which tends to prove an element of the offense is admissible on behalf of the state;[13] and any evidence which legitimately tends to disprove any of the elements of the crime is admissible on behalf of accused.[14] However, evidence which is incompetent, immaterial, or irrelevant, is inadmissible.[15] The admissibility of evidence in the face of an objection that it is too remote should ordinarily be left to the sound discretion of the trial judge.[16] These rules have been applied in prosecutions for lewd and lascivious conduct on the body of a child,[17] for contributing to delinquency or dependency,[18] and for taking indecent liberties.[19]

W.Va.—State v. Furr, 132 S.E. 504, 101 W.Va. 178.

Age of child

In order to sustain a conviction it is necessary to prove that the child against whom the offense was committed was under the age specified in the statute.—People v. Adams, 47 P.2d 320, 7 Cal.App.2d 743.

13. Cal.—People v. Watrous, 45 P.2d 380, 7 Cal.App.2d 7.
31 C.J. p 999 note 83 [e].

14. Del.—State v. Wood, 131 A. 567, 3 W.W.Harr. 127.

15. Cal.—People v. Pappens, 43 P.2d 371, 5 Cal.App.2d 544.
Del.—State v. Casper, 138 A. 633, 3 W.W.Harr. 432.

Evidence held inadmissible

La.—State v. Campbell, 148 So. 708, 177 La. 559.
31 C.J. p 999 note 83 [f].

16. Cal.—People v. Arrangoiz, 74 P.2d 789, 24 Cal.App.2d 116.

17. **Complaint or outcry**

(1) Evidence showing that complaining witness made complaint or outcry after the commission of the offense is admissible.

Cal.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Hubbell, 128 P.2d 579, 54 Cal.App.2d 49—People v. Morcumb, 82 P.2d 714, 28 Cal.App.2d 465—People v. Watrous, 45 P.2d 380, 7 Cal.App.2d 7—People v. Ferrari, 251 P. 692, 80 Cal.App. 182—People v. Ewing, 234 P. 917, 71 Cal.App. 138.

Iowa.—State v. Rounds, 248 N.W. 500, 216 Iowa 131.

(2) The complaint must have been made while the occurrence was recent.—People v. Hubbell, supra.

(3) Such evidence may be given by the complaining witness or by the person to whom the complaint was made.—People v. Adams, 93 P.2d 146, 14 Cal.2d 154, superseding, App., 87 P.2d 372.

(4) But details recited in the complaint or outcry, or the name of the person accused therein, is inadmissible.

Cal.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Adams, supra—People v. Watrous, 45 P.2d 380, 7 Cal.App.2d 7—People v. Ewing, 234 P. 917, 71 Cal.App. 138.

Iowa.—State v. Rounds, 248 N.W. 500, 216 Iowa 131.

(5) Proof that the person to whom the complaint was made reported it to someone else is inadmissible under the rule.—People v. Hubbell, 128 P.2d 579, 54 Cal.App.2d 49.

Evidence held admissible

(1) Generally.—People v. Sargent, 3 P.2d 319, 117 Cal.App. 50.

(2) Evidence that defendant exhibited obscene pictures, corroborated by police officer's testimony as to obscenity.—People v. Linton, 283 P. 389, 102 Cal.App. 608.

(3) Testimony that, at same time and place as commission of acts charged and in presence of each other, defendant committed same acts on two of prosecutrix' playmates.—People v. Hunt, 61 P.2d 1208, 17 Cal.App.2d 284.

Evidence held inadmissible

(1) Generally.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Piburn, 31 P.2d 470, 138 Cal.App. 56—People v. Heath, 248 P. 1027, 79 Cal.App. 20—People v. Ewing, 234 P. 917, 71 Cal.App. 138.

(2) Testimony of child's mother relating to conversation with child relative to details of former similar conduct toward child by defendant which had taken place approximately two years prior to alleged commission of offense, when child was only three years old.—People v. Adams, 93 P.2d 146, 14 Cal.2d 154, superseding, App., 87 P.2d 372.

(3) Defendant's offer to show child's consent.—People v. Russell, 251 P. 699, 80 Cal.App. 243.

(4) Defendant's offer of physician's testimony as to condition of the child's private parts.—Bocchi v. State, 212 P. 463, 25 Ariz. 37.

18. **Rule in trial of children distinguished**

The provision of the Juvenile Delinquency Act authorizing admission of any character of evidence which court may deem proper refers to trial of neglected and delinquent children, not to those contributing to such condition; in the trial of the latter, the statute does not permit introduction of purely hearsay testimony.—State v. Campbell, 148 So. 708, 177 La. 559.

Evidence held admissible

(1) Generally.

Cal.—People v. Ferello, 268 P. 915, 92 Cal.App. 683.

Wash.—State v. Tweedy, 5 P.2d 335, 165 Wash. 281.

(2) Where, in a prosecution for contributing to the delinquency of a female child, a young woman, who was a companion of the infant and defendants, testified as to the manner and by whom she and the infant were brought to a certain city, and that a room was procured for them at a hotel, it was not error to permit her to testify that the room was procured by a brother of one of the defendants and another boy.—State v. Hempke, 209 P. 10, 121 Wash. 226.

(3) In prosecution for contributing to the delinquency of a fourteen-year old child by soliciting, encouraging, and advising her to associate with immoral persons, where defendants themselves were the immoral persons with whom they caused the child to associate, the defendants' characters were an issuable fact, and proof of the reputations of the defendants for morality was admissible over objection that unless the defendant in a criminal case puts his character in issue the state cannot attack it.—State v. Johnson, Mo.App., 145 S.W.2d 468.

(4) In a prosecution for aiding, encouraging, and abetting another in committing acts contributing to the delinquency of a fifteen-year-old girl, evidence that she and her companion were taken by defendant to his home on a prior occasion was held admissible.—State v. Lehman, 217 P. 15, 125 Wash. 617.

Evidence held inadmissible

(1) Generally.

Cal.—People v. Brown, 77 P.2d 880, 25 Cal.App.2d 513—People v. Pappens, 43 P.2d 371, 5 Cal.App.2d 544.

Tex.—Duplichan v. State, 276 S.W. 435, 101 Tex.Cr. 580.

(2) Accused's offer of evidence of girl's intoxication on arriving at defendants' home, and that others caused such condition.—Loveland v. State, 86 P.2d 942, 53 Ariz. 131.

19. **Complaint or outcry**

(1) In a case in which the admission of evidence of prosecutrix's complaint of defendant's conduct was held error, it was said broadly that the rule permitting evidence of prosecutrix's complaint in rape cases does not extend to the crime of taking indecent liberties with a child.—

Weight and sufficiency. In order to sustain a conviction accused's guilt must be proved beyond a reasonable doubt.[20] The offense need not be proved by direct and positive testimony; circumstantial evidence may be sufficient.[21] The fact that there is some conflict among the witnesses for the prosecution does not prevent a conviction.[22] Although the evidence against accused may be so manifestly false or inherently improbable as to be insufficient in law to sustain a conviction,[23] the fact that certain evidence is inherently improbable will not prevent a conviction if there is sufficient evidence apart from the improbable testimony to support it,[24] or if the inconsistencies, contradictions, or improbabilities do not render the evidence entirely unbelievable but merely affect its weight.[25] Reference is made in the notes to cases in which the sufficiency of the evidence in prosecutions for lewd and lascivious acts,[26] for contributing to the delinquency or dependency of minors,[27] for taking indecent liber-

People v. Romano, 138 N.E. 169, 306 Ill. 502.

(2) However, in a subsequent case holding the admission of evidence of prosecutrix' complaint together with the details recited therein erroneous, the court intimated that the mere fact that a complaint was made, without any proof of the details or the name of the person accused, would not be inadmissible.—People v. Phipps, 170 N.E. 305, 338 Ill. 373.

Evidence held inadmissible

Ill.—People v. Heine, 35 N.E.2d 323, 377 Ill. 134—People v. Bernsee, 11 N.E.2d 961, 367 Ill. 518.

Mich.—People v. Cook, 232 N.W. 349, 251 Mich. 364.

20. Cal.—People v. Ewing, 234 P. 917, 71 Cal.App. 138.

Del.—State v. Martin, 183 A. 334, 7 W.W.Harr. 342.

21. Cal.—People v. Mohr, 75 P.2d 616, 24 Cal.App.2d 580—People v. Ewing, 234 P. 917, 71 Cal.App. 138.

Ill.—People v. Sukdol, 153 N.E. 727, 322 Ill. 540.

22. Cal.—People v. Beatty, 130 P.2d 433, 55 Cal.App.2d 258.

Ill.—People v. Anderson, 30 N.E.2d 648, 375 Ill. 163.

23. Cal.—People v. Trippell, 61 P.2d 929, 7 Cal.2d 612—People v. Gonzales, 92 P.2d 482, 33 Cal.App.2d 482.

24. Cal.—People v. Gimiliani, 114 P. 2d 392, 45 Cal.App.2d 535—People v. Taylor, 78 P.2d 207, 25 Cal.App. 2d 525—People v. Quinn, 55 P.2d 1277, 12 Cal.App.2d 752—People v. Russell, 251 P. 699, 80 Cal.App. 243.

25. Cal.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Schultz, 120 P.2d 893, 49 Cal.2d 38—People v. Gimiliani, 114 P.2d 392, 45 Cal.App.2d 535—People v. Gonzales, 92 P.2d 482, 33 Cal.App. 2d 482—People v. Miller, 81 P.2d 567, 27 Cal.App.2d 722—People v. Ralls, 70 P.2d 265, 21 Cal.App.2d 674—People v. Quinn, 55 P.2d 1277, 12 Cal.App.2d 752—People v. Vosger, 11 P.2d 649, 123 Cal.App. 503—People v. Geonzelis, 289 P. 667, 106 Cal.App. 434—People v. Morotti, 215 P. 719, 61 Cal.App. 689.

26. Evidence held sufficient

(1) Generally.—People v. Crownover, 92 P.2d 929, 34 Cal.App.2d 7—People v. Ewing, 234 P. 917, 71 Cal. App. 138.

(2) To sustain conviction.

Cal.—People v. Putnam, 129 P.2d 367, 28 Cal.2d 885, prior opinion, App., 123 P.2d 573—People v. Kearney, 126 P.2d 612, 20 Cal.2d 435, prior opinion, App., 120 P.2d 156—People v. Trippell, 61 P.2d 929, 7 Cal.2d 612—People v. Reyes, 229 P. 947, 194 Cal. 650—People v. Pollock, App., 142 P 2d 328—People v. Paris, 139 P.2d 671, 59 Cal. App.2d 699—People v. Bush, 133 P.2d 870, 56 Cal.App.2d 877—People v. Beatty, 130 P.2d 433, 55 Cal.App.2d 258—People v. Hubbell, 128 P.2d 579, 54 Cal.App.2d 49—People v. King, 127 P.2d 605, 53 Cal.App.2d 123—People v. Hyche, 126 P.2d 885, 52 Cal.App.2d 661—People v. Smith, 122 P.2d 288, 49 Cal.App.2d 720—People v. Harrison, 117 P.2d 19, 46 Cal.App.2d 779—People v. Gimiliani, 114 P.2d 392, 45 Cal.App.2d 535—People v. Nobles, 112 P.2d 651, 44 Cal.App. 2d 422—People v. Karpinski, 111 P. 2d 393, 43 Cal.App.2d 545—People v. Von Benson, 101 P.2d 527, 38 Cal.App.2d 431, superseding 99 P. 2d 295—People v. Loehr, 94 P.2d 390, 35 Cal.App.2d 1—People v. Bresh, 91 P.2d 193, 33 Cal.App.2d 161—People v. Christensen, 89 P. 2d 1095, 32 Cal.App.2d 380—People v. Asavis, 81 P.2d 595, 27 Cal.App. 2d 685—People v. Freeman, 75 P.2d 640, 24 Cal.App.2d 619—People v. Mack, 75 P.2d 547, 24 Cal.App.2d 438—People v. Arrangoiz, 74 P.2d 789, 24 Cal.App.2d 116—People v. Spillard, 59 P.2d 887, 15 Cal.App.2d 649—People v. Connell, 59 P.2d 433, 15 Cal.App.2d 380—People v. Roebling, 58 P.2d 929, 14 Cal.App. 2d 586—People v. Adams, 47 P.2d 320, 7 Cal.App.2d 743—People v. Mangus, 42 P.2d 681, 5 Cal.App.2d 353—People v. Kocalis, 35 P.2d 584, 140 Cal.App. 566—People v. Lanham, 31 P.2d 410, 137 Cal.App. 737—People v. Guiterez, 14 P.2d 838, 126 Cal.App. 526—People v. Sargent, 3 P.2d 319, 117 Cal.App. 50—Ex parte Jeffcoates, 262 P. 1105, 88 Cal.App. 221—People v. Russell, 251 P. 699, 80 Cal.App. 243—People v. Ferrari, 251 P. 692, 80 Cal.App. 182—People v. Whitholt, 247 P. 245, 77 Cal.App. 587—People v. Halistik, 230 P. 972, 69 Cal. App. 174—People v. King, 223 P. 1001, 65 Cal.App. 306.

Iowa.—State v. Ragona, 5 N.W.2d 907—State v. Derry, 209 N.W. 514, 202 Iowa 352.

Nev.—Skidmore v. State, 92 P.2d 979, 59 Nev. 320.

31 C.J. p 1000 note 84 [c] (3).

(3) To establish corpus delicti.—People v. Mohr, 75 P.2d 616, 24 Cal. App.2d 580.

(4) To fix date of lascivious conduct.—People v. Barnett, 278 P. 885, 99 Cal.App. 409.

(5) To show that the acts committed by accused were such as are denounced by the statute.

Cal.—People v. McCurdy, 213 P. 59, 60 Cal.App. 499.

Mont.—State v. Kocher, 119 P.2d 35, 112 Mont. 511.

(6) To support finding that no such intent accompanied acts as would make them punishable under some other statute.—People v. Parker, 241 P. 401, 74 Cal.App. 540.

Evidence held insufficient

Cal.—People v. Briggs, 4 P.2d 593, 117 Cal.App. 708—People v. De Vaughan, 288 P. 113, 105 Cal.App. 516.

31 C.J. p 1000 note 84 [d] (4).

27. Evidence held sufficient

(1) To sustain conviction.

Cal.—People v. Lucas, 105 P.2d 102, 16 Cal.2d 178, 130 A.L.R. 1485, superseding, App., 99 P.2d 547—People v. Dorland, 40 P.2d 474, 2 Cal. 2d 235—People v. Calkins, 119 P.2d 142, 48 Cal.App.2d 33—People v. Lopez, 117 P.2d 10, 46 Cal.App. 857—People v. Slepnol, 85 P.2d 474, 30 Cal.App.2d 64—People v. Potter, 44 P.2d 610, 6 Cal.App.2d 474—People v. Wortman, 30 P.2d 565, 137 Cal.App. 339—People v. Koenig, 24 P.2d 852, 133 Cal.App. 701—People v. Kinser, 279 P. 488, 99 Cal. App. 778—People v. Ferello, 268 P. 915, 92 Cal.App. 683—People v. Cohen, 217 P. 78, 62 Cal.App. 521—People v. Morotti, 215 P. 719, 61 Cal.App. 689.

ties,[28] for impairing or endangering the morals of minors,[29] for cruelty to children,[30] for unlawfully employing minors,[31] and other crimes against children[32] has been considered.

Corroboration. To sustain a conviction for the type of crime under discussion it is generally held that the testimony of the complaining witness need not be corroborated;[33] but it has been said that corroboration is desirable to the fullest extent possible,[34] and that a conviction on uncorroborated testimony will not be sustained under all circumstances[35] but will in fact be reversed unless the testimony and surrounding circumstances are quite clear, convincing, and decisive of guilt.[36] In some jurisdictions corroboration is held essential where the complaining witness is incompetent to understand the nature of an oath,[37] or where the complaining witness by testifying to his willing participation in the acts charged places himself in the category of an accomplice whose testimony requires corroboration.[38] Where corroboration is required, it must, of course, be sufficient;[39] there must be corrobora-

Colo.—Sharp v. People, 9 P.2d 483, 90 Colo. 356.
Ill.—People v. Brosnan, 198 N.E. 708, 361 Ill. 545.
Mo.—State v. Johnson, App., 145 S.W.2d 468.
Neb.—Bolker v. State, 278 N.W. 377, 134 Neb. 255.
Wash.—State v. Clevenger, 296 P. 1054, 161 Wash. 306—State v. Lehman, 217 P. 15, 125 Wash. 617.
31 C.J. p 1000 note 84 [c] (2).

(2) To identify accused.—People v. Taylor, 78 P.2d 207, 25 Cal.App.2d 525.

(3) To show minor's delinquency or dependency.—Chambers v. State, 270 S.W. 528, 168 Ark. 248.

(4) To prove corpus delicti.—People v. Carter, 52 P.2d 294, 10 Cal.App.2d 387.

(5) To prove other particular matters.—People v. Miller, 19 P.2d 814, 130 Cal.App. 191.

Evidence held insufficient
Cal.—People v. Wilkerson, 278 P. 466, 99 Cal.App. 123.
Ill.—People v. Chiafreddo, 44 N.E.2d 888, 381 Ill. 214.
Ind.—Stone v. State, 41 N.E.2d 609, 220 Ind. 165.
Pa.—Commonwealth v. Lash, 30 A.2d 609, 151 Pa.Super. 601.
Tex.—Hamilton v. State, 277 S.W. 1069, 102 Tex.Cr. 368—McAbee v. State, 271 S.W. 908, 100 Tex.Cr. 79.
31 C.J. p 1000 note 84 [d] (3).

28. Colo.—Paxton v. People, 246 P. 276, 79 Colo. 361.

Evidence held sufficient
(1) To sustain conviction.
Ill.—People v. Klemann, 48 N.E.2d 957, 383 Ill. 236—People v. Heine, 35 N.E.2d 323, 377 Ill. 134—People v. Anderson, 30 N.E.2d 648, 375 Ill. 163—People v. Sukdol, 153 N.E. 727, 322 Ill. 540—People v. Gilmore, 150 N.E. 631, 320 Ill. 233—People v. Peck, 145 N.E. 353, 314 Ill. 237.
Minn.—State v. McReady, 191 N.W. 816, 154 Minn. 366.
Wash.—State v. Moss, 108 P.2d 633, 6 Wash.2d 629—State v. Stuhr, 96 P.2d 479, 1 Wash.2d 521.
Wis.—State v. Hoffman, 2 N.W.2d 707, 240 Wis. 142.

(2) To sustain finding as to accused's age.—State v. Dorathy, 170 A. 506, 132 Me. 291.

(3) To justify binding over accused for trial.—People v. Lakin, 282 N.W. 149, 286 Mich. 282.

Evidence held insufficient
Ill.—People v. Martin, 44 N.E.2d 49, 380 Ill. 328—People v. Herzberger, 23 N.E.2d 37, 372 Ill. 251—People v. Schwabauer, 16 N.E.2d 723, 369 Ill. 261—People v. Langaas, 171 N.E. 144, 339 Ill. 267.
Mich.—People v. Healy, 251 N.W. 393, 265 Mich. 317.

29. Evidence held sufficient
N.Y.—People, on Complaint of Barber, v. Caminiti, 28 N.Y.S.2d 133.

Evidence held insufficient
N.Y.—People v. Klein, 194 N.E. 402, 266 N.Y. 188—People v. Levy, 37 N.Y.S.2d 648, 265 App.Div. 841—People v. Seto, 9 N.Y.S.2d 429, 256 App.Div. 848—People v. Slaughter, 15 N.E.2d 70, 278 N.Y. 479, reversing 1 N.Y.S.2d 673, 253 App.Div. 802.

30. Evidence held sufficient
Mo.—State v. Evans, 270 S.W. 684.
Ohio.—Nebgen v. State, 192 N.E. 130, 47 Ohio App. 431.

Evidence held insufficient
N.J.—State v. Hankins, 67 A. 1057, 75 N.J.Law 318.

31. Evidence held sufficient
Mass.—Commonwealth v. Wallace Y. Hong, 158 N.E. 759, 261 Mass. 226, 55 A.L.R. 640.

Evidence held insufficient
Tex.—Limon v. State, 124 S.W.2d 122, 136 Tex.Cr. 107.

32. Evidence held sufficient
(1) Generally.
Ky.—Dezarn v. Commonwealth, 243 S.W. 921, 195 Ky. 686.
Miss.—Allen v. State, 166 So. 922, 175 Miss. 745.
Okl.—State v. Vending Mach. Corporation of America, 51 P.2d 724, 174 Okl. 603, 103 A.L.R. 391.
31 C.J. p 1000 note 84 [c].

(2) In action on cigarette dealer's bond.—State v. Vending Mach. Corporation of America, 51 P.2d 724, 174 Okl. 603, 103 A.L.R. 391.

Evidence held insufficient
N.Y.—People, on Complaint of Rosner, v. Rose, 284 N.Y.S. 962, 158 Misc. 508.
31 C.J. p 1000 note 84 [d] (1).

33. Cal.—People v. Lucas, 105 P.2d 102, 16 Cal.2d 178, 130 A.L.R. 1485, superseding, App., 99 P.2d 547—People v. Beatty, 130 P.2d 433, 55 Cal.App.2d 258—People v. Hubbell, 128 P.2d 579, 54 Cal.App.2d 49—People v. Karpinski, 111 P.2d 393, 43 Cal.App.2d 545—People v. Spillard, 59 P.2d 887, 15 Cal.App.2d 649—People v. Chaddock, 38 P.2d 473, 2 Cal.App.2d 643—People v. Geonzelis, 289 P. 667, 106 Cal.App. 434—People v. Anastasion, 249 P. 209, 79 Cal.App. 268—People v. Barbera, 248 P. 304, 78 Cal.App. 277.
31 C.J. p 999 note 83 [c].

Weak testimony
Cal.—People v. Gump, 61 P.2d 970, 17 Cal.App.2d 221.

34. Wis.—Rice v. State, 217 N.W. 697, 195 Wis. 181.

35. Wis.—Rice v. State, supra.

36. Ill.—People v. Herzberger, 23 N.E.2d 37, 372 Ill. 251.
Wis.—Rice v. State, 217 N.W. 697, 195 Wis. 181.

37. N.Y.—People v. Masiano, 3 N.Y.S.2d 766, 253 App.Div. 454—People v. Haber, 12 N.Y.S.2d 406—People v. Fazio, 5 N.Y.S.2d 195.

Necessity of preliminary examination
In view of the statutory presumption that a child under twelve years of age is incompetent to understand the nature of an oath, where such a child was permitted to testify without a preliminary examination as to his competency to be sworn his uncorroborated testimony was insufficient to support a conviction.—People v. Klein, 194 N.E. 402, 266 N.Y. 188.

38. Tex.—Gallager v. State, 97 S.W.2d 954, 131 Tex.Cr. 254.

39. Ill.—People v. Martin, 44 N.E.2d 49, 380 Ill. 328.

tion as to each essential fact of the crime,[40] and a lack of the necessary corroboration cannot be supplied by the testimony of accused after the close of the state's case.[41]

e. Province of Court and Jury

Questions of fact are for the jury; and the weight to be accorded any evidence is exclusively a matter for their determination.

In accordance with the general rule in criminal prosecutions, questions of fact are for the jury provided there is sufficient evidence to support one of several possible findings.[42] The weight to be accorded any evidence is exclusively a matter for the determination of the jury,[43] and their acceptance of the testimony of a witness will not be disturbed unless it appears that such testimony is inherently improbable or impossible of belief.[44]

f. Instructions

General rules governing instructions in criminal prosecutions are applicable.

The general rules governing instructions in criminal prosecutions are applicable in prosecutions for crimes of the type under discussion,[45] such as committing lewd and lascivious acts on the body of a child,[46] contributing to the delinquency or dependency of a minor,[47] or taking indecent liberties.[48]

g. Verdict and Sentence

General rules governing verdicts in criminal prosecutions are applicable. The sentence imposed must conform to the applicable statutory provisions.

General rules respecting verdicts in criminal prosecutions are applicable to the type of prosecutions under discussion.[49] The sentence imposed must con-

Corroboration insufficient

In prosecution for taking indecent liberties with a child, the testimony of prosecuting witness' mother as to identity of guilty person which was based only on prosecuting witness' description of guilty person's automobile was not "corroborative" of prosecuting witness' testimony.—People v. Martin, supra.

40. N.Y.—People v. Haber, 12 N.Y.S.2d 406—People v. Fazio, 5 N.Y.S.2d 195.

41. N.Y.—People v. Fazio, supra.

42. Cal.—People v. Schultz, 120 P.2d 893, 49 Cal.2d 38—People v. Quinn, 55 P.2d 1277, 12 Cal.App.2d 752—People v. Agullana, 40 P.2d 848, 4 Cal.App.2d 34.

Questions held for jury

(1) What is cruel treatment.—Crowe v. Constitution Pub. Co., 11 S.E.2d 513, 63 Ga.App. 497.

(2) Whether acts had tendency to cause delinquency.—State v. Stone, 226 P. 430, 111 Or. 227.

(3) Whether conduct amounts to taking of "indecent liberties."—State v. Hoffman, 2 N.W.2d 707, 240 Wis. 142.

(4) Other questions.—People v. McDougal, 241 P. 598, 74 Cal.App. 666.

Evidence sufficient to go to jury

Cal.—People v. Piburn, 31 P.2d 470, 138 Cal.App. 56—People v. Bronson, 230 P. 213, 69 Cal.App. 83.

Ill.—People v. Klemann, 48 N.E.2d 957, 383 Ill. 236—People v. Haas, 127 N.E. 740, 293 Ill. 274.

Iowa.—State v. Hall, 283 N.W. 414, 225 Iowa 1316.

Mich.—People v. McGovern, 11 N.W.2d 15, 306 Mich. 427.

N.J.—State v. Browne, 143 A. 810, 7 N.J.Misc. 1, certiorari denied 146 A. 350, 7 N.J.Misc. 525.

Va.—McWilliams v. Commonwealth, 181 S.E. 391, 165 Va. 725.

Wash.—State v. Tweedy, 5 P.2d 335, 165 Wash. 281.

31 C.J. p 1000 note 86 [b].

43. Cal.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Schultz, 120 P.2d 893, 49 Cal.2d 38—People v. Slaughter, 115 P.2d 30, 45 Cal.App.2d 724—People v. Loehr, 94 P.2d 390, 35 Cal.App.2d 1—People v. Crownover, 92 P.2d 929, 34 Cal.App.2d 7—People v. Gonzales, 92 P.2d 482, 33 Cal.App.2d 482—People v. Quinn, 55 P.2d 1277, 12 Cal.App.2d 752—People v. Agullana, 40 P.2d 848, 4 Cal.App.2d 34—People v. Ferello, 268 P. 915, 92 Cal.App. 683—People v. Parker, 241 P. 401, 74 Cal.App. 540.

Colo.—Sharp v. People, 9 P.2d 483, 90 Colo. 356.

Ill.—People v. Klemann, 48 N.E.2d 957, 383 Ill. 236.

44. Cal.—People v. Huston, 134 P.2d 758, 21 Cal.2d 690, prior opinion, App., 127 P.2d 1021—People v. Loehr, 94 P.2d 390, 35 Cal.App.2d 1—People v. Ralls, 70 P.2d 265, 21 Cal.App.2d 674—People v. Ferello, 268 P. 915, 92 Cal.App. 683.

45. Cal.—People v. Bush, 133 P.2d 870, 56 Cal.App.2d 877.

Instructions held erroneous

Ill.—People v. Crane, 134 N.E. 99, 302 Ill. 217.

Instructions held not erroneous

Cal.—People v. Young, 186 P. 383, 44 Cal.App. 279.

Instructions held properly refused

Cal.—People v. Troutman, 201 P. 928, 187 Cal. 313.

46. Instructions held proper

(1) Generally.—People v. Schultz, 120 P.2d 893, 49 Cal.2d 38—People v. Navarette, 69 P.2d 449, 21 Cal.App.2d 598—People v. Halistik, 230 P. 972, 69 Cal.App. 174.

(2) As not misleading.—People v. Bush, 133 P.2d 870, 56 Cal.App.2d 877.

(3) As having sufficiently differentiated between the crime charged and other crimes against children.—People v. Dant, 229 P. 983, 68 Cal.App. 588—People v. King, 223 P. 1001, 65 Cal.App. 306.

Instructions held improper

Cal.—People v. Piburn, 31 P.2d 470, 138 Cal.App. 56.

Iowa.—State v. Rounds, 248 N.W. 500, 216 Iowa 131.

47. Instructions held proper

(1) Generally.—People v. Wortman, 30 P.2d 565, 137 Cal.App. 339.

(2) Instruction to acquit of contributing to delinquency of child, unless child was already delinquent at date of alleged offense.—Dunn v. State, 298 S.W. 903, 108 Tex.Cr. 68.

Instructions held improper or properly refused

La.—State v. Scallan, 10 So.2d 885, 201 La. 1026—State v. McCain, 121 So. 583, 168 La. 87.

48. Instructions held proper

Ill.—People v. Czajkowski, 173 N.E. 817, 342 Ill. 144.

Instructions held improper

Ill.—People v. Phipps, 170 N.E. 305, 338 Ill. 373.

Mich.—People v. Visel, 265 N.W. 781, 275 Mich. 77.

49. Necessity of special finding

Where information charged accused with unlawfully, knowingly and wilfully encouraging a male person of the age of sixteen years to become a delinquent child, general verdict finding accused guilty as charged in the information was valid, notwithstanding there was no special finding as to the boy's age.—People v. Kappos, 19 N.E.2d 441, 298 Ill.App. 625.

form to the applicable statutory provisions.[50] The propriety of sentences on convictions for contributing to the delinquency or dependency of minors[51] and other offenses[52] have been passed on by the courts.

h. Review

In the absence of an independent statement of facts, the appellate court is confined to consideration of the facts disclosed by the record before it. Generally speaking, if the proceedings below were correct and proper and free from prejudicial error, the judgment will not be reversed.

In the absence of an independent statement of facts, the appellate court is confined to consideration of the facts as disclosed by the record before it.[53] Under a statute providing that when an appeal from a judgment of the juvenile court is prayed, the judge shall certify the facts of the case in the form of a special finding, and that the finding shall be considered as the basis of the judgment rendered, and that no judgment shall be reversed except as the finding or evidence shall be found to be insufficient, where the finding is not presented to the appellate court no question is presented for review;[54] the court will presume in such case that the findings cover all the facts and that they are sufficient.[55] So, too, where the evidence is not brought up for review, the court will presume that the trial court performed its duty and that the evidence is sufficient.[56] The only proper assignment of error under such a statute is that the decision of the juvenile court is contrary to law.[57]

Generally speaking, if the proceedings in the court below were correct and proper and free from prejudicial error, the judgment will not be reversed.[58] It has been said, however, that in prosecutions of the type under discussion, because of the ease with which such charges are made and the difficulty of disproving them, errors committed either by the prosecution or the court, which ordinarily might be considered trivial, may be regarded as of greater importance,[59] and that courts of last resort will rigorously insist on the observance by the trial court of the rules of evidence and procedure which assure accused of a fair trial.[60] Where a majority of the court are for reversal but do not agree on the specific ground for reversing, the judgment is nevertheless reversed.[61]

§ 17. Probation Officers

Under appropriate statutory provisions, probation officers may be appointed for the purpose of aiding the court in exercising proper control and custody of children.

In most jurisdictions, by force of statute, probation officers may be appointed for the purpose of aiding the court in exercising proper control and custody of children.[62] Such an officer is practical-

50. Cal.—People v. Phair, 31 P.2d 421, 137 Cal.App. 612.

51. Sentence held proper

(1) Under a statute relating to the crime of willfully encouraging a male person of the age of sixteen years to become a delinquent child, sentence of defendant to confinement in the house of correction for a term of one year and to pay fine of one dollar was authorized, and the court was justified in disregarding the jury's recommendation that accused be punished by imposition of fine.—People v. Kappos, 19 N.E.2d 441, 298 Ill.App. 625.

(2) Under provisions for imprisonment in penitentiary, or jail, or fine, for contributing to delinquency of child, penitentiary sentence was proper, notwithstanding prosecuting witness was a wayward girl.—State v. Taylor, 209 N.W. 287, 202 Iowa 189.

(3) The court had jurisdiction to impose sentence of three months in workhouse on conviction for crime of contributing to the dependency of defendant's minor children.—Petticrew v. Webster, 27 N.E.2d 151, 63 Ohio App. 456, appeal dismissed 24 N.E.2d 455, 136 Ohio St. 158.

Imprisonment limited to one year

Cal.—People v. Yalo, 89 P.2d 391, 13 Cal.2d 765—People v. Phair, 31 P.2d 421, 137 Cal.App. 612.

N.Y.—People v. Kelley, 243 N.Y.S. 613, 230 App.Div. 249, 251, 252, followed in 244 N.Y.S. 774 (two cases), 230 App.Div. 252.

52. N.Y.—People v. De Salvo, 294 N.Y.S. 87, 250 App.Div. 292.

Tex.—Clausse v. State, 127 S.W.2d 900, 137 Tex.Cr. 49.

53. Tex.—Walcott v. State, 88 S.W. 2d 714, 129 Tex.Cr. 485.

54. Ind.—Dedrick v. State, 6 N.E.2d 730, 103 Ind.App. 706—Alvey v. State, 199 N.E. 432, 101 Ind.App. 391—Femeyer v. State, 152 N.E. 853, 85 Ind.App. 596—Eddy v. State, 102 N.E. 277, 54 Ind.App. 93.

Time for appeal

Under the statute providing that an appeal to the appellate court shall lie from judgment of the juvenile court, if brought within thirty days, appeal from a conviction for contributing to the delinquency of a ward of the court must be brought within such time, regardless of another statute providing that any person convicted of such charge may appeal to the appellate court.—Cline v. State, 135 N.E. 159, 80 Ind. App. 251.

Findings held sufficient

Ind.—Parker v. State, 113 N.E. 763, 63 Ind.App. 671—Murphy v. State, 111 N.E. 806, 61 Ind.App. 226.

55. Ind.—Alvey v. State, 199 N.E. 432, 101 Ind.App. 391—Yeager v. State, 144 N.E. 846, 82 Ind.App. 566.

56. Ind.—Murphy v. State, 111 N.E. 806, 61 Ind.App. 226.

57. Ind.—Blake v. State, App., 48 N.E.2d 651—Alvey v. State, 199 N. E. 432, 101 Ind.App. 391.

31 C.J. p 999 note 72 [b].

58. Idaho.—State v. Johnson, 246 P. 531, 42 Idaho 381.

59. Cal.—People v. Adams, 93 P.2d 146, 14 Cal.2d 154, superseding, App., 87 P.2d 372.

60. Cal.—People v. Adams, supra.

61. D.C.—Campbell v. District of Columbia, 32 A.2d 394.

62. W.Va.—State v. Monongalia County Court, 96 S.E. 966, 82 W. Va. 564.

31 C.J. p 1000 note 89.

Probation officers:

Generally see Courts § 143.

As county officers see Courts § 143 a.

ly a guardian ad litem for each child brought into court.[63] It is his duty to be present in court in order to represent the interest of the child when the case is heard;[64] and to take such charge of any child, before and after trial, as may be directed by the court.[65] He has authority to make arrests only when such power is incident or necessary to the performance of his duties.[66]

§ 18. Societies for Care and Protection of Children

Societies may be organized to care for dependent or neglected children or for the prevention of cruelty to children. The powers of such organizations are determined by their charters or the governing statutes.

Corporations or societies may be organized for the purpose of caring for dependent or neglected children,[67] to whom the custody and control of such children may be delegated,[68] subject to the supervision of the courts,[69] or for the purpose of preventing cruelty to children.[70] Such organizations occupy the relation of guardians to the children committed to their care.[71] The powers of such incorporated associations are extended and limited to those conferred by their charter or the governing statutes;[72] and any person dealing with them is bound to take notice of such limitations.[73] Ordinarily, such organizations are created for the purpose of securing homes for dependent or neglected children by adoption or otherwise into private families, and with authority to receive such children for such purposes.[74] The legislature may authorize such societies to bind out to service children committed to their care, the societies reserving the right of supervision to see that the children are properly cared for.[75]

III. PRIVILEGES AND DISABILITIES GENERALLY

§ 19. Status in General

Infants have certain disabilities and privileges which do not attach to adults although generally they are bound by the same law.

While generally infants are bound by the law of the land the same as adults,[76] their rights not being superior to those of adults,[77] at common law infants do not possess the power to exercise the same legal rights as adults.[78]

The disabilities of infants are really privileges, which the law gives them, and which they may exercise for their own benefit,[79] the object of the law being to secure infants from damaging themselves or their property by their own improvident acts[80] or prevent them from being imposed on by the

63. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.
Ill.—Witter v. Cook County, 100 N. E. 248, 256 Ill. 616.

64. W.Va.—State v. Monongalia County Ct., 96 S.E. 966, 82 W.Va. 564.
31 C.J. p 1000 note 98.

65. W.Va.—State v. Monongalia County Ct., supra.
31 C.J. p 1000 note 99.

66. W.Va.—State v. Monongalia County Ct., supra.

67. N.D.—In re Kol, 88 N.W. 273, 10 N.D. 493.

68. S.D.—McFall v. Simmons, 81 N. W. 898, 12 S.D. 562.
Va.—Napier v. Prison Assoc., 28 S. E. 598, 95 Va. 431.

69. N.D.—In re Kol, 88 N.W. 273, 10 N.D. 493.

70. N.J.—Esping v. Elizabeth S. P. C. C., 75 A. 547, 79 N.J.Law 357.

71. N.D.—In re Kol, 88 N.W. 273, 10 N.D. 493.

72. N.Y.—People v. New York Catholic Protectory, 4 N.E. 177, 101 N. Y. 195.
31 C.J. p 1001 note 22.

73. Ind.—Milligan v. State, 97 Ind. 355.

Right to reclaim custody
Persons, to whom licensed agency gave temporary custody of child committed to it by court, were charged with knowledge of agency's statutory right to terminate such custody.—Turner v. Children's Home Soc. of Virginia, 163 S.E. 399, 158 Va. 406, 80 A.L.R. 1125.

74. Ind.—Milligan v. State, 97 Ind. 355.
N.D.—In re Kol, 88 N.W. 273, 10 N. D. 493.

75. Ga.—Kennedy v. Meara, 56 S.E. 243, 127 Ga. 68, 9 Ann.Cas. 396.

76. Alaska.—Johnson v. Kennecott Copper Corp., 5 Alaska 571.

Where statute makes no exception of infants from its application, court can make none on ground of any inherent equity applicable to infants. —Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559.

77. N.J.—Anderson v. Anderson, 32 A.2d 83, 183 N.J.Eq. 311—Morris v. Glaser, 151 A. 766, 106 N.J. Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661—Caruso v. Caruso, 141 A. 16, 102 N.J.Eq. 393, reversed on other grounds 148 A. 882, 106 N.J. Eq. 130—Graves v. Graves, 120 A. 420, 94 N.J.Eq. 268—In re March's Estate, 6 A.2d 478, 17 N.J.Misc. 157.
31 C.J. p 1001 note 29.

The rights of adults are not to be defeated because the adversary parties are infants.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661—Graves v. Graves, 120 A. 420, 94 N.J.Eq. 268 —In re Shreve, 103 A. 683, 87 N.J.Eq. 7, 710.

78. N.J.—Young v. Sterling Leather Works, 102 A. 395, 91 N.J.Law 289.

Infancy as badge of incompetency
Minority, and particularly minority to the extent of tender years, is in itself a recognized badge of incompetency of an infant to handle his own affairs.—Hampton v. Ewert, C. C.A.Okl., 22 F.2d 81, certiorari denied Ewert v. Hampton, 48 S.Ct. 303, 276 U.S. 623, 72 L.Ed. 737.

79. Del.—King v Cordrey, 177 A. 303, 306, 6 W.W.Harr. 418, citing **Corpus Juris.**

80. Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.

Hardships arising in particular cases must yield to the operation of the general rule founded on public policy, intended to protect infants from their imprudent acts.—Yubas v. Witaskis, 95 Pa.Super. 296.

fraud of others.[81] While the rights of infants are not superior, they are of greater concern to a court of equity than those of adults,[82] and the rights of infants must be protected by the court, while adults must protect their own rights.[83] Persons dealing with the infant must take notice of his privileges and disabilities.[84]

Although after the death of an infant the privilege of infancy extends to his legal personal representatives,[85] infancy is a personal privilege.[86] An infant cannot disaffirm acts done for others and not affecting his own property.[87]

The limits on the legal capacity of minors to act in their own behalf were not established to defeat the enforcement of their rights.[88] On the other hand, as is often stated, infancy is a shield for the protection of an infant and not a weapon of attack;[89] consequently an infant cannot take advantage of his infancy for the purpose of perpetrating a fraud,[90] nor may he have the benefits from claiming his personal privilege without having imposed on him the disabilities of infancy.[91]

The common-law disability of an infant to enter into a binding transaction is not a property right,[92] and hence such disability may be constitutionally interfered with by the legislature.[93] Accordingly, in the absence of constitutional inhibition, the legislature has the power to fix the age at which the disabilities of infancy shall be removed[94] and to change the age at which an infant is privileged to exercise legal rights which shall be binding on him.[95]

Specific privileges and disabilities which attach to infancy are elsewhere considered, such as the power of acting as agent or trustee see infra § 21; the effect of admissions by infants see infra § 22; adverse possession by or against infants see infra § 32; appointment of agents or attorneys by infants see infra § 23; the capacity of an infant to acquire domicile see Domicile § 12, to acquire property see infra § 47, to act as executor or administrator see Executors and Administrators §§ 28, 46, to act as witness see the C.J.S. title Witnesses § 58, also 70 C.J. p 92 note 2–p 94 note 19, to alienate property see infra §§ 48–56, to commit crime see infra § 95, to commit tort see infra § 87, to contract see infra § 71, to execute power see the C.J.S. title Powers § 35, also 49 C.J. p 1278 notes 51–56, to make will see the C.J.S. title Wills § 8, also 68 C.J. p 419 notes 16–31, to marry see the C.J.S. title Marriage § 11, also 38 C.J. p 1283 note 97–p 1285 note 29, to release dower see Dower § 65, the eligibility of infants to public office or employment see infra § 24; their capacity to exercise the right of election see infra § 25; and their immunity from estoppel see infra §§ 26–27, from laches see Equity § 122, and from waiver or consent see infra § 26.

§ 20. What Law Governs

The status of a person as an infant ordinarily is determined by the law of his domicile but the validity and effect of the acts and transactions of an infant are controlled by the law applicable to such acts and transactions in other cases.

As a general rule in the case of a conflict of laws the law of the domicile regulates the status of a person as an infant[96] and determines as to his

81. Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.

82. N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.

83. N.J.—Anderson v. Anderson, 32 A.2d 83, 133 N.J.Eq. 311—Caruso v. Caruso, 141 A. 16, 102 N.J.Eq. 393, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130—In re March's Estate, 6 A.2d 478, 17 N.J. Misc. 157.

Jurisdiction of courts over property of infants generally see infra § 57.

84. Miss.—Watson v. Peebles, 59 So. 881, 102 Miss. 725.

85. Vt.—Person v. Chase, 37 Vt. 647, 88 Am.D. 630.

31 C.J. p 1001 note 35.

86. Fla.—Persons v. Pflum, 135 So. 878, 102 Fla. 402.

31 C.J. p 1001 note 36.

Who may avoid infant's:

Contract see infra § 75.

Transaction in respect to property see infra § 43.

87. Ohio.—Sheldon v. Newton, 3 Ohio St. 494.

Tex.—Hughes v. Hughes, Com.App., 221 S.W. 970.

88. Mass.—Dellamano v. Francis, 33 N.E.2d 327, 308 Mass. 502.

89. Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341—Conrad v. Martin, 270 S.W. 805, 208 Ky. 411.

Or.—Potter v. Davidson, 20 P.2d 409, 143 Or. 101, rehearing denied 21 P.2d 785, 143 Or. 101.

90. Ky.—Conrad v. Martin, 270 S.W. 805, 208 Ky. 411.

31 C.J. p 1001 note 41.

Estoppel by fraud see infra §§ 26, 27.

Tort liability for fraud see infra § 90.

91. Or.—Potter v. Davidson, 20 P. 2d 409, 143 Or. 101, rehearing denied 21 P.2d 785, 143 Or. 101.

Full effect must be given plaintiff's status, where he seeks affirmative relief because of his infancy.—Potter v. Davidson, 21 P.2d 785, 143 Or. 101, denying rehearing 20 P.2d 409, 143 Or. 101.

92. N.J.—Young v. Sterling Leather Works, 102 A. 395, 91 N.J.Law 289.

93. Tenn.—Scott v. Nashville Bridge Co., 223 S.W. 844, 143 Tenn. 86.

31 C.J. p 1001 note 39.

94. Tenn.—Campbell v. Bon Air Coal & Iron Corporation, 268 S.W. 377, 151 Tenn. 132.

95. N.J.—Young v. Sterling Leather Works, 102 A. 395, 91 N.J.Law 289.

31 C.J. p 1001 note 40.

Power to:

Change age of majority generally see supra § 2.

Remove disabilities see infra § 28.

Extending minority of female

Wash.—Springstun v. Springstun, 229 P. 14, 131 Wash. 109, 40 A.L.R. 595.

96. Me.—White v. Shalit, 1 A.2d 765, 136 Me. 65.

minority or majority, if the status is one recognized by the law of the state where it is called in question, and there is nothing in its law to prohibit giving it effect.[97] On a change of domicile, the question is determined by the law of the new domicile.[98] However, the status of persons within a state is a matter exclusively for the state to determine for itself, and as to transactions within the state by an infant it will not recognize a decree of a foreign state conferring on him rights to transact business with the same effect as though such business were transacted by a person who had acquired a status of majority.[99]

As to a right acquired by law or a legal remedy given, the general rule is that the law of the jurisdiction wherein the right is acquired or the remedy given governs.[1]

As to acts done or contracts made in the place of domicile, it is generally held that the law of the domicile, as to the capacity or incapacity of the person, governs.[2] Where the place of domicile and of the act or contract are not the same, although there may be authority inclined to the contrary,[3] the general rule is that, in case of a conflict between the lex domicilii and lex loci contractus aut actus, the latter will prevail.[4] However, according to the accepted principle governing the exercise of comity, such law will not be given effect where it is contrary to the public policy of the forum.[5] It has been held that where the contract is made in a state other than that of the domicile and the promise is made and is to be substantially performed in the state of the domicile, the law of the latter state governs.[6]

The capacity or incapacity to deal with real estate is governed by the lex loci rei sitæ.[7]

A minor, like any other person, is entitled to the protection of the laws of the state or territory in which he resides or is domiciled.[8]

§ 21. Acting as Agent or Trustee

a. Acting as agent
b. Acting as trustee

a. Acting as Agent

An infant may act as an agent and bind his principal.

It is generally held that an infant may act as agent,[9] his capacity being limited only by the readiness of the principal to intrust to him a commission, and his own physical and mental capacity to carry out the instructions under which he acts.[10] Such agency may be created by parol.[11] To the extent and within the limits discussed in Agency §§ 231–274, the acts of an infant acting as an agent are binding on the principal.[12]

b. Acting as Trustee

An infant may be a trustee and when he acts in such capacity he may not claim the disabilities of infancy.

An infant may be created or charged as a trustee,[13] and in such case he is as much bound to carry out the trust as though he were an adult.[14] Since the infant's right to disaffirmance is personal, as discussed supra § 19 and infra §§ 43, 75, such right does not extend to acts performed by him in a fiduciary capacity.[15] He will not be permitted to re-

97. Md.—Harding v. Schapiro, 87 A. 951, 120 Md. 541.
31 C.J. p 1001 note 43.

98. Ind.—Hiestand v. Kuns, 8 Blackf. 345, 46 Am.D. 481.
Infant's domicile see Domicile § 12.

99. Cal.—Deason v. Jones, 45 P.2d 1025, 7 Cal.App.2d 482.

1. Ky.—Harris v. Berry, 82 Ky. 137, 6 Ky.L. 157.
31 C.J. p 1002 note 47.

Legacy to take effect on majority
Where a provision in a will provides that a gift of personalty shall take effect on the legatee attaining her majority, the question as to the age at which majority is attained is to be determined according to the law of the testator's domicile, and not according to the law of the legatee's domicile.—Harding v. Schapiro, 87 A. 951, 120 Md. 541.

Under federal statute
In disposing of the proceeds of a death action under a federal statute, the determination of the legal age of majority is governed by the law of the United States.—Miller v. Miller, 257 Ill.App. 287.

2. Ind.—Hiestand v. Kuns, 8 Blackf. 345, 46 Am.D. 481.
Pa.—Kohne's Estate, 1 Pars.Eq.Cas. 399.

3. Pa.—Kohne's Estate, supra.

4. Ala.—Wilkinson v. Buster, 26 So. 940, 124 Ala. 574.
Ga.—Peretzman v. Borochoff, 200 S.E. 331, 58 Ga.App. 838.
31 C.J. p 1002 note 50.

5. La.—Le Breton v. Nouchet, 3 Mart. 59, 5 Am.D. 736.

6. N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.

7. Ark.—Beauchamp v. Bertig, 119 S.W. 75, 90 Ark. 351, 23 L.R.A.,N.S., 659.
31 C.J. p 1002 note 55.

8. D.C.—Lehmer v. Hardy, 294 F. 407, 54 App.D.C. 51.

9. Ala.—Cornelius v. Moore, 100 So. 895, 211 Ala. 544.
31 C.J. p 1002 note 57.

10. Ala.—Lyon v. Kent, 45 Ala. 656.

11. Ky.—Talbot v. Bowen, 1 A.K. Marsh. 436, 10 Am.D. 747.

12. Ky.—Talbot v. Bowen, supra.
N.Y.—Kanevsky v. New York, O. & W. R. Co., 103 N.Y.S. 727, 53 Misc. 564.

13. Okl.—Fibikowski v. Fibikowski, 94 P.2d 921, 185 Okl. 520.
31 C.J. p 1002 note 64.
Persons under legal disability as trustees generally see the C.J.S. title Trusts § 205, also 65 C.J. p 570 notes 87–90.

14. Va.—Clary v. Spain, 89 S.E. 130, 119 Va. 58.
31 C.J. p 1002 note 65.

15. Tex.—Hughes v. Hughes, Com. App., 221 S.W. 970.
31 C.J. p 1002 note 67.

ceive property to his own exclusive benefit and then repudiate the trust or equitable charge created by the person from whom he derived it.[16]

§ 22. Admissions

Although admissions of an infant may be shown for what they are worth, they are not binding on him nor do the admissions of another person affect an infant's rights.

An infant is incapable of making an admission which can affect his rights.[17] Although admissions of an infant may be shown for what they are worth,[18] nevertheless they are not binding on him.[19] a fortiori, the admissions of another person cannot affect an infant's rights[20] nor can the admissions of infants bind other persons.[21]

§ 23. Appointment of Agent or Attorney

There is a conflict of authority as to whether an infant may appoint an agent, but even where it is permitted such appointment is voidable.

It is well settled that an infant cannot bind himself absolutely by the appointment of an agent,[22] or by a power, warrant, or letter of attorney.[23] There is a conflict of authority, however, as to whether such act is absolutely void or merely voidable.[24] The modern trend of authorities is that the appointment of an agent by an infant and the acts of the agent under such appointment are not void but only voidable,[25] subject to affirmance or disaffirmance depending on whether or not it is to the infant's advantage,[26] and that he may ratify or deny both the appointment of the agent and the act which the

16. N.Y.—Levin v. Ritz, 41 N.Y.S. 405, 17 Misc. 737.

17. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292.
31 C.J. p 1002 note 70.
Admissions of persons not sui juris generally see Evidence § 315.
Confessions by children see Criminal Law § 829.

18. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875.
Ill.—Reed v. Kabureck, 229 Ill.App. 36.
Mo.—Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 9 A.L.R. 1076.
N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J. Eq. 203.
N.Y.—Ackerman v. Runyon, 1 Hilt. 169, 3 Abb.Pr. 111.
22 C.J. p 345 note 5.

19. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875.
22 C.J. p 345 note 9.

20. Tex.—Wright v. Jones, Com. App., 52 S.W.2d 247, reversing, Civ. App., 33 S.W.2d 292.
31 C.J. p 1002 note 71.
Admission of:
Adult codefendant see infra § 117.
Guardian see Evidence § 367.
Guardian ad litem or next friend see infra §§ 111, 117.

21. Colo.—Barker v. Hamilton, 3 Colo. 291.
Mich.—Smith v. Smith, 13 Mich. 258.

22. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing **Corpus Juris.**
Mo.—Curtis v. Alexander, 257 S.W. 432—Hodge v. Feiner, App., 78 S. W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483.
31 C.J. p 1002 note 74.
Liability of infant for torts of his agent see infra § 87.

Advice of family meeting
An attorney representing a minor was powerless to act for his client without advice of family meeting.—Milburn v. Wemple, 101 So. 132, 156 La. 759.

Liability for acts
Infants are affected by acts done on their account by a person whom they direct so to act, to the extent to which they have capacity to give consent and become parties to the transaction.—Woodson v. Hare, Ala., 13 So.2d 172.

23. Mo.—Curtis v. Alexander, 257 S. W. 432.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
31 C.J. p 1003 note 75.
Appearance and representation by attorney see infra § 114.
Professional services of attorney as necessaries see infra § 78.

Warrant to confess judgment
(1) A warrant of attorney by a minor to confess a judgment, is void no matter what the circumstances.—Vacuum Oil Co. v. Pitarra, 32 Luz. Leg.Reg., Pa., 224.

(2) Judgment confessed on bond after infant's majority pursuant to warrant of attorney executed shortly before infant's majority could not be repudiated by infant for the first time more than ten years later, even though he was merely a surety on such bond.—King v. Cordrey, 177 A. 303, 6 W.W.Harr, Del., 418.

24. Or.—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.

25. Colo.—Sipes v. Sipes, 287 P. 284, 87 Colo. 301.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Kan.—Crawford v. Firmin, 59 P.2d 27, 144 Kan. 270.
Mass.—Chamberlain v. Employers' Liability Assur. Corporation, 194 N.E. 310, 289 Mass. 412.
N.J.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.
Pa.—Feagles v. Sullivan, 32 Pa.Dist. & Co. 47.
31 C.J. p 1003 note 82.

At least voidable
U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.

Better rule is that minor's appointment of an agent is voidable and not void.—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.

Well-considered case
Del.—King v. Cordrey, 177 A. 303, 306, 6 W.W.Harr. 418, citing **Corpus Juris.**

In New York
(1) Earlier cases held that an infant's appointment of an agent was void.—Fonda v. Van Horn, 15 Wend. 631—31 C.J. p 1003 note 76.

(2) However, it is now well established that an infant may appoint an agent, although his agreement in this regard, like his other contracts, is voidable at his election.—Casey v. Kastel, 142 N.E. 671, 673, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738—Goldfinger v. Doherty, 276 N.Y. S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.

(3) "Notwithstanding numerous general statements in the books, sound principles compel the conclusion that no satisfactory distinction can be drawn between a sale and delivery by the infant and delivery by an agent for him . . . [and] dicta and general statements to the contrary are no longer respectable authority."—Casey v. Kastel, supra.

26. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.

agent has assumed to do for him.[27] On the other hand, it has frequently been asserted that an infant's appointment of an agent is absolutely void[28] and cannot be ratified by him after he becomes of age;[29] but most of these statements seem to be mere dicta, the cases either involving no question of agency at all,[30] or containing other facts or circumstances which may have lead the court to the same decision whether the act was void or voidable.[31] Many of the cases were actions in which the infant was seeking to disaffirm the act of the agent[32] or in which there had been no ratification of the act by the infant on reaching majority.[33]

The rule that an infant is incapable of appointing an attorney does not preclude the right or power of the infant's next friend to appoint an attorney.[34]

§ 24. Eligibility to Public Office or Employment

At common law infants are eligible to offices which are ministerial but not to offices which are judicial or concern the administration of justice.

At common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only;[35] but they are not eligible to offices which are judicial or concern the administration of justice,[36] nor should offices imposing duties to the proper discharge of which judgment, discretion, and experience are necessary be intrusted to infants.[37] In accordance with these rules it has been held that an infant may be an appraiser of land to be sold on execution,[38] an overseer of a public road,[39] or a deputy county clerk.[40] On the other hand, it has been held that an infant cannot act as a deputy sheriff[41] or a constable.[42]

Service of process or writ by an infant generally is considered in the C.J.S. title Process § 30, also 50 C.J. p 474 notes 64, 65, and by an infant specially deputized or appointed in the C.J.S. title Process § 29, also 31 C.J. p 1004 notes 6-8.

Acting as de facto officer. To the extent and within the limitations governing the acts of de facto

Colo.—Sipes v. Sipes, 287 P. 284, 87 Colo. 301.
31 C.J. p 1004 note 83.

27. Mass.—Chamberlain v. Employers' Liability Assur. Corporation, 194 N.E. 310, 289 Mass. 412.
31 C.J. p 1004 note 84.

Acceptance of investment
Where, under court order, fund belonging to infant was deposited with city chamberlain who purchased mortgage certificate constituting legal investment for trust funds, infant's acceptance of mortgage certificate on his attaining majority precluded him from making claim against city because certificate had depreciated in value.—Nepola v. City of New York, 284 N.Y.S. 314, 246 App. Div. 15.

Time of ratification
An infant cannot, during minority, ratify an act done by one assuming without authority to act as its agent.—Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116, and modified on other grounds Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995.

28. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211.
Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E.2d 104, 310 Ill.App. 582—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.
Mo.—Curtis v. Alexander, 257 S.W. 432—Hodge v. Feiner, App., 78 S.W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483.
Tenn.—Wilson v. Moudy, 123 S.W. 2d 828, 22 Tenn.App. 356.
31 C.J. p 1003 note 76.
Infant's avoidance of contracts generally see infra § 75.

At common law, powers of attorney and agencies of all sorts were among those contracts of an infant which were absolutely void.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.

Minor cannot give a delegation of power
N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.

29. Mo.—Curtis v. Alexander, 257 S. W. 432—Hodge v. Feiner, App., 78 S.W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483.
Ratification of:
Contracts see infra § 74.
Conveyances see infra § 39.

30. Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N. E.2d 104, 310 Ill.App. 582.
31 C.J. p 1003 note 77.

31. Ill.—Johnson v. Turner, 49 N.E. 2d 297, 319 Ill.App. 265.
31 C.J. p 1003 note 78.

32. Ga.—Siegelstein v. Fenner and Beane, 17 S.E.2d 907, 66 Ga.App. 345.
31 C.J. p 1003 note 79.
Right to avoid:
Contracts see infra § 75.
Property transactions see infra § 43.

33. Ind.—Burns v. Smith, 64 N.E. 94, 29 Ind.App. 181, 94 Am.S.R. 268.
31 C.J. p 1003 note 81.

34. Ala.—Smoot v. Ryan, 65 So. 828, 187 Ala. 396.
Appearance and representation by attorney see infra § 114.

35. N.H.—In re Golding, 57 N.H. 146, 24 Am.R. 66.
31 C.J. p 1004 note 87.

36. Tex.—Harkreader v. State, 33 S. W. 117, 35 Tex.Cr. 243, 60 Am.S.R. 40.
31 C.J. p 1004 note 88.

37. N.H.—In re Golding, 57 N.H. 146, 24 Am R. 66—Moore v. Graves, 3 N.H. 408.
Infant's eligibility to be:
Clerk of court see Clerks of Courts § 86.
Grand juror see Grand Juries § 6 (b).
Juror see the C.J.S. title Juries § 138, also 35 C.J. p 245 note 42-p 246 note 44.
Justice of the peace see the C.J.S. title Justices of the Peace § 5, also 35 C.J. p 457 note 98.
Notary see the C.J.S. title Notaries § 2, also 46 C.J. p 503 notes 27-29.

38. Ky.—White v. Laurel Land Co., 82 S.W. 571, 26 Ky.L. 775, 83 S.W. 628, 26 Ky.L. 1235.

39. Ala.—Allison v. State, 60 Ala. 54.

40. Tex.—Harkreader v. State, 33 S. W. 117, 35 Tex.Cr. 243, 60 Am.S.R. 40.

41. Ind.—New Albany & S. R. Co. v. Grooms, 9 Ind. 243.

42. Ala.—Floyd v. State, 79 Ala. 39.

officers, considered in the C.J.S. title Officers §§ 135–147, also 46 C.J. p 1053 note 85–p 1062 note 82, where a minor exercises an office which his infancy prevents him from holding lawfully his acts are not necessarily void,[43] but may be sustained as those of a de facto officer.[44]

§ 25. Exercising Right of Election

An infant does not have the legal capacity to exercise a right or power of election without the consent of the court; such exercise should be by the court, which will act only if it is beneficial to the infant.

An infant has not the legal capacity to exercise a right or power of election[45] without consent of the court,[46] and the exercise should be by the court.[47] Where other rights are involved a court of equity may exercise the right for him[48] or bar him from a future exercise of the right.[49] The court in making an election for an infant will consider whether it is beneficial to do so,[50] and in case it is not beneficial will not make the election.[51]

§ 26. Estoppel, Waiver, or Consent in General

a. Estoppel
b. Waiver or consent

a. Estoppel

As a general rule the doctrine of estoppel is not applicable to an infant although exceptions are recognized to the rule or its application is denied where the infant has attained years of discretion and his conduct is intentional and fraudulent.

It has been laid down that as a general rule the doctrine of estoppel has no application to an infant,[52] even though he has reached the age of discretion.[53] However, there are cases recognizing an exception to this rule or denying its application where the conduct of the infant, on which the estoppel is sought to be based, was intentional and fraudulent, and the infant was at the time of years of discretion.[54] Under particular circumstances the

43. Cal.—Page v. Mintzer, 184 P. 690, 42 Cal.App. 694.
31 C.J. p 1004 note 10.

44. Miss.—Wimberly v. Boland, 16 So. 905, 72 Miss. 241.
31 C.J. p 1004 note 11.

45. N.Y.—Crowe v. Fort Greene Nat. Bank in New York, 3 N.Y.S.2d 513, 515, 167 Misc. 100, citing **Corpus Juris.**
31 C.J. p 1004 note 13.
Election:
By:
Guardian see Guardian and Ward § 68.
Guardian ad litem or next friend see infra § 111.
Under will see the C.J.S. title Wills § 1246, also 69 C.J. p 1109 notes 95–98.

46. N.Y.—Crowe v. Fort Greene Nat. Bank in New York, 3 N.Y.S.2d 513, 167 Misc. 100.

47. Ala.—Abney v. Abney, 62 So. 64, 182 Ala. 213.
31 C.J. p 1004 note 14.

48. Ala.—Goodman v. Winter, 64 Ala. 410, 38 Am.R. 13.
31 C.J. p 1004 note 15.

49. Ill.—Grattan v. Grattan, 18 Ill. 167, 65 Am.D. 726.

50. Ky.—Moorman v. Louisville Trust Co., 203 S.W. 856, 181 Ky. 30.
S.C.—Cauldwell v. Hannahan, 16 S. C.Eq. 352.

51. Ky.—Moorman v. Louisville Trust Co., 203 S.W. 856, 181 Ky. 30.
31 C.J. p 1004 note 18.

52. Fla.—Watkins v. Watkins, 166 So. 577, 578, 123 Fla. 267, citing **Corpus Juris.**
Ga.—Brown v. Anderson, 197 S.E. 761, 186 Ga. 220, followed in 197 S.E. 833, 186 Ga. 222—Pierce v. J. A. Alford & Sons, 179 S.E. 84, 180 Ga. 327—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203, citing **Corpus Juris.**
Ill.—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161.
Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 106.
N.J.—Rothenberg v. Franklin Washington Trust Co., 19 A.2d 640, 129 N.J.Eq. 361, modifying 13 A.2d 667, 127 N.J.Eq. 406.
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App. Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.
Or.—Skyles v. Kincaid, 264 P. 432, 436, 124 Or. 443, citing **Corpus Juris.**
S.C.—Floyd v. Page, 124 S.E. 1, 129 S. C. 301.
Tex.—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W.2d 281.
31 C.J. p 1005 note 20.
Estoppel of:
Emancipated minor see infra § 30.
Person accepting benefits of contract to assert invalidity of contract because of minority of a party see Estoppel § 110 a.
Third persons acquiescing in employment of infant to repudiate transaction see Estoppel § 114 b.

Status of majority cannot be created by estoppel.—Broussard v. Rosenblum, 5 La.App. 245.

If there can be no legal waiver the principle of estoppel does not arise as against a minor.—Hess v. Gerhart, 19 Pa.Dist. & Co. 253, 43 Lanc.L.Rev. 585, 47 York Leg.Rec. 97.

In actions ex contractu
In view of Rev.St.1919 § 2173, in actions ex contractu, an infant is not estopped by misrepresentations made during infancy.—Gerkey v. Hampe, Mo.App., 274 S.W. 510.

53. Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 S.W. 42; Miller v. St. Louis & S. F. R. Co., 174 S.W. 166, 188 Mo.App. 402.

54. Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345—Clemons v. Olshine, 187 S.E. 711, 54 Ga.App. 290—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Ill.—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161.
S.C.—Floyd v. Page, 124 S.E. 1, 6, 129 S.C. 301, quoting **Corpus Juris.**
31 C.J. p 1005 note 22.
Fraudulent misrepresentation as to age see infra § 27.
"Waivers or estoppels [are] not ordinarily imputable against infants, except an estoppel in pais based on fraud and deceit by an infant who has reached an age of discretion when fraud can be imputed against him."—Brown v. Anderson, 197 S.E. 761, 762, 186 Ga. 220, followed in 197 S.E. 833, 186 Ga. 222.

Doctrine based on tort
The only theory on which doctrine of estoppel is ever applicable to civil transactions of infants is that conduct relied on constitutes a tort, unconnected with contract for which infant might be held civilly liable.—Floyd v. Page, 124 S.E. 1, 129 S.C. 301.

Rule applicable at law
Infant of sufficient age and capacity to comprehend nature, signifi-

benefits of a particular transaction may have been so appropriated for his advantage as to give rise to a form of equitable estoppel.[55] However, in order that an estoppel may become effective against an infant, the evidence supporting it must be certain, clear, and unequivocal.[56]

Elements of estoppel. If an estoppel can arise against an infant, all the elements of estoppel must concur.[57] The conduct of the infant must have been fraudulent,[58] and believed in, relied on, and acted on by the other party[59] to his detriment.[60]

Estoppel to assert title to property. Although exceptions to the rule have been recognized,[61] ordinarily an infant cannot estop himself to assert title or right to his own property,[62] and certainly he cannot be estopped by the acts or admissions of other persons.[63] Still his declarations that he does not own certain property may be competent evidence against him when the title to the property is in question.[64]

Estoppel to disaffirm transaction. While, if the particular transaction is considered void, no estoppel can arise,[65] in case of a merely voidable transaction the doctrine of estoppel being as a general rule not applicable to infants, the courts are reluctant to hold that the acts of an infant during infancy have created an estoppel against him to disaffirm his civil acts or transactions where the facts are at all consistent with a contrary opinion.[66] Certainly he cannot be estopped to do so by the acts, admissions, or misrepresentations of other persons.[67] Some cases hold that an infant cannot be estopped by a fraudulent representation that is the basis of a contract between him and another.[68] However, some authorities which maintain this doctrine assert the right of estoppel against him where,

cance, and probable consequences of his contractual undertaking, who procured making of such agreement by fraud, acquired benefits thereof, and retained them, may be estopped even in court of law to escape liability because of infancy.—Sawicki v. Slahor, 167 A. 691, 11 N.J.Misc. 604.

Even as against innocent purchaser for value, minor is not estopped by his acts which mislead another to his injury unless such acts were intentional and fraudulent.—Uhlmann Grain Co. of Texas v. Wilson, Tex. Civ.App., 68 S.W.2d 281.

55. Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.
S.C.—Davis v. Strauss, 174 S.E. 908, 173 S.C. 99.
31 C.J. p 1005 note 23.
Equitable estoppel generally see Estoppel §§ 59–129.

Infant's consumption of irreturnable benefits

An infant is estopped to exercise his privilege of avoiding a fair and reasonable contract on the ground of his minority at the time the agreement was made, where it appears that he has received, enjoyed, and consumed its irreturnable benefits.—Clemons v. Olshine, 187 S.E. 711, 54 Ga.App. 290—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.

56. Mo.—Gerkey v. Hampe, App., 274 S.W. 510.

57. Fla.—Watkins v. Watkins, 166 So. 577, 578, 123 Fla. 267, citing **Corpus Juris.**
Ill.—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161, 168, citing **Corpus Juris.**
31 C.J. p 1005 note 30.

58. Fla.—Watkins v. Watkins, 166 So. 577, 578, 123 Fla. 267, citing **Corpus Juris.**
Ill.—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161, 168, citing **Corpus Juris.**
S.C.—Floyd v. Page, 124 S.E. 1, 6, 129 S.C. 301, citing **Corpus Juris.**
31 C.J. p 1005 note 31.

59. Fla.—Watkins v. Watkins, 166 So. 577, 123 Fla. 267.
Ill.—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161, 168, citing **Corpus Juris.**
31 C.J. p 1005 note 32.

Evidence held insufficient to show that purchaser was misled by infant's misrepresentations.—Floyd v. Page, 124 S.E. 1, 129 S.C. 301.

60. S.C.—Floyd v. Page, supra.

61. Ala.—Cheek v. Odom, 100 So. 782, 20 Ala.App. 31.
Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.

62. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875, 876, quoting **Corpus Juris.**
31 C.J. p 1005 note 26.

Matters not constituting estoppel

(1) Notification to infant that person would buy property from his alleged grantee.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.

(2) Failure to declare ownership and assert rights at time of wrongful levy does not preclude action therefor.—Cheek v. Odom, 100 So. 782, 20 Ala.App. 31.

(3) Acceptance of share of money from sale of homestead during minority does not preclude setting aside sale.—Hart v. Wimberly, 296 S.W. 39, 173 Ark. 1083.

(4) Leaving documents in possession of father is not such negligence as to forfeit rights as against bona fide purchaser of documents.—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738.

63. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875, 876, quoting **Corpus Juris.**
31 C.J. p 1005 note 27.

64. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, supra, quoting **Corpus Juris.**
31 C.J. p 1005 note 28.

65. Cal.—Hakes Inv. Co. v. Lyons, 137 P. 911, 166 Cal. 557.
31 C.J. p 1006 note 34.

66. Ark.—Hart v. Wimberly, 296 S.W. 39, 173 Ark. 1083.
Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738.
S.C.—Floyd v. Page, 124 S.E. 1, 129 S.C. 301.
31 C.J. p 1006 note 36.
Estoppel by acts after:
Attaining majority see infra §§ 43, 75.
Emancipation see infra § 30.

67. Tex.—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W. 2d 281.
31 C.J. p 1006 note 37.

68. Miss.—Ferguson v. Bobo, 54 Miss. 121.
Mo.—Gerkey v. Hampe, App., 274 S. W. 510.

Reason for rule

"To hold otherwise would be to enforce the contract which the law permits the minor to avoid; it would convert a representation into a warranty, and be equivalent to holding that the fraud itself was an undertaking or warranty."—Woodall v.

by his conduct, he has led others to act to their prejudice in dealing with persons other than himself,[69] and it is generally held that, if the infant has arrived at years of discretion, his fraudulent conduct, which has been intentional or willful, on which the other party to the transaction has in good faith relied, and which has worked detriment to such party, may estop him to avoid or disaffirm his civil acts or transactions,[70] at least without returning the consideration.[71]

The receipt of money or property by an infant during the course of a transaction does not preclude him from repudiating such transaction.[72]

Right to assert estoppel. It has been said that an infant is not bound by an estoppel in pais and therefore he cannot claim one against an adult since such an estoppel would lack mutuality.[73]

b. Waiver or Consent

An infant is not capable of waiving his rights or of consenting to a violation thereof, nor can there be such a waiver or consent by a third person unless authorized by law.

In the absence of bad faith the doctrine of waiver does not apply to an infant,[74] nor can he consent to the violation of his rights,[75] and no third person not authorized by law to do so can under any circumstances dispose of or weaken the infant's rights by any consent or waiver.[76]

§ 27. —— False Representation as to Age

The authorities are divided as to whether an infant's false representation as to his age will estop him from claiming the disabilities of infancy as to his voidable transactions, but even in jurisdictions permitting such estoppel, before it can be invoked, all the elements of an estoppel must coexist.

On the question as to what effect the false representation of an infant as to his age has on a merely voidable civil transaction entered into by the other party relying thereon, there is conflict of authority.[77]

According to the weight of authority, the fact that an infant, at the time of entering into such transaction, misrepresented his age to the person with whom he dealt does not give any validity to the transaction or estop the infant from disaffirming the same or setting up the defense of infancy, against the enforcement of any rights thereunder.[78]

Grant & Co., 9 S.E.2d 95, 62 Ga.App. 581.

69. Miss.—Ferguson v. Bobo, 54 Miss. 121.
31 C.J. p 1006 note 39.

70. Ga.—Clemons v. Olshine, 187 S. E. 711, 54 Ga.App. 290.
Ky.—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383.
31 C.J. p 1006 note 40.

71. Ky.—Smith v. Cole, 146 S.W. 30, 148 Ky. 138.
Return of property or consideration on disaffirmance of:
Contract see infra § 75.
Property transaction see infra § 46.

72. Ark.—Hart v. Wimberly, 296 S. W. 39, 173 Ark. 1083.
N.C.—Millsaps v. Estes, 50 S.E. 227, 137 N.C. 535, 107 Am.S.R. 496, 70 L.R.A. 170, rehearing 46 S.E. 988, 134 N.C. 486.

73. Ala.—Montgomery v. Gordon, 51 Ala. 377.

74. Ga.—Brown v. Anderson, 197 S. E. 761, 186 Ga. 220, followed in 197 S.E. 833, 186 Ga. 222.
31 C.J. p 1008 note 67.
"Minors being persons non sui juris cannot themselves waive any rights."—Watson v. Glenn, Tex.Civ. App., 82 S.W.2d 704.
Appointment of guardian
(1) A minor cannot waive the legal requirement that an action against him can be maintained only through the appointment of a guardian.—Hess v. Gerhart, 19 Pa.Dist. & Co. 253, 43 Lanc.L.Rev. 585, 47 York Leg.Rec. 97.
(2) Necessity for appointment of guardian ad litem or next friend see infra § 108.

75. N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.
31 C.J. p 1008 note 68.

76. Me.—Therriault v. Breton, 95 A. 699, 114 Me. 137.
N.Y.—Jongers v. First Trust & Deposit Co., 263 N.Y.S. 619, 147 Misc. 260.
Consent or waiver by:
General guardian see Guardian and Ward § 73.
Guardian ad litem or next friend see infra § 111.
No consent can be given for infant which will waive any of her substantive rights under law governing distribution of assets of estate.—Caruso v. Caruso, 143 A. 771, 103 N.J. Eq. 487, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.

77. U.S.—Myers v. Hurley Motor Co., App.D.C., 47 S.Ct. 277, 273 U. S. 18, 71 L.Ed. 515, 50 A.L.R. 1181.
Ga.—Clemons v. Olshine, 187 S.E. 711, 713, 54 Ga.App. 290, citing **Corpus Juris.**

78. U.S.—Myers v. Hurley Motor Co., App.D.C., 47 S.Ct. 277, 273 U. S. 18, 71 L.Ed. 515, 50 A.L.R. 1181.
Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 235 Ala. 275.
Ark.—Foreman v. Dickinson, 6 S.W. 2d 829, 177 Ark. 121—Arkansas Reo Motor Car Co. v. Goodlett, 258 S. W. 975, 163 Ark. 35.
Cal.—Williams v. Leon T. Shettler Co., 276 P. 1065, 98 Cal.App. 282.
Me.—Sawyer Boot & Shoe Co. v. Braveman, 136 A. 290, 126 Me. 70.
Mass.—Tracey v. Brown, 163 N.E. 885, 265 Mass. 163—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Minn.—Steigerwalt v. Woodhead Co., 244 N.W. 412, 186 Minn. 558.
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Ohio.—Summit Auto Co. v. Jenkins, 153 N.E. 153, 20 Ohio App. 229.
Pa.—Osipovitch v. Golnick, 44 Lack. Jur. 145—Osipovitch v. Golnick, 43 Lack.Jur. 189, 56 York Leg.Rec. 123.
31 C.J. p 1006 note 46.
Estoppel where transaction is void see supra § 26 a.
Reason for rule
If a minor cannot make a valid contract, he cannot by his act or conduct, during minority, become legally bound thereby.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

This has been held true notwithstanding the infant's appearance of maturity,[79] and the rule has been applied to deeds, mortgages, or other instruments affecting an infant's realty.[80] Under other authorities such misrepresentations may, under some circumstances,[81] when accompanied with the other elements of estoppel, and in the absence of bad faith on the part of the other party to the transaction,[82] or where the infant made the false representation of his age with fraudulent intent,[83] estop the infant from disaffirming the transaction both at law[84] and in equity,[85] especially if the situation and appearance of the alleged infant at the time were such as tended to corroborate the statement as to his being of full age.[86] This rule has been applied to deeds, mortgages, or other instruments affecting an infant's realty.[87] By force of statute, in some jurisdictions, no contract or transaction can be disaffirmed where, on account of the infant's misrepresentation as to his majority, the other party had good reason to believe the infant capable of contracting.[88]

If a misrepresentation as to age may work an estoppel the other elements of estoppel must coexist in order that it may do so.[89] The rule that will work an estoppel will be applied only when necessary to protect the other party to the transaction from what would otherwise be a fraud.[90] It will not be applied where he has knowledge of the infancy,[91] or where, from the infant's appearance,

Remedy in tort

(1) In an action by an infant who had disaffirmed his contract, the fact that the infant, at the time the contract was made, fraudulently represented that he was of age cannot be used defensively by defendant, and defendant's remedy, if any, for the fraud of the infant is in tort in the nature of an action of deceit against the minor.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

(2) Infant's false representations as to age, inducing contract, may be set up by defendant in infant's action ex contractu as a separate defense in tort.—Chasser v. Hutton, 248 N.Y.S. 136, 139 Misc. 623.

79. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

80. Ark.—Moore v. Smith, 155 S.W. 2d 572, 202 Ark. 1197.
S.C.—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.
31 C.J. p 1007 note 47.

81. Ky.—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.
N.J.—Horwitz v. Hudson County Nat. Bank, 13 A.2d 495, 125 N.J.Law 3.
Tex.—Mitchell v. Higginbotham-Pearlstone Hardware Co., Civ.App., 38 S.W.2d 390.

Absence of verbal representation

If infant's conduct was such as naturally and reasonably to induce another to believe that he was of full age and to deal with him on that assumption, although he may have made no verbal misstatement as to his age, infant was estopped from defending on the ground of minority.—First State Bank v. Edwards, Tex. Civ.App., 245 S.W. 478.

82. Ga.—Clemons v. Olshine, 187 S. E. 711, 54 Ga.App. 290—Watters v. Arrington, 146 S.E. 773, 39 Ga.App. 275—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Ky.—Burk v. Moore, 272 S.W. 38, 209 Ky. 24.
Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 106.
N.J.—Reggiori v. Forbes, 26 A.2d 145, 128 N.J.Law 391.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192.
31 C.J. p 1007 note 48.

83. Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.

Positive fraud

(1) Mere silence or passive acquiescence is insufficient.—Wood v. Imperial Motor Co., 5 Tenn.App. 246.

(2) Active fraud is required.—Conrad v. Martin, 270 S.W. 805, 208 Ky. 411.

Fraud not shown

Ill.—Burnet v. Chapin, 274 Ill.App. 186—Hunter v. Egolf Motor Co., 268 Ill.App. 1.

84. N.J.—Reggiori v. Forbes, 26 A. 2d 145, 128 N.J.Law 391—La Rosa v. Nichols, 105 A. 201, 92 N.J.Law 375, 6 A.L.R. 412, reversing 103 A. 390, 91 N.J.Law 355.

85. N.J.—Reggiori v. Forbes, 26 A. 2d 145, 128 N.J.Law 391.
31 C.J. p 1007 note 50.

86. N.J.—Brinkman v. Dorsey Motors, Inc., 1 A.2d 473, 121 N.J.Law 115.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192, quoting **Corpus Juris.**
31 C.J. p 1007 note 51.

Appearance of majority coupled with fraud

Personal appearance, family surroundings, or business activities, coupled with a misrepresentation by the infant leading one who deals with him in good faith and not knowing of his infancy to believe he is of age, will estop him from thereafter maintaining an action to avoid an executed contract.—Pinnacle Motor Co. v. Daugherty, 21 S.W.2d 1001, 231 Ky. 626—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.

87. Tex.—First State Bank v. Edwards, Civ.App., 245 S.W. 478.
31 C.J. p 1007 note 52.

Subsequent purchaser from infant affected by estoppel

Ky.—Burk v. Moore, 272 S.W. 38, 209 Ky. 24—Damron v. Commonwealth, 61 S.W. 459, 22 Ky.L. 1717.

88. Wash.—Thosath v. Transport Motor Co., 240 P. 921, 136 Wash. 565.
31 C.J. p 1007 note 53.

Good reason held not to exist

Kan.—McClure Motor Co. v. Irwin, 21 P.2d 403, 137 Kan. 528, reheard 23 P.2d 470, 138 Kan. 35.

89. Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246.
31 C.J. p 1005 note 30 [a].

Damage or detriment

In the absence of fraudulent intent in making a misrepresentation of age and proof of actual damages suffered by the party dealing with the infant in reliance on the representation, the infant may disaffirm the transaction.—Burnet v. Chapin, 274 Ill.App. 186.

Right to rely

Grantee was not entitled to rely on estoppel based on minor grantor's misrepresentation of age, where grantee sustained a confidential relationship to infant and could not have been deceived by the misrepresentation, and she procured the land for a mere pittance.—Mitchell v. Swartz, 270 S.W. 22, 207 Ky. 780.

90. Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.
Ky.—Asher v. Bennett, 136 S.W. 879, 143 Ky. 361.
Tenn.—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.

91. Kan.—McClure Motor Co. v. Irwin, 23 P.2d 470, 138 Kan. 35, rehearing 21 P.2d 403, 137 Kan. 528.
Ky.—Elkhorn Coal Corporation v.

situation, or other circumstance, he should, as a reasonably prudent man, have knowledge of the infancy.[92] If the misrepresentation as to his age was induced by the other party to the transaction,[93] or by the agent of such party,[94] no estoppel arises.

Under some authorities, an infant who represents himself to be an adult, is estopped from setting up infancy only if he has received a benefit under the contract or transaction he fraudulently induced,[95] and retains it,[96] but on the other hand, it is stated that if the infant is able to do so and makes timely offer to return such benefit or the reasonable value of the use and benefit which inured to him, he will not be estopped because of his misrepresentation of age.[97]

Mere failure to give notice of the fact of infancy, without any representations on the subject or any intent to defraud, has been held insufficient to create an estoppel,[98] although the infant appeared to be of age and was believed by the other party so to be.[99] The execution of the instrument is not in itself a sufficient misrepresentation by the infant as to his age.[1] There is authority, however, to the effect that if the infant has arrived at the age of discretion and under the circumstances of the case it was his duty to disclose his minority, he may be estopped by his failure to do so,[2] as, for example, where the infant's personal appearance, family surroundings, or business activities, coupled with his fraudulent concealment, lead one, who deals with him in good faith and not knowing of his infancy, to believe he is of age.[3]

Representation by third person. One who holds out an infant as being of full age is estopped to set up the infancy against a person who has acted on the representation with nothing to put him on notice of the truth,[4] but the infant is not estopped by such third person's misrepresentation of the infant's age.[5]

§ 28. Removal of Disabilities or Emancipation

Subject to constitutional prohibitions, the legislature has the power to remove the disabilities of infancy.

The extent to which the disability of minority may be removed depends on statutory and consti-

Tackett, 88 S.W.2d 943, 948, 261 Ky. 795, citing **Corpus Juris.**
Tex.—Jones v. Teat, Civ.App., 57 S.W.2d 617, affirmed Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480.
31 C.J. p 1007 note 57.

92. Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 948, 261 Ky. 795, citing **Corpus Juris.**
31 C.J. p 1007 note 58.
Investigation
(1) It is not necessary for the party relying on the infant's misrepresentation of age to show that he made an independent investigation as to the age of the infant, where no fact or circumstance appears, such as the youthful appearance of the infant, to throw some doubt or suspicion on the truthfulness of the representation.—Clemons v. Olshine, 187 S.E. 711, 54 Ga.App. 290.
(2) The party dealing with the infant has the duty to make at least a reasonable effort, when it is doubtful whether he is of legal age, to ascertain the minor's true age before dealing with him, although the minor represents himself to be of age.—Burnet v. Chapin, 274 Ill.App. 186.
Ready means of ascertaining truth
Failure to use all ready means of ascertaining the truth touching on the infant's apparent majority may constitute lack of justification in reliance on the representation of majority.—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.

93. Conn.—International Text Book Co. v. Doran, 68 A. 255, 80 Conn. 307.
Failure of infant to read contract
The representation of a minor, in a written contract with which he is sought to be bound, that he is twenty-one years of age, will not estop him from avoiding the contract, especially when the uncontradicted evidence shows that he did not read the contract.—Woodall v. Grant & Co., 9 S.E.2d 95, 62 Ga.App. 581.

94. Conn.—International Text Book Co. v. Doran, 68 A. 255, 80 Conn. 307.

95. Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 106.
31 C.J. p 1007 note 55.

96. Ga.—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
N.J.—Reggiori v. Forbes, 26 A.2d 145, 128 N.J.Law 391—Feinsilver v. Schifter Motors, 23 A.2d 283, 127 N.J.Law 459—Brinkman v. Dorsey Motors, Inc., 1 A.2d 473, 121 N.J. Law 115.
Tenn.—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.
Retaining proceeds of sale
If an infant sold his property for a fair price and received and retained the proceeds, and then seeks to retake the property to the prejudice of those who in good faith acted on the transaction as valid, he will be estopped.—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.

97. N.J.—Reggiori v. Forbes, 26 A. 145, 128 N.J.Law 391—Feinsilver v. Schifter Motors, 23 A.2d 283, 127 N.J.Law 459.
Return of property or consideration on disaffirmance of:
Acquisition or alienation of property see infra § 46.
Contract generally see infra § 75

98. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Ga.—Woodall v. Grant & Co., 9 S.E. 2d 95, 62 Ga.App. 581.
Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246.
31 C.J. p 1007 note 61.

99. Ky.—Conrad v. Martin, 270 S.W. 805, 208 Ky. 411.
Pa.—Frank Spangler Co. v. Haupt, 53 Pa.Super. 545.
31 C.J. p 1007 note 61.

1. Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795—Conrad v. Martin, 270 S.W. 805, 208 Ky. 411.

2. D.C.—Utermehle v. McGreal, 1 App.D.C. 359, reversing on other grounds MacGreal v. Taylor, 17 S. Ct. 961, 167 U.S. 688, 42 L.Ed. 326.
Tenn.—Adams v. Fite, 3 Baxt. 69.
Tex.—First State Bank v. Edwards, Civ.App., 245 S.W. 478.

3. Ky.—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.

4. Ky.—Harris v. Ronk, 107 S.W. 341, 32 Ky.L. 966.

5. Tex.—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W.2d 281, error dismissed.

tutional provisions.[6] In the absence of constitutional inhibition,[7] it is within the power of the legislature to remove the disabilities of infancy,[8] to emancipate infants,[9] and to endow minors with the right to enter into transactions otherwise lawful.[10] Such power may be exercised by the legislature without intervention of other authority,[11] or it may delegate the exercise of such power to some other authority,[12] even to an officer or commission having no judicial authority.[13]

An infant may be emancipated by his parents, as discussed in the C.J.S. title Parent and Child §§ 86–90, also 46 C.J. p 1341 note 79–p 1346 note 53, by his marriage, as considered infra § 29, or by judicial proceedings to that effect, considered infra § 30. Although parental emancipation may free the infant from parental control, it does not remove all of the disabilities of infancy.[14] It does not, for example, enlarge or affect the minor's capacity or incapacity to contract.[15] Also, it has been held that it does not render him capable of suing without a guardian.[16]

Under the civil law, unless and until emancipation of a minor is revoked, the emancipated minor has the simple administration of his property,[17] and although he may encumber his interest in real property without the necessity of judicial authorization,[18] he cannot alienate or encumber it without the consent of parent, curator, tutor, or family council,[19] or appear in real actions except through one of them.[20] After his emancipation, transactions authorized by the minor and executed in conformity to law are binding on him.[21] Ratification by an infant, after his emancipation, of a transaction made prior to emancipation is legally effective.[22] A statute providing that a father cannot represent a minor son if there is an incompatibility of interests between father and son is applicable only to unemancipated sons.[23]

A person emancipated by the attainment of majority thereby acquires full civil rights.[24]

§ 29. —— Emancipation by Marriage

Marriage does not remove the disabilities of infancy unless it is so provided for by statute, and the extent to which such disabilities are removed is dependent on the statutes; the authorities are divided as to whether the consent of the parent or guardian to the marriage is necessary to effect the infant's emancipation.

While in most jurisdictions the marriage of a minor works an emancipation as to his person,[25]

6. Fla.—Riley v. Holmer, 131 So. 330, 100 Fla. 938.

Terms of statute

Statute, relieving against disability of minor depositor, does not extend to validating a release to bank which has been executed by minor. —Harris v. Columbia County Bank, 298 S.W. 872, 175 Ark. 143.

7. Mo.—Dickens v. Carr, 84 Mo. 658.

8. Mich.—Naudzius v. Lahr, 234 N. W. 581, 253 Mich. 216.
N.Y.—Application of Presler, 13 N.Y. S.2d 49, 171 Misc. 559.
31 C.J. p 1008 note 71.
Abrogation of disability to contract see infra § 71.

9. Tenn.—Campbell v. Bon Air Coal & Iron Corporation, 268 S.W. 377, 151 Tenn. 132.

10. N.Y.—Application v. Presler, 13 N.Y.S.2d 49, 171 Misc. 559.
31 C.J. p 1008 note 72.

11. Miss.—Marks v. McElroy, 7 So. 408, 67 Miss. 545.

12. Tex.—Brown v. Wheelock, 12 S. W. 111, 75 Tex. 385, reheard 12 S. W. 841, 75 Tex. 385.

13. Miss.—Marks v. McElroy, 7 So. 408, 67 Miss. 545.

14. N.Y.—Cohen v. Delaware, L. & W. R. Co., 269 N.Y.S. 667, 150 Misc. 450.

15. Tenn.—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.
Wis.—Schoenung v. Gallet, 233 N.W. 852, 853, 206 Wis. 52, 78 A.L.R. 387, citing **Corpus Juris.**
31 C.J. p 1008 note 80.

Collection of wages

Emancipated infant cannot repudiate collections of wages during infancy, after attaining majority.—Acme Lumber Co. v. Miller, 139 S.E. 246, 148 Va. 409.

16. Mont.—Hoskins v. White, 32 P. 163, 13 Mont. 70.
Necessity of representation generally see infra § 108.

17. Philippine.—Ibañez de Aldecoa v. Hongkong & Shanghai Banking Corp., 30 Philippine 228.
40 C.J. p 1277 note 27.

18. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 116 F.2d 359.

19. La.—Grigsby v. Louisiana Bank, 3 La. 491.
40 C.J. p 1277 note 28.

Form of consent

A father's consent, required by Puerto Rican law, to emancipated minor's encumbrance or sale of realty, need not be manifest by formal instrument executed by father in father's capacity as guardian, but can be shown by implication.—Benitez v. Bank of Nova Scotia, C.C.A. Puerto Rico, 116 F.2d 359.

20. La.—Richardson v. Richardson, 38 La.Ann. 639.
40 C.J. p 1278 note 29.

21. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 116 F.2d 359.

22. U.S.—Benitez v. Bank of Nova Scotia, supra.

23. U.S.—Benitez v. Bank of Nova Scotia, supra.

24. Philippine.—U. S. v. De la Santa, 9 Philippine 22.
40 C.J. p 1278 note 31.

25. U.S.—Miller v. U. S., C.C.A.Ark. 123 F.2d 715, applying law of Arkansas, opinion supplemented 124 F.2d 849, opinion supplemented 126 F.2d 462, certiorari granted 62 S. Ct. 1307, 316 U.S. 658, 86 L.Ed. 1736, remanded on other grounds 63 S.Ct. 187, 317 U.S. 192, 87 L.Ed. 179, rehearing denied 63 S.Ct. 438, 317 U.S. 713, 87 L.Ed. 567.
Miss.—Bickerstaff v. Marlin, 60 Miss. 509, 45 Am.R. 418.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
N.Y.—Inakay v. Sun Laundry Corporation, 42 N.Y.S.2d 344, 180 Misc. 550.
Wis.—La Crosse County v. Vernon County, 290 N.W. 279, 233 Wis. 664.
31 C.J. p 1008 note 83.
Marriage of minor as affecting capacity to acquire domicile see Domicile § 12 (b), (9).
Minor's marriage as terminating guardianship see Guardian and Ward § 43.

the emancipation of a minor by marriage, although it may free him from parental control, as discussed in the C.J.S. title Parent and Child § 87, also 46 C.J. p 1345 note 52–p 1346 note 53, does not, in the absence of express statutory provision to that effect,[26] remove the civil disabilities imposed on him as a minor.[27] To what extent such disabilities are removed depends on the statutes and the construction thereof.[28] Accordingly, the mere fact that a woman's disability of infancy is asserted during her coverture does not give it any greater or less force than it would have if asserted out of coverture.[29] Some statutes, however, have the effect of relieving minors, whether male[30] or female,[31] who come within the terms of the statute, of the disabilities of infancy as though they had attained the age of majority.[32]

Subject to the disability of coverture, as considered in Husband and Wife § 165 emancipation by marriage has the effect of removing the disability of incapacity to mortgage or alienate real estate,[33] or to sue without representation,[34] and to permit the operation of the rules of limitation of actions[35] or prescription[36] against the minor as though he were an adult. Where a statute secures to a minor married woman her rights in property in the same manner and with the same effect as though she were of full age, her conveyance is not voidable on the ground of infancy.[37]

According to some authorities a marriage made in violation of law will not effect an emancipation,[38] but, according to a different view, the emancipation is nevertheless effected.[39] While a marriage without the consent of the parent may work an emancipation from the control and authority of the parent, as discussed in the C.J.S. title Parent and Child § 89, also 46 C.J. p 1345 note 48, according to some authorities a marriage to work an emancipation, removing the disabilities of infancy, should be contracted with the consent of the parent or guard-

Male or female minor is emancipated by marriage.—Bonnette v. Flournoy, 119 So. 736, 9 La.App. 467.

26. Miss.—Chapman v. Hughes, 61 Miss. 339.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 974, 77 Mont. 290, 49 A.L.R. 398, citing **Corpus Juris.**
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

27. U.S.—Miller v. U. S., C.C.A.Ark., 123 F.2d 715, applying law of Arkansas, opinion supplemented 124 F.2d 849, opinion supplemented 126 F.2d 462, certiorari granted 62 S. Ct. 1307, 316 U.S. 658, 86 L.Ed. 1736, remanded on other grounds 63 S.Ct. 187, 317 U.S. 192, 87 L.Ed. 179, rehearing denied 63 S.Ct. 438, 317 U.S. 713, 87 L.Ed. 567.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 974, 77 Mont. 290, 49 A.L.R. 398, citing **Corpus Juris.**
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.
Tex.—Newberry v. Johnson, Civ.App., 248 S.W. 456, reversed on other grounds, Com.App., 267 S.W. 476.
Wis.—La Crosse County v. Vernon County, 290 N.W. 279, 233 Wis. 664.
31 C.J. p 1008 note 82, p 1009 notes 97, 2.
Married infants as subject to delinquency statutes see infra § 98.

Property or property rights
(1) The marriage of a woman before she attains majority, although it emancipates her as to her person, does not affect her property or property rights.—Inakay v. Sun Laundry Corporation, 42 N.Y.S.2d 344, 180 Misc. 550.

(2) A deed executed by an infant feme covert pursuant to the statutory requirements stands on precisely the same footing as a deed executed by an infant feme sole, and the deed is not binding.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.

28. Ala.—State v. De Marco, 100 So. 574, 20 Ala.App. 52.
31 C.J. p 1009 note 98.

Setting aside judgment
Under a statute so providing, an infant married woman may be precluded from moving to set aside a judgment rendered against her.—Schlenker v. Clark, 11 S.W.2d 725, 226 Ky. 665.

29. Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

30. La.—Roe v. Caldwell, 83 So. 43, 145 La. 853.

31. Ala.—State v. De Marco, 100 So. 574, 20 Ala.App. 52.
La.—Succession of Hecker, 185 So. 32, 191 La. 302, reversing, App., 180 So. 228.
Neb.—Rotzin v. Miller, 274 N.W. 190, 133 Neb. 4, vacated on other grounds 277 N.W. 811, 134 Neb. 8.
31 C.J. p 1009 note 4.

Default judgment
Husband and infant wife, making no defense to action to enforce mortgages signed by them, could not have judgment set aside after term in which it was rendered, on ground that wife was under age when signing mortgage.—Schlenker v. Clark, 11 S.W.2d 725, 226 Ky. 665.

32. Ala.—State v. De Marco, 100 So. 574, 20 Ala.App. 52.
Ga.—Irby v. State, 196 S.E. 101, 57 Ga.App. 717.
Iowa.—Boehm v. Rohts, 276 N.W. 105, 224 Iowa 226.
La.—Thorton v. Central Surety and Insurance Corporation, App., 191 So. 179—Murray v. Hardee, App., 189 So. 376.
Tex.—Thompson v. Crim, 126 S.W.2d 18, 132 Tex. 586, affirming, Civ. App., 103 S.W.2d 855.

The purpose of the act relative to the emancipation of minors over eighteen years of age by marriage was to relieve such minors of all the disabilities of minority and fully emancipate them and give them the status of a major.—Succession of Hecker, 185 So. 32, 191 La. 302, reversing, App., 180 So. 228.

33. La.—Succession of Hecker, supra—Arrington v. Gray, 108 So. 790, 161 La. 413—Murray v. Hardee, App., 189 So. 376.

34. La.—Bonnette v. Flournoy, 119 So. 736, 9 La.App. 467—Goldsby v. Lowrey, 6 La.App. 450.
31 C.J. p 1009 note 5.

35. La.—Murray v. Hardee, App., 189 So. 376.

36. La.—Succession of Hecker, 185 So. 32, 191 La. 302, reversing, Civ. App., 180 So. 228.

37. Me.—Fields v. Mitchell, 92 A. 293, 112 Me. 368.

38. La.—Guillebert v. Grenier, 32 So. 238, 107 La. 614.
31 C.J. p 1008 note 85.

39. Ga.—Irby v. State, 196 S.E. 101, 57 Ga.App. 717.

ian,[40] while other authorities state that such consent is not necessary, especially where it is not required by the statute providing for emancipation by marriage.[41]

Statutes discharging minors from guardianship on their marriage do not necessarily remove the disabilities of infancy;[42] nor does the removal of the disability of coverture necessarily remove the disability of infancy.[43] Accordingly, statutes conferring on married women power and authority over their property,[44] power to contract generally,[45] to convey their separate real estate with or without the consent of their husbands,[46] or to sue or be sued in the same manner as though they were sole,[47] may not operate to remove the disabilities of infancy. In some jurisdictions, however, by force of statute, on the removal of the disability of coverture, the disability of infancy of a married woman is also removed.[48] Where an infant emancipated by marriage becomes a widow before reaching the age of majority, she does not relapse into pupilage.[49]

Statutes deemed remedial. The statutes providing for the emancipation and removal of the disabilities of married infants are remedial in their nature, and should be construed to effect the legislative purpose.[50]

§ 30. —— Judicial Emancipation

a. In general
b. Proceedings
c. Conclusiveness and effect of judicial emancipation

a. In General

In some jurisdictions proceedings to remove the disabilities of minority may be instituted in cases within the intent of statutes providing therefor.

By virtue of the power of the legislatures to remove the disabilities of infancy, considered supra § 28, in some jurisdictions, by force of statute, proceedings may be instituted leading up to an order or decree removing the disabilities of a minor.[51] The right to emancipation must come within the provisions of the statutes providing for such emancipation.[52]

Ordinarily it should appear that removal of the disabilities is for the best interest of the minor,[53] and that he is capable of attending to his own affairs or business;[54] and an order removing the disability of a minor not so capable has been held void.[55] The statutory requirements concerning the

40. Iowa.—Boehm v. Rohlfs, 276 N. W. 105, 224 Iowa 226.
31 C.J. p 1008 note 87.

41. Ga.—Irby v. State, 196 S.E. 101, 57 Ga.App. 717.
31 C.J. p 1008 note 87.

Applicability of statute
A statute, which states that a minor, emancipated by marriage on attaining the age of eighteen years, shall have the full powers of one twenty-one years of age, applies to all married minors who attain the age of eighteen years, without qualification or limitation.—Succession of Hecker, 185 So. 32, 191 La. 302, reversing, App., 180 So. 228.

42. Miss.—Chapman v. Hughes, 61 Miss. 339.
N.Y.—Inakay v. Sun Laundry Corporation, 42 N.Y.S.2d 344, 180 Misc. 550.
31 C.J. p 1008 note 88.

43. N.Y.—Inakay v. Sun Laundry Corporation, supra—Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559.
Pa.—Reese v. Reese, 13 Pa.Dist. & Co. 8, 41 Lanc.L.Rev. 475, 43 York Leg.Rec. 30.
31 C.J. p 1009 note 89.

44. N.Y.—Inakay v. Sun Laundry Corporation, 42 N.Y.S.2d 344, 180 Misc. 550—Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559.

45. Ind.—Shipley v. Smith, 70 N.E. 803, 162 Ind. 526.

46. Ind.—Shipley v. Smith, supra.

47. Hawaii.—Beckley v. Brown, 20 Hawaii 596.
S.C.—Hiers v. Atlantic Coast Line R. Co., 55 S.E. 457, 75 S.C. 311, 9 Ann.Cas. 1114.

48. Me.—Fields v. Mitchell, 92 A. 293, 112 Me. 368, explaining Cummings v. Everett, 19 A. 456, 82 Me. 260.

49. N.J.—Rinaldi v. Rinaldi, 118 A. 685, 94 N.J.Eq. 14.
La.—Wilcox v. Henderson, 7 Rob. 338.

50. Ala.—Hays v. Bowdoin, 49 So. 122, 159 Ala. 600.

51. Ala.—Cornelius v. Moore, 100 So. 895, 211 Ala. 544.
31 C.J. p 1009 note 11.

Necessity of proceeding
Common-law status of minority continues to age of twenty-one, and only by express statute may minor over age of nineteen have disability of minority removed by conformity to the statutory proceedings.—Dallas Joint Stock Land Bank v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds, 120 S.W.2d 798, 132 Tex. 198.

52. La.—Emancipation of Dupuy, 199 So. 384, 196 La. 439.

Illegitimate minor may present cause for removal of disabilities of minority.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

Indian
The district court of Oklahoma has authority to confer majority rights on a minor heir of one thirty-second Cherokee Indian blood and may emancipate such heir from the disabilities of minority the same as any other minor of the state.—Hardesty v. Gordon, 119 P.2d 70, 189 Okl. 677.

53. Miss.—McLeiter v. Rackley, 114 So. 128, 148 Miss. 75.
31 C.J. p 1009 note 12.

Interest of third persons
Statute providing that minors above the age of nineteen may have their disabilities of minority removed was passed in the interest of minors and was not intended to aid others.—Dallas Joint Stock Land Bank v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds 120 S.W.2d 798, 132 Tex. 198.

Joinder in mineral lease
Disability could be removed as to minor over eighteen years in order to enable him to join in oil and gas lease on homestead.—Wilson v. Magnolia Petroleum Co., 26 S.W.2d 92, 181 Ark. 391.

54. Ark.—Dalton v. Bradley Lumber Co., 205 S.W. 695, 135 Ark. 392.
31 C.J. p 1009 note 13.

55. Ark.—Doles v. Hilton, 3 S.W. 193, 48 Ark. 305.
31 C.J. p 1009 note 14.

age of the minor must be complied with in order to bring a proceeding for the removal of his disabilities,[56] but in the absence of a prescribed minimum age therefor, a particular youthful age will not necessarily preclude the court from the exercise of its power to remove the disabilities of minority.[57]

A proceeding to remove the disability of minority is not a case in equity.[58]

b. Proceedings

(1) In general
(2) Jurisdiction and venue
(3) Parties
(4) Application
(5) Notice and service of application
(6) Hearing and determination
(7) Evidence
(8) Order, decree, or judgment

(1) In General

Proceedings for the removal of a minor's disabilities are governed by, and must conform to, the statute under which they are brought. Although the statutory requirements must be substantially followed, literal compliance is not necessary.

The proceedings to remove a minor's disabilities are governed by, and must conform to, the statute of the particular jurisdiction in which they are had,[59] and, although the statute must be substantially followed, a literal compliance is not necessary.[60] Irregularities in the proceedings do not render the order or decree void,[61] especially where the jurisdiction of the person and the subject matter is shown.[62] On the other hand, where the proceedings are had before a judge or chancellor, acting as a commissioner, and not as a court, ordinarily, they are ex parte,[63] not judicial in character,[64] the minor having no adversary,[65] and affect only the status of the minor.[66]

(2) Jurisdiction and Venue

Except as otherwise provided by statute, chancery courts and probate courts in the county where the minor resides usually are vested with the statutory jurisdiction to remove the disabilities of the minor.

In the matter of the removal of disabilities of minority, the source of power of the court to act is the Constitution or statute conferring the jurisdiction,[67] and the question as to what particular court has jurisdiction is one depending entirely on the Constitution and statutes.[68] Such jurisdiction is limited and restricted.[69] Usually the power to remove such disability is vested in courts of chancery[70] or of probate.[71]

Residence of the infant within the county where the court is held is ordinarily a jurisdictional requi-

56. Ark.—Crabtree v. Bonner, 93 S.W.2d 134, 192 Ark. 377—Wilson v. Magnolia Petroleum Co., 26 S.W.2d 92, 181 Ark. 391—Tays v. Johnson, 292 S.W. 122, 173 Ark. 223.
Tex.—Cunningham v. Robinson, 136 S.W. 441, 104 Tex. 227—Dallas Joint Stock Land Bank v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds 120 S.W.2d 798, 132 Tex. 198.

Voidable decree

Decree removing disabilities of minors who were fifteen and seventeen years of age to enable them to convey their interests in realty was voidable only and not subject to collateral attack in suit to recover possession of realty conveyed, where no suit had been brought to set aside decree removing disabilities within time prescribed after minors had reached majority.—Crabtree v. Bonner, 93 S.W.2d 134, 192 Ark. 377.

57. Miss.—McLeiter v. Rackley, 114 So. 128, 148 Miss. 75.

58. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

59. U.S.—Johnson v. Mississippi Power Co., C.C.A.Miss., 68 F.2d 545.
Ark.—Gilmore v. Union Sawmill Co., 10 S.W.2d 517, 178 Ark. 297.
La.—Emancipation of Dupuy, 199 So. 384, 196 La. 439.
Tex.—Dallas Joint Stock Land Bank v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds 120 S.W. 2d 798, 132 Tex. 198.
31 C.J. p 1009 note 20.

60. Tex.—Brown v. Wheelock, 12 S.W. 111, 841, 75 Tex. 385.
31 C.J. p 1009 note 20.

61. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.
Tex.—Stewart v. Robbins, 65 S.W. 899, 27 Tex.Civ.App. 188.

62. Ala.—Hutchinson v. Till, 101 So. 676, 212 Ala. 64.

63. Tex.—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

64. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.
31 C.J. p 1009 note 17.

65. Tex.—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

66. Miss.—Marks v. McElroy, 7 So. 408, 67 Miss. 545.
Tex.—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

67. Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.
Tex.—Hobbs v. Boyd, Civ.App., 292 S.W. 947.

68. Tex.—Hobbs v. Boyd, Civ.App., 292 S.W. 947.
31 C.J. p 1010 note 24.

69. Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

In Texas

(1) In proceedings for the removal of disabilities of minors, the district courts, according to most cases, do not exercise jurisdiction of a court, but only such special and limited jurisdiction as provided by statute.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111—31 C.J. p 1009 note 17.

(2) However, there is authority holding that the district court exercises general original jurisdiction in such proceedings, and its judgments should be given the same consideration as any other judgment of a court of competent jurisdiction.—Hobbs v. Boyd, Civ.App., 292 S.W. 947.

70. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.
31 C.J. p 1010 note 25.

71. Ark.—Doles v. Hilton, 3 S.W. 193, 48 Ark. 305.

site.[72] Although under a statute so providing the court may remove a nonresident minor's disability as to a sale or conveyance of the minor's real estate interests within the county of the court's jurisdiction, if the proceeding is not brought under such statute, the court does not have jurisdiction where it is not shown that the minor resided within the county where the proceeding is brought.[73]

(3) Parties

Necessary parties in a proceeding to remove the disabilities of a minor are determined by the governing statute. Usually the petition is presented by the minor; sometimes his parents or guardian may be required to join in, or assent to, the petition, and sometimes it is required that it be presented by the minor's next friend.

A petition for removal of an infant's disabilities is usually required to be presented by the infant,[74] and his parents or guardian may sometimes be required to join in, or assent to, the petition.[75] It is sometimes required that the application should be by the minor's next friend,[76] and in such case a petition by the minor and his parents is insufficient to confer jurisdiction.[77] Where the statute requires that the petition be filed by the parent, if living, the minor has no right to file the petition, notwithstanding the parent is a nonresident.[78] The governing statute determines who must be joined as parties to the proceeding,[79] and when the petition names the parties in compliance with the statute, the court has complete jurisdiction of the parties and subject matter.[80] Under a statute so providing, all the kindred within the third degree, known to the minor or to his copetitioners, must be made parties to, or join in, the application.[81] An ex parte petition for the removal of the disabilities of a minor, filed by the minor through his father and mother as next friends, meets the requirements of a statute providing that, if any two of the nearest of kin within the third degree, known to the minor or his copetitioners, shall unite with the minor in his application, it shall not be necessary to make any person defendant.[82] Under some authorities, the rule is

72. Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.
31 C.J. p 1010 note 27.

Minor's right to fix residence
District court of county, to which minor came to establish residence, without his parents' consent, was without jurisdiction of proceeding to remove his disabilities.—Deterly v. Wells, Tex.Civ.App., 53 S.W.2d 847, error refused.

73. Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

74. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.
31 C.J. p 1010 note 29.

Preparation of petition by person adversely interested
Decrees removing deceased employee's widow's disability of minority were not vitiated by the fact that the attorney for employer, offering a compromise settlement of widow's death claim, prepared and submitted petitions for such relief.—Johnson v. Mississippi Power Co., C.C.A.Miss., 68 F.2d 545.

75. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.

In Louisiana
(1) The law does not favor displacement of parental authority without consent of the parents.—Emancipation of Dupuy, 199 So. 384, 196 La. 439.

(2) When the father and mother are both living, both parents must consent to the emancipation proceeding.—Emancipation of Dupuy, supra—State ex rel. Billington v. Sacred Heart Orphan Asylum, 98 So. 406, 154 La. 883—Folse v. Hannagriff & Edmondson, 127 So. 663, 14 La.App. 249.

(3) However, such consent is not necessary if the application is made on the ground of ill treatment, refusal to support, or corrupt examples.—Emancipation of Dupuy, supra.

(4) The unexplained absence of the father is not such cruelty as permits judgment of emancipation without the consent of the father or tutor.—Gaston v. Rainach, 74 So. 890, 141 La. 162.

(5) It is the mother's consent that is essential when the father has been divested of his parental authority.—Emancipation of Dupuy, supra.

(6) The judgment of emancipation is void, notwithstanding the consent of a parent to the proceeding, where a duly appointed and qualified tutor existed who did not give assent thereto.—In re Webster's Tutorship, 177 So. 688, 188 La. 623.

(7) Where the minor has neither father nor mother, the petition must be accompanied by the assent of a duly appointed and qualified tutor.—Emancipation of Dupuy, supra.

(8) If there is no tutor, a special one is appointed for that purpose.—In re Webster's Tutorship, supra—Gaston v. Rainach, supra.

(9) Emancipation proceedings carried on without the assent of a duly appointed and qualified tutor or a special tutor are void.—In re Webster's Tutorship, supra—31 C.J. p 1010 note 30 [a] (1), (2).

(10) The reasons for refusal of parental consent are immaterial because the court is not authorized to entertain the application without the parental consent.—Emancipation of Dupuy, supra.

(11) The court may, however, inquire into the reasons why the tutor refuses to give his consent.—Emancipation of Dupuy, supra.

76. Miss.—Poole v. Jones, 101 So. 786, 136 Miss. 645—Jackson v. Jackson, 63 So. 275, 105 Miss. 868, Ann.Cas.1915D 489.

77. Miss.—Jackson v. Jackson, supra.

78. Ala.—Ex parte Singleton, 68 So. 253, 192 Ala. 117.

79. U.S.—Johnson v. Mississippi Power Co., C.C.A.Miss., 68 F.2d 545. Miss.—Milham v. Higdon, 95 So. 433, 131 Miss. 260.

Statutory requirements held satisfied
Miss.—Eastman-Gardner Co. v. Leverett, 106 So. 106, 141 Miss. 96.

80. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

Relatives and friends, although proper parties to intervene, are not, because of that, necessary parties.—Wilkerson v. Swayze, supra.

81. Miss.—Wilson v. McCorkle, 99 So. 366, 135 Miss. 525—Milham v. Higdon, 95 So. 433, 131 Miss. 260.
31 C.J. p 1010 note 31.

82. Miss.—Bazor v. J. J. Newman Lumber Co., 97 So. 761, 133 Miss. 538.

Dual capacity
The adult petitioner may appear in a dual capacity of kinsman and next friend.—Eastman-Gardner Co. v. Leverett, 106 So. 106, 141 Miss. 96.

that if both parents are alive they must both be made parties to the proceeding,[83] and that the father, if he is living, is a necessary party defendant.[84] On the other hand, if there be only one parent of whom the law can take cognizance, then it is only that parent who must be made a party, so that in the event that the minor is illegitimate, the mother is the only parent necessary as a party defendant to the proceeding.[85]

(4) Application

Proceedings for the removal of a minor's disabilities are ordinarily commenced by petition which must state all the jurisdictional requisites prescribed by statute.

The requirements concerning the application for emancipation of an infant must conform to the applicable statute.[86] Such proceedings are usually commenced by a petition[87] in writing.[88]

The petition should state all the necessary jurisdictional requisites,[89] such as the cause for the removal asked,[90] that the minor resides in the county in which the proceeding is brought,[91] and that the minor is capable of managing his own affairs;[92] but it has been held that a petition may be sufficient without alleging that the relief sought will be to the interest of the minor.[93] It is sometimes required that the petition shall be sworn to by some person cognizant of the facts set out therein.[94]

On filing of a sufficient petition the jurisdiction of the court attaches.[95]

(5) Notice and Service of Application

Issuance of process or notice of the filing of the petition for the removal of an infant's disabilities is sometimes required as in other suits, but it may be waived.

Process sometimes must be issued in removal of disabilities proceeding, as in other suits.[96] Notice by publication of the filing of the petition is sometimes required, but the failure to do so has been held not to be a jurisdictional defect.[97] Issuance or service of process may be waived.[98] Under a statute so providing, if the father of the minor is not living, a copy of the petition shall be served on the county judge of the county in which the proceeding is instituted,[99] but a waiver of such service satisfies this provision of the statute.[1] The appearance of the county judge implies a waiver of the service of a copy of the application.[2]

(6) Hearing and Determination

There should be a hearing on an application for the removal of a minor's disabilities and it may be contested; the determination of the application is within the discretion of the court or judge.

There should be a hearing on the petition for the removal of a minor's disabilities,[3] at which it may

83. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

84. Miss.—Lake v. Perry, 49 So. 569, 95 Miss. 550.

85. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

86. Miss.—Poole v. Jones, 101 So. 786, 136 Miss. 645.

Fraudulent allegations

(1) A false averment of a necessary jurisdictional fact, knowingly made, constitutes such legal or constructive fraud as renders a decree based on such false petition void.—Wilson v. McCorkle, 99 So. 366, 135 Miss. 525.

(2) However, a false and fraudulent allegation of an immaterial fact will not vitiate the emancipation decree.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

(3) Fraud will not be presumed because illegitimate states in petition to remove disabilities of minority that father is dead.—Wilkerson v. Swayze, supra.

87. Tex.—Dallas Joint Stock Land Bank v. Dolan, Civ.App., 92 S.W. 2d 1111, modified on other grounds 120 S.W.2d 798, 132 Tex. 198.
31 C.J. p 1010 note 28.

Petition jurisdictional
Miss.—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877.

88. Miss.—Poole v. Jones, 101 So. 786, 136 Miss. 645.

89. Miss.—Dullon v. Folkes, 120 So. 437, 153 Miss. 91.

90. Tex.—Stewart v. Robbins, 65 S. W. 899, 27 Tex.Civ.App. 188.

91. Miss.—Dullon v. Folkes, 120 So. 437, 153 Miss. 91.

92. La.—Pochelu's Emancipation, 6 So. 541, 41 La.Ann. 331.

93. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.

94. Tex.—Stewart v. Robbins, 65 S. W. 899, 27 Tex.Civ.App., 188.

95. U.S.—Johnson v. Mississippi Power Co., C.C.A.Miss., 68 F.2d 545.

96. Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

97. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.

98. Miss.—McLeiter v. Rackley, 114 So. 128, 148 Miss. 75.

By filing an answer a party waives the issuance and service of process. —Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

99. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

1. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

2. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

3. Ark.—Bickle v. Turner, 202 S.W. 703, 133 Ark. 536.
31 C.J. p 1010 note 46.

In vacation

(1) If the jurisdiction is conferred on the court and not on the judge or chancellor, the order removing the disabilities cannot be rendered in vacation.—Bickle v. Turner, supra.

(2) But, if the authority is conferred on the judge or chancellor and not on the court, the hearing may be in term time or vacation.
Miss.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141—Poole v. Jones, 101 So. 786, 136 Miss. 645.
Tex.—Brown v. Wheelock, 12 S.W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

(3) Petition for removal of disabilities of minority may be made returnable in vacation.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

be contested.[4] The grant or refusal of the application is within the discretion of the court or judge.[5] The judge, in ordering removal of the minor's disabilities, has the implied authority to determine the existence of all facts on which the validity of the order depends.[6]

(7) Evidence

General rules governing the weight and sufficiency of evidence ordinarily apply in proceedings for the removal of disabilities of infancy.

General rules governing the weight and sufficiency of evidence in civil proceedings ordinarily apply in proceedings for the removal of disabilities of infancy.[7]

(8) Order, Decree, or Judgment

A decree, order, or judgment removing disabilities of infancy should comply with the statute and practice of the jurisdiction in which it is entered; the facts giving jurisdiction to the court must plainly appear in the judgment.

The removal of the disabilities of infancy by judicial emancipation is effected by a decree, order, or judgment[8] which should comply with the statutes and practice of the jurisdiction in which it is entered;[9] if it substantially follows the language of the statute, it is sufficient.[10] The facts giving jurisdiction to the court must plainly appear in the judgment of the court, such as, that the minor was a resident of the county in which the proceeding was brought, and that he reached the age required by the statute for bringing on such proceeding.[11] It is not necessary for a decree removing disabilities of minority to recite that the chancellor heard evidence in support thereof; that he properly satisfied himself that the disabilities should be removed will be presumed.[12]

Under a statute so providing, a certified copy of the decree or order should be filed,[13] but it has been held that the decree or order goes into effect immediately on its rendition, notwithstanding the failure to file it.[14]

c. Conclusiveness and Effect of Judicial Emancipation

An emancipation order by a court of limited jurisdiction where the jurisdictional facts do not appear on the face of the record is not conclusive, and one relying on such order must show that the court had acquired jurisdiction; however, such an order by a court of general jurisdiction is not subject to collateral attack except for fraud. The scope of the order determines the extent to which the infant's disabilities are removed.

If the proceedings are had before a judge or chancellor acting as a commissioner, and not as a court, or before a chancery court of limited or special jurisdiction, the judgment, order, or decree, is not as conclusive as an ordinary judgment,[15] especially as to jurisdiction,[16] and no presumptions will be indulged in in favor of the jurisdiction or regularity of the proceedings,[17] even on collateral attack;[18] nor does a presumption of jurisdiction arise from the mere fact of the exercise of jurisdiction.[19] One

4. Ala.—Boykin v. Collins, 37 So. 248, 140 Ala. 407.

Persons entitled to resist application
Where the statute so provides, any person made a party or any other relative or friend of the minor may appear and resist the application.—Wilkerson v. Swayze, 113 So. 327, 147 Miss. 141.

Proof of nonresidence of minor
Decree removing disabilities of minority was held invalid, where evidence disclosed that minor did not reside in county in judicial district of court which entered order notwithstanding petition recited that minor lived in such county.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.

5. Tex.—Brown v. Wheelock, 12 S. W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385.

6. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

7. **Evidence held insufficient** to show that mother was guilty of ill treatment to minor, so as to entitle minor to emancipation without his mother's consent.—Emancipation of Dupuy, 199 So. 384, 196 La. 439.

8. Miss.—Poole v. Jones, 101 So. 786, 136 Miss. 645.

9. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

10. Ala.—Ketchum v. Faircloth-Segrest Co., 46 So. 476, 155 Ala. 256.

11. Ark.—Gilmore v. Union Sawmill Co., 10 S.W.2d 517, 178 Ark. 297.

12. Miss.—McLeiter v. Rackley, 114 So. 128, 148 Miss. 75.

13. Tex.—Dallas Joint Stock Land Bank of Dallas v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds 120 S.W.2d 798, 132 Tex. 198.

14. Ala.—Ketchum v. Faircloth-Segrest Co., 46 So. 476, 155 Ala. 256.
31 C.J. p 1010 note 52.

15. Miss.—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.
31 C.J. p 1010 note 53.

However, there is a positive dictum that a proceeding to remove minor's disabilities, under Vernon Sayles' Civ.St.Annot.1914 arts 5947, 5948, constitutional amendment of 1891 art 5 § 8, is judicial, and judgment should be viewed as any other judgment.—Hobbs v. Boyd, Tex.Civ. App., 292 S.W. 947.

16. Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.
Tex.—Cunningham v. Robison, 136 S. W. 441, 104 Tex. 227.

17. Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.
31 C.J. p 1011 note 55.

18. Tex.—Brown v. Wheelock, 12 S. W. 111, 75 Tex. 385, reheard 12 S.W. 841, 75 Tex. 385—Buckley v. Herder, Civ.App., 133 S.W. 703.

19. Ark.—Gilmore v. Union Sawmill Co., 10 S.W.2d 517, 178 Ark. 297.

relying on the decree removing the disability of minority must show that there was compliance with all the prerequisites for the court to acquire jurisdiction.[20] The fact that the minor appeared in the proceeding does not show or create a presumption that the court obtained jurisdiction.[21] However, jurisdictional facts which appear on the face of the record establish the validity of the emancipation order,[22] and recitals thereof in the order are conclusive of the facts recited,[23] except in a suit brought in the proper court to vacate or annul the emancipation order,[24] and the verity of such recitals is immune from collateral attack.[25]

If the proceedings are had before a court of general jurisdiction, following the general rule, considered in the C.J.S. title Judgments § 401, also 34 C.J. p 511 note 46, the judgment, order, or decree is not subject to collateral attack.[26]

The order may in all cases be attacked on jurisdictional grounds,[27] and the transactions of the minor under a decree invalid on such grounds may be rendered ineffectual or avoided.[28]

The effect of an order or decree fully emancipating an infant or removing his disabilities ordinarily invests him with all the powers and capacities and subjects him to all the liabilities and obligations which he would have or to which he would be subject if he had actually reached his majority.[29] Under some statutes the removal of the disabilities may be restricted to certain purposes,[30] and, when the order or decree so limits the removal of the disability, any transaction not within the scope of the order or decree is subject to the same rules regarding the invalidity of civil acts of infants.[31] Where the words of a decree are plain and unambiguous, the power thereby conferred cannot be extended beyond the plain meaning of the language used.[32]

20. Ark.—Gilmore v. Union Sawmill Co., supra—Tays v. Johnson, 292 S. W. 122, 173 Ark. 223.
Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

Where no petition could be found praying removal of disabilities of minors, presumption was that chancery court, a court not of record in such proceeding when rendering decree removing disabilities, did not have jurisdiction.—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877.

21. Miss.—Hayes v. Federal Land Bank of New Orleans, La., 140 So. 340, 162 Miss. 877—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

22. Ark.—Gilmore v. Union Sawmill Co., 10 S.W.2d 517, 178 Ark. 297.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W. 2d 1111.

23. U.S.—Johnson v. Mississippi Power Co., C.C.A.Miss., 68 F.2d 545.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

Where all statutory requirements were complied with in suit for removal of disabilities of minor, recitals in order of removal that special guardian was appointed and county judge served with copy of petition, and that both asked that disabilities be removed, were held to import absolute verity to order, and were conclusive against everyone.—Hobbs v. Boyd, Tex.Civ.App., 292 S. W. 947.

Necessity of showing evidence
Order removing disabilities of minor is deemed conclusive without showing of evidence on which judge acted, where statute was complied with.—Hobbs v. Boyd, supra.

24. Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ.App., 92 S.W.2d 1111.

25. Ark.—Gilmore v. Union Sawmill Co., 10 S.W.2d 517, 178 Ark. 297.
Tex.—Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198, modifying, Civ., 92 S.W.2d 1111.

Evidence outside record
Order removing disabilities of minor cannot be set aside by evidence outside record.—Hobbs v. Boyd, Tex. Civ.App., 292 S.W. 947.

26. La.—Wilson v. Lyon Lumber Co., 7 La.App. 169.
31 C.J. p 1011 note 58.

After spending inheritance minor was not entitled to avoid decree, not shown to have been obtained by fraud, removing disabilities of nonage, and compel mother's estate to account for his expenditures.—McGathey v. Thompson, 138 So. 841, 224 Ala. 163.

27. Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.
31 C.J. p 1011 note 59.

Infant under statutory age
The judgment, order, or decree removing the disabilities of a minor, under the age required by statute for removal of disabilities of minority, is void and subject to collateral attack.
Ark.—Crabtree v. Bonner, 93 S.W.2d 134, 192 Ark. 377—Tays v. Johnson, 292 S.W. 122, 173 Ark. 223.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Dolan, Civ.App., 92 S.W.2d 1111, modified on other grounds Dallas Joint Stock Land Bank v. Dolan, 120 S.W.2d 798, 132 Tex. 198—Brox v. Kelly, Civ. App., 87 S.W.2d 753, error dismissed agreement.

28. Ark.—Crabtree v. Bonner, 93 S. W.2d 134, 192 Ark. 377.
Miss.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.

29. Tex.—Jones v. Teat, Civ.App., 57 S.W.2d 617, affirmed Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480.
31 C.J. p 1011 note 60.

Decree as notice to third persons
The law contemplates that the decree becomes a public record and is notice to all persons that they are free to do business with the party as though he were twenty-one years of age.—Hutchinson v. Till, 101 So. 676, 212 Ala. 64.

30. Miss.—Wilkerson v. Sawyze, 113 So. 327, 147 Miss. 141.
31 C.J. p 1011 note 61.

31. Miss.—Watson v. Peebles, 59 So. 881, 102 Miss. 725.
31 C.J. p 1011 note 62.

Authority to mortgage
Decrees removing disabilities of minority whereby minors were authorized to sue and be sued, to buy and sell real and personal property in their own names, and perform all acts necessary for proper management of their estates, were insufficient to authorize minors to mortgage their property.—Howard v. McMurchy, 166 So. 917, 175 Miss. 328.

32. Miss.—Howard v. McMurchy, supra.

If the order or decree is valid on its face, the emancipated minor is estopped from evoking its nullity against third persons who have dealt with him as an emancipated minor,[33] and any transaction made in the exercise of the authority and power thereby vested cannot be set aside so as to affect innocent parties,[34] but the minor is not so estopped against those who are not innocent parties where the emancipation decree is void.[35]

A direct action to annul a judgment of emancipation of a minor should be brought contradictorily with the minor and not contradictorily with a curator ad hoc, but an irregularity in this respect is cured if the minor voluntarily appears.[36]

Territorial effect. It has been held that an order removing the disabilities of infancy can have no operation without the state wherein it was rendered.[37]

IV. PROPERTY AND CONVEYANCES

A. PROPERTY RIGHTS GENERALLY

§ 31. General Rule

Generally an infant may acquire property rights; but he cannot be deprived thereof except as provided by law. An infant does not have the management of his property.

Generally, an infant may acquire property rights;[38] but he cannot be deprived thereof save in the modes provided by law.[39] However, an infant is not regarded as capable of managing his property;[40] hence, the law does not intrust him with the custody or control of his estate,[41] but places it in the hands of a guardian for its preservation and probable increase, as is discussed in Guardian and Ward §§ 68–104. However, when a minor attains his majority the whole legal title to his lands vests in him and he can thereafter dispose of it as he sees fit.[42] In dealing with the funds of a minor, the best interest of the minor must be considered.[43]

Abandonment. An infant has no legal capacity irrevocably to abandon his property rights.[44]

Equitable conversion. An infant is incapable of determining whether a change from one kind of property to another is for his interest,[45] and hence the general rule has been, in dealing with the property of infants, to impress it during the infants' minority with its original character, whatever change may have actually occurred, as considered in Conversion §§ 34, 35.

§ 32. Adverse Possession

Generally, under statutes to that effect, the statute of limitations, so far as it permits the acquisition of property by adverse possession, is suspended, as against infants, during their disability, or is otherwise restricted in its application.

Ordinarily, the statute of limitations so far as it permits the acquisition of property by adverse possession is suspended, as against infants, during their disability,[46] although such exemption does not rest

33. Ala.—Hutchinson v. Till, 101 So. 676, 212 Ala. 64.
La.—State ex rel. Billington v. Sacred Heart Orphan Asylum, 98 So. 406, 154 La. 883—Allison v. Watson, 36 La.Ann. 616.
Immunity of infants from estoppel see supra § 26.

34. Ala.—Hutchinson v. Till, 101 So. 676, 677, 212 Ala. 64, citing **Corpus Juris.**
Ark.—Young v. Hiner, 79 S.W. 1062, 72 Ark. 299.
Tex.—Jones v. Teat, Civ.App., 57 S.W.2d 617, affirmed Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480.
31 C.J. p 1011 note 64.

Receiving benefits of transaction made after emancipation
Where minors, after being fully emancipated and relieved from all disabilities attaching to minors, received property according to partition previously made and were enjoying fruits and revenue from property, and made no offer to return property as interest in their deceased father's estate, they are estopped to attack judgment and proceedings in partition.—Porter v. Porter, 111 So. 664, 163 La. 167.

35. Tex.—Brox v. Kelly, Civ.App., 87 S.W.2d 753, error dismissed agreement.

36. La.—State ex rel. Billington v. Sacred Heart Orphan Asylum, 98 So. 406, 154 La. 883.

37. Cal.—Deason v. Jones, 45 P.2d 1025, 7 Cal.App.2d 482.
31 C.J. p 1011 note 65.
What law governs capacity generally see supra § 20.

38. Me.—Therriault v. Breton, 95 A. 699, 114 Me. 137.
31 C.J. p 1011 note 66.

39. Wyo.—Kreigh v. Cogswell, 21 P. 2d 831, 833, 45 Wyo. 531, citing **Corpus Juris.**
31 C.J. p 1011 note 67.

40. Ky.—Hudson v. Hudson, 169 S. W. 891, 160 Ky. 432.
N.Y.—Horton v. McCoy, 47 N.Y. 21.

41. Ky.—Hudson v. Hudson, 169 S. W. 891, 160 Ky. 432.

42. Okl.—Harrison v. Elliott, 232 P. 23, 105 Okl. 163.

43. Iowa.—Irwin v. Keokuk Sav. Bank & Trust Co., 255 N.W. 671, 218 Iowa 477.

Cancellation of bequeathed pledge
Where an antichresis or pledge of a plantation, carrying with it obligations on the creditor to cultivate, repair, and pay taxes and charges, was bequeathed to impecunious minors, it was held that the antichresis was properly ordered canceled by judgment rendered on the recommendation of a family meeting.—In re Bennett, 70 So. 1011, 138 La. 975.

44. Ky.—Baker v. Lane, 118 S.W. 963.

45. N.Y.—Horton v. McCoy, 47 N.Y. 21.

46. Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.

on any doctrine of law, but on express provisions of statute;[47] and in some jurisdictions, under statute to that effect, the period of prescription can begin to run during the infant's minority, but an additional period, after majority has been attained, is allowed before the prescriptive right accrues.[48] Such limitations ordinarily do begin to run after the infant becomes of age,[49] and then title may be acquired as against him by adverse possession during the period of limitations prescribed by statute.[50] In some jurisdictions limitations begin to run against a female minor on her marriage.[51] The disability of infancy of one cotenant does not extend to the protection of the interest of the others against the running of limitations.[52]

The elements that constitute the acquisition of title by adverse possession against an infant are generally the same as those applicable in other cases.[53] The adverse possession must continue for the requisite period after the minor becomes of age.[54]

§ 33. Infant as Cotenant

The rights and liabilities of infants as tenants in common are considered in the C.J.S. title Tenancy in Common, in connection with the particular right or liability involved, as, for example, the right of an infant to collect his share of the rents and profits from his cotenant is considered in § 47 of that title, and the liability of an infant to contribute for the expense of his cotenant in protecting the common title is considered in § 66.

Examine Pocket Parts for later cases.

§ 34. Deposits by Infant

An infant may deposit his money in a bank and may reclaim it at any time even during minority; and the depositary assumes no risk in paying out the money so reclaimed.

Where an infant is in absolute and lawful possession of money as his own property, he has a right to deposit it in any place for safe-keeping,[55] as in a bank;[56] and he has a right to reclaim it at any time,[57] although he is yet a minor;[58] and the

Miss.—McLeiter v. Rackley, 114 So. 128, 148 Miss. 75.
N.J.—Dobbelaar v. Hughes, 156 A. 469, 109 N.J.Eq. 200.
Tex.—Shell Petroleum Corporation v. Howth, Civ.App., 133 S.W.2d 253, modified on other grounds Shell Oil Co. v. Howth, 159 S.W.2d 483, 138 Tex. 357—Coleman v. Buttram, Civ.App., 40 S.W.2d 977—Lee v. Kirby, Civ.App., 277 S.W. 225—Smith v. Lancaster, Civ.App., 248 S.W. 472.
31 C.J. p 1011 note 75.
Application of statutes of limitations generally to infants see the C.J.S. title Limitations of Actions §§ 235–240, also 37 C.J. p 1018 note 29–p 1024 note 65.

As affecting mineral servitude

Where husband reserved mineral servitude during existence of community, and thereafter died leaving wife and several children and grandchildren, two of grandchildren being minors, failure of wife, as owner of half interest in servitude and as usufructuary of other half interest, to explore property for minerals while such incapacities to some of heirs existed, did not cause prescription period to extinguish servitude.—State ex rel. Bourgaux v. Fontenot, 187 So. 66, 192 La. 95.

Pleading

(1) In order that infancy during the statutory period be available to defeat a claim of title by adverse possession, defendant must specially plead the defense of infancy.—Niemann v. Garcia, Tex.Civ.App., 144 S.W.2d 621, error dismissed, judgment correct.

47. U.S.—Schauble v. Schulz, N.D., 137 F. 389, 69 C.C.A. 581.
Okl.—Pearson v. Hasty, 137 P.2d 545, 546, 547, 192 Okl. 425, 147 A.L.R. 232, citing and quoting **Corpus Juris**—Wirick v. Nance, 62 P.2d 997, 1004, 178 Okl. 180, citing **Corpus Juris.**

48. La.—Sample v. Whitaker, 140 So. 36, 174 La. 245—Stubbs v. Bain, 138 So. 96, 173 La. 544.
Okl.—Pearson v. Hasty, 137 P.2d 545, 192 Okl. 425, 147 A.L.R. 232.

49. Ga.—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602.
Tex.—Smith v. Lancaster, Civ.App., 248 S.W. 472.
31 C.J. p 1012 note 77.

50. Ga.—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602.
Mo.—Barker v. Hayes, 147 S.W.2d 429, 347 Mo. 265.
31 C.J. p 1012 note 78.

Evidence held sufficient

Tex.—Smith v. Lancaster, Civ.App., 248 S.W. 472.

51. Tex.—Louisiana & Texas Lumber Co. v. Lovell, Civ.App., 147 S.W. 366.

52. S.C.—Sibley v. Sibley, 70 S.E. 615, 88 S.C. 184, Ann.Cas.1912C 1170.
Tex.—Shell Petroleum Corporation v. Howth, Civ.App., 133 S.W.2d 253, modified on other grounds Shell Oil Co. v. Howth, 159 S.W.2d 483, 138 Tex. 357.

53. Okl.—Pearson v. Hasty, 137 P.2d 545, 546, 192 Okl. 425, 147 A.L.R. 232, citing **Corpus Juris**—Wirick v. Nance, 62 P.2d 997, 1004, 178 Okl. 180, citing **Corpus Juris.**
31 C.J. p 1012 note 81.

54. Tex.—Burnham v. Hardy Oil Co., Civ.App., 147 S.W. 330.

55. Ind.—Smalley v. Central Trust & Savings Co., 125 N.E. 789, 72 Ind. App. 296.
Mo.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 926, 231 Mo.App. 1178, quoting **Corpus Juris.**

56. Mo.—Phillips v. Savings Trust Co. of St. Louis, supra, quoting **Corpus Juris.**
31 C.J. p 1012 note 93.

Bank examiner's reduction of minors' deposit accounts in insolvent bank, without judge's authorization, was illegal.—Gay v. Sabine State Bank & Trust Co., 127 So. 14, 13 La.App. 41.

57. Mo.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 926, 231 Mo.App. 1178, quoting **Corpus Juris.**
31 C.J. p 1012 note 94.
Liability on checks see infra § 79.

Where minor made time deposit in bank which thereafter became insolvent, minor was entitled to disaffirm contract, rendering it void, either during minority or within a reasonable time after attaining majority.—Stinson v. Bank of Queen City, Mo.App., 101 S.W.2d 537.

58. Mo.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 926, 231 Mo.App. 1178, quoting **Corpus Juris.**
31 C.J. p 1012 note 95.

person or institution so paying it to him assumes no risk in so doing.[59] A minor drawing money from a bank for a third person cannot disaffirm the withdrawing of the money, where, after attaining majority, he made a settlement with such third person in full satisfaction of all moneys received from him by such third person.[60]

§ 35. Intermeddling with Estates of Infants

Anyone who intermeddles with the property of an infant without authority is liable therefor.

Anyone who intermeddles with the property of an infant, without authority, is liable to account therefor.[61] Thus he may be liable for rents and profits[62] or for any injury to the infant's estate, although he may not be liable for such injury if his administration is beneficial and he accounts fairly.[63]

Such a person may be treated by the infant as his guardian or bailee, although the relation cannot be set up for his own benefit against the infant owner.[64]

In equity the intermeddler will be treated as a trustee of the infant. He cannot buy an outstanding legal title to the infant's prejudice.[65]

B. ACQUISITION AND ALIENATION OF PROPERTY

1. General Rules

§ 36. Capacity and Validity Generally

While an infant may acquire or alienate property, such acquisition or alienation is voidable at his election.

An infant has capacity to acquire property,[66] as more fully discussed infra § 47, in which the different methods of acquiring property are considered; but as appears therein such acquisition is generally voidable at the infant's election.

As more fully discussed infra §§ 48–56, in which the different methods of alienating property are considered, an infant has not the legal capacity irrevocably to alienate or dispose of his property,[67] even for necessaries.[68] However, the alienation or

Building and loan deposits

Where a two-year-old infant, by his mother, deposited certain sums of money in a building and loan association over a period of years, and the association, on proper notice of withdrawals, refused to permit withdrawals, and minor was under fourteen years of age throughout the transactions, he could disaffirm the agreement and recover the sums deposited with interest at six per cent. —Leonard v. Tulsa Building & Loan Ass'n, 88 P.2d 875, 184 Okl. 558.

59. Ind.—Smalley v. Central Trust & Savings Co., 125 N.E. 789, 72 Ind. App. 296.
Mo.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 926, 231 Mo.App. 1178, quoting **Corpus Juris.**

Statutory provisions

(1) Provision of Banking Law relating to repayment of trust deposits, joint deposits, and deposits of minors, permitted payment of trust deposit to infant by savings bank, and savings bank was protected in paying trust deposit to infant at least in absence of proof that infant lacked capacity to understand transaction.—McCarthy v. North River Sav. Bank, 296 N.Y.S. 298, 163 Misc. 58.

(2) The statute providing that an infant may deposit and withdraw funds as if an adult and that as between the infant and the bank the infant should be subject to all obligations, equities, and defenses to which an adult would be subject in similar transactions was intended to place an infant in the same category with an adult in the matter of depositing and withdrawing funds.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J.Misc. 455.

(3) Under statute so providing, where a minor applied for, and received from, a bank a draft for part of her deposit therein, it amounted to payment to her of the sum named, and when the draft, indorsed by her, was paid by the bank, her indorsement constituted a receipt for the amount so paid.—Peterson v. Weimar, 194 N.W. 346, 181 Wis. 231.

60. Ind.—Smalley v. Central Trust & Savings Co., 125 N.E. 789, 72 Ind. App. 296.

61. U.S.—Lenox v. Notrebe, Super. Ark., 15 F.Cas.No.8,246b, Hempst. 225.
31 C.J. p 1012 note 98.

Conversion

Parties who intermeddle with the property of an infant are guilty of conversion.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

62. Ky.—Patrick v. Woods, 3 Bibb 29.

63. La.—Bird v. Black, 5 La.Ann. 189.

64. N.C.—Smith v. Reid, 51 N.C. 494.

65. U.S.—Lenox v. Notrebe, Super. Ark., 15 F.Cas.No.8,246b, Hempst. 225.

66. Cal.—In re Tetsubumi Yano, 206 P. 995, 188 Cal. 645.
Ky.—Davis' Committee v. Loney, 162 S.W.2d 189, 290 Ky. 644.
Nev.—Warren v. De Long, 59 P.2d 1165, 1169, 57 Nev. 131, citing **Corpus Juris,** and petition denied 60 P.2d 608, 57 Nev. 148.
Infant's right to acquire homestead see Homesteads § 27.

Shares of stock

Tenn.—McDowell v. Rees, 122 S.W.2d 839, 22 Tenn.App. 336.

67. Ark.—Walker v. Goodlett, 144 S.W. 189, 102 Ark. 383.
31 C.J. p 1013 note 15.
"The disposition of an infant's real property is hedged about with legal barriers. Because of a conclusive presumption of incapacity, he is denied the right of disposing of it according to his own wishes."—Soper v. Foster, 51 S.W.2d 927, 929, 244 Ky. 658.

A minor cannot be held liable on his contracts for the disposition of his property.—Bonner v. Moran, 126 F.2d 121, 75 U.S.App.D.C. 156, 139 A.L.R. 1366.

68. Ark.—Walker v. Goodlett, 144 S. W. 189, 102 Ark. 383.
Liability for necessaries see infra § 78.

disposal of his property may operate to transmit title thereto,[69] it being generally considered to be merely voidable,[70] not absolutely void.[71]

However, when an infant has become sui juris, he may validly alienate his realty.[72]

§ 37. Property Held in Trust

Rules governing infants' transactions as to property generally apply to an infant's acceptance of a conveyance in trust; but a conveyance by the infant in execution of the trust is not subject to disaffirmance.

Rules governing infants' transactions with property generally, as discussed supra § 36 and infra §§ 38–46, have been applied to an infant's acceptance of a conveyance which he is to hold in trust.[73] However, since infancy is a personal privilege, see supra § 19, if an infant takes the legal title to property in trust for another, and in the execution of that trust makes a conveyance, he cannot afterward disaffirm or avoid it on the plea of his infancy.[74] So also an infant trustee may be directed by order or decree of court to make a conveyance,[75] and a conveyance made by the infant trustee pursuant to such a decree is good until the decree is reversed and the conveyance avoided.[76]

§ 38. Election to Ratify or Avoid Transactions and Necessity Therefor

Voidable property transactions may be ratified or avoided; but ratification is not necessary since the transaction is valid unless disaffirmed. A single transaction must be ratified or avoided in its entirety.

If a transaction is considered absolutely void, it is not subject to ratification,[77] and there is no necessity for any act of disaffirmance;[78] but if the transaction is considered merely voidable it may be either ratified[79] or avoided.[80] These rules include transactions in which other persons have assumed to act for infants.[81]

The election to ratify or avoid an infant's contracts and the necessity therefor are considered infra § 73; and the application of the rules stated herein to particular property transactions is considered infra §§ 47–56.

Necessity of ratification. The voidable act or transaction holds good until some act has been done by the infant to avoid it.[82] Its validity does not depend on ratification by the infant;[83] but when there is an effort to avoid the transaction it becomes important to inquire whether there has been a previous confirmation or ratification,[84] for, if so, the matter has passed beyond the control of the party and is no longer voidable as appears infra § 39, and then it may become necessary to show a prior avoidance.[85] A ratification may be necessary where other persons have assumed to act for the infant subject to the infant's ratification upon his attaining majority.[86]

Partial ratification. The transaction must be either affirmed or ratified in its entirety;[87] that part which is beneficial cannot be ratified,[88] while disaffirming the other part.[89] However, where there are several acts not forming part of the same trans-

69. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.

70. Fla.—Putnal v. Walker, supra.
31 C.J. p 1013 note 18.

71. Fla.—Putnal v. Walker, supra.

72. La.—Murray v. Hardee, App., 189 So. 376.

Married person of eighteen years
La.—Arrington v. Gray, 108 So. 790, 161 La. 413—Murray v. Hardee, App., 189 So. 376.

Validity of change of age of majority
Amendment of statute changing age of majority of females from eighteen to twenty-one was held not unconstitutional as respects right of female persons between ages of eighteen and twenty-one to convey realty.—Coleman v. Coleman, 200 N. E. 197, 51 Ohio App. 221.

73. Assent after majority
An infant will be bound by the terms of a conveyance of property which he is to hold in trust, at least where he assents to such conveyance after attaining his majority.—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.

74. Fla.—Persons v. Pflum, 135 So. 878, 102 Fla. 402.
31 C.J. p 1013 note 22.

75. Del.—Bradford v. Robinson, 30 A. 670, 12 Del. 29.
N.Y.—Livingston v. Livingston, 2 Johns.Ch. 537.

76. S.C.—Thompson v. Dulles, 26 S. C.Eq. 370.

77. Cal.—Lee v. Hibernia Savings & Loan Soc., 171 P. 677, 177 Cal. 656.
31 C.J. p 1013 note 28.

78. Tenn.—Chambers v. Chattanooga Union R. Co., 171 S.W. 84, 130 Tenn. 459.

79. N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1013 note 31.

80. N.C.—Barger v. M. & J. Finance Corporation, 18 S.E.2d 826, 221 N. C. 64—Hight v. Harris, 124 S.E. 623, 188 N.C. 328—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
31 C.J. p 1013 note 32.

81. Miss.—Gambrel v. Harper, 74 So. 623, 113 Miss. 715.
31 C.J. p 1013 note 33.

82. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.
31 C.J. p 1014 note 38.

83. Fla.—Putnal v. Walker, supra.
31 C.J. p 1014 note 39.

84. S.C.—Ihley v. Padgett, 3 S.E. 468, 27 S.C. 300.
Tex.—Hieatt v. Dixon, Civ.App., 26 S.W. 263.

85. Tex.—Hieatt v. Dixon, Civ.App., 26 S.W. 263.

86. La.—Marty v. His Creditors, 5 Rob. 193.
31 C.J. p 1014 note 43.

87. S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 464, 176 S.C. 476, citing **Corpus Juris.**
31 C.J. p 1013 note 34.

88. S.C.—Dickert v. Ætna Life Ins. Co., supra, citing **Corpus Juris.**
31 C.J. p 1014 note 35.

89. S.C.—Dickert v. Ætna Life Ins. Co., supra, citing **Corpus Juris.**
31 C.J. p 1014 note 36.

action, some of them may be affirmed and others avoided.[90]

§ 39. Ratification

Ratification of an infant's property transaction is a right personal to the infant. Ratification makes the transaction binding ab initio, and it cannot be avoided thereafter.

As in the case of his contracts, as discussed infra § 74, ratification of a transaction affecting the property rights of an infant is a right personal to an infant or his personal representatives after death.[91]

What constitutes ratification is considered infra § 40, and the time therefor is considered infra § 41. Ratification with regard to particular transactions respecting infants' property is considered infra §§ 47–56.

Effect of ratification. The ratification makes the transaction binding ab initio,[92] and it cannot be avoided thereafter.[93] It is the ratification which is the effective act and which rescues the transaction from the possibility of its avoidance.[94]

§ 40. —— What Constitutes Ratification

a. In general
b. Lapse of time without disaffirmance
c. Retention or disposal of property or consideration
d. Instruments showing ratification

a. In General

Infants' property transactions may be ratified expressly or, ordinarily, by implication from acts showing an intention to ratify.

The act or transaction may be affirmed by express ratification,[95] or, except in some jurisdictions in which, by force of statute, the ratification is required to be in writing,[96] by the performance of acts from which an affirmance may reasonably be implied.[97] Thus ordinarily it is not necessary that there should be an instrument of ratification,[98] or that there should be a reacknowledgment of the instrument executed during infancy.[99]

Express ratification may be by deed, release, or declaration.[1]

If an implied confirmation is relied on, this must appear from facts and circumstances tending to prove a recognition of the transaction and inconsistent with the idea of any intention to avoid it;[2] but any act by which the infant after becoming of age assents to or recognizes as valid his act performed during minority may be sufficient to confirm it.[3] The confirmation may be by acts of less solemn character than would be required to avoid the transaction.[4]

In order to constitute a ratification there must be some positive and clear act performed for the purpose of ratification,[5] with a full knowledge of its consequences.[6]

What constitutes ratification as to contracts is considered infra § 74; and what constitutes ratification in particular transactions involving the property of infants is considered infra §§ 47–56.

Knowledge of nonliability. It has been held that the ratification must be with knowledge that the transaction was not binding.[7] Where the same lack of knowledge exists at the time of the alleged

90. Pa.—Citizens' Bldg. & Loan Ass'n v. Arvin, 56 A. 870, 207 Pa. 293.
31 C.J. p 1014 note 37.

91. Ala.—Hines v. Seibels, 86 So. 43, 204 Ala. 382.
31 C.J. p 1014 note 49.
Ratification by guardian see Guardian and Ward § 73.

92. Wis.—In re Kane, 168 N.W. 402, 168 Wis. 1.
31 C.J. p 1017 note 2.

93. Ga.—McGarrity v. Cook, 114 S.E. 213, 154 Ga. 311.
31 C.J. p 1018 note 3.

94. Ill.—Black v. Hills, 36 Ill. 376, 87 Am.D. 224.

95. La.—Whitney Nat. Bank of New Orleans v. Schwob, 13 So.2d 782, 203 La. 175.
N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1014 note 51.

96. Ky.—Moore v. Cleveland, 6 Ky. Op. 588.
S.C.—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.

97. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 116 F.2d 359.
La.—Whitney Nat. Bank of New Orleans v. Schwob, 13 So.2d 782, 203 La. 175.
N.J.—Morris v. Glaser, 151 A. 766, 774, 106 N.J.Eq. 585, citing **Corpus Juris**, and affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1015 note 56.

98. Mo.—Craig v. Van Bebber, 13 S.W. 906, 100 Mo. 584, 18 Am.S.R. 569.
31 C.J. p 1015 note 63.

99. Ky.—Syck v. Hellier, 131 S.W. 30, 140 Ky. 388—Hoffert v. Miller, 6 S.W. 447, 86 Ky. 572, 9 Ky.L. 732.

1. Pa.—Dolph v. Hand, 27 A. 114, 156 Pa. 91, 36 Am.S.R. 25.

2. Ala.—American Freehold Land Mortg. Co. v. Dykes, 18 So. 292, 111 Ala. 178, 56 Am.S.R. 38.
31 C.J. p 1015 note 57.

Acts held to constitute ratification
Ga.—Biederman v. Jones, 188 S.E. 519, 183 Ga. 351.

Acts held not to constitute ratification
Tex.—Fulwiler Electric Co. v. Spann, Civ.App., 252 S.W. 892.

3. Ky.—Henson v. Culp, 163 S.W. 455, 157 Ky. 442.
31 C.J. p 1015 note 65.

4. U.S.—Irvine v. Irvine, Minn., 9 Wall. 617, 19 L.Ed. 800.

5. Ill.—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.
31 C.J. p 1015 notes 59, 61.

6. Ill.—Davidson v. Young, 38 Ill. 145.
31 C.J. p 1015 note 55.

7. Mo.—Ridgeway v. Herbert, 51 S.

disposal of his property may operate to transmit title thereto,[69] it being generally considered to be merely voidable,[70] not absolutely void.[71]

However, when an infant has become sui juris, he may validly alienate his realty.[72]

§ 37. Property Held in Trust

Rules governing infants' transactions as to property generally apply to an infant's acceptance of a conveyance in trust; but a conveyance by the infant in execution of the trust is not subject to disaffirmance.

Rules governing infants' transactions with property generally, as discussed supra § 36 and infra §§ 38–46, have been applied to an infant's acceptance of a conveyance which he is to hold in trust.[73] However, since infancy is a personal privilege, see supra § 19, if an infant takes the legal title to property in trust for another, and in the execution of that trust makes a conveyance, he cannot afterward disaffirm or avoid it on the plea of his infancy.[74] So also an infant trustee may be directed by order or decree of court to make a conveyance,[75] and a conveyance made by the infant trustee pursuant to such a decree is good until the decree is reversed and the conveyance avoided.[76]

§ 38. Election to Ratify or Avoid Transactions and Necessity Therefor

Voidable property transactions may be ratified or avoided; but ratification is not necessary since the transaction is valid unless disaffirmed. A single transaction must be ratified or avoided in its entirety.

If a transaction is considered absolutely void, it is not subject to ratification,[77] and there is no necessity for any act of disaffirmance;[78] but if the transaction is considered merely voidable it may be either ratified[79] or avoided.[80] These rules include transactions in which other persons have assumed to act for infants.[81]

The election to ratify or avoid an infant's contracts and the necessity therefor are considered infra § 73; and the application of the rules stated herein to particular property transactions is considered infra §§ 47–56.

Necessity of ratification. The voidable act or transaction holds good until some act has been done by the infant to avoid it.[82] Its validity does not depend on ratification by the infant;[83] but when there is an effort to avoid the transaction it becomes important to inquire whether there has been a previous confirmation or ratification,[84] for, if so, the matter has passed beyond the control of the party and is no longer voidable as appears infra § 39, and then it may become necessary to show a prior avoidance.[85] A ratification may be necessary where other persons have assumed to act for the infant subject to the infant's ratification upon his attaining majority.[86]

Partial ratification. The transaction must be either affirmed or ratified in its entirety;[87] that part which is beneficial cannot be ratified,[88] while disaffirming the other part.[89] However, where there are several acts not forming part of the same trans-

69. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.

70. Fla.—Putnal v. Walker, supra.
31 C.J. p 1013 note 18.

71. Fla.—Putnal v. Walker, supra.

72. La.—Murray v. Hardee, App., 189 So. 376.

Married person of eighteen years
La.—Arrington v. Gray, 108 So. 790, 161 La. 413—Murray v. Hardee, App., 189 So. 376.

Validity of change of age of majority
Amendment of statute changing age of majority of females from eighteen to twenty-one was held not unconstitutional as respects right of female persons between ages of eighteen and twenty-one to convey realty.—Coleman v. Coleman, 200 N. E. 197, 51 Ohio App. 221.

73. Assent after majority
An infant will be bound by the terms of a conveyance of property which he is to hold in trust, at least where he assents to such conveyance after attaining his majority.—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.

74. Fla.—Persons v. Pflum, 135 So. 878, 102 Fla. 402.
31 C.J. p 1013 note 22.

75. Del.—Bradford v. Robinson, 30 A. 670, 12 Del. 29.
N.Y.—Livingston v. Livingston, 2 Johns.Ch. 537.

76. S.C.—Thompson v. Dulles, 26 S. C.Eq. 370.

77. Cal.—Lee v. Hibernia Savings & Loan Soc., 171 P. 677, 177 Cal. 656.
31 C.J. p 1013 note 28.

78. Tenn.—Chambers v. Chattanooga Union R. Co., 171 S.W. 84, 130 Tenn. 459.

79. N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1013 note 31.

80. N.C.—Barger v. M. & J. Finance Corporation, 18 S.E.2d 826, 221 N. C. 64—Hight v. Harris, 124 S.E. 623, 188 N.C. 328—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
31 C.J. p 1013 note 32.

81. Miss.—Gambrel v. Harper, 74 So. 623, 113 Miss. 715.
31 C.J. p 1013 note 33.

82. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.
31 C.J. p 1014 note 38.

83. Fla.—Putnal v. Walker, supra.
31 C.J. p 1014 note 39.

84. S.C.—Ihley v. Padgett, 3 S.E. 468, 27 S.C. 300.
Tex.—Hieatt v. Dixon, Civ.App., 26 S.W. 263.

85. Tex.—Hieatt v. Dixon, Civ.App., 26 S.W. 263.

86. La.—Marty v. His Creditors, 5 Rob. 193.
31 C.J. p 1014 note 43.

87. S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 464, 176 S.C. 476, citing **Corpus Juris.**
31 C.J. p 1013 note 34.

88. S.C.—Dickert v. Ætna Life Ins. Co., supra, citing **Corpus Juris.**
31 C.J. p 1014 note 35.

89. S.C.—Dickert v. Ætna Life Ins. Co., supra, citing **Corpus Juris.**
31 C.J. p 1014 note 36.

action, some of them may be affirmed and others avoided.[90]

§ 39. Ratification

Ratification of an infant's property transaction is a right personal to the infant. Ratification makes the transaction binding ab initio, and it cannot be avoided thereafter.

As in the case of his contracts, as discussed infra § 74, ratification of a transaction affecting the property rights of an infant is a right personal to an infant or his personal representatives after death.[91]

What constitutes ratification is considered infra § 40, and the time therefor is considered infra § 41. Ratification with regard to particular transactions respecting infants' property is considered infra §§ 47–56.

Effect of ratification. The ratification makes the transaction binding ab initio,[92] and it cannot be avoided thereafter.[93] It is the ratification which is the effective act and which rescues the transaction from the possibility of its avoidance.[94]

§ 40. —— What Constitutes Ratification

a. In general
b. Lapse of time without disaffirmance
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a. In General

Infants' property transactions may be ratified expressly or, ordinarily, by implication from acts showing an intention to ratify.

The act or transaction may be affirmed by express ratification,[95] or, except in some jurisdictions in which, by force of statute, the ratification is required to be in writing,[96] by the performance of acts from which an affirmance may reasonably be implied.[97] Thus ordinarily it is not necessary that there should be an instrument of ratification,[98] or that there should be a reacknowledgment of the instrument executed during infancy.[99]

Express ratification may be by deed, release, or declaration.[1]

If an implied confirmation is relied on, this must appear from facts and circumstances tending to prove a recognition of the transaction and inconsistent with the idea of any intention to avoid it;[2] but any act by which the infant after becoming of age assents to or recognizes as valid his act performed during minority may be sufficient to confirm it.[3] The confirmation may be by acts of less solemn character than would be required to avoid the transaction.[4]

In order to constitute a ratification there must be some positive and clear act performed for the purpose of ratification,[5] with a full knowledge of its consequences.[6]

What constitutes ratification as to contracts is considered infra § 74; and what constitutes ratification in particular transactions involving the property of infants is considered infra §§ 47–56.

Knowledge of nonliability. It has been held that the ratification must be with knowledge that the transaction was not binding.[7] Where the same lack of knowledge exists at the time of the alleged

90. Pa.—Citizens' Bldg. & Loan Ass'n v. Arvin, 56 A. 870, 207 Pa. 293.
31 C.J. p 1014 note 37.

91. Ala.—Hines v. Seibels, 86 So. 43, 204 Ala. 382.
31 C.J. p 1014 note 49.
Ratification by guardian see Guardian and Ward § 73.

92. Wis.—In re Kane, 168 N.W. 402, 168 Wis. 1.
31 C.J. p 1017 note 2.

93. Ga.—McGarrity v. Cook, 114 S.E. 213, 154 Ga. 311.
31 C.J. p 1018 note 3.

94. Ill.—Black v. Hills, 36 Ill. 376, 87 Am.D. 224.

95. La.—Whitney Nat. Bank of New Orleans v. Schwob, 13 So.2d 782, 203 La. 175.
N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1014 note 51.

96. Ky.—Moore v. Cleveland, 6 Ky. Op. 588.
S.C.—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.

97. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 116 F.2d 359.
La.—Whitney Nat. Bank of New Orleans v. Schwob, 13 So.2d 782, 203 La. 175.
N.J.—Morris v. Glaser, 151 A. 766, 774, 106 N.J.Eq. 585, citing **Corpus Juris**, and affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1015 note 56.

98. Mo.—Craig v. Van Bebber, 13 S.W. 906, 100 Mo. 584, 18 Am.S.R. 569.
31 C.J. p 1015 note 63.

99. Ky.—Syck v. Hellier, 131 S.W. 30, 140 Ky. 388—Hoffert v. Miller, 6 S.W. 447, 86 Ky. 572, 9 Ky.L. 732.

1. Pa.—Dolph v. Hand, 27 A. 114, 156 Pa. 91, 36 Am.S.R. 25.

2. Ala.—American Freehold Land Mortg. Co. v. Dykes, 18 So. 292, 111 Ala. 178, 56 Am.S.R. 38.
31 C.J. p 1015 note 57.
Acts held to constitute ratification
Ga.—Biederman v. Jones, 188 S.E. 519, 183 Ga. 351.
Acts held not to constitute ratification
Tex.—Fulwiler Electric Co. v. Spann, Civ.App., 252 S.W. 892.

3. Ky.—Henson v. Culp, 163 S.W. 455, 157 Ky. 442.
31 C.J. p 1015 note 65.

4. U.S.—Irvine v. Irvine, Minn., 9 Wall. 617, 19 L.Ed. 800.

5. Ill.—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.
31 C.J. p 1015 notes 59, 61.

6. Ill.—Davidson v. Young, 38 Ill. 145.
31 C.J. p 1015 note 55.

7. Mo.—Ridgeway v. Herbert, 51 S.

ratification as existed at the time of the original conveyance, in such case the ratification is held to be a part of the original transaction and to be ineffectual.[8]

No new consideration is necessary to validate the ratification.[9]

b. Lapse of Time without Disaffirmance

An infant's failure to disaffirm within a reasonable time after reaching majority may constitute a ratification. What is a reasonable time is generally a question of fact depending on the circumstances, although some courts have set particular periods for disaffirmance, generally based on the period of statutory limitations.

The mere failure to disaffirm the transaction within a reasonable time after his majority may operate as a ratification thereof,[10] especially when other iniquities exist,[11] or the rights of third persons have intervened;[12] and in some jurisdictions, by force of statute, the transaction is binding unless disaffirmed within a reasonable time.[13]

The failure to disaffirm within a reasonable time as ratification of a contract is considered infra § 74, and as ratification of particular property transactions, infra §§ 47–56.

What is a reasonable time is determined by the circumstances of the particular case,[14] and is considered a question of fact,[15] although it has been held that it may become a question of law.[16] In some jurisdictions the courts have set particular periods within which the late infant may avoid the transaction and after which he cannot do so, the transaction being considered ratified,[17] as, for example, the time fixed by the statute of limitations.[18] However, in any event he may be required to act sooner by peculiar circumstances or have the transaction considered ratified,[19] as where he has acted inconsistently with the right to repudiate,[20] or permitted the purchaser to spend money or make improvements on the property.[21]

If the transaction is considered void the unreasonableness of the time within which it is sought to be avoided does not work a ratification so as to prevent avoidance.[22]

c. Retention or Disposal of Property or Consideration

The infant's disposal or retention of property or other consideration received pursuant to a transaction involving property, after reaching his majority, may constitute a ratification of such transaction.

Where an infant who has dealt with property, at the time of reaching his majority, still has the property or other consideration received by him, his subsequent disposal of the same to a third person,[23] or retaining it and treating it as his own for an unreasonable time without electing to disaffirm,[24] will amount to a ratification. However, it has also been held that the mere retention of the purchase money paid to him during his minority does not amount to a confirmation.[25]

The retention or disposal of the consideration as constituting a ratification of contracts entered into by an infant is considered infra § 74, and as constituting a ratification of purchases of property, infra § 47.

d. Instruments Showing Ratification

Ratification may be by written instrument executed with an intent to ratify; and it may be by reacknowledgment or redelivery of the original instrument.

While the ratification ordinarily need not be by

W. 1040, 150 Mo. 606, 73 Am.S.R. 464.
31 C.J. p 1015 note 67.

8. Ill.—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.

9. Kan.—Calhoun v. Anderson, 98 P. 275, 78 Kan. 749.

10. Me.—Robinson v. Weeks, 56 Me. 102—Dana v. Coombs, 6 Me. 89.
N.Y.—Pedro v. Pedro, 127 N.Y.S. 997, 71 Misc. 296.
Tex.—Holden v. Murphy, Civ.App., 62 S.W.2d 189, error refused—Miller v. McAden, Civ.App., 253 S.W. 901—Lawder v. Larkin, Civ.App., 94 S.W. 171.
31 C.J. p 1015 note 74.

11. Pa.—Boyd v. Shiffer, 27 A. 60, 156 Pa. 100.
Wash.—Kline v. Galland, 102 P. 440, 53 Wash. 504.

12. Ky.—Martin v. Elkhorn Coal Corporation, 13 S.W.2d 780, 227 Ky. 623.
31 C.J. p 1016 note 76.

13. Kan.—Brown v. Staab, 176 P. 113, 103 Kan. 611—Ralph v. Ball, 164 P. 1081, 100 Kan. 460.

14. Tex.—Miller v. McAden, Civ. App., 253 S.W. 901.
31 C.J. p 1016 note 78.

15. Tex.—Miller v. McAden, supra.
31 C.J. p 1016 note 79.

16. Hawaii.—McCandless v. Lansing, 19 Hawaii 474.

17. Mo.—Parrish v. Treadway, 183 S.W. 580, 267 Mo. 91.
31 C.J. p 1016 note 81.

18. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961, certiorari denied Allen v. Commissioner of Internal Revenue, 60 S.Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.
La.—Whitney Nat. Bank of New Orleans v. Schwob, 13 So.2d 782, 203 La. 175.
31 C.J. p 1016 note 82.

19. Ind.—Sims v. Bardoner, 86 Ind. 87, 44 Am.R. 263.
31 C.J. p 1017 note 83.

20. U.S.—Wells v. Seixas, C.C.N.Y., 24 F. 82, 23 Blatchf. 242.

21. Ind.—Sims v. Bardoner, 86 Ind. 87, 44 Am.R. 263.
31 C.J. p 1017 note 85.

22. Cal.—Hakes Inv. Co. v. Lyons, 137 P. 911, 166 Cal. 557.

23. U.S.—MacGreal v. Taylor, App. D.C., 17 S.Ct. 961, 167 U.S. 688, 42 L.Ed. 326.
31 C.J. p 1017 note 89.

24. U.S.—MacGreal v. Taylor, supra.
31 C.J. p 1017 note 90.

25. Ky.—Peters v. Noble, 244 S.W. 416, 196 Ky. 123—Syck v. Hellier, 131 S.W. 30, 140 Ky. 388.

the execution of a written instrument, as considered supra subdivision a of this section, it may be by written instrument.[26] However, the subsequent instrument must be executed with an intent to ratify; and if it is executed with specific revocation of the earlier one, no ratification takes effect.[27] So, also, while there need not be a reacknowledgment of the instrument executed during infancy for ratification to take effect, as considered supra subdivision a of this section, ratification may take effect by reacknowledging[28] or redelivering[29] the same, after attaining majority.[30]

§ 41. —— Time for Ratification

Generally the power to ratify does not exist prior to the attainment of majority.

The power to ratify does not exist during infancy, but the ratification can be only after attaining majority,[31] unless the infant has been emancipated prior to that time.[32]

The time for ratification of contracts is considered infra § 74.

§ 42. Avoidance

The avoidance of an infant's transaction affecting property renders it void ab initio, and the avoidance cannot be withdrawn, or the transaction ratified.

The avoidance of an infant's transaction affecting property renders the same void ab initio by relation,[33] and there can be no ratification thereafter.[34] After disaffirmance by the late infant, all persons may take advantage thereof and treat the transaction as null;[35] and the infant is entitled to recover the consideration paid in money or property.[36]

The right of avoidance of an infant's transactions affecting property, the time therefor, and the steps necessary to effect it, are discussed infra §§ 43–46. The avoidance of an infant's contracts is considered infra § 75, and the avoidance of particular transactions affecting property, infra §§ 47–56.

Withdrawal of avoidance. Where the late infant has unequivocally disaffirmed and elected to avoid the transaction, he cannot subsequently withdraw or rescind the avoidance and insist on having the transaction stand,[37] even though he has not returned the purchase money and no suit for its recovery has been brought.[38]

§ 43. —— Right to Avoid and Estoppel

a. In general
b. Who may avoid

a. In General

The right of avoidance is independent of the good faith or consent of the other party to the transaction, and exists in the infant even though an adult is a joint party. It is generally superior to all equities of other persons. The right may, however, be lost by acts constituting an estoppel.

The right of avoidance is not affected by the presence of good faith on the part of the other party to the transaction;[39] and it may be exercised without his consent,[40] unless in making it the infant merely did, without suit, what the law would have compelled him to do if suit had been brought for that purpose,[41] or unless he has previously ratified the same, as considered supra § 39. As appears supra § 38, the infant may not avoid part of a transaction while affirming the rest.

The right to avoid contracts made by infants is considered infra § 75, and the right to avoid par-

26. Ky.—Keller v. Cooper, 12 Ky.L. 188.
31 C.J. p 1017 note 93.

27. N.Y.—Pedro v. Pedro, 127 N.Y.S. 997, 71 Misc. 296.
31 C.J. p 1017 note 95.

28. Ind.—Blair v. Whittaker, 69 N.E. 182, 31 Ind.App. 664.
31 C.J. p 1017 note 97.

29. Ill.—Davidson v. Young, 38 Ill. 145.
31 C.J. p 1017 note 98.

30. Ky.—Outland v. Vance, 34 S.W. 22, 17 Ky.L. 1226.
31 C.J. p 1017 note 99.

31. Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.
Mich.—Milligan v. S. W. Straus & Co., 256 N.W. 449, 268 Mich. 317.
N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1014 note 46.
Ratification or disaffirmance of guardian's unauthorized transactions see Guardian and Ward § 96.

32. La.—Lyne's Succession, 12 La. Ann. 155—Wilson v. Craighead, 6 Rob. 429.

33. Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 350, 332 Mo. 1098, citing **Corpus Juris.**
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Tex.—Teat v. Jones, 89 S.W.2d 987, 989, 126 Tex. 480, citing **Corpus Juris.**
31 C.J. p 1022 note 96.
Limitation
An infant's disaffirmance of a contract is retroactive only to the extent that, when it is accomplished, parties thereafter intermeddling in the infant's property are guilty of conversion.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

34. N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
31 C.J. p 1022 note 97.

35. Pa.—Love v. Dobson, 5 Wkly.N.C. 359.

36. N.C.—Hight v. Harris, 124 S.E. 623, 188 N.C. 328.

37. Tex.—Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480, affirming Jones v. Teat, Civ.App., 57 S.W.2d 617.
31 C.J. p 1023 note 99.

38. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.

39. Miss.—Lake v. Perry, 49 So. 569, 95 Miss. 550.

40. Ill.—Baker v. Pratt, 15 Ill. 568.

41. U.S.—Irvine v. Irvine, Minn., 9 Wall. 617, 19 L.Ed. 800.
31 C.J. p 1018 note 9.

ticular transactions relating to the property of an infant is considered infra §§ 47–56.

Transactions jointly with adult. Where an infant and an adult who have estates or interests in the same property join in a transaction in respect thereof, the infant still has the right to disaffirm it as to his interest;[42] but such transaction is not voidable as to the adult party.[43]

Effect of other's equities. The right of avoidance generally is superior to all equities of other persons,[44] and may therefore be exercised against, or regardless of the existence of, a bona fide purchaser[45] or mortgagee.[46] Infants holding merely an equity in land, when the legal title thereto is acquired by an innocent purchaser, are in no better condition than they would have been if they were adults;[47] and it has been held that the principle that a purchaser of land for value and without notice of a senior unrecorded deed acquires superior title applies even though the senior vendee is a minor.[48]

Estoppel to disaffirm. The question whether the infant's acts or conduct during his infancy may or may not give rise to an estoppel to disaffirm has been discussed, supra §§ 26, 27. After the infant has reached majority the rules of estoppel are more strictly applied, and he may readily, by either his acts or his acquiescence, become estopped to dispute his acquisition or alienation of property, even though it occurred during his infancy;[49] but even in such case all the elements of estoppel must coexist.[50]

The heirs may be estopped to exercise their right to avoid their infant ancestor's transaction by their conduct, as by lapse of time.[51]

b. Who May Avoid

The right to avoid an infant's transaction respecting property rests primarily in the infant himself; and it cannot be exercised by third persons, even, it is generally held, by privies in estate. After the infant's death, however, the right may be exercised by the infant's personal representatives or those succeeding to his rights.

Infancy, being a personal privilege, the right to avoid a transaction with respect to property rests primarily in the infant himself,[52] and is a privilege personal to him,[53] and not assignable,[54] or capable of being exercised by strangers.[55]

Who may avoid an infant's contracts is considered infra § 75.

By privies in estate. Although there is authority to the contrary,[56] it is generally held that the privilege of avoidance cannot be exercised by the infant's privies in estate merely.[57] However, when an infant has avoided the transaction his privies in estate may avail themselves of such avoidance.[58]

42. Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind. App. 632.
N.J.—Levine v. Mallon Oldsmobile Co., 21 A.2d 852, 127 N.J.Law 197.
31 C.J. p 1018 note 12.

43. Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind. App. 632.
31 C.J. p 1018 note 13.

44. Ga.—Ware v. Mobley, 9 S.E.2d 67, 69, 190 Ga. 249, quoting **Corpus Juris.**
31 C.J. p 1019 note 35.

45. Ga.—Ware v. Mobley, supra, quoting **Corpus Juris.**
31 C.J. p 1019 note 36.
"There is no such person as an innocent successor in title to property conveyed by a minor during his minority if no deceit is practiced by the infant. Nothing less than an express or implied ratification by the former minor, after attaining his majority, affords any protection to any grantee, no matter how remote he may be, who is holding under a deed made by such minor during his minority."—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 945, 261 Ky. 795.

46. Ga.—Ware v. Mobley, 9 S.E.2d 67, 69, 190 Ga. 249, quoting **Corpus Juris.**
N.Y.—Oneida County Sav. Bank v. Saunders, 166 N.Y.S. 280, 179 App. Div. 282.

47. Ky.—Hardin v. Harrington, 11 Bush 367.
Miss.—Barksdale v. Learnard, 73 So. 736, 112 Miss. 861.

48. Ga.—Coniff v. Hunnicutt, 122 S.E. 694, 157 Ga. 823.

49. N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
S.C.—Davis v. Strauss, 174 S.E. 908, 173 S.C. 99—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.
31 C.J. p 1019 note 30, p 1005 note 30 [b].
Facts held to constitute estoppel
Iowa.—First Nat. Bank v. Torkelson, 228 N.W. 655, 209 Iowa 659.
Ky.—Martin v. Elkhorn Coal Corporation, 13 S.W.2d 780, 227 Ky. 623—J. I. Case Threshing Mach. Co. v. Dulworth, 287 S.W. 994, 216 Ky. 637.
Tex.—Hinnant v. Rodriguez, Civ. App., 255 S.W. 1000, affirmed, Com. App., 267 S.W. 471.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.

50. Ind.—Miles v. Lingerman, 24 Ind. 385.
Facts held not to constitute estoppel
Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 445.
S.C.—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72—Floyd v. Page, 124 S.E. 1, 129 S.C. 301.

51. Ky.—Sanders v. Bennett, 1 S.W. 436.

52. N.Y.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.
N.C.—Vail v. Stone, 23 S.E.2d 329, 222 N.C. 431.
31 C.J. p 1018 note 17.

53. Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind. App. 632.
N.Y.—In re Ziemba's Will, 1 N.Y.S. 2d 988, 165 Misc. 853.
31 C.J. p 1018 note 18.

54. Ind.—Gillenwaters v. Campbell, 41 N.E. 1041, 142 Ind. 529.

55. Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind. App. 632.
31 C.J. p 1018 note 20.

56. N.Y.—Dominick v. Michael, 6 N.Y.Super. 374.
31 C.J. p 1019 note 24.

57. Mass.—Mansfield v. Gordon, 10 N.E. 773, 144 Mass. 168.
31 C.J. p 1019 note 25.

58. Ind.—Shrock v. Crowl, 83 Ind. 243.

The committee of an infant lunatic may plead his infancy in avoidance of his transactions.[59]

After infant's death. The privilege of avoidance can be exercised in case of the infant's death by one who has succeeded beneficially to all rights of the infant by inheritance or bequest,[60] in the same manner as it might have been by the late infant if alive.[61] It has also been held that it may be exercised by the infant's personal representatives.[62]

§ 44. —— Time for Avoidance

An infant must exercise a right to avoid within a reasonable time after reaching his majority; and, except with respect to personal property, ordinarily he may not avoid before reaching majority.

The right to avoid need not be exercised before the removal of the disability of infancy.[63] The infant must, however, avoid within a reasonable time after attaining his majority;[64] and the failure to do so may constitute a ratification, as appears supra § 40 b, in which section the question of what constitutes a reasonable time is also discussed. If the infant delays beyond the period of limitation after reaching majority, his right to disaffirm is lost.[65]

The time for avoidance of an infant's contracts is considered infra § 75, and the time for avoidance of particular transactions involving an infant's property is considered infra §§ 47–56.

The heirs of an infant may, it has been held, disaffirm the transaction within the same time that the infant might himself have disaffirmed if living.[66] It has been held that it should be disaffirmed within a reasonable time after his death, and the right to do so may be barred by the statute of limitations.[67]

Before or after majority. Ordinarily the time to avoid a transaction affecting an infant's realty, on the ground of infancy, is after the removal of such disability,[68] and not prior thereto.[69] However, such transaction may be avoided on the ground of fraud before the infant's arrival at majority;[70] and even on the mere ground of the disability of infancy it may be avoided prior to attaining majority where a delay will work injury to the infant.[71] Also, in some jurisdictions, it has been held that a transaction affecting realty may be avoided by the infant through his guardian during his minority in a proper proceeding for that purpose.[72] So also infancy may be pleaded or set up in any action or proceeding, during minority, wherein the transaction is sought to be enforced to the prejudice of the infant.[73] According to some authorities an infant may, during infancy, enter and take the profits of the land,[74] or avoid his conveyance so far as to be enabled to recover the income of the estate conveyed.[75]

As to transactions with relation to personal property, the disaffirmance may be effected as well before as after majority,[76] although there is also some authority to the contrary.[77]

59. Pa.—Ledger Bldg. Assoc. v. Cook, 12 Phila. 434.
31 C.J. p 1019 note 27.

60. N.Y.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.
31 C.J. p 1018 note 21.

61. Tenn.—Walton v. Gaines, 29 S.W. 458, 94 Tenn. 420.
Tex.—Veal v. Fortson, 57 Tex. 482.

62. R.I.—Tillinghast v. Holbrook, 7 R.I. 230.
31 C.J. p 1019 note 28.

63. Mo.—Parrish v. Treadway, 183 S.W. 580, 267 Mo. 91.
31 C.J. p 1019 note 39.

64. Mo.—Stinson v. Bank of Queen City, App., 101 S.W.2d 537, 538, citing **Corpus Juris.**

65. Ky.—Justice v. Justice, 186 S.W. 148, 170 Ky. 423.
31 C.J. p 1019 note 42.

66. Ill.—Illinois Land & Loan Co. v. Bonner, 75 Ill. 315.
Mo.—Singer Mfg. Co. v. Lamb, 81 Mo. 221.

67. Mo.—Robinson v. Allison, 91 S.W. 115, 192 Mo. 366.

68. Tex.—Holden v. Murphy, Civ. App., 62 S.W.2d 189, error refused —Miller v. McAden, Civ.App., 253 S.W. 901.
31 C.J. p 1020 note 46.

69. Tex.—Holden v. Murphy, Civ. App., 62 S.W.2d 189, error refused.
31 C.J. p 1020 note 47.

70. Mich.—Gillmett v. Tourcott, 182 N.W. 128, 213 Mich. 617.
31 C.J. p 1020 note 48.

71. D.C.—Adriaans v. Dill, 37 App. D.C. 59.
Tenn.—Matherson v. Davis, 2 Coldw. 443.

72. Ky.—New Domain Oil & Gas Co. v. McKinney, 221 S.W. 245, 188 Ky. 183.
31 C.J. p 1020 note 50.

73. Mo.—Schneider v. Stahr, 20 Mo. 269.
31 C.J. p 1020 note 51.

74. N.Y.—Bool v. Mix, 17 Wend. 119, 31 Am.D. 285.
31 C.J. p 1020 note 52.

75. Ind.—Sims v. Bardoner, 86 Ind. 87, 44 Am.R. 263.

76. Ill.—Lewellyn v. Hawkins, 253 Ill.App. 368.
Mo.—Stinson v. Bank of Queen City, App., 101 S.W.2d 537, 538, citing **Corpus Juris.**
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.
N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659—Hight v. Harris, 124 S.E. 623, 188 N.C. 328—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Vt.—McNaughton v. Granite City Auto Sales, 183 A. 340, 108 Vt. 130.
31 C.J. p 1020 note 54, p 1067 note 24.
"All contracts of an infant in relation to personal property (not excepted by statute), whether executory or executed, may be disaffirmed by the infant during his minority." —Harris v. Cannon, 6 Ga. 382, 387—Levy v. McPhail, 127 S.E. 793, 794, 33 Ga.App. 784—Gonackey v. General Accident Assurance Corporation, 65 S.E. 53, 6 Ga.App. 381.

77. Mich.—Milligan v. S. W. Straus & Co., 256 N.W. 449, 268 Mich. 317.
31 C.J. p 1067 note 22.

§ 45. —— What Constitutes Avoidance

Avoidance must be effected by some positive act of disaffirmance which shows an intention not to be bound. It need not be by a writing but may be by an act inconsistent with the continued validity of the transaction.

The avoidance of the transaction must be effected not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance[78] which is of such a character as clearly to show an intention not to be bound.[79] While an act or instrument of equal solemnity with the one sought to be avoided is sufficient to effect an avoidance,[80] such an act or instrument is not essential to an avoidance.[81] It is not even necessary that the disaffirmance should be in writing; but any act on the part of the late infant done with the intent to disaffirm, which shows that he does not intend to be bound, and is inconsistent with the continued validity of the transaction, is sufficient.[82] Thus denial of the execution of the instrument is a sufficient act of avoidance.[83]

What constitutes avoidance of an infant's contracts is considered infra § 75; and what constitutes avoidance of particular property transactions of infants is considered infra §§ 47–56.

Notice of disaffirmance. The giving of notice of disaffirmance is a sufficient notice of avoidance.[84] While the giving of notice of rescission of the transaction and a tender of the consideration received have been held to be conditions precedent to the maintenance of an action at law based on such rescission, the failure to do so will not warrant dismissal of such a suit where the infant has disposed of the consideration and has nothing of value left to tender back.[85]

Disaffirmance by written instrument. While the avoidance need not be effected by written instrument, as appears supra note 82, a written instrument executed after the disability of infancy is removed and, with the intent to avoid, may have that effect.[86] A letter written to the other person stating the infant's intention of repudiating the transaction may be sufficient.[87]

Bringing or defending suit. The institution of a suit to set aside the transaction is an avoidance of it, although it is not essential to an avoidance, there being other ways of disaffirmance.[88] Setting up the defense of infancy in a suit by the other party to enforce his rights under the transaction is also a sufficient avoidance.[89]

§ 46. —— Return of Property or Consideration

An infant is generally required, in connection with the disaffirmance of a voidable transaction affecting property, or as a condition precedent to his action to recover what he has parted with, to return the property or consideration received by him, at least to the extent that he still has it.

In accordance with the general rules governing the necessity of restoring the consideration as a condition of avoiding the contracts of an infant, considered infra § 75, if an infant's transaction affecting property is voidable, the infant, in connection with the disaffirmance, and sometimes as a condition precedent thereto, as hereinafter appears, is generally required to return the property or consideration received by him,[90] at least to the extent that he still has the property or consideration;[91] and it has been held that he must account for so much of its value as may have been invested in other property which he still controls.[92] However, if, during infancy, the infant has disposed of the property received or spent or wasted the consideration, he is not obliged to make restitution on his avoid-

78. N.Y.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.
31 C.J. p 1020 note 56.

79. Tex.—O'Brien v. Smith, Civ. App., 118 S.W.2d 474, 478, citing **Corpus Juris**—Jones v. Teat, Civ. App., 57 S.W.2d 617, 620, citing **Corpus Juris.**
31 C.J. p 1020 note 57.

80. Ky.—Vallandingham v. Johnson, 3 S.W. 173, 85 Ky. 288, 8 Ky.L. 940.

81. Ind.—Shroyer v. Pittenger, 67 N.E. 475, 31 Ind.App. 158.
31 C.J. p 1020 note 59.

82. Ind.—Shroyer v. Pittenger, supra.
31 C.J. p 1020 note 62.

83. N.C.—Ricks v. Wilson, 70 S.E. 476, 154 N.C. 282.

84. U.S.—Sims v. Everhardt, Ind., 102 U.S. 300, 26 L.Ed. 87.
31 C.J. p 1020 note 63.

85. N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.

86. Ky.—Phillips v. Hoskins, 108 S.W. 283, 128 Ky. 371, 33 Ky.L. 378.
N.Y.—McIlvaine v. Kadel, 26 N.Y. Super. 429, 30 How.Pr. 193.

87. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.

88. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 406, 225 Ky. 288, citing **Corpus Juris.**
Mo.—Parrish v. Treadway, 183 S.W. 580, 267 Mo. 91.

89. N.H.—Roberts v. Wiggin, 1 N.H. 73, 8 Am.D. 38.

90. Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.

91. Ky.—Begley v. Holliday's Committee, 58 S.W.2d 654, 655, 248 Ky. 453, citing **Corpus Juris.**
N.C.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659—Wright v. Hepler, 140 S.E. 90, 91, 194 N.C. 542, quoting **Corpus Juris**—Hight v. Harris, 124 S.E. 623, 188 N.C. 328.
31 C.J. p 1021 note 82.

92. N.C.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659—Hight v. Harris, 124 S.E. 623, 188 N.C. 328.

ance.[93] The same rules apply where the transaction is sought to be avoided, not by the late infant himself, but by some other person claiming in his right.[94] Under a statute to that effect, in order to avoid a transaction affecting the real property of an infant under a certain age it is not necessary to return the consideration.[95]

On the other hand, if the transaction is considered absolutely void, it has been held that no legal duty devolves on the late infant, as a condition of its disaffirmance, to restore the consideration received;[96] nor is the necessity of restoring the consideration as a condition to avoid the transaction involved in cases where the infant disposed of his property while under guardianship; and his guardian may recover such property without restoring the consideration.[97]

The necessity of restoring property or consideration received in connection with the avoidance of particular transactions affecting property is considered infra §§ 47–56.

Restoration or tender as condition precedent. Some cases seem to hold that, if the late infant still has in his possession the consideration received, he must restore or offer to restore the same before he can maintain an action to avoid the transaction and to recover what he has parted with.[98] However, it is held in some jurisdictions that the late infant need not tender anything which he may have acquired or received in the transaction which he seeks to disaffirm in order to exercise the right of avoidance;[99] but by exercising the right he subjects himself to liability to account for what he has received and has in his possession when he reaches majority.[1] Where restoration of the property or consideration received is essential to an effectual disaffirmance, the duty to restore becomes a right to restore, which cannot be defeated by the other party refusing to take it back.[2]

Consideration not received by infant. Even though the transaction is merely voidable, and therefore subject to avoidance, the consideration need not be restored in order to avoid the transaction where the consideration was not received by the infant,[3] notwithstanding the receipt thereof is recited in the instrument,[4] as where it was paid to some other person than the infant,[5] even though the person who received it was the recognized agent of the infant;[6] and this rule applies to part of the consideration received by other than the infant, where the infant received no benefit therefrom.[7]

Infant's fraud or deceit. Under[8] or apart from[9] statute to that effect, the late infant may be required to return the property or consideration, in order to avoid the transaction, where it was entered into through his fraud or deceit, particularly as to his age.

Illegal administrator's sale. Where an infant heir receives from his curator the proceeds of an administrator's illegal sale, without knowledge on his part or on the part of his curator of the illegality of the transaction, it has been held that the infant is not

93. Me.—Whitman v. Allen, 121 A. 160, 123 Me. 1, 36 A.L.R. 776.
Minn.—Johnson v. Northwest Mut. Life Ins. Co., 57 N.W. 934, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187, affirmed 59 N.W. 992, 56 Minn. 365, 26 L.R.A. 187, 45 Am.S.R. 473.
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, which affirmed Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.
Pa.—Musser v. Schock, 95 Pa.Super. 406, 410, citing **Corpus Juris.**
Wis.—Olson v. Veum, 222 N.W. 233, 197 Wis. 342.
31 C.J. p 1021 note 83.

Condition of property

Infant disaffirming contract is only required to return or tender vendor the object purchased in whatever condition it may be.—Musser v. Schock, 95 Pa.Super. 406—Osipovitch v. Golnick, 43 Lack.Jur. 189, 56 York Leg.Rec. 123.

94. Miss.—Harvey v. Briggs, 8 So. 274, 68 Miss. 60, 10 L.R.A. 62.
31 C.J. p 1022 note 84.

95. Okl.—Rice v. Anderson, 134 P. 1120, 39 Okl. 279.

96. Cal.—Lee v. Hibernia Sav. & Loan Soc., 171 P. 677, 177 Cal. 656.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

97. Ga.—Hughes v. Murphy, 63 S.E. 231, 5 Ga.App. 328.

98. N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App. Div. 793, which affirmed Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.
31 C.J. p 1022 note 92.

99. U.S.—Bernstein v. Biscayne View Corporation, D.C.Fla., 16 F. 2d 1010.
Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.

1. Ala.—McCarty v. Woodstock Iron Co., supra.
31 C.J. p 1022 note 94.

2. N.M.—Evants v. Taylor, 137 P. 583, 18 N.M. 371, 50 L.R.A.,N.S., 1113.

3. Ark.—Stull v. Harris, 11 S.W. 104, 51 Ark. 294, 2 L.R.A. 741.
31 C.J. p 1021 note 77.

4. Miss.—Cook v. Toumbs, 36 Miss. 685.

5. Tenn.—Bowers v. Henning, 4 Tenn.Civ.App. 698.
31 C.J. p 1021 note 77.

6. Tex.—Vogelsang v. Null, 3 S.W. 451, 67 Tex. 465.

7. Tenn.—Bowers v. Henning, 4 Tenn.Civ.App. 698.

8. Ind.—Gillenwaters v. Campbell, 41 N.E. 1041, 142 Ind. 529.
31 C.J. p 1022 note 89 [a].

9. Ga.—Watters v. Arrington, 146 S.E. 773, 39 Ga.App. 275.
Okl.—International Land Co. v. Marshall, 98 P. 951, 22 Okl. 693, 19 L.R.A.,N.S., 1056.

required to make a tender of the proceeds before joining in a suit to avoid the transaction. However, he may be required to do so where he had knowledge of the illegality.[10]

2. Application of Rules

§ 47. Acquisition of Property

a. By purchase
b. By mortgage
c. By lease
d. By gift

a. By Purchase

(1) Validity
(2) Ratification
(3) Avoidance
(4) Vendors' liens

(1) Validity

An infant can purchase realty and personalty and can enter into a contract of purchase; but such purchase or contract is voidable.

In accordance with the rules as to the validity of an infant's property transactions generally, discussed supra § 36, while under some statutes an infant cannot purchase property without the authority of justice, although he may ratify such purchase on coming of age,[11] it is generally held, as hereinafter appears, that he may be a grantee in a conveyance or the purchaser of personalty.

Realty. An infant may be a grantee in a conveyance of land,[12] and the estate conveyed vests in him,[13] subject only to be divested in case he disagrees to the conveyance when of full age,[14] which he has power to do.[15] The conveyance is binding on the grantor.[16]

While ordinarily a delivery of the deed is necessary,[17] it is not essential that there shall be an actual delivery to make it a legal conveyance.[18] An infant may assent to a deed delivered to a third person for the benefit of the infant, so as to vest the estate,[19] or delivery of a deed executed in behalf of an infant to a witness of the deed, for the benefit of the infant, may operate as a delivery to the infant.[20] The mere recording of a voluntary deed with the intent that the beneficial title shall pass to an infant grantee amounts to a delivery whereby the title passes to the infant.[21] Where a deed clearly beneficial to an infant is given to him, his acceptance of the deed will be presumed,[22] but such presumption is only prima facie and is rebuttable.[23]

Personalty. A purchase of personalty by an infant is also voidable at his option,[24] especially where unfair advantage was taken of the infant;[25] but such purchase is not void,[26] and the adult seller cannot avoid the transaction.[27] In the absence of fraud the sale is a valid transfer of property out of the seller,[28] although the infant is not bound to pay

10. Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 S.W. 42.

11. La.—Sarapure v. Debuys, 6 Mart.,N.S., 18.

12. Cal.—In re Tetsubumi Yano's Estate, 206 P. 995, 188 Cal. 645.
31 C.J. p 1023 note 13.

13. Ky.—Mullins v. Mullins, 87 S. W. 764, 120 Ky. 643, 27 Ky.L. 1048.
Utah.—Rohwer v. First Judicial Dist. Ct., 125 P. 671, 41 Utah 279.

14. Md.—Monumental Bldg. Assoc. No. 2 v. Herman, 33 Md. 128.
31 C.J. p 1023 note 15.

15. N.M.—Evants v. Taylor, 137 P. 583, 18 N.M. 371, 50 L.R.A.,N.S., 1113.
31 C.J. p 1023 note 16.

16. N.C.—Armfield v. Tate, 29 N.C. 258.

17. Ala.—Foster v. Mitchell, 15 Ala. 571.
Necessity and sufficiency of delivery of deeds generally see Deeds §§ 94–129.

18. Ky.—Mullins v. Mullins, 87 S. W. 764, 120 Ky. 643, 27 Ky.L. 1048.

19. N.C.—Tate v. Tate, 31 N.C. 22.

20. Ga.—Watson v. Myers, 73 Ga. 138.

21. Colo.—Annis v. Wilson, 25 P. 304, 15 Colo. 236.
31 C.J. p 1023 note 23.

22. Ill.—McReynolds v. Stoats 122 N.E. 860, 288 Ill. 22.
31 C.J. p 1023 note 24.
Presumption of acceptance of gifts see infra subdivision d of this section.

23. Mo.—McNear v. Williamson, 66 S.W. 160, 166 Mo. 358.

24. Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.
Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.
Kan.—McClure Motor Co. v. Irwin, 23 P.2d 470, 138 Kan. 35, modifying 21 P.2d 403, 137 Kan. 528.
Ky.—Wright v. Stanley Motor Co., 60 S.W.2d 144, 249 Ky. 20.
N.J.—Levine v. Mallon Oldsmobile Co., 21 A.2d 852, 127 N.J.Law 197.
N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873.
31 C.J. p 1023 note 26.

Seller could not recover on contract of sale with infant.—Hecker-Jones-Jewell Milling Co. v. Bernstein, 254 N.Y.S. 588, 142 Misc. 501.

25. Mich.—Welch v. Olmsted, 51 N. W. 541, 90 Mich. 492.

26. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873.

27. Mass.—Oliver v. Houdlet, 13 Mass. 237, 7 Am.D. 134.
Tex.—Youngblood v. Hoeffle, Civ. App., 201 S.W. 1057.
Dealings at seller's peril
One contracting to sell automobile to infant without ascertaining his age, of which he made no representation, dealt with him at seller's peril, where automobile was not necessity under facts appearing.—Mosko v. Forsythe, 76 P.2d 1106, 102 Colo. 115.

28. Me.—Lankin v. Le Doux, 64 A.

the price stipulated.[29] It has been held that the failure of the infant, after coming of age, to pay for the property does not revest it in the vendor; nor does his sale thereof render him liable to an action for money had and received.[30]

Until a contract of purchase is avoided by the infant's disaffirmance thereof, an infant purchaser has the capacity to pass good title to the property.[31] However, a statute providing that title to property sold under a conditional sale contract shall remain in the seller applies to property purchased by an infant under such a contract, and the minor by his sale of the property cannot defeat the seller's title.[32]

If an infant obtains personal property by fraud, the contract is void from the beginning and requires no repudiation from the infant to render it so, even though the contract did not involve necessaries.[33] In such case title to the property does not pass, but remains in the seller, and his title is superior to that of attaching creditors.[34]

Contracts of purchase. Following the general rule with regard to contracts, discussed infra § 71, ordinarily a contract by an infant for the purchase of property is voidable,[35] although not void.[36] It is binding on the adult party unless disaffirmed.[37] Where an infant's agreement to purchase land has been assigned by the infant during his minority, it has been held that the assignee cannot enforce a specific performance thereof without proof of some affirmance by the late infant, both of the original agreement and the assignment thereof.[38]

(2) Ratification

The general rules governing the ratification of infants' transactions as to property ordinarily apply to the ratification of purchases of property.

In accordance with the rules governing the ratification of an infant's transactions as to property generally, as discussed supra §§ 38–41, ratification or disaffirmance of a contract of purchase must be of the entire contract, and the infant cannot ratify one part and disaffirm another.[39]

A voidable purchase of property by an infant may be confirmed by acts which might not confirm a sale by him.[40] The purchase may be ratified after reaching majority by acts indicating an intention to ratify,[41] as where the late infant pays part of the purchase money,[42] or promises to pay a note given for the price,[43] or enters upon the property,[44] or exercises ownership over the property.[45]

Retention or disposition of property. While it has been held that, where an infant purchases property and gives his note or promise to pay therefor, his retention of the property, after his coming of age, is not a ratification,[46] it is generally held that if he retains the property for an unreasonable time,[47] or disposes of it,[48] there is a ratification of the promise to pay. Where the infant tenders back the property received by him, and on refusal of his tender, brings suit, the mere retention of the property after arrival at majority cannot be deemed a ratification.[49]

1048, 101 Me. 581, 8 L.R.A.,N.S., 104.
S.C.—Crymes v. Day, 17 S.C.L. 320.

29. S.C.—Crymes v. Day, supra.

30. Me.—Lankin v. Le Doux, 64 A. 1048, 101 Me. 581, 8 L.R.A.,N.S., 104.
Liability for torts connected with contracts see infra § 89.

31. D.C.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

32. Okl.—Oklahoma Maytag Co. v. Worthen, 97 P.2d 562, 186 Okl. 267.

33. Ind.—Butler Bros. v. Snyder, 142 N.E. 398, 81 Ind.App. 44.

34. Mo.—Wray v. Wrightsman, 124 S.W. 38, 139 Mo.App. 635.
31 C.J. p 1023 notes 34, 35.

35. N.J.—Levine v. Mallon Oldsmobile Co., 21 A.2d 852, 127 N.J.Law 197.
31 C.J. p 1024 note 62.
Conditional sale contract
D.C.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

36. Ind.—Rice v. Boyer, 9 N.E. 420, 108 Ind. 472, 58 Am.R. 53.
Conditional sale contract
D.C.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

37. Pa.—McGinn v. Shaeffer, 7 Watts 412.

38. Mich.—Carrell v. Potter, 23 Mich. 377.

39. Pa.—Oransky v. Stepanavich, 155 A. 290, 304 Pa. 84, 77 A.L.R. 983.

40. Ky.—Middleton v. Hoge, 5 Bush 478.

41. N.C.—Wright v. Hepler, 140 S.E. 90, 194 N.C. 542.
Giving mortgage on property
N.C.—Wright v. Hepler, supra.
Acts held not affirmance as matter of law
Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.

42. N.C.—Dewey v. Burbank, 77 N. C. 259.
31 C.J. p 1023 note 9.
Schedule of debt in bankruptcy after reaching majority was not "ratification" of contract.—Sawyer Boot & Shoe Co. v. Braveman, 136 A. 290, 126 Me. 70.
Intention to ratify held not shown
N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722, affirming 297 N.Y.S. 79, 162 Misc. 751.

43. N.C.—Armfield v. Pate, 29 N.C. 258.

44. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 468, 12 L.R.A. 136.

45. **Facts held to constitute ratification**
N.Y.—Whitman v. Home Guardian Co. of New York, 238 N.Y.S. 301, 135 Misc. 598.

46. Conn.—Benham v. Bishop, 9 Conn. 330, 23 Am.D. 358.

47. Me.—Hilton v. Shepherd, 42 A. 387, 92 Me. 160.
31 C.J. p 1065 note 83.

48. Mich.—Minock v. Shortridge, 21 Mich. 304.
31 C.J. p 1065 note 84.

49. Ind.—House v. Alexander, 4 N.

Lapse of time without disaffirmance. It has been held that the failure of an infant to disaffirm within a reasonable time after reaching his majority, or within the period of statutory limitations, constitutes a ratification;[50] and acquiescence for a shorter period does not constitute ratification.[51] What constitutes a reasonable time for disaffirmance of a purchase is considered infra subdivision a (3) (b) of this section.

(3) Avoidance
- (a) In general
- (b) Time for avoidance
- (c) What constitutes avoidance
- (d) Restoration of property; liability for use or depreciation
- (e) Effect of avoidance

(a) In General

An infant has the right to disaffirm a contract of purchase even though it has been executed.

An infant has the right to disaffirm a contract of purchase[52] even though it has been executed;[53] and infancy at the time of the making of a contract to purchase is available not only as a defense to an action on the contract, but is also available as a basis for affirmative relief.[54] Thus an infant may relinquish property purchased by him during infancy and reclaim the money paid therefor,[55] even though the property has been damaged while in his possession.[56]

It has been held that an emancipated minor who authorized deductions from his wages to pay for certain property cannot, on reaching his majority, repudiate the purchase, since such payments were lawful when made;[57] but a statute providing that infants over fourteen years of age may become members in a building and loan association and shall be subject to the same duties and liabilities as adult members has been held not to preclude an infant's disaffirmance of a purchase financed by the association.[58]

An infant is not estopped to assert the right to avoid a purchase by reason of the fact that he filed an answer and replevied the property before a guardian ad litem was appointed;[59] nor will he be estopped by the fact that he continued to use the property after he became of age.[60]

Partial disaffirmance. An infant cannot disaffirm part of a purchase transaction and ratify some other part, and when the infant does disaffirm part of the transaction it operates as a disaffirmance of the entire transaction.[61]

(b) Time for Avoidance

An infant must disaffirm his purchase within a reasonable time after reaching majority.

In accordance with the rules governing the time for avoidance of an infant's property transactions generally, discussed supra § 44, the right of an infant to disaffirm a purchase and recover the money paid must be exercised within a reasonable time after reaching majority;[62] and the failure to do so within a reasonable time may be regarded as a ratification of the purchase, as appears supra subdivision a (2) of this section. It is frequently held that the question whether disaffirmance occurred within a reasonable time is one of fact,[63] and depends on all the circumstances of the case.[64] However, it

E. 891, 105 Ind. 109, 55 Am.R. 189.

50. N.Y.—Levenberg v. Ludington, 274 N.Y.S. 193, 152 Misc. 735.

51. N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 297 N.Y.S. 79, 162 Misc. 751, affirmed 295 N.Y.S. 249, 250 App.Div. 689, 251 App. Div. 722.

52. Ky.—Harris v. Shaffer, 246 S.W. 26, 197 Ky. 54.

Agreement made by mother
Ill.—Lewellyn v. Hawkins, 253 Ill. App. 368.

Disaffirmance for fraud
Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.

53. N.Y.—Pieri v. Nebbia, 34 N.Y.S. 2d 317, 178 Misc. 388.

54. U.S.—Bernstein v. Biscayne View Corporation, D.C.Fla., 16 F.2d 1010.

55. Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

56. Pa.—Osipovitch v. Golnick, 44 Lack.Jur. 145.

57. Va.—Acme Lumber Co. v. Miller, 139 S.E. 246, 148 Va. 409.
Emancipation of minor and effect thereof generally see supra §§ 28–30.

58. Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W. 2d 1029, 284 Ky. 408.

59. N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664.

60. Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

61. **Disaffirmance of purchase money obligation**
Where infant wife, on reaching majority, disaffirms liability on purchase-money note, mortgage, or judgment, she disaffirms as between herself and owner of judgment all title to property.—Oransky v. Stepanavich, 155 A. 290, 304 Pa. 84, 77 A.L.R. 983.

62. Ill.—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.

63. Minn.—Kelly v. Furlong, 261 N. W. 460, 194 Minn. 465.

64. **Time held not reasonable**
(1) More than six months.—Herschede Motor Car Co. v. Bangham, 26 Ohio N.P.,N.S., 232.
(2) More than eight years.—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.

Time held reasonable
(1) In general.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.
(2) Within fifty-two days.—Eckrich v. Hogan Bros., 263 N.W. 308, 220 Iowa 755.

has also been held that disaffirmance is timely if made within the statutory period of limitations after the infant has reached full age.[65]

A purchase of personalty can be avoided before as well as after the infant has attained his majority.[66]

(c) What Constitutes Avoidance

A purchase may be disaffirmed by any act on the part of the minor clearly showing an intention not to be bound thereby.

In accordance with the rules as to what constitutes disaffirmance of an infant's property transactions generally, discussed supra § 45, a purchase may be disaffirmed by any act on the part of the minor clearly showing an intention not to be bound thereby.[67] Thus a suit by the late infant to recover the money paid by him on a contract of purchase is an act of avoidance;[68] and the setting up of infancy as a defense in an answer to a suit for the purchase price constitutes an election to rescind.[69] An infant may also disaffirm a purchase by returning the property purchased.[70]

Restoration of the property to the seller as a condition precedent to disaffirmance is considered infra subdivision a (3) (d) of this section.

(d) Restoration of Property; Liability for Use or Depreciation

While there is a conflict of authority on the subject, it usually is held that an infant must, to disaffirm a purchase and recover payments thereon, restore the property only if it is in his control, or only so much of it as remains in his control; and where the property is returned ordinarily it is held that the infant is not liable for the use or depreciation of the property.

The conflict of authority with regard to the necessity of an infant's placing the other party to a contract or property transaction in statu quo, discussed supra § 46, infra § 75, seems to apply to an infant's purchases. Thus it has been held in some jurisdictions that, on the disaffirmance of a contract for the purchase of personalty in order to recover the money paid thereon, it is not necessary first to return or offer to return the goods purchased.[71] In others it has been held that the right to disaffirm his contract of purchase of personalty is limited to cases wherein he can place the seller in the position he was in before the contract was made and offers to do so.[72] However, it is the more usual rule, announced and followed by the great majority of the courts, that the infant must, in order to disaffirm the purchase and recover his payments, restore the property if it is still in his control, or must restore so much of it as remains in his control,[73] unless he shows some legal excuse for not doing so;[74] and the infant is not required to make good that which has been lost or wasted or otherwise disposed of during infancy.[75] In some jurisdictions this rule has been extended so that the infant, if he has dis-

(3) Less than two months.—Burnet v. Chapin, 274 Ill.App. 186.

(4) Within five months.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266.

65. N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 297 N.Y.S. 79, 162 Misc. 751, affirmed 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722.

Purchase of stock not within rule
Minn.—Kelly v. Furlong, 261 N.W. 460, 194 Minn. 465.

66. N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664.

Avoidance before or after majority as to property transactions generally see supra § 44.

67. Vt.—McNaughton v. Granite City Auto Sales, 183 A. 340, 108 Vt. 130.

Disaffirmance need not be express
Tenn.—McDowell v. Rees, 122 S.W. 2d 839, 22 Tenn.App. 336.

Statement by minor to seller that he was under age, wanted money back, and that sellers could get automobile, was disaffirmance of contract.—Tracey v. Brown, 163 N.E. 885, 265 Mass. 163.

68. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.
Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.
Vt.—McNaughton v. Granite City Auto Sales, 183 A. 340, 108 Vt. 130.

69. N.Y.—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266.

70. Pa.—Osipovitch v. Golnick, 44 Lack.Jur. 145.

The mere proposal to rescind the contract, wherein only a conditional tender of the purchased property is made, is not tantamount to actual repudiation.—Clyde v. Steger & Sons Piano Mfg. Co., 95 S.E. 734, 22 Ga. App. 192.

71. Ind.—Shirk v. Shultz, 15 N.E. 12, 113 Ind. 571.

72. Pa.—Friedman v. Huber, 92 Pa. Super. 245, 247, citing **Corpus Juris.**
31 C.J. p 1025 note 91.

73. U.S.—Nations v. Gregg, C.C.A. Neb., 290 F. 157.
Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.
Colo.—Mosko v. Forsythe, 76 P.2d 1106, 102 Colo. 115.
Kan.—Weeks v. Berschauer, 86 P.2d 81, 140 Kan. 244.
N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.

74. Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873.

Futility of offer to restore property
Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.

Claim of lien for payments on automobile bought while minor was sufficient excuse for not restoring automobile on disaffirming purchase.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

Restitution by seller
Seller was entitled to return of automobile on condition that he first restore to infant automobile traded in or its value.—Bell v. Smith, 124 So. 331, 155 Miss. 227.

75. N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659.

posed of the property, must turn over to the seller any substitute or equivalent which the infant may have received for it.[76] In any event, since the disaffirmance of a contract of purchase renders it void ab initio, the infant cannot after disaffirmance of the purchase retain the property, but must return it;[77] and it has been held that the disaffirmance without the return of the property or its equivalent will not relieve the infant from liability for the purchase price.[78]

Where the seller seeks to enforce the contract against the infant, the infant may plead his disability without returning or offering to return what he has received; but the legal effect of the plea is to annul the contract and to revest the seller with the title to the property.[79] A plea of infancy is not a defense in an action by the seller for claim and delivery when it appears that the infant's right to possession is contingent on compliance with the terms of the contract under which he originally came into possession.[80]

It is sufficient to support a disaffirmance that the property was recovered by the seller, and it is immaterial how the property came into his hands, as where it was repossessed by the seller for default in payments.[81] Where the property was restored to the seller it is immaterial that the seller's assignee was not notified.[82]

Statutory provisions. In some jurisdictions having statutes to that effect, restoration of the property or its equivalent or an offer to restore is a condition precedent to an infant's disaffirmance of a purchase.[83] Under such statutes it has been held that the infant has the right to elect either to return the goods purchased or pay the purchase price thereof, and where there is full and complete restoration made the seller cannot defeat the infant's right to disaffirm the contract by his refusal to accept the goods.[84]

Tender of property purchased. Even in those jurisdictions in which or under those circumstances where return of the property is required, a minor who has made a proper tender to the seller of the property is entitled to recover any payments made thereon.[85] To constitute a valid tender of property purchased so as to support a disaffirmance, the tender must be unconditional.[86]

Use or depreciation. Authorities differ as to whether, where the infant does return the property, he is required to pay for its use, depreciation, or damage. It is generally held that where the infant does return the property he is not liable for its use[87] or for depreciation of, or damages to, the property,[88] even though he has misrepresented his

Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.

Reasonable value of merchandise with which infant had since parted need not be paid as condition of pleading infancy against seller.—Hecker-Jones-Jewell Milling Co. v. Bernstein, 254 N.Y.S. 588, 142 Misc. 501.

76. Me.—Whitman v. Allen, 121 A. 160, 123 Me. 1, 36 A.L.R. 776.

Proceeds of sale

Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.

77. Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.

Conditional sales

Idaho.—Commercial Credit Co. v. Mizer, 296 P. 580, 50 Idaho 388.

Ill.—General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 358 Ill. 541.

After recovery of the purchase price the infant cannot hold the goods purchased as against his vendor.—Shirk v. Shultz, 15 N.E. 12, 113 Ind. 571.

78. N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388.

79. W.Va.—Wallace v. Leroy, 50 S.E. 243, 57 W.Va. 263, 110 Am.S.R. 777.

80. Idaho.—Commercial Credit Co. v. Mizer, 296 P. 580, 50 Idaho 388.

Me.—Robinson v. Berry, 45 A. 34, 93 Me. 320.

81. Tex.—Standard Motor Co. v. Stillians, Civ.App., 1 S.W.2d 332, error dismissed—Fulwiler Electric Co. v. Spann, Civ.App., 252 S.W. 892.

W.Va.—Zink v. Gray, 142 S.E. 428, 105 W.Va. 232.

Failure to surrender certificate of title

Fact that infant in returning truck trailer to seller did not surrender certificate of title was held not to preclude infant's rescission of contract and recovery of purchase price, where seller became repossessed of the trailer and, acting under power reserved to it in mortgage, subsequently sold trailer to a third person and conveyed both the title and possession to him.—Freiburghaus v. Herman Body Co., Mo.App., 102 S.W.2d 743.

82. Ohio.—Hoffman v. Edson Co., 173 N.E. 307, 37 Ohio App. 262.

83. Cal.—Freitas v. Cordeiro, 9 P.2d 882, 122 Cal.App. 319—Murdock v. Fisher Finance Corporation, 251 P. 319, 79 Cal.App. 787.

N.D.—Luce v. Jestrab, 97 N.W. 848, 12 N.D. 548.

84. Mont.—Stanhope v. Shambow, 170 P. 752, 54 Mont. 360.

85. Tex.—McKnight Chevrolet Co. v. Strahan, Civ.App., 11 S.W.2d 259.

Offer held sufficient

Cal.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

86. Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149.

87. Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.

Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743.

N.C.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.

31 C.J. p 1025 note 87.

88. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.

N.C.—McCormick v. Crotts, 153 S.E. 152, 198 N.C. 664—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659.

Tex.—Standard Motor Co. v. Stilli-

age to induce the transaction,[89] unless it is on the ground of tort, discussed infra § 89. However, it has been held in some jurisdictions that the infant cannot recover what he has paid on account without accounting for or setting off the reasonable value of use or deterioration in value of the property,[90] at least where the infant fraudulently represented himself as of age when he made the contract;[91] and in effecting the rescission the equities running through the entire transaction should be balanced to determine whether the parties had been restored to status quo.[92] In at least one jurisdiction it has been held, on the ground that restoration to status quo means restoration to the original condition of the parties at the time of the consummation of the sale, that the infant is liable for depreciation in value while the property was in his possession, but is not liable for the use of the property.[93] Where the property never came into the infant's possession, the right of the minor to return of the money paid on the purchase price is not affected by any depreciation in value of the property between the date of the contract and the date of final sale of the property.[94]

Under a statute providing that when minors are admitted to the benefit of restitution against their engagements the reimbursement of what may have been received by them is not required unless it be proved that it accrued to their benefit, the infant purchaser need not pay to the seller depreciation resulting from the contract.[95]

Where the infant continued to use the property after he became of age the seller will be entitled to recover for the use of the property or for the deterioration in value resulting therefrom.[96]

Restoration of realty. It has been held that the minor disaffirming a purchase of realty must restore,[97] or offer to restore,[98] the property to his vendor, or the profit or benefit derived therefrom.[99] However, it has also been held that, where a contract of sale of realty is rescinded, the vendor cannot recover from the minor, or set off, the value of the minor's use and occupation of the property.[1]

ans, Civ.App., 1 S.W.2d 332, error dismissed.
31 C.J. p 1025 note 88.

Condition of property immaterial
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743.
Pa.—Musser v. Schock, 95 Pa.Super. 406—Osipovitch v. Golnick, 44 Lack.Jur. 145.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.

Expenses in recovering property
A counterclaim by the seller for expenses incurred in getting the car sold from the place where it had been abandoned by the minor after it had been damaged by him will not be allowed.—Osipovitch v. Golnick, 43 Lack.Jur., Pa., 189, 56 York Leg. Rec. 123.

89. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 235 Ala. 275.

90. Cal.—Freitas v. Cordeiro, 9 P.2d 882, 122 Cal.App. 319—Toon v. Mack International Motor Truck Corporation, 262 P. 51, 87 Cal.App. 151—Murdock v. Fisher Finance Corporation, 251 P. 319, 79 Cal.App. 787.
N.J.—Levine v. Mallon Oldsmobile Co., 21 A.2d 852, 127 N.J.Law 197, citing **Corpus Juris.**
N.Y.—Wolf v. Vim Electric Co., 24 N.Y.S.2d 643.
31 C.J. p 1025 note 92.

Determination of value of use
It has been held that the amount to be deducted as the value of infant's use is not the reasonable rental value during the time the property was in his possession, but the amount of benefits actually received by the infant from their use.—Berglund v. American Multigraph Sales Co., 160 N.W. 191, 135 Minn. 67.

91. D.C.—Dick Murphy, Inc., v. Holcer, 57 F.2d 431, 61 App.D.C. 65.
Ill.—Berryman v. Highway Trailer Co., 30 N.E.2d 761, 307 Ill.App. 480.
Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.
Contra Summit Auto Co. v. Jenkins, 153 N.E. 153, 20 Ohio App. 229.

Natural justice
Where the infant has misrepresented his age, natural justice will not permit him to recover the money paid for the property without compelling him to account for the injury which his deceit has inflicted on the other person.
U.S.—Myers v. Hurley Motor Co., App.D.C., 47 S.Ct. 277, 273 U.S. 18, 71 L.Ed. 515, 50 A.L.R. 1181.
D.C.—Myers v. Hurley Motor Co., 18 F.2d 187, 57 App.D.C. 145.
Minn.—Steigerwalt v. Woodhead Co., 244 N.W. 412, 186 Minn. 558.

92. Cal.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

Complicated facts
Where the transaction involves complicated facts equity cannot be done until an accounting is had of the charges and countercharges as to each party.—Murdock v. Fisher Finance Corporation, 251 P. 319, 79 Cal.App. 787.

93. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

94. Vt.—McNaughton v. Granite City Auto Sales, 183 A. 340, 108 Vt. 130.

95. La.—Smith v. Hempen, 8 La. App. 120.

96. Ala.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

97. N.C.—Wright v. Hepler, 140 S.E. 90, 194 N.C. 542.

Inability to restore unencumbered title
Where a minor who purchased land executed a mortgage thereon after reaching his majority, he was unable to restore unencumbered title, and could not disaffirm and recover the purchase price.—Wright v. Hepler, supra.

98. **Offer held sufficient**
An offer by one seeking to rescind a contract for the purchase of realty, entered into during his minority, to execute a deed reconveying the property, and a tender into court of a deed duly executed, was held sufficient to constitute a tender back of such property.—Miller v. McAden, Tex.Civ.App., 253 S.W. 901.

99. **Executory contract**
An infant purchaser of realty under executory contract received no profit or benefit which she could return or account for as condition of disaffirmance of contract after reaching her majority.—Hook v. Harmon Nat. Real Estate Corporation, 297 N.Y.S. 79, 162 Misc. 751, affirmed 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722.

1. Mich.—Lawrence v. Baxter, 267 N.W. 742, 275 Mich. 587.

It has been held that the infant is liable for the reasonable rental value of property purchased where he had no other place to live so that the rental of the property was a necessity.[2]

Where an infant repudiated a purchase of property which had been financed by a third person, the court may direct that the property be conveyed to such third person rather than be returned to the vendor.[3]

Infant's expenses as to property. Where the property which the infant had purchased and then returned on disaffirmance was a business, he will be entitled to an allowance for the expenses of operating the business;[4] and where the proceeds of sales of some of the property included in the purchase of the business were used to pay the expenses of the business they are not chargeable to the minor.[5]

(e) Effect of Avoidance

Rules governing the effect of an infant's avoidance of transactions as to property generally, apply to contracts of purchase. The infant may recover whatever he has parted with in payment of the purchase price; but the rights of an infant after disaffirmance do not attach to an adult party to the contract.

In accordance with the rules governing the effect of an infant's avoidance of his property transactions generally, as discussed supra § 42, the effect of the disaffirmance of a contract by an infant to purchase property is to render it void ab initio,[6] and the other party is reinvested with a right to whatever he has parted with under the contract and may sue to recover it,[7] except where the property has been transferred to a bona fide purchaser.[8] It has been held that the disaffirmance does not ipso facto retransfer the legal title to land to the vendor so as to enable him to recover the land in ejectment;[9] but it has been held, with regard to an infant's purchase of personal property, that on disaffirmance title to the property remains in the seller.[10]

Rights of infant. An infant's disaffirmance of a contract of purchase absolves him from all liability under the contract,[11] and entitles him to recover from the seller whatever he has parted with in payment of the purchase price,[12] even though part of

2. Ky.—Marcelliac v. Stevens, 267 S.W. 229, 206 Ky. 383.

3. Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W. 2d 1029, 284 Ky. 408.

4. Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

5. Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.

6. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.
Colo.—Mosko v. Forsythe, 76 P.2d 1106, 102 Colo. 115.
Vt.—Hoyt v. Wilkinson, 57 Vt. 404.

Rights fixed by law
Ill.—Fuller v. Pool, 258 Ill.App. 513.

7. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.
31 C.J. p 1025 note 80.
Necessity of return of property or consideration by infant see supra subdivision a (3) (d) of this section.

Rights of third persons receiving notes
Where an owner of land conveyed it and successfully attempted to retain a vendor's lien, and the purchaser resold the land to an infant, giving the infant's notes for the purchase price as collateral to loans from third persons, and the infant, subsequently renouncing his agreement, procured the cancellation of the notes, it was held that the land was subject to a lien in favor of such third persons for the amount obtained from them by the first purchaser.—Harris v. Shaffer, 246 S.W. 26, 197 Ky. 54.

8. **Sale on mortgage foreclosure**
A purchaser of realty at mortgage foreclosure sale before mortgagor disaffirmed his contract, made while he was an infant, to purchase oil burner, annexed by him to mortgaged realty with intent to make it a permanent part thereof, acquired good title to burner, as rescission of contract did not render original transfer of title void ab initio, so that seller of burner had neither title to it nor right to possession thereof at time of its alleged conversion by foreclosure purchaser and could not recover damages therefor from such purchaser.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

9. Ala.—McCarty v. Woodstock Iron Co., 8 So. 417, 92 Ala. 463, 12 L.R.A. 136.

10. Neb.—Curtis v. Kent, 131 N.W. 944, 89 Neb. 496, 52 L.R.A.,N.S., 723.

Conditional sale contracts
(1) Conditional sale contracts are within the rule.—Curtis v. Kent, supra.

(2) Infant, to have special property in truck after rescission, must have had legal possession thereof, with right to retain possession as against seller.—General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 358 Ill. 541.

11. N.Y.—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406.

12. U.S.—Nations v. Gregg, C.C.A. Neb., 290 F. 157.
Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.
Colo.—Mosko v. Forsythe, 76 P.2d 1106, 102 Colo. 115.
Iowa.—Mubler v. Gates, 229 N.W. 767, 209 Iowa 1198.
Ky.—Harris v. Shaffer, 246 S.W. 26, 197 Ky. 54.
N.J.—Levine v. Mallon Oldsmobile Co., 21 A.2d 852, 127 N.J.Law 197.
N.C.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659.
Tex.—Lockhart v. National Cash Register Co., Civ.App., 66 S.W.2d 796.
31 C.J. p 1025 notes 75, 82.
Necessity of infant's restoring property to seller as condition precedent to recovery of payments see supra subdivision a (3) (d) of this section.
Rights and remedies of infants on disaffirmance of contracts generally see infra § 75.

Recovery from broker
Infant who directed stockbrokers to purchase stock could rescind and recover money paid brokers, on tendering shares purchased, notwithstanding defense that brokers paid undisclosed sellers and profited only to extent of commissions.—Schroeder v. Hitt, 260 N.Y.S. 2, 236 App.Div. 466, affirmed 185 N.E. 786, 261 N.Y. 671.

the consideration was property of the infant which he traded in;[13] but he is not entitled to recover payments made by another than himself.[14] The rights of an infant disaffirming a contract for the purchase of realty have been held to be limited to an action for the recovery of money paid under the contract; and he has no possessory rights in the property.[15] Thus, it has been held that the infant's right to recover the purchase money paid for the property cannot be effectuated by the interposition of a counterclaim or set-off therefor in the seller's action of replevin to recover the property, particularly where an adult is a joint party with the infant.[16] If the infant has been in possession and paid rents, it has been held that he has no right to recover the same.[17]

While it is generally held that, where property traded in by the infant as part of the price is beyond reach of the seller, the infant is entitled to the reasonable value of the property at the time of the purchase, rather than the value fixed in the purchase agreement,[18] it has also been held that he is entitled to receive the value fixed in the agreement.[19]

It has been held that, since a purchaser trading in other property as part of the payment knows that his vendor will attempt to sell it, he is estopped to pursue the property against an innocent purchaser from his seller;[20] and, under a statute providing that a purchaser from a seller having a voidable title acquires good title provided he buys in good faith, for value, and without notice of the seller's defect of title, it has been held that the infant cannot recover the proceeds realized by his vendor from the sale of the property traded in by the infant, since such sale is not a tortious act, notwithstanding the disaffirmance relates back to the date of the contract.[21]

It has been held that where there has been a disaffirmance, the infant is entitled to interest on the money paid to the seller from the date of its payment,[22] and that where the infant had turned over some property to the seller in the course of the transaction, the seller, on the return of the property after disaffirmance of the transaction, was chargeable with the use and depreciation of such property.[23] On the other hand where the seller took property of the infant in part payment, and paid off a chattel mortgage on such property, on rescission of the purchase the seller is not liable for the failure to return the property to the infant, until the infant refunds to him the amount paid on the chattel mortgage, since such payment inured to the benefit of the infant.[24]

The infant may have a lien on the property for the purchase money paid; and he may enforce the lien against a subsequent purchaser who had or should have had notice thereof.[25] Where the infant was granted a lien on the property returned to the seller to secure repayment of the purchase price paid to the seller, the lien could not be enforced against insurance on the property in the hands of a purchaser from the seller, since the insurance did not protect the lien interest, which the infant could himself have insured.[26]

13. Tex.—Lockhart v. National Cash Register Co., Civ.App., 66 S.W.2d 796.

14. Cal.—Freitas v. Cordeiro, 9 P.2d 882, 122 Cal.App. 319.
31 C.J. p 1025 note 77.

Judgment paid by mother
Infant disaffirming contract to purchase automobile cannot recover amount of judgment voluntarily paid by infant's mother to holder of installment notes.—Fuller v. Pool, 258 Ill.App. 513.

15. Pa.—Funk v. Wharen, 165 A. 513, 108 Pa.Super. 556.

16. **On theory of recoupment**
In suit to replevin truck sold to infant under conditional sales contract, infant was not entitled to recover payment made and value of automobile exchanged on theory of recoupment, since "recoupment" is weapon of defense, never of offense, and applies only by way of reduction, mitigation, or abatement of damages claimed by plaintiff.—General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 358 Ill. 541.

17. S.C.—Jennings v. Hare, 25 S.E. 198, 47 S.C. 279.

18. Mass.—Carpenter v. Grow, 141 N.E. 859, 247 Mass. 133.
N.C.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659.

Credit slip
Where the infant has a credit slip for property which he has transferred as part of the purchase price, the credit slip does not become the equivalent of a cash obligation on rescission, since he is entitled only to the reasonable value of the property and not the agreed value.—Cook v. Clarke Chevrolet Co., 153 S.E. 88, 41 Ga.App. 389.

Real property held within rule
Mich.—Lawrence v. Baxter, 267 N.W. 742, 275 Mich. 587.

19. Tex.—Lockhart v. National Cash Register Co., Civ.App., 66 S.W.2d 796.

Presumption as to value
Where, on infant's disaffirmance, defendant cannot restore automobile, defendant will be charged with the value thereof, which is presumed to be the sum at which he valued it in the trade-in.—Schoenung v. Gallet, 238 N.W. 852, 206 Wis. 52, 78 A.L.R. 387.

20. **Automobile**
Fla.—Russell v. Donaldson, 195 So. 198, 142 Fla. 394.

21. Mass.—Carpenter v. Grow, 141 N.E. 859, 247 Mass. 133.

22. Cal.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

23. Cal.—Murdock v. Fisher Finance Corporation, 251 P. 319, 79 Cal. App. 787.

24. La.—Smith v. Hempen, 8 La. App. 120.

25. **Infant in possession**
Ky.—Marceillac v. Stevens, 267 S.W. 229, 206 Ky. 383.

26. Ky.—Marceillac's Adm'r v. Taylor, 289 S.W. 283, 217 Ky. 354.

Rights and liabilities of adult parties to transaction. An infant's disaffirmance of a contract of purchase does not protect or release an adult who has contracted jointly with the infant;[27] nor does it protect the principal for whom the infant has been acting as agent,[28] or an adult who has made an independent purchase for the benefit of the infant.[29]

Where the consideration turned over by the infant to the seller in making the purchase was furnished for that purpose by an adult, it cannot be recovered;[30] but where the contract was one with the infant, it may be repudiated by the infant even though the money was furnished to the infant, or directly to the vendor, by an adult.[31]

Both parties infants. If both parties to a sale are infants, the purchaser cannot recover the purchase price which the seller has spent;[32] but where an adult had participated in the transaction, the buyer is entitled to recover from him so much of the purchase price as was received by him.[33]

(4) Vendors' Liens

The vendor may have a lien on the property where the infant ratifies, or where he disaffirms but retains the property, or where the infant disaffirms but an adult is a joint party.

If an infant purchaser ratifies his purchase of land, the vendor has a lien thereon for the unpaid purchase price;[34] and if the infant successfully pleads infancy as a defense to an action for the purchase price, and retains the property, the property is still subject to the vendor's lien.[35] Where the purchase is made by an infant and an adult jointly, and the infant disaffirms, the vendor still retains a lien on the property for the entire purchase price.[36]

b. By Mortgage

An infant may take a mortgage of real or personal property.

An infant may take a mortgage of personal property,[37] or become a mortgagee of realty.[38]

The cancellation, satisfaction, or release of a mortgage by an infant mortgagee may be disaffirmed by him when he reaches his majority.[39]

c. By Lease

Rules governing infants' property transactions generally apply, ordinarily, to an infant's lease of property.

In accordance with the rules governing infants' property transactions generally, considered supra §§ 36–46, a lease to an infant, while voidable,[40] is not void.[41] Thus, where an infant enters into possession under a lease, an estate vests in him, until he repudiates the lease and redelivers possession.[42]

Ratification. The retaining of possession of the leased premises for sometime after attaining majority may work a ratification;[43] but the taking of a new lease after the expiration of the old one has been held not to operate as a ratification of the prior lease.[44]

Disaffirmance. Since the right to avoid a transaction respecting property is in the infant personally, as considered supra § 43, infancy, as a defense to liability on a lease, cannot be asserted by third persons.[45]

Even though he has disaffirmed the lease, the infant is liable for rent under the lease for the period before the disaffirmance and during which he occupied the premises and received the benefits thereof;[46] but he is not liable for rent for the period after the disaffirmance of the lease, even though

27. Ind.—Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 86 Ind. App. 632.
Ky.—Gray v. Grimm, 163 S.W. 762, 157 Ky. 603.
Husband
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

28. Pa.—Keystone Discount Co. v. Demby, 91 Pittsb.Leg.J. 437.

29. Purchase by mother
N.Y.—Marsak v. Title Guarantee & Trust Co., 276 N.Y.S. 891, 154 Misc. 295.

30. Father's car traded in
Seller was not liable for value of old car traded in for new one while buyer disaffirming purchase was a minor, where his father gave him old automobile solely to trade in.—McCarty-Greene Motor Co. v. McCluney, 121 So. 713, 219 Ala. 211.

31. Ill.—Moskovitz v. Kerman Stores Co., 259 Ill.App. 480.

32. Mass.—Drude v. Curtis, 67 N.E. 317, 183 Mass. 317, 62 L.R.A. 755.
Tex.—Dodson v. Roberts, Civ.App., 4 S.W.2d 155.

33. Tex.—Dodson v. Roberts, supra.

34. Ill.—Wright v. Buchanan, 123 N.E. 53, 287 Ill. 468.

35. Vt.—Weed v. Beebe, 21 Vt. 495.

36. Ky.—Gray v. Grimm, 163 S.W. 762, 157 Ky. 603.

37. Mass.—Bradford v. French, 110 Mass. 365—Barnard v. Eaton, 2 Cush. 294.

38. Mass.—Parker v. Lincoln, 12 Mass. 16.
31 C.J. p 1023 note 38.

39. N.Y.—Foy v. Salzano, 136 N.Y.S. 699, 152 App.Div. 47.
N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.

40. Neb.—Cole v. Manners, 107 N.W. 777, 76 Neb. 454.
31 C.J. p 1024 note 41.
Lease of personal property
Pa.—Camera & Radio Shop v. Zalewske, 157 A. 376, 102 Pa.Super. 562.

41. Mo.—Griffith v. Schwenderman, 27 Mo. 412.
31 C.J. p 1024 note 42.

42. N.Y.—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.

43. S.C.—Ihley v. Padgett, 3 S.E. 468, 27 S.C. 300.
31 C.J. p 1024 note 49.

44. Ala.—Flexner v. Dickerson, 72 Ala. 318.

45. Mo.—Griffith v. Schwenderman, 27 Mo. 412.

46. N.Y.—9302 Boardwalk Corpora-

such period is within the term covered by the lease.[47] He may recover the rent paid where he has received no benefits from the leased premises.[48] The lessor has been held to have no counterclaim against the infant for damages because of inability to rent the premises to advantage after the disaffirmance, in the absence of fraud or other special circumstances.[49]

Restraining irreparable injury. The plea of infancy is not available in a suit brought to restrain an infant lessee from making use of his possession to inflict irreparable injury on the landlord.[50]

d. By Gift

An infant may be a donee of property; and where the gift is for his advantage formal acceptance is unnecessary, since the law will presume acceptance.

An infant is capable of being a donee of property.[51] In the case of a gift to an infant no formal acceptance is necessary.[52] If the gift is for his advantage the law will presume acceptance;[53] the law accepts it for him, and will hold the donor bound.[54] However, if the gift is not for the infant's advantage, the law will repudiate it at his instance,[55] even though he may in terms have accepted it.[56] Under a statute permitting the grandparents of a child to accept a donation of realty for the minor, a formal acceptance by the grandparents is required.[57] Where a deed of gift to an infant appeared in the possession of the trustee of the gift, its delivery will be presumed.[58]

Where a widow purchased property in the name of herself and her children without authority, she could sell the property and pass valid title so long as the purchase was not ratified by the children or by an appropriate judicial proceeding.[59] Where the infant received the gift as the result of the fraud of another, and retained the property after maturity, he was held to have ratified the agency of the person procuring the gift and therefore to be subject to all infirmities of title.[60] Where an infant inherits property subject to certain indebtedness under a will, he should be permitted to pay the indebtedness where the property value exceeds the debt.[61]

§ 48. Alienation of Property

The alienation of property by an infant is ordinarily governed by the rules applicable to infants' property transactions generally, considered supra §§ 36–46, as appears infra §§ 49–56, in which particular kinds of alienation are discussed.

The partition of property of which an infant is one of the owners is considered infra § 51 c.

Examine Pocket Parts for later cases.

§ 49. —— Assignments

An infant's assignment ordinarily is voidable and not void.

An assignment being of the nature of a contract, as discussed in Assignments § 2, an infant's assignment of a property right is, in accordance with the rules governing the contracts of infants generally, discussed infra §§ 71–75, ordinarily voidable,[62] but

tion v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
31 C.J. p 1024 note 45.

47. Conn.—Gregory v. Lee, 30 A. 53, 64 Conn. 407, 25 L.R.A. 618.
31 C.J. p 1024 note 46.

48. Ala.—Ex parte McFerren, 63 So. 159, 184 Ala. 223, 224, 47 L.R.A.,N.S., 543, Ann.Cas.1915B 672.
31 C.J. p 1024 note 48.

49. Ohio.—Hewitt v. Klein, 191 N.E. 836, 47 Ohio App. 355.

50. Neb.—Cole v. Manners, 107 N.W. 777, 76 Neb. 454.

51. N.Y.—Stromberg v. Rubenstein, 44 N.Y.S. 405, 19 Misc. 647.
31 C.J. p 1024 note 53.
Gifts between parent and child see the C.J.S. title Parent and Child § 60, also 46 C.J. p 1319 note 31–p 1324 note 31.

52. Tex.—Youngblood v. Hoeffle, Civ.App., 201 S.W. 1057.
31 C.J. p 1024 note 54.

53. Conn.—Hammond v. Lummis, 137 A. 767, 106 Conn. 276.
Ind.—Klingaman v. Burch, 25 N.E.2d 996, 999, 216 Ind. 695, quoting **Corpus Juris.**
Ky.—Davis' Committee v. Loney, 162 S.W.2d 189, 290 Ky. 644—Collins v. Collins' Adm'r, 45 S.W.2d 811, 242 Ky. 5.
Tenn.—McDowell v. Rees, 122 S.W.2d 839, 850, 22 Tenn.App. 336, quoting **Corpus Juris.**
Utah.—Wood v. Wood, 49 P.2d 416, 87 Utah 394.
31 C.J. p 1024 note 55—28 C.J. p 673 note 76.

54. Ind.—Klingaman v. Burch, 25 N.E.2d 996, 999, 216 Ind. 695, quoting **Corpus Juris.**
Miss.—Brown v. Long Bell Co., 103 So. 353, 138 Miss. 548.
31 C.J. p 1024 note 56—28 C.J. p 673 note 77.

55. Cal.—De Levillain v. Evans, 39 Cal. 120.
Tex.—Youngblood v. Hoeffle, Civ. App., 201 S.W. 1057.

56. Cal.—De Levillain v. Evans, 39 Cal. 120.

57. La.—Works v. Noble, 149 So. 423, 177 La. 681.

58. Ky.—Taylor v. Purdy, 151 S.W. 45, 151 Ky. 82.

59. La.—Williams v. Horn, 129 So. 122, 170 La. 663.

60. Cal.—Simmons v. Briggs, 231 P. 604, 69 Cal.App. 447.

61. Ill.—Van Epps v. Arbuckle, 164 N.E. 1, 332 Ill. 551.

62. Mass.—Kingman v. Perkins, 105 Mass. 111.
Assignment of dower by infant see Dower § 82 c (2).
Certificate of deposit
Infant may avoid transfer of certificates of deposit, particularly when held by one not holder for value.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J.Eq. 203.
Executed contract of assignment
Minor establishing her minority at time she assigned her stock certificates to cover margin on grain account had right to disaffirm assignment and have it canceled and recover market value of stock, notwithstanding assignment was fully ex-

not void.[62] The same rule has been applied to assignments for the benefit of creditors made by infants, see Assignments for Benefit of Creditors § 7.

An infant's assignment cannot be avoided by his creditors on the mere ground of his infancy.[64]

§ 50. —— Contracts of Sale

The general rules governing transactions of infants relating to their property apply to an infant's contracts of sale.

In accordance with the general rules governing transactions of infants relating to their property, see supra §§ 36–46, a contract of sale or bond to convey entered into or executed by an infant is voidable[65] but not void,[66] although, under a statute providing that realty can be sold by infants under specified conditions only, a contract of sale not within the statute is illegal and will not be enforced.[67] It may be avoided[68] or ratified[69] after the infant reaches his majority.

It has been held that a purchaser after rescinding a contract of sale on the ground of the fraud of the infant seller may recover the purchase price paid in an action in assumpsit.[70]

Rights and liabilities of adult parties to contract. The contract is binding on the adult party thereto until disaffirmed by the infant;[71] and the infancy of one vendor does not release other vendors from their obligations on the sale contract.[72] However, an executory contract for the sale of land owned jointly by infants and adults which is void as to the infants is void altogether, as the parts cannot be separated.[73]

§ 51. —— Conveyances and Mortgages

a. Conveyances and mortgages generally
b. Conveyances and mortgages of infant wife or husband
c. Partition

a. Conveyances and Mortgages Generally

(1) Validity
(2) Ratification
(3) Avoidance

(1) Validity
(a) Conveyances
(b) Mortgages

(a) Conveyances

Subject to some exceptions, an infant's conveyance is merely voidable and not void.

In accordance with the rules governing the acquisition and alienation of property by infants generally, as discussed supra §§ 36–46, ordinarily an infant's conveyance is merely voidable,[74] and not absolutely void;[75] and, under the rule stated, an in-

ecuted before any notice to assignee of its disaffirmance.—Uhlmann Grain Co. of Texas v. Wilson, Tex.Civ.App., 68 S.W.2d 281, error dismissed.

Ratification

(1) A minor assignor of an application for patent was held to have affirmed the assignment by actively assisting the assignee in obtaining the patent after attaining his majority.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, C.C.A. Conn., 287 F. 328, modifying, D.C., 270 F. 219.

(2) An assignment of a patent application by a minor was held valid, where not disaffirmed by the assignor within lapse of ten years after he attained his majority.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, supra.

62. Mass.—Kingman v. Perkins, 105 Mass. 111.

64. Mass.—Kingman v. Perkins, supra.

65. N.Y.—Persico v. Guernsey, 220 N.Y.S. 689, 129 Misc. 190, affirmed 225 N.Y.S. 890, 222 App.Div. 719.
31 C.J. p 1026 note 8.

66. N.Y.—Persico v. Guernsey, supra.
31 C.J. p 1026 note 9.

67. Minn.—Terrell v. Kopp, 210 N. W. 632, 168 Minn. 479.

68. Ark.—Cook v. Bronaugh, 13 Ark. 183.
31 C.J. p 1026 note 10.

69. Or.—Haldeman v. Weeks, 175 P. 445, 90 Or. 201.
31 C.J. p 1026 note 11.

70. Mich.—Patterson v. Kasper, 148 N.W. 690, 182 Mich. 281, L.R.A. 1915A 1221.
31 C.J. p 1026 note 16.
Liability of infant for torts arising out of contract see infra § 89.

71. N.Y.—Persico v. Guernsey, 220 N.Y.S. 689, 129 Misc. 190, affirmed 225 N.Y.S. 890, 222 App.Div. 719.
Pa.—McGinn v. Shaeffer, 7 Watts 412.

72. N.Y.—Persico v. Guernsey, 220 N.Y.S. 689, 129 Misc. 190, affirmed 225 N.Y.S. 890, 222 App.Div. 719.

73. Minn.—Terrell v. Kopp, 210 N. W. 632, 168 Minn. 479.

74. Ga.—Taylor v. Brown, 141 S.E. 898, 165 Ga. 698.
Ill.—Schlig v. Spear, 177 N.E. 730, 345 Ill. 219.
Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.
Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.
Neb.—Klapka v. Shrauger, 281 N.W. 612, 135 Neb. 354.
N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.
N.Y.—Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559.
Okl.—McElroy v. Calhoun, 57 P.2d 827, 177 Okl. 38—Warner v. Williams, 12 P.2d 525, 158 Okl. 66.
Tex.—Neill v. Pure Oil Co., Civ.App., 101 S.W.2d 402, error refused—McGill v. Reed, Civ.App., 64 S.W.2d 358—Holden v. Murphy, Civ.App., 62 S.W.2d 189, error refused.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
Va.—New v. H. E. Harman Coal Corporation, 26 S.E.2d 39, 181 Va. 627.
31 C.J. p 1026 note 18.

Deed by female between eighteen and twenty-one, executed after effective date of amendment to statute changing age of majority of females from eighteen to twenty-one, was voidable.—Coleman v. Coleman, 200 N.E. 197, 51 Ohio App. 221.

75. Ill.—Schlig v. Spear, 177 N.E. 730, 345 Ill. 219.
Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.

fant's conveyance operates to transmit title,[76] subject to the infant's right to disaffirm on attaining majority.[77]

However, under statute to that effect in some jurisdictions, where the infant is under a specified age his conveyance is void and not merely voidable.[78] An infant's conveyance may also be held to be void when it appears from its face to be to his prejudice;[79] and it has been held that conveyances without consideration, by way of gift, are void, as discussed infra § 53. The deed of an infant which the law will compel him to make is as valid as though he were of full age.[80] The acknowledgment by an infant, in open court, of a deed executed by him does not render it irrevocable.[81]

Conveyances of mining claims. In some jurisdictions, by force of statute, a conveyance by an infant under a certain age of mining locations and claims is as valid as though it had been executed by an adult.[82]

(b) Mortgages

Subject to some exceptions, an infant's mortgage of realty or chattels is merely voidable and not void. It cannot be foreclosed until it is no longer avoidable; and when it is given to secure the purchase price of a conveyance to the infant it cannot be disaffirmed if the conveyance is not also disaffirmed.

In accordance with the rules governing the acquisition and alienation of property by infants generally, discussed supra §§ 36-46, an infant may make a mortgage of his lands.[83] While the infant may avoid such a mortgage[84] on attaining his majority,[85] such mortgage is voidable only and not void,[86] and is valid until some act is done by him to avoid it.[87]

If the mortgage is given without consideration, it is void;[88] and in some jurisdictions, by force of statute, a mortgage of land by an infant, under a certain age, is void and not merely voidable.[89]

A chattel mortgage given by an infant is subject to the same rules as obtain in the case of a mortgage of real estate;[90] it is not void but merely voidable.[91]

Foreclosure of mortgage. A mortgage may not be made the subject of foreclosure until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagor.[92] Under a statute to that effect, a minor has one year after arriving at the age of twenty-one years to show cause against an order or judgment of foreclosure, even though such right is not reserved in the order or judgment.[93]

N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.
Okl.—Warner v. Williams, 12 P.2d 525, 158 Okl. 66.
Tex.—Neill v. Pure Oil Co., Civ.App., 101 S.W.2d 402, error refused—McGill v. Reed, Civ.App., 64 S.W.2d 358—Holden v. Murphy, Civ. App., 62 S.W.2d 189, error refused.
Va.—New v. H. E. Harman Coal Corporation, 26 S.E.2d 39, 181 Va. 627.
31 C.J. p 1026 note 19.

76. Neb.—Klapka v. Shrauger, 281 N.W. 612, 135 Neb. 354.
Okl.—Warner v. Williams, 12 P.2d 525, 158 Okl. 66.
Tex.—Neill v. Pure Oil Co., Civ.App., 101 S.W.2d 402, error refused—McGill v. Reed, Civ.App., 64 S.W.2d 358.
31 C.J. p 1027 note 20.

77. Neb.—Klapka v. Shrauger, 281 N.W. 612, 135 Neb. 354.
Okl.—Warner v. Williams, 12 P.2d 525, 158 Okl. 66.
Tex.—McGill v. Reed, Civ.App., 64 S.W.2d 358.
Va.—New v. H. E. Harman Coal Corporation, 26 S.E.2d 39, 181 Va. 627.

78. Okl.—Lawson v. Bridges, 43 P.2d 111, 171 Okl. 502.
31 C.J. p 1027 note 21.

79. U.S.—MacGreal v. Taylor, App. D.C., 17 S.Ct. 961, 167 U.S. 688, 42 L.Ed. 326.
31 C.J. p 1027 note 22.
When the benefit of the infant demands, his conveyance may be held void.
Ga.—Wellborn v. Rogers, 24 Ga. 558.
Ky.—Breckenridge v. Ormsby, 1 J.J. Marsh. 236, 19 Am.D. 71.

80. Ala.—Sims v. Gunter, 78 So. 62, 201 Ala. 286.
31 C.J. p 1027 note 25.

81. Ala.—Slaughter v. Cunningham, 24 Ala. 260, 60 Am.D. 463.

82. Nev.—Keyworth v. Nevada Packard Mines Co., 186 P. 1110, 43 Nev. 428.

83. Tex.—Askey v. Williams, 11 S. W. 1101, 74 Tex. 294, 5 L.R.A. 176.

84. Mass.—Ready v. Pinkham, 63 N. E. 887, 181 Mass. 351.
31 C.J. p 1027 note 31.

85. N.Y.—Palmer v. Miller, 25 Barb. 399.
31 C.J. p 1027 note 32.

86. S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510.
31 C.J. p 1027 note 33.

87. Neb.—Uecker v. Koehn, 32 N.W. 583, 21 Neb. 559, 59 Am.R. 849.
31 C.J. p 1027 note 36.

88. Pa.—In re Steger's Estate, 11 Phila. 158.

89. S.D.—Gruba v. Chapman, 153 N. W. 929, 36 S.D. 119.
31 C.J. p 1028 note 38.

90. Mich.—Barney v. Rutledge, 62 N.W. 369, 104 Mich. 289.
31 C.J. p 1028 note 39.

91. Okl.—Drumhiller v. Norick Motor Co., 289 P. 698, 144 Okl. 174, 69 A.L.R. 1368.
31 C.J. p 1028 note 40.
Infancy as defense
While generally infancy is no excuse for wrongful detention of property of another, it is available as defense, as in actions ex contractu, where plaintiff claims title and right of possession through chattel mortgage given by infant.—Hooper Motor Co. v. Harris, 146 So. 618, 226 Ala. 278.
Mortgage jointly with adult
Crop mortgage executed by father and infant son which did not call for crops on any specific land was not binding on infant, but passed only crops of father.—Hooper Motor Co. v. Harris, 146 So. 618, 226 Ala. 278.

92. Conn.—Watson v. Ruderman, 66 A. 515, 79 Conn. 687.

93. Okl.—Leslie v. Hammond, 50 P. 2d 321, 174 Okl. 212.

Following the rule that a transaction must be avoided or affirmed in its entirety only and not in part, considered supra § 38, where an infant has given a purchase-money mortgage to secure the purchase money of a conveyance to him the infancy of the mortgagor is no defense to a foreclosure proceeding, when such conveyance has not been disaffirmed.[94]

(2) Ratification

The general rules governing the ratification of transactions of acquisition or alienation of property by infants apply to the ratification of conveyances and mortgages of infants.

In accordance with the rules governing the ratification of transactions of acquisition or alienation of property by infants generally, discussed supra §§ 39-41, if the conveyance[95] or mortgage[96] is considered void it is not subject to ratification. If, however, the conveyance[97] or mortgage[98] is considered merely voidable it is subject to ratification. Where a deed or mortgage executed by an infant does not name him in the instrument, the infant will not be bound thereby even though he again executes and acknowledges the instrument after reaching his majority.[99]

What constitutes ratification. It has been held that an infant's conveyance may be ratified by any decisive act showing intention to affirm,[1] as by a subsequent conveyance to the same grantee after his arrival at majority,[2] by retaining the consideration or a part thereof, and enjoying the same after coming of full age[3] although there is also some authority to the contrary,[4] by accepting part of the consideration after majority,[5] by suing for the purchase price,[6] by renting the land from the grantee,[7] or by otherwise receiving benefits under the deed after arriving at full age.[8]

A verbal confirmation of a deed after the infant reaches majority is sufficient,[9] but mere declarations or a promise on a contingency to make a deed of affirmance will not confirm the deed.[10] It has been asserted that more solemn and decisive acts are requisite to prove ratification of a conveyance than of a purchase by the infant.[11] Where an infant conveyed land which a third person claimed as a remote grantee of the infant's grantor, and the infant, on attaining majority, conveys it to the third person, the conveyance does not ratify the former deed but vests in the third person the infant's title.[12]

A mortgage may be ratified by any acts, after attaining majority, tending to recognize it and inconsistent with the idea of any intention to avoid it,[13] such as, for instance, by conveying the property subject to the mortgage,[14] by executing a subsequent mortgage recognizing the validity of the prior mortgage,[15] by executing a will directing that all his just debts be paid,[16] by paying the interest,[17] by agreeing to pay the interest,[18] by procuring from the mortgagee releases of portions of the mortgaged

94. Ohio.—Robinson v. Bergholz, 4 Ohio Dec., Reprint, 103, 1 Clev.L. Rep. 29.

95. Okl.—Colby v. Hayes, 97 P.2d 65, 66, 186 Okl. 283, citing **Corpus Juris.**

31 C.J. p 1028 note 47.

96. Ind.—Wetherill v. Harris, 67 Ind. 452.

97. Ky.—Damron v. Ratliff, 97 S.W. 401, 123 Ky. 758, 30 Ky.L. 67.

Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.

98. Ala.—American Mortg. Co. v. Wright, 14 So. 399, 101 Ala. 658.

31 C.J. p 1028 note 50.

99. Ky.—Goodrum's Guardian v. Kelsey, 50 S.W.2d 932, 244 Ky. 349—Hall v. Ditto, 12 S.W. 941, 11 Ky.L. 667.

1. Ill.—Schlig v. Spear, 177 N.E. 730, 345 Ill. 219.

N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.

Collecting rent for grantee

Ill.—Schlig v. Spear, 177 N.E. 730, 345 Ill. 219.

2. N.C.—Cox v. McGowan, 21 S.E. 108, 116 N.C. 131.

31 C.J. p 1028 note 52.

3. Mo.—Lacy v. Pixler, 25 S.W. 206, 120 Mo. 383.

31 C.J. p 1028 note 53.

4. Ky.—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.

Contra Damon v. Ratliff, 97 S.W. 401, 123 Ky. 758, 30 Ky.L. 67.

5. Ky.—Frazier v. Rockhouse Realty Co., 295 S.W. 1042, 220 Ky. 761—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.

31 C.J. p 1028 note 54.

6. La.—Harty v. Harty, 2 La. 518.

7. Ky.—Ingram v. Ison, 80 S.W. 787, 26 Ky.L. 48.

8. Ky.—Damron v. Ratliff, 97 S.W. 401, 123 Ky. 758, 30 Ky.L. 67.

31 C.J. p 1028 note 57.

9. N.C.—Houser v. Reynolds, 2 N. C. 114, 1 Am.D. 551.

10. Mo.—Craig v. Van Bebber, 13 S.W. 906, 100 Mo. 584, 18 Am.S.R. 569—Clamorgan v. Lane, 9 Mo. 446.

Performance of condition

Statements by grantor after reaching majority that if promised consideration for deed executed during minority was paid, he would let deed stand did not amount to "ratification," in absence of proof that consideration was paid.—Ware v. Molley, 9 S.E.2d 67, 190 Ga. 249.

11. Ky.—Syck v. Hellier, 131 S.W. 30, 140 Ky. 388.

Mich.—Carrell v. Potter, 23 Mich. 377.

12. Tex.—Allen v. Anderson, Civ. App., 96 S.W. 54.

13. N.Y.—Coney v. Harris, 118 N.Y. S. 244, 133 App.Div. 686, affirmed 93 N.E. 1118, 200 N.Y. 534.

Acts held not to constitute ratification

Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.

S.C.—Virginia-Carolina Chemical Corporation v. Chandler, 167 S.E. 663, 168 S.C. 425.

14. Mass.—Boston Bank v. Chamberlin, 15 Mass. 220.

31 C.J. p 1028 note 63.

15. N.C.—Ward v. Anderson, 15 S. E. 933, 111 N.C. 115.

16. N.Y.—Merchants' Fire Ins. Co. v. Grant, 2 Edw. 544.

17. Ala.—American Mortg. Co. v. Wright, 14 So. 399, 101 Ala. 658.

18. Mich.—Ruehle v. Lange, 194 N. W. 492, 223 Mich. 690.

premises,[19] by failing to defend an action for its foreclosure,[20] or by, when the consideration is executory, receiving a part thereof after attaining majority.[21]

The rule that the infant's failure to disaffirm the transaction within a reasonable time after reaching his majority constitutes a ratification of the transaction, discussed supra § 40, applies to an infant's conveyances and mortgages.[22]

Time for ratification. In accordance with the rule that the power to ratify does not exist during infancy, as discussed supra § 41, a deed is not ratified by the execution of another deed during infancy.[23]

Effect of ratification. While the ratification renders the transaction valid ab initio, discussed supra § 39, it is the ratification which rescues the conveyance from its liability to be avoided.[24] After a conveyance or mortgage has been ratified it cannot subsequently be disaffirmed.[25]

A subsequent purchaser for valuable consideration of land conveyed by an infant during his minority will hold the land as against a ratification by the grantor of which the subsequent purchaser had neither actual nor constructive notice;[26] but an infant's deed ratified after reaching his majority is superior to the title of a person claiming under a deed executed after such ratification, of which the subsequent grantee had notice.[27] If a mortgage is ratified and executed after obtaining majority, it is superior to a deed made during infancy but not ratified until after the ratification and execution of such mortgage; such deed is subject to the mortgage previously ratified.[28]

(3) Avoidance

(a) In general

(b) What constitutes avoidance

(a) In General

In general, rules governing the avoidance of the transactions of an infant relating to his property generally, apply to the avoidance of infants' conveyances and mortgages.

Rules governing the avoidance by infants of transactions relating to property generally, considered supra §§ 42–46, have been applied to the avoidance of infants' conveyances and mortgages.[29] It is not necessary to entitle one who has conveyed land while an infant to disaffirm that he should be in a position to recover possession of the land.[30] An infant may rid himself of the obligation of a mortgage on realty by disaffirming it, even if he still retains title to the property.[31] The duty of the infant to disaffirm if he elects to do so is a positive duty enjoined by the law.[32]

As considered supra § 43, the right of avoidance is superior to, and may be exercised against, or regardless of, a bona fide purchaser or mortgagee.

Time for avoidance. In accordance with the rules governing the right to avoid transactions as to property of infants generally, considered supra § 44, the right of an infant to disaffirm a conveyance or mortgage may and must be exercised within a reasonable time after reaching majority;[33] and the failure to do so within a reasonable time may constitute a ratification, as considered supra sub-

19. N.Y.—Wilson v. Darragh, 7 N.Y.S. 810.

20. Mich.—Terry v. McClintock, 2 N.W. 787, 41 Mich. 492.
31 C.J. p 1028 note 68.

21. Mass.—Keegan v. Cox, 116 Mass. 289.

22. Ga.—Merritt v. Jowers, 193 S.E. 238, 184 Ga. 762—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245.
Iowa.—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402.
N.C.—Hogan v. Utter, 95 S.E. 565, 175 N.C. 332.
Okl.—McElroy v. Calhoun, 57 P.2d 827, 177 Okl. 38.
S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510.
What constitutes reasonable time for avoidance see infra subdivision a (3) of this section.

23. Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.

24. Ill.—Black v. Hills, 36 Ill. 376, 87 Am.D. 224.

25. Ga.—Taylor v. Brown, 141 S.E. 898, 165 Ga. 698.
Ky.—Frazier v. Rockhouse Realty Co., 295 S.W. 1042, 220 Ky. 761.
Mich.—Ruehle v. Lange, 194 N.W. 492, 223 Mich. 690.
N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.

26. Ill.—Black v. Hills, 36 Ill. 376, 87 Am.D. 224.
31 C.J. p 1028 note 74.

27. S.C.—Tolar v. Marion County Lumber Co., 75 S.E. 545, 93 S.C. 274, Ann.Cas.1914D 844.

28. S.C.—Tolar v. Marion County Lumber Co., supra.

29. Ga.—Merritt v. Jowers, 193 S.E. 238, 184 Ga. 762.

30. Ind.—Long v. Williams, 74 Ind. 115.

31. N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.

32. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 225 Ky. 288.

33. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961, certiorari denied Allen v. Commissioner of Internal Revenue, 60 S.Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.
Ga.—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514.
Hawaii.—Jellings v. Pioneer Mill Co., 30 Hawaii 184.
Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Martin v. Elkhorn Coal Corporation, 13 S.W.2d 780, 227 Ky. 623.
S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510.
Tex.—McGill v. Reed, Civ.App., 64 S.W.2d 358.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
W.Va.—Muncey v. Norfolk & W. Ry. Co., 145 S.E. 581, 106 W.Va. 348.

division a (2) of this section. What is a reasonable time is a question of fact,[34] and depends on the circumstances of the case,[35] provided, in some jurisdictions, that it does not exceed a specified time,[36] or that it is not within a specified period during which disaffirmance is regarded as a matter of right.[37]

An infant remainderman who has joined with the life tenant in a conveyance of the premises may disaffirm his deed and proceed to have the same annulled as to him as soon as he reaches his majority, notwithstanding the life tenant is still living and the late infant consequently has no right to claim actual possession of any portion of the premises.[38] It has been held that he is under no obligation to bring suit before the life tenant's death and his failure to do so puts him in no legal default;[39] but it has also been held that he will not be excused from disaffirming within a reasonable time because the right to bring suit has not accrued,[40] as a suit is not necessary to disaffirm, as hereinafter appears.

Necessity of return of consideration. In accordance with the rules as to the necessity of returning property or consideration received by the infant in connection with his avoidance of a transaction relating to property, stated supra § 46, in some jurisdictions the infant is required, as a condition precedent to avoidance of a conveyance or mortgage, to restore the consideration received therefor if he still has it;[41] but he is not required to make restitution as a condition precedent to a disaffirmance if he has expended or otherwise disposed of the consideration received,[42] although it has also been broadly stated, without qualification, that disaffirmance will not be permitted with respect to a purchaser from the infant in good faith without notice of his infancy without restoration of the value of the consideration received.[43] It has been held that where no sufficient reason is given why the consideration should not be restored, the grantee under the disaffirmed conveyance may be granted a lien on the property to the extent of such consideration.[44] A tender of the consideration has been held to be a sufficient compliance with the requirement that the consideration be restored;[45] but even a tender of the consideration is not a condition precedent where such tender would be futile.[46]

34. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961, certiorari denied Allen v. Commissioner of Internal Revenue, 60 S.Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.

35. U.S.—Commissioner of Internal Revenue v. Allen, supra.

Lack of legal knowledge that infant must disaffirm deed within reasonable time after majority would not alone excuse delay in disaffirming.—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245.

Time held unreasonable

(1) Seventeen years.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.

(2) Eleven years.—Jones v. Godwin, 198 S.E. 86, 187 S.C. 510.

(3) Four years and eight months.—Muncey v. Norfolk & W. Ry. Co., 145 S.E. 581, 106 W.Va. 348.

(4) One year with knowledge grantee had been erecting valuable improvements.—Jellings v. Pioneer Mill Co., 30 Hawaii 184.

Time held not unreasonable

(1) Two years.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853.

(2) Delay from January 27, 1926, when plaintiff reached majority, until October 30, 1926, when she sued to cancel deed was held not unreasonable, particularly where there were negotiations between the parties during that time.—Muncey v. Norfolk & W. Ry. Co., 145 S.E. 581, 106 W.Va. 348.

36. U.S.—Collins v. Dye, C.C.A.Ariz., 94 F.2d 799, certiorari denied Collins, by Hughes v. Dye, 59 S.Ct. 62, 305 U.S. 601, 83 L.Ed. 381.

Ga.—Merritt v. Jowers, 193 S.E. 238, 184 Ga. 762—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514.

Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Martin v. Elkhorn Coal Corporation, 13 S.W.2d 780, 227 Ky. 623.

Under statute to that effect, all deeds, mortgages, and other instruments affecting title to land, executed by a minor, are binding on him unless he disaffirms in accordance with the statute within a specified period after the removal of the disability of minority.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.

37. **Twenty years**

N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.

38. Miss.—Shipp v. McKee, 31 So. 197, 80 Miss. 741, 92 Am.S.R. 616, suggestions of error overruled 32 So. 281, 80 Miss. 741, 92 Am.S.R. 616, following Fox v. Coon, 1 So. 629, 64 Miss. 465.

31 C.J. p 1029 note 81.

39. Miss.—Shipp v. McKee, 31 So. 197, 80 Miss. 741, 92 Am.S.R. 616, suggestions of error overruled 32 So. 281, 80 Miss. 741, 92 Am.S.R. 616.

S.C.—Steele v. Poe, 60 S.E. 951, 79 S.C. 407.

40. Ga.—Nathans v. Arkwright, 66 Ga. 179.

41. Ga.—Merritt v. Jowers, 193 S.E. 238, 184 Ga. 762.

Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278.

42. Ga.—Merritt v. Jowers, 193 S.E. 238, 184 Ga. 762.

Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278.

Ky.—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378.

43. Tex.—Westbrook v. Adams, Civ. App., 17 S.W.2d 116, affirmed Adams v. Bankers Life Co., Com. App., 36 S.W.2d 182.

44. **Deceased grantor**

Where deed of deceased grantor was canceled, land in possession of grantee's successors was restored to grantor's daughter on ground that grantor was minor when deed was executed, and no reason was presented why consideration received by grantor should not be restored, the successors were given lien on land to extent of consideration paid to grantor.—Hart v. Davidson, 120 S.W.2d 214, 274 Ky. 663.

45. Ky.—Mitchell v. Swartz, 270 S.W. 22, 207 Ky. 780.

46. **After refusal of previous offer**

Grantees, refusing offer to repay loan secured by deed of minor, and seeking to enforce deed as absolute conveyance, cannot demand tender of amount paid as condition pre-

In the case of a purchase-money mortgage given by the infant, the consideration which he must return is the land which he received; but where the infant had paid part of the purchase price and the mortgage was given only for the balance, he is not required to reconvey the property until the consideration he had paid is restored to him; and the rights of the infant could not be adjusted where the grantors of the lots were not made parties to the action.[47] Moreover, where an infant mortgagor has himself invested in the mortgaged property, he need not, on disaffirming the mortgage, redeliver possession of the property to the mortgagee, unless the mortgagee pays the amount that has been invested; but a court of equity may decree the sale of the property so that all parties may be protected by equitably sharing in the proceeds.[48]

Effect of avoidance; rights and liabilities of purchaser. Since the effect of the disaffirmance of a transaction entered into by an infant is to render the same void ab initio by relation,[49] in case of a conveyance, possession of the property may be recovered by the late infant.[50] The disaffirmed conveyance cannot subsequently be reinstated by ratification or express agreement.[51]

The late infant is entitled to charge the purchaser under the deed which has been avoided with rents and profits for the whole time during which he was in possession of the property claiming under such deed,[52] but some decisions have restricted the right of recovery for rents as from the date of the disaffirmance of the conveyance.[53] It has been held that the purchaser is not liable for rents on his improvements.[54] A purchaser who has paid off a judgment lien on the land as a part of the purchase price is entitled to credit therefor in his accounting for the rents of the land.[55]

The purchaser may also be charged with the value of timber cut by him while in possession.[56] The late infant need not offer to do equity by offering to let his part of the damages for the grantee's waste be deducted from the consideration paid him, where the consideration has been disposed of during minority.[57]

On the other hand the purchaser from an infant whose deed has been avoided is ordinarily entitled to be allowed for improvements placed by him on the property,[58] and for taxes paid,[59] and for the payment of claims against the property discharged by him for which it would have been liable after the infant reached his majority,[60] by setting off the same against the rents and profits.[61] To secure the repayment he may be entitled to a lien on the realty.[62] However, it has been held that the late infant cannot be required to compensate him for improvements exceeding the rental value.[63] The right of the purchaser to be allowed for improvements may be barred where he knew of the vendor's infancy.[64]

(b) What Constitutes Avoidance

An infant's conveyance or mortgage may be disaffirmed by any act which shows that he does not intend to be bound and which is inconsistent with the original alienation, such as by bringing a suit to set aside the alienation, or defending a suit to enforce it, by reëntering or reclaiming the property, or by a subsequent conveyance or mortgage of the same property.

In accordance with the general rules as to what constitutes avoidance of a transaction affecting the property of an infant, considered supra § 45, an infant's conveyance or mortgage may be disaffirmed by any act on his part which shows that he does not intend to be bound, and which is inconsistent with the continued validity of the conveyance or mortgage.[65] Under statute to that effect, all deeds,

cedent to setting aside deed.—Murphy v. Smith, Tex.Civ.App., 277 S.W. 228.

47. N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.

48. Ala.—Brasher v. Grayson, 117 So. 301, 217 Ala. 674.

49. Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392.

50. Va.—Mustard v. Wohlford, 15 Gratt. 329, 56 Va. 329, 76 Am.D. 209.
31 C.J. p 1030 note 18.

51. Tex.—Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480, affirming Jones v. Teat, Civ.App., 57 S.W.2d 617.

52. Tex.—Merida v. Cummings, Civ. App., 115 S.W. 613.
31 C.J. p 1031 note 19.

53. Ky.—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.
31 C.J. p 1031 note 20.

54. Ky.—Peters v. Noble, 244 S.W. 416, 196 Ky. 123—Wornack v. Loar, 11 S.W. 438, 11 Ky.L. 6.

55. Miss.—French v. McAndrew, 61 Miss. 187.

56. Ky.—Peters v. Noble, 244 S.W. 416, 196 Ky. 123.
31 C.J. p 1031 note 30.

57. Ala.—Bell v. Burkhalter, 57 So. 460, 176 Ala. 62.

58. Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341.
Md.—Quynn v. Staines, 3 Harr. & M. 128.
31 C.J. p 1031 note 23.

59. Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341.
31 C.J. p 1031 note 24.

60. Ark.—Beauchamp v. Bertig, 119 S.W. 75, 90 Ark. 351, 23 L.R.A.,N.S., 659.

61. Ill.—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.
31 C.J. p 1031 note 26.

62. Ky.—Baisden v. Gibson, 270 S.W. 830, 208 Ky. 341.
Tenn.—Bowers v. Henning, 4 Tenn. Civ.A. 698.

63. Ky.—Sewell v. Sewell, 18 S.W. 162, 92 Ky. 500, 36 Am.S.R. 606.

64. Mont.—Clark v. Tate, 14 P. 761, 7 Mont. 171.

65. Ala.—Slaughter v. Cunningham, 24 Ala. 260, 60 Am.D. 463.
Ind.—Long v. Williams, 74 Ind. 115.
Tender back of purchase price
Miss.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

mortgages, and other instruments affecting title to land, executed by a minor, are binding on him unless he files a duly executed disaffirmance in accordance with the statute.[66]

Bringing or defending suit. The institution of a suit to set aside a conveyance is an avoidance of it,[67] although it is not essential to an avoidance.[68] Setting up the defense of infancy in a suit by the other party to enforce his rights under the deed, etc., is also a sufficient avoidance.[69] The weight of authority supports the rule that, where one, after reaching majority, brings suit to recover possession of land which he has conveyed during infancy, this is a sufficient disaffirmance,[70] but there is also authority for the view that some previous act of disaffirmance is necessary to authorize the bringing of a suit for possession of the land.[71]

Reëntry or reclaiming property. An entry by the late infant on real estate conveyed by him or his reclaiming the property sold shows his disaffirmance; but such acts of ownership must be distinct and unequivocal.[72]

Subsequent conveyance or mortgage. In order that a subsequent conveyance or mortgage shall operate as a disaffirmance of the former act it must be inconsistent therewith, and if both can properly stand together there is no disaffirmance.[73] Subject to this limitation, and that of the necessity for entry which is required in some jurisdictions under some circumstances, as hereinafter discussed, it is generally held that a subsequent conveyance executed operates as a disaffirmance of a conveyance executed during infancy,[74] even though the subsequent deed is a mere quitclaim, while the one executed during infancy is a warranty deed.[75] The purchaser from the late infant acquires a good title,[76] even though he has knowledge of the prior conveyance,[77] and is entitled to a decree quieting his title, without restoring the consideration for the voidable conveyance.[78] The avoidance of an infant's conveyance may also be effected by the execution of a mortgage on the same land on his arrival at majority.[79]

The execution after reaching majority of an absolute conveyance or warranty deed containing no reference to a mortgage executed during infancy is a disaffirmance of the mortgage;[80] but it has also been held that the disaffirmance of a mortgage will not be inferred from a mere conveyance of the same premises without referring to the mortgage, that, in such case, the grantee takes subject to the mortgage.[81] Whether a mere quitclaim deed will have the effect of avoiding the mortgage is a question on which there is a conflict of authority, it being held, in some jurisdictions, that such a deed will not have such effect,[82] and in others that it will have such effect.[83] It has been held that an infant's sale of personalty on which he previously gave a chattel mortgage disaffirms the chattel mortgage.[84]

In order that an infant's conveyance or mortgage

66. Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.

67. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 225 Ky. 288.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
31 C.J. p 1029 note 87.

68. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 225 Ky. 288.
Mo.—Parrish v. Treadway, 183 S.W. 580, 267 Mo. 91.

69. N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
31 C.J. p 1029 note 89.

70. Mo.—Craig v. Van Bebber, 13 S.W. 906, 100 Mo. 584, 18 Am.S.R. 569.
31 C.J. p 1029 note 90.

71. N.Y.—Tomczek v. Wieser, 108 N.Y.S. 784, 58 Misc. 46, 47.
31 C.J. p 1029 note 91.

72. Tex.—Harris v. Musgrove, 59 Tex. 401.
31 C.J. p 1029 note 92.

73. Neb.—Buchanan v. Griggs, 24 N.W. 452, 18 Neb. 121.
31 C.J. p 1029 note 94.

Execution of mortgage for grantee The fact that minor grantor under unrecorded deed executed mortgage at request and for accommodation of grantee did not constitute disaffirmance of deed this being entirely consistent with continued ownership in the grantee.—Collins v. Dye, C.C.A.Ariz., 94 F.2d 799, certiorari denied Collins, by Hughes, v. Dye, 59 S.Ct. 62, 305 U.S. 601, 83 L.Ed. 381.

74. Tex.—O'Brien v. Smith, Civ.App., 118 S.W.2d 474, 478, citing **Corpus Juris**—Jones v. Teat, Civ.App., 57 S.W.2d 617, 620, citing **Corpus Juris**, and affirmed Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480.
31 C.J. p 1030 note 99.
Subsequent conveyance as champertous see Champerty § 33 d.

75. Ark.—Beauchamp v. Bertig, 119 S.W. 75, 90 Ark. 351, 23 L.R.A.,N.S., 659—Bagley v. Fletcher, 44 Ark. 153.

76. Okl.—Drumhiller v. Norick Motor Co., 289 P. 698, 144 Okl. 174, 69 A.L.R. 1368.
31 C.J. p 1030 note 2.

77. Okl.—Drumhiller v. Norick Motor Co., supra.
31 C.J. p 1030 note 3.

78. U.S.—Nettleton v. Morrison, C.C. Minn., 18 F.Cas.No.10,127, 5 Dill. 503.

79. Ark.—Watkins v. Wassell, 15 Ark. 73.
Ky.—Phillips v. Hoskins, 108 S.W. 283, 128 Ky. 371, 33 Ky.L. 378.

80. Ala.—Scott v. Brown, 17 So. 731, 106 Ala. 604.
31 C.J. p 1030 note 6.

81. N.Y.—Palmer v. Miller, 25 Barb. 399.

82. Mich.—Shreeves v. Caldwell, 97 N.W. 764, 135 Mich. 323, 106 Am.S.R. 396.
Mo.—Singer Mfg. Co. v. Lamb, 81 Mo. 221.

83. Ohio.—Hetterick v. Porter, 20 Ohio Cir.Ct. 110, 11 Ohio Cir.Dec. 145.

84. Okl.—Drumhiller v. Norick Motor Co., 289 P. 698, 144 Okl. 174, 69 A.L.R. 1368.

may be considered disaffirmed by a subsequent alienation by the infant, the subsequent alienation must be made by the infant,[85] after attaining majority,[86] and must be of the same property.[87] However, it has been held that a conveyance by the heirs of the infant grantor may operate as a disaffirmance of a conveyance executed by the infant, during his infancy, of the same land.[88]

It has been held that an infant's conveyance of land may be disaffirmed on his attaining majority without entry by conveying the land to another person.[89] However, it has also been held that while this rule applies to cases where the land continues in the possession of the infant[90] or is vacated and uncultivated,[91] a second deed executed by the infant after arriving at full age, while the land is held adversely to him under the first, and without an entry by him for the purpose of avoiding the first conveyance, will not amount to a revocation thereof.[92]

b. Conveyances and Mortgages of Infant Wife or Husband

In general, conveyances and mortgages by an infant wife or husband are voidable; and where both spouses joined in the transaction it is voidable at the election of the infant spouse only. Authorities differ as to whether the time within which an infant married woman may avoid such transaction begins at her majority or when the disabilities of both infancy and coverture are removed.

While in some jurisdictions, by force of statute, a deed or mortgage by an infant married woman executed jointly with her husband is binding,[93] ordinarily such transaction, in the absence of statute providing otherwise, stands on the same footing as that of an infant feme sole,[94] except as it may be affected by the disability of coverture, considered in Husband and Wife §§ 194–203.

In general, she cannot irrevocably bind herself by her conveyance or mortgage.[95] Thus, while there are some early decisions to the effect that the conveyance or mortgage of an infant feme covert is absolutely void,[96] it is generally held that such transaction is merely voidable,[97] but not absolutely void.[98] Where the statute removing the disability of coverture limits the removal of such disability to a feme covert under a certain age, it is held that a conveyance by a feme covert under such age is void.[99]

Conveyances by both spouses jointly. Where an adult husband joins his infant wife in a conveyance of her realty, it is generally held that the conveyance passes the husband's interest or estate;[1] but it has also been held that, where the conveyance of a married woman is disaffirmed by reason of her infancy, it is avoided as to the husband who joined her in making it.[2]

Ordinarily a conveyance by an infant husband, jointly with a wife of full age, is voidable at his election,[3] and, if the wife's disabilities of coverture have been removed, is binding on her.[4] However, where the statute requires the husband to join in the conveyance of the wife, it has been held that, if the husband is an infant at the time thereof, his disaffirmance after attaining majority has the effect of avoiding the deed,[5] and she is not bound

85. Mich.—Shreeves v. Caldwell, 97 N.W. 764, 135 Mich. 323, 106 Am.S.R. 396.
31 C.J. p 1029 note 96.

86. Mo.—Singer Mfg. Co. v. Lamb, 81 Mo. 221.
31 C.J. p 1030 note 97.

87. Ind.—Blair v. Whitaker, 69 N.E. 182, 31 Ind.App. 664.
31 C.J. p 1030 note 98.

Conveyance of portion of interest
Conveyance by escrow agreement of portion of interest in realty after removal of grantor's disabilities of minority was held disaffirmance of prior deed to entire interest made during infancy and binding on grantor.—Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480, affirming Jones v. Teat, Civ.App., 57 S.W.2d 617.

88. Tex.—Searcy v. Hunter, 17 S.W. 372, 81 Tex. 644, 26 Am.S.R. 837.

89. Ark.—Beauchamp v. Bertig, 119 S.W. 75, 90 Ark. 351, 23 L.R.A.,N.S., 659.
31 C.J. p 1030 note 13.

90. N.H.—Roberts v. Wiggin, 1 N.H. 73, 8 Am.D. 38.
31 C.J. p 1030 note 14.

91. Ga.—Harris v. Cannon, 6 Ga. 382.
31 C.J. p 1030 note 15.

92. Mass.—Worcester v. Eaton, 13 Mass. 371, 7 Am.D. 155.
31 C.J. p 1030 note 16.

93. Fla.—Commercial Building Co. v. Parslow, 112 So. 378, 93 Fla. 143.
Minn.—Daley v. Minnesota Loan & Investment Co., 45 N.W. 1100, 43 Minn. 517.
Release of dower by infant wife see Dower § 65 a.

94. Ala.—Sims v. Gunter, 78 So. 62, 201 Ala. 286.
Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.

95. Mo.—Holcomb v. Pressley, supra.
31 C.J. p 1031 note 36.

96. N.J.—Porch v. Fries, 18 N.J.Eq. 204.
31 C.J. p 1031 note 37.

97. Ky.—Hackney v. Smith, 273 S.W. 476, 209 Ky. 806.
Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.
31 C.J. p 1031 note 38.

98. Ky.—Hackney v. Smith, 273 S.W. 476, 209 Ky. 806.
Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.
31 C.J. p 1031 note 40.

99. Ill.—Harrer v. Wallner, 80 Ill. 197—Hoyt v. Swar, 53 Ill. 134.

1. Ky.—Sewell v. Sewell, 18 S.W. 162, 92 Ky. 500, 36 Am.S.R. 606.
31 C.J. p 1032 note 48.

2. Mo.—Craig v. Van Bebber, 18 S.W. 906, 100 Mo. 584, 18 Am.S.R. 569.
31 C.J. p 1032 note 49.

3. N.C.—Jackson v. Beard, 78 S.E. 6, 162 N.C. 105.
31 C.J. p 1032 note 43.

4. Pa.—Brunner v. Ringe, 57 Pa. Super. 237.

5. N.C.—Jackson v. Beard, 78 S.E. 6, 162 N.C. 105.

thereby.[6]

Ratification. Following the general rules as to ratification with respect to conveyances and mortgages by infants, considered supra subdivision a (2) of this section, if the deed, mortgage, etc., is considered absolutely void, it is incapable of ratification.[7] In some jurisdictions it has been held that the acknowledgment of a deed by an infant married woman is invalid and not binding on her unless ratified by her after she becomes of legal age.[8] Ratification may be effected by a deed executed after reaching majority or by other acts.[9] Where a deed or mortgage executed after attaining majority is relied on to effect the ratification of a prior instrument executed by a feme covert during her minority, in order that such subsequent instrument may have that effect it must have been executed in the manner required of instruments executed by married women.[10]

Time for avoidance. In accordance with the rule as to the infant's avoidance of transactions with respect to property generally, discussed supra § 44, the time to avoid the deed, mortgage, etc., executed by an infant feme covert is after her arrival at majority.[11] While she may avoid the transaction on arrival of age and before discoverture,[12] it is generally held that she is not, in the absence of statute, required to disaffirm or estopped by failure to do so until the disabilities of both infancy and coverture are removed.[13] However, in some jurisdictions it has been held that she may be barred from the right of disaffirming her conveyance made during infancy, although she remains under coverture if she does not act within a reasonable time;[14] but here coverture is a circumstance to be considered in determining, as a question of fact, whether or not the disaffirmance has been attempted within a reasonable time.[15] Under a statute by which married women may be barred by estoppels in pais, discussed in Husband and Wife § 216, the time for disaffirmance runs from majority notwithstanding coverture.[16] If she becomes discovert after reaching her majority, so that the period to disaffirm has begun to run, it continues to run, although she marries again.[17] Where an infant feme sole has conveyed her property, her marriage shortly after attaining majority does not extend the time for avoidance of the deed.[18]

The manner of avoiding a conveyance executed by an infant feme covert is similar to that of other infants except as it may be affected by the disability of coverture,[19] and may be by a subsequent deed after reaching majority,[20] or by other acts.[21]

Return of consideration upon avoidance. In some jurisdictions, by force of statute, an infant feme covert who has joined with her adult husband in a conveyance of her lands cannot disaffirm the same without restoring the consideration.[22]

c. Partition

Subject to statutory exception, a partition agreement is generally not binding on an infant and may be avoid-

6. Ky.—Phillips v. Hoskins, 108 S. W. 283, 128 Ky. 371, 33 Ky.L. 378.
7. Md.—Cronise v. Clark, 4 Md.Ch. 403.
Mich.—Chandler v. McKinney, 6 Mich. 217, 74 Am.D. 686.
8. Miss.—Cason v. Hubbard, 38 Miss. 35—Markham v. Merrett, 8 Miss. 437, 40 Am.D. 76.
9. Mo.—Holcomb v. Pressley, 255 S. W. 1062, 301 Mo. 208.
10. N.C.—Gaskins v. Allen, 49 S. E. 919, 137 N.C. 426.
Tenn.—Walton v. Gaines, 29 S.W. 458, 94 Tenn. 420.
11. Ind.—Scranton v. Stewart, 52 Ind. 68.
31 C.J. p 1032 note 56.
12. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 225 Ky. 288.
31 C.J. p 1032 note 57.
13. W.Va.—Blake v. Hollandsworth, 76 S.E. 814, 71 W.Va. 387, 43 L.R. A.,N.S., 714.
31 C.J. p 1032 note 58.
14. Ky.—Brown v. Elk Horn Coal Corporation, 8 S.W.2d 404, 225 Ky. 288.
Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.
Contra Linville v. Greer, 65 S.W. 579, 165 Mo. 380.
Tex.—Searcy v. Hunter, 17 S.W. 372, 81 Tex. 644, 26 Am.S.R. 837.

Wife held estopped

(1) Since, under statute to that effect, wife of grantor could have disaffirmed deed executed during minority and prosecuted action in her own name to set it aside and claim dower, failure to do so, although she lived in immediate vicinity of land and saw it changing hands and being permanently improved by innocent purchasers, estopped her to disavow deed many years later.—Hackney v. Smith, 273 S.W. 476, 209 Ky. 806—Moore v. Hudson, 240 S.W. 383, 194 Ky. 725.

(2) A woman married during minority could not thirty-nine years after reaching majority disaffirm a deed executed during minority by executing a deed of disaffirmance or suit, or otherwise, notwithstanding provisions that period of limitations of actions shall begin to run only after disability of coverture is removed, such statutes relating solely to actions, and not preventing disaffirmance otherwise than by action. —Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.

15. Tex.—Searcy v. Hunter, 17 S.W. 372, 81 Tex. 644, 26 Am.S.R. 837.
16. Ind.—Applegate v. Conner, 93 Ind. 185.
31 C.J. p 1032 note 62.
17. Mo.—Parrish v. Treadway, 183 S.W. 580, 267 Mo. 91.
18. Ill.—Keil v. Healey, 84 Ill. 104, 25 Am.R. 434.
19. Mo.—Norcum v. Sheahan, 21 Mo. 25, 64 Am.D. 214.
31 C.J. p 1033 note 65.
20. Mo.—Holcomb v. Pressley, 255 S.W. 1062, 301 Mo. 208.
31 C.J. p 1033 note 65 [a].
21. **Bringing suit**
One method of disaffirming a deed executed during minority is the bringing of a suit.—Holcomb v. Pressley, supra.
22. Ind.—Blair v. Whitaker, 69 N. E. 182, 31 Ind.App. 664.
31 C.J. p 1033 note 66.

ed by him except where there has been a ratification or an estoppel.

Some of the early commentators and decisions have stated that a voluntary partition in which an infant joins will be binding on him if it is fair and equal, on the theory that the infant may do voluntarily what he may be compelled by law to do.[23] However, it has more usually been held, in accordance with the general rule applying to infants' contracts, discussed infra § 71, that a partition deed is not binding on the infant,[24] and that a partition to which an infant was a party may be avoided where nothing has occurred which in equity works an estoppel, particularly where it is unfair to the infant,[25] and it has been held without discussion that a parol partition cannot be sustained where an infant joins in the partition.[26] In any event it has been held that an infant may be bound by the partition on the ground of estoppel or ratification.[27]

Under special statutory provisions. A valid partition of land wholly or partly owned by infants as cotenants may be effected under statutes authorizing and regulating such partitions.[28]

§ 52. —— Deeds of Trust

Subject to statutory exceptions, the rules governing the acquisition and alienation of property by infants generally apply to deeds of trust executed by infants.

In accordance with the rules governing the acquisition and alienation of property by infants generally discussed supra §§ 36–46, while in some jurisdictions a deed of trust executed by an infant is, by force of statute, void,[29] and such a deed may also be void when it was procured fraudulently,[30] ordinarily a deed of trust executed by an infant is merely voidable,[31] and not absolutely void.[32] So also, if the deed of trust is considered void, it is not subject to ratification;[33] but, if it is considered merely voidable, it is subject to ratification or avoidance,[34] and it is valid until avoided.[35]

A deed of trust by an infant is affirmed where, after his majority, he recognizes the fact that he holds the property in trust;[36] but it is not ratified by a subsequent written instrument executed simultaneously with a specific revocation of the earlier instrument.[37]

Under statute to that effect, a deed of trust executed by an infant is binding on him unless he files a duly executed disaffirmance in accordance with the statute and within a specified period after the disability of minority is removed; and the foreclosure of the trust deed and the transfer of title to the property to the grantee is of no effect where the trust deed is subsequently disaffirmed within the specified period.[38]

§ 53. —— Gifts

An infant cannot bind himself by a gift of his property.

23. Pa.—St. Bartholomew Church v. Wood, 80 Pa. 219.
47 C.J. p 269 note 60.
Judicial partition and actions therefor see the C.J.S. title Partition §§ 20–60, also 47 C.J. p 287 note 75–p 354 note 51.
Partition by act of parties generally see the C.J.S. title Partition §§ 2–19, also 47 C.J. p 267 note 6–p 287 note 74.

24. Ky.—Vanover v. Cline, 39 S.W. 2d 477, 239 Ky. 335.

25. Miss.—Thompson v. Strickland, 52 Miss. 574.
Dictum Cochran v. Cochran, 115 N.E. 142, 277 Ill. 244.

26. N.C.—Camp Mfg. v. Liverman, 31 S.E. 346, 123 N.C. 7.

27. Md.—Amey v. Cockey, 20 A. 1071, 73 Md. 297.
Tex.—Barrett v. Crump, Civ.App., 15 S.W.2d 672.
47 C.J. p 269 note 62, p 277 note 7 [c].
Acceptance of payment for interest
Defendant, by accepting payment for his interest in decedent's lands after majority, and with full knowledge, ratified previous partition sale. —Williams v. Williams, 146 S.E. 707, 196 N.C. 674.
Acquiescence for long period
In accepting a fair share under voluntary partition of estate, and acquiescing therein for forty years, plaintiffs were held to have ratified it, although minors not legally represented at partition.—De Rodriguez v. Hinnant, Tex.Com.App., 267 S.W. 471, affirming Hinnant v. Rodriguez, Civ.App., 255 S.W. 1500.
Partial ratification
A partition cannot be ratified in part and disaffirmed in part; and where the acts of the infants were regarded as constituting a ratification of the partition they could not attack the title derived by a particular person as a result of the partition.—Llenza v. Balseiro & Giorgetti, C.C.A.Puerto Rico, 285 F. 132.

28. La.—Richardson v. Richardson, 27 So. 890, 52 La.Ann. 1402.
47 C.J. p 269 note 68.

29. Cal.—Lee v. Hibernia Savings & Loan Soc., 171 P. 677, 177 Cal. 656.
31 C.J. p 1033 note 68 [a].

30. D.C.—Adriahs v. Dill, 37 App.D. C. 59.

31. Miss.—Parker v. Gillis, 66 So. 978, 108 Miss. 490.
Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.
Tenn.—Human v. Hartsell, 148 S.W. 2d 634, 24 Tenn.App. 678.
Tex.—Lawder v. Larkin, Civ.App., 94 S.W. 171.
31 C.J. p 1033 note 70.

32. Mo.—Hamlin v. Hawkins, 61 S. W.2d 348, 332 Mo. 1098.
Tenn.—Human v. Hartsell, 148 S.W. 2d 634, 24 Tenn.App. 678.
31 C.J. p 1033 note 71.

33. Cal.—Lee v. Hibernia Savings & Loan Soc., 171 P. 677, 177 Cal. 656.

34. N.Y.—Pedro v. Pedro, 127 N.Y.S. 997, 71 Misc. 296.
Wis.—In re Kane, 168 N.W. 402, 168 Wis. 1.

35. Or.—Eldriedge v. Hoefer, 93 P. 246, 52 Or. 241, modified on other grounds 94 P. 563, 52 Or. 241, petition denied 96 P. 1105, 52 Or. 241.

36. N.J.—Ownes v. Ownes, 23 N.J. Eq. 60.

37. N.Y.—Pedro v. Pedro, 127 N.Y.S. 997, 71 Misc. 296.
31 C.J. p 1033 note 77.

38. Mo.—Hamlin v. Hawkins, 61 S. W.2d 348, 332 Mo. 1098.

An infant cannot bind himself by a gift of his property,[39] even though accompanied by a manual delivery;[40] and a conveyance without consideration, by way of gift, has also been held void, as manifestly and necessarily prejudicial to the infant,[41] although there is authority for the view that it is merely voidable.[42] Such a gift may be revoked or avoided by the infant[43] or his personal representative,[44] even though it is not void.[45]

§ 54. —— Leases

Subject to statutory exceptions, rules governing the acquisition and alienation of property by infants generally apply to leases executed by infants.

In accordance with the rules governing the acquisition and alienation of property by infants generally, discussed supra §§ 36–46, a lease executed by an infant is, except in so far as the rule may be affected by statute,[46] voidable[47] and not void.[48]

The lease, however, may be affirmed or ratified by the infant on attaining majority,[49] as by accepting the rent;[50] but mere delay after reaching majority will not estop the lessor to avoid the lease where no one has been prejudiced thereby.[51] The lessee cannot set up the infant's disability to defeat the lease or to be relieved from its covenants.[52] While a void lease cannot be ratified by the signing of a similar lease after the infant has attained his majority,[53] such signing will create a new valid lease as of that time even though the new lease bore the same date and contained the same terms as the prior void lease, if its terms are sufficient.[54]

§ 55. —— Marriage Settlements and Antenuptial Contracts

While some authorities regard all antenuptial contracts made by a female infant as voidable, it has been more usually held that settlements as to personalty are binding, but that settlements as to realty are voidable on attaining majority.

Except in so far as the rule may be affected by statute, as discussed infra this section, the rule established by the weight of authority is that antenuptial settlements by an infant female are binding on her where they affect her personalty;[55] but that marriage settlements affecting realty, while not void,[56] are voidable at her election on attaining majority.[57] This distinction grew out of the old common-law principle that a wife's personalty belonged to her husband and therefore a settlement limiting personalty to herself or issue must necessarily inure to her benefit in that it removed from the husband's control property which he would in the absence of settlement have acquired by virtue of marriage,[58] such a settlement of personalty being regarded as virtually a relinquishment by the husband of his legal rights in the wife's property.[59] However, the reason for the distinction seems to have disappeared with the enactment of statutes placing both the personalty and the realty of the wife under her separate control;[60] and there is authority stating broadly that all antenuptial contracts made by a female infant are voidable at her election.[61]

39. Vt.—Person v. Chase, 37 Vt. 647, 88 Am.D. 630.
31 C.J. p 1033 note 79.
Gifts between parent and child see the C.J.S. title Parent and Child § 60, also 46 C.J. p 1319 note 31–p 1324 note 31.
An unexecuted gift by a minor cannot be enforced.—Harvey v. Carroll, 10 S.W. 334, 72 Tex. 63.

40. Vt.—Person v. Chase, 37 Vt. 647, 88 Am.D. 630.

41. Mich.—Gillmett v. Tourcott, 182 N.W. 128, 213 Mich. 617.
31 C.J. p 1027 note 24.

42. N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.

43. Iowa.—Oxley v. Tryon, 25 Iowa 95.
31 C.J. p 1033 notes 81, 88.

44. Vt.—Person v. Chase, 37 Vt. 647, 88 Am.D. 630.

45. Ala.—Slaughter v. Cunningham, 24 Ala. 260, 60 Am.D. 463.
La.—Johnson v. Alden, 15 La.Ann. 505.

46. Philippine.—Enriquez v. A. S. Watson & Co., Ltd., 22 Philippine 623.
31 C.J. p 1033 note 92 [a].

47. Ill.—Field v. Herrick, 101 Ill. 110, affirming 5 Ill.App. 54.
31 C.J. p 1033 notes 90, 92.

48. Ill.—Field v. Herrick, 101 Ill. 110.
31 C.J. p 1033 note 91.

49. **Effect on subsequent purchaser** Minor, having rental contract with tenant for one year on which rent has been paid, may ratify it on attaining majority so as to bind subsequent purchaser of land to permit tenant to retain possession and to retain crops for such term.—Harrison v. Elliott, 232 P. 23, 105 Okl. 163.

50. Mo.—Lacy v. Pixler, 25 S.W. 206, 120 Mo. 383.
31 C.J. p 1033 note 93.

51. U.S.—Rose v. Union Gas & Oil Co., C.C.A.Ky., 297 F. 16.

52. Ill.—Field v. Herrick, 101 Ill. 110, affirming 5 Ill.App. 54.

53. Tex.—Humble Oil & Refining Co. v. Clark, 87 S.W.2d 471, 126 Tex. 262, reversing Clark v. Humble Oil & Refining Co., Civ.App., 57 S.W.2d 597.

54. Tex.—Humble Oil & Refining Co. v. Clark, supra.

55. N.Y.—Wetmore v. Kissam, 16 N.Y.Super. 321.
31 C.J. p 1033 note 96.
Marriage settlements generally see Husband and Wife §§ 75–118.

56. N.Y.—Wetmore v. Kissam, 16 N.Y.Super. 321.
31 C.J. p 1034 note 97.

57. Va.—Smith v. Smith, 57 S.E. 577, 107 Va. 112, 118, 12 L.R.A.,N.S., 1184.
31 C.J. p 1034 note 1.

58. Va.—Smith v. Smith, 57 S.E. 577, 107 Va. 112, 122 Am.S.R. 831, 12 L.R.A.,N.S., 1184, 12 Ann.Cas. 857.
31 C.J. p 1034 note 2.

59. N.C.—Satterfield v. Riddick, 43 N.C. 265.
31 C.J. p 1034 note 3.

60. Va.—Smith v. Smith, 57 S.E. 577, 107 Va. 112, 122 Am.S.R. 831, 12 L.R.A.,N.S., 1184, 12 Ann.Cas. 857.
31 C.J. p 1034 note 4.

61. Ark.—Shirey v. Shirey, 112 S.W. 369, 87 Ark. 175.
31 C.J. p 1034 note 5.

Disaffirmance may take place during coverture[62] but not after birth of issue whose rights will be prejudiced by disaffirmance.[63] Irrespective of the foregoing conflicts and distinctions, it is settled that an antenuptial contract voidable for infancy becomes binding on subsequent ratification,[64] although the burden of proving the ratification of the agreement by the wife after attaining her majority rests on the party claiming under the contract,[65] and that the validity of infants' antenuptial contracts cannot be contested by an adult party to the marriage[66] or by a trustee of the marriage settlement.[67]

Contracts made through guardian. Antenuptial contracts made through a guardian are subject to the same principles as those made without a guardian provided it appears that the infant was personally a party to the contract,[68] but antenuptial contracts made by a guardian without the infant being personally a party thereto are void.[69]

It has been held that an antenuptial contract signed by a male infant and settling his wife's property is not voidable at his election;[70] but there is also authority to the contrary.[71]

Statutory provisions. Under statute to that effect, marriage contracts and settlements of infants who are of lawful age to marry are binding on them as though they were adults.[72] A statute authorizing marriage settlements by an infant with respect to property of which the parties are seized at the time of the marriage has been held not to authorize a female minor to agree to transfer property acquired by her after marriage; nor would the probate court's decree empowering such contract render it binding on the infant wife.[73] Thus the wife could disaffirm such agreement within a reasonable time after reaching her majority.[74]

English decisions concerning marriage settlements under the Infants' Settlement Act are collected in 31 C.J. p 1034 note 16–p 1035 note 34.

§ 56. —— Sales of Personalty

The rules governing the acquisition and alienation of property by infants generally apply to sales of personalty. Except as the rule is changed by statute, the right of avoidance is superior to the rights of third persons.

In accordance with the rules governing the acquisition and alienation of property by infants generally, discussed supra §§ 36–46, a sale of personalty is voidable,[75] and not void;[76] and such a sale is sufficient to transmit title[77] provided a manual delivery of the property is made.[78]

While if a sale of chattels is void, no disaffirmance before suit is necessary,[79] if the sale of an infant's property is voidable no tort is committed by the purchaser by his retention of, or dealings with, the property until after avoidance;[80] but after avoidance the infant may treat the refusal to deliver back the property or the proceeds as a conversion by those who have kept it intentionally or so intermeddled with it as to interfere with the infant's dominion over it.[81]

62. Pa.—Whichcote v. Lyle, 28 Pa. 73.
31 C.J. p 1034 note 6.

63. N.Y.—Wetmore v. Kissam, 16 N.Y.Super. 321.
31 C.J. p 1034 note 7.

64. Md.—Levering v. Heighe, 2 Md. Ch. 81.
31 C.J. p 1034 note 10.

65. N.Y.—Beardsley v. Hotchkiss, 30 Hun 605, modified on other grounds 96 N.Y. 201.

66. N.Y.—Beardsley v. Hotchkiss, 96 N.Y. 201, modifying 30 Hun 605.
31 C.J. p 1034 note 12.

67. N.Y.—Jones v. Butler, 30 Barb. 641.

68. Pa.—Wilson v. McCullough, 19 Pa. 77.
31 C.J. p 1034 note 14.

69. N.Y.—Temple v. Hawley, 1 Sandf.Ch. 153.
Va.—Healy v. Rowan, 5 Gratt. 414, 46 Va. 414, 52 Am.D. 94.

70. S.C.—Kottman v. Peyton, 17 S.C.Eq. 46.
31 C.J. p 1034 note 8.

71. Tenn.—Lancaster v. Lancaster, 13 Lea 126.

72. Ga.—Sellers v. Sellers, 128 S.E. 659, 160 Ga. 516.

73. Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.

74. Disaffirmance on first occasion therefor

Where minor, in 1902, conveyed property to trustee under statute, pursuant to marriage contract, and agreed to transfer after-acquired property, and where first after-acquired property came to her in 1931 by gift from husband, disaffirmance, in 1931, of clause respecting after-acquired property was held timely.—Welch v. King, supra.

Ratification

(1) Minor wife's assent to trustee's accounts was not ratification of agreement to convey after-acquired property to trustee, accounts containing no items relating thereto.—Welch v. King, supra.

(2) Where eighteen-year old minor, pursuant to marriage contract, conveyed property to trustee under statute, consent to appointment of successor trustees was not ratification of agreement to convey after-acquired property to trustees.—Welch v. King, supra.

75. Ala.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
Miss.—Upshaw v. Gibson, 53 Miss. 341.
31 C.J. p 1035 note 36.

76. Ala.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
31 C.J. p 1035 note 37.

77. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.

78. N.Y.—Fonda v. Van Horne, 15 Wend. 631, 30 Am.D. 77.

Good as against third persons

A sale accompanied by manual delivery is good as against third persons.—Packer v. Johnson, 10 S.C.L. 1.

79. N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App. Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.

80. N.Y.—Casey v. Kastel, supra.

81. N.Y.—Casey v. Kastel, supra.

Ratification during minority

Brokers, selling stock of infant, indorsed in blank by her, are liable to her in conversion, her signature in blank being nothing more than a

An agreement to sell his partnership interest is not binding on an infant.[82]

Rights of third persons; innocent purchasers. The right to avoid the sale may be exercised notwithstanding the right of third persons has supervened.[83] However, under statute so providing, where the purchaser of goods from the infant has a voidable title, but his title had not been avoided at the time of the sale of the goods by him to a third person, such third person acquires good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title;[84] and under a provision to that effect the infant's rescission of a transfer of a certificate of stock does not invalidate a transfer to a purchaser for value, in good faith, and without notice even though such transfer was made after the infant's rescission of the original sale.[85]

C. JURISDICTION OF COURTS OVER ESTATES OF INFANTS

§ 57. In General

Jurisdiction over the estates of infants is inherent in equity, but it may also be vested by constitutional or statutory provisions in particular courts. The institution of proceedings affecting an infant's property makes the infant a ward of the court, and it has very broad powers to protect his interests.

Courts of equity have general[86] and inherent[87] jurisdiction over the property of infants. The mere fact of infancy is sufficient to sustain the jurisdiction of the court, although no other ground of chancery jurisdiction exists,[88] but such jurisdiction can be exercised only when the court has acquired jurisdiction as to the particular infant and subject matter in accordance with the practice in courts of equity,[89] which ordinarily is by the commencement of some sort of recognized proceeding in the court.[90] Primary jurisdiction over the estates of infants may, under constitutional or statutory provisions, be vested in the probate, county, district, or other specified court,[91] and such courts, when they succeed to the jurisdiction of the court of chancery, exercise the power under the same rules as pertained to the court of chancery subject to whatever limitations have been imposed by statute.[92]

The institution of any proceeding affecting an infant's property in a court of equity or other court vested with peculiar jurisdiction over the estates of infants makes the infant a ward of the court,[93] and the court becomes in contemplation of

voidable consent to a sale, contractual in its nature rather than tortious, the infant not being estopped in view of Pers.Prop.L. §§ 162, 163, and it is immaterial that once during minority she ratified the sale. —Casey v. Kastel, supra.

82. Ariz.—Johnson v. Wright, 179 P. 958, 20 Ariz. 255.

83. Miss.—Upshaw v. Gibson, 53 Miss. 341.

31 C.J. p 1035 note 41.

84. N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116.

85. N.Y.—Casey v. Kastel, supra.

86. Ark.—Crenshaw v. Crenshaw, 160 S.W.2d 37, 203 Ark. 1086.
N.C.—Commercial Nat. Bank of Charlotte v. Alexander, 125 S.E. 385, 387, 188 N.C. 667, citing **Corpus Juris.**

31 C.J. p 1035 note 44.

87. Fla.—Fisher v. Guidy, 142 So. 813, 106 Fla. 94.
Ga.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.
N.Y.—Petition of Travers, 32 N.Y.S. 2d 742, 177 Misc. 1044.
Tenn.—Gillespie v. Jackson, 281 S.W. 929, 153 Tenn. 150—Newburger v. Newburger, 10 Tenn.App. 555—Smartt v. Smartt, 1 Tenn.App. 68.

88. N.C.—Commercial Nat. Bank of Charlotte v. Alexander, 125 S.E. 385, 387, 188 N.C. 667, citing **Corpus Juris.**

31 C.J. p 1035 note 45.

89. Ill.—Thomas v. Thomas, 95 N. E. 345, 250 Ill. 354, 35 L.R.A.,N. S., 1158, Ann.Cas.1912B 344.

31 C.J. p 1035 note 46.

90. Ill.—Thomas v. Thomas, supra.

91. Mo.—Campbell v. Campbell, 165 S.W.2d 851, 350 Mo. 169.
Okl.—In re Vaughn's Guardianship, 73 P.2d 411, 181 Okl. 274.
Tex.—Crowley v. Redmond, Civ.App., 41 S.W.2d 274, 123 Tex. 315, affirmed Redmond v. Crowley, 70 S. W.2d 1113, 123 Tex. 315.

31 C.J. p 1036 note 55, p 1035 note 44 [a].

In Tennessee, with respect to jurisdiction over minors and their estates, apart from Act of 1935, probate court of Shelby county exercises jurisdiction identical with that exercised by county courts of other counties of state and procedure in one is applicable to the other.—Monteverde v. Christie, 134 S.W.2d 905, 23 Tenn.App. 514.

Appellate jurisdiction of district court

The district court's appellate jurisdiction regarding business transactions appertaining to minors' estate is coextensive with county court's original jurisdiction.—Haggard v. McFarland, 155 S.W.2d 797, 137 Tex. 542, affirming, Civ.App., 133 S.W.2d 313.

92. N.Y.—Bernstein v. Bernstein, 176 N.Y.S. 820, 188 App.Div. 276.

93. Ala.—Higdon v. Higdon, 11 So. 2d 140, 243 Ala. 571—Bowen v. Hester, 186 So. 695, 237 Ala. 321—First Nat. Bank v. Robertson, 127 So. 221, 220 Ala. 654.
Ga.—Sangster v. Toledo Mfg. Co., 19 S.E.2d 723, 193 Ga. 685—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.
Ill.—McReynolds v. Miller, 22 N.E. 2d 951, 372 Ill. 151—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Union Bank of Chicago v. Wormser, 256 Ill.App. 291.
Ky.—Skidmore v. Napier, 166 S.W. 2d 439, 292 Ky. 311—Davis' Committee v. Loney, 162 S.W.2d 189, 290 Ky. 644.
La.—Succession of Stabile, 165 So. 713, 184 La. 203.
N.Y.—In re Title Guarantee & Trust Co., 273 N.Y.S. 158, 242 App.Div. 80, motion denied 198 N.E. 371, 268 N.Y. 494, affirmed 2 N.E.2d 683, 271 N.Y. 537—In re Kessler's Estate, 276 N.Y.S. 773, 153 Misc. 753.

31 C.J. p 1035 note 48, p 1036 note 59.

law his guardian.[94] Some proceeding affecting the infant's rights or interests is necessary in order for such relation to exist.[95] It is the duty of the court to guard and protect the property interests of the infant[96] with great care[97] on its own motion,[98] and it must act whenever the necessity for action to protect the infant's estate becomes apparent.[99] An infant's claim to property which is under the control of the court is especially entitled to protection.[1]

After the jurisdiction of the court has attached, it has very broad[2] or plenary[3] powers over the estate of the infant. It may adjudicate the rights and equities of the infant in property,[4] and it may cause to be done whatever may be necessary to preserve the infant's estate,[5] but it cannot act in violation of constitutional or statutory limitations on its powers,[6] nor can it abrogate rights of other persons in order to bestow a benefit on the infant,[7] or permit the impounding of the infant's funds or the creation of a trust to deprive the infant of the right to absolute enjoyment of the funds at majority.[8] In all cases where an infant is a ward of chancery no act can be done affecting his person or his property unless under the express or implied direction of the court itself,[9] but the court may ratify or sanction acts affecting the infant's interests which it could originally have authorized.[10] Minors are not competent to waive the statutory requirements enacted for their benefit and protection with

Infant as ward of court generally see supra § 7.

94. Ala.—Strawn v. Caffee, 178 So. 430, 235 Ala. 218.
31 C.J. p 1036 note 49.

95. Ill.—Thomas v. Thomas, 95 N. E. 345, 250 Ill. 354, 35 L.R.A.,N.S., 1158, Ann.Cas.1912B 344.
31 C.J. p 1036 note 50.

96. Ala.—Strawn v. Caffee, 178 So. 430, 235 Ala. 218.
Ill.—McReynolds v. Miller, 22 N.E. 2d 951, 372 Ill. 151.
Tenn.—Reynolds v. Chumbley, 135 S. W.2d 941, 175 Tenn. 496.
31 C.J. p 1036 note 60.

Exercise of protective powers at chambers

The protective powers of a judge of the superior court over the estates of minors may be exercised at chambers, where the minors and their property are otherwise within equitable jurisdiction of the court.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.

Duty of courts to protect interests of infant litigants see infra § 105.

97. Ala.—Scott v. Mussafer, 134 So. 857, 223 Ala. 153.
Ark.—Crenshaw v. Crenshaw, 160 S. W.2d 37, 203 Ark. 1086.
Ky.—Davis' Committee v. Loney, 162 S.W.2d 189, 290 Ky. 644.
N.Y.—In re Title Guarantee & Trust Co., 273 N.Y.S. 158, 242 App.Div. 80, motion denied 198 N.E. 371, 268 N.Y. 494, affirmed 2 N.E.2d 683, 271 N.Y. 537.

98. Neb.—Jones v. Hudson, 141 N. W. 141, 93 Neb. 561, 44 L.R.A.,N. S., 1182.
W.Va.—Buskirk v. Ragland, 65 S.E. 101, 65 W.Va. 749.

99. Ala.—Strawn v. Caffee, 178 So. 430, 235 Ala. 218.
31 C.J. p 1036 note 63.

1. Ill.—Gibbs v. Andrews, 132 N.E. 544, 299 Ill. 510.
31 C.J. p 1036 note 62.

2. Tenn.—Gillespie v. Jackson, 281 S.W. 929, 153 Tenn. 150.

3. Ala.—Higdon v. Higdon, 11 So.2d 140, 243 Ala. 571.
La.—Succession of Stabile, 165 So. 713, 184 La. 203
Miss.—Newsom v. Federal Land Bank of New Orleans, 185 So. 595, 184 Miss. 318.

4. Ky.—Whittaker v. Whittaker, 277 S.W. 1013, 211 Ky. 679.
Mich.—Metzner v. Newman, 194 N. W. 1008, 224 Mich. 324, 33 A.L.R. 98.

5. Ark.—Crenshaw v. Crenshaw, 160 S.W.2d 37, 203 Ark. 1086.
31 C.J. p 1036 note 64.

Change of property from realty to personalty

The courts having jurisdiction over estates of minors may authorize change of property from real to personal and vice versa for minor's benefit.
Ill.—Van Epps v. Arbuckle, 164 N.E. 1, 332 Ill. 551.
N.C.—Coxe v. Charles Stores Co., 1 S.E.2d 848, 215 N.C. 380, 121 A.L.R. 959.

Investments

The court may authorize the investment of a minor's funds.—In re Vaughn's Guardianship, 73 P.2d 411, 181 Okl. 274—31 C.J. p 1036 note 64 [c].

Divesting title in partitioning property

District court may divest minors of title to property and create a lien in their favor on all the property if necessary to make equitable partition.—Garza v. Kenedy, Tex.Civ.App., 291 S.W. 615, reversed on other grounds, Com.App., 299 S.W. 231, rehearing denied 5 S.W.2d xx.

Permitting change of beneficiary in insurance policy

Ark.—Crenshaw v. Crenshaw, 160 S. W.2d 37, 203 Ark. 1086.

6. Cal.—Walters v. Superior Court in and for Los Angeles County, 18 P.2d 343, 129 Cal.App. 19.
N.Y.—In re Kessler's Estate, 276 N. Y.S. 773, 153 Misc. 753—In re Vanderbilt's Estate, 223 N.Y.S. 314, 129 Misc. 605.
Pa.—In re Barley's Estate, 31 Pa. Dist. & Co. 404, 52 York Leg.Rec. 4.
31 C.J. p 1036 note 56.

Authority of ordinary to receive money for minor

Words "money due and owing," in a statute authorizing ordinary to receive moneys for minors, mean "money demand" and signify demand for fixed amount, and such a statute does not authorize the ordinary to act as guardian for minor for receiving money on unliquidated claim for damages arising in tort.—Georgia Power Co. v. Davis, 160 S.E. 690, 43 Ga.App. 791.

Appointment of receiver for female minor

A statute authorizing the equity court to appoint a receiver for a minor female's estate unless she has married with the consent of her parent or guardian permits the court to appoint a receiver where she is married with the consent only of her grandparent.—Moody v. Whittle, 111 S.W.2d 401, 271 Ky. 29.

7. N.Y.—Petition of Travers, 32 N. Y.S.2d 742, 177 Misc. 1044.

8. N.Y.—In re Vanderbilt's Estate, 223 N.Y.S. 314, 129 Misc. 605.

9. U.S.—In re Lindsley, Orph.Ct. D.C., 30 F.Cas.No.18,308, 2 Hayw. & H. 430.
31 C.J. p 1036 note 53.

Entering lien against property

Pa.—Clothier v. Kniffen, 31 Luz.Leg. Reg. 229.

10. Ala.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441.
S.C.—Hammassapoulo v. Hammassapoulo, 131 S.E. 319, 134 S.C. 54.

Minor's ratification of disposition of property may be recognized.—Midland Savings & Loan Co. v. Carpenter, 279 P. 810, 137 Okl. 204.

respect to the manner in which the jurisdiction of the court may be exercised.[11]

Supervision of guardianship by the court is considered in Guardian and Ward § 4.

§ 58. Judicial Allowances for Support and Maintenance

The court may order an infant's property to be applied to the maintenance of the infant where he is without other means of support or education.

Where infants who have an interest in certain property are without other means of support or education, the court may order so much of such property as may be necessary for that purpose to be applied to their maintenance,[12] but it cannot do so if such an order would abrogate or modify the plain provisions of a binding contract.[13] While the allowance should ordinarily be made out of the income, if the income is insufficient, a reasonable allowance may be made out of the principal.[14] The allowance is subject to the future control of the court and may be altered with the varying circumstances of the estate.[15] The court may properly order reimbursement from the infant's estate to one who, after he has in good faith assumed custody of the infant, expended his own funds for legal services in proceedings involving custody of the infant,[16] for the assumption of personal liability for such expenses is an act within the scope of the duty of a custodian of a child to provide proper care for such child.[17]

Use of the estate of a ward for his support or education is considered in Guardian and Ward § 62.

D. SALES AND CONVEYANCES UNDER AUTHORITY OF LAW IN GENERAL

§ 59. In General

An infant's property cannot be disposed of without authority of law and where the power of disposition is conferred by statute it must be exercised in compliance with the statutory requirements.

No one can make any disposition of an infant's property without authority of law,[18] but an attack on the validity of the title of an infant is not a divestiture of title within this rule and it may be maintained without express statutory authority.[19] The legislature may condition or prohibit disposal of minors' lands,[20] and where the power of disposal is conferred by statute, the exercise of the power, to be valid, must be in compliance with the statutory requirements.[21] When so provided by statute title to an infant's lands can be divested only by a suit for the sale of the lands or by a partition suit.[22] Where no interest in the land has ever vested in the infant, statutes pertaining to the divestiture of an infant's title are inapplicable.[23] Under a statute which permits married minors to dispose of and make contracts relating to real estate acquired after marriage, an infant wife may effectively join in a mortgage covering property owned by her husband.[24]

Authority of a guardian to sell property of the ward is considered in Guardian and Ward § 82. Authority of a parent to dispose of property of a child is considered in the C.J.S. title Parent and Child § 56, also 46 C.J. p 1315 note 90. Authority of a trustee to sell property of a beneficiary is discussed in the C.J.S. title Trusts §§ 286–292, also 65 C.J. p 730 note 16–p 752 note 88.

§ 60. Under Private or Special Acts

The exercise of a power of sale conferred by a private or special act must conform strictly to the statutory provisions.

The exercise of a power of sale conferred by a private or special act must conform strictly to the statutory provisions.[25] Ordinarily the power to sell

11. Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.
12. N.Y.—Petition of Travers, 32 N.Y.S.2d 742, 177 Misc. 1044.
31 C.J. p 1037 note 66.
13. N.Y.—Petition of Travers, supra.
14. Pa.—Keough's Estate, 16 Pa. Dist. 225.
15. S.C.—Chisolm v. Chisolm, 25 S.C.Eq. 266.
16. N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
Compensation and allowances to guardian ad litem or next friend see infra § 112.
17. N.Y.—In re Boulware's Will, supra.
18. Ky.—Whittaker v. Whittaker, 277 S.W. 1013, 211 Ky. 679.
31 C.J. p 1037 note 70.
19. Ky.—Whittaker v. Whittaker, supra.
20. U.S.—Gordon v. Empire Gas & Fuel Co., C.C.A.Tex., 63 F.2d 487, certiorari denied Gordon v. Empire Fuel & Gas Co., 53 S.Ct. 696, 289 U.S. 751, 77 L.Ed. 1496.
21. Ky.—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724—May v. Pratt, 35 S.W.2d 542, 237 Ky. 369—Flannery v. Chiles, 1 S.W.2d 1040, 222 Ky. 649—Whittaker v. Whittaker, 277 S.W. 1013, 211 Ky. 679.
Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.
31 C.J. p 1037 note 72.
22. Va.—Ferebee v. Todd, 153 S.E. 705, 154 Va. 293.
23. Ky.—Oliver v. Belcher, 265 S.W. 942, 205 Ky. 417.
24. Okl.—Starr v. Vaughn, 241 P. 152, 113 Okl. 247.
25. U.S.—Garth v. Arnold, Mo., 115 F. 468, 53 C.C.A. 200, modifying, C.C., 106 F. 13.
31 C.J. p 1037 note 76.

terminates when the infant reaches his majority.[26] The validity of the title passed by the sale does not depend on the infant's assent, and he cannot disaffirm the sale on his coming of age.[27]

Validity of private or special statutes authorizing sale of infant's property is considered generally in the C.J.S. title Statutes § 173, also 59 C.J. p 742 note 97 [b], and 31 C.J. p 1037 note 75 [a], [b]. The validity of such statutes under the due process clause is considered in Constitutional Law § 647 b.

E. SALES AND CONVEYANCES UNDER ORDER OF COURT

§ 61. Sales of Realty

a. What property or interests may be sold
b. Who may secure order
c. Consent of infant or guardian and knowledge of application

a. What Property or Interests May Be Sold

Only the particular property interests or estates to which a sale is restricted by statute may be sold, but in the absence of statutory restrictions power to order a sale of an infant's real property is not dependent on the nature or the quality of the estate.

Where the statutes provide for a sale by the court of property of a particular character or of particular estates in land only, it must appear that the property or estate is of the character designated;[28] thus a statute authorizing the sale of a part of the infant's real estate does not empower the court to decree a sale of the whole estate.[29] In the absence of statutory restrictions, power to order a sale of an infant's real estate is not dependent on the nature and quality of the estate;[30] a sale may be ordered of an estate whether legal[31] or equitable,[32] in possession[33] or remainder,[34] vested[35] or contingent,[36] in common with others,[37] or separate,[38] or in whatever manner it may be held, whether by descent, devise, or by contract.[39] The contingent interest of an infant cannot be sold separately where the statute which authorizes the sale of remainders provides for the sale of the whole estate.[40]

Land, in which persons not in being will have an interest on the coming into being, may be sold free from such interest, provided the fund derived from the sale is preserved to the extent necessary to satisfy such interest.[41]

Property or interests of a ward which are subject to sale on an application by the guardian are considered in Guardian and Ward § 106.

Effect of restrictions in will or deed. In some jurisdictions, by force of statute, the real estate of an infant or an interest therein cannot be sold or conveyed in contravention of a will or deed under which the estate is created;[42] but such statutes have been held to have no application where there are adult tenants in common who have an immediate right to the possession of their shares.[43]

Encumbered property. Where the property is encumbered by a lien equal in amount to the value of the property, the court should not have the property conveyed in satisfaction of the debt but should require the mortgagee to foreclose the mortgage in the usual way.[44]

b. Who May Secure Order

A bill for the sale of the infant's land for his benefit should be filed by someone who has the infant's interests at heart, such as by his guardian or next friend.

A bill for the sale of land for the infant's benefit should be filed by someone who has the infant's interests at heart.[45] As a general rule, pro-

26. U.S.—Garth v. Arnold, supra.

27. N.J.—Snowhill v. Snowhill, 3 N.J.Eq. 20.

28. Ky.—Crutcher v. Rodman, 81 S.W. 252, 26 Ky.L. 294.
31 C.J. p 1039 note 23.

29. U.S.—In re Mount, C.C.D.C., 17 F.Cas.No.9,885a, 2 Hayw. & H. 44.

30. Ala.—McCreary v. Billing, 58 So. 311, 176 Ala. 314, Ann.Cas.1915A 561.
31 C.J. p 1040 note 26.

31. Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.

32. D.C.—Thaw v. Ritchie, 16 D.C. 200, affirmed 10 S.Ct. 137, 136 U.S. 519, 34 L.Ed. 531.
Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.

33. Ala.—McCreary v. Billing, 58 So. 311, 176 Ala. 314, Ann.Cas.1915A 561.
Va.—Faulkner v. Davis, 18 Gratt. 651, 60 Va. 651, 98 Am.D. 698.

34. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429—Crawford v. Solomon, 95 So. 686, 131 Miss. 792.
31 C.J. p 1040 note 30.

35. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.
31 C.J. p 1040 note 31.

36. Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.
31 C.J. p 1040 note 32.

37. Kan.—Guy v. Hansow, supra.
31 C.J. p 1040 note 33.

38. Kan.—Guy v. Hansow, supra.

39. Kan.—Guy v. Hansow, supra.
31 C.J. p 1040 note 37.

40. N.C.—Butler v. Winston, 27 S.E.2d 124, 223 N.C. 421.

41. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.
31 C.J. p 1040 note 43.

42. Miss.—Crawford v. Solomon, 95 So. 686, 131 Miss. 792.
N.Y.—Bradley v. Bradley, 238 N.Y.S. 6, 228 App.Div. 629.
W.Va.—White v. Jackson, 114 S.E. 875, 92 W.Va. 593.
31 C.J. p 1040 note 40.

43. N.Y.—O'Donaghue v. Smith, 77 N.E. 621, 184 N.Y. 365.

44. Ky.—Clore v. Clore, 211 S.W. 208, 184 Ky. 83.

45. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

Bill by prospective purchaser
A bill for an infant's benefit to

ceedings to secure an order for the sale or mortgage of an infant's land may and should be brought by the regular and statutory guardian duly appointed or recognized by the court and who has properly qualified, as stated in Guardian and Ward § 109. In some jurisdictions the application may or should be made by a next friend.[46] In accordance with the provisions of some statutes the infant need not join in the application,[47] or where a number of infants have interests in the property all need not join in the application if all are properly before the court.[48] The sale cannot be ordered on the application of a father as natural guardian merely of his children.[49]

Husband of infant wife. Although it has been held that the order for the sale cannot be obtained by the husband of the infant wife,[50] in some jurisdictions, by force of statute, a bill to sell the real estate of an infant wife may be filed by her husband.[51]

Adult coöwner. Under a statute permitting a sale for the purpose of distributing the proceeds among the joint owners where the estate cannot be conveniently and equitably divided in kind, the action may be brought on behalf of an infant coöwner as well as by his adult coöwners.[52]

c. Consent of Infant or Guardian and Knowledge of Application

In accordance with the provisions of some statutes the consent of the infant or of his guardian may be necessary to authorize the court to order a sale of the infant's realty, or it may be necessary that the parents or other near relatives of the infant shall have knowledge of the intention of a next friend to make the application.

In accordance with statutory provisions the consent of the infant or of his guardian may be necessary to authorize the court to order a sale of the infant's realty.[53] In some jurisdictions, by force of statute, it is required that, when the application for sale is made by a next friend, the parents or other near relatives of the infant shall have knowledge of the intention to make such application, and such knowledge should affirmatively be shown by the record.[54]

§ 62. —— Power of Court to Authorize Sale

Particular courts specified by statute have the power to authorize a sale of infant's realty, and in some jurisdictions courts of equity have inherent power so to do. Only a court of proper jurisdiction may authorize a sale, and the statutes conferring the power must be at least substantially followed.

Only a court of proper jurisdiction may authorize the disposition of an infant's realty.[55] In some jurisdictions it is held that courts of equity have no inherent power to order or to authorize sales or conveyances of infants' real estate[56] but in other jurisdictions courts of equity have been held to possess such power.[57] No court other than the courts of equity in those jurisdictions has inherent power to order or authorize the sale of an infant's land.[58] Some cases have made a distinction as to the power of the courts of equity with respect to the sale or conveyance of equitable and legal estates, and have held that while such courts have no power to sell or convey legal estates,[59] they may do so in cases of equitable estates;[60] but other cas-

sell realty for maintenance and education should not be entertained when filed by a person desiring to purchase the infant's realty.—Reynolds v. Chumbley, supra.

46. Ala.—Higdon v. Higdon, 11 So. 2d 140, 243 Ala. 571.
31 C.J. p 1041 note 68.

47. N.Y.—Cole v. Gourlay, 79 N.Y. 527, affirming 9 Hun 493.
Infant as party see infra § 64 c.

48. Md.—Mumma v. Brinton, 26 A. 184, 77 Md. 197.

49. Neb.—Wells v. Steckleberg, 70 N.W. 242, 50 Neb. 670.
31 C.J. p 1042 note 70.

50. N.Y.—Matter of Lansing, 3 Paige 264.
Ohio.—Dengenhart v. Cracraft, 36 Ohio St. 549—Cracraft v. Roach, 5 Ohio Dec., Reprint, 467, 6 Am.L. Rec. 83.

51. Tenn.—McNish v. Bryan, 2 Tenn.Civ.A. 443.

52. Ky.—Moore v. Potter-Matlock Trust Co., 180 S.W. 739, 167 Ky. 201.

53. Ky.—Peyton v. Alcorn, 7 J.J. Marsh. 502.

54. Mich.—In re Flynn, 137 N.W. 113, 171 Mich. 136.
Service of notice of application for sale see infra § 64 d (2).

55. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658—May v. Pratt, 35 S.W.2d 542, 237 Ky. 369.
Or.—Kirk v. Mullen, 197 P. 300, 100 Or. 563.

56. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Greenway's Guardian ad Litem v. Greenway, 91 S.W.2d 553, 262 Ky. 813—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724.
Va.—Newman v. Light, 148 S.E. 818, 152 Va. 760—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.
31 C.J. p 1039 note 10.

57. Miss.—Neely v. Craig, 139 So. 835, 162 Miss. 712—Kelly v. Neville, 101 So. 565, 136 Miss. 429.
N.C.—Shull v. Rigby, 144 S.E. 372, 196 N.C. 4.
S.C.—Cannon v. Cannon, 133 S.E. 556, 135 S.C. 183.
Tenn.—Gillespie v. Jackson, 281 S.W. 929, 153 Tenn. 150—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47—Smartt v. Smartt, 1 Tenn.App. 68.
31 C.J. p 1039 note 11.

58. Ky.—Eversole v. Roberts, 39 S.W.2d 986, 239 Ky. 532—Ware's Guardian v. Ware, 25 S.W.2d 50, 233 Ky. 109.
N.Y.—In re Title Guarantee & Trust Co., 273 N.Y.S. 158, 242 App.Div. 80, motion denied 198 N.E. 371, 268 N.Y. 494, affirmed 2 N.E.2d 683, 271 N.Y. 537.
31 C.J. p 1037 note 82.

59. N.M.—Bent v. Maxwell Land Grant & R. Co., 3 P. 721, 8 N.M. 158.

60. N.M.—Bent v. Miranda, 42 P. 91, 8 N.M. 78.
31 C.J. p 1039 note 16.

es have held that the inherent power of courts of equity extends to both legal and equitable estates of infants.[61] The fact that the legislature has provided other methods of sale of infants' lands does not interfere with, or deprive the chancery courts of, such inherent power;[62] and statutes conferring such power on other courts do not, in the absence of express provision to the contrary, deprive courts of equity of their inherent jurisdiction.[63] The inherent jurisdiction of equity should be exercised with caution.[64]

The legislature has the general power to authorize sales of the land of infants through the agency of a court or judicial tribunal,[65] and in accordance with statutory provisions primary jurisdiction to order or authorize a sale may be vested in the chancery, county, orphans', probate, or other specified court.[66] Whether the jurisdiction of the particular court is exclusive or concurrent depends on the language of the instrument granting the power. In some cases, it is exclusive;[67] in others, it is concurrent with that of other courts.[68]

Jurisdiction to order a sale by a guardian of a ward's property is considered in Guardian and Ward § 105.

Construction of statutes generally. Ordinarily, statutes granting power to authorize the sale of infants' real estate are to be strictly construed,[69] and although it has also been asserted that such statutes are eminently remedial in their nature and should receive a liberal construction,[70] especially where the jurisdiction is conferred on chancery courts,[71] the doctrine of liberal construction has been interpreted as applicable only as to the subjects or property sought to be sold, and not as to the procedure by which the sale is effected.[72] Liberal construction should not be given to such an extent as to conflict with the legislative intent to safeguard the interests of infants.[73]

Conformity with statute generally. Where the court ordering the sale of an infant's property derives its power to make the order solely from statute, the provisions of the statute conferring jurisdiction must be strictly complied with or the sale will be void.[74] Thus the power to sell or mortgage does not authorize an exchange;[75] but where it is held that the court has, independently of statute, inherent jurisdiction, the sale is not necessarily invalid by reason of failure to comply with the statutory requirements on the subject.[76]

Situs of property as affecting power of court. Ordinarily, the sale is under the control of the court of the county where the real estate is situated.[77] A court which has acquired jurisdiction may order the sale of lands situated in another county in the state.[78] Jurisdiction to authorize sale by guardian as affected by situs of property or domicile of ward is considered in Guardian and Ward § 105.

§ 63. —— Purposes and Grounds

The power to sell may and should be exercised only when it is necessary or manifestly for the infant's benefit. A sale may generally be ordered to pay debts, to discharge encumbrances, or to procure funds for the

61. Ill.—Allman v. Taylor, 101 Ill. 185—Smith v. Sackett, 10 Ill. 534.

62. N.J.—Day v. Devitt, 81 A. 368, 79 N.J.Eq. 342.
Tenn.—Gillespie v. Jackson, 281 S. W. 929, 153 Tenn. 150—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47—Smartt v. Smartt, 1 Tenn.App. 68.

63. Tenn.—Morris v. Richardson, 11 Humphr. 389.

64. S.C.—Bulow v. Buckner, 9 S.C. Eq. 401.

65. N.Y.—Gedney v. Marlton Realty Co., 179 N.E. 766, 258 N.Y.S. 355, reversing 246 N.Y.S. 881, 231 App. Div. 812.
31 C.J. p 1037 note 83.

66. Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.
31 C.J. p 1038 notes 85–89.

67. Or.—Kirk v. Mullen, 197 P. 300, 100 Or. 563.

68. Ark.—Shumard v. Phillips, 13 S. W. 510, 53 Ark. 37.

69. Fla.—Wilkins v. Deen Turpentine Co., 94 So. 508, 84 Fla. 457.
Va.—Sterling v. Trust Co. of Norfolk, 141 S.E. 856, 149 Va. 867.
31 C.J. p 1038 note 94.

70. Va.—Rhea v. Shields, 49 S.E. 70, 103 Va. 305—Faulkner v. Davis, 18 Gratt. 651, 59 Va. 651, 98 Am.D. 698.

71. Va.—Brenham v. Smith, 90 S.E. 657, 120 Va. 30.
W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

72. Va.—Coleman v. Virginia Stave & Heading Co., 70 S.E. 545, 112 Va. 61.

73. Va.—Brenham v. Smith, 90 S.E. 657, 120 Va. 30.

74. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455—Wilkins v. Deen Turpentine Co., 94 So. 508, 84 Fla. 457.
Ky.—Greenway's Guardian ad Litem v. Greenway, 91 S.W.2d 553, 262 Ky. 818—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658—Eversole v. Roberts, 39 S.W.2d 986, 239 Ky. 532—May v. Pratt, 35 S.W.2d 542, 237 Ky. 369—Ware's Guardian v. Ware, 25 S.W.2d 56, 233 Ky. 109.
N.Y.—In re Title Guarantee & Trust Co., 273 N.Y.S. 158, 242 App.Div. 80, motion denied 198 N.E. 371, 268 N.Y. 494, affirmed 2 N.E.2d 683, 271 N.Y. 537.
31 C.J. p 1038 note 1.

75. N.Y.—Moran v. James, 47 N.Y.S. 486, 21 App.Div. 183, affirming 45 N.Y.S. 537, 20 Misc. 235—Matter of Adderley, 100 N.Y.S. 421, 50 Misc. 189.

76. Tenn.—Carter v. Carter, 234 S. W. 764, 144 Tenn. 628.
31 C.J. p 1038 note 3.

77. Tenn.—Smartt v. Smartt, 1 Tenn.App. 68.
31 C.J. p 1039 note 20.

78. Okl.—Klaus v. Campbell-Ratcliff Land Co., 150 P. 676, 48 Okl. 648.
Tenn.—Smartt v. Smartt, 1 Tenn. App. 68.

maintenance or education of the infant, and it may also be ordered for the purpose of reinvestment.

The power to sell may be exercised, and should be exercised, only when it is necessary[79] or manifestly for the infant's benefit.[80] Where a sale or conveyance is sought under statutory authority, the court can order the same only for the purpose for which it is authorized by the statute.[81] It has been held that a court of chancery may sell the realty of an infant for the purpose of removing the proceeds to another state where the infant permanently resides.[82] In some jurisdictions, by force of statute, a sale may be ordered for the purpose of distributing the proceeds among the joint owners where the estate cannot, conveniently and equitably, be divided in kind,[83] and in such case it is not necessary to establish that it is to the interest of the infant that the land be sold.[84] When permitted by statute the court may authorize an infant husband,[85] or an infant wife,[86] to join the other spouse in a conveyance so as to release prospective rights of curtesy or dower.

The purposes for which a sale by a guardian of a ward's property may be ordered are considered in Guardian and Ward § 107.

Debts and liens. A sale may generally be ordered whenever necessary to pay the debts of the infant,[87] or to discharge encumbrances on the property.[88] Unproductive lands may be sold to raise amounts to discharge encumbrances on productive property.[89] In some jurisdictions land descended to infants is subject to be sold for the payment of the debts of the deceased ancestor,[90] provided the personal property of decedent is not sufficient for that purpose;[91] but, in accordance with specific provisions, the court can authorize such a sale only in an action brought against the infant by a representative, legatee, distributee, or creditor of the deceased person.[92] A sale cannot be authorized for the purpose of paying the debts of living parents although the infant has participated in the enjoyment of the benefits for which the debts were incurred, even though a statute authorizes a sale for the maintenance and education of the infant.[93] In the absence of statute no court has power to authorize the sale of an infant's estate in remainder to pay claims chargeable against the owner of an existing life estate.[94]

Reinvestment. A sale may be ordered for the purpose of reinvesting the proceeds more beneficially for the infant,[95] especially where the property is wholly unproductive,[96] liable to depreciate in value,[97] or exposed to waste or dilapidation.[98] In some jurisdictions it is held that a court of equity has no inherent power to decree a sale of an infant's real estate merely for reinvestment;[99] but in

79. S.C.—Cannon v. Cannon, 133 S.E. 556, 135 S.C. 183—Fairey v. Strange, 104 S.E. 325, 115 S.C. 10.
Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.

Land not connected with public highway
Necessity for the sale of infant's land did not exist by reason of isolation, etc., where the situation could be remedied by establishment of a private road, a private way of necessity connecting the land with a public highway.—McConnell v. Deal, 246 S.W. 594, 296 Mo. 275.

Unproductiveness of land
Reasonable necessity for sale of lands devised to infant and her issue, with contingent remainder to others, may arise from its unproductiveness and infant's inexperience.—Kirkham v. First Nat. Bank, 147 S.E. 648, 149 S.C. 545.

80. S.C.—Cannon v. Cannon, 133 S.E. 556, 135 S.C. 183.
31 C.J. p 1040 note 46.

81. Ky.—Nunnelly v. Nunnelly, 191 S.W. 85, 173 Ky. 372.
31 C.J. p 1041 note 47.

82. Tenn.—Greenlaw v. Greenlaw, 16 Lea 435.

83. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691.
31 C.J. p 1041 note 49.

84. Ky.—Scott v. Graves, 154 S.W. 1084, 153 Ky. 221.

85. Ky.—Jesse v. Kinser, 120 S.W. 2d 654, 274 Ky. 821.

86. Ky.—Ex parte Roush, 137 S.W. 2d 352, 281 Ky. 733.

87. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691.
31 C.J. p 1041 note 52.

88. Ill.—Fienhold v. Babcock, 113 N.E. 962, 275 Ill. 282.
N.Y.—Hammer Realty Co. v. Moran, 132 N.Y.S. 412, 73 Misc. 135.

Redemption from tax sale
Minors with right of redemption from tax sale may have interests sold if necessary to raise funds for redemption.—Cuevas v. Cuevas, 110 So. 865, 145 Miss. 456.

89. Ill.—Allman v. Taylor, 101 Ill. 185.

90. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691.
31 C.J. p 1041 note 55.

91. Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.

Before administration of estate
A suit for the sale of infants' lands to pay the debts of the ancestor from which the property descended is premature where it is instituted before the administration of decedent's estate.—Gee v. McCormick, supra.

92. Ky.—Bowles v. Bowles' Adm'x, 277 S.W. 260, 211 Ky. 250.

Action by infant
A sale for this purpose is not authorized in an action brought by an infant.—Bowles v. Bowles' Adm'x, supra.

93. S.C.—Beckwith v. McAlister, 162 S.E. 623, 165 S.C. 1.

94. Ky.—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724.

95. Ala.—Martin v. Barnett, 87 So. 324, 205 Ala. 220.
31 C.J. p 1041 note 56.

96. Ill.—Gorman v. Mullins, 50 N.E. 222, 172 Ill. 349.
31 C.J. p 1041 note 57.

97. Ill.—Gorman v. Mullins, 50 N.E. 222, 172 Ill. 349.

98. Wis.—Schafer v. Luke, 8 N.W. 857, 51 Wis. 669.
31 C.J. p 1041 note 59.

99. Mo.—Heady v. Crouse, 100 S.W. 1052, 203 Mo. 100, 120 Am.S.R. 643.

other jurisdictions, such power is recognized when its exercise would be to the benefit of the infant.[1] A court of equity may exercise such power under constitutional provisions which confer on it full jurisdiction of a minor's business,[2] but it may do so only in conformity with statutes prescribing the manner in which it may be done.[3]

Support, maintenance, and education. A very usual purpose for which a sale of an infant's land may be ordered is the maintenance and support or education of the infant.[4] Such sale should be ordered only when his personal estate is insufficient for this purpose,[5] and he is without other means of support or education.[6] It should not be ordered unless his parents are unable to maintain and educate him.[7]

§ 64. —— Proceedings to Obtain Order of Sale

a. In general
b. Nature of proceedings
c. Parties
d. Application
e. Pleadings subsequent to application
f. Family meeting
g. Hearing
h. Reference and appraisement of property
i. Order or decree

a. In General

As a general rule, in order for the court to have jurisdiction to order a sale of an infant's property, there must be at least a substantial compliance with the procedure provided by statute.

While mere formal defects or irregularities may not vitiate the proceedings,[8] as a general rule, in order to give the court jurisdiction there must be compliance with the procedure provided by statute.[9] In some cases it has been held that a strict compliance with the statutory requirements,[10] as well as with the rules of practice,[11] is necessary. At least there should be substantial compliance with the procedure provided.[12] It has been held that, in the absence of proof, there is no presumption of compliance with the statutory requirements.[13]

Proceedings to obtain an order of sale on the application of the guardian of the minor's property are considered in Guardian and Ward §§ 110–118.

b. Nature of Proceedings

As a general rule a proceeding to obtain an order to sell an infant's realty for the payment of debts is considered adversary to the infant and not in rem, and a proceeding in which a sale is sought by a guardian or next friend for the benefit of the infant is not considered to be adversary to the infant and is in the nature of a proceeding in rem.

As a general rule, unless otherwise provided by statute, a proceeding to obtain an order to sell an infant's real estate for the payment of debts is considered to be adversary to the infant,[14] and not in rem,[15] and a proceeding in which a sale is sought by a guardian or next friend for the benefit of the infant is not considered to be adversary to the infant,[16] and is in the nature of a proceeding in rem.[17] Thus, where the sale is sought for the in-

1. Ala.—McCreary v. Billing, 58 So. 311, 176 Ala. 314, Ann.Cas.1915A 561.
Tenn.—Holt v. Hamlin, 111 S.W. 241, 120 Tenn. 496.

2. Miss.—Neely v. Craig, 139 So. 835, 162 Miss. 712—Kelly v. Neville, 101 So. 565, 136 Miss. 429—Crawford v. Solomon, 95 So. 686, 131 Miss. 792.

3. Miss.—Clark v. Foster, 70 So. 583, 110 Miss. 543.

4. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691.
31 C.J. p 1041 note 63.

5. Ky.—Luscher v. Julian, 190 S.W. 692, 173 Ky. 150.
31 C.J. p 1041 note 64.

6. S.C.—Fairey v. Strange, 104 S.E. 325, 115 S.C. 10.
31 C.J. p 1041 note 65.

7. Ky.—Luscher v. Julian, 190 S.W. 692, 173 Ky. 150.
31 C.J. p 1041 note 66.

8. Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.
31 C.J. p 1042 note 82.

9. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455—Wilkins v. Deen Turpentine Co., 94 So. 508, 84 Fla. 457.
Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.
Miss.—Clark v. Foster, 70 So. 583, 110 Miss. 543.
Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.
31 C.J. p 1042 note 83.

Commencement of proceedings before clerk

Where special proceeding for sale of infants' contingent interests in realty was commenced before the clerk instead of being brought at term by summons, proceeding was a nullity for want of jurisdiction and judgment therein was void.—Butler v. Winston, 27 S.E.2d 124, 223 N.C. 421.

10. N.Y.—Ellwood v. Northrup, 12 N.E. 590, 106 N.Y. 172.
31 C.J. p 1042 note 84.

11. N.Y.—Moscowitz v. Homberger, 43 N.Y.S. 1130, 19 Misc. 429.

12. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311.
Okl.—Carlile v. National Oil & Development Co., 201 P. 377, 83 Okl. 217.
Va.—Newman v. Light, 148 S.E. 818, 152 Va. 760.

13. N.Y.—Ellwood v. Northrup, 12 N.E. 590, 106 N.Y. 172.

14. Wis.—Weld v. Johnson Mfg. Co., 54 N.W. 335, 998, 84 Wis. 537.
31 C.J. p 1042 notes 88, 92, p 1043 notes 96, 97.

15. Iowa.—Good v. Norley, 28 Iowa 188.

16. Ark.—Watts v. Hicks, 178 S.W. 924, 119 Ark. 621.
31 C.J. p 1042 notes 90, 93.

17. Neb.—Myers v. McGavock, 58 N.W. 522, 39 Neb. 843, 42 Am.S.R. 627.
31 C.J. p 1042 note 91, p 1043 note 94.

fant's education and maintenance, the proceeding is not considered adversary.[18]

c. Parties

(1) In general
(2) Guardian ad litem

(1) In General

All persons designated by statute as necessary to the proceedings must be made parties thereto. The infant is a necessary party if a statute expressly so provides, and he may also be necessary if the proceedings are considered adversary in nature.

The presence of necessary parties required by statute is jurisdictional and a decree rendered in their absence is void.[19] All parties in interest should be brought before the court.[20] Under statutes specifically so providing those persons who would be the heirs or distributees of the infant if he were dead should be made parties.[21] The court may allow any near relative of the infant to become a party to the action for the purpose of protecting the interest of the infant.[22] There is no authority for uniting in a suit to sell an infant's interest in land, persons who claim a legal title adverse to the infant's, and compelling them to litigate that claim and pronouncing on it in such suit.[23] A person claiming an interest in the property adverse to that of the infant has no right to intervene.[24]

Parties to proceedings to obtain an order of sale on the application of the guardian of the minor's property are considered in Guardian and Ward § 111.

Infant as party. The infant is a necessary party to the proceedings if a statute expressly so provides,[25] or he may be a necessary party if the proceedings as instituted are considered adversary in nature;[26] otherwise the infant is not a necessary party.[27] Where a statute requires the infant to be made a party defendant in proceedings to sell the infant's estate for debts of his ancestor, the fact that he is a party plaintiff is not sufficient;[28] but the statute does not apply where the suit is brought primarily to divide the land, and the application of some of the proceeds of the property to pay the ancestor's debts is merely an incident to the proceedings.[29]

(2) Guardian ad Litem

Generally, where the proceedings are adversary in nature and the interests of the infant are unprotected or not adequately represented, the court should appoint a guardian ad litem to represent his interests, but, where the proceedings are not adversary or the interests of the infant are adequately represented, no appointment of a guardian ad litem is necessary.

Generally, under statutes or rules of practice, where the proceedings are adversary in nature and the interests of the infant are unprotected or not adequately represented, the court should appoint a guardian ad litem to represent his interests,[30] but, where the proceedings are not adversary or the interests of the infant are adequately represented, no appointment of a guardian ad litem is necessary.[31]

18. Ill.—Spring v. Kane, 86 Ill. 580.
Neb.—Myers v. McGavock, 58 N.W. 522, 39 Neb. 843, 42 Am.S.R. 627.

19. Va.—Newman v. Light, 148 S.E. 818, 152 Va. 760—Gee v. McCormick, 128 S.E. 541, 142 Va. 173—Park v. Stephenson, 104 S.E. 39, 127 Va. 431.

20. Ky.—Stovall v. Oates, 154 S.W. 914, 153 Ky. 81.

Persons interested in proceeds under will

Where the application of some of the proceeds of the sale is provided for by will, the persons interested in the proceeds under the will should be made parties to the proceedings.—Shull v. Rigby, 144 S.E. 372, 196 N.C. 4.

21. Va.—Newman v. Light, 148 S.E. 818, 152 Va. 760—Parker v. Stephenson, 104 S.E. 39, 127 Va. 431.

Mother as necessary party

In proceedings for sale of land descending to infants from father, for payment of his debts, mother would not be heir of infants and a necessary party where deceased had brother living, and a statute of descent provides that real estate descends to kindred of that parent from whom it was derived.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.

Commonwealth as necessary party in absence of heirs

Under such a statute, the commonwealth, made distributee of a person's personal estate in the absence of heirs by statute, and to which real estate would have escheated, was not a necessary party, although the infant had no heirs.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.

22. Ark.—Watts v. Hicks, 178 S.W. 924, 119 Ark. 621.

23. N.Y.—Onderdonk v. Mott, 34 Barb. 106.

24. Puerto Rico.—Surinach v. Ninliat, 17 Puerto Rico 63.

25. Ky.—Wilson v. Stephens, 161 S.W.2d 604, 290 Ky. 390.
31 C.J. p 1043 note 6.

26. Kan.—Crapster v. Taylor, 87 P. 1138, 74 Kan. 771.
31 C.J. p 1043 note 6.

27. Ark.—Watts v. Hicks, 178 S.W. 924, 119 Ark. 621.

28. Ky.—Clark v. Satterfield's Adm'r, 26 S.W.2d 516, 233 Ky. 600—Hicks v. Winn, 248 S.W. 499, 198 Ky. 192.

29. Ky.—Clark v. Satterfield's Adm'r, 26 S.W.2d 516, 233 Ky. 600—Baxter Realty Co. v. Martin, 216 S.W. 110, 185 Ky. 697.

30. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455.
Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind. App. 282.
31 C.J. p 1043 note 9.

31. Ohio.—Judy v. Trollinger, 144 N.E. 44, 110 Ohio St. 576.
31 C.J. p 1043 note 10.

Representation by next friend

Sale of land on foreclosure of vendor's lien was held not invalid, because one of heirs of purchaser was a minor without a lawful guardian and no guardian ad litem was appointed to represent him, where only relief sought against such minor was a foreclosure of lien and he appeared in motion to set aside sale by his brother as next friend, who was a party to cross action for affirma-

While it has been held that, if a guardian ad litem is necessary, the failure to appoint him[32] or his void appointment[33] renders the judgment or decree ordering the sale invalid, it has also been held that the failure to appoint a guardian ad litem is not necessarily fatal to a sale if it appears to be beneficial to the infant,[34] and mere irregularities in the order or decree of appointment will not render the judgment or decree of sale void[35] where the sale has been consummated and it is beneficial to the infant.[36] Under express statutory provisions a guardian ad litem may be appointed before the infant is served with process if all the parties on whom process may be served are plaintiffs in the action,[37] but in all other cases no appointment of a guardian ad litem shall be made until after the infant is served with process.[38]

Representation of infants by guardian ad litem in litigation generally is considered infra §§ 107–113. Representation of infant in proceedings to sell decedent's realty is considered in Executors and Administrators § 561 b.

d. Application

(1) Necessity and sufficiency
(2) Notice of application

(1) Necessity and Sufficiency

(a) In general
(b) Showing reason and necessity for sale
(c) Description of property or interest to be sold
(d) Signature and verification

(a) In General

The petition must be presented to a court of competent jurisdiction, and it must aver every fact necessary to confer jurisdiction on the court as well as all matters which the statute requires to be set forth.

While it has been held that the court may depart from the rule requiring the application to be by petition, and allow an order on oral application,[39] the application to sell an infant's property ordinarily must be by petition,[40] in writing,[41] to a court of competent jurisdiction,[42] averring every fact necessary to confer jurisdiction on the court,[43] as well as all matters which the statute requires to be set forth.[44] A petition embracing substantially all that is required by the statute is sufficient.[45] The authority to sell real estate carries with it the implied power to determine the sufficiency of the pleadings presented to the court for that purpose.[46] The petition may, in the discretion of the court, be granted, although it does not in form comply with the requirements of the rules of the court.[47] No demurrer is needed on the part of the infant to protect him from defective allegations in the application.[48] The fact that the petition is for a private sale of the infant's share after the whole had been offered at public sale is no fraud on the court where the court has been informed of the facts before granting the petition.[49]

Necessity and sufficiency of an application by a guardian of a ward's property are considered in Guardian and Ward §§ 112, 115.

Exhibits. Sometimes the petition is required to be accompanied by certain exhibits or certificates;[50] but this requirement is usually regarded as merely

tive relief, in suit to foreclose lien and there was no allegation that minor was not represented in such cross action by such brother, or some other proper party as next friend.—Austin v. First State Bank & Trust Co., Tex.Civ.App., 275 S.W. 156.

32. Md.—Roche v. Waters, 18 A. 866.

33. Ky.—Roy v. Allen, 118 S.W. 981.

34. Ky.—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.
31 C.J. p 1042 note 12.

35. W.Va.—Chapman v. Branch, 78 S.E. 235, 72 W.Va. 54.
31 C.J. p 1043 note 13.

36. Ky.—Crume v. Sherman, 215 S.W. 196, 185 Ky. 376.

37. Ky.—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186.
Necessity and sufficiency of notice of application see infra subdivision d (2) of this section.

38. Ky.—First State Bank v. Thacker's Adm'x, supra—Cain v. Hall, 278 S.W. 152, 211 Ky. 817.

39. N.Y.—O'Reilly v. King, 25 N.Y. Super. 587, 28 How.Pr. 408.

40. Ala.—Holten v. Rogers, 67 So. 1004, 191 Ala. 48.
31 C.J. p 1042 note 17.

41. Neb.—Hubermann v. Evans, 65 N.W. 1045, 46 Neb. 784.
R.I.—Barry v. Clarke, 13 R.I. 65, distinguishing Robbins v. Tafft, 12 R.I. 67.

42. N.Y.—In re Bookhout, 21 Barb. 348.

43. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691.
31 C.J. p 1043 note 20.

44. Ky.—Fields v. Letcher State Bank, 54 S.W.2d 910, 246 Ky. 229—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.
Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.
31 C.J. p 1043 note 21.

45. Ky.—Noell v. Webster, 86 S.W. 2d 1013, 260 Ky. 823.
31 C.J. p 1043 note 22.

46. Neb.—Trumble v. Williams, 24 N.W. 716, 18 Neb. 144.
Collateral attack on ground of insufficiency of petition see infra § 66 n.

47. N.Y.—Cole v. Gourley, 79 N.Y. 527, affirming 9 Hun 493—O'Reilly v. King, 25 N.Y.Super. 587, 28 How. Pr. 408.

48. Va.—Parker v. Stephenson, 104 S.E. 39, 127 Va. 431—Coleman v. Virginia Stave & Heading Co., 70 S.E. 545, 112 Va. 61.

49. Pa.—Swartz v. Crum, 167 A. 414, 110 Pa.Super. 102.

50. Mass.—In re Williams, 3 Mass 397.
Mo.—Pattee v. Thomas, 58 Mo. 163—Overton v. Johnson, 17 Mo. 442
Filing of title papers
(1) In suit for sale of land in which infant has joint interest where

directory, and not jurisdictional.[51]

Designation of parties in interest. It is usual to designate the parties in interest in some manner in the petition,[52] but an erroneous description or designation does not necessarily vitiate the proceeding.[53]

(b) Showing Reason and Necessity for Sale

As a general rule the petition must contain allegations of facts showing the reasons for which the sale is sought and the necessity or propriety of making it.

As a general rule it is required that the petition contain allegations of facts showing the reasons for which the sale is sought and the necessity or propriety of making it.[54] It is not necessary, however, that such facts should be specifically alleged, if it appears by reasonable inference from the facts stated in the petition that one or more of the contingencies authorizing the sale exists.[55] A general averment in regard to the necessity of the sale may be sufficient to give the court jurisdiction,[56] although it is better practice to set forth fully all the facts and circumstances rendering the sale necessary.[57]

Condition of estate. The petition is usually required to set forth the condition of the estate in such a manner as to enable the court to judge of the propriety or necessity of the sale.[58] It should state the real[59] and personal[60] property of the infant, his income, and the debts against his estate.[61] The insufficiency of the personal property ordinarily must be alleged,[62] especially where the sale is for the payment of his debts;[63] but, if the sale is asked on the ground of expediency, for better investment of the proceeds, the petition need only state the condition of the estate to be sold, and the omission of the petition to describe and show the condition of the ward's personal estate will not affect the question of jurisdiction.[64] A petition for a sale of property to pay debts of the ancestor must, in accordance with statutory provisions, set forth the value of the property and the amount of the debts, and facts sufficient to show that the personalty is insufficient for the payment of all debts.[65]

Stating several grounds. The fact that two distinctly different grounds of sale are joined in the same bill or petition will not affect the validity of the sale,[66] although the practice is irregular.[67]

(c) Description of Property or Interest to Be Sold

The petition should contain a correct description of the property or interest to be sold. Any description which provides the means of identifying the property is sufficient as against a collateral attack.

The petition should contain a correct description of the property or interest to be sold.[68] Some cases hold that the description is essential and that an order on a petition with the description omitted and the sale thereunder is void,[69] while other cases hold that a mistake in the description will not affect the jurisdiction of the court or the validity of the purchaser's title.[70] Any description will be sufficient when collaterally attacked when it provides the means of identifying the property.[71] The proceedings will not be invalidated by reason of an erroneous description of the property, when the remainder of the description, after rejecting that which is erroneous, is sufficiently certain to enable

property cannot be divided without materially impairing its value, it is not necessary to file title papers.—Greenway's Guardian ad Litem v. Greenway, 91 S.W.2d 553, 262 Ky. 818.

(2) Where the petition sets up the source of title, it is not necessary that the title papers should be filed.—Smith v. Leavill, 29 S.W. 319, 16 Ky.L. 609.

51. Mo.—Pattee v. Thomas, 58 Mo. 163—Overton v. Johnson, 17 Mo. 442.

52. Ala.—McQueen v. Grigsby, 44 So. 961, 152 Ala. 656.
31 C.J. p 1044 note 29.

53. Mo.—Exendine v. Morris, 8 Mo. App. 383.
31 C.J. p 1044 note 30.

54. Va.—Gee v. McCormick, 128 S. E. 541, 142 Va. 173.
31 C.J. p 1044 note 32.

55. U.S.—Sprigg v. Stump, C.C.Or., 8 F. 207, 7 Sawy. 280.
Cal.—Fitch v. Miller, 20 Cal. 352.
Miss.—Hanks v. Neal, 44 Miss. 212.

56. Iowa.—Bunce v. Bunce, 13 N.W. 705, 59 Iowa 533.

57. Mich.—In re Dorr, Walk. 145.

58. Cal.—Smith v. Biscailuz, 21 P. 15, 83 Cal. 344, reheard 23 P. 314, 83 Cal. 344.
31 C.J. p 1044 note 36.

59. Va.—Gee v. McCormick, 128 S. E. 541, 142 Va. 173.
31 C.J. p 1044 note 37.

60. Va.—Gee v. McCormick, supra.
31 C.J. p 1044 note 38.

61. N.Y.—Title Guarantee & Trust Co. v. Rudershausen, 164 N.Y.S. 15.

62. Ky.—Luscher v. Julian, 190 S.W. 692, 173 Ky. 150.

63. Tenn.—Kindell v. Titus, 9 Heisk. 727.

64. Cal.—Smith v. Biscailuz, 21 P. 15, 83 Cal. 344, reheard 23 P. 314, 83 Cal. 344.

65. Ky.—Jones v. Keen, 160 S.W.2d 164, 289 Ky. 779—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

66. Or.—Walker v. Goldsmith, 12 P. 537, 14 Or. 125.
Tenn.—Kindell v. Titus, 9 Heisk. 727.

67. Pa.—Graham's Estate, 14 Wkly. N.C. 31.
31 C.J. p 1044 note 46.

68. Neb.—Hubermann v. Evans, 65 N.W. 1045, 46 Neb. 784.
31 C.J. p 1044 note 48.

69. Neb.—Hubermann v. Evans, supra.

70. Cal.—Scarf v. Aldrich, 32 P. 324, 97 Cal. 360, 33 Am.S.R. 190.
31 C.J. p 1045 note 50.

71. Neb.—Hubermann v. Evans, 65 N.W. 1045, 46 Neb. 784.
Wash.T.—Brazee v. Schofield, 3 P. 265, 2 Wash.T. 209, affirmed 8 S.Ct. 604, 124 U.S. 495, 31 L.Ed. 484.

the land to be located.[72] Where the contrary does not appear, it may be presumed that the estate described in the petition includes all that the infant owns.[73]

Value of property. An allegation as to the assessed value has been held to comply sufficiently with a statutory requirement that the petition state the value of the property to be sold.[74]

(d) Signature and Verification

In the absence of a statutory requirement, the signature of the applicant or verification of the petition is not essential to the validity of the sale. When required, the verification should comply with the statute, but the want of a verification is not usually regarded as a jurisdictional defect.

While, unless required by statute, it is not essential to the validity of the sale that a petition be signed by applicant,[75] it is usual and proper that he do so.[76]

Verification. Unless required by statute it is not necessary that the petition should be verified.[77] The verification, when necessary, should be in accordance with the statutory requirements[78] and in the form prescribed by the rules of court.[79] While the want of a verification when required may constitute error,[80] it is not usually regarded as a jurisdictional defect, and the sale will be sustained on a collateral attack.[81]

(2) Notice of Application

(a) Necessity

(b) Requisites and sufficiency

(a) Necessity

Notice of the application must be given to the persons designated by statute.

When required by statute notice of the application must be given actually or constructively to the infant himself, or some one interested in his welfare,[82] and the courts cannot rightfully dispense with the requirement of such notice.[83] Such want of notice is not excused or cured by the appointment of a guardian ad litem and defense made by him,[84] or consent to the proceedings given by him.[85] Whether or not a want of such notice renders the proceeding void usually depends on the view taken as to the nature of the proceeding. If the proceeding is considered adversary to the infant, it is generally held that a sale made without giving the notice required by statute is absolutely void.[86] Thus in a proceeding to sell the real estate of an infant to pay the debt of his ancestor, which proceeding is regarded as adversary, notice is a jurisdictional requirement.[87] If the proceeding is not regarded as adversary, it is held that the jurisdiction to make the order does not depend on the giving of notice, but that it is only necessary that the court should have jurisdiction of the subject matter;[88] and at most, in such case, the proceeding is merely voidable but not void.[89] Under statutes providing that in order to authorize the sale the infant be summoned in the manner provided by the service of process, it has been held that failure to do so is a jurisdictional defect.[90] It has been held that, in the absence of statute requiring the service of proc-

72. Neb.—Hubermann v. Evans, 65 N.W. 1045, 46 Neb. 784.

73. Ohio.—Mauarr v. Parrish, 26 Ohio St. 636.
Va.—Parker v. Stephenson, 104 S.E. 39, 127 Va. 431.

74. N.Y.—In re Wilbert, 244 N.Y.S. 216, 230 App.Div. 764, rearguing 239 N.Y.S. 223, 228 App.Div. 703.
However, it has also been held in an earlier case that the petition should allege the real market value of the property in question and that an allegation as to the assessed value is not sufficient.—Title Guarantee & Trust Co. v. Rudershausen, 164 N.Y.S. 15.

75. Mich.—Ellsworth v. Hall, 12 N. W. 512, 48 Mich. 407—Stewart v. Bailey, 28 Mich. 251.

76. Wis.—Mohr v. Porter, 8 N.W. 364, 51 Wis. 487.
31 C.J. p 1045 note 59.

77. Miss.—Hanks v. Neal, 44 Miss. 212.

78. Va.—Lancaster v. Barton, 24 S. E. 251, 92 Va. 615.
31 C.J. p 1045 note 63.

79. N.Y.—Matter of Lansing, 3 Paige 265.

80. Mo.—Castleman v. Relfe, 50 Mo. 583.

81. Iowa.—Hamiel v. Donnelly, 39 N.W. 210, 75 Iowa 93.
31 C.J. p 1045 note 66.

82. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455.
Ky.—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186.
N.C.—Welch v. Welch, 140 S.E. 436, 194 N.C. 633.

83. W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

84. Ky.—Walker v. Perkins, 76 S.W. 2d 251, 256 Ky. 442—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186.
W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

85. N.Y.—Donovan v. Flynn, 220 N. Y.S. 44, 219 App.Div. 471.

86. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455.
31 C.J. p 1045 note 72.

87. Ky.—Hicks v. Winn, 248 S.W. 499, 198 Ky. 192.
31 C.J. p 1045 note 74.
Necessity for notice of counterclaim.
A statute providing that no summons is required on a set-off or counterclaim against plaintiff does not apply where, contrary to the statute, infants were joined as plaintiffs in an action to sell their interests in their ancestors' lands for the payment of debts, and where defendants filed a counterclaim.—Hicks v. Winn, supra.

88. Cal.—Scarf v. Aldrich, 32 P. 324, 97 Cal. 360, 33 Am.S.R. 190.
31 C.J. p 1045 note 76.

89. N.C.—Welch v. Welch, 140 S.E. 436, 194 N.C. 633.
W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

90. Ky.—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky.

ess on the infant, the validity of the proceedings is not affected by the failure to serve him with process when the infant was in court and a guardian ad litem was appointed who duly answered for him.[91]

Notice of application by a guardian is considered in Guardian and Ward § 113.

Notice to next of kin and others. In some jurisdictions, by force of statute, it is required that the next of kin of the infant or other persons legally or beneficially interested shall be summoned or otherwise notified of the application to sell the infant's land.[92] Compliance with such requirement is a condition precedent to the exercise by the court of jurisdiction to order a sale, and consequently to the validity of the sale.[93]

(b) Requisites and Sufficiency

The notice should give the necessary information and comply with statutory requirements.

The notice should give the necessary information and comply with statutory requirements,[94] but mere defects or irregularities in the notice itself or in the service thereof does not render the proceeding void.[95] It is not necessary to state the names of the heirs or other interested parties in the notice.[96]

Description of property. Even though it may be unnecessary for the notice to describe the land desired to be sold, it is the better practice to do so;[97] and if the notice assumes to describe the land it must be substantially correct;[98] thus while, where the notice does not contain an entire misdescription of the land intended to be sold, the petition will be good for so much of the land as is properly described,[99] where the notice contains an entire misdescription, the sale will be void.[1]

Time designated for hearing application. The notice should state the time when the petition will be presented to the court and a hearing had.[2] Where the notice gives the wrong time, or no time, for the hearing of the petition, it is equivalent to no notice, and a sale under it is void.[3]

Manner of giving notice. The manner of giving notice must comply with statutory provisions.[4] In accordance with such provisions the notice may be permitted or required to be by personal service[5] or by publication,[6] or by either[7] or both[8] personal service or publication.

Time of giving notice. Where notice of the application is required, it must be given the required length of time before the hearing.[9] The mere fact that the notice is dated before the date of filing the application in court will not render the sale void.[10]

e. Pleadings Subsequent to Application

An answer must be filed by the infant or his guardian in accordance with statutory requirements.

An answer must be filed by the infant or his guardian in accordance with statutory requirements, and a failure of a guardian ad litem to file an answer in his own proper person for infants over fourteen, as required by statute, is a defect in the proceedings.[11] However, failure of minor remaindermen to file personal answers in accordance with statutory provisions does not require the court to declare the decree void after a long period of time has elapsed where the remaindermen were represented by a guardian ad litem and the decree has been beneficial to the minors.[12] A joint answer filed by the infant and his guardian ad litem is a

186—Hicks v. Winn, 248 S.W. 499, 198 Ky. 192.
31 C.J. p 1046 note 78.

91. D.C.—Cuyler v. Cuyler, 16 D. C. 568.

92. Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.
31 C.J. p 1046 note 81.

93. Okl.—Rock Island Implement Co. v. Pearsey, supra.
31 C.J. p 1046 note 82.

94. Fla.—McIntyre v. Parker, 82 So. 253, 77 Fla. 690.
Iowa.—Lyon v. Vanatta, 35 Iowa 521.

95. Ind.—Tucker v. Sellers, 30 N.E. 531, 130 Ind. 514.
31 C.J. p 1046 note 84.

96. Ill.—Hobson v. Ewan, 62 Ill. 146.

97. Iowa.—Lyon v. Vanatta, 35 Iowa 521.

98. Iowa.—Lyon v. Vanatta, supra—Frazier v. Steenrod, 7 Iowa 339, 71 Am.D. 447.

99. Iowa.—Frazier v. Steenrod, supra.

1. Iowa.—Lyon v. Vanatta, 35 Iowa 521.

2. Cal.—Scarf v. Aldrich, 32 P. 324, 97 Cal. 360, 33 Am.S.R. 190.
31 C.J. p 1046 note 91.

3. Iowa.—Lyon v. Vanatta, 35 Iowa 521.

4. Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.

5. Iowa.—Hamiel v. Donnelly, 39 N.W. 210, 75 Iowa 93.
31 C.J. p 1046 note 96.

Infant over fourteen years of age
In action for sale of indivisible property jointly owned by adults and infants, summons was properly served, in accordance with statutory provisions, on infant instead of on some one for him, where infant was over fourteen years of age at time of institution of action.—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.

6. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455.
31 C.J. p 1046 note 97.

7. Ill.—Hobson v. Ewan, 62 Ill. 146.
Ind.—Doe v. Bowen, 8 Ind. 197, 65 Am.D. 758.

8. Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.

9. Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.
31 C.J. p 1047 note 99.

10. Kan.—Bradford v. Larkin, 45 P. 69, 57 Kan. 90.

11. Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.

12. Tenn.—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47.

sufficient compliance with a statute requiring an infant over the age of fourteen years to answer the bill.[13]

f. Family Meeting

In Louisiana a family meeting must declare that the sale is necessary or of evident advantage to the infant before the court may order a sale for the infant's benefit.

In Louisiana a family meeting must be had to declare that the sale is necessary or of evident advantage to the infant before the court may order a sale of the infant's land for his benefit.[14] It has been held that an administrator may, for the purpose of paying debts, sell the property of a succession in which minors are interested without the advice of a family meeting.[15] A decree homologating the proceedings of a family meeting is conclusive[16] and will protect a purchaser in good faith,[17] but if the proceedings have not been in conformity with statutory regulations, and the purchaser does not take in good faith, the sale may be set aside in a subsequent suit by the infant.[18]

The family meeting as necessary in a sale of a minor's property by a tutor is considered in Guardian and Ward § 116.

g. Hearing

The court should require affirmative proof of the essential allegations of the petition notwithstanding admissions by the guardian ad litem. The facts proved must be sufficient to establish the necessity and propriety of the sale.

The court should require affirmative proof of the essential allegations of the petition in order that it may determine whether the facts requisite to the granting of the petition exist,[19] notwithstanding the infant's guardian ad litem admits allegations of the bill regarding the property,[20] and it should hear evidence of the value of the property.[21] The facts proved must be sufficient to establish the necessity and propriety of the sale,[22] such as that it will be for the benefit of the infant,[23] or that it is necessary for the payment of debts.[24] However, the indivisibility of land necessary to authorize a sale for distribution of land in which infants have an interest need not be proved where the facts pleaded make it reasonably clear that the element of essential indivisibility to authorize such a sale exists.[25] Under some statutes the court may proceed in a summary manner to inquire into the merits of the application.[26]

The hearing on an application for a sale by the guardian of the infant's property is considered in Guardian and Ward § 117.

Discretion. The granting of the application is a matter within the discretion of the court,[27] although such discretion is not absolute but will be controlled when improperly exercised.[28]

Validity of title. The court is without jurisdiction to determine whether the title in the property is good, doubtful, or bad,[29] except in so far as it affects the adequacy of the price offered by a purchaser.[30]

Liens. A sale should not be authorized until all liens against the land for taxes or otherwise are ascertained and determined so that a fair sale may be had and a clear title secured to the purchaser.[31]

13. Tenn.—State ex rel. Tobin v. Independent Life Ins. of America, 100 S.W.2d 228, 171 Tenn. 13.

14. La.—Delouche v. Rosenthal, 78 So. 970, 143 La. 581.
31 C.J. p 1047 note 3.

15. La.—Woniger v. Falletta, 8 La. A., Orleans, 280.

16. La.—Becnal v. Louisiana Cypress Lumber Co., 64 So. 380, 134 La. 467.

17. La.—Dauterive v. Shaw, 17 So. 345, 47 La.Ann. 882.

18. La.—Fradella v. Pumilia, 147 So. 496, 177 La. 47.

19. Ky.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Jones v. Keen, 160 S.W.2d 164, 289 Ky. 779—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

20. Tenn.—McClure v. Keeling, 43 S.W.2d 383, 163 Tenn. 251.

21. Mo.—McConnell v. Deal, 246 S.W. 594, 296 Mo. 275.

Evidence held to show adequacy of price offered
S.C.—Stafford v. Stafford, 20 S.E.2d 217, 200 S.C. 1.

22. Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.
Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.
31 C.J. p 1047 note 9.

Evidence held sufficient
S.C.—Stafford v. Stafford, 20 S.E.2d 217, 200 S.C. 1.
31 C.J. p 1047 note 8 [a].

Evidence held insufficient
Ala.—Gassenheimer v. Gassenheimer, 18 So. 520, 108 Ala. 651.
31 C.J. p 1047 note 8 [b].

23. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.
31 C.J. p 1047 note 10.

24. Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658—Luscher v. Julian, 190 S.W. 692, 173 Ky. 150.

25. Ky.—Cini v. Ball, 156 S.W.2d 486, 288 Ky. 471—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.

26. Wis.—Schafer v. Luke, 8 N.W. 857, 51 Wis. 669.
31 C.J. p 1047 note 11.

27. Iowa.—Dickinson v. Hughes, 37 Iowa 160.
N.Y.—Matter of McIlvaine, 15 Abb. Pr. 91.

28. Iowa.—Dickinson v. Hughes, 37 Iowa 160.

29. Pa.—In re Burke's Estate, 15 Pa.Co. 9.

Construction of will
There is no prerequisite in the statute requiring that the will under which infants hold land shall be construed before a sale is ordered. —Lancaster v. Barton, 24 S.E. 251, 92 Va. 615.

30. Pa.—In re Burke's Estate, 15 Pa. Co. 9.

31. W.Va.—White v. Straus, 35 S.E. 843, 47 W.Va. 794.

Suggestions by infant. When an infant has arrived at an age of discretion, he may suggest to the court facts and views of policy in regard to his estate which, if worthy of consideration, should be given great weight.[32]

At chambers. The power of a judge to conduct a hearing and grant an order of sale at chambers must be found in the statutes on the subject.[33] In the absence of statutory authority the order cannot be made at chambers,[34] but under some statutes it may be made at chambers under given circumstances.[35]

The power of judges at chambers generally is considered in the C.J.S. title Judges § 48, also 33 C.J. p 964 note 64–p 969 note 14.

h. Reference and Appraisement of Property

When so required by statute the court must appoint a referee, a master, or commissioners, to ascertain the necessity and propriety of the sale, and it has been held that the report is essential to the jurisdiction of the court. By force of statute in some jurisdictions the infant's property must be appraised before it is sold.

When so required by statute, the court must appoint a referee, a master, or commissioners, to ascertain the necessity and propriety of the sale, and whether the interest of the infant requires it,[36] and it has been held that the report required by the statute is essential to the jurisdiction of the court.[37] Even though this procedure is not required by statute, the appointment of a commissioner to make inquiries concerning matters material to the validity of the sale has been recommended.[38] The referee master or commissioners, appointed in accordance with the statute, must act on evidence judicially presented and not act merely perfunctorily,[39] and the testimony on which the opinion of the master or commissioner as to the necessity and expediency of the sale is founded should be reported to the court so that it may form an opinion as to such necessity for itself.[40] The report must comply with the statutory requirements[41] and the rules of court.[42] A discrepancy between the description of the land to be sold in the referee's report and in the petition for the sale is a valid objection to the title.[43]

In some jurisdictions, by force of statute, the infant's property must be appraised before it can be sold,[44] and a sale without an appraisement has been held to be void,[45] but there is also authority that the sufficiency of the appraisement cannot be collaterally questioned.[46] In some jurisdictions the property cannot be sold for less than the amount of the appraisement[47] except where it is sold to pay the debts of the ancestor.[48] In other jurisdictions it cannot be sold for less than a certain proportion of the appraised value, and a sale in contravention of such requirement has been held to be absolutely void.[49] On the other hand, however, it has been held that the sale cannot be collaterally attacked because the property sold for less than the appraised value;[50] at most such sale is merely voidable at the option of the infant.[51]

32. Okl.—In re Hickory, 182 P. 233, 75 Okl. 79.

33. Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.

34. Ga.—Sparks v. Ridley, 103 S.E. 425, 150 Ga. 210.
31 C.J. p 1039 notes 6, 8.

35. Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.
31 C.J. p 1039 notes 7, 8.

36. N.C.—Harrison v. Bradley, 40 N.C. 136.
31 C.J. p 1047 note 18–p 1048 note 20.

37. N.Y.—Hegeman v. Stearns Realty Co., 102 N.Y.S. 1025, 1117 App. Div. 754, affirmed 85 N.E. 1111, 192 N.Y. 557.
31 C.J. p 1048 note 21.

38. Va.—Gee v. McCormick, 128 S. E. 541, 142 Va. 178.

Proper subjects for inquiry by commissioner

Suit for sale of infant's lands should be referred to master commissioner for inquiries as to real and personal estate of infant; where situated, its fee-simple and annual value, and liens, if any, against it; whether infants' interest would be promoted by selling or encumbering real estate or any part of it; what amount should be borrowed, and how proceeds should be distributed or invested if encumbered or sold; whether rights of any persons would be violated by such encumbrance, sale, and investment; who would be heirs at law of infant if he were dead, and whether all such persons were properly before court in cause. —Gee v. McCormick, supra.

39. N.J.—In re Heaton, 21 N.J.Eq. 221.
N.Y.—Matter of O'Brien, 155 N.Y.S. 552, 169 App.Div. 519.

40. S.C.—Bulow v. Buckner, 9 S.C. Eq. 401.
31 C.J. p 1048 note 26.

41. Ky.—Campbell v. Clay, 6 Bush 498.
31 C.J. p 1048 note 24.

42. N.Y.—Title Guarantee & Trust Co. v. Rudershausen, 164 N.Y.S. 15.
31 C.J. p 1048 note 25.

43. N.Y.—Title Guarantee & Trust Co. v. Rudershausen, supra.

44. Ind.—Meikel v. Borders, 29 N.E. 29, 129 Ind. 529.
31 C.J. p 1048, note 28.

45. Mo.—Strouse v. Drennan, 41 Mo. 289.

46. Cal.—Smith v. Biscailuz, 21 P. 15, 83 Cal. 344, 359, reheard 23 P. 314, 83 Cal. 344.
31 C.J. p 1048 note 30.

47. La.—Fraser v. Zylicz, 29 La.Ann. 534.

48. La.—Fraser v. Zylicz, supra—Towles v. Weeks, 7 La. 312—Woniger v. Falletta, 8 La.A., Orleans, 280.

49. Mo.—Carder v. Culbertson, 13 S. W. 88, 100 Mo. 269, 18 Am.S.R. 548.

50. Ind.—Meikel v. Borders, 29 N.E. 29, 129 Ind. 529.
31 C.J. p 1048 note 35.

51. La.—Richard v. Deuel, 11 Rob. 508.

Reference and appraisal of property on an application for sale by the guardian are considered in Guardian and Ward § 120.

i. Order or Decree

An order or decree of the court is necessary to authorize a sale of an infant's property, and it must comply with statutory requirements. The order or decree conclusively adjudicates everything necessarily considered and determined, and, if the court has jurisdiction, it is not subject to collateral attack. Before the passing of title it may be modified or set aside on proper notice and for good reason.

An order or decree of the court to that effect is necessary to authorize a sale of an infant's property.[52] The order or decree must comply with the statutory requirements,[53] and, in accordance therewith, it may be necessary for the order to show the existence of facts authorizing the sale,[54] to direct the manner of sale,[55] and to specify the time and place of sale.[56] Where the sale is to be a public one, the order should direct proper notice to be given.[57] The order or decree need not contain a statement of any facts not required by statute.[58] In decreeing a sale the court of equity may make such provisions as will protect the interest of the infant,[59] or, if necessary, the interests of persons not yet born who have contingent or vested interests.[60]

The order or decree on an application by the guardian of the infant's property is considered in Guardian and Ward § 118.

Description of property. The order should contain a sufficient description of the land intended to be sold,[61] but any description by which the premises may be identified will be sufficient.[62] An order authorizing a sale of as much of the land as may be necessary to accomplish the desired purpose has been held void for uncertainty.[63]

Joint order. The fact that an order is joint for the sale of the property of several minors does not render the sale void.[64]

Operation and effect. The decree directing sale of the property conclusively adjudicates everything necessarily considered and determined in reaching the conclusion,[65] but it does not determine matters not involved in the proceedings.[66] The order may be collaterally attacked for want of jurisdiction,[67] but, if the court has jurisdiction, the order is conclusive until reversed or set aside,[68] and not subject to collateral attack.[69] Minors are concluded by the decree to the same extent as adults.[70]

Where nothing to the contrary appears in the record, it will be presumed that the order was made on a sufficient showing and was for the infant's benefit.[71] Where the record is lost, the court will in-

52. Ky.—Bill v. Burgess, 22 S.W. 84, 51 Ky.L. 41.
31 C.J. p 1048 note 38.

License to guardian as validating parent's contract
A license of the probate court authorizing the guardian to sell real estate of his infant ward did not validate and make irrevocable a previous contract for the sale of such lands, made by the infant's parent as agent for such infant, in the absence of express terms in the license to that effect, even if the court had power to ratify the voidable contract.—Freeman v. Fishman, 139 N.E. 846, 245 Mass. 222.

53. N.C.—Leary v. Fletcher, 23 N.C. 259.

54. N.C.—Spruill v. Davenport, 48 N.C. 42.
31 C.J. p 1049 note 41.

55. Ill.—Reid v. Morton, 6 N.E. 414, 119 Ill. 118.
31 C.J. p 1049 note 43.

56. Ill.—Benefield v. Albert, 24 N.E. 634, 132 Ill. 665.
31 C.J. p 1049 note 45.

57. Mich.—Schlee v. Darrow, 32 N.W. 717, 65 Mich. 362.

58. Pa.—Morrison v. Nellis, 7 A. 768, 115 Pa. 41.

59. S.C.—Kirkham v. First Nat. Bank, 147 S.E. 648, 149 S.C. 545.

Requiring deposit in trust
Where grantor, after conveying life estate to wife with remainder to children, requested reconveyance, in which wife concurred, court of equity on decreeing sale will require grantor to deposit in trust a sum equal to value of such property for benefit of children.—Cannon v. Cannon, 133 S.E. 556, 135 S.C. 183.

60. S.C.—Kirkham v. First Nat. Bank, 147 S.E. 648, 149 S.C. 545.

61. Neb.—Huberman v. Evans, 65 N.W. 1045, 46 Neb. 784.
31 C.J. p 1049 note 47.

62. N.C.—Williams v. Harrington, 33 N.C. 616, 53 Am.D. 421.

63. N.C.—Brock v. King, 48 N.C. 45.
31 C.J. p 1049 note 48.

64. Ind.—Doe v. Wise, 5 Blackf. 402.

65. Pa.—Swartz v. Crum, 167 A. 414, 110 Pa.Super. 102.

Implied finding as to compliance with statute
Where the bill in proceedings for the sale of an infant's land alleged that the infant had no kin or relations, and the court confirmed the report of commissioner, stating that all necessary parties were before the court, and that the infant had no relations whatever, and there was nothing on the face of the proceedings to negative the fact that the infant had no kin the court impliedly found compliance with the statute requiring the infant's "heirs or distributees if he were dead" to be made defendants, and such finding cannot be assailed collaterally.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.

66. Terms of will
A proceeding to sell an infant's realty in which no reference is made to a will prohibiting a division of the property before the infant attains majority does not determine that the property may be sold under the terms of the will.—Bradley v. Bradley, 238 N.Y.S. 6, 228 App.Div. 629.

67. N.Y.—Losey v. Stanley, 42 N.E. 8, 147 N.Y. 560, reversing 31 N.Y.S. 950, 83 Hun 420.

68. Tenn.—Livingston v. Noe, 1 Lea 55.
Va.—Rhea v. Shields, 49 S.E. 70, 103 Va. 305.

69. Ala.—Holton v. Rogers, 67 So. 1004, 191 Ala. 48.
Ky.—Cini v. Ball, 156 S.W.2d 486, 288 Ky. 471.

70. Tenn.—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47.

71. Ark.—Redmond v. Anderson, 13 Ark. 449.

dulge a presumption that the judgment is regular and valid.[72]

Modification or vacation. At any time prior to the passing of title to a purchaser the order of sale may, on proper notice and for sufficient reason, be modified, vacated, or set aside.[73] In some jurisdictions, by force of statute, the order may be vacated or set aside after the term at which it has been rendered.[74] A proceeding by the infant after attaining majority to set aside the judgment must be timely instituted,[75] and a claim may be barred where the infant, after attaining majority, accepts the proceeds of the sale with knowledge of the facts.[76] In setting aside a portion of the decree the court may grant other relief to which the petitioner is entitled.[77]

Review. If the right to appeal exists, it cannot be exercised by one not a party to the proceedings.[78] The reviewing court will protect the infant's interests.[79]

§ 65. —— Bond

By force of statute in some jurisdictions the person conducting the sale is required to file a bond for the faithful discharge of his trust and the accounting for, and paying over of, all moneys received by him in the proceedings.

In some jurisdictions, by force of statute, the person conducting the sale is required to file a bond for the faithful discharge of his trust and the accounting for, and paying over of, all moneys received by him in the proceedings.[80] Sometimes the bond is not required to be given where the infant's interest is amply secured without it, as where the proceeds of sale are to be paid into, and invested or controlled by, the court,[81] or where the sale is not for cash and the purchase price remains a lien on the land,[82] or where the sale is ordered to pay a debt created in the purchase of the land,[83] or where the sale is ordered in a partition action,[84] or where the interest sold is an undivided interest worth less than one hundred dollars.[85] Where a bond is required by the statute, there is a conflict of authority as to the effect of the noncompliance with the requirement. In some jurisdictions it is held that a failure to require or give a bond renders the whole proceeding void.[86] In other jurisdictions, however, it has been held that a sale which is otherwise regularly made is not rendered void by a failure to give the required bond,[87] and the proceedings are simply erroneous or irregular.[88]

Special bonds for sales by guardians are considered in Guardian and Ward § 121.

Breach of bond. The bond is breached by failure to comply with any of its conditions, as by omission or neglect to account for the purchase money, or by failing to invest the same according to the terms of the sale and the order of the court affirming it.[89] The liability on the bond cannot be avoided on the ground of mere irregularities in the sale; and the surety is estopped from denying the validity of the appointment of the principal in order to avoid its liability.[90]

Statement that decree entered on consent

The mere statement in a decree, directing the sale of the interest in certain land adjudicated to an infant in the action, that it was entered on "consent," does not show that it was based on "consent" alone, the presumption being that the chancellor, in directing the sale, exercised the discretion vested in him.—Bent v. Miranda, 42 P. 91, 8 N.M. 78.

72. Ky.—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311.

73. Pa.—In re Carter, 99 A. 58, 254 Pa. 518.

Vacating or setting aside sale generally see infra § 66.

74. Ky.—Clifton v. Pfirman, 110 S.W. 406, 33 Ky.L. 529.

Infants represented by guardian ad litem

Under a statute giving a court power after the expiration of the term to vacate or modify a judgment for erroneous proceedings against a person under disability if the condition of such defendant does not appear in the record nor the error in the proceedings, a confirmation of a sale of property for the payment of decedent's debts rendered at a prior term cannot be set aside at the suit of infant heirs where it appeared in the proceedings for sale that they were infants, and each had had appointed for him a guardian ad litem who filed an answer.—Browder v. Nourse, 251 S.W. 825, 199 Ky. 531.

75. Ky.—Cini v. Ball, 156 S.W.2d 486, 288 Ky. 471.

76. N.C.—Watson v. Watson, 167 S.E. 389, 204 N.C. 5.

77. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

78. Puerto Rico.—Surinach v. Ninlliat, 17 Puerto Rico 63.

79. W.Va.—Jackson v. Jackson, 109 S.E. 724, 89 W.Va. 571.

80. Ky.—Nunnelly v. Nunnelly, 191 S.W. 85, 173 Ky. 372.
31 C.J. p 1049 note 62.

81. Ky.—Craig v. Wilcox, 22 S.W. 76, 94 Ky. 484, 14 Ky.L. 908—Power v. Power, 15 S.W. 523, 12 Ky.L. 793.

82. Ky.—Powell v. Baer, 136 S.W. 629, 143 Ky. 282.
31 C.J. p 1049 note 65.

83. Ky.—Moore v. Carr, 269 S.W. 302, 207 Ky. 388.

84. Ky.—Greenway's Guardian ad Litem v. Greenway, 91 S.W.2d 553, 262 Ky. 818—Bethel College v. Gladdish, 263 S.W. 659, 204 Ky. 10.

85. Ky.—Farris v. Rogers, 7 S.W. 543—Barnett v. Bull, 81 Ky. 127.

86. Me.—Tracey v. Roberts, 34 A. 68, 88 Me. 310, 51 Am.S.R. 394.
31 C.J. p 1049 note 68.

87. Colo.—Orman v. Bowles, 33 P. 109, 18 Colo. 463.
31 C.J. p 1050 note 69.

88. Wis.—Weld v. Johnson Mfg. Co., 54 N.W. 335, 84 Wis. 537, reheard 54 N.W. 998, 84 Wis. 537.

89. N.Y.—Hunt v. Hunt, 65 Barb. 577.

90. U.S.—U. S. v. Morse, App.D.C., 31 S.Ct. 37, 218 U.S. 493, 54 L.Ed. 1123, 21 Ann.Cas. 782.

§ 66. —— Sale

a. In general
b. Notice
c. Time and place
d. Public or private
e. Terms and conditions
f. By whom conducted
g. Who may purchase
h. Report of sale
i. Confirmation of sale
j. Approval of sale not previously ordered
k. Deed to purchaser
l. Ratification and curing defects
m. Vacating or setting aside sale
n. Validity and effect of sale, and collateral attack
o. Rights and liabilities of purchaser
p. Disposition and application of proceeds

a. In General

The sale must comply with the statutory requirements and the order of the court.

When a sale in a certain way is authorized by the court, it can be made only in that way;[91] and statutory requirements as to the manner of making the sale must be complied with.[92] The sale cannot exceed the interest or estate authorized by the order of court.[93]

Sales by the guardian of the ward's property are considered in Guardian and Ward §§ 122–138.

b. Notice

Notice of sale must be given in compliance with statutory requirements.

Generally, if the sale is a private one, notice thereof is not required.[94] Where the sale is to be a public one, due notice of the time and place of sale must be given, in compliance with the statute.[95] Although it has been held that a sale without giving the required notice is void,[96] there is also authority that a failure to give due notice when required is merely an error which does not render the sale void, but only irregular,[97] and the title of a bona fide purchaser will be protected.[98]

Sufficiency of notice. The notice should designate the time and place of sale,[99] state the terms and conditions of the sale,[1] and describe the property to be sold with sufficient certainty to enable it to be identified.[2]

Time for giving notice. The giving of a notice of sale for a shorter length of time than is required by statute is an error, but it does not affect the validity of the sale when collaterally attacked.[3] The giving of longer notice than is required does not render the sale invalid.[4]

Manner of giving notice. The ordinary and sufficient manner of giving notice of the sale is by advertisement in a newspaper,[5] or by posting notice in conspicuous places.[6]

Proof of notice. Proof that notice was given may be, and usually is, made by affidavit that the notice was posted[7] or published,[8] but this mode of proof is not exclusive of any other.[9] Mere clerical errors in the affidavit do not affect the validity of the sale.[10]

c. Time and Place

The sale must be made at the time and place prescribed by statute and fixed by decree in the notice of sale. The court has power to extend the time of sale for good cause.

The sale should be made at the time prescribed by law and fixed by decree in the notice of sale, or it will be irregular[11] and should be set aside,[12] but

91. Mich.—In re Axtell, 54 N.W. 889, 95 Mich. 244.
92. Ky.—Conrad v. Conrad, 153 S.W. 740, 152 Ky. 422.
31 C.J. p 1050 note 78.
93. S.C.—Berry v. Marion County Lumber Co., 93 S.E. 328, 108 S.C. 108, Ann.Cas.1918E 877.
94. Ind.—Eliason v. Bronnenberg, 46 N.E. 582, 147 Ind. 248.
31 C.J. p 1050 note 79.
95. Minn.—Richardson v. Farwell, 51 N.W. 915, 49 Minn. 210.
31 C.J. p 1050 note 80.
96. Me.—Tracy v. Roberts, 34 A. 68, 88 Me. 310, 51 Am.S.R. 394.
97. Ind.—Eliason v. Bronnenberg, 46 N.E. 582, 147 Ind. 248.
31 C.J. p 1050 note 82.
98. Miss.—Hanks v. Neal, 44 Miss. 212.
31 C.J. p 1050 note 83.
99. Mich.—Houlihan v. Fogarty, 127 N.W. 793, 162 Mich. 492.
31 C.J. p 1050 note 84.
1. Minn.—Richardson v. Farwell, 51 N.W. 915, 49 Minn. 210.
2. Colo.—Orman v. Bowles, 33 P. 109, 18 Colo. 463.
3. Ala.—Doe v. Jackson, 51 Ala. 514.
Wash.—Brazee v. Schofield, 3 P. 265, 2 Wash.T. 209, affirmed 8 S.Ct. 604, 124 U.S. 495, 31 L.Ed. 484.
4. Miss.—Morton v. Carroll, 9 So. 896, 68 Miss. 699.
5. Ky.—Finney v. Finney, 138 S.W. 257, 144 Ky. 114.
31 C.J. p 1050 note 90.
6. Mich.—Schaale v. Wasey, 138 N.W. 317, 70 Mich. 414.
31 C.J. p 1050 note 91.
7. Or.—Walker v. Goldsmith, 12 P. 537, 14 Or. 125.
31 C.J. p 1050 note 92.
8. Ill.—Reid v. Morton, 6 N.E. 414, 119 Ill. 118.
31 C.J. p 1050 note 93.
9. Mich.—Persinger v. Jubb, 17 N.W. 851, 52 Mich. 304.
10. Or.—Walker v. Goldsmith, 12 P. 537, 14 Or. 125.
31 C.J. p 1051 note 95.
11. Tex.—Butler v. Stephens, 14 S.W. 202, 77 Tex. 599.
31 C.J. p 1051 note 97.
12. Tex.—Butler v. Stephens, supra —Brown v. Christie, 27 Tex. 73, 84 Am.D. 607.

the sale is not absolutely void in the sense that its confirmation may not validate it,[13] for if the sale is confirmed, although improperly, it cannot be collaterally attacked.[14] The court has power to extend the time of sale for good cause;[15] the sale may be adjourned to a later date than the one fixed in the notice of sale,[16] and when the sale is confirmed, it cannot be questioned collaterally for an error in the adjournment.[17] Where the order of sale does not require the master to consult with the guardian ad litem as to the time of the sale, his failure to do so cannot be regarded even as an irregularity.[18]

Time and place of sale by a guardian of the ward's property is considered in Guardian and Ward § 124.

Place of sale. The sale should be made at the place fixed by law and the order of court and notice of sale.[19] In some jurisdictions it has been held that the sale of a minor's property must be at the place where the family meeting has determined, and this may be outside of the parish where the land lies.[20]

d. Public or Private

Ordinarily the sale should be by public outcry but in some jurisdictions the court has power to authorize a private sale.

Ordinarily the sale should be by public outcry,[21] and where the statute requires a public sale, either in all cases or under the particular circumstances of the case, the court has no authority to order or to authorize a private one;[22] and a private sale, although ordered and approved by the court, is void.[23] If the statute is merely directory, a court of equity may, in the exercise of its discretion, authorize a private sale.[24] In some jurisdictions, by force of statute, the court making the order has, under certain circumstances, power to authorize a private sale,[25] and in such case it is in the discretion of the court whether the sale shall be public or private.[26] An order for a private sale does not authorize a public sale.[27]

Public or private sales by a guardian are considered in Guardian and Ward § 125.

e. Terms and Conditions

The sale must be made on the term and conditions prescribed by statute or by the order of the court.

The sale must be made on such terms and conditions as are prescribed by statute or by the order of the court.[28] It is for the court to determine whether the sale was in compliance with its order.[29] The court may provide for payment for the land in part in other commodities or other land, but the power should be exercised with great caution.[30] It is held that in the absence of statute the court has no authority for making a sale of an infant's real estate as a part of, or in conjunction with, other land in which the infant has no interest.[31]

The terms and conditions of a sale by a guardian of the ward's property are considered in Guardian and Ward § 126.

f. By Whom Conducted

The sale should be conducted by one who has authority, under the order of the court, to make the sale.

The sale should be conducted by one who has authority, under the order of the court, to make the sale.[32] The general guardian of the infant, if he has one, is the proper person to be appointed to sell, unless some sufficient reason is shown for substituting another for that purpose,[33] and when nec-

13. Tex.—Butler v. Stephens, 14 S. W. 202, 77 Tex. 599.
31 C.J. p 1051 note 99.

14. Tex.—Butler v. Stephens, 14 S. W. 202, 77 Tex. 599.
31 C.J. p 1051 note 1.

15. Tex.—Butler v. Stephens, supra.
31 C.J. p 1051 note 2.

16. U.S.—Richards v. Holmes, D.C., 18 How. 143, 15 L.Ed. 304.
31 C.J. p 1051 note 3.

17. U.S.—Gager v. Henry, C.C.Or., 9 F.Cas.No.5,172, 5 Sawy. 237.

18. S.C.—Bulow v. Witte, 3 S.C. 308.

19. Tex.—Brown v. Christie, 27 Tex. 73, 84 Am.D. 607.
Va.—Talley v. Starke, 6 Gratt. 339, 47 Va. 339.

20. La.—In re Pierce's Case, 9 Mart. 461.

21. La.—Fradella v. Pumilia, 147 So. 496, 177 La. 47.
31 C.J. p 1051 note 13.

22. La.—Fradella v. Pumilia, supra.
31 C.J. p 1051 notes 14, 15.

23. U.S.—Longpré v. Diaz, Puerto Rico, 35 S.Ct. 731, 237 U.S. 512, 59 L.Ed. 1080.

24. N.C.—Rowland v. Thompson, 73 N.C. 504.
31 C.J. p 1051 note 10.

25. Ala.—Higdon v. Higdon, 11 So. 2d 140, 243 Ala. 571.
31 C.J. p 1051 note 11.
Sale to effect partition
Under a statute in Louisiana the property of a minor may be sold at a private sale to effect a partition. —Fradella v. Pumilia, 147 So. 496, 177 La. 47—31 C.J. p 1051 note 11 [a].

26. N.C.—Barcello v. Hapgood, 24 S.E. 124, 118 N.C. 712.

27. N.C.—In re Dickerson, 15 S.E. 1025, 111 N.C. 108.
31 C.J. p 1051 note 18.

28. Ky.—Clark v. Stanhope, 59 S. W. 856, 109 Ky. 521.
31 C.J. p 1051 notes 20–22.

29. Ill.—Fitzgibbon v. Lake, 29 Ill. 165, 81 Am.D. 302.
Collateral attack on ground of noncompliance with order see infra subdivision n of this section.

30. Miss.—Neely v. Craig, 139 So. 835, 162 Miss. 712.

31. Ky.—Conrad v. Conrad, 153 S.W. 740, 152 Ky. 422.
31 C.J. p 1051 note 23.

32. Mich.—Hunt v. Stevens, 140 N. W. 992, 174 Mich. 501.

33. N.Y.—Matter of Lansing, 3 Paige 265—Matter of Wilson, 2 Paige 412.

essary a commissioner or a special guardian may be appointed to make the sale.[34]

The sale of his ward's property by a guardian is considered in Guardian and Ward § 127.

g. Who May Purchase

Ordinarily a person standing in a fiduciary relation to the infant cannot purchase the property for himself.

A person standing in a fiduciary relation to the infant ordinarily cannot purchase the property for himself.[35] A sale by special guardian appointed by the court to his wife in ordinarily improper, but the court has power in its discretion to permit and approve such a sale.[36]

Purchases by a guardian ad litem or next friend are considered infra § 111 f, and a purchase by the general guardian in Guardian and Ward § 128 b.

h. Report of Sale

A report or return of the sale to the court is not necessary to the validity of the sale unless it is required by statute.

When required by statute a report or return of the sale must be made to the court which granted the order,[37] but in the absence of statute, it is not necessary to the validity of the sale that a report or return thereof be made to the court.[38] The report should correctly set out all the proceedings under the order of sale.[39]

The report or return of sale by a guardian of the ward's property is considered in Guardian and Ward § 130.

i. Confirmation of Sale

(1) In general
(2) Granting or refusing confirmation and ordering resale
(3) Operation and effect of confirmation

(1) In General

As a general rule the sale must be confirmed by the court.

As a general rule, in order that the sale may be of such validity that on the execution of a deed the title may pass to the purchaser, it is essential that the sale first be confirmed by the court,[40] and until such confirmation not even an equitable title passes.[41]

At the hearing to confirm or approve the report any objections thereto may properly be raised by exception.[42] The purchaser may except to the confirmation of the commissioner's report of sale and may appeal from the judgment on such exceptions.[43] He cannot object to the confirmation because he thinks he offered too much for the property.[44]

Confirmation of a guardian's sale of the ward's property is considered in Guardian and Ward §§ 131–133.

(2) Granting or Refusing Confirmation and Ordering Resale

The matter of confirming or refusing to confirm the sale is largely within the reasonable discretion of the court, in consideration of all the circumstances.

The matter of confirming or refusing to confirm the sale is largely within the discretion of the court, in consideration of all the surrounding circumstances, but the court's discretion is not arbitrary but subject to review.[45] In determining whether to confirm or refuse to confirm the sale the court will always consider the justice of the action;[46] and in accordance therewith it may refuse to confirm it,[47] or may confirm it, although the sale was not made in strict compliance with the statute.[48] When a sale of land of adults in given circumstances would be confirmed, a sale of infant's lands in like circumstances ordinarily should be confirmed.[49] The court may refuse to confirm a sale and order a resale where it appears that the sale is unfair and will work an injustice to the infant,[50] as where the sale has not been made for a fair price.[51] Mere inadequacy of price is not sufficient ground for re-

34. Ind.—McKeever v. Ball, 71 Ind. 398.
31 C.J. p 1052 note 29.

35. Miss.—Memphis Stone & Gravel Co. v. Archer, 82 So. 315, 120 Miss. 453.
31 C.J. p 1052 note 32.

36. N.Y.—Strauss v. Bendheim, 56 N.E. 1007, 162 N.Y. 469, reversing 60 N.Y.S. 398, 44 App.Div. 82.

37. Ark.—Greer v. Anderson, 35 S. W. 215, 62 Ark. 213.

38. Ohio.—Stall v. Macalester, 9 Ohio 19.

39. Ill.—Mulford v. Beveridge, 78 Ill. 455.

40. Ky.—Finney v. Finney, 138 S. W. 257, 144 Ky. 114.
31 C.J. p 1052 note 42.

41. Ill.—Young v. Dowling, 15 Ill. 481.
Mo.—Bone v. Tyrrell, 20 S.W. 796, 113 Mo. 175.

42. Ky.—Palmer v. Husbands, 119 S.W. 762, 134 Ky. 152.
31 C.J. p 1052 note 44.

43. Ky.—Allen v. Graves, 3 Bush 491.

44. Ky.—Smizer v. Inskeep, 12 Ky. Op. 668.

45. Ill.—Stivers v. Stivers, 86 N.E. 209, 236 Ill. 160.

46. Ga.—Powell v. Heyman, 85 S.E. 891, 143 Ga. 728.

47. Md.—Bolgiano v. Cooke, 19 Md. 375.

48. Ky.—Kinslow v. Grove, 32 S.W. 933, 98 Ky. 266, 17 Ky.L. 845.

49. N.J.—In re Shreve, 103 A. 683, 87 N.J.Eq. 710.

50. S.C.—McIver v. Thompson, 108 S.E. 411, 117 S.C. 175.
31 C.J. p 1052 note 55.

51. Ill.—Johnson v. Buck, 77 N.E. 163, 220 Ill. 226.
Ky.—Prentiss v. Sanders, 6 Ky.Op. 296.

fusing to confirm the sale,[52] unless it clearly appears that the property will bring a larger price on a resale.[53] Mere increase in value since the making of the order of sale is not sufficient per se to refuse an order of confirmation.[54] It is no objection to confirmation that the petition for confirmation is filed by the purchaser.[55]

Vacating or setting the sale aside generally is considered infra subdivision m of this section.

(3) Operation and Effect of Confirmation

The confirmation perfects the title of the purchaser and ordinarily cures defects and irregularities in the proceeding, but it does not render operative a sale that is void.

The confirmation perfects the title of the purchaser;[56] and the purchaser cannot thereafter, and after the expiration of the term at which such confirmation was made, resist the payment of the purchase money on the ground of irregularity in the sale or the proceedings under which it was had.[57]

Curing defects. While the confirmation ordinarily cures all defects and irregularities in the proceeding,[58] it does not cure and render operative a sale that is void.[59]

j. Approval of Sale Not Previously Ordered

In the absence of statutory prohibition, a court may sanction or approve a sale made by the parties without a previous application to the court if there has been a substantial compliance with the statute authorizing the sale.

In the absence of statutory prohibition, a court which on application could have ordered a sale of the infant's land may sanction or approve a sale made by the parties without a previous application to the court.[60] In order to warrant confirmation of a sale not previously ordered by the court, there must be a substantial compliance with the statute authorizing the sale,[61] and it has been held that a court of equity cannot confirm a private sale of an infant's real estate made by an unauthorized person without an order of court.[62] The court, of course, is not bound to accept or approve the terms of a proposed sale.[63] Where the court has not acquired jurisdiction on other grounds the petition for confirmation of a private sale must specifically allege the jurisdictional grounds essential to a confirmation of the sale.[64] Decedent's creditors are not proper parties to a suit to confirm a contract for the sale of an infant's inherited lands where the sale was not carried out under the statute pertaining to a sale of land for the payment of decedent's debts.[65]

k. Deed to Purchaser

The execution and delivery of a deed by the person duly authorized is usually necessary in order that the legal title will pass.

Although an equitable title may become vested in the purchaser without a deed being executed,[66] in order that the legal title will pass the execution and delivery of a deed by the person duly authorized is usually necessary.[67] The deed should be properly executed in conformity with the order of the court,[68] and if it is not so executed the purchaser is not bound to accept it.[69] A deed based on a void order or decree of sale by the court is likewise void.[70]

The deed operates as an estoppel to the same extent and in the same manner that a proper deed of an adult conveying his title would bar him from asserting it against his grantee.[71]

Deeds to the purchaser after a sale of a ward's property are discussed in Guardian and Ward § 134.

l. Ratification and Curing Defects

Nonjurisdictional defects or irregularities may be cured by curative statutes or by the ratification of the sale by the court or by the infant.

A defective sale in point of procedure only may

52. Ill.—Stivers v. Stivers, 86 N.E. 209, 236 Ill. 160.
Ky.—Castleman v. Buckner, 202 S. W. 681, 180 Ky. 350.
31 C.J. p 1053 note 65.

53. Ill.—Stivers v. Stivers, 86 N.E. 209, 236 Ill. 160.

54. N.J.—In re Shreve, 103 A. 683, 87 N.J.Eq. 710.

55. Md.—Dorsey v. Gilbert, 11 Gill & J. 87.
N.Y.—Battell v. Torrey, 65 N.Y. 294.

56. Ky.—Cromwell v. Mason, 2 Bush 439—Thornton v. McGrath, 1 Duv. 349.

57. Ky.—Todd v. Dowd, 1 Metc. 281.

58. Or.—Kirk v. Mullen, 197 P. 300, 100 Or. 563.
31 C.J. p 1053 note 65.

59. Or.—Kirk v. Mullen, supra.

60. Ala.—Higdon v. Higdon, 11 So.2d 140, 243 Ala. 571.
S.C.—Hammassapoulo v. Hammassapoulo, 131 S.E. 319, 134 S.C. 54.

61. Ky.—Flannery v. Chiles, 1 S.W. 2d 1040, 222 Ky. 649.
Va.—Clark v. George, 170 S.E. 713, 161 Va. 104.

62. Ky.—Kinslow v. Grove, 32 S.W. 933, 98 Ky. 266, 17 Ky.L. 845.

63. Va.—Ferebee v. Todd, 153 S.E. 705, 154 Va. 293.

64. Md.—Tucker v. Hudson, 148 A. 116, 158 Md. 13.

65. Va.—Clark v. George, 170 S.E. 713, 161 Va. 104.

66. Ark.—Alexander v. Hardin, 16 S. W. 264, 54 Ark. 480.
31 C.J. p 1053 note 68.

67. Ky.—Finney v. Finney, 138 S. W. 257, 144 Ky. 114.
31 C.J. p 1053 note 70.

68. N.Y.—Hyatt v. Seeley, 11 N.Y. 53.
31 C.J. p 1053 note 71.

69. N.Y.—Hyatt v. Seeley, supra.

70. Fla.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455.
Ky.—Hall v. Tackett, 68 S.W.2d 42, 252 Ky. 718.

71. S.C.—Bulow v. Witte, 3 S.C. 398.

be ratified by the court,[72] and mere irregularities may be cured by supplementary proceedings.[73] The infant may on coming of age either expressly or impliedly ratify the sale.[74] Ordinarily the conduct by the late infant evidencing acquiescence in the sale may operate as a ratification thereof or estop him from denying its validity,[75] as where on coming of age, with full knowledge of the facts, he executes a deed to the purchaser.[76] After ratification of the sale the infant may insist on a specific performance by the purchaser.[77] Where the sale is void for want of jurisdiction, the late infant cannot be estopped by his conduct from denying the validity of the sale.[78] A court of chancery will not undertake to validate a void sale of infants' property because beneficial to them.[79]

Ratification of a sale of a ward's property is considered in Guardian and Ward § 135.

Curative statutes. The rule that a statute curing irregularities at a prior judicial sale is not invalid as impairing vested rights, as stated in Constitutional Law § 232, is applicable to statutes curing defects in proceedings for the sale of an infant's real estate.[80] Such statutes do not validate unauthorized or void sales.[81]

m. Vacating or Setting Aside Sale

The sale may be vacated or set aside where there have been errors of a substantial character, or fraud, in the proceedings for the sale or in the sale itself. A sale which is beneficial to the infant will not be set aside for mere irregularities.

The sale may be vacated or set aside where there have been errors of a substantial character, or fraud, in the proceedings for the sale or in the sale itself,[82] and a statute providing that the title of the purchaser will not be disturbed after a certain period of time will not be applied where the decree for the sale of the land is void.[83] Under statutes so providing the infant has the right to show good cause to set the sale aside within a specified period of time after he has attained majority unless he has previously attacked the sale,[84] and he has this right, even though it is not actually reserved in the decree.[85] Where a judgment decreeing a sale of infant's lands is vacated, the sale should also be vacated.[86] The sale may be set aside for misdescription of the premises sold in the proceedings,[87] for nonpayment of the purchase money,[88] or for fraud.[89] Where the sale is beneficial to the infant, it will not be set aside for mere irregularities,[90] or on the election of the purchaser without complaint on the part of the infant,[91] and, if it has not been disadvantageous to the infant, it will not be set aside for mere irregularities after the property has passed to bona fide purchasers.[92] The failure to appoint a guardian ad litem for an infant in a proceeding to sell land for the payment of his ancestor's debt is not ground for setting aside the sale, the remedy being by appeal.[93] A failure of the commissioner appointed to sell to give the bond required by law is not necessarily a ground for setting aside the sale.[94]

Vacating the sale of a ward's property is considered in Guardian and Ward § 137.

Mere inadequacy of price is not sufficient ground for setting aside the sale,[95] but, where the price is grossly inadequate, so as to prejudice the infant's interest, the sale may be set aside on that ground;[96] and, where the proceedings are irregular or fraud is charged, the inadequacy of the price may become

72. W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

73. Ky.—Smizer v. Inskeep, 12 Ky. Op. 668.

74. Ky.—Schlickman v. Dusing, 203 S.W. 295, 180 Ky. 506.
31 C.J. p 1053 note 78.

75. N.C.—Watson v. Watson, 167 S.E. 389, 204 N.C. 5.
31 C.J. p 1053 note 79.

76. Ark.—Green v. Holzer, 177 S. W. 903, 118 Ark. 533.

77. Ky.—Nelson v. Lee, 10 B.Mon. 495.

78. Mich.—In re Flynn, 137 N.W. 113, 171 Mich. 136.
31 C.J. p 1053 note 81.

79. Tenn.—Andrews v. Andrews, 7 Heisk. 234.

80. Ky.—Thornton v. McGrath, 1 Duv. 349—Pratt v. Cox, 5 Ky.Op. 410.

81. Fla.—McIntyre v. Parker, 82 So. 253, 77 Fla. 690.
31 C.J. p 1053 note 88.

82. La.—Fradella v. Pumilia, 147 So. 496, 177 La. 47.
Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173.
Incompetent purchaser
Where the land was sold to the wife of the guardian, in contravention of the statute, the sale may be set aside.—Hampton v. Hampton, 29 S.W. 423, 9 Tex.Civ.App. 497.

83. Va.—Gee v. McCormick, 128 S. E. 541, 142 Va. 173.

84. Miss.—Dendy v. Commercial Bank & Trust Co., 108 So. 274, 143 Miss. 56.

85. Miss.—Dendy v. Commercial Bank & Trust Co., supra.

86. Ky.—Clifton v. Phrman, 110 S. W. 406, 33 Ky.L. 529.

87. Iowa.—Deford v. Mercer, 24 Iowa 118, 92 Am.D. 460.

88. La.—Jones v. Crocker, 1 La.Ann. 440.

89. Ill.—Devine v. Harkness, 7 N.E. 52, 117 Ill. 145.
31 C.J. p 1054 note 94.

90. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.
31 C.J. p 1054 note 95.

91. Tenn.—Curd v. Bonner, 4 Coldw. 632.

92. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

93. Ky.—Davidson v. Marcum, 89 S. W. 708, 28 Ky.L. 562.

94. Va.—Dixon v. McCue, 31 Gratt. 373, 62 Va. 373.

95. Ky.—Castleman v. Buckner, 202 S.W. 681, 180 Ky. 350.
31 C.J. p 1054 note 1.

96. Ky.—Richey v. Harlan, 186 S. W. 149, 170 Ky. 461—Steele v. Wood, 137 S.W. 1061, 144 Ky. 254.

a controlling consideration.[97] If the price paid at the time of sale was a fair one, the fact that the land has subsequently increased in value gives the infant no equity to have it set aside.[98]

Procedure. The sale may be set aside by bill in equity[99] or civil action for that purpose,[1] and is not limited to an appeal in the cause or to a formal reopening thereof.[2] The right to avoid the sale and recover the property sold may be barred by limitation.[3]

n. Validity and Effect of Sale, and Collateral Attack

The sale is void if substantial departure from the procedure prescribed by statute has deprived the court of jurisdiction to order the sale. Unsubstantial irregularities in the proceedings or in the order of sale do not render the sale void or vulnerable to collateral attack.

The sale is void if substantial departure from the procedure prescribed by statute has deprived the court of jurisdiction to order the sale.[4] Unsubstantial irregularities in the proceedings do not render the sale void;[5] nor is the sale void for mere irregularities or defects in regard to the order of sale;[6] nor is it rendered void by the reversal of the order of sale for error.[7] The fact that the purchase price was paid in a currency not in existence when the order of sale was made does not render the sale void if such currency was the only circulating medium prevailing in the country at the time of sale.[8]

Infants properly represented are bound by the sale,[9] with the qualifications that after coming of age an infant may impeach the sale for error apparent on the face of the decree, or, it seems, for fraud,[10] or may move to set aside the sale for good cause within a certain period of time after attaining majority under statutes expressly granting the right, as stated supra subdivision m of this section.

Collateral attack. If the court had jurisdiction, the sale cannot be collaterally impeached for errors or irregularities[11] or for fraud.[12] Thus, as a general rule the validity of the sale cannot be attacked in a collateral proceeding on the ground that the petition for the order was insufficient,[13] and, after the sale is confirmed, it cannot be collaterally attacked on the ground that it was not made in compliance with the order of the court.[14] The sale may be collaterally attacked on jurisdictional grounds.[15]

Collateral attack on sale of a ward's property is discussed in Guardian and Ward § 138.

o. Rights and Liabilities of Purchaser

The rules governing the title, rights, and liabilities of purchasers at judicial sales generally apply to sales of an infant's real estate under order of court. Where the court has jurisdiction the purchaser acquires a good title to the estate sold even though the proceedings have been irregular in some respects. There is no warranty of title and the doctrine of caveat emptor applies to the purchaser.

The rules governing the title, rights, and liabilities of purchasers at judicial sales, discussed in the C.J.S. title Judicial Sales §§ 38–49, also 35 C.J. p 71 note 11–p 93 note 70, generally apply to sales of infants' real estate under orders of court.[16] In order for the purchaser to acquire title he must comply with the terms and conditions of the sale.[17] Where the court has jurisdiction, the purchaser ac-

97. Ill.—Dickerman v. Burgess, 20 Ill. 266.

98. N.C.—Latta v. Vickers, 82 N.C. 501.

99. W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.
31 C.J. p 1054 note 6.

1. Tex.—Weems v. Masterson, 15 S.W. 590, 80 Tex. 45.
31 C.J. p 1054 note 7.
Petition held sufficient
Ky.—Ford v. May, 164 S.W. 88, 157 Ky. 830.

2. W.Va.—French v. Pocahontas Coal & Coke Co., 104 S.E. 554, 87 W.Va. 226.

3. Ky.—Schlickman v. Dusing, 203 S.W. 295, 180 Ky. 506.
Tenn.—State ex rel. Tobin v. Independent Life Ins. of America, 100 S.W.2d 228, 171 Tenn. 13.

4. Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

5. Mo.—Thompson v. McClernon, 127 S.W. 384, 142 Mo.App. 429.
31 C.J. p 1054 note 13.

6. Ind.—Taylor v. Parker, Smith 225.
Mo.—Evans v. Morris, 136 S.W. 408, 234 Mo. 177.

7. Ind.—Taylor v. Parker, Smith 225.
Md.—Newbold v. Schlens, 9 A. 849, 66 Md. 585.

8. S.C.—Bulow v. Witte, 3 S.C. 308.
Payment in confederate money
S.C.—Bulow v. Witte, supra.

9. La.—Rauschkolb v. Di Matteo, 181 So. 555, 190 La. 7—Clark v. Norred, 4 La.App. 394.
31 C.J. p 1054 note 16.

10. Tenn.—Rogers v. Clark, 5 Sneed 665.

11. Ala.—Birmingham Coal & Iron Co. v. Doe, 62 So. 26, 181 Ala. 621.
Tenn.—Covington v. Bullefin, 1 Tenn. App. 603.
31 C.J. p 1054 note 19.

12. Tex.—Bouldin v. Miller, 28 S.W. 940, 87 Tex. 359, affirming, Civ. App., 26 S.W. 133.
31 C.J. p 1054 note 20.

13. Va.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.
31 C.J. p 1044 note 24.

14. Ill.—Mulford v. Beveridge, 78 Ill. 455.
31 C.J. p 1051 note 25.

15. Pa.—Kreimendahl v. Neuhauser, 13 Pa.Super. 606.

16. N.Y.—In re Marino, 213 N.Y.S. 680, 215 App.Div. 841.
Va.—Chapman v. Branch, 78 S.E. 235, 72 W.Va. 54.

17. Tex.—Judson v. Sierra, 22 Tex. 365.
31 C.J. p 1054 note 25.

quires a good title[18] to the entire estate sold,[19] even though the proceedings may have been irregular in some respects,[20] for which irregularities the judgment might have been reversed,[21] for if jurisdiction was properly acquired, the purchaser is not bound to look beyond the decree.[22] However, he is required to see to the regularity of the proceedings on which the jurisdiction of the court is founded.[23] Where the sale is by special guardian, the purchaser is presumed to have knowledge of the proceedings.[24] If the purchaser has notice of facts sufficient to put a prudent man on inquiry, he is chargeable with knowledge of any defects or irregularities that might have been discovered by diligent inquiry, and cannot be regarded as a bona fide purchaser,[25] and it has been held that the purchaser must establish by affirmative evidence that every requirement of the statute necessary to confer jurisdiction on the court to order the sale has been complied with.[26] The purchaser cannot refuse to consummate the purchase on account of mere irregularities which are not jurisdictional.[27] In such case he may be required to complete the purchase,[28] as by specific performance, and by virtue of the decree of specific performance any doubt respecting the marketability of the title will be removed;[29] but it has also been held that, where the purchaser objects that the proceedings were irregular, he cannot be compelled to pay the purchase price until the proceedings have been so far perfected as to secure him a good title.[30] A purchaser is not bound to accept the title which is void for lack of jurisdiction,[31] and in such case the payment of the purchase money will not be compelled.[32] Where the statute confers on the infant the right, for a specified period of time after he attains majority, to have the sale set aside for good cause, the purchaser cannot obtain absolute title until expiration of that time.[33] One who agrees to purchase the land under an unauthorized contract cannot be required to accept a deed to the property after the sale on those terms has been authorized by the court in a proceeding to which the alleged purchaser was not a party.[34]

The duties of the purchaser regarding the disposition and application of the proceeds are considered infra subdivision p of this section. The rights and liabilities of the purchaser of a ward's property are considered in Guardian and Ward § 139.

Warranty of title. There is no warranty of the title of the lands of an infant sold under an order or decree of the court;[35] the sale is only of such estate as the infant has in the lands,[36] and the doctrine of caveat emptor applies to the purchaser.[37] The person conducting the sale has no authority to bind the infant by warranty of title.[38] If, before confirmation, the purchaser discovers that the title is defective, he may be relieved from the necessity

18. Ill.—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316.
31 C.J. p 1055 note 27.

Valid sale subsequent to unauthorized sale
Where widow unauthorizedly sold children's property, valid probate sale gave purchaser good title.—Toll v. McKenzie, 299 P. 14, 88 Colo. 582.

19. N.Y.—Hunt v. Hunt, 65 Barb. 577, reversed on other grounds 58 N.Y. 666—Davidson v. De Freest, 3 Sandf.Ch. 456.

Absence of representative of unborn remaindermen
Where the court seeks to protect the interests of remaindermen yet unborn, the purchaser may take a fee simple title although no representative of such remaindermen is in court.—Kirkham v. First Nat. Bank, 147 S.E. 648, 149 S.C. 545.

20. N.C.—Rowls v. Henries, 90 S.E. 140, 172 N.C. 216.
31 C.J. p 1055 note 29.

21. Ill.—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316—Allman v. Taylor, 101 Ill. 185.
N.C.—Welch v. Welch, 140 S.E. 436, 194 N.C. 633.

22. Ill.—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316.
31 C.J. p 1055 note 31.

23. Va.—Gee v. McCormick, 128 S.E. 541, 142 Va. 173—Coleman v. Virginia Stave & Heading Co., 70 S.E. 545, 112 Va. 61.

24. Mich.—In re Flynn, 137 N.W. 113, 171 Mich. 136—In re Axtell, 54 N.W. 889, 95 Mich. 244.

25. S.C.—McIver v. Thompson, 108 S.E. 411, 117 S.C. 175.

Solicitor in proceedings as bona fide purchaser
Where an administratrix' son, who was administratrix' solicitor in proceedings under which a minor's interest in decedent's land was sold to administratrix, purchased land from administratrix, son was not a "bona fide purchaser without notice" as respects minor's right to attack decree in administratrix' suit to sell realty.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

26. N.Y.—Ellwood v. Northrup, 12 N.E. 590, 106 N.Y. 172.

27. Ky.—Clay v. Rice, 189 S.W. 11, 172 Ky. 164.
31 C.J. p 1055 note 38.

28. Mich.—In re Axtell, 54 N.W. 889, 95 Mich. 244.
31 C.J. p 1055 note 39.

29. Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.

30. Ky.—Cornwall v. Cornwall, 6 Bush. 369.
31 C.J. p 1055 note 44.

31. Ky.—Bayne v. Stratton, 115 S.W. 728, 131 Ky. 494—Parker v. Hawkins, 4 Ky.Op. 90.

32. Ky.—Todd v. Dowd, 1 Metc. 281.
31 C.J. p 1055 note 43.

33. Miss.—Dendy v. Commercial Bank & Trust Co., 108 So. 274, 143 Miss. 56.

34. Va.—Tulin v. Johnston, 147 S.E. 206, 152 Va. 587.

35. Ky.—Beale v. Stroud, 231 S.W. 522, 191 Ky. 755.
31 C.J. p 1055 note 45.

36. Ark.—Black v. Walton, 32 Ark. 321.
Ky.—Beale v. Stroud, 231 S.W. 522, 191 Ky. 755.

37. Ky.—Beale v. Stroud, supra.
31 C.J. p 1055 note 37.

38. Ark.—Black v. Walton, 32 Ark. 321.
Ky.—Beale v. Stroud, 231 S.W. 522, 191 Ky. 755.

of consummating the purchase;[39] but, after the confirmation of the sale he will not be relieved from complying with his bid on the ground of the title being defective, unless he can show that he has relied on an authorized representation which has caused him or induced him to make the purchase,[40] or unless the proceedings have been conducted wholly on the theory that the infant possessed an absolute fee title.[41]

Statutes protecting title of purchaser. A statute which provides that the title of any purchaser of lands of an infant, at a sale by an executor, administrator, or guardian, who has held possession for a number of years, cannot be questioned on the ground of any irregularity in the proceedings, if it appears that the proceeds of the sale have been applied bona fide to the object and purpose for which it was made, has been held not to be applicable in cases where some unauthorized person assumes to obtain an order from the court to sell the real estate of a minor over whose person or estate such person has neither control nor management, or in cases where the real estate of the minor is sold under a misapprehension of the fact of ownership by the administrator of the estate of another.[42]

Mistake in quantity. If there is a deficiency in quantity, the purchaser may recover back a proportionate part of the purchase price,[43] or may be entitled to an abatement in the purchase price.[44]

On restoration of property to infant. On recovery of the land the infant is entitled to recover from the purchaser the rents and profits which accrued during the latter's occupation.[45] The purchaser is entitled to have the purchase money returned,[46] to a refund of taxes paid, and to an allowance for permanent improvements to the extent that they have enhanced the value of the land; and it has been held that no allowance can be made for improvements beyond the value of the rents and profits on the premises.[47]

Security for purchase money. A lien for the purchase price exists in favor of the infant, independent of any statutory provision and even against subsequent purchasers with notice.[48] Where the statute only requires personal security for the purchase money, no lien on the land can be enforced therefor.[49] It has been held to be the duty of a court of equity, on decreeing the sale, to retain the title as security for the purchase money, no matter what other security may have been taken for the payment thereof.[50]

p. Disposition and Application of Proceeds

The proceeds are properly paid into court rather than to the guardian ad litem. The court may direct the disposition of the proceeds or their reinvestment in such manner as it may deem most advantageous to the infant. The purchaser is not, as a rule, under any duty to see to the application of the proceeds.

The proceeds are properly paid into court[51] rather than to the guardian ad litem,[52] and should be secured to the benefit of the infant.[53] Payment to a trustee rather than to the court, as required by statute, will not divest the infant of his interest in the property.[54] The court will conserve[55] and sedulously guard[56] the funds arising from a sale ordered or authorized by it, and it should see that the reinvestment of the proceeds is satisfactory,[57] that the interests of all parties are preserved in the reinvestment,[58] and that all estates existing in the

39. Ky.—Beale v. Stroud, supra. Md.—Bolgiano v. Cooke, 19 Md. 375.

40. Ky.—Beale v. Stroud, 231 S.W. 522, 191 Ky. 755.
31 C.J. p 1055 note 50.

41. N.Y.—In re Marino, 213 N.Y.S. 680, 215 App.Div. 841.

Return of down payment
Under such circumstances the court may order a return of the down payment.—In re Marino, supra.

42. Fla.—Moralis v. Matheson, 79 So. 202, 75 Fla. 589.

43. Va.—McComb v. Gilkeson, 66 S.E. 77, 110 Va. 406, 135 Am.S.R. 944.

44. Iowa.—Stonebrook v. Wisner, 158 N.W. 351, 171 Iowa 109, L.R.A. 1915E 834, Ann.Cas.1917E 252.

45. Tex.—Wichita Land & Cattle Co. v. Ward, 21 S.W 128, 1 Tex.Civ. App. 307.
31 C.J. p 1056 note 58.

46. La.—Bowen v. Marston, 64 So. 118, 134 La. 298.
31 C.J. p 1056 note 59.

47. Tenn.—Starkey v. Hammer, 1 Baxt. 438.

48. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

49. Miss.—Tate v. Bush, 62 Miss. 145.

50. N.C.—Walke v. Moody, 65 N.C. 599.

51. N.Y.—Carpenter v. Schermerhorn, 2 Barb.Ch. 314.
31 C.J. p 1056 note 68.

52. N.Y.—Carpenter v. Schermerhorn, supra.
31 C.J. p 1056 note 69.

53. Mass.—In re Dagget, 3 Pick. 280.

54. Ky.—Bullock v. Gudgell, 77 S. W. 1126, 25 Ky.L. 1413.

55. Ala.—Higdon v. Higdon, 11 So. 2d 140, 243 Ala. 571.

56. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.

57. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.

58. Miss.—Kelly v. Neville, supra.

Property sold to third person after unrecorded sale to infants
Where land owned by a married woman and her children as heirs of her body was sold and the proceeds ordered reinvested in land owned by the husband, but the husband's deed to the wife and children was destroyed without being recorded, and the land was subsequently sold by the husband to defendant, who made a partial payment, which the wife spent, the children were entitled to have the amount still due reinvested in other real property to be held by them and their mother as was the original property, but with the mother's interest reduced by the amount received by her from defendant.—

original property are protected.[59] The court may direct the disposition of the proceeds,[60] or their investment for the benefit of the infant in such manner as the court may deem best and most advantageous;[61] or it may ratify a settlement by the minors of their interests in the proceeds, and it should do so when it is to the minors' best interests.[62] The failure of the court to make such order as the statute requires as to the proceeds will not vitiate the sale.[63] Where the land has been sold free of encumbrances, the proceeds may be applied so far as necessary to the payment of such encumbrances.[64] A special guardian appointed to sell is bound to account to the infant for the purchase money, less his lawful disbursements.[65] A commissioner appointed to sell lands of minors for the purpose of reinvesting the proceeds cannot transfer notes taken for the purchase money.[66] Where the court appoints a receiver to take care of the proceeds of the sale, it should prescribe the receiver's duties and fix his compensation.[67] The receiver should keep an accurate record of the estate,[68] and he should not expend the corpus except under direction of court.[69]

Disposition of proceeds of a sale of a ward's property is considered in Guardian and Ward § 140.

As affecting purchaser. The purchaser is not, as a rule, under any duty to see to the application of the proceeds of sale,[70] but he may be responsible where the sale has not been confirmed or the conditions on which the sale was decreed complied with.[71] Under statutes dispensing with the necessity of a bond, but requiring the money to be paid into court, it has been held that the purchaser is bound to see that the proceeds of the sale are paid into court, notwithstanding the order of the court made other provisions.[72]

§ 67. —— Costs

The costs of the proceedings and of the sale itself are ordinarily allowed out of the proceeds of the sale.

The costs of the proceedings to obtain the order of sale and of the sale are ordinarily allowed out of the proceeds of the sale.[73] In determining the costs to be allowed the court will safeguard the interests of the infant.[74] In some jurisdictions in the absence of statute the amount to be fixed for costs may be limited by the general rules of practice.[75] Where several infants are included in the same application for the order of sale and several parcels of land are sold at different times, an extra allowance, in addition to the limit provided by the rules of practice, may be allowed;[76] but the mere fact that there are several infants interested in the application does not warrant the court in making an allowance beyond the limit prescribed, although the infant's interests in the aggregate are greater than the sum on which the limitation of the rules of practice is based.[77] Under some statutes a special guardian should be allowed the necessary premium which he has to pay on his bond.[78]

Carrier v. Kavanaugh, 247 S.W. 1107, 198 Ky. 25.

59. Miss.—Kelly v. Neville, 101 So. 565, 136 Miss. 429.

60. Tenn.—Reynolds v. Chumbley, 135 S.W.2d 941, 175 Tenn. 496.
31 C.J. p 1056 note 71.

Disposition of proceeds in proceedings to set sale aside
Although the court may refuse to set aside the sale in proceedings for that purpose, it may correct a partly erroneous decree relating to the disposition of the proceeds of the sale.—Reynolds v. Chumbley, supra.
Allowance of costs from proceeds see infra § 67.

61. Ky.—Carrier v. Kavanaugh, 247 S.W. 1107, 198 Ky. 25.
S.C.—Stafford v. Stafford, 20 S.E.2d 217, 200 S.C. 1.
31 C.J. p 1056 note 72.

62. Ala.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441.

63. Ky.—Robinson v. Redman, 2 Duv. 82.
N.Y.—Cochran v. Van Surley, 20 Wend. 365, 32 Am.D. 570.

64. N.J.—Cool v. Higgins, 25 N.J. Eq. 117.

65. N.Y.—Hunt v. Hunt, 65 Barb. 577, reversed on other grounds 58 N.Y. 666.

66. Tenn.—Carnes v. Polk, 4 Coldw. 87.

67. Va.—Royall v. Peters, 21 S.E. 2d 782, 180 Va. 178.

68. Va.—Royall v. Peters, supra.

Status of advancements by receiver
A receiver of securities and currency realized from sales of realty belonging to infants, under decrees requiring investment at a designated interest rate, was charged with full knowledge of the status of his accounts, and hence, where he advanced funds from the principal to cover interest due but not collected, the advances were required to be considered as personal advances in anticipation of future interest collections and the principal and its earning power remained unchanged.—Royall v. Peters, supra.

69. Va.—Royall v. Peters, supra.

70. Ky.—Cini v. Ball, 156 S.W.2d 486, 288 Ky. 471.
31 C.J. p 1056 note 76.

71. Pa.—Kreimendahl v. Neuhauser, 13 Pa.Super. 606.

72. Ky.—Bullock v. Gudgell, 77 S.W. 1126, 25 Ky.L. 1413.

73. Md.—Senseney v. Repp, 50 A. 416, 94 Md. 77.
31 C.J. p 1056 note 87.

Award to attorney from proceeds
Where realty of infant remaindermen was sold on suit of life tenant for thirteen thousand five hundred dollars, attorney representing guardian ad litem for the infant remaindermen was awarded one hundred dollars for his services out of proceeds of sale.—Stafford v. Stafford, 20 S.E.2d 217, 200 S.C. 1.

74. N.Y.—Matter of Molinari, 144 N.Y.S. 217, 82 Misc. 663.

75. N.Y.—Matter of Molinari, supra —In re Morrell, 4 Paige 44.

76. N.Y.—In re Morrell, supra.

77. N.Y.—Matter v. Molinari, 144 N.Y.S. 217, 82 Misc. 663.

78. N.Y.—Matter of Molinari, supra.

§ 68. Mortgages

a. In general
b. Proceedings
c. Foreclosure

a. In General

Generally, authority to mortgage an infant's realty must be conferred by statute either expressly or by implication, and the authority may be exercised only in the cases and in the manner provided for by statute.

The inherent jurisdiction of a court of equity to order a sale of an infant's realty does not permit it to order an encumbrance of the infant's property, in the absence of a trust and the existence of an active trustee or guardian charged with the duty of administering the property and raising the encumbrance without sacrifice to the infant's estate.[79] Generally, authority to mortgage must be conferred by statute either expressly or by necessary implication from other powers actually conferred.[80] If a mortgage is regarded as a conditional sale, then a power to sell may authorize the execution of a mortgage;[81] but, if a mortgage is not regarded as a conditional sale, it is held that a power to sell and dispose does not authorize the execution of a mortgage.[82] Under a statute authorizing the court to permit an infant wife to join her husband in a deed conveying the husband's property, the court may permit the infant wife to join her husband in a mortgage of the property if the interests of the wife are not prejudiced thereby.[83] The power of the court must be exercised only in the cases and only in the manner provided for by the statute.[84]

Mortgage of ward's property is considered in Guardian and Ward § 141.

Purposes. A mortgage of an infant's property has been permitted to provide for his support and maintenance,[85] to raise funds for the purpose of cultivating the property,[86] or to discharge encumbrances on the property.[87] A mortgage for other than one of the purposes authorized by statute is void, and subject to collateral attack.[88] It has been held that the court should not permit an infant's estate to be mortgaged for the purpose of paying debts of his father.[89] Where by statute the wife may join her husband in a mortgage of her husband's property if it is not prejudicial to her interests, she may join in a mortgage to secure funds to retire a lien indebtedness, and also to secure funds to make advantageous improvements on the property.[90]

b. Proceedings

The procedure provided by statute must be substantially complied with in order to render the mortgage valid. The court may direct the disposition of the proceeds and its order in regard thereto must be complied with.

The procedure provided by statute must be substantially complied with in order to render the mortgage valid,[91] even though the jurisdiction to mortgage the estate is regarded as inherent in the court.[92] Thus there must be a petition to the proper court,[93] describing the land,[94] and notice of the application to the infant or his guardian.[95] So there must be an order of court authorizing the mortgage,[96] a special bond filed and approved,[97] and the mortgage must be reported to, and confirmed by, the court.[98]

The referee's report in mortgage proceedings for the payment of certain specified debts should specify the objects to which the avails are to be applied, and not merely refer to the evidence for a statement of these objects.[99]

Execution. A statute requiring that the conveyance shall be executed under the direction of the

79. Ala.—Midgley v. Ralls, 176 So. 799, 234 Ala. 685.

80. Or.—Trutch v. Bunnell, 4 P. 588, 11 Or. 58, 50 Am.R. 456.

Orphans' court has jurisdiction.—Chase v. Brown, 22 Pa.Co. 598.

81. D.C.—Middleton v. Parks, 3 App. D.C. 149.

82. Or.—Trutch v. Bunnell, 4 P. 588, 11 Or. 58, 50 Am.R. 456, overruling Trutch v. Bunnell, 5 Or. 504.
Wash.—Wilson v. Hubbard, 82 P. 154, 39 Wash. 671.

83. Ky.—Ex parte Roush, 137 S.W. 2d 352, 281 Ky. 733.

84. N.Y.—Warren v. Union Bank, 51 N.E. 1036, 157 N.Y. 259, 68 Am.S.R. 777, 43 L.R.A. 256, reversing 51 N.Y.S. 27, 28 App.Div. 7--Barker v. Barker, 158 N.Y.S. 413, 172 App. Div. 244.

85. Pa.—Chase v. Brown, 22 Pa.Co. 598.

86. La.—Leisey v. Tanner, 28 La. Ann. 299.

87. Wis.—Lueft v. Lueft, 109 N.W. 652, 129 Wis. 534, 7 L.R.A.,N.S., 263, 9 Ann.Cas. 639.

88. N.Y.—Warren v. Union Bank, 51 N.E. 1036, 157 N.Y. 259, 68 Am. S.R. 777, 43 L.R.A. 256, reversing 51 N.Y.S. 27, 28 App.Div. 7.

89. S.C.—Davis v. Strauss, 174 S.E. 908, 173 S.C. 99.

90. Ky.—Ex parte Roush, 137 S.W. 2d 352, 281 Ky. 733.

91. Va.—Parker v. Stephenson, 104 S.E. 39, 127 Va. 431.
31 C.J. p 1057 note 12.

92. Va.—Parker v. Stephenson, supra.

93. Iowa.—McMannis v. Rice, 48 Iowa 361.
31 C.J. p 1057 note 15.

94. Pa.—West v. Cochran, 104 Pa. 482.

95. Ga.—Couthbert Bank v. Martin, 107 S.E. 848, 151 Ga. 664.

96. U.S.—U. S. Mortgage Co. v. Sperry, Ill., 11 S.Ct. 321, 138 U.S. 313, 34 L.Ed. 969.
31 C.J. p 1057 note 18.

97. Kan.—Higgins v. Reed, 29 P. 389, 48 Kan. 272.
Pa.—Leedom v. Lombaert, 80 Pa. 381.

98. Iowa.—Dohms v. Mann, 39 N.W. 823, 76 Iowa 723.
31 C.J. p 1057 note 20.

99. N.Y.—In re Lampman, 22 Hun 239.

court applies to a mortgage as well as to an absolute deed.[1]

Disposition of proceeds. The court may direct the disposition of the proceeds,[2] and its order in regard thereto must be complied with.[3]

c. Foreclosure

The proceeding to foreclose a mortgage of an infant's real estate executed under order of court is adversary in character. If the court has jurisdiction, a judgment of foreclosure, although it may be erroneous, is not void and subject to collateral attack.

The proceeding to foreclose a mortgage of an infant's real estate executed under order of court is adversary in character. If the court has jurisdiction over the person of the infant in such matter, a judgment of foreclosure, although it may be erroneous, is not void and subject to collateral attack, but the remedy, if any, is by application for a modification or vacation of the judgment, within the time prescribed by statute. The omission of the guardian ad litem to direct the court's attention to the fact that the execution of the mortgage was without the approval of the court or without the giving of a bond does not affect the title of a purchaser at the foreclosure sale in the absence of bad faith.[4] Under statutes expressly so providing no guardian ad litem need be appointed for an infant who is a married woman.[5]

§ 69. Leases

A court having jurisdiction of an infant's estate may authorize a lease of the infant's land even for a term exceeding the infant's minority. The proceedings must be in conformity with the governing statutes or rules of court.

A court having jurisdiction of an infant's estate may authorize a lease of the infant's land,[6] and approve such lease for a period of time extending beyond the minority of the minor.[7] In jurisdictions wherein chancery courts have inherent power to sell or convey the real property of infants, as discussed supra § 62, such courts have inherent power to authorize a lease of such property when the best interests of the infant are subserved thereby,[8] even for a term exceeding the infant's minority.[9] A decree of a court sanctioning a lease is conclusive until it is reversed or set aside if the court has jurisdiction. A bona fide purchaser for value of the leasehold interest will be protected.[10] An infant whose interest in real estate has been leased by authority of the court, with an option to the lessee to purchase, cannot, after reaching majority, maintain a suit in equity for the cancellation of the option closed in the lease on the ground that the court had no power to authorize it, while retaining the benefits of the other provisions, for which such option was part consideration.[11] A lease of an infant's real estate, made by the infant's father who is not the guardian of such minor, which is not approved by the court having jurisdiction of the estate, is void.[12]

Validity of leases by the infant is considered supra § 54. Lease of ward's estate by the guardian is considered in Guardian and Ward § 142.

The proceedings must be in conformity with the governing statutes or rules of court.[13] A special bond[14] and the approval of the lease by the court[15] are usually required. The lease should be in writing.[16] Mere irregularities in the proceedings, where not prejudicial to the infant, will not vitiate the lease.[17]

§ 70. Sales of Personalty

A court of equity has power in a proper case to authorize a sale of an infant's personalty, and by force of statute in many jurisdictions the personalty may be sold under orders of court whenever the sale would be beneficial to the infant.

A court of equity has power in a proper case to authorize a sale of an infant's personalty.[18] By

1. N.Y.—Battell v. Torrey, 65 N.Y. 294.
2. Wis.—Lueft v. Lueft, 109 N.W. 652, 129 Wis. 534, 7 L.R.A.,N.S., 263, 9 Ann.Cas. 639.
3. N.Y.—In re Lampman, 22 Hun 239.
31 C.J. p 1057 note 24.
4. Iowa.—Ringstad v. Hanson, 130 N.W. 145, 150 Iowa 324.
5. Ky.—Schlenker v. Clark, 11 S.W. 2d 725, 226 Ky. 665.
6. Okl.—Charley v. Britton-Johnson Oil Co., 263 P. 1096, 129 Okl. 153—Scott v. Gypsy Oil Co., 239 P. 887, 112 Okl. 13.
7. Okl.—Scott v. Gypsy Oil Co., supra.
8. Ala.—McCreary v. Billing, 58 So. 311, 176 Ala. 314, Ann.Cas.1915A 561.
Tenn.—Smartt v. Smartt, 1 Tenn. App. 68.
31 C.J. p 1058 note 35.
9. Tenn.—Ricardi v. Gaboury, 89 S. W. 98, 115 Tenn. 484.
10. Tenn.—Anderson v. Ammonett, 9 Lea 1.
11. U.S.—Goin v. Cincinnati Realty Co., Ohio, 200 F. 252, 118 C.C.A. 438.
12. Okl.—Jones v. Goldsberry, 247 P. 60, 118 Okl. 219—Baken v. Fox, 157 P. 340, 57 Okl. 544.
13. Okl.—Charley v. Britton-Johnson Oil Co., 263 P. 1096, 129 Okl. 153.
14. Ill.—Wan v. People, 57 Ill. 202.
15. Ill.—Field v. Herrick, 101 Ill. 110.
Okl.—Baken v. Fox, 157 P. 340, 57 Okl. 544.
16. Tenn.—Sawyers v. Zachery, 1 Head 21.
17. Ga.—Palmer Brick Co. v. Woodward, 69 S.E. 827, 135 Ga. 450.
18. Ga.—Strain v. Wright, 7 Ga. 568.
31 C.J. p 1058 note 51.

force of statute in many jurisdictions the personal property of an infant may be sold under orders of court whenever circumstances make it beneficial to him that it should be sold.[19] In proceedings authorized by statute the court has jurisdiction to determine whether a transaction transferring securities owned by infants was such as to divest their ownership.[20]

Confirmation of sale. Where authority to sell is derived from an order of the court, ordinarily it is necessary that the sale be confirmed.[21]

V. CONTRACTS

A. IN GENERAL

§ 71. Capacity to Contract and Validity of Contracts in General

The general rule, which is subject to some qualifications, is that an infant cannot bind himself absolutely by a contract, and that an infant's contracts are voidable, and not void.

A state legislature may regulate the contracts of infants and declare under what conditions they may contract;[22] so the question of the age at which one otherwise qualified shall have the right to make lawful contracts and be entitled to their benefits and bound by their obligations is within its control,[23] and it has power to fix any age at which an infant may enter into a contract of a particular character.[24] It may also abrogate or remove the disability of infants to contract.[25]

While the privilege of infancy will not enable an infant to escape liability on his contractual obligations in all cases and under all circumstances,[26] the general rule, with qualifications appearing in this section and succeeding sections, and particularly with the frequently mentioned exception of contracts for necessaries, as discussed infra § 78, is that an infant has not the capacity to bind himself absolutely by a contract, or that an infant is not bound by his contract,[27] since, with such exceptions, any contract made by him during his infancy may be avoided or disaffirmed by him,[28] both at

19. Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.
31 C.J. p 1058 note 52.

20. N.Y.—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738.

21. Tex.—Harrison v. Ilgner, 11 S. W. 1054, 74 Tex. 86.

22. Wis.—Peterson v. Weimar, 194 N.W. 346, 181 Wis. 231.

Infant has no vested right to be free from legislative limitation of right to contract, or from limitation by amendment of an original statute limiting such right, provided new limitation is not unreasonable and other rights have not intervened by exercise of right to contract under former legislation.—Coleman v. Coleman, 200 N.E. 197, 51 Ohio App. 221.

23. Ill.—People v. Kowalski, 138 N. E. 634, 307 Ill. 378.

24. Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.

25. Mich.—Thomas v. Morton Salt Co., 235 N.W. 846, 253 Mich. 613, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528, affirmed on rehearing and supplemented 242 N.W. 235, 258 Mich. 231—Naudzius v. Lahr, 234 N.W. 581, 253 Mich. 316.
N.Y.—Application of Presler, 13 N.Y. S.2d 49, 171 Misc. 559.
Removal of disabilities of infancy generally see supra §§ 28–30.

26. N.J.—Sawicki v. Siahor, 167 A. 691, 11 N.J.Misc. 604.

27. U.S.—Minersville School Dist. v. Gobitis, C.C.A.Pa., 108 F.2d 683—Ex parte Chan Hai, D.C.Wash., 11 F.2d 667, affirmed, C.C.A., Chan Hai v. Weedin, 15 F.2d 296.
Ala.—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 34, reversing 109 So. 576, 21 Ala.App. 515.
Alaska.—The Emporium v. Boyle, 7 Alaska 80.
Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A. L.R. 1363.
Ill.—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265—Hunter v. Egolf Motor Co., 268 Ill.App. 1.
Me.—Shaw v. Philbrick, 151 A. 423, 129 Me. 259, 74 A.L.R. 290.
Miss.—Greene v. Greene, 110 So. 218, 145 Miss. 87, 49 A.L.R. 565.
Mo.—Spears v. De Clue, App., 133 S.W.2d 1044, record quashed on other grounds State ex rel. Spears v. Hughes, 142 S.W.2d 3, 346 Mo. 421—Swoboda v. Nowak, 255 S.W. 1079, 213 Mo.App. 452.
N.Y.—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App. Div. 1016.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404.
R.I.—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.
31 C.J. p 1058 note 57.
Infancy as defense to action for breach of marriage promise see Breach of Marriage Promise § 2 a.
Torts connected with contracts see infra § 89.

"The universal law . . . is that a minor cannot be held liable on his personal contracts."—Bonner v. Moran, 126 F.2d 121, 122, 75 U.S.App.D. C. 156, 139 A.L.R. 1366.

The provision of the compensation act that minors should have same power of contracting for their services as adult employees does not operate generally to enable minors to enter into enforceable contracts.—Eckhardt v. Judevine, 288 N.W. 756, 233 Wis. 168.

Contract in course of committing offense
An infant is not civilly liable on a contract entered into by him in the course of committing the offense of obtaining property by false pretenses, or a kindred offense.—Vinson v. State, 52 S.E. 79, 124 Ga. 19—25 C.J. p 617 note 28.

In Louisiana, under Civil Code Articles §§ 1782, 1785, minors are incapacitated to contract except in the cases provided for.—Gott v. Scott, App., 199 So. 460—Stakes v. Jones, App., 125 So. 197.

28. Ala.—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 576, 21 Ala.App. 515.
Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Cal.—Field v. Hughes, 20 P.2d 990, 131 Cal.App. 144.

law and in equity,[28] and whether the contract is executory[30] or executed;[31] and such is the rule regardless of whether or not he has arrived at an age of discretion,[32] whether the transaction is fair or unfair,[33] or reasonable or unreasonable,[34] whether or not the other party is aware of the infant's disabilities,[35] and even though hardship or injury may result to others than the infant.[36] However, as appears infra § 76, an infant is liable on contracts which the law requires him to make or which it makes for him.

The rules above stated do not mean that infants are absolutely incapable of contracting in the sense that all their contracts are absolutely void;[37] their contracts have been said to be valid until disaffirmed.[38] It has been laid down as a proper distinc-

Conn.—Wells v. Radville, 153 A. 154, 112 Conn. 459.
Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Berryman v. Highway Trailer Co., 30 N.E.2d 761, 307 Ill.App. 480—Crandall v. Coyne Electrical School, 256 Ill. App. 322.
Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Marceliac v. Stevens, 267 S.W. 229, 206 Ky. 383—Young v. McDaniel, 255 S.W. 854, 201 Ky. 65.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743.
N.Y.—Schroeder v. Hitt, 260 N.Y.S. 2, 236 App.Div. 466, affirmed 186 N. E. 786, 261 N.Y. 671—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853—Goldfinger v. Doherty, 276 N.Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673—Egnaczyk v. Rowland, 267 N.Y.S. 14, 148 Misc. 889.
Ohio.—Hoffman v. Edson Co., 173 N. E. 807, 37 Ohio App. 262.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.
R.I.—Tillinghast v. Holbrook, 7 R.I. 230.
Tenn.—Western Union Telegraph Co. v. Ausbrooks, 257 S.W. 858, 148 Tenn. 615, 33 A.L.R. 330—Tennessee Brokerage Co. v. Larkin, 1 Tenn.App. 276.
Tex.—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W.2d 281, error dismissed.
Wis.—Peterson v. Weimar, 194 N.W. 346, 181 Wis. 231.
31 C.J. p 1058 note 57.

"Unqualified right to disaffirm"
Wis.—Olson v. Veum, 222 N.W. 233, 234, 197 Wis. 342, citing **Corpus Juris.**

"Absolute and paramount right"
Colo.—Mosko v. Forsythe, 76 P.2d 1106, 1108, 102 Colo. 115.

Discretion of infant
"The right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion."
Ill.—Hunter v. Egolf Motor Co., 268 Ill.App. 1, 6.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 262, 185 N. C. 109.

Reason for rule
"Infants may avoid their contracts because it is the policy of the law to protect them against their own mistakes."—Wharen v. Funk, 31 A. 2d 450, 452, 152 Pa.Super. 133—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 393, 122 Pa.Super. 485.

"The endeavor of the courts has been to prevent designing adults from overreaching infants by taking advantage of their lack of experience and judgment and inducing them to enter into contracts clearly to their disadvantage."—Worman Motor Co. v. Hill, 94 P.2d 865, 867, 54 Ariz. 227, 124 A.L.R. 1363.
Effect of false representations as to age or right to disaffirm see supra § 27.

29. Conn.—Watson v. Ruderman, 66 A. 515, 79 Conn. 687.
31 C.J. p 1059 note 60.

30. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.
Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149.
Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322—Lewellyn v. Hawkins, 253 Ill.App. 368.
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
31 C.J. p 1059 note 58.

31. Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149.
Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322.
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
N.Y.—Horowitz v. Manufacturers' Trust Co., 268 N.Y.S. 729, 239 App. Div. 693—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
31 C.J. p 1059 note 59.
"There is, in law, no distinction between executed and executory contracts so far as the right of disaffirmance is concerned."—Collins v. Peters Real Estate Improvement Corporation, 252 Ill.App. 348, 350.

32. Ala.—Ex parte McFerren, 63 So. 159, 184 Ala. 223, 47 L.R.A.,N.S., 543, Ann.Cas.1915B 672.
31 C.J. p 1059 note 62.
"In law there is no 'twilight zone' between an infant ten years of age and an infant on the verge of maturity."—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 428, 155 Va. 826, 73 A.L.R. 166.

33. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.
Utah.—Blake v. Harding, 180 P. 172, 54 Utah 158.

34. Utah.—Blake v. Harding, 180 P. 172, 54 Utah 158.

35. Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Pa.—Osipovitch v. Golnick, 44 Lack. Jur. 145.
Effect of false representation as to age see supra § 27.

36. Ill.—Hunter v. Egolf Motor Co., 268 Ill.App. 1.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 122 Pa.Super. 485.

37. Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Phillips v. Savings Trust Co. of St. Louis, 85 S. W.2d 923, 231 Mo.App. 1178.
N.Y.—Goldfinger v. Doherty, 276 N. Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.
In North Dakota, "a minor over 18 years of age may enter into any contract, subject only to his power of disaffirmance (section 4339, C.L. 1913)."—In re Campbell's Guardianship, 215 N.W. 913, 915, 56 N.D. 60.

38. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Rahman v. Bethel, 258 N.Y.S. 286, 236 App.Div. 182.
Wis.—Roeder v. Simonson, 192 N.W. 477, 180 Wis. 155.
"A minor is . . . capable of making contracts. They are voidable, but, until avoided by disaffirmance, they are contracts nevertheless."—Paulson v. McMillan, 111 P. 2d 983, 985, 8 Wash.2d 295.
In Iowa
(1) Under the Iowa statute, the contract of a minor is valid unless disaffirmed.—In re Willmott's Estate, 230 N.W. 330, 211 Iowa 34, 71 A.L.R. 1018—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402.

tion, under what has been said to be the old common-law rule,[39] that, where an infant's contract is to his benefit, it is good and binding on him,[40] or, except where it is for necessaries,[41] voidable, at his election when he comes of age;[42] when it is to his prejudice, or not to his benefit, it is void[43] ab initio,[44] or he is not bound;[45] and, when it is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant.[46] However, it has been said that, under the modern rule, this classification is abandoned in favor of permitting the infant, when he has become of age, to determine what contracts are, and what are not, to his interest and liking.[47] The general rule, ignoring the distinction above made, is that, with certain exceptions,[48] as in the case of contracts for necessaries, as discussed infra § 78, contracts authorized by law,[49] and those entered into in the performance of a legal duty,[50] and in some special cases of actual and active fraud,[51] the contracts of an infant, whether executed[52] or executory,[53] are voidable,[54] and such contracts of an infant are void-

(2) "Under the statute (section 10493, Code 1927; section 3189, Code 1897) a minor is bound, not only by contracts for necessaries, but also by his other contracts, unless he disaffirms."—First Nat. Bank v. Torkelson, 228 N.W. 655, 657, 209 Iowa 659.

39. Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.

"At common law the contracts of infants were divided into three classes—void, voidable, and valid."—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 427, 155 Va. 826, 73 A.L.R. 166.

40. Conn.—Wells v. Radville, 153 A. 154, 112 Conn. 459.
Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, 41 A.L.R. 1092, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473.
Nev.—Schmidt v. Horton, 290 P. 1023, 52 Nev. 479, denying rehearing 287 P. 274, 52 Nev. 302.
N.Y.—In re Taylor, 275 N.Y.S. 934, 937, 153 Misc. 673, citing Corpus Juris.
31 C.J. p 1060 note 73.

41. D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
Contracts for necessaries generally see infra § 78.

42. Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.

43. Del.—King v. Cordrey, supra.
D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
N.Y.—In re Taylor, 275 N.Y.S. 934, 937, 153 Misc. 673, citing Corpus Juris.
Pa.—Vacuum Oil Co. v. Pitarra, 32 Lua.Leg.Reg. 224.
31 C.J. p 1060 note 74.

44. U.S.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.

45. Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.

46. U.S.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.
N.Y.—In re Taylor, 275 N.Y.S. 934, 937, 153 Misc. 673, citing Corpus Juris.
31 C.J. p 1060 note 75.

47. Tenn.—Human v. Hartsell, 148 S.W.2d 634, 636, 24 Tenn.App. 678.

Effect of rule

"The adoption of this rule does not lead to any intrenchment of the infant's rights but gives him the option of invoking contracts found to be advantageous but which, if held void, could not be enforced against the other party to the contract. Thus the minor can secure the advantage of contracts advantageous to himself and be relieved of the effect of an injudicious contract."—Human v. Hartsell, supra.

Moral obligation

"He is thus permitted to assume the burden of a contract, clearly disadvantageous to him, if he deems himself under a moral obligation to do so."—Human v. Hartsell, supra.

48. Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Mich.—Brown v. Wood, 291 N.W. 255, 293 Mich. 148, 127 A.L.R. 1436.

"Except as to a very limited class of contracts considered binding."—Lee v. Thompson, 168 So. 848, 850, 124 Fla. 494.

49. Ohio.—Mestezko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.

In California, "the contract of a minor, except for necessaries furnished to him or his family, or for an obligation incurred by direct authority of statute, may be disaffirmed by him. Section 35, Civ.Code."—Field v. Hughes, 20 P.2d 990, 991, 131 Cal.App. 144.

50. Ohio.—Mestezko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.

51. Miss.—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968.
Fraud as not preventing disaffirmance see infra § 75.

52. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.

53. Fla.—Lee v. Thompson, supra.
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.

54. Ala.—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 576, 21 Ala.App. 515—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
Conn.—Shutter v. Fudge, 143 A. 896, 108 Conn. 528.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567—Hunter v. Egolf Motor Co., 268 Ill.App. 1—Crandall v. Coyne Electrical School, 256 Ill.App. 322.
Ky.—J. I. Case Threshing Mach. Co. v. Dulworth, 287 S.W. 994, 216 Ky. 637.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Mich.—Brown v. Wood, 291 N.W. 255, 293 Mich. 148, 127 A.L.R. 1436.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968.
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Anderson v. Middle States Utilities Co., 98 S.W.2d 163, 231 Mo.App. 129—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178—Gerkey v. Hampe, App., 274 S.W. 510.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—De Vito v. City of Mechanicville, 297 N.Y.S. 935, 251 App.Div. 514—Rahman v. Bethel, 258 N.Y.S. 286, 236 App.Div. 182—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490—Vichnes v. Transcontinental & Western Air, 18 N.Y.S.2d 603, 173 Misc. 631—Goldfinger v. Doherty, 276 N.Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779—Far-

able at his election or option[55] after attaining his | majority,[56] and not void,[57] in the absence of a stat-

num v. O'Neil, 252 N.Y.S. 900, 141 Misc. 555.
N.C.—Coker v. Virginia-Carolina Joint Stock Land Bank, 178 S.E. 863, 208 N.C. 41.
N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.
Ohio.—Mestezko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575—State ex rel. Squire v. Schulman, App., 47 N.E.2d 913—Eagle Dairy Co. v. Dylag, 168 N.E. 754, 33 Ohio App. 113.
R.I.—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964—Hammassapoulo v. Hammassapoulo, 131 S.E. 319, 134 S.C. 54.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192, citing **Corpus Juris**—Western Union Telegraph Co. v. Ausbrooks, 257 S.W. 858, 148 Tenn. 615, 33 A.L.R. 330—Human v. Hartsell, 148 S.W.2d 634, 24 Tenn. App. 678—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S.W. 2d 157, 119 Tex. 228—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct—Neill v. Pure Oil Co., Civ.App., 101 S.W.2d 402, error refused—Robinson v. Roquemore, Civ.App., 2 S.W.2d 873.
Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.
Wash.—Paulson v. McMillan, 111 P. 2d 983, 8 Wash.2d 295.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.
Wis.—Roeder v. Simonson, 192 N.W. 477, 180 Wis. 155.
31 C.J. p 1060 note 76.

"Universally established doctrine"
N.Y.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, 864, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.

"Almost as a universal rule"
R.I.—Tillinghast v. Holbrook, 7 R.I. 230, 243.

"Voidable or de facto, that is to say, subject to the possibility of disaffirmance."—Lee v. Thompson, 168 So. 848, 850, 124 Fla. 494.

In Georgia

(1) "A contract made by a minor is not void, but is voidable only."—Benjamin v. Pardue, 162 S.E. 291, 44 Ga.App. 587.

(2) "The contracts of infants are not void but voidable . . . Code §§ 20-202, 20-201."—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 139, 60 Ga.App. 149.

(3) "The contracts of an infant, except for necessaries, are ordinarily not enforceable."—Gibson v. Kyle, 167 S.E. 547, 548, 46 Ga.App. 295.

(4) Under Code §§ 20-201, 20-202, 20-203, the contract of an infant, which is not connected with the practice by him of any trade or profession by permission of his parent or guardian or by permission of law, or which is not for necessaries furnished him where the parent or guardian fails or refuses to furnish them, is voidable, and may, at the option of the infant, be disaffirmed."—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 50, 60 Ga.App. 449.

(5) "While the contract of an infant is declared by the Code [Civ. Code 1910, § 4233; Code 1933, § 20-201], to be 'void except for necessaries,' it is the well-settled rule that such a contract is not void but voidable, at the election of the infant, when arriving at full age."—Clemons v. Olshine, 187 S.E. 711, 712, 54 Ga.App. 290—Levy v. McPhail, 127 S. E. 793, 794, 33 Ga.App. 784.

(6) "The contracts of an infant under 21 years of age are void, except for necessaries . . . Civil Code 1910, § 4233."—Holbrook v. Montgomery, 141 S.E. 408, 409, 165 Ga. 514.

(7) Earlier decisions see 31 C.J. p 1061 note 78 [b].

Contract to marry see Breach of Marriage Promise § 2 b.
Who may avoid see infra § 75.

55. Ala.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149—Clemons v. Olshine, 187 S.E. 711, 54 Ga.App. 290—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Ill.—Hunter v. Egolf Motor Co., 268 Ill.App. 1.
Miss.—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—De Vito v. City of Mechanicville, 297 N.Y.S. 935, 251 App.Div. 514—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
N.C.—Coker v. Virginia-Carolina Joint Stock Land Bank, 178 S.E. 863, 208 N.C. 41.
Ohio.—Mestezko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tenn.—Western Union Telegraph Co. v. Ausbrooks, 257 S.W. 858, 148 Tenn. 615, 33 A.L.R. 330.
Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct.
Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.

56. Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149—Clemons v. Olshine, 187 S.E. 711, 54 Ga.App. 290—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.

57. Ala.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149—Benjamin v. Pardue, 162 S.E. 291, 44 Ga.App. 587.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—De Vito v. City of Mechanicville, 297 N.Y.S. 935, 251 App.Div. 514—Rahman v. Bethel, 258 N.Y.S. 286, 236 App.Div. 182—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Vichnes v. Transcontinental & Western Air, 18 N.Y.S.2d 603, 173 Misc. 631—Goldfinger v. Doherty, 276 N.Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.
N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.
Ohio.—State ex rel. Squire v. Schulman, App., 47 N.E.2d 913.
R.I.—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.
Tenn.—Human v. Hartsell, 148 S.W. 2d 634, 24 Tenn.App. 678.
Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct—Neill v. Pure Oil Co., Civ.App., 101 S.W.2d 402, error refused—Robinson v. Roquemore, Civ.App., 2 S.W.2d 873.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.
Wis.—Roeder v. Simonson, 192 N.W. 477, 180 Wis. 155.
31 C.J. p 1061 note 77.

Unexecuted contracts
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E.

ute providing otherwise.[58] In this connection it has been said that one deals with an infant at his peril,[59] particularly when doing so with knowledge of his incapacity.[60]

The incapacity of an infant to bind himself by contract is not removed by the mere fact that he has no parent or guardian, or by the fact that he is employed and receiving his wages from the employment.[61] The approval by a parent of his infant child's contract does not validate it.[62] The effect of emancipation on an infant's right to contract is considered supra §§ 28–30.

The fact that a contract of an infant is evidenced by a sealed instrument does not take it out of the operation of the general rules applicable to the contracts of infants.[63]

The fraud of a minor in procuring a contract may vitiate it,[64] but will not give it validity.[65]

Burden of proof as to validity. One dealing with an infant has been held to have the burden of proving that the contract was a fair, reasonable, and provident one, not tainted with fraud, undue influence, or overreaching on his part.[66]

Liability of infant for interest. There is no general rule exempting infants from the payment of interest on amounts due by them.[67]

§ 72. Ratification and Avoidance

Questions as to election between the ratification and avoidance of contracts and as to the sufficiency and effect of a ratification or of an avoidance are considered in detail infra §§ 73–75. Ratification and avoidance of transactions affecting the acquisition and alienation of property are considered supra §§ 39–46.

Examine Pocket Parts for later cases.

§ 73. —— Election between Ratification and Avoidance and Necessity Therefor

An executory contract has been held to bind an infant only if he performs some act of affirmance or ratification, while an executed one is binding until disaffirmed, without ratification. An infant cannot partially ratify and partially avoid his contract.

Whether, when an infant arrives at full age, it is necessary that he should perform any act to avoid or affirm a contract made under age, in order to render it nugatory or binding, is a question on which, it has been said, there are contradictory authorities.[68]

Distinction between executed and executory contract. A distinction has been made in this regard between a contract that is executory and one that is executed.[69] While an executory contract, as considered supra § 71, is voidable at the election of the infant, it is presumed to be invalid until ratified,[70] and the burden of overcoming this presumption is on him who seeks to enforce its terms;[71] but an executed contract, while voidable, considered supra § 71, is presumed to be valid, and the burden is on him who seeks to avoid it to establish his right so to do.[72] If the contract is considered executory, there must be some act of affirmance or ratification in order to make it binding on the infant,[73] and it may be avoided notwithstanding there has been no disaffirmance.[74] If the contract has been executed, no ratification is necessary in order to be bound thereby;[75] it is binding until disaffirmed;[76] and if

726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.

Mere act of rescission cannot make the contract void ab initio.—Joseph v. Schatzkin, 181 N.E. 464, 259 N. Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747.

58. Cal.—Hakes Inv. Co. v. Lyons, 137 P. 911, 166 Cal. 557.
31 C.J. p 1061 note 78.

59. Cal.—Pollock v. Industrial Accident Commission, 54 P.2d 695, 5 Cal.2d 205.
Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.

60. N.Y.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.

61. Ga.—Wickham v. Torley, 71 S. E. 881, 136 Ga. 594, 36 L.R.A.,N.S., 57.

62. Vt.—Bombardier v. Goodrich, 110 A. 11, 94 Vt. 208.

63. Ala.—West v. Penny, 16 Ala. 186.

64. Ala.—Ex parte Pritchett, 65 So. 521, 187 Ala. 384.
31 C.J. p 1060 note 70.

65. N.Y.—Studwell v. Shapter, 54 N.Y. 249.

66. Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476—Johnson v. Northwestern Mut. Life Ins. Co., 57 N.W. 934, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187, reheard 59 N.W. 992, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187.

67. Vt.—Bradley v. Pratt, 23 Vt. 378, overruling Holden v. Pike, 14 Vt. 405, 39 Am.D. 228.

68. Vt.—Farr v. Sumner, 12 Vt. 28, 36 Am.D. 327.

69. Pa.—Shannon v. Sterling Coal Co., 25 Pa.Dist. 672.
31 C.J. p 1061 note 82.

70. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing **Corpus Juris.**
Pa.—Shannon v. Sterling Coal Co., 25 Pa.Dist. 672.

71. Pa.—Shannon v. Sterling Coal Co., supra.

72. Pa.—Shannon v. Sterling Coal Co., supra.

73. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
31 C.J. p 1061 note 89.

74. Tex.—Fletcher v. A. W. Koch Co., Civ.App., 189 S.W. 501.
31 C.J. p 1061 note 90.

75. Tex.—Clemmer v. Price, 125 S. W. 604, 59 Tex.Civ.App. 84.
31 C.J. p 1061 note 91.

76. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
31 C.J. p 1061 note 92.

it is desired to avoid it, there must be some act of disaffirmance.[77]

Partial ratification or avoidance. Although it has been said that the ratification may be partial,[78] the general rule is that a contract must be wholly ratified or wholly avoided; the infant cannot split up an entire contract and ratify so much thereof as he considers to his advantage and avoid the balance, or hold the other party to what he contracted, while the infant escapes his own obligation.[79]

§ 74. —— Ratification of Contracts

a. In general
b. Time for ratification
c. Who may ratify
d. Requisites to valid ratification
e. What constitutes ratification
f. Effect of ratification

a. In General

An infant's voidable contract may be made binding by ratification, but a void contract is not subject to ratification. Ordinarily a ratification may be absolute or conditional.

A contract which is considered void is not subject to ratification,[80] although it has been held that an infant, after attaining majority, may adopt a void contract not inherently against public policy, by conduct clearly showing an intention to do so, and thereby create a new contract in terms the same as the void one.[81] A contract which is considered merely voidable is capable of being made binding by ratification.[82] An infant may also, after coming of age, ratify or affirm a contract or settlement made for his benefit[83] and, as discussed infra § 104, may sue on it, or enforce it, as though he had originally been a party to it; and he may affirm a contract irregularly made on his behalf,[84] or one made without his express authority.[85]

Conditional ratification. While it has been held that a conditional agreement to create a liability on account of a contract made during infancy is not a ratification of the original contract, although if the condition is performed it may become a new contract and as such binding,[86] ordinarily a ratification may be absolute or conditional;[87] and if it is the latter the terms of the condition must be shown to have happened or been complied with before an action can be sustained.[88]

An engagement to pay when able is a conditional promise, and the promisee, to avail himself of it, must prove the ability of the promisor.[89] It is not, however, necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid or an income from some source which would enable the party to pay would be sufficient.[90]

b. Time for Ratification

Ratification of his contract by an infant, to be effective, must take place after he arrives at majority.

77. Fla.—Lee v. Thompson, supra.
31 C.J. p 1061 note 93.

78. N.H.—Edgerly v. Shaw, 25 N.H. 514, 57 Am.D. 349.

79. Ky.—J. I. Case Threshing Mach. Co. v. Dulworth, 287 S.W. 994, 216 Ky. 637.
N.Y.—Anthony v. Syracuse University, 231 N.Y.S. 435, 224 App.Div. 487, reversing 223 N.Y.S. 796, 130 Misc. 249—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490.
Pa.—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 122 Pa. Super. 485.
S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 464, 176 S.C. 476, citing **Corpus Juris.**
Wis.—Roeder v. Simonson, 192 N.W. 477, 180 Wis. 155.
31 C.J. p 1061 note 96.

80. Okl.—Carlile v. National Oil & Development Co., 201 P. 377, 83 Okl. 217.
31 C.J. p 1062 note 99.
"The incapacity to contract bars ratification of it."—Ex parte Chan Hai, D.C.Wash., 11 F.2d 667, 668, affirmed, C.C.A., Chan Hei v. Weedin, 15 F.2d 296.

81. Okl.—Cosden Oil & Gas Co. v. Hendrickson, 221 P. 86, 96 Okl. 206.
"Adopt" and "avoid" distinguished
"Though sometimes used synonymously, from a strictly lexical standpoint, the word 'adopt' should be used to apply to void transactions, while the word 'ratify' should be limited to the final approval of a voidable transaction by one who theretofore had the optional right to relieve himself from its obligations."—Cosden Oil & Gas Co. v. Hendrickson, supra.

82. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.
Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Mo.—Anderson v. Middle States Utilities Co., 98 S.W.2d 163, 231 Mo. App. 129.
Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
31 C.J. p 1062 note 2.
Effect of ratification see infra subdivision f of this section.
Contract as void or voidable see supra § 71.

83. Minn.—Jentzen v. Pruter, 180 N.W. 1004, 148 Minn. 8.
Ohio.—Simpson v. Industrial Commission of Ohio, 173 N.E. 211, 36 Ohio App. 316.
Okl.—Shipman v. Conrad, 223 P. 183, 97 Okl. 216—Cosden Oil & Gas Co. v. Hendrickson, 221 P. 86, 96 Okl. 206.
31 C.J. p 1062 note 3.

84. S.C.—Bailey v. Boyce, 26 S.C.Eq. 187.

85. Mo.—Anderson v. Middle States Utilities Co., 98 S.W.2d 163, 231 Mo.App. 129.

86. Mich.—Minock v. Shortridge, 21 Mich. 304.

87. N.J.—Peacock v. Binder, 31 A. 215, 57 N.J.Law 374.
31 C.J. p 1063 note 39.

88. Mass.—Procter v. Sears, 4 Allen 95.
31 C.J. p 1063 note 40.

89. Colo.—Kendrick v. Neisz, 30 P. 245, 17 Colo. 506.
31 C.J. p 1063 note 42.

90. Mass.—Thompson v. Lay, 4 Pick. 48, 16 Am.D. 325.

The time for the ratification or affirmance of the contract or undertaking of an infant is after his arrival at majority;[91] prior to that time the rule that precludes his binding himself by his contracts also precludes him from binding himself by any subsequent ratification thereof.[92] A ratification during infancy stands on no better footing than the original contract itself, or any other contract of an infant.[93]

It has been held that as the executory contract of an infant gives no cause of action against him until it is ratified, as discussed supra § 73, a new promise or ratification made after the commencement of an action against him will not support that action;[94] but there is also authority to the contrary.[95]

c. Who May Ratify

The ratification of a contract is a right personal to the infant.

The ratification of a contract is a right personal to the infant.[96] Hence the ratification can be only by the infant himself,[97] his agent,[98] or, as is discussed in Executors and Administrators § 189, his personal representative.

d. Requisites to Valid Ratification

Acts or statements, to show ratification, must be voluntary; no new consideration is necessary, and, unless a statute requires a writing, ratification may be oral. Authorities differ as to whether the infant's knowledge that he was not bound, or could disaffirm, is essential to valid ratification.

The acts, declarations, or promises relied on to show ratification must have been voluntary, and not made under duress,[99] and not be the result of circumvention.[1] No new consideration is necessary for the late infant's ratification of his contract made during infancy,[2] even though the consideration received by the infant has been consumed or destroyed by him during infancy.[3]

Writing. Under some statutes the ratification of an infant's contract must be in writing;[4] but an infant, after attaining full age, may be estopped by his conduct to claim the benefit of such a statute.[5] In the absence of such a statutory requirement the ratification may be oral.[6] It has been held that a statute requiring the ratification to be in writing is not applicable where one seeks to recover back the consideration paid by him on a contract made while he was an infant, and ratification is set up as a defense to the action.[7]

Knowledge of nonliability. As the late infant is presumed to know his legal rights,[8] in some jurisdictions it has been held that it is not necessary to a ratification of his contract made during infancy that the act or promise relied on should have been done or made with actual knowledge that he was not bound, or had the right to disaffirm,[9] if the

91. Ala.—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 576, 21 Ala.App. 515.
Ky.—J. I. Case Threshing Mach. Co. v. Dulworth, 287 S.W. 994, 216 Ky. 637.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
Mich.—Milligan v. S. W. Strauss & Co., 256 N.W. 449, 450, 268 Mich. 317, citing **Corpus Juris.**
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
N.Y.—Wyatt v. Lortscher, 216 N.Y. S. 571, 217 App.Div. 224—9302 Broadwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.
31 C.J. p 1062 note 7.

92. Iowa.—Roeper v. Danese, 221 N. W. 506, 206 Iowa 964.
Mich.—Milligan v. S. W. Strauss & Co., 256 N.W. 449, 450, 268 Mich. 317, citing **Corpus Juris.**
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
31 C.J. p 1062 note 8.

93. Mich.—Milligan v. S. W. Strauss & Co., 256 N.W. 449, 450, 268 Mich. 317, citing **Corpus Juris.**
N.H.—Stack v. Cavanaugh, 30 A. 350, 67 N.H. 149.
"If . . . [the infant] 'affirms' during minority, he may yet disaffirm when he comes of age."—Haines v. Fitzgerald, 165 A. 52, 55, 108 Pa. Super. 290.
The fact that the infant has been emancipated does not affect the rule.—Milburn v. Wemple, 101 So. 132, 156 La. 759.

94. N.H.—Merriam v. Wilkins, 6 N. H. 432, 25 Am.D. 472.
31 C.J. p 1062 note 11.

95. Ky.—Best v. Givens, 3 B.Mon. 72.
Mo.—Snyder v. Gericke, 74 S.W. 377, 101 Mo.App. 647.

96. N.J.—Hermenau v. Zazzarino, 155 A. 459, 108 N.J.Eq. 451.
31 C.J. p 1062 note 15.

97. Ala.—Shropshire v. Burns, 46 Ala. 108.
N.J.—Hermenau v. Zazzarino, 155 A. 459, 108 N.J.Eq. 451.

98. Mich.—Carrel v. Potter, 23 Mich. 377.

99. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Me.—Sawyer Boot & Shoe Co. v. Braveman, 136 A. 290, 126 Me. 70.
31 C.J. p 1062 note 23, p 1063 note 24.

1. Me.—Sawyer Boot & Shoe Co. v. Braveman, supra.

2. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
31 C.J. p 1063 note 25.

3. Ga.—Bell v. Swainsboro Fertilizer Co., 76 S.E. 756, 12 Ga.App. 81.

4. S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.
31 C.J. p 1063 note 27.

5. S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.

6. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
31 C.J. p 1063 note 28.

7. Me.—Whitman v. Allen, 121 A. 160, 123 Me. 1, 36 A.L.R. 776—Hilton v. Shepherd, 42 A. 387, 92 Me. 160.

8. Conn.—Bestor v. Hickey, 41 A. 555, 71 Conn. 181.
Vt.—Hatch v. Hatch, 13 A. 791, 60 Vt. 160.

9. Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365, distinguishing Hinely v. Margaritz, 3 Pa. 428 and Curtin v. Patton, 11 Serg. & R., Pa., 305.
31 C.J. p 1063 note 31.

ratification is untainted with fraud or undue influence;[10] but a number of authorities declare it essential to the validity of the ratification that the late infant at the time of such ratification knew that the transaction was not binding on him.[11] Some of the cases, while admitting that the late infant is presumed to know his legal rights, limit the existence of such presumption to situations in which there is an absence of evidence to the contrary,[12] and consider such presumption rebuttable,[13] and hold that, while in order to ratify an infant's contract the late infant must have known that he was not bound thereby, it is presumed that he did know.[14]

e. What Constitutes Ratification

(1) In general
(2) Acquiescence or failure to disaffirm
(3) Retention or disposal of consideration; retention of benefits

(1) In General

An infant's ratification of his contract may be either express or implied, as long as his intention to be bound by the contract is clearly manifested. In the absence of statute, an executory contract is not ratified by a mere acknowledgment of the obligation or, ordinarily, by a part payment. The burden of proving a ratification rests on the person claiming under an infant's contract; and whether there has been a ratification ordinarily is a question of fact, or of mixed law and fact.

It has been said that acts of lesser solemnity or formality suffice for confirmation of an infant's contract than for its avoidance.[15] An infant's ratification of his contract may be either express[16] or implied, as by acts or conduct.[17] It must be by some act or declaration recognizing the legal existence and binding efficacy of the contract,[18] and inconsistent with any intention not to be bound;[19] and it has been said that ratification will be inferred from any action on the part of the infant manifesting his intention to regard the contract as binding.[20] The act, promise, or declaration relied on must have been done or made deliberately and understandingly,[21] and there must have been a clear intention to ratify,[22] unless the act relied on is of such a nature that it would be a fraud on the other party if the contract were not affirmed;[23] but no particular form of language is necessary to show a ratification.[24] The acts and conduct relied on for confirmation must often be determined from the facts and circumstances of each particular case.[25]

Reason for rule

"To require that one must have knowledge of a right to disaffirm in order to make an effective ratification of a voidable contract made in infancy would be inconsistent with the well-established rule that failure to disaffirm such contract within a reasonable time after coming of age terminates the privilege of disaffirmance."—Campbell v. Sears, Roebuck & Co., 161 A. 310, 312, 307 Pa. 365.

10. Ill.—Rubin v. Strandberg, 122 N.E. 808, 288 Ill. 64, 5 A.L.R. 133—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.

11. La.—International Accountants' Society v. Santana, 7 La.App. 594, affirmed 117 So. 768, 166 La. 671, 59 A.L.R. 276.
N.Y.—Farnum v. O'Neill, 252 N.Y.S. 900, 905, 141 Misc. 555, quoting **Corpus Juris.**
31 C.J. p 1063 note 33.
"In order to ratify a contract made during infancy, the act relied upon as a ratification must be performed with full knowledge of its consequences and with an express intent of ratifying what is known to be voidable. Where the same lack of knowledge exists at the time of the alleged ratification as existed at the time of the execution of the original contract or deed, the ratification is part of the original transaction and the ratification is ineffectual."—Swiney v. Womack, 175 N.E. 419, 422, 343 Ill. 278.

12. N.Y.—Taft v. Sergeant, 18 Barb. 320—Healy v. Kellogg, 145 N.Y.S. 943.

13. N.Y.—Healy v. Kellogg, supra.

14. Ind.—Ogborn v. Hoffman, 52 Ind. 439.
31 C.J. p 1063 note 36.

15. U.S.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, C.C.A.Conn., 287 F. 328, modifying, D.C., 270 F. 219.

16. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tenn.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
31 C.J. p 1063 note 46.

17. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tenn.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
31 C.J. p 1063 note 47.

18. Conn.—Benham v. Bishop, 9 Conn. 330, 23 Am.D. 358.
31 C.J. p 1064 note 48.

19. Ill.—Coe v. Moon, 102 N.E. 1074, 260 Ill. 76.
W.Va.—Hobbs v. Hinton Foundry, Machine & Plumbing Co., 82 S.E. 267, 74 W.Va. 443, Ann.Cas.1917D 410.

20. Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365—Cundiff v. Ertl, 47 Dauph.Co. 440.
Infant's demand in the alternative for damages, if consideration delivered under former contract could not be restored to him, did not constitute ratification of voidable contract.—Schoenung v. Gallet, 238 N.W. 852, 206 Wis. 52, 78 A.L.R. 387.

21. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
N.Y.—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.
31 C.J. p 1064 note 50.
Knowledge of nonliability see supra subdivision d of this section.

22. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278.
La.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.
N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722, affirming 297 N.Y.S. 79, 162 Misc. 751—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.
31 C.J. p 1064 note 51.

23. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
S.C.—Rainsford v. Rainsford, 17 S.C.Eq. 385.

24. Colo.—Kendrick v. Neisz, 30 P. 245, 17 Colo. 506.
31 C.J. p 1064 note 53.

25. W.Va.—Hobbs v. Hinton Foun-

An executory contract requires a greater degree of confirmatory conduct than one executed,[26] positive and explicit ratification being required.[27] It has been held that in order to constitute a ratification of an infant's executory contract for the payment of money there must be a direct promise,[28] which is obviously a sufficient ratification,[29] or such a direct confirmation as expressly ratifies the contract,[30] although not in the language of a formal promise;[31] but in this connection the acts of the late infant in favor of the contract may constitute as full a ratification as an express and unequivocal promise;[32] and where the declarations or acts of the individual, after coming of age, fairly and justly led to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part made during infancy, and intended to pay the debt then incurred, this is sufficient to constitute ratification.[33] Contracts simply for the payment of money or the performance of any personal duty have been distinguished from those which are connected with land or grow out of an interest therein, and an affirmation of the latter class may be implied.[34]

In the absence of statute providing otherwise,[35] a mere acknowledgment or admission of the debt, contract, or obligation is not sufficient,[36] even though accompanied by a declaration of an intention or desire to pay, where such declaration does not amount to a positive promise;[37] nor is the payment of interest sufficient.[38] Also, in the absence of statute providing otherwise,[39] even the payment of a part of the debt alone has been held not to constitute a ratification of the promise to pay the whole,[40] where there has been no intent to ratify;[41] part payment constitutes some evidence of an intention to ratify the contract,[42] but it is not conclusive.[43] However, a voluntary part payment with the full knowledge that the contract is not binding may constitute ratification.[44] A promise to pay the debt in part, or in any way other than that stipulated in the contract, does not amount to a ratification; and this is also true as to any kind of negotiation to renew or extend the old contract.[45]

Executed contract. In order to confirm an executed contract of an infant, all that appears to be necessary is to show some distinct acknowledgment or act indicating an intention to be bound by the contract; and if the infant continues, after coming of full age, to occupy a position which is explicable only on the supposition that he intends to stand by his contract, he will be considered to have ratified.[46]

dry, Machine & Plumbing Co., 82 S.E. 267, 74 W.Va. 443, Ann.Cas. 1917D 410.

26. W.Va.—Hobbs v. Hinton Foundry, Machine & Plumbing Co., supra.

27. Fla.—Lee v. Thompson, 168 So. 848, 850, 124 Fla. 494.
"It must be a direct promise to pay or discharge the contract in question."—Lee v. Thompson, supra.

28. Miss.—Edmunds v. Mister, 58 Miss. 765.
31 C.J. p 1064 note 56.

29. Mich.—Watzel v. Beardslee, 286 N.W. 813, 289 Mich. 522.
31 C.J. p 1064 note 57.
Promise to pay a debt of his father for necessaries is not a ratification of any contract of an infant.—Baron v. Guidry, 134 So. 410, 17 La.App. 32.

30. Vt.—Hatch v. Hatch, 13 A. 791, 60 Vt. 160.
31 C.J. p 1064 note 58.

31. Mo.—Baker v. Kennett, 54 Mo. 82.
31 C.J. p 1064 notes 58, 59.

32. N.C.—Long v. Miller, 93 N.C. 227.
31 C.J. p 1064 note 60.

33. Mass.—Tobey v. Wood, 123 Mass. 88, 25 Am.R. 27.
31 C.J. p 1064 note 61.

34. Mass.—Barnaby v. Barnaby, 1 Pick. 221.

35. **In Missouri** under the statute an acknowledgment of a debt made in writing constitutes a ratification.—Koerner v. Wilkinson, 70 S.W. 509, 96 Mo.App. 510.

36. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
La.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La. App. 594.
31 C.J. p 1065 note 64.

37. N.C.—Bresee v. Stanly, 25 S.E. 870, 119 N.C. 278.
31 C.J. p 1065 note 65.

38. Colo.—Kendrick v. Neisz, 30 P. 245, 17 Colo. 506.
Mass.—Whitney v. Dutch, 14 Mass. 457, 7 Am.D. 229.

39. **In Missouri**
(1) Under the statute a partial payment after majority constitutes a ratification of a contract made during infancy.—Koerner v. Wilkinson, 70 S.W. 509, 96 Mo.App. 510.
(2) However, where the maker of a note after attaining his majority directed his debtor to pay the amount of the debt to the holder of the note, believing that the holder had agreed to look to the debtor for payment, such direction and a subsequent payment by the debtor did not amount to a ratification by the maker within the statute.—Snyder v. Gericke, 74 S.W. 377, 101 Mo.App. 647.

40. La.—International Accountants Society v. Santana, 7 La.App. 594, affirmed 117 So. 768, 166 La. 671, 59 A.L.R. 276.
31 C.J. p 1065 note 68.

41. La.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.
N.Y.—Healy v. Kellogg, 145 N.Y.S. 943.

42. Mich.—Watzel v. Beardslee, 286 N.W. 813, 289 Mich. 522.
N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722, affirming 297 N.Y.S. 79, 162 Misc. 751—Healy v. Kellogg, 145 N.Y.S. 943.

43. N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722, affirming 297 N.Y.S. 79, 162 Misc. 751—Healy v. Kellogg, 145 N.Y.S. 943.

44. Tenn.—Johnson v. Steger, 7 Tenn.Civ.A. 317.

45. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.

46. Mich.—Durfee v. Abbott, 28 N.W. 521, 61 Mich. 471.
31 C.J. p 1065 note 73.

(2) Acquiescence or Failure to Disaffirm

According to most authorities, an infant's failure to disaffirm his contract within a reasonable time after reaching majority works a ratification thereof.

According to most authorities, and in some cases by force of statute,[47] the contract of an infant may become binding on him through his failure to disaffirm it within a reasonable time after reaching his majority, this being construed to work a ratification,[48] at least as to the executed provisions of the contract,[49] and at least where he received some benefit during infancy;[50] what is a reasonable time depends on the circumstances of the particular case,[51] and ordinarily is a question of fact.[52] On the other hand, there are cases denying that mere acquiescence and failure to disaffirm, or silence or inaction, will be construed as a ratification,[53] if short of the statutory period of limitations,[54] especially where the infant has not, since his majority, received any new consideration or retained any old consideration arising out of the original transaction.[55]

(3) Retention or Disposal of Consideration; Retention of Benefits

An infant's retention of the consideration or benefits of a contract, or his disposal of the consideration, after majority, may constitute a ratification.

Under statute, the retention or enjoyment by an infant, after attaining majority, of the consideration received by him under a contract made during his minority may constitute a ratification of the contract.[56] Apart from statute, ratification may be held to follow from retention for an unreasonable time;[57] and this principle has been applied in the case of executed contracts.[58] The infant's disposal of the consideration on attaining majority may have the same effect,[59] as may his retention of the benefits of the contract generally,[60] or his receipt of performance, in whole or in part, from the other party to the contract, after attaining his majority.[61] However, a contract by one who had no power to bind the infant's interest is not made good because he was benefited by it and accepted its fruits.[62]

f. Effect of Ratification

An infant's ratification of his contract makes it binding and enforceable; it ceases to be voidable.

The effect of an infant's ratification of his contract is to make it binding, and enforceable;[63] it

47. Kan.—McCullough v. Finley, 77 P. 696, 69 Kan. 705.
31 C.J. p 1065 note 76.

48. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Minn.—Kelly v. Furlong, 261 N.W. 460, 194 Minn. 465.
N.Y.—Horowitz v. Manufacturers' Trust Co., 268 N.Y.S. 729, 239 App. Div. 693—Levenberg v. Ludington, 274 N.Y.S. 193, 152 Misc. 735.
Ohio.—Herschede Motor Car Co. v. Bangham, 26 Ohio N.P.,N.S., 232.
Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365—Cundiff v. Ertl, 47 Dauph.Co. 440.
S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tenn.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
31 C.J. p 1065 note 75.
Time for avoidance see infra § 75 c.
"The protection which the law gives an infant is the right of rescission. His contracts which are not rescinded are construed like those of an adult, and, so long as he asserts contractual rights, he is bound by reciprocal obligations."—Bracy v. Miller, 278 S.W. 41, 43, 169 Ark. 1115, 43 A.L.R. 114.

49. N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App. Div. 266.

50. Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.

51. Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.
A delay for nearly a year after attaining majority before disaffirming contract for instruction in aviation was not a ratification of contract so as to preclude former minor from disaffirming contract, where contract was wholly executed and there was no evidence that earlier disaffirmance would have benefited defendant, and minor made no use of his education in aviation, which had been of no apparent benefit to him.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281.

52. Vt.—Spencer v. Lyman Falls Power Co., 196 A. 276, 109 Vt. 294.

53. N.J.—Majaika v. Jamison, 180 A. 402, 403, 115 N.J.Law 358, citing **Corpus Juris**—Mandell v. Passaic Nat. Bank & Trust Co., 14 A. 2d 523, 18 N.J.Misc. 455.
31 C.J. p 1065 note 77.
An infant is under no obligation to disaffirm
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., supra.

54. N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.

55. Mich.—Durfee v. Abbott, 28 N.W. 521, 61 Mich. 471.
N.H.—New Hampshire Mut. F. Ins. Co. v. Noyes, 32 N.H. 345.

56. Ga.—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203—Clyde v. Steger & Sons Piano Mfg. Co., 95 S.E. 734, 22 Ga.App. 192.
Transactions affecting property see supra § 40.

57. Philippine.—Lim v. Unchuan, 38 Philippine 552.

58. S.C.—Eubanks v. Peak, 18 S.C.L. 497.
31 C.J. p 1066 note 85.

59. Philippine.—Lim v. Unchuan, 38 Philippine 552.

60. Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.
Ohio.—Simpson v. Industrial Commission of Ohio, 173 N.E. 211, 36 Ohio App. 316.
Okl.—Shipman v. Conrad, 223 P. 183, 97 Okl. 216.

61. U.S.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.
Pa.—Cundiff v. Ertl, 47 Dauph.Co. 440.

62. Tex.—Stone v. Ellis, 7 S.W. 349, 69 Tex. 325.

63. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.
Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.

ceases to be voidable,[64] and cannot be subsequently repudiated or disaffirmed.[65] Ordinarily the ratification makes the contract valid from its date or inception,[66] and an action need not be brought on the new promise;[67] but it has been held that when the contract is executory the ratification does not relate back so as to render the contract good ab initio.[68]

The ratification of one contract does not operate to ratify a separate contract with a different person, although both are connected with the same transaction.[69]

§ 75. —— Avoidance of Contracts

a. In general
b. Who may avoid
c. Time for avoidance
d. What constitutes avoidance
e. Restoration of consideration or status quo
f. Effect of avoidance

a. In General

An infant may disaffirm regardless of his motive or the other party's good faith; but the privilege of disaffirmance should not serve as an instrument of oppression, or for another's advantage. Disaffirmance is said to be governed by equitable principles; and an infant may be estopped after majority to deny the validity of his contract.

The right of avoidance, referred to supra § 71, may be exercised regardless of the motive in doing so,[70] and is not affected by the presence of good faith on the part of the other party to the transaction;[71] and the contract may be avoided as against an assignee thereof.[72] However, with respect to contracts infancy is said to act as a shield and not as a sword,[73] and the privilege of disaffirmance should serve as a shield and not as an instrument of oppression. Also, it has been said that, where the reason for the rule permitting avoidance fails, the rule itself is not applicable,[74] that the right to disaffirm will not be extended beyond the required limits, and that it is not given to be exercised for the advantage of others than the infant.[75]

An infant disaffirming his contract need not do so on the express ground of infancy; no reason need be given for the disaffirmance.[76]

Equitable principles. Whether the disaffirmance of an infant's contract is sought in equity or at law, it is to be governed by equitable principles.[77]

Fraud has been said not to be a bar to the exercise of an infant's right to disaffirm;[78] but, as considered supra § 71, other authority has referred to certain cases of fraud as exceptions to the rule that an infant's contracts are voidable.

Mo.—Anderson v. Middle States Utilities Co., 98 S.W.2d 163, 231 Mo. App. 129.
Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
31 C.J. p 1066 note 1.
"The contract of an infant . . . if ratified, is as binding as if it had been made after he became 21 years of age."—J. I. Case Threshing Mach. Co. v. Dulworth, 287 S.W. 994, 996, 216 Ky. 637, citing **Corpus Juris.**

Repayment of costs of education
Where a minor son agreed to repay father for cost of education, ratification of promise on reaching majority made repayment an obligation on which father could invoke a legal remedy; and the legal effect of such ratification was not lessened by an agreement that part of debt to father was to be satisfied by defraying educational expenses of sister.—Watzel v. Beardslee, 286 N.W. 813, 289 Mich. 522.

64. N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
"Ratification does not create a right, but merely terminates the privilege which the law gives an infant of avoiding a contract entered into when under age."—Farnum v. O'Neill, 252 N.Y.S. 900, 904, 141 Misc. 555.

65. Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
31 C.J. p 1066 note 2.

66. Ala.—West v. Penny, 16 Ala. 186.
Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.

67. Ala.—West v. Penny, 16 Ala. 186.

68. Miss.—Edmunds v. Mister, 58 Miss. 765.
N.Y.—Hodges v. Hunt, 22 Barb. 150.

69. Ala.—American Freehold Land Mortg. Co. v. Dykes, 18 So. 292, 111 Ala. 178, 56 Am.S.R. 38.

70. Ky.—Forsee v. Forsee, 137 S.W. 836, 144 Ky. 169.

71. Miss.—Lake v. Perry, 49 So. 569, 95 Miss. 550.

72. Cal.—Spencer v. Collins, 104 P. 320, 156 Cal. 298, 20 Ann.Cas. 49.

73. Mo.—Gerkey v. Hampe, App., 274 S.W. 510.
N.Y.—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124—Egnczyk v. Rowland, 267 N.Y.S. 14, 148 Misc. 889.

74. Nev.—Schmidt v. Horton, 287 P. 274, 280, 52 Nev. 302, rehearing denied 290 P. 1023, 52 Nev. 479.

Advantageous contract with other infant
Where the other party to the contract "was at the time of his contract himself under the age of majority, and the contract entered into advantageous to all parties," the rule was held not applicable.—Schmidt v. Horton, supra.

75. Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

76. N.Y.—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App. Div. 490.

77. Ohio.—Smith v. Newark Shoe Co., 182 N.E. 347, 42 Ohio App. 437.

78. N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
False representation as to age see supra § 27.

Fraud in procuring contract
"If an infant is sued on a contract his fraud in procuring the execution of the contract will not prevent his disaffirmance."—Greensboro Morris Plan Co. v. Palmer, supra.

Estoppel. An infant, after attaining full age, may be estopped, by acquiescence, conduct, or failure to disaffirm within a reasonable time, from denying the validity of his contract.[79]

b. Who May Avoid

With some qualifications, the general rule is that an infant's right to avoid his contracts is a personal privilege of which no one can take advantage but the infant himself; the adult party to the contract cannot avoid it on the ground of the other party's infancy.

The general rule is that the right of an infant to avoid or disaffirm his contracts is a personal privilege[80] of which no one can take advantage but the infant himself,[81] if living and under no mental or physical disability,[82] or, in case of his death, his privies in blood or heirs[83] or, as considered in Executors and Administrators § 189, his personal representatives. However, the doctrine that disaffirmance is a personal privilege has been held not to apply to a contract of an infant which is disadvantageous to him,[84] in which case a guardian may disaffirm it;[85] and, more generally, a natural guardian or a guardian ad litem has been held empowered to disaffirm his child's or ward's contract when an attempt is made to enforce it during infancy.[86]

The contract is binding on the adult party thereto, unless avoided by the infant;[87] it cannot be avoided on the ground of the other party's infancy, by such person[88] or by any other person.[89]

c. Time for Avoidance

In most jurisdictions an infant may avoid his contracts, on the ground of infancy, during his minority, as well as after majority, and an infant failing to disaffirm within a reasonable time after reaching majority loses the right to do so; what is a reasonable time is ordinarily a question of fact.

79. U.S.—Walker v. Arkansas Nat. Bank, Mo., 256 F. 1, 167 C.C.A. 273.
S.C.—Jones v. Godwin, 198 S.E. 36, 187 S.C. 510—Beam v. McBrayer, 128 S.E. 34, 132 S.C. 72.
Tex.—Mitchell v. Higginbotham-Pearlstone Hardware Co., Civ.App., 38 S.W.2d 390.
Estoppel by acts during minority see supra §§ 26–27.
Time for avoidance see infra subdivision c of this section.

80. U.S.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, C.C.A.Conn., 287 F. 328, modifying, D.C., 270 F. 219.
Ala.—Forbes v. Loftin, 50 Ala. 396.
Fla.—Persons v. Pflum, 135 So. 878, 102 Fla. 402.
Ga.—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Iowa.—Kuehl v. Means, 218 N.W. 907, 206 Iowa 539, 58 A.L.R. 1359.
Ky.—Younce v. Duty, 265 S.W. 776, 205 Ky. 274.
Me.—Shaw v. Philbrick, 151 A. 423, 129 Me. 259, 74 A.L.R. 290.
N.Y.—In re Ziemba's Will, 1 N.Y.S. 2d 988, 165 Misc. 853.
N.D.—In re Campbell's Guardianship, 215 N.W. 913, 915, 56 N.D. 60, citing **Corpus Juris.**
Tex.—Cheney v. Cheney, Civ.App., 82 S.W.2d 1024, reversed on other grounds Cheney v. Coffey, 113 S. W.2d 162, 131 Tex. 212, rehearing denied 114 S.W.2d 533, 131 Tex. 212—Fort Worth & R. G. Ry. Co. v. Nabers, Civ.App., 288 S.W. 255.
31 C.J. p 1066 note 15.

81. Ala.—Forbes v. Loftin, 50 Ala. 396.
Cal.—Hastings v. Dollarhide, 24 Cal. 195.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
Miss.—Southern Automobile Co. v. Holifield, 111 So. 96, 145 Miss. 51.
Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, 41 A. L.R. 1092, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473.
31 C.J. p 1067 note 16.

82. N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.

83. Cal.—Hastings v. Dollarhide, 24 Cal. 195.
Miss.—Southern Automobile Co. v. Holifield, 111 So. 96, 145 Miss. 51.
Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, 41 A.L. R. 1092, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473.
31 C.J. p 1067 note 17.

84. Ohio.—Champa v. New York Central Mut. Relief Ass'n, 15 N.E. 2d 172, 174, 57 Ohio App. 522.

85. Ohio.—Champa v. New York Central Mut. Relief Ass'n, supra.
Disaffirmance by guardian generally see Guardian and Ward § 101 b.

86. Ark.—Crockett Motor Co. v. Thompson, 6 S.W.2d 834, 177 Ark. 495.

87. Ky.—Horney v. Downs, 272 S.W. 728, 209 Ky. 255—Younce v. Duty, 265 S.W. 776, 205 Ky. 274.
N.Y.—De Vito v. City of Mechanicville, 297 N.Y.S. 935, 251 App.Div. 514—Goldfinger v. Doherty, 276 N. Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.
Tenn.—Western Union Telegraph Co. v. Ausbrooks, 257 S.W. 858, 148 Tenn. 615, 33 A.L.R. 330.
31 C.J. p 1067 note 19.
Whether plaintiff or defendant, the infant may disaffirm.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App.Div. 349.

88. Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
N.Y.—De Vito v. City of Mechanicville, 297 N.Y.S. 935, 251 App.Div. 514.
S.C.—Hammassapoulo v. Hammassapoulo, 131 S.E. 319, 134 S.C. 54.
Tex.—Cheney v. Cheney, Civ.App., 82 S.W.2d 1024, reversed on other grounds Cheney v. Coffey, 113 S. W 2d 162, 131 Tex. 212, rehearing denied 114 S.W.2d 533, 131 Tex. 212.
31 C.J. p 1067 notes 19–20.
"Infancy is a shield which the infant may employ, but which the adult with whom he deals may not call into play to rescue himself from the obligations of contract with the infant."—Horney v. Downs, 272 S.W. 728, 209 Ky. 255.
Enjoyment of consideration until majority
"If one who contracts with a minor remains in possession of and enjoys the consideration inducing the contract until the minor attains his majority, he cannot then be heard to say that he will not further perform because the minor could not have been required to perform during the period of his infancy."—Bracy v. Miller, 278 S.W. 41, 43, 169 Ark. 1115, 43 A.L.R. 114.

89. U.S.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, C. C.A.Conn., 287 F. 328, modifying, D.C., 270 F. 219.
31 C.J. p 1067 note 21.
In action by infant for personal injury, in which she claimed special damages for medical attention, defendant can derive no benefit from the fact that the services were performed for an infant, since, in an action by the physician against the infant, infancy would be a personal defense, of which she might or might not avail herself, as she chose.—Forbes v. Loftin, 50 Ala. 396.

In some jurisdictions, it is held that an infant cannot disaffirm his voidable contract on the ground of his infancy while the infancy continues,[90] although he may disaffirm it on the ground of fraud.[91] In most jurisdictions, however, an infant has the right and power to avoid, on the ground of his infancy, his personal contracts during his minority,[92] as well as after he has attained full age;[93] and this rule has been held to apply generally to all contracts,[94] whether executory[95] or executed.[96]

At least one statute regulates the time within which an infant's contract may be disaffirmed.[97] In some jurisdictions, the contract may be repudiated, after the infant becomes of age, within the statute of limitations.[98] In other jurisdictions, it is held that the right to avoid the contract is not lost by mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intent to assent to the contract.[99]

In most jurisdictions it is held that the contract must be disaffirmed within a reasonable time after the infant reaches his majority, or the right to do so will be lost,[1] and in some jurisdictions this is the

90. Mich.—Milligan v. S. W. Straus & Co., 256 N.W. 449, 450, 268 Mich. 317, quoting **Corpus Juris.**
31 C.J. p 1067 note 22.

91. Mich.—Patterson v. Kasper, 148 N.W. 690, 182 Mich. 281, L.R.A. 1915A 1221—Stoll v. Hawks, 146 N.W. 229, 179 Mich. 571, 51 L.R.A., N.S., 28.

92. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing **Corpus Juris.**
Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 235 Ala. 275.
Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322.
Iowa.—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402.
Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178.
N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J. Misc. 455.
N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.
Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575—Hoffman v. Edson Co., 173 N.E. 307, 37 Ohio App. 262.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192, citing **Corpus Juris.**
31 C.J. p 1067 note 24.

Abandonment

An infant cannot, after coming of age, have specific performance of a contract entered into by him during his minority and treated by him, during that period, as abandoned.—Magee v. Hutton, 5 Pa.Dist. & Co. 129.

93. Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Crandall v. Coyne Electrical School, 256 Ill. App. 322.
Iowa.—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402.
Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383—Young v. McDaniel, 255 S.W. 854, 201 Ky. 65.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178.
N.Y.—In re Ziemba's Will, 1 N.Y.S.2d 988, 165 Misc. 853—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575—McKenzie v. Tellis, App., 47 N.E.2d 253—Hoffman v. Edson Co., 173 N.E. 307, 37 Ohio App. 262.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133—Haines v. Fitzgerald, 165 A. 52, 55, 108 Pa.Super. 290, citing **Corpus Juris.**
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192, citing **Corpus Juris.**
Tex.—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W.2d 281, error dismissed.
W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.
Wis.—Peterson v. Weimar, 194 N.W. 346, 181 Wis. 231.
31 C.J. p 1067 note 25.

94. Ala.—Ex parte McFerren, 63 So. 159, 184 Ala. 223, 47 L.R.A.,N.S., 543, Ann.Cas.1915B 672.

95. Ill.—Lewellyn v. Hawkins, 253 Ill.App. 368—Collins v. Peters Real Estate Improvement Corporation, 252 Ill.App. 348.
31 C.J. p 1068 note 27.

96. N.Y.—Sparandera v. Staten Island Garage, 193 N.Y.S. 392, 117 Misc. 780.
31 C.J. p 1068 note 28.

97. **In North Dakota,** under the statute, the contract of a minor cannot be disaffirmed after the expiration of one year from his majority.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60—Luce v. Jestrab, 97 N.W. 848, 12 N.D. 548.

98. Ill.—Wright v. Buchanan, 123 N.E. 53, 287 Ill. 468—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.

99. Fla.—Putnal v. Walker, 55 So. 844, 61 Fla. 720, 36 L.R.A.,N.S., 33.

1. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961, certiorari denied Allen v. Commissioner of Internal Revenue, 60 S.Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.
Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.
Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383.
Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281—Welch v. King, 181 N.E. 846, 279 Mass. 445.
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
N.Y.—Horowitz v. Manufacturers' Trust Co., 268 N.Y.S. 729, 239 App. Div. 693—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575—McKenzie v. Tellis, App., 47 N.E.2d 253—Hoffman v. Edson Co., 173 N.E. 307, 37 Ohio App. 262—Herschede Motor Car Co. v. Bangham, 26 Ohio N.P.,N.S., 232.

rule by force of statute.[2] What is a reasonable time is ordinarily a question of fact,[3] to be determined according to the circumstances of each case,[4] unless, it has been said, the matter is so clear one way or the other that the court can decide it as a matter of law.[5] A longer delay has been held permissible where the contract was wholly executed and an earlier disaffirmance would not have benefited the other party.[6] In determining the reasonableness of the period, the former infant's ignorance of his right to disaffirm has been declared immaterial;[7] but according to other authority, it is in all cases indicated by the courts that unless it is made to appear that the infant was fully advised of his rights after attaining his majority, the law deals leniently with him with respect to the time within which he may disaffirm.[8]

During trial. The court may, during the trial of an action by the other party to enforce the contract, allow the infant to rescind it, if it is reasonable for him so to do.[9]

d. What Constitutes Avoidance

An infant's contract may be avoided by any act, such as the pleading of infancy in an action based on the contract, showing unequivocally a renunciation thereof, or a disposition not to abide thereby.

An infant may avoid his act or contract by various means, according to the nature of the act and the circumstances of the case,[10] no particular form of disaffirmance,[11] or of words or acts,[12] being required by the decisions; but it may be laid down as

Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S.W. 2d 157, 119 Tex. 228—Mitchell v. Higginbotham-Pearlstone Hardware Co., Civ.App., 38 S.W.2d 390, citing **Corpus Juris**—Robinson v. Roquemore, Civ.App., 2 S.W.2d 873—Miller v. McAden, Civ.App., 253 S.W. 901.
31 C.J. p 1068 note 33.

"There is no definite rule as to how soon after an infant reaches majority he must exercise his privilege to disaffirm."—McKenzie v. Tellis, Ohio App., 47 N.E.2d 253, 255.

Executed contract
Minn.—Kelly v. Furlong, 261 N.W. 460, 194 Minn. 465.
N.Y.—Levenberg v. Ludington, 274 N.Y.S. 193, 152 Misc. 735.
Estoppel to deny validity of contract see supra subdivision a of this section.
Failure to disaffirm as ratification see supra § 74 e.

2. Iowa.—In re Guardianship of Fisher, 284 N.W. 821, 226 Iowa 596—First Nat. Bank v. Torkelson, 228 N.W. 655, 209 Iowa 659—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402.
Kan.—Brown v. Staab, 176 P. 113, 103 Kan. 611.

3. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961. Certiorari denied Allen v. Commission of Internal Revenue, 60 S.Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.
Minn.—Kelly v. Furlong, 261 N.W. 460, 194 Minn. 465—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873—Miller v. McAden, Civ.App., 253 S.W. 901.
31 C.J. p 1068 note 36.

4. U.S.—Commissioner of Internal Revenue v. Allen, C.C.A., 108 F.2d 961, certiorari denied Allen v. Commission of Internal Revenue, 60 S. Ct. 718, 309 U.S. 680, 84 L.Ed. 1023.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
Minn.—Kelly v. Furlong, 261 N.W. 460, 194 Minn. 465.
N.Y.—Horowitz v. Manufacturers' Trust Co., 268 N.Y.S. 729, 239 App. Div. 693.
Ohio.—McKenzie v. Tellis, App., 47 N.E.2d 253.
Tex.—Robinson v. Roquemore, Civ. App., 2 S.W.2d 873—Miller v. McAden, Civ.App., 253 S.W. 901.
31 C.J. p 1068 note 35.

Particular factors
(1) "No hard and fast rule can be stated regarding the precise time within which a minor may disaffirm his contract. Much depends upon the intelligence of the minor, his means of knowledge, the nature of and his relation to the transaction, and the purpose to be attained thereby."—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 1019, 64 Utah 364.

(2) "The situation of the parties, their accessibility to and observation of the subject-matter of the contract, and the opportunity of the minor affected to determine whether the contract so made was beneficial to him."—Miller v. McAden, Tex.Civ. App., 253 S.W. 901, 903.

Periods held reasonable
(1) Three months.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.

(2) "Nearly a year."—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 468, 300 Mass. 281.

(3) Two years and seven months.—Montgomery v. Erie R. Co., C.C.A. N.J., 97 F.2d 289.

(4) Other periods see 31 C.J. p 1068 note 35 [a].

Periods held unreasonable
(1) "Within two days of seven months."—Kelly v. Furlong, 261 N. W. 460, 461, 194 Minn. 465.

(2) "Three years lacking six weeks."—Levenberg v. Ludington, 274 N.Y.S. 193, 196, 152 Misc. 735.

(3) Other periods see 31 C.J. p 1068 note 35 [b].

5. Minn.—Kelly v. Furlong, 261 N. W. 460, 194 Minn. 465.
"There is great diversity among the decisions respecting the time within which disaffirmance is permitted as a matter of law."—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 1019, 64 Utah 364.
Eighteen days is held reasonable as a matter of law, where it does not appear that the status of the parties changed during that time or that the other party to the contract has been prejudiced by the lapse of time. —Gannon v. Manning, 42 App.D.C. 206.

6. Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281.

7. Minn.—Kelly v. Furlong, 261 N. W. 460, 194 Minn. 465.

8. Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.

9. N.H.—Wooldridge v. Lavoie, 104 A. 346, 79 N.H. 21.

10. Okl.—Grissom v. Beidleman, 129 P. 853, 35 Okl. 343, 41 L.R.A.,N.S., 411, Ann.Cas.1914D 599.
31 C.J. p 1068 note 40.

11. N.Y.—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App.Div. 490.

12. Mass.—Tracey v. Brown, 163 N.E. 885, 265 Mass. 163.

a general rule that any act showing unequivocally a renunciation of, or a disposition not to abide or be bound by, the contract made during minority is sufficient to avoid it.[13] Bringing a suit inconsistent with the contract, or to assert rights contrary to those existing thereunder, is an election to rescind or disaffirm,[14] although the bringing of a suit is not essential to an avoidance.[15] So also a plea of infancy in an action based on the contract is an election to avoid.[16] The obtaining of leave to prosecute a suit commenced by a next friend, after majority is attained, is a repudiation of the contract.[17]

The notice of rescission should be given to the party with whom the infant contracted, and not to an assignee.[18]

Oral disaffirmance may be sufficient.[19]

e. Restoration of Consideration or Status Quo

The general rule is that, to give effect to an infant's disaffirmance of his contract, the other party need not be placed in statu quo, nor, except as otherwise provided by statute, is a restoration or tender of what the other party parted with, or its value, a condition precedent to avoidance. Nevertheless the infant usually is required, after disaffirming, to return the consideration, if he can, or the part remaining in his possession or control, although if he has disposed of or wasted the consideration, or a part thereof, during infancy, he cannot be required to make good to the other party.

While there is apparently authority to the contrary,[20] the general rule is that, in order to give effect to an infant's disaffirmance of his contract, it is not necessary that the other party be placed in statu quo.[21] Hence, except as may be provided otherwise by statute, a restoration or tender of what the adult party to the contract has parted with, or its value, generally is not regarded as a condition precedent to avoidance,[22] unless at the time of disaffirmance the infant has the fruits of the contract in his possession or within his control;[23] but there also is authority to the contrary.[24] Nevertheless,

13. Mass.—Tracey v. Brown, supra.
N.Y.—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App.Div. 490.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404, 407, quoting **Corpus Juris.**
Vt.—McNaughton v. Granite City Auto Sales, 183 A. 340, 108 Vt. 130.
31 C.J. p 1068 note 41.

Change of beneficiary by minor insured held sufficient to revoke his oral assignment of life insurance policy.—Novosel v. Sun Life Assur. Co. of Canada, 57 P.2d 110, 111, 49 Wyo. 422, citing **Corpus Juris.**

14. Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.
N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 574, 217 App.Div. 224, citing **Corpus Juris.**
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.
31 C.J. p 1068 note 42.

Suit to recover infant's payment
N.Y.—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App.Div. 490.

15. Tenn.—White v. Flora, 2 Overt. 426.

16. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.
Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.
N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 574, 217 App.Div. 224, citing **Corpus Juris.**
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404, 407, quoting **Corpus Juris.**
Wis.—Olson v. Veum, 222 N.W. 233, 234, 197 Wis. 342, citing **Corpus Juris.**
31 C.J. p 1069 note 44.

17. D.C.—Carmody v. Patchell, 42 App.D.C. 426.

18. Cal.—Spencer v. Collins, 104 P. 320, 156 Cal. 298, 20 Ann.Cas. 49.
Mo.—Downing v. Stone, 47 Mo.App. 144.

19. Cal.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.

20. Conn.—Riley v. Mallory, 33 Conn. 201.

21. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 235 Ala. 275.
D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mass.—Kelly v. Halox, 152 N.E. 236, 256 Mass. 5.
N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224.
N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.
Ohio.—Eagle Dairy Co. v. Dylag, 168 N.E. 754, 33 Ohio App. 113—Herschede Motor Car Co. v. Bangham, 26 Ohio N.P.,N.S., 232.
31 C.J. p 1069 note 51.

Well-considered case
Conn.—Shutter v. Fudge, 143 A. 896, 108 Conn. 528.

22. D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281, stating New York law.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743—Eagleburger v. Shelton, App., 272 S.W. 698.
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 798, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116—In re Ferguson's Guardianship, 41 N.Y.S. 2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.
31 C.J. p 1069 notes 51–52.

But it has been said that "no rule of law has ever permitted a minor to avoid a contract of which he has enjoyed the benefits."—Pieri v. Nebbia, 34 N.Y.S.2d 317, 319, 178 Misc. 388.

Reason for rule

"If the infant is, in every case, bound to return the consideration which he received, or its equivalent, in order to avoid or rescind his contract, the protection afforded to him, as such infant, is seriously impaired, and may often be destroyed, for it is precisely because he is supposed to be improvident, and likely to misuse and squander what he receives, that his contracts are made voidable."—Shutter v. Fudge, 143 A. 896, 108 Conn. 528.

Restoration as condition on granting relief to infant see infra subdivision f of this section.

Transactions affecting property see supra § 46.

23. Ga.—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514.
Tex.—Ulmer v. John Hancock Mut. Life Ins. Co., Civ.App., 161 S.W.2d 862, error refused—Houston Land & Trust Co. v. Sheldon, Civ.App., 69 S.W.2d 796.

24. Ky.—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.

"In cases where no fraud is present an infant must restore what he has received under the contract to the extent of the benefits actually derived by him in order to disaffirm it after reaching majority."—Kelly

where he has exercised his right to repudiate the contract, the infant may be required to return the consideration, if he can, or such part thereof as still remains in his hands or under his control,[25] for the law will not allow him to repudiate his contract and at the same time retain its fruits or benefits as his own;[26] and it has been said that, as long as the infant retains and does not restore the consideration received by him, he may be treated as a trustee of the other party.[27]

Restoration in specie; lost or wasted consideration. While in some cases it has been asserted broadly that the infant on disaffirming his contract may be required to restore the consideration which he received or to allow or be liable for the benefit derived from whatever of the consideration cannot be restored in specie,[28] and in others that it is immaterial that the consideration has changed form since the making of the contract and is not on hand in specie,[29] ordinarily it is held that he may be required to return only such part of the consideration as remains in his hands in specie,[30] and that, where the infant had disposed of, lost, or wasted the consideration or a part thereof during his infancy, he cannot be required to make good to the other party the consideration, or such part,[31] but

v. Furlong, 261 N.W. 460, 461, 194 Minn. 465.

25. Conn.—Shutter v. Fudge, 143 A. 896, 897, 108 Conn. 528, quoting **Corpus Juris.**
Ga.—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514.
Ill.—General Motors Acceptance Corporation v. Vaughan, 193 N.E. 483, 358 Ill. 541.
Kan.—Weeks v. Berschauer, 36 P.2d 81, 83, 140 Kan. 244, citing **Corpus Juris.**
Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Hart v. Davidson, 120 S.W.2d 214, 274 Ky. 663—Walker v. Walker, 69 S.W.2d 716, 253 Ky. 378—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 744, citing **Corpus Juris.**
N.Y.—Casey v. Kastel, 142 N.E. 671, 237 N.Y. 305, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, affirming Casey v. Kastel, 195 N.Y.S. 848, 119 Misc. 116—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App.Div. 490—Egnaczyk v. Rowland, 267 N.Y.S. 14, 148 Misc. 889—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S. 2d 222, 266 App.Div. 1016.
N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.
Ohio.—Simpson v. Industrial Commission of Ohio, 173 N.E. 211, 36 Ohio App. 316.
Okl.—Shipman v. Conrad, 223 P. 183, 97 Okl. 216.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 122 Pa.Super. 485—Schoenberger v. Baur Baking Co., 16 Pa. Dist. & Co. 373.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192, citing **Corpus Juris**—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S. W.2d 157, 119 Tex. 228—State Bank v. Edwards, Civ.App., 245 S.W. 478.
Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.
31 C.J. p 1069 note 57.

26. Ga.—Holland v. Peerless Furniture Co., 3 S.E.2d 138, 60 Ga.App. 149.
N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
Ohio.—Simpson v. Industrial Commission of Ohio, 173 N.E. 211, 36 Ohio App. 316.
Okl.—Shipman v. Conrad, 223 P. 183, 97 Okl. 216.
Tex.—First State Bank v. Edwards, Civ.App., 245 S.W. 478.
31 C.J. p 1070 note 58.
Retention of benefits as ratification see supra § 74.

27. Md.—Monumental Bldg. Assoc. No. 2 v. Herman, 33 Md. 128.

28. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388.
31 C.J. p 1070 note 60.

29. Cal.—Whyte v. Rosencrantz, 56 P. 436, 123 Cal. 634, 69 Am.S.R. 90.
31 C.J. p 1070 note 61.

30. Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 1037, 173 Wash. 86, citing **Corpus Juris.**
W.Va.—Zink v. Gray, 142 S.E. 428, 430, 105 W.Va. 232, citing **Corpus Juris.**
31 C.J. p 1070 notes 62–63.

31. Conn.—Shutter v. Fudge, 143 A. 896, 108 Conn. 528.
Ill.—Shellabarger v. Jacobs, 45 N.E. 2d 184, 316 Ill.App. 191.
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281, stating New York law.
Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 744, citing **Corpus Juris**—Eagleburger v. Shelton, App., 272 S.W. 698.
N.Y.—Wyatt v. Lortscher, 216 N.Y. S. 571, 217 App.Div. 224—In re Ferguson's Guardianship, 41 N.Y. S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
Pa.—Schoenberger v. Baur Baking Co., 16 Pa.Dist. & Co. 373.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S. W.2d 157, 119 Tex. 228.
Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.
31 C.J. p 1070 note 63.

"Rule . . . followed by a great majority of the courts"
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 1037, 173 Wash. 86, citing **Corpus Juris.**
"Either at law or in equity"
Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 763, 235 Ala. 275.

Reason for rule

"The reason . . . is that the welfare of the infant is, in such cases, the first consideration of the law, and its policy is to protect the infant against improvidence and folly, because his mind and judgment are immature. The improvidence which the law contemplates is not simply the making of an unwise contract, but very often is the use or abuse to which the property is put after it is purchased. To deny

that this rule applies only when the consideration was wasted or disposed of during infancy, and not where it was wasted or disposed of after attaining majority.[32]

If the infant received no consideration or benefit under the contract, he cannot be made to account for any.[33]

Executory and executed contracts compared. Although some distinctions have been attempted to be made, in this respect, between executory and executed contracts,[34] the rule requiring restoration of consideration applies to both executed and executory contracts,[35] both at law and in equity.[36]

Under statute in some jurisdictions restoration of the consideration, or at least of that part thereof remaining within the infant's control, is made a condition precedent to the right to disaffirm,[37] the requirement being limited, under some statutes, to contracts entered into by infants who are over a certain age.[38] Under some statutes only a return of the identical money received by the infant, and not its equivalent, is required;[39] under others the consideration received by the infant, or its equivalent, is to be restored,[40] and it is not essential that there be an ability to restore the identical money received in order to sustain an action against the infant for money had and received.[41]

f. Effect of Avoidance

(1) In general
(2) Rights and remedies of infant
(3) Rights and remedies of adult party to contract
(4) Rights of other persons

(1) In General

The general rule is that an infant's disaffirmance of his contract nullifies it and renders it void ab initio; it cannot thereafter be resuscitated or ratified.

The general rule, which has been said to have its exceptions and limitations,[42] is that the disaffirmance of a contract made by an infant nullifies it and renders it void ab initio,[43] and that the rights of the parties are to be determined as though the contract had not been made,[44] the parties being restored to the status quo as far as possible.[45] Where an infant avoids his contract, it cannot thereafter be

the privilege or right of disaffirmance, when that improvidence or folly has become apparent, would permit the accomplishment of the very thing against which the statute seeks to provide."—Snodderly v. Brotherton, 21 P.2d 1036, 1037, 173 Wash. 86.

32. Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 1037, 173 Wash. 86, citing **Corpus Juris.**
31 C.J. p 1071 note 64.

33. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747.
Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.
31 C.J. p 1071 note 66.

34. Minn.—Braucht v. Graves-May Co., 99 N.W. 417, 92 Minn. 116.
31 C.J. p 1071 note 67.

35. Conn.—Shutter v. Fudge, 143 A. 896, 897, 108 Conn. 528, citing **Corpus Juris.**
31 C.J. p 1071 note 68.

36. Tenn.—Lane v. Dayton Coal & Iron Co., 48 S.W. 1094, 101 Tenn. 581.

37. Iowa.—First Nat. Bank v. Torkelson, 228 N.W. 655, 209 Iowa 659.
Kan.—Weeks v. Berschauer, 36 P.2d 41, 42, 140 Kan. 244, citing **Corpus Juris.**
31 C.J. p 1071 note 71.

38. N.D.—In re Campbell's Guardianship, 215 N.W. 913, 56 N.D. 60.
31 C.J. p 1071 note 72.
In California
(1) Under Civ.Code § 35, except in certain instances contract of minor under eighteen may be disaffirmed without return of consideration.—Tracy v. Gaudin, 285 P. 720, 104 Cal. App. 158.
(2) Under that section a minor over eighteen may disaffirm on restoring the consideration or its equivalent.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

39. Iowa.—Hawes v. Burlington, C. R. & N. R. Co., 20 N.W. 717, 64 Iowa 315.

40. **In California,** under Civ.Code, § 35, allowing a minor over eighteen to disaffirm his contract on restoring consideration or paying its equivalent, payment of the equivalent may be in cash, property, or benefits received, and equities running through entire transaction may be balanced by the court to determine whether consideration or its equivalent had been restored.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

41. Cal.—Whyte v. Rosencrantz, 56 P. 436, 123 Cal. 634, 69 Am.S.R. 90.

42. Mo.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178.

43. Miss.—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968, citing **Corpus Juris.**
Mo.—Windisch v. Farrow, App., 159 S.W.2d 392—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 925, 231 Mo.App. 1178, citing **Corpus Juris.**
N.C.—Coker v. Virginia-Carolina Joint Stock Land Bank, 178 S.E. 863, 208 N.C. 41.
Okl.—Leonard v. Tulsa Building & Loan Ass'n, 88 P.2d 875, 184 Okl. 558.
Tex.—O'Brien v. Smith, Civ.App., 118 S.W.2d 474, 478, citing **Corpus Juris**—Jones v. Teat, Civ.App., 57 S.W.2d 617, 620, citing **Corpus Juris.**
31 C.J. p 1072 note 76.
Contra Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747.

44. Miss.—Bell v. Smith, 124 So. 331, 155 Miss. 227—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968, citing **Corpus Juris.**
31 C.J. p 1072 note 76.
Release of sureties
Where an infant disaffirms his contract for the payment of money, his sureties on a note given therefor are released.—Patterson v. Cave, 61 Mo. 439.

45. Cal.—Freitas v. Cordeiro, 9 P.2d 882, 122 Cal.App. 319.
Tex.—Lockhart v. National Cash Register Co., Civ.App., 66 S.W.2d 796.
31 C.J. p 1069 note 56.

resuscitated or ratified.[46] After the contract has been disaffirmed, there can be no recovery for any services rendered by the other party thereunder who had notice of the disaffirmance.[47]

Disaffirmance, after reaching full age, of a contract made in infancy will discharge a trust lien given to secure payment of the consideration.[48]

(2) Rights and Remedies of Infant

An infant, on disaffirming his contract, is ordinarily entitled to recover what he parted with, or its value, pursuant thereto. While the authorities are not uniform, it appears that, where it is his duty, on disaffirmance, to return the consideration received by him, a return or tender is a condition precedent to relief sought by him, while such restoration or offer to restore is not a condition precedent to relief where he has no such duty, as where the consideration has been lost or wasted.

There has been said to be wide conflict in the authorities as to the rights of an infant in the disaffirmance of a contract.[49] With qualifications which will appear, the general rule is that, on the disaffirmance of a contract by an infant, he is, ordinarily, entitled to recover what he paid or parted with pursuant to such contract, or its value.[50] The infant may recover the consideration parted with, even though he has wasted or lost the consideration received by him,[51] or although it has depreciated, as through wear and tear,[52] or although it is of such a nature that it cannot be returned.[53] On the other hand, there is authority for the view that, where an infant has received the benefit and enjoyed the consideration of an executed or partly executed contract which was fair and reasonable, he cannot demand the return of that with which he parted.[54]

Nature of remedy. On disaffirmance of a contract and restoration of the consideration received by him, or a tender of such restoration, the infant may maintain replevin or trover, as the case may be, for the consideration parted with by him,[55] or a special action on the case for damages sustained by him,[56] or he may seek any equitable relief to which, in the circumstances, he may be entitled.[57] An infant's action for the recovery of payments made under a disaffirmed contract, although brought in law, has been said to be in its nature a substitute for a suit in equity, so that it is to be determined under equitable principles.[58]

46. Okl.—Grissom v. Beidleman, 129 P. 853, 35 Okl. 343, 41 L.R.A.,N.S., 411, Ann.Cas.1914D 599.
Pa.—Funk v. Wharen, 165 A. 513, 108 Pa.Super. 556.
31 C.J. p 1072 note 79.

47. Cal.—Spencer v. Collins, 104 P. 320, 156 Cal. 298, 20 Ann.Cas. 49.

48. N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.
W.Va.—Hobbs v. Hinton, Foundry, Machine & Plumbing Co., 82 S.E. 267, 74 W.Va. 443, Ann.Cas.1917D 410.

49. Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.

50. Ill.—Berryman v. Highway Trailer Co., 30 N.E.2d 761, 307 Ill. App. 480—Crandall v. Coyne Electrical School, 256 Ill.App. 322.
Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S.W. 2d 157, 119 Tex. 228.
Wis.—Peterson v. Weimar, 194 N.W. 346, 181 Wis. 231.
31 C.J. p 1072 notes 82, 83.

Reason for rule
"The right of the . . . infant to disaffirm and void his contract is an absolute and paramount right which carries with it the right to be placed in status quo relative thereto."—Mosko v. Forsythe, 76 P.2d 1106, 1108, 102 Colo. 115.

Advancement by another for infant's benefit
"Upon the rescission of a contract by a minor, upon becoming of age, he should recover only what he parted with, and not what another advanced or paid for his benefit."—McCarty-Green Motor Co. v. McCluncy, 121 So. 713, 714, 219 Ala. 211.

Tortious acquisition of property by infant held not to prevent recovery by him.—Ruehl v. Kardos, 198 N.Y.S. 412, 204 App.Div. 499.

Money paid under infant's direction
Money belonging to an infant and received from him by his brother under an agreement that the latter would use it for the support of their family, and so used by the brother before any revocation of the directions, cannot be recovered by the infant, on coming of age, from his brother.—Welch v. Welch, 103 Mass. 562.

In Louisiana, "the right to restitution is governed by the Civil Code, Arts 2221 et seq., under which losses resulting directly from the invalidity of the contract cannot be considered;" and, where minor entered contract and after majority sued for restitution of property, law governing minority when contract was made was held applicable.—Smith v. Hempen, 8 La.App. 120, 123.

51. Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281, stating New York law.
R.I.—McGucklan v. Carpenter, 110 A. 402, 43 R.I. 94, 16 A.L.R. 1473.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S.W. 2d 157, 119 Tex. 228.

52. Tex.—Prudential Building & Loan Ass'n v. Shaw, supra.

53. Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281, stating New York law.

Instruction
Mass.—Adamowski v. Curtiss-Wright Flying Service, supra.

54. N.Y.—Vichnes v. Transcontinental & Western Air, 18 N.Y.S.2d 603, 173 Misc. 631.
31 C.J. p 1073 note 91.

55. Me.—Towle v. Dresser, 73 Me. 252.
31 C.J. p 1072 note 88.

56. N.H.—Carr v. Clough, 26 N.H. 280, 59 Am.D. 345.

57. Ky.—Bryant v. Pottinger, 6 Bush. 473.
31 C.J. p 1072 note 90.

In California an action by a minor seeking to avoid his contract under Civ.Code § 35 is in equity.—Freitas v. Cordeiro, 9 P.2d 882, 122 Cal.App. 319—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

58. U.S.—Myers v. Hurley Motor Co., App.D.C., 47 S.Ct. 277, 273 U. S. 18, 71 L.Ed. 515, 50 A.L.R. 1181.

Conditions precedent to relief. The infant, on repudiation, has been required to make a demand before bringing action.[59]

Subject to such qualifications as have been or may be referred to with respect to the nature of the particular transaction, as discussed supra §§ 46–56 and infra §§ 76–86, the proper rule would seem to be that, where it is the duty of the infant, after disaffirming his contract, to return the consideration received by him, as considered supra subdivision e of this section, a return or tender of the consideration, or an accounting for benefits enjoyed, becomes a condition precedent to relief sought by him after his repudiation of the contract,[60] even though the relief is sought by him as defendant in an action or suit by the adult party,[61] and whether the proceeding is an action at law or a suit in equity.[62]

However, this condition precedent rule has not been applied, at least to its full extent, in some cases,[63] and it has been held that a minor disaffirming a contract need not put the other party in statu quo before beginning an action to recover what he parted with.[64] Thus restoration or offer to restore does not become a condition precedent where no duty is imposed on the infant to return the consideration after disaffirmance of the contract, as considered supra subdivision e of this section, as where the consideration has been lost, squandered, or wasted,[65] or where the infant has received no consideration or no benefit whatever from the contract.[66] Distinctions have been made between suits brought during infancy and suits brought after the infant has attained his majority, requiring restoration in the latter case, but not in the former;[67] between cases in which the infant was the "actor" in seeking relief, in which case restoration by him is required, and those in which he is sued and merely seeks, to interpose his plea of infancy, in which case it is not;[68] and between actions at law and suits in equity, requiring restoration where relief is sought in equity,[69] but not always where relief is sought at law;[70] and, indeed, it would seem that, where the infant seeks equity, he should be required to do equity.[71]

Even where return of or offer to return the consideration received by the infant is not a condition precedent to granting him relief, it has been held that, if the contract was free from any fraud, and fair and reasonable, except that what the infant paid was in excess of the value of what he received, he can recover only such excess,[72] and, generally, that the amount received by the infant will reduce his recovery pro tanto.[73]

If the contract was fraudulent or in bad faith, the infant is entitled to recover back all he has paid,

59. N.Y.—Nathan v. Herman N. Karp, 212 N.Y.S. 459, 214 App.Div. 490.

60. Ill.—General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 358 Ill. 541.
Kan.—Weeks v. Berschauer, 36 P.2d 81, 140 Kan. 244.
Me.—Utterson v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266—Nathan v. Herman N. Karp, Inc., 212 N.Y.S. 459, 214 App.Div. 490—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192.
Tex.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 225, rehearing denied 27 S.W. 2d 157, 119 Tex. 228.
Wis.—Schoenung v. Gallet, 238 N.W. 852, 854, 206 Wis. 52, 78 A.L.R. 387, citing **Corpus Juris.**
31 C.J. p 1072 note 83, p 1073 notes 91, 94.
Recovery on disaffirmance of contract of purchase see supra § 47.

61. N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266.
31 C.J. p 1073 note 96.

62. Mich.—Prout v. Wiley, 28 Mich. 164.
31 C.J. p 1073 note 97.

63. Pa.—Yubas v. Witaskis, 95 Pa. Super. 296.
31 C.J. p 1073 note 2.

64. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mass.—Kelly v. Halox, 152 N.E. 236, 256 Mass. 5.

65. Ill.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281, stating New York law.
31 C.J. p 1073 note 99.

66. Minn.—Johnson v. Northwestern Mut. Life Ins. Co., 57 N.W. 934, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187, reheard 59 N.W. 992, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187.
31 C.J. p 1073 note 1.

67. Mich.—Corey v. Burton, 32 Mich. 30.

68. Pa.—Yubas v. Witaskis, 95 Pa. Super. 296.
31 C.J. p 1073 notes 5, 6.

69. Ala.—Eureka Co. v. Edwards, 71 Ala. 248, 46 Am.R. 314—Manning v. Johnson, 26 Ala. 446, 62 Am.D. 732.

70. Ark.—St. Louis, Iron Mountain & Southern R. Co. v. Higgins, 44 Ark. 293.
31 C.J. p 1074 note 8.

71. U.S.—Myers v. Hurley Motor Co., App.D.C., 47 S.Ct. 277, 273 U. S. 18, 71 L.Ed. 515, 50 A.L.R. 1181.
N.Y.—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388—9302 Boardwalk Corporation v. Littman, 298 N.Y.S. 320, 164 Misc. 124.
31 C.J. p 1074 note 9.
False representation as to age
(1) Infant who induces execution of contract by falsely representing himself as adult must do equity on disaffirmance.—Smith v. Newark Shoe Co., 182 N.E. 347, 42 Ohio App. 437.
(2) False representation as to age generally see supra § 27.

72. N.H.—Heath v. Stevens, 48 N.H. 251.
31 C.J. p 1074 note 12.

73. Miss.—Thorn v. Holland, 40 So. 19, 87 Miss. 470.
Va.—Clinchfield Coal Corp. v. Couch, 104 S.E. 802, 127 Va. 634, 13 A.L.R. 398.
31 C.J. p 1074 note 13.

without returning the consideration received by him, except to the extent to which he still retains it, or a part, in specie.[74]

Time of tender; excusing tender. Where restoration of tender of the consideration is a condition precedent to relief, it has been held that it may be made on the trial as a condition of the judgment.[75] A tender sometimes may be excused,[76] as where it is known that it will be refused.[77] Refusal of tender will not deprive the infant of his right to recover.[78]

(3) Rights and Remedies of Adult Party to Contract

After an infant's disaffirmance of his contract, the adult party may recover what he parted with, if it is still in the infant's hands, but the infant is not liable for damages for failure to complete the contract.

Subject to such qualifications as have been or may be referred to with respect to the nature of the particular transaction, as discussed supra §§ 46–56 and infra §§ 76–86, after disaffirmance of his contract by an infant the adult party to the contract may recover what he has parted with, if the consideration is still in the hands of the infant.[79] The duty of an adult party as regards the return of the consideration received by him under a rescinded contract is treated in Contracts § 439.

After disaffirmance by an infant, the adult party to the contract may maintain replevin[80] or trover,[81] as the case may be, against the infant who has refused to restore the consideration received by him. If, however, the infant has parted with the possession of the consideration or property received by him, the adult may be remediless, provided no fraud has been practiced; if fraud has been practiced, a special action on the case may be sustained.[82] It has been held that whether the adult party possesses any remedy against an infant ward under a contract which the latter has disaffirmed must be determined by an ordinary action in a court of general jurisdiction.[83]

Ordinarily, on avoidance of the contract, the infant is not liable for damages for his failure to complete it.[84] The infant is not liable to an action of trespass for peaceably retaking into his possession the property parted with.[85]

(4) Rights of Other Persons

Anyone may take advantage of an infant's disaffirmance of his contract.

After an infant has disaffirmed his contract, anyone may take advantage of such disaffirmance.[86] A third person may take advantage of a plea of infancy made in the same action.[87]

The right to avoid a contract on the ground of infancy has been said not to be affected by the fact that the rights of third parties have supervened;[88] but it has also been held that, where an infant parts with property on a contract valid until disaffirmed, third parties becoming innocent purchasers for value are entitled to protection as such.[89]

74. Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476—Johnson v. Northwestern Mut. Life Ins. Co., 57 N.W. 934, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187, reheard 59 N.W. 992, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187.

75. Neb.—Star v. Watkins, 111 N.W. 363, 78 Neb. 610.
Wis.—Jones v. Valentines' School of Telegraphy, 99 N.W. 1043, 122 Wis. 318.

76. Cal.—Pereira v. Toscano, 258 P. 429, 431, 84 Cal.App. 526, quoting **Corpus Juris.**
31 C.J. p 1074 note 19.

77. Cal.—Pereira v. Toscano, supra, quoting **Corpus Juris.**
31 C.J. p 1074 note 20.

78. N.M.—Evants v. Taylor, 137 P. 583, 18 N.M. 371, 50 L.R.A.,N.S., 1113.

79. Pa.—General Casmir Pulaski Building & Loan Ass'n v. Provident Trust Co. of Philadelphia, 12 A.2d 336, 338 Pa. 198.
31 C.J. p 1074 note 23.

In Louisiana, "the Civil Code . . . provides for the protection of the minor's estate against obligations flowing or resulting from their actions, except in designated instances . . . and one asking to recoup his losses resulting from a contract with a minor, from the estate of the minor, must bring the obligation under one of the designated exceptions, or . . . show that his losses or funds or property received by the minor had enured to the benefit of his estate."—Smith v. Hempen, 8 La.App. 120, 123.

80. Mass.—Badger v. Phinney, 15 Mass. 359, 8 Am.D. 105.
31 C.J. p 1074 note 25.

81. N.H.—Carr v. Clough, 26 N.H. 280, 59 Am.D. 345—Fitts v. Hall, 9 N.H. 441.

82. N.H.—Carr v. Clough, 26 N.H. 280, 59 Am.D. 345.

83. N.Y.—In re Kamhi, 264 N.Y.S. 356, 147 Misc. 620.

84. U.S.—American Film Co. v. Reilly, C.C.A.Cal., 278 F. 147.
31 C.J. p 1075 note 32.

85. Conn.—Shipman v. Horton, 17 Conn. 481.
31 C.J. p 1075 note 33.

86. Ill.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.
Okl.—Grissom v. Beidleman, 129 P. 853, 35 Okl. 343, 41 L.R.A.,N.S., 411, Ann.Cas.1914D 599.
31 C.J. p 1075 note 34.

87. Tex.—Peck v. Cain, 63 S.W. 177, 27 Tex.Civ.App. 38.
31 C.J. p 1075 note 35.

88. Miss.—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968.

89. Iowa.—Kuehl v. Means, 218 N. W. 907, 911, 206 Iowa 539, 58 A. L.R. 1359.
"The right of a minor to pursue his property upon disaffirmance, into the hands of a third party, may not be predicated upon the mere fact of his minority. Such right of pursuit must be predicated, not only upon minority and disaffirmance, but upon some form of fraud chargeable to the third party. . . . If a minor seeks recourse beyond the party with whom he contracts, he must connect such third party in some manner by notice or otherwise with the contract which he disaffirms."—Kuehl v. Means, supra.

B. PARTICULAR TRANSACTIONS

§ 76. In General

a. Bonds and recognizances
b. Insurance
c. Releases
d. Suretyship
e. Obligations imposed or authorized by law
f. Contracts by person acting for infant
g. Miscellaneous transactions

a. Bonds and Recognizances

Except for particular types of bonds or recognizances, such as those given to secure his release from commitment or given by him in a bastardy proceeding, the bond or recognizance of an infant is ordinarily voidable by him.

In accordance with the general rule that an infant is not bound by his contracts, considered supra § 71, a bond or recognizance executed by an infant ordinarily is not binding on him,[90] although such an instrument is not entirely void,[91] but merely voidable,[92] and may become binding on him by his ratification thereof after attaining majority.[93] However, following the rule that an infant can bind himself for an obligation imposed on him by law, considered infra subdivision e of this section, it is held that an infant is liable on a bond executed in a bastardy proceeding against him requiring him to appear and defend or to indemnify the local authorities against the expense of maintaining his bastard child.[94] Also, a bond or recognizance executed by an infant to avoid imprisonment or to procure his release therefrom is by most authorities held binding on him,[95] either on the ground that it is a necessary[96] or because of statutes permitting him to enter into such an obligation,[97] although there is authority holding that an infant arrested on a capias ad respondendum for torts committed by him cannot execute a legal bond, but must either submit to imprisonment or, by the aid of a next friend, appear and execute a bond.[98]

b. Insurance

The general rule is that an insurance contract of an infant or his assignment of benefits thereunder is voidable by him, although subject to ratification after his majority; but in some jurisdictions an infant is by statute made competent to contract for insurance. There is some conflict of authority as to whether he may avoid his warranties or representations and at the same time recover on the policy, and as to whether, on disaffirming, he may recover the full amount of premiums paid by him without deduction for the cost of keeping the policy in force.

In the absence of statute otherwise providing, an infant's insurance contracts are not binding on him,[99] although such contracts are not void[1] but merely voidable, by the infant.[2] Such contracts are not for necessaries[3] under the rule that an infant's contracts for necessaries are binding on him, as discussed infra § 78. Insurer, however, is bound by contracts of insurance made with infants,[4] unless the contract is prohibited by statute.[5]

In some jurisdictions, by force of statute, an infant is deemed competent to contract for insurance on his life.[6] Under such a statute the agreement

90. S.D.—Smith v. Monserud, 235 N. W. 693, 58 S.D. 278.
Tenn.—National Union Fire Ins. Co. v. Winn, 3 Tenn.App. 60.
Vt.—Patchin v. Cromach, 13 Vt. 330.
Bond for necessaries see infra § 78 a.

91. N.Y.—Conroe v. Birdsall, 1 Johns.Cas. 127, 1 Am.D. 105.

Recognizance for costs
Vt.—Patchin v. Cromach, 13 Vt. 330.

92. U.S.—Sanger v. Hibbard, Ind.T., 104 F. 455, 43 C.C.A. 635.
31 C.J. p 1083 note 51, p 1081 note 2.

93. Ky.—Strong v. Duff, 15 S.W.2d 517, 228 Ky. 615, 70 A.L.R. 56.

Ratification by participating in litigation
A temporary injunction bond executed by an infant was effectively ratified by him where, after attaining majority, he gave his deposition in the case and actively participated in the litigation throughout its continuance,—Strong v. Duff, supra.

94. Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
31 C.J. p 1081 note 97.

95. Kan.—Weatherwax v. State, 17 Kan. 427.
Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
6 C.J. p 1010 note 1 [a].

96. Kan.—State v. Weatherwax, 12 Kan. 463.

97. Ky.—Starr v. Commonwealth, 7 Dana 243.
Mass.—McCall v. Parker, 13 Metc. 372, 46 Am.D. 735.
R.I.—Fagin v. Goggin, 12 R.I. 398.

98. Pa.—Vincent v. Warner, 16 Phila. 87.

99. Mass.—Simpson v. Prudential Ins. Co., 68 N.E. 673, 184 Mass. 348, 100 Am.S.R. 560, 63 L.R.A. 741.
31 C.J. p 1086 note 29.

1. Mich.—Wood v. Merchants Ins. Co. of Providence, 289 N.W. 259, 291 Mich. 573.
Mo.—Byrne v. Prudential Ins. Co. of America, 88 S.W.2d 344, reversing, App., 79 S.W.2d 789.
31 C.J. p 1086 note 32.

2. Mo.—Byrne v. Prudential Ins. Co. of America, supra.
Tex.—Carrizales v. W. O. W. Life Ins. Soc., 167 S.W.2d 509, 140 Tex. 259, affirming W. O. W. Life Ins. Soc. v. Carrizales, Civ.App., 159 S. W.2d 536.
Wyo.—Novosel v. Sun Life Assur. Co. of Canada, 55 P.2d 302, 306, 49 Wyo. 422, citing **Corpus Juris**, and rehearing denied 57 P.2d 110, 49 Wyo. 422.
31 C.J. p 1086 note 33—26 C.J. p 41 note 55.

3. D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
31 C.J. p 1086 note 30.

4. Mich.—Monaghan v. Agricultural Fire Ins. Co., 18 N.W. 797, 53 Mich. 238.

5. Mo.—Byrne v. Prudential Ins. Co. of America, 88 S.W.2d 344, reversing, App., 79 S.W.2d 789.

6. N.J.—Prahm v. Prudential Ins. Co., 116 A. 798, 97 N.J.Law 206.
31 C.J. p 1086 note 34.

of an infant insured to pay a premium, or to repay a person who advanced a premium, has been held valid.[7] A loan made by insurer to an insured infant is also valid and binding under such a statute.[8]

Warranties and representations. There is authority holding that an infant is not bound by his warranties in an application for life insurance,[9] that insurer cannot defend an action on the policy by proving their falsity,[10] and that the beneficiary is not estopped by such warranties in the absence of fraudulent conduct on his part.[11] This view has, however, been criticized and expressly disapproved,[12] and the better rule asserted to be that the beneficiary cannot disaffirm the warranty and still enforce the policy.[13] Particularly in a jurisdiction wherein by force of statute an infant may contract for insurance on his life, a false and fraudulent representation made by the insured infant in the application on which the policy is based constitutes a defense to an action on the policy.[14]

Ratification or failure to disaffirm. An infant may, after attaining majority, ratify a policy of insurance obtained by him during minority,[15] and such ratification occurs where the infant keeps the policy of insurance in his possession after coming of age and in a situation favorable to his estate to claim the benefits thereof in case of his death,[16] or where, after attaining majority, he submits details of his claim to insurer and brings an action to recover benefits under the policy.[17] The rule that an infant cannot split an entire contract, ratifying as much thereof as he considers to his advantage and avoiding the remainder, as discussed supra § 73, is applicable to insurance contracts.[18] Thus the infant, on ratifying, becomes subject to the provisions in the policy respecting the time of giving notice and proof of disability,[19] and, as shown supra note 13, he cannot, at least according to some authorities, avoid his warranties and at the same time enforce the beneficial provisions of the policy. After ratification the insurance contract becomes valid ab initio,[20] and the infant will be liable on a note given to pay the premium on the policy.[21] An infant may by his acts after majority lose any right to avoid his agent's cancellation, during the infant's minority, of a policy insuring the infant.[22]

7. N.Y.—Equitable Trust Co. v. Moss, 134 N.Y.S. 533, 149 App.Div. 615.
31 C.J. p 1086 note 35.

The Michigan statute permitting infants over a certain age to contract for life insurance expressly provides that its provisions "shall not have the effect of making a promissory note or other evidence of indebtedness given by such minor in payment of premium or premiums on such contracts for insurance valid, either in the hands of the original owner or subsequent purchaser thereof."—Wilson v. Prudential Ins. Co. of America, 267 N.W. 824, 276 Mich. 232.

Transaction held not contract for insurance
A written contract under which an infant borrowed money from an insurance broker for a premium on a life insurance policy, the amount borrowed plus a certain fee to be repaid to the broker out of a fund to be accumulated by the infant or, if the fund should be insufficient, then directly by the infant, is not a contract for insurance within the statute, against which a defense of infancy is unavailable, particularly in the absence of proof that the particular insurance was necessary for the infant and how much the broker was actually out of pocket.—United Thrift Plan v. Goldstein, 234 N.Y.S. 592, 134 Misc. 91.

8. Mich.—Wilson v. Prudential Ins. Co. of America, 267 N.W. 824, 276 Mich. 232.

Extended insurance affected by loan
The amount of the loan must be considered in computing the period of extended insurance in effect after failure to pay a premium.—Wilson v. Prudential Ins. Co. of America, supra.

9. R.I.—Keenan v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 146 A. 401, 50 R.I. 158—O'Rourke v. John Hancock Mut. Life Ins. Co., 50 A. 834, 23 R.I. 457, 91 Am.S.R. 643, 57 L.R.A. 496.

10. R.I.—Keenan v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 146 A. 401, 50 R.I. 158—O'Rourke v. John Hancock Mut. Life Ins. Co., 50 A. 834, 23 R.I. 457, 91 Am. S.R. 643, 57 L.R.A. 496.

11. R.I.—Keenan v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 146 A. 401, 50 R.I. 158.

12. Kan.—Metropolitan Life Ins. Co. v. Burbaker, 96 P. 62, 78 Kan. 146, 130 Am.S.R. 356, 18 L.R.A.,N.S., 362, 16 Ann.Cas. 267.
Tex.—Carrizales v. W. O. W. Life Ins. Soc., Com.App., 167 S.W.2d 509, 140 Tex. 259, affirming W. O. W. Life Ins. Soc. v. Carrizales, Civ. App., 159 S.W.2d 536.

13. Tex.—Carrizales v. W. O. W. Life Ins. Soc., 167 S.W.2d 509, 510, 140 Tex. 259, citing **Corpus Juris,** and affirming W. O. W. Life Ins. Soc. v. Carrizales, Civ.App., 159 S.W.2d 536.
31 C.J. p 1087 note 47.

Affirmative avoidance by insurer
Minority of insured does not preclude insurer from affirmatively avoiding a life insurance policy because of a fraudulent misrepresentation in the application as to the health of insured.—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 122 Pa.Super. 485.

14. N.J.—Prahm v. Prudential Ins. Co., 116 A. 798, 97 N.J.Law 206.

15. Ind.—Campbell v. Lindsay, 133 N.E. 751, 77 Ind.App. 413.
S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 176 S.C. 476.

16. Ind.—Campbell v. Lindsay, 133 N.E. 751, 77 Ind.App. 413.

17. S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 176 S.C. 476.

18. Pa.—Prudential Ins. Co. of America v. Ordonoff, 186 A. 391, 393, 122 Pa.Super. 485, citing **Corpus Juris.**
S.C.—Dickert v. Ætna Life Ins. Co., 180 S.E. 462, 176 S.C. 476.
31 C.J. p 1087 note 46.

19. S.C.—Dickert v. Ætna Life Ins. Co., supra.

20. S.C.—Dickert v. Ætna Life Ins. Co., supra.

21. Ind.—Campbell v. Lindsay, 133 N.E. 751, 77 Ind.App. 413.

22. Mass.—Chamberlain v. Employers' Liability Assur. Corporation, 194 N.E. 310, 289 Mass. 412.

Failure to act within reasonable time
Where an infant borrowed money and appointed the lender his agent with power to take out an automobile liability policy and to cancel it on the infant's failure to make pay-

An infant beneficiary of a policy on the life of an adult may, on attaining majority, elect to affirm or reject it,[23] but he may not affirm as to some of its terms and reject the remainder,[24] and by instituting suit after attaining majority he affirms the contract in all its provisions and with its burdens,[25] and hence assumes the burden of strict compliance with provisions relating to the time within which suit must be brought under the terms of the policy.[26]

Extent of recovery. Where the infant elects to rescind a contract of life insurance it has been held, in some jurisdictions, that he has a right to recover the whole amount of premiums paid by him thereon,[27] and that the insurance company is not entitled to retain out of the premiums the cost to it of keeping the policy in force.[28] However, there is also authority holding that, if the transaction is bona fide, he cannot recover the premiums which he has paid in, as far as such premiums cover the annual risk assumed by the company under its policy.[29] An infant who surrenders a life insurance policy is in any event entitled to recover its cash surrender value.[30]

Assignment of policy or benefits. An assignment of a policy of insurance by an infant is not binding on the infant and may be repudiated by him,[31] unless some equitable circumstances appear which should impress a trust on the contract, such as payment of premiums by the assignee to preserve his security for money advanced on the strength of the assignment. Voluntary payment of premiums by a parent do not create such an equitable interest in favor of the parent as to preclude his minor child, insured, from repudiating an alleged assignment of the policy to the parent.[32] A statute which allows infants to contract in certain respects as to insurance policies issued on their own lives has no application to contracts of an infant assigning the benefits of an insurance policy on the life of an adult in which the infant is named as beneficiary.[33] A change of beneficiary by an infant insured may be sufficient to revoke his oral assignment of the policy alleged to have been made to the original beneficiary, and it is not essential to the validity of such revocation that the infant have a guardian, give due notice to the opposite party, and have the revocation duly adjudged in court.[34]

c. Releases

A release by an infant is, with some exceptions, voidable by him and is disaffirmed by his commencement of an action on the released claim. Disaffirmance of the release is ordinarily required to be made within a reasonable time after his majority, and is subject to the usual rules respecting the necessity of restitution.

Ordinarily a release by an infant is not binding on him,[35] and, according to the decisions on the

ments on the loan, and where the infant made two payments on the loan after attaining majority but failed to make further payments, whereupon the lender canceled the policy, and where the infant, for more than a year after attaining majority, although notified of the proposed cancellation of the policy, took no steps to disaffirm either the contract, or the appointment of the agent, or the agent's cancellation of the policy, it was held that he did not exercise his privilege of disaffirmance within a reasonable time after he became of age and that the agent's cancellation of the policy was therefore effective.—Chamberlain v. Employers' Liability Assur. Corporation, supra.

23. U.S.—Reiter v. Ætna Life Ins. Co., D.C.N.J., 33 F.Supp. 159.

24. U.S.—Reiter v. Ætna Life Ins. Co., supra.

25. U.S.—Reiter v. Ætna Life Ins. Co., supra.

26. U.S.—Reiter v. Ætna Life Ins. Co., supra.

27. D.C.—Mutual Life Ins. Co. of New York v. Schiavone, 71 F.2d 980, 63 App.D.C. 257, 94 A.L.R. 962.
31 C.J. p 1086 note 36.

28. D.C.—Mutual Life Ins. Co. of New York v. Schiavone, supra.

Mass.—Simpson v. Prudential Ins. Co., 68 N.E. 673, 184 Mass. 348, 100 Am.S.R. 560, 63 L.R.A. 741.

29. Minn.—Johnson v. Northwestern Mut. Life Ins. Co., 57 N.W. 934, 56 Minn. 365, reheard 59 N.W. 992, 56 Minn. 365, 45 Am.S.R. 473, 26 L.R.A. 187.
31 C.J. p 1086 note 38.

30. Minn.—Johnson v. Northwestern Mut. Life Ins. Co., supra.

31. S.C.—Hack v. Metz, 176 S.E. 314, 173 S.C. 413, 95 A.L.R. 196.
Wyo.—Novosel v. Sun Life Assur. Co. of Canada, 55 P.2d 302, 306, 49 Wyo. 422, citing **Corpus Juris**, and rehearing denied 57 P.2d 110, 49 Wyo. 422.
31 C.J. p 1087 note 42.

32. Wyo.—Novosel v. Sun Life Assur. Co. of Canada, 55 P.2d 302, 49 Wyo. 422, rehearing denied 57 P.2d 110, 49 Wyo. 422.

33. Ohio.—Champa v. New York Central Mut. Relief Ass'n, 15 N.E.2d 172, 57 Ohio App. 522.

34. Wyo.—Novosel v. Sun Life Assur. Co. of Canada, 57 P.2d 110, 49 Wyo. 422, denying rehearing 55 P.2d 302, 49 Wyo. 422.

35. Ark.—St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293.
Me.—Harding v. Skolfield, 134 A. 567, 125 Me. 438.
Minn.—Gendreau v. North American Life & Casualty Co., 197 N.W. 257, 158 Minn. 259.
N.Y.—Application of Presler, 13 N.Y.S.2d 49, 171 Misc. 559.
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.
31 C.J. p 1087 note 61.
Compromises and settlements see infra § 80.

Emancipation does not prevent an infant from asserting the right to disaffirm his release.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.

Acknowledgment of satisfaction for assault

A statute providing that a person who is committed to jail for an assault or who is under recognizance to answer therefor may be discharged if the person injured acknowledges his receipt of satisfaction for the injury, and further providing that a civil action for such assault shall thereafter be barred, does not bar an infant from disaffirming a release given by him for an assault where it does not appear that the person released had been committed to jail or was under recognizance for his appearance before a higher court.—Dardzinski v. Angelus, 8 N.E.2d 816, 297 Mass. 288.

question, although it is not entirely void,[36] but merely voidable,[37] and subject to ratification by him after coming of age;[38] but it has been held that a release by an infant is void when it is injurious to him.[39] On the other hand, stipulations of release in a transaction otherwise beneficial to the infant have been upheld;[40] and, under statutes enlarging the power of infants to enter into particular kinds of contracts, such as contracts for insurance benefits, infants have been held empowered to execute binding releases of claims under such contracts.[41]

Bringing suit on the released claim is a disaffirmance of the release.[42] On disaffirmance the release becomes null and void,[43] and cannot be interposed or insisted on in bar of his rights.[44]

Time to disaffirm. An infant may disaffirm his release at any time during his minority,[45] but is not obliged to do so and may disaffirm after he attains majority,[46] provided the disaffirmance takes place within a reasonable time after the infant becomes of age.[47] Under some statutes an infant has a specified period after attaining majority within which to disaffirm a release.[48]

Restitution. In application of the rules governing the necessity of returning the consideration received, as discussed supra § 75, it has been held that, if the consideration is still in the hands of the late infant, it should be returned;[49] but, if it is spent or otherwise wasted, it need not be returned,[50] and that the burden is on the other party to the agreement to show that the consideration has not been expended if he insists on return of the consideration.[51] If the consideration for the release has been paid to the infant's parents, the infant is under no obligation to return the consideration in order to disaffirm the release.[52] If he has received consideration for the release of a claim for damages for personal injury, in assessing the damages credit must be given to the extent that he has been benefited by the consideration,[53] but such credit will

36. Mo.—Horine v. Horine, 11 Mo. 649.

37. Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365.
31 C.J. p 1087 note 61.

38. Pa.—Campbell v. Sears, Roebuck & Co., supra.

Ratification held shown
An infant ratified a release for personal injuries sustained in an automobile accident where, after reaching majority, she collected installments due under the agreement of release and for a long time attempted to collect other installments.—Campbell v. Sears, Roebuck & Co., supra.

39. Tenn.—Langford v. Frey, 8 Humphr. 443.
31 C.J. p 1087 note 63.

40. Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, 41 A.L.R. 1092, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473.

Free railway pass
Stipulations of release in a free railway pass given to an infant and used by him while searching for employment have been held binding on him as being within the rule upholding the validity of contracts of an infant which are beneficial to him.—Pinnell v. St. Louis-San Francisco Ry. Co., supra.

41. N.Y.—Sneze v. National Acc. Soc., 231 N.Y.S. 589, 133 Misc. 406.
31 C.J. p 1087 note 61 [a].
Insurance contracts of infants see supra subdivision b of this section.

42. Ark.—St. Louis, I. M. & S. R. Co. v. Higgins, 44 Ark. 293.
Ill.—Born v. Chicago City R. Co., 159 Ill.App. 585.
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.

43. Ill.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.

44. Ala.—Wilson v. Judge Pike County Ct., 18 Ala. 757.
Ariz.—Arizona Eastern R. Co. v. Carillo, 149 P. 313, 17 Ariz. 115.

Action for false imprisonment
A release obtained from an infant is no defense to an action by him for false imprisonment.—Therriault v. Breton, 95 A. 699, 114 Me. 137—25 C.J. p 527 note 18.

Claim for injuries and expenses
Waiver of liability executed by infant at the time of using a bobsled run maintained by state conservation department, which was subsequently disaffirmed by infant, was no bar to infant's claim against state for injuries sustained when sled tipped over, or to her father's claim for medical expenses and increased cost of infant's maintenance.—Cunningham v. State, 32 N.Y.S.2d 275, modified on other grounds 34 N.Y.S.2d 903, 264 App.Div. 811.

Recovery individually or for use of another
Where an infant who suffered personal injuries and property damage in an accident received money from insurer of the person alleged to have caused the accident and gave a release of all liability, and where the infant also received money from his own insurance company and subrogated such company to his property damage claim, the infant, on disaffirming the release, was not barred from recovering either individually or for the use of his insurance company.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.

45. Mass.—Dardzinski v. Angelus, 8 N.E.2d 816, 297 Mass. 288.
Time for avoidance of contracts generally see supra § 75.

46. Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.

47. Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365.

Three months after attaining majority may be a reasonable time within which to disaffirm.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.

Thirteen months have been held not a reasonable time, under circumstances, within which infant after reaching majority could disaffirm contract, made during infancy, releasing autoist who injured her from liability.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365.

48. Ill.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.

49. W.Va.—Britton v. South Penn Oil Co., 81 S.E. 525, 73 W.Va. 792.

50. Ill.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.
W.Va.—Britton v. South Penn Oil Co., 81 S.E. 525, 73 W.Va. 792.

51. W.Va.—Britton v. South Penn Oil Co., supra.

52. Ariz.—Arizona Eastern R. Co. v. Carillo, 149 P. 313, 17 Ariz. 115.

53. Va.—Clinchfield Coal Corp. v. Couch, 104 S.E. 802, 127 Va. 634, 13 A.L.R. 398.
31 C.J. p 1087 note 71.

not be given where the consideration was not paid to the infant.[54]

d. Suretyship

An infant's contract of suretyship is not binding on him unless he ratifies it after coming of age, and he does not become bound by mere inaction after attaining majority.

An infant's contract of suretyship is not binding on him,[55] unless he ratifies and confirms it after attaining his majority.[56] While there is early authority asserting that such a contract is void as a contract against the infant's interest,[57] it is generally considered that the contract is voidable only.[58] It has been held that affirmative action of the minor within a reasonable time after reaching majority is not required as a condition precedent to his right to avoid liability on a simple contract of suretyship,[59] and that the infant, although having attained majority, may wait until liability on the contract is sought to be enforced against him and then interpose his plea of infancy.[60]

e. Obligations Imposed or Authorized by Law

An infant's contract for the performance of obligations which are imposed on him by law, or which he is authorized by law to incur, is binding on him.

An infant may bind himself by contract for the performance of obligations which are imposed on him by law,[61] or which he is authorized by law to incur.[62] As otherwise expressed, he is liable on contracts which the law requires him to make or which it makes for him.[63] Thus an infant may obligate himself on certain bonds or recognizances for legal obligations, as discussed supra subdivision a of this section, or, in some jurisdictions, on insurance contracts, as discussed supra subdivision b of this section, and an infant father of a bastard child may bind himself by contract with the mother for its support, as considered in Bastards § 19a.

It has been held that the law will not allow an infant the privilege of avoiding his contract with an adult where the contract on the part of the adult was legally compulsory.[64]

f. Contracts by Person Acting for Infant

A contract imposing obligations on an infant made by one not authorized by law to act for him is voidable by the infant, even though he originally consented to the contract; but a contract in effect made by an adult, although intended for the ultimate benefit of an infant, is not subject to repudiation at the infant's election.

An infant is not bound by a contract made for him or in his name by another person purporting to act for him,[65] even if such person acts by his consent,[66] unless such person is in some manner authorized by law to act for him.[67] Such a contract is not void but voidable at the election of the infant,[68] and the other party to the contract cannot avoid his obligations thereunder on the ground that he had contracted with an infant.[69] An infant may disaffirm a contract entered into by an agent on his behalf without questioning the authority of the agent, in the same manner as though he had made the contract directly, and, where he does so, the transaction is not rendered void ab initio so that

54. Ky.—Interstate Coal Co. v. Love, 155 S.W. 746, 153 Ky. 323.

55. S.D.—Smith v. Monserud, 235 N.W. 693, 58 S.D. 278.
31 C.J. p 1090 note 19.

Reason for rule
"The general ground for the imposition of liability when it exists is that some benefit has been received by the minor. Where the minor contracts as a surety there is clearly no direct benefit to him."—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 659, 251 Mass. 383.

56. Mass.—J. G. Pierce Co. v. Wallace, supra.
S.C.—State v. Satterwhite, 20 S.C. 536.

57. Ala.—West v. Penny, 16 Ala. 186.
Conn.—Maples v. Wightman, 4 Conn. 376, 10 Am.D. 149.

Corpus Juris cited to show scarcity of authority on proposition.—Walker v. Stokes Bros. & Co., Tex. Civ.App., 262 S.W. 158, 159.

58. Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Tenn.—Human v. Hartsell, 148 S.W. 2d 634, 636, 24 Tenn.App. 678, citing **Corpus Juris.**
Tex.—Walker v. Stokes Bros. & Co., Civ.App., 262 S.W. 158, 160.
31 C.J. p 1090 note 20.

59. Tex.—Walker v. Stokes Bros. & Co., supra.

Reason for rule
"The holder of such obligation could not possibly suffer any detriment or inconvenience by the minor's inaction, and it could serve no useful purpose to require affirmative action on the minor's part."—Walker v. Stokes Bros. & Co., supra.

60. Tex.—Walker v. Stokes Bros. & Co., supra.

61. Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.
31 C.J. p 1081 notes 94, 95.

62. Ohio.—Mestetzko v. Elf Motor Co., supra.
31 C.J. p 1081 note 98.

63. Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.

64. Ky.—Watson v. Cross, 2 Duv. 147, 148.

Entertainment at inn
An infant cannot avoid liability for entertainment furnished him at an inn where the innkeeper was compelled, as a legal duty, to receive the infant as a guest.—Watson v. Cross, supra.

65. Mich.—O'Brien v. Loeb, 201 N. W. 488, 229 Mich. 405.
31 C.J. p 1081 note 5.

66. Miss.—Gambrel v. Harper, 74 So. 623, 113 Miss. 715.
Appointment of agent or attorney see supra § 23.

67. Mich.—O'Brien v. Loeb, 201 N. W. 488, 229 Mich. 405.
31 C.J. p 1081 note 7.

68. N.Y.—Goldfinger v. Doherty, 276 N.Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.
Tex.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605.

69. Tex.—Sims v. University Interscholastic League, supra.

the agent is deemed to have acted without any authority.[70]

A contract in fact and in legal effect made by an adult, although sought to be made on behalf, or for the ultimate benefit, of an infant, confers no rights on the infant, and cannot be repudiated by him so as to permit his recovery of amounts paid thereunder.[71]

g. Miscellaneous Transactions

The general rule that an infant's contracts are not binding on him has been applied to a great variety of transactions, including agreements relating to arbitration, hiring, dealings in securities, joint adventures, repairs, and joint obligations of an adult and an infant; but the rule is inapplicable to contracts entered into by him as agent or trustee for a competent person.

The liability incurred by an infant in transactions other than those considered supra this section, and infra §§ 77-86, has frequently been adjudicated, and transactions of an infant held to be voidable but not void include a voluntary trust agreement executed by an infant,[72] and a contract by which an infant charters a vessel.[73] The statement of an account by an infant is not binding on him,[74] unless it is ratified by him after he becomes of age.[75]

Arbitration. In accordance with the general rule that an infant is not bound on his contracts, as discussed supra § 71, an infant cannot ordinarily make a binding submission of a dispute to arbitration;[76] and, while it has been held that such a submission and an award thereon is not void but merely voidable,[77] and subject to ratification[78] or avoidance,[79] it has also been held that an award under such a submission is not binding on either party,[80] even though the award is in favor of the infant,[81] and the submission was under an order of court.[82] An infant who has entered into a contract of which a provision for arbitrating grievances arising thereunder is an inseparable part cannot affirm some of the provisions of the contract and at the same time reject the provision for arbitration.[83]

Contracts of hiring. An infant may repudiate a contract whereby he engages the services of another,[84] and he may disaffirm an executory contract of this nature during minority.[85] The right of an infant to disaffirm a contract whereby he employs an attorney is not dependent on his return of the precise consideration received;[86] but, under statutes making the return of the consideration or its equivalent a condition precedent to the right of an infant to disaffirm his contract, it is necessary, but sufficient, for an infant who disaffirms a contract with his attorney to pay the reasonable value of the attorney's services.[87]

Dealings in securities. A transaction in which an infant delivers cash or securities for investment or stock trading is voidable only and not void.[88] An

70. N.Y.—Goldfinger v. Doherty, 276 N.Y.S. 289, 153 Misc. 826, affirmed 280 N.Y.S. 778, 244 App.Div. 779.
Liability to third persons of agent acting for incompetent principal see Agency §§ 213, 215 d.

71. Mich.—Armitage v. Widoe, 36 Mich. 124.
31 C.J. p 1081 note 8.

72. Tenn.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
Ratification held shown
An infant ratified a voluntary trust agreement where, after attaining majority, he received and receipted for income, and also assigned some of the income.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.

73. U.S.—Sheafe v. Kimball, D.C.N.Y., 21 F.Cas.No.12,729a.
Mass.—Thompson v. Hamilton, 12 Pick. 425, 23 Am.D. 619.

74. Ark.—Dunavant v. Fields, 60 S.W. 420, 68 Ark. 534.
31 C.J. p 1082 note 24.

75. Ark.—Dunavant v. Fields, supra.
31 C.J. p 1082 note 28.

76. N.C.—Millsaps v. Estes, 46 S.E. 988, 134 N.C. 486, petition dismissed 50 S.E. 227, 137 N.C. 535, 107 Am.S.R. 496, 70 L.R.A. 170.
31 C.J. p 1089 note 4.
Submission to arbitration by:
Guardian see Guardian and Ward § 72.
Guardian ad litem or next friend see infra § 111.

77. N.C.—Millsaps v. Estes, 50 S.E. 227, 137 N.C. 535, 107 Am.S.R. 496, 70 L.R.A. 170, dismissing petition 46 S.E. 988, 134 N.C. 486.
Tex.—Chambers v. Ker, 24 S.W. 1118, 6 Tex.Civ.App. 373.

78. N.Y.—Jones v. Phœnix Bank, 8 N.Y. 228.
31 C.J. p 1089 note 6.

79. N.C.—Millsaps v. Estes, 50 S.E. 227, 137 N.C. 535, 107 Am.S.R. 496, 70 L.R.A. 170, dismissing petition 46 S.E. 988, 134 N.C. 486.
31 C.J. p 1089 note 7.

80. Mass.—Baker v. Lovett, 6 Mass. 78, 4 Am.D. 88.
Va.—Britton v. Williams, 6 Munf. 455, 20 Va. 455.

81. Va.—Britton v. Williams, supra.

82. Va.—Britton v. Williams, supra.
31 C.J. p 1089 note 10.

83. N.Y.—Farin v. Sercarz, 39 N.Y.S. 2d 482, 179 Misc. 490.

84. N.Y.—Lee v. Silver, 28 N.Y.S. 2d 333, 262 App.Div. 149, modifying 27 N.Y.S.2d 236, 176 Misc. 307, and affirmed 38 N.E.2d 233, 287 N.Y. 575—People, on Complaint of Meyers, v. Zimmerman, 6 N.Y.S. 2d 90.
Contracts for infant's services see infra § 85.

85. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.

86. Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.
Attorney's services as necessaries see infra § 78 b (4).
Reason for rule
It is manifestly impossible for the infant to restore the services themselves, the time and effort expended by the attorney, or the skill exercised by him in a particular matter. —Downey v. Northern Pac. Ry. Co., supra.

87. Cal.—Spencer v. Collins, 104 P. 320, 156 Cal. 298, 20 Ann.Cas. 49.

88. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Casey v. Kastel, 237 N.Y. 305, 142 N.E. 671, 31 A.L.R. 995, modifying Casey v. U. S. Steel Corporation, 200 N.Y.S. 790, 206 App.Div. 793, which affirmed Casey v. Kastel, 195

infant may recover money deposited by him with a broker as margin, and subsequently lost, in a stock transaction,[89] particularly where such a transaction is regarded as gambling,[90] and in a case of marginal trading where nothing has been received, nothing need be restored,[91] but it has been held that in an action for recovery of such money the broker may set up as a defense that he was induced to accept and disburse the money by the fraudulent representation of the infant as to his age.[92]

Joint adventures. An infant cannot ordinarily enter into a binding contract or agreement of joint adventure.[93] However, on the general principle that infancy is to be used as a shield and not for purposes of oppression, the plea of infancy has been held unavailable as a ground for an infant's avoidance of his obligations under a joint adventure undertaken with other infants and successfully carried out.[94]

Repairs to infant's property. An infant is not liable for repairs made to his property on orders of a third person without his knowledge, and he is entitled to recover such property without paying for such repairs.[95] On the other hand it has been held, under the doctrine that infancy is to be used as a shield and not as a sword, that an infant who orders repairs on his property cannot refuse to pay therefor and at the same time demand that the repairer turn the property over to him.[96]

Infant acting as agent or trustee. Since an infant may act as agent or trustee, as discussed supra § 21, the general rule that an infant's contracts are voidable and may be disaffirmed by him, as considered supra §§ 71, 75, has no application where the infant contracts in such capacity.[97]

Contracts jointly with adults. Where an infant and an adult enter into a joint contract or assume a joint liability, it is generally considered that, although the infant may avoid the transaction,[98] the adult is bound.[99] However, it has been held that a contract for the sale of land owned jointly by an infant and another, being illegal as to the infant, is bad altogether, as the parts cannot be separated,[1] and that, therefore, damages cannot be recovered of either party for a breach of the contract.[2] Where an infant engaged in business is liable on contracts arising therefrom, as discussed infra § 81, an infant so engaged who, to the extent that he has received the benefits of the transaction, pays an obligation incurred by him jointly with another cannot be held liable for the benefits conferred on the adult.[3] It has been intimated that, where there has been confirmation by the infant after attaining majority whereby his liability has become fixed as a joint contractor, a release of the infant would release both.[4]

Agreement to marry. The capacity of an infant to enter into a contract to marry is treated in Breach of Marriage Promise § 2 b.

§ 77. Bailments

A contract of bailment does not bind an infant.

An infant cannot be held liable for breach of his contract of bailment.[5]

§ 78. Contracts for Necessaries

a. In general

N.Y.S. 848, 119 Misc. 116—Fishman v. All American Sportwear Co., 4 N.Y.S.2d 48, 167 Misc. 861.

89. N.Y.—Mordecai v. Pearl, 18 N.Y.S. 543, 63 Hun 553, affirmed 32 N.E. 1014, 136 N.Y. 625.
31 C.J. p 1086 note 24.
Subscription to corporate stock see infra § 86.

90. Pa.—Ruchizky v. De Haven, 97 Pa. 202, reversing 7 Wkly N.C. 311.
Infant's gambling contracts generally see infra § 83.
Purchase on margin as gambling see Gaming § 11.

91. N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Mordecai v. Pearl, 18 N.Y.S. 543, 63 Hun 553, affirmed 32 N.E. 1014, 136 N.Y. 625.

92. N.Y.—Falk v. MacMasters, 188 N.Y.S. 795, 197 App.Div. 357.

93. La.—Gott v. Scott, App., 199 So. 460.
Partnership agreements see infra § 82.

94. Nev.—Schmidt v. Horton, 287 P. 274, 52 Nev. 302, rehearing denied 290 P. 1023, 52 Nev. 479.

Mining claim

Where three minors made a joint adventure agreement relating to locating mining claims, two of them, after locating claims, were held not entitled to avoid, on the ground of their infancy, obligations to the third who performed labor and furnished equipment.—Schmidt v. Horton, supra.

95. Tenn.—McDonald v. Cady, 9 Tenn.App. 354.

96. N.Y.—Egnaczyk v. Rowland, 267 N.Y.S. 14, 148 Misc. 889.

97. Iowa.—Des Moines Ins. Co. v. McIntire, 68 N.W. 565, 99 Iowa 50.
31 C.J. p 1082 note 14.

98. Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.
31 C.J. p 1082 note 15.

99. Pa.—Wharen v. Funk, supra.
31 C.J. p 1082 note 16.

1. Ky.—Clark v. Stanhope, 59 S.W. 856, 109 Ky. 521.

2. Ky.—Clark v. Stanhope, supra.

3. Ga.—James v. Sasser, 60 S.E. 329, 3 Ga.App. 568.
31 C.J. p 1082 note 18.

4. Ind.—Kirby v. Cannon, 9 Ind. 371.

5. Tex.—Miller v. Peck, Civ.App., 258 S.W. 887.

Transaction held not bailment

Where one infant, who had been intrusted by owner with the possession of an automobile, delivered the automobile to another infant, the other infant was not a bailee of the owner, in view of incapacity of infants to enter into contractual relations.—Miller v. Peck, supra.

b. What are necessaries
c. Loans and encumbrances for necessaries

a. In General

An infant is liable for the reasonable value of necessaries supplied to him or his family, unless his parent or guardian has already made provision for the articles furnished. He is liable only for necessaries already furnished, and may disaffirm an executory agreement to purchase necessaries in the future.

The general rule is well settled that an infant can bind himself, and is liable, for necessaries furnished him[6] or his family;[7] the law implies an obligation on his part to pay for such necessaries out of his own property,[8] the ability to incur such liability being deemed a benefit rather than a disadvantage to him.[9] However, to render the infant liable, the necessaries must have been furnished to him on his own credit and not on the credit of others;[10] and the law implies no promise on the infant's part to pay for necessaries furnished where he was a member of the family of the person furnishing the necessaries.[11] Where, pursuant to statute, an infant ward on his marriage becomes intrusted with the management of his estate, his power to contract for necessaries extends to such contracts as are necessary to secure the preservation and beneficial enjoyment of the estate.[12]

Infant having parent or guardian, or already supplied with necessaries. Since, as a rule, the parent is liable for the support of his child, discussed in the C.J.S. title Parent and Child § 15, also 46 C.J. p 1256 note 87-p 1258 note 5, and the guardian for the support of his ward, discussed in Guardian and Ward § 61, an infant who has a parent or guardian, or one who stands in loco parentis, who provides him, or is able and willing to provide him, with everything that appears to be necessary and proper, cannot bind himself and is not liable to a stranger even for necessaries,[13] although

6. U.S.—Ex parte Chan Hai, D.C. Wash., 11 F.2d 667, affirmed, C.C.A., Chan Hai v. Weedin, 15 F.2d 296.
Ala.—Ragan v. Williams, 127 So. 190, 191, 220 Ala. 590, 68 A.L.R. 1182, citing **Corpus Juris**—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 576, 21 Ala.App. 515.
Alaska.—The Emporium v. Boyle, 7 Alaska 80.
Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.
Ark.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Conn.—Wells v. Radville, 153 A. 154, 112 Conn. 459.
Del.—King v. Cordrey, 177 A. 303, 305, 6 W.W.Harr. 418, citing **Corpus Juris.**
Fla.—Lee v. Thompson, 168 So. 848, 124 Fla. 494.
Ill.—Hunter v. Egolf Motor Co., 268 Ill.App. 1.
Iowa.—First Nat. Bank v. Torkelson, 228 N.W. 655, 209 Iowa 659.
Ky.—Sumner v. Hall, 116 S.W.2d 309, 273 Ky. 138.
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mass.—J. G. Pierce Co. v. Wallace, 146 N.E. 658, 251 Mass. 383.
Miss.—Mellott v. Love, 119 So. 913, 152 Miss. 860, 64 A.L.R. 968—Greene v. Greene, 110 So. 218, 145 Miss. 87, 49 A.L.R. 565.
Mo.—Fenn v. Hart Dairy Co., 83 S.W.2d 120, 231 Mo.App. 1005.
Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App.Div. 224—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.
N.C.—Cole v. Wagner, 150 S.E. 339, 192 N.C. 692.
Ohio.—Mestezko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575—Hoffman v. Edson Co., 173 N.E. 307, 37 Ohio App. 262.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404—Provident Trust Co. v. Hofstetter, 28 Del.Co. 58—Osipovitch v. Golnick, 44 Lack.Jur. 145.
R.I.—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.
Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569—Bentley v. Haiman's Ready-to-Wear, 1 Tenn.App. 280.
Wash.—McAllister v. Saginaw Timber Co., 18 P.2d 41, 43, 171 Wash. 448, citing **Corpus Juris.**
31 C.J. p 1075 note 41.

If the infant has paid for necessaries supplied he cannot recover the amount paid.—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.

7. Ala.—Ragan v. Williams, 127 So. 190, 191, 220 Ala. 590, 68 A.L.R. 1182, citing **Corpus Juris.**
Del.—King v. Cordrey, 177 A. 303, 305, 6 W.W.Harr. 418, citing **Corpus Juris.**
31 C.J. p 1075 note 42.

8. Ala.—Ragan v. Williams, 127 So. 190, 191, 220 Ala. 590, 68 A.L.R. 1182, citing **Corpus Juris.**
31 C.J. p 1075 note 38, p 1076 note 65.

9. Ala.—Ragan v. Williams, supra, citing **Corpus Juris.**
31 C.J. p 1075 note 38.

10. Mo.—Mackey v. Shreckengaust, App., 27 S.W.2d 752, 753, citing **Corpus Juris.**
31 C.J. p 1076 note 51.

11. Ind.—Wright v. McLarinan, 92 Ind. 103.
Parent's duty to maintain child having independent means see the C.J.S. title Parent and Child § 15, also 46 C.J. p 1261 note 54-p 1262 note 61.

12. Miss.—Chapman v. Hughes, 61 Miss. 339.

13. Mass.—L. P. Hollander Co. v. Porter, 166 N.E. 724, 267 Mass. 378.
Mich.—Westrate v. Schipper, 279 N.W. 870, 284 Mich. 383.
Pa.—In re Springer's Estate, 3 Fay. L.J. 234.
Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.
Tex.—Bowman v. Bowman, Civ.App., 96 S.W.2d 667, 669, quoting **Corpus Juris.**
31 C.J. p 1077 note 79.
Liability of parent to third persons for necessaries see the C.J.S. title Parent and Child § 16, also 46 C.J. p 1262 note 65-p 1263 note 77.

Parent's recognition of liability

(1) Liability cannot be fastened on the infant based on the alleged financial inability of the parent to pay for necessaries where the parent has recognized an obligation arising from a bill for necessaries, has paid a large part of the bill, and the case is not one of indifferent failure or refusal on the part of the parent to provide necessaries.—Foster v. Ad-

the mere fact that an infant has a father, mother, or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything toward his care or support.[14] Indeed, if the infant is already supplied with articles of the same or a similar character as those furnished to him, he cannot be held liable on the theory of necessaries although the articles are such as would be necessary if the infant had not been supplied with them,[15] no matter by whom or how he has been supplied,[16] and regardless of whether or not the person supplying the articles knew of the existing supply.[17] Thus it is incumbent on a tradesman before he trusts an infant for what may appear to be necessaries to inquire whether he is already provided, as otherwise he trusts the infant at his peril.[18]

An infant who has an allowance from the court, his guardian, or any other source, of a sum sufficient to supply himself with necessaries suitable to his fortune and condition is not liable for alleged necessaries supplied in an amount in excess of the allowance.[19]

Necessaries to be furnished in the future. To render an infant liable for necessaries they must have been actually furnished;[20] hence he cannot make a binding executory agreement to purchase necessaries or to pay for necessaries to be supplied him,[21] and he may disaffirm such contract or agreement before it has been performed[22] and recover the unearned portion of the money paid in advance.[23]

Amount of recovery; express contracts. The liability of an infant for necessaries is limited to the reasonable value thereof,[24] and is not fixed by what the infant may have promised to pay.[25]

According to some authorities, an infant who has made an express contract for necessaries can-

cock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.

(2) A statute declaring valid a contract or quasi contract by a minor when the minor has no tutor, or when his tutor neglects to provide him with necessaries for his support or education, has no application where the father has not refused to supply the minor with necessaries and has recognized his individual liability for the particular necessaries by giving his note for the amount due.—Baron v. Guidry, 134 So. 410, 17 La.App. 32.

Statutes prohibiting infants from disaffirming contracts for necessaries when not living under the care of a parent or guardian do not prevent a minor living under the care of a parent or guardian from making a voidable contract for necessaries.—Aubel v. Sosso, 236 P. 319, 72 Cal. App. 57.

14. N.Y.—In re Taylor, 275 N.Y.S. 934, 938, 153 Misc. 673, citing **Corpus Juris.**
N.C.—Cole v. Wagner, 150 S.E. 339, 340, 192 N.C. 692, quoting **Corpus Juris.**
31 C.J. p 1077 note 81.

Consent of guardian
It has been held that an infant is bound for necessaries purchased by him with the consent of his guardian, express or implied.—Watson v. Hensel, 7 Watts, Pa., 344—Rundel v. Keeler, 7 Watts, Pa., 237.

Statutory restriction against contract of ward
A statute, providing that no contract of any nature whatever, made by a person under guardianship, after the appointment and during the continuance of the guardianship, shall be valid in law, has been held not to preclude a recovery for the reasonable value of necessaries furnished an infant ward under an implied contract.—McConnell v. McConnell, 74 A. 875, 75 N.H. 385.

Recovery of damages for injury
(1) An infant who collected a judgment for injuries has been held liable for the reasonable value of medical services rendered in connection with such injuries although the infant's father, with whom the infant lived, had obtained a recovery for his own expenses, including hospital and medical expenses, there being no showing that the father was solvent.—Bitting v. Goss, 166 S.E. 302, 203 N.C. 424.

(2) On the other hand, it has been held that, although the father did not pay for medical services rendered an injured minor, payment for such services cannot be had out of a verdict awarded minor as damages for pain and loss of earning power, or out of any settlement made on his account in lieu of verdict, but claimants must look to the father.—In re Mikasinovich, 168 A. 506, 110 Pa.Super. 252.

(3) This has been held particularly true where, in a settlement of a claim for personal injuries to a minor, a separate award for medical expenses was made to the minor's parent.—In re Sperling's Estate, 22 Pa.Dist. & Co. 679.

15. Mass.—Trainer v. Trumbull, 6 N.E. 761, 141 Mass. 527.
31 C.J. p 1077 note 72.

16. Ga.—Nicholson v. Wilborn, 13 Ga. 467.

17. Mass.—Trainer v. Trumbull, 6 N.E. 761, 141 Mass. 527.
31 C.J. p 1077 note 74.

18. N.Y.—Ryan v. Boltz, 48 N.Y. Super. 152.
31 C.J. p 1076 note 69, p 1077 note 71.

19. Ill.—McKanna v. Merry, 61 Ill. 177.
S.C.—Rivers v. Gregg, 26 S.C.Eq. 274.

Debt exceeding income
An infant under guardianship has no power to incur a debt exceeding his income even for necessaries.—Hussey v. Roundtree, 44 N.C. 110—State v. Cook, 34 N.C. 67.

20. Ga.—Mauldin v. Southern Shorthand & Business Univ., 60 S.E. 358, 3 Ga.App. 800.
Wis.—Jones v. Valentines' School of Telegraphy, 99 N.W. 1043, 122 Wis. 318.

21. Conn.—Gregory v. Lee, 30 A. 53, 64 Conn. 407, 25 L.R.A. 618.
31 C.J. p 1076 note 47.

22. Tex.—Peacock Military College v. Hughes, Civ.App., 225 S.W. 221.
31 C.J. p 1076 note 48.

23. Iowa.—Wallin v. Highland Park Co., 102 N.W. 839, 127 Iowa 131, 4 Ann.Cas. 421.

24. Ky.—Sumner v. Hall, 116 S.W. 2d 309, 273 Ky. 138.
Mich.—In re Dzwonkiewicz's Estate, 203 N.W. 671, 231 Mich. 165.
Mo.—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
R.I.—Quinley v. Desautels, 120 A. 65, 45 R.I. 106.
31 C.J. p 1076 notes 63, 65.

25. Mo.—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
R.I.—Quinley v. Desautels, 120 A. 65, 45 R.I. 106.
31 C.J. p 1076 note 63.

not be held liable on the express contract but only on an implied contract to pay;[26] and accordingly it has been held that he is not liable on his acceptance of a bill of exchange[27] or on his note[28] or account stated[29] for necessaries. According to other authorities the infant may be held on his express contract for necessaries,[30] at least if the form of the contract is such that the consideration may be inquired into,[31] although, if the amount agreed to be paid is unreasonable, he can reduce the recovery to a just compensation for the necessaries which he has received,[32] and accordingly it has been held that a bond[33] or note[34] given for necessaries is enforceable to the extent that the amount thereof does not exceed the fair value of the necessaries. Following either line of authority, therefore, the practical result is in harmony with the general doctrine that the infant cannot be held liable for more than the reasonable value of the necessaries.

b. What Are Necessaries

(1) In general
(2) Things answering bodily needs
(3) Education
(4) Services of attorney
(5) Miscellaneous

(1) In General

The term "necessaries," while flexible and not limited to any specific group of articles, usually applies to things supplying the infant's actual personal needs, either of his body or mind, excluding, for example, articles to be used merely for business or ornamental purposes; and whether certain articles are necessaries for a particular infant depends on his situation in life and all the surrounding facts and circumstances.

As stated in Corpus Juris, which has been cited and quoted with approval, the term "necessaries," as used in the law relating to the liability of infants therefor, is a relative term,[35] somewhat flexible,[36] except when applied to such things as are obviously requisite for the maintenance of existence;[37] and whether or not particular things are necessaries depends on the social position and situation in life of the infant,[38] as well as on his own fortune[39] and that of his parents.[40] Thus there is no positive or fixed rule by means of which it may be determined what are or what are not necessaries,[41] for what may be considered a necessary for one infant may not be such for another infant whose state is different as to rank, social position, fortune, health, or other circumstances,[42] the question being one to be determined from the particular facts and circumstances of each case.[43] While the term "nec-

26. Wash.—Plummer v. Northern Pac. R. Co., 167 P. 73, 98 Wash. 67, 7 A.L.R. 104.
31 C.J. p 1076 note 53.

27. Ind.—Henderson v. Fox, 5 Ind. 489.

28. Ind.—Ayers v. Burns, 87 Ind. 245, 44 Am.R. 759.
31 C.J. p 1076 note 56.
Infancy as defense to action on negotiable instrument see Bills and Notes § 506 c.

29. N.J.—Fenton v. White, 4 N.J. Law 100.
31 C.J. p 1076 note 57.

30. Tex.—Askey v. Williams, 11 S. W. 1101, 74 Tex. 294, 5 L.R.A. 176.
31 C.J. p 1076 note 58.

31. Ark.—Guthrie v. Morris, 22 Ark. 411.
Mass.—Earle v. Reed, 10 Metc. 387—Stone v. Dennison, 13 Pick. 1, 23 Am.D. 654.

32. Tex.—Askey v. Williams, 11 S. W. 1101, 74 Tex. 294, 5 L.R.A. 176.
31 C.J. p 1076 note 67.

33. Ark.—Cooper v. State, 37 Ark. 421—Guthrie v. Morris, 22 Ark. 411.

34. S.C.—Norwood Nat. Bank v. Allston, 149 S.E. 593, 152 S.C. 199, 65 A.L.R. 1334.
31 C.J. p 1076 note 61.

35. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 745, citing **Corpus Juris.**
N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115—Macfadden v. Macfadden, 17 N.Y.S.2d 118, 119, 173 Misc. 85, quoting **Corpus Juris.**
Wis.—Schoenung v. Gallet, 238 N.W. 852, 853, 206 Wis 52, 78 A.L.R. 387, quoting **Corpus Juris.**
Insurance as necessaries see supra § 76 b.
Presumptions and burden of proof as to what are necessaries see infra § 117.
Questions of law and fact as to what are necessaries see infra § 119.

36. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
Mass.—Moskow v. Marshall, 171 N. E. 477, 271 Mass. 302.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 745, citing **Corpus Juris**—Rhodes v. Frazier, App., 204 S.W. 547.

37. N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.
31 C.J. p 1077 note 87.

38. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
Mass.—Moskow v. Marshall, 171 N. E. 477, 271 Mass. 302.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 745, citing **Corpus Juris.**
N.Y.—Macfadden v. Macfadden, 17 N. Y.S.2d 118, 119, 173 Misc. 85, quoting **Corpus Juris**—In re Taylor, 275 N.Y.S. 934, 938, 153 Misc. 673, citing **Corpus Juris.**
31 C.J. p 1077 note 88.

39. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115—Macfadden v. Macfadden, 17 N.Y.S.2d 118, 119, 173 Misc. 85, quoting **Corpus Juris.**

40. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115—Macfadden v. Macfadden, 17 N.Y.S.2d 118, 119, 173 Misc. 85, quoting **Corpus Juris.**

41. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
N.Y.—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406.
31 C.J. p 1077 note 99.

42. N.Y.—In re Taylor, 275 N.Y.S. 934, 938, 153 Misc. 673, citing **Corpus Juris.**
31 C.J. p 1078 note 1.

43. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
N.Y.—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406—In re Taylor, 275 N.Y.S. 934, 938, 153 Misc. 673, citing **Corpus Juris.**
31 C.J. p 1078 note 1.

essaries" is not confined to merely such things as are required for a bare subsistence,[44] nevertheless the need of the infant for the articles furnished must be actual,[45] not for mere ornament or pleasure,[46] and the articles must supply the infant's personal needs, either of his body or of his mind.[47] The articles must be useful and suitable,[48] although they are not necessaries merely because useful or beneficial.[49]

Articles used for business. Articles furnished to an infant to enable him to carry on his business or occupation successfully do not come within the description of the term "necessaries,"[50] even though the infant depends on the income from his business for his sole support.[51] The sale of a liquor saloon to a minor is not necessary or beneficial to him, so as to preclude him from disaffirming the contract, where he is disqualified from obtaining the license required for engaging in the business.[52]

(2) Things Answering Bodily Needs

Things answering the infant's bodily needs and necessary for his maintenance and comfort, such as food, clothing, lodging, and medicines, are necessaries for an infant not already supplied therewith, the precise extent of such articles for which he may obligate himself depending on his situation at the time.

The most usual things which are considered necessaries are those answering the bodily needs of the infant,[53] without which the individual cannot reasonably exist,[54] and which are necessary for his support, use, maintenance, and comfort,[55] such as food[56] and clothing.[57] The extent to which such things are in fact necessary is a relative fact to be governed by the fortune and circumstances of the infant, and his state and condition in life.[58]

Lodging is a necessary for the payment of which an infant may be bound,[59] and it has been held that the infant may render himself liable on the purchase

44. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
31 C.J. p 1077 note 98.

45. Ill.—McKanna v. Merry, 61 Ill. 177.
31 C.J. p 1077 note 91.

Articles usually had by children in like condition
The articles furnished must be necessary for the particular infant supplied, and it is not sufficient that they were such as children in like condition in life are usually supplied with.—Rapoport v. Hussey, Mo.App., 267 S.W. 68.

46. Ill.—McKanna v. Merry, 61 Ill. 177.
31 C.J. p 1077 note 92.

47. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 745, citing **Corpus Juris.**
N.Y.—In re Taylor, 275 N.Y.S. 934, 938, 153 Misc. 673, citing **Corpus Juris.**
31 C.J. p 1077 note 95.
Education see infra subdivision b (3) of this section.
Things answering bodily needs see infra subdivision b (2) of this section.

Benefit to infant's father
Fertilizers sold for the benefit of the infant's father are not necessaries for the infant.—Virginia-Carolina Chemical Corporation v. Chandler, 167 S.E. 663, 168 S.C. 425.

48. N.C.—Turner v. Gaither, 83 N.C. 357, 35 Am.R. 574.
31 C.J. p 1077 note 93.

49. Me.—Nielson v. International Text Book Co., 75 A. 330, 106 Me. 104, 20 Ann.Cas. 591.
Mo.—Rhodes v. Frazier, App., 204 S.W. 547.

50. Me.—Sawyer Boot & Shoe Co. v. Braveman, 136 A. 290, 126 Me. 70—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743, 745, citing **Corpus Juris**—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
Wis.—Wallace v. Newdale Furniture Co., 205 N.W. 819, 188 Wis. 205.
31 C.J. p 1078 note 2.

Corpus Juris cited in expressing doubt that fertilizers for an infant engaged in agriculture are necessaries.—Virginia-Carolina Chemical Corporation v. Chandler, 167 S.E. 663, 665, 168 S.C. 425.

51. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.

52. R.I.—Chabot v. Paulhus, 79 A. 1103, 32 R.I. 471.

53. Mich.—In re Dzwonkiewicz's Estate, 203 N.W. 671, 231 Mich. 165, quoting **Corpus Juris.**
Tenn.—McDonald v. Cady, 9 Tenn. App. 354, 358, quoting **Corpus Juris**—Bentley v. Haiman's Ready-to-Wear, 1 Tenn.App. 280.
31 C.J. p 1079 note 44.

54. Mich.—In re Dzwonkiewicz's Estate, 203 N.W. 671, 231 Mich. 165, quoting **Corpus Juris.**
31 C.J. p 1079 note 45.

55. Neb.—Cobbey v. Buchanan, 67 N.W. 176, 48 Neb. 391.
31 C.J. p 1079 notes 46, 48.

56. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
31 C.J. p 1079 note 49.

57. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
31 C.J. p 1079 note 51.

Certainty of contract
A contract whereby infant bought dress and wore it nine months was not of such uncertain nature as to benefit or prejudice that she would have the right to avoid it.—Bentley v. Haiman's Ready-to-Wear, 1 Tenn. App. 280.

Guardian's willingness to supply necessities
(1) If guardian is willing to supply minor ward with necessities, ward is not liable for articles of clothing, furnished on ward's order without guardian's approval.—L. P. Hollander Co. v. Porter, 166 N.E. 724, 267 Mass. 378.

(2) Liability generally of infant already supplied see supra subdivision a of this section.

58. Tenn.—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.
31 C.J. p 1079 note 47.

59. Ala.—Ragan v. Williams, 127 So. 190, 220 Ala. 590, 68 A.L.R. 1182.
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
N.J.—West v. Prest, 119 A. 169, 98 N.J.Law 209.
Tex.—Johnson v. Newberry, Com. App., 267 S.W. 476, reversing Newberry v. Johnson, Civ.App., 248 S. W. 456.
31 C.J. p 1079 note 50.

of a home bought for this purpose,[60] unless he resides with his parent or otherwise has suitable living accommodations at the time of the purchase.[61] Where the parent has the ability and is willing to support his minor child, board, lodging, etc., furnished to such infant by another without the parent's consent are not necessaries for which the infant is liable.[62]

Medicines and medical attendance furnished to an infant when his health or physical condition require them ordinarily constitute necessaries for which he may render himself liable.[63] This liability attaches although the infant lives with his parent, where it appears that the parent is unable to, or at least does not, provide for the infant;[64] but an infant is not liable for medical services rendered to him where he has a parent, or other person charged with the duty of maintaining him, who is not shown to be unwilling or unable to pay therefor,[65] or who has in fact incurred or recognized his liability therefor and paid part of the bill.[66]

(3) Education

Education suitable to the infant's station in life is a necessary for which he may render himself liable on his parent's failure to supply it. As to the extent of the education, it is held that a common school education is a necessary while a college or professional education ordinarily, although not invariably, is not.

Included among things generally considered to be necessaries is a proper education or course of instruction,[67] suitable to the infant's station in life,[68] although what is a proper education for a particular infant depends on circumstances.[69] A common school education is necessary in this country, since it is essential to the transaction of business and the adequate discharge of civil and political duties,[70] while a college,[71] classical,[72] or professional[73] education has been held not to be a necessary for particular infants under the facts, although it has been recognized that circumstances may exist where such higher education might properly be found a necessary as a matter of fact.[74] The fact that a college course would not be extravagant or unreasonable for an infant, considering his parents' means

60. Tex.—Johnson v. Newberry, supra.

Circumstances warranting purchase

Purchase of a home will be enforced as a contract for a necessary where it appears that the best interests of the infant will be subserved by his owning a habitation rather than renting one, that the kind purchased is suitable to his station in life, and that the price agreed is no more than its reasonable value. —Johnson v. Newberry, supra.

61. Mich.—Lawrence v. Baxter, 267 N.W. 742, 275 Mich. 587.
N.Y.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S. 2d 222, 266 App.Div. 1016.

62. N.C.—Cole v. Wagner, 150 S.E. 339, 340, 192 N.C. 692, quoting **Corpus Juris.**
31 C.J. p 1077 note 80.

63. Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
Mich.—In re Dzwonkiewicz's Estate, 203 N.W. 671, 231 Mich. 165, quoting **Corpus Juris.**
Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.
Wash.—McAllister v. Saginaw Timber Co., 18 P.2d 41, 43, 171 Wash. 448, citing **Corpus Juris.**
31 C.J. p 1079 note 52.

"Doubtless in some circumstances medical services furnished to a minor upon his own credit may be a necessary, the furnishing of which to him implies an obligation on his part to pay therefor what such services are reasonably worth."—Wiley v. Fuller, 39 N.E.2d 418, 421, 310 Mass. 597.

Hospital bill

N.C.—Cole v. Wagner, 150 S.E. 339, 192 N.C. 692.

Surgical operation

Mich.—Bishop v. Shurly, 211 N.W. 75, 237 Mich. 76.

Minor's modification of contract made by parent

A contract for a necessary surgical operation on a nineteen-year-old minor made by his mother on his behalf can be changed or modified by him at any time thereafter as he sees fit.—Bishop v. Shurly, supra.

64. N.C.—Cole v. Wagner, 150 S.E. 339, 192 N.C. 692.

65. Mich.—Westrate v. Schipper, 279 N.W. 870, 284 Mich. 383.
N.Y.—Potter v. Thomas, 164 N.Y.S. 923.
Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.
Liability generally of infant already supplied see supra subdivision a of this section.

Statute held inapplicable

Recovery for medical services rendered to an infant who was unconscious at the time cannot be had under a statute making an infant liable on an agreement for necessaries sold and delivered to him, since there cannot be an agreement with a person admittedly unconscious.—Westrate v. Schipper, 279 N.W. 870, 284 Mich. 383.

66. Cal.—McManus v. Arnold Taxi Corporation, 255 P. 755, 82 Cal.App. 215.
Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.

67. Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322, 324, citing **Corpus Juris.**
Me.—Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 124 Me. 10.
N.Y.—International Text Book Co. v Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.
Tenn.—McDonald v. Cady, 9 Tenn. App. 354.

68. N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.
31 C.J. p 1079 note 55.

69. Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322, 324, citing **Corpus Juris.**
Mass.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.
31 C.J. p 1079 note 54.

70. N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.
31 C.J. p 1079 note 56.

71. Mass.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.
Vt.—Middlebury College v. Chandler, 16 Vt. 683, 42 Am.D. 537.

72. Va.—Gayle v. Hayes, 79 Va. 542.
31 C.J. p 1079 note 57.

73. N.C.—Turner v. Gaither, 83 N.C. 357, 35 Am.R. 574.
31 C.J. p 1079 note 58.

74. Mass.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.
N.Y.—International Text Book Co. v. Connelly, 99 N.E. 722, 206 N.Y. 188, 42 L.R.A.,N.S., 1115.

and manner of living and his own prospects in life, does not render such education a necessary.[75] A college education, even if needed by a minor, is not a necessary for which he is liable if he has a parent or guardian able and willing to supply it.[76] A course of instruction in aviation[77] and a course of electrical instruction[78] have been held not necessaries under the particular facts.

(4) Services of Attorney

Attorneys' services are necessaries if they were in fact required under the particular circumstances, and usually they are considered necessaries if rendered in a proceeding, civil or criminal, involving the infant personally. Liability of the infant, as in other cases, is limited to the reasonable value of the services.

Whether or not attorney's services are to be considered necessaries depends on whether or not there is a necessity therefor under the particular circumstances.[79] If such necessity exists, the infant is bound,[80] and usually the services of an attorney rendered in a proceeding personal to an infant,[81] whether to enforce or protect the civil or property rights of the infant,[82] or to defend him in a criminal action or prosecution,[83] are considered necessaries for which the infant will be bound under an express or implied promise to pay. On the other hand, if the circumstances are such that there is no necessity for the services, there can be no recovery,[84] and hence in some cases attorney's services in relation to the estate of infants have been held not necessaries.[85] The mere fact that the services of an attorney are beneficial to the infant is not sufficient to classify them as necessaries.[86] Where the legal services are rendered in behalf of the legal guardian, they are not considered necessaries and no recovery can be had therefor against the infant.[87] Following the general rule respecting the amount of recovery against an infant for necessaries supplied to him, considered supra subdivision a of this section, the liability of an infant for attorney's services is limited to a reasonable compensation for the services rendered.[88]

(5) Miscellaneous

In accordance with the rules determining what are necessaries, a great variety of miscellaneous articles or services have been held to be or not to be necessaries for particular infants under the circumstances.

An automobile or other vehicle is not ordinarily regarded as a necessary for an infant.[89] Particularly it is held, in accordance with the general rule that articles used by an infant for business purposes do not constitute necessaries for which he can be held liable, as considered supra subdivision b (1) of this section, that a motor vehicle used by an infant for such purposes is not a necessary.[90] A mo-

75. Mass.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.

76. Mass.—Moskow v. Marshall, supra.
Necessaries furnished to infants already supplied see supra subdivision a of this section.

77. Mass.—Adamowski v. Curtiss-Wright Flying Service, 15 N.E.2d 467, 300 Mass. 281.

78. Ill.—Crandall v. Coyne Electrical School, 256 Ill.App. 322.

79. Ky.—Vanover v. Cline, 39 S.W. 2d 477, 479, 239 Ky. 335, citing **Corpus Juris.**
Mo.—Fenn v. Hart Dairy Co., 83 S. W.2d 120, 124, 231 Mo.App. 1005, quoting **Corpus Juris.**
31 C.J. p 1080 note 62.
Contract for attorney's services generally see supra § 76 g.
Compensation of attorney in action by or against infant see infra § 114.

80. Mo.—Fenn v. Hart Dairy Co., supra, quoting **Corpus Juris.**
Tenn.—McDonald v. Cady, 9 Tenn. App. 354.
31 C.J. p 1080 note 63.

81. Cal.—Leonard v. Alexander, 122 P.2d 984, 986, 50 Cal.App.2d 385, quoting **Corpus Juris.**
Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.
Tex.—El Paso & S. W. Co. v. Hudspeth, Wallace & Harper, Civ.App., 255 S.W. 772.
6 C.J. p 748 note 11.

82. Mo.—Fenn v. Hart Dairy Co., 83 S.W.2d 120, 124, 231 Mo.App. 1005, quoting **Corpus Juris.**
31 C.J. p 1080 note 64.

83. Mo.—Fenn v. Hart Dairy Co., supra, quoting **Corpus Juris.**
31 C.J. p 1080 note 65.

84. Miss.—Epperson v. Nugent, 57 Miss. 45, 34 Am.R. 434.
Mo.—Fenn v. Hart Dairy Co., 83 S. W.2d 120, 124, 231 Mo.App. 1005, quoting **Corpus Juris.**
31 C.J. p 1080 note 66.

85. Okl.—Watts v. Houston, 165 P. 128, 65 Okl. 151.
31 C.J. p 1080 note 68, p 1079 note 61 [a].

86. Mo.—Fenn v. Hart Dairy Co., 83 S.W.2d 120, 231 Mo.App. 1005.

87. Neb.—Englebert v. Troxell, 58 N.W. 852, 40 Neb. 195, 42 Am.S.R. 665, 26 L.R.A. 177.
31 C.J. p 1080 note 67.

88. Iowa.—Hickman v. McDonald, 145 N.W. 322, 164 Iowa 50.
31 C.J. p 1080 note 70.

89. Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.
Ark.—Crockett Motor Co. v. Thompson, 6 S.W.2d 834, 177 Ark. 495—Commercial Credit Co. v. Blanks Motor Co., 294 S.W. 999, 174 Ark. 274—Arkansas Reo Motor Car Co. v. Goodlett, 258 S.W. 975, 163 Ark. 35.
Iowa.—Perry Auto Co. v. Mainland, 294 N.W. 281, 229 Iowa 187.
N.Y.—H. L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 App.Div. 406.
Tenn.—McDonald v. Cady, 9 Tenn. App. 354.
31 C.J. p 1078 note 40.
Bicycle
Mass.—Pyne v. Wood, 14 N.E. 775, 145 Mass. 558.
N.Y.—Rice v. Butler, 49 N.Y.S. 494, 25 App.Div. 388, reversed on other grounds 55 N.E. 275, 160 N.Y. 578, 73 Am.S.R. 703, 47 L.R.A. 303.
Buggy
Ga.—Howard v. Simpkins, 70 Ga. 322.
Tex.—Heffington v. Jackson, 96 S.W. 108, 43 Tex.Civ.App. 560.
Truck bought for another
A minor cannot be held liable for the price of a truck on the theory that it was a necessity for him, where it appears that the truck was not bought for himself or for his individual use, but rather for his brother.—Maddox v. Hamp Williams Hardware Co., 26 S.W.2d 85, 181 Ark. 403.

90. Me.—Utterstrom v. Myron D.

tor vehicle does not become a necessary merely because the infant can conveniently use it for transportation to and from work, especially if it appears that his place of employment is not too far removed from his home or that there are other means of transportation available.[91]

Horse. Ordinarily a horse is not a necessary for which the infant can be held liable.[92] Nevertheless, it has been recognized that circumstances may exist where a horse would be a necessary.[93]

Maintenance or improvement of realty; taxes. Labor and material expended in erecting a building on the land of an infant,[94] or in repairing[95] or improving[96] an infant's realty, have been held not necessaries for which he was bound by contract to pay, even though, in the case of repairs, they were required to prevent immediate and serious injury to a building.[97] A contract for the employment of a janitor, for a building owned by an infant, is not a contract for necessaries.[98] On the other hand, the payment of taxes on the property of an infant constituting his homestead has been held to be a necessary.[99]

A bridal or wedding outfit has been held to constitute a necessary.[1] However, furniture purchased by an infant in contemplation of marriage does not constitute a necessary, at least as of the time of the sale, where his engagement is broken off and the marriage never takes place.[2]

Other articles or services in addition to those already mentioned have been held to constitute necessaries.[3] On the other hand the following have been held to be not necessaries: Chronometers;[4] cologne;[5] cravats;[6] fiddle and fiddle strings;[7] kid gloves;[8] liquor;[9] pistols and powder;[10] saddles, harness, and the like;[11] and other particular articles.[12]

c. Loans and Encumbrances for Necessaries

A loan is not a necessary unless given for the express purpose of paying for necessaries; but if given for such purpose it does not cease to be a necessary because diverted from that purpose. Some authorities hold an infant's encumbrance of his property for necessaries valid, while others hold such encumbrance voidable.

It is a general rule that a loan of money is not a necessary,[13] although the infant afterward purchases necessaries with it;[14] but in some cases relief has been allowed in equity.[15] It has been held that money furnished to an infant for the express purpose of purchasing necessaries may be recovered as for necessaries furnished;[16] and if the money is furnished for such purpose it is not in every instance incumbent on the obligee to see that the money is actually spent by the infant for that purpose and no other,[17] the extent of precaution to be

Kidder, Inc., 124 A. 725, 124 Me. 10.
Mo.—Freiburghaus v. Herman Body Co., App., 102 S.W.2d 743.

Vehicle advantageous but unnecessary

An automobile is not a necessary where, although it appears that it would be advantageous to the minor and that he would not have been promoted in his work without it, it does not appear that the automobile is necessary for him to earn a livelihood.—Barger v. M. & J. Finance Corporation, 18 S.E.2d 826, 221 N.C. 64.

91. Iowa.—Perry Auto Co. v. Mainland, 294 N.W. 281, 229 Iowa 187.
Tenn.—Giddens v. D. S. Etheridge Co., Inc., 2 Tenn.App. 324.
Wis.—Schoenung v. Gallet, 238 N.W. 852, 206 Wis. 52, 78 A.L.R. 357.

92. Mo.—O'Donnilley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.
31 C.J. p 1078 note 34.

93. Vt.—Thrall v. Wright, 38 Vt. 494.
31 C.J. p 1078 note 16.

94. N.Y.—Allen v. Lardner, 29 N.Y.S. 213, 78 Hun 603.

95. Wis.—Covault v. Nevitt, 146 N.W. 1115, 157 Wis. 113, 51 L.R.A., N.S., 1092, Ann.Cas.1916A 959.
31 C.J. p 1078 notes 6, 9.

96. Ky.—Wornack v. Loar, 11 S.W. 438, 11 Ky.L. 6.
31 C.J. p 1078 note 7.

97. R.I.—Phillips v. Lloyd, 25 A. 909, 18 R.I. 99.

98. Wis.—Covault v. Nevitt, 146 N.W. 1115, 157 Wis. 113, 51 L.R.A.,N.S., 1092, Ann.Cas.1916A 959.

99. Mo.—Horstmeyer v. Connors, 56 Mo.App. 115.
31 C.J. p 1078 note 11.

1. Ky.—Sams v. Stockton, 14 B.Mon. 232.
N.C.—Jordan v. Coffield, 70 N.C. 110.

2. N.Y.—Wilkinson v. Fleishman, 263 N.Y.S. 18, 238 App.Div. 858.

3. **Mourning apparel**
Ky.—De Moss v. Giltner, 5 Ky.L. 691.

Telegram

A contract between an infant and a telegraph company for the transmission of a message by the infant to his parents requesting money, the infant being practically destitute and without work, would be a contract for necessaries.—Western Union Tel. Co. v. Greer, 89 S.W. 327, 115 Tenn. 368, 1 L.R.A.,N.S., 525.

4. Ill.—McKanna v. Merry, 61 Ill. 177.
31 C.J. p 1078 note 25.

5. Ark.—Lefils v. Sugg, 15 Ark. 137.

6. Ark.—Lefils v. Sugg, supra.

7. S.C.—Glover v. Ott, 12 S.C.L. 572.

8. Ark.—Lefils v. Sugg, 15 Ark. 137.

9. Ill.—McKanna v. Merry, 61 Ill. 177.
S.C.—Glover v. Ott, 12 S.C.L. 572.

10. Ill.—McKanna v. Merry, 61 Ill. 177.
S.C.—Glover v. Ott, 12 S.C.L. 572.

11. Ill.—McKanna v. Merry, 61 Ill. 177.
Ky.—Beeler v. Young, 1 Bibb 519.
S.C.—Glover v. Ott, 12 S.C.L. 572.

12. **Walking canes**
Ark.—Lefils v. Sugg, 15 Ark. 137.

13. Me.—Kilgore v. Rich, 22 A. 176, 83 Me. 305, 23 Am.S.R. 780, 12 L.R.A. 859.
31 C.J. p 1080 note 72.
Loans and advances generally see infra § 84.

14. Me.—Kilgore v. Rich, supra.

15. Ind.—Price v. Sanders, 60 Ind. 310.
31 C.J. p 1080 note 74.

16. S.C.—Norwood Nat. Bank v. Allston, 149 S.E. 593, 152 S.C. 199, 65 A.L.R. 1334.
31 C.J. p 1080 note 75.
Note for necessaries see supra subdivision a of this section.

17. S.C.—Norwood Nat. Bank v. Allston, supra.

exercised by the obligee depending on whether the infant has reached an age when discretion is presumed.[18]

An infant is liable to a person who at his request pays a bill already contracted by the infant for necessaries, or advances him the money with which to pay it.[19] Such liability is subject to the condition that the debt so paid must in fact have been for a necessary,[20] and is not measured by the actual amount paid, but is limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the necessaries furnished.[21]

Encumbrance for necessaries. It is held by some authorities that an infant may bind and encumber his estate for the value of necessaries furnished to him.[22] By others, however, it is held that a mortgage, although it was executed to secure payment for necessaries, is voidable.[23] An infant's mortgage cannot be upheld as being for necessaries furnished to him if the articles supplied did not in fact constitute necessaries.[24]

§ 79. Bills, Notes, and Checks

a. In general
b. Indorsements
c. Time, mode, and effect of disaffirmance

a. In General

An infant is not bound on a bill, note, or check given by him, at least if not given in a transaction, such as for necessaries, in which he can bind himself generally. However, such an instrument is not, according to the weight of authority, void, but is voidable only, at his election, and is subject to ratification by him.

As a general rule the bill, promissory note, or check of an infant is not binding on him,[25] at least if not given for necessaries,[26] and this rule applies whether or not the instrument is negotiable,[27] and even as against a holder in due course.[28] It is stated in some cases that such an instrument is void,[29] but the great weight of authority holds that such an instrument is voidable,[30] and that such an in-

18. S.C.—Norwood Nat. Bank v. Allston, supra.

Twenty-year-old minor receiving money for necessaries could not avoid liability on the ground that he spent money for other purposes. —Norwood Nat. Bank v. Allston, supra.

19. N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
31 C.J. p 1080 note 76.

20. Or.—Burton v. Anthony, 79 P. 185, 46 Or. 47, 114 Am.S.R. 847, 68 L.R.A. 826.
31 C.J. p 1080 note 78.

21. Me.—Kilgore v. Rich, 22 A. 176, 83 Me. 305, 23 Am.S.R. 780, 12 L.R.A. 859.
Mass.—Swift v. Bennett, 10 Cush. 436.
Amount of recovery generally see supra subdivision a of this section.

22. Ark.—Walker v. Goodlett, 144 S.W. 189, 102 Ark. 383—Cooper v. State, 37 Ark. 421.

23. Tex.—Askey v. Williams, 11 S.W. 1101, 74 Tex. 294, 5 L.R.A. 176.

24. S.C.—Virginia-Carolina Chemical Corporation v. Chandler, 167 S.E. 663, 168 S.C. 425.

25. Ark.—Commercial Credit Co. v. Blanks Motor Co., 294 S.W. 999, 174 Ark. 274.
Mo.—Swoboda v. Nowak, 255 S.W. 1079, 1082, 213 Mo.App. 452, citing **Corpus Juris.**
Pa.—Burgunder v. Jackson, 1 Lack. Leg.N. 386.
31 C.J. p 1082 note 32.
Deposits in bank see supra § 34.
Note for insurance premium see supra § 76 b.

Result advantageous to infant
An unemancipated minor is not bound on a note entered into as part of a contract which does not result advantageously to him.—Commercial Credit Co. v. Pool, 2 La.App. 525.

Check given under joint contract of infant and another
Where an infant bought property, signing a contract which his father also signed, and gave a check in part payment, the fact that the bank account was overdrawn and that the father deposited enough to cover the overdraft did not prevent the infant from rescinding the purchase and recovering the amount of the check, as against the contention that the deposit by the father resulted in legal effect in payment by the father to the seller of the father's own debt.—Rhyne v. Miller, 97 So. 758, 133 Miss. 463.

Statutory permission for infants' bank transactions
The statute providing that an infant may deposit and withdraw funds as though he were an adult and that as between the infant and the bank the infant should be subject to all obligations, equities, and defenses to which an adult would be subject in similar transactions has no application where an infant sues to recover payment by check of an extraneous obligation sought to be avoided on ground of infancy.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J.Misc. 455.

26. Ala.—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 574, 215 Ala. 84, reversing 109 So. 576, 21 Ala.App. 515.
D.C.—Interstate Bankers Corporation v. Larsen, Mun.App., 32 A.2d 103.
Ind.—McKee v. Harwood Automotive Co., 183 N.E. 646, 204 Ind. 233.
Miss.—Williams v. Pool, 110 So. 224, 144 Miss. 459.
N.J.—Majaika v. Jamison, 180 A. 402, 115 N.J.Law 358.
N.Y.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S. 2d 222, 266 App.Div. 1016.
S.C.—Norwood Nat. Bank v. Allston, 149 S.E. 593, 152 S.C. 199, 65 A.L.R. 1334.
Notes given for necessaries see supra § 78.

27. Ill.—Wright v. Buchanan, 123 N.E. 53, 287 Ill. 468.

28. Ky.—Universal Credit Co. v. Hibbard, 117 S.W.2d 583, 273 Ky. 597.
Infancy as defense to action on negotiable instrument see Bills and Notes § 506 c.

29. Ark.—Commercial Credit Co. v. Blanks Motor Co., 294 S.W. 999, 174 Ark. 274.
31 C.J. p 1082 note 32.

30. Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.
Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.
Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
N.J.—Majaika v. Jamison, 180 A. 402, 115 N.J.Law 358.
Ohio.—McKenzie v. Tellis, App., 47 N.E.2d 253.
31 C.J. p 1082 note 33.

"Valid" until repudiated
A note of an infant, until repudi-

strument is not void.[31] The instrument is voidable at the election of the infant,[32] the right to avoid being a privilege personal to the infant or his legal representative,[33] and such instrument may be validated ab initio by ratification after the infant attains majority.[34]

Recitals in a note given by an infant as to the consideration or property for which the note was given are not binding on him.[35]

The joint note of an infant and an adult is binding on the adult[36] but not on the infant.[37] However, where an infant disaffirms his purchase of property, and returns the property, the sureties on a note given by him for the purchase money have been held no longer liable, on the ground that the seller cannot have the property and at the same time recover the purchase money from the sureties.[38]

Note in settlement of tort. Although it has been held that a note of an infant given on a settlement of damages arising from his torts is voidable,[39] it has also been held that, as an infant ordinarily is liable for his torts, as discussed infra § 87, he is liable on his note given in settlement of a tort to the same extent as he would have been liable on the original cause of action, as long as the consideration of the note is open to inquiry.[40]

b. Indorsements

An infant's indorsement of a note, although voidable by him or his representative, passes title as between the indorsee and the maker enabling the indorsee to sue on the note.

While an infant can disaffirm his indorsement of a note,[41] such indorsement is voidable only by himself or his representatives;[42] the indorsement passes the title as between the indorsee and the maker, entitling the former to sue the latter on the note,[43] the infancy of the payee, for example, being no defense to the maker.[44]

c. Time, Mode, and Effect of Disaffirmance

In the absence of statute providing otherwise, an infant may disaffirm his note during minority or within a reasonable time after majority, and the disaffirmance need not be in any particular form. On disaffirmance an infant's note or indorsement becomes annulled ab initio as to him.

Time. An infant may avoid his promissory note during infancy;[45] and he may[46] and must[47] dis-

ated by him, is "valid."—Commercial Credit Co. v. Ward & Son Auto Co., 109 So. 576, 21 Ala.App. 515, reversed on other grounds 109 So. 574, 215 Ala. 34.

31. Ala.—Commercial Credit Co. v. Ward & Son Auto Co., supra.
Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.
Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
Ohio.—McKenzie v. Tellis, App., 47 N.E.2d 253.

32. Ky.—Universal Credit Co. v. Hibbard, 117 S.W.2d 583, 273 Ky. 597.
31 C.J. p 1082 note 33.

33. Ind.—Garner v. Cook, 30 Ind. 331.
31 C.J. p 1083 note 39.

34. Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
N.J.—Majaika v. Jamison, 180 A. 402, 115 N.J.Law 358.
31 C.J. p 1083 note 46.
Ratification of contracts generally see supra § 74.

Silence as ratification
The mere fact that the infant remained silent and failed to disaffirm his note after reaching majority has been held not to constitute a ratification of the note so as to render him liable thereon.—Majaika v. Jamison, supra.

Payments after majority
Payment of three small installments on a note after majority was held not to constitute ratification, there being no intent to ratify or any benefit obtained by the maker in consequence of the payments.—International Accountants' Society v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.

Infant's acts during minority will not constitute ratification of infant's obligation on a note made for the benefit of another and application of a bank deposit in payment thereof.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J.Misc. 455.

35. Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.

36. Ky.—Gray v. Grimm, 163 S.W. 762, 157 Ky. 603.
Pa.—Walters v. Markey, 13 Lanc.Bar 131.
Contracts jointly with adult see supra § 76 g.

37. Or.—Baer v. Ballingall, 61 P. 852, 37 Or. 416.
31 C.J. p 1083 note 44.

38. Mo.—Baker v. Kennett, 54 Mo. 82.

39. Me.—Shaw v. Coffin, 58 Me. 254, 4 Am.R. 290.

40. Mo.—Swoboda v. Nowak, 255 S.W. 1079, 1082, 213 Mo.App. 452, citing **Corpus Juris.**
Vt.—Ray v. Tubbs, 50 Vt. 688, 28 Am.R. 519.

41. Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.
31 C.J. p 1083 note 40 [b].

Rule unaffected by negotiable instruments law
The infant's right to disaffirm his indorsement is not affected by the provision of the negotiable instruments law under which the indorsement or assignment of a note by an infant passes title and enables the indorsee to recover against the maker; the provision merely makes the incapacity of the minor unavailing to prior parties.
Tenn.—Murray v. Thompson, 188 S.W. 578, 136 Tenn. 118, L.R.A.1917B 1172.
Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.

42. Me.—Hardy v. Waters, 38 Me. 450.
Tenn.—Murray v. Thompson, 188 S.W. 578, 136 Tenn. 118, L.R.A.1917B 1172.

43. Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.
31 C.J. p 1083 note 42.

44. Ind.—Garner v. Cook, 30 Ind. 331.

45. Mass.—Hoyt v. Wilkinson, 10 Pick. 31.

46. Ill.—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278.

47. Ill.—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.
Tex.—Kinnebrew v. McAfee, Civ.App., 272 S.W. 242.

affirm within a reasonable time after attaining majority. Where the time within which the infant must repudiate or disaffirm is prescribed by statute, the repudiation or disaffirmance may[48] and must[49] take place within the time so prescribed.

Mode. Disaffirmance of an infant's note need not be in any particular form.[50] An answer, in an action on the note, filed by the infant's attorney as guardian ad litem disaffirming the note on the ground of infancy has been held a sufficient disaffirmance.[51] It has been said to be the general rule that mere silence is not taken as indicative either for or against the infant on the question of disaffirmance.[52]

Effect. When the note of an infant is disaffirmed the instrument as to him becomes rescinded and annulled ab initio.[53] On disaffirming a note given by him for property purchased, the infant can, subject to the rules respecting the return of any property or consideration received by him, discussed supra § 46, recover the amount already paid thereon as well as avoid liability for the balance.[54]

On disaffirming his indorsement of a note the infant may cause title to the note to revest in him and may compel redelivery of the note to him.[55]

§ 80. Compromises and Settlements

A compromise or settlement by an infant or a person not authorized to act for him is voidable by the infant, although subject to ratification by him after majority. He need not as a condition precedent to disaffirmance restore the consideration, unless he is able to do so or still has the consideration when he reaches majority; but amounts which he has received will be credited against any ultimate recovery by him.

A compromise or settlement of a claim in favor of or against an infant entered into by the infant[56] or a person not authorized to act for him[57] is not binding on the infant, although such a settlement is not entirely void,[58] but is voidable only.[59] Such an agreement can be ratified by the infant after coming of age,[60] and must be disaffirmed by him within

Delay held reasonable

Disaffirmance within four months after reaching majority, and again within six months after majority, has been held made within a reasonable time.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.

Delay held unreasonable

Where the maker of a note, for ten years after attaining majority, remained mute as to disaffirmance of a note executed by him when he was nineteen years old, he was held not entitled to disaffirm; and the question whether plaintiff had knowledge of the maker's infancy at the time the note was executed was held immaterial.—McKenzie v. Tellis, Ohio App., 47 N.E.2d 253.

48. Two years after majority

Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.

49. Two years after majority

Ill.—Mourant v. Pullman Trust & Savings Bank, 41 N.E.2d 1007, 314 Ill.App. 567.

50. Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.

51. Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, supra.

52. Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, supra.

53. Mo.—Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.

Release of surety

Where infant never received stock for which he subscribed and gave notes, on his disaffirmance of contract there remained no consideration for notes and both infant and surety on notes were released.—Lagerquist v. Bankers' Bond & Mortgage Guaranty Co., 205 N.W. 977, 201 Iowa 430, 43 A.L.R. 585.

54. Ky.—Universal Credit Co. v. Hibbard, 117 S.W.2d 583, 273 Ky. 597.

Tex.—McKnight Chevrolet Co. v. Strahan, Civ.App., 11 S.W.2d 259.

Utah.—Merchants' Credit Bureau v. Kaoru Akiyama, 230 P. 1017, 64 Utah 364.

Sufficient tender

In action against infant on note given for price of phonograph, in which infant filed cross action for amount paid thereon, infant by statement in plea that he "repudiates said transaction, and tenders back said phonograph," and by statement in open court under oath that "the phonograph is at my room," and that plaintiff "can get it when he wants it," made a sufficient tender, if such tender is necessary, although there was no showing that tender was continuing or that phonograph was produced in court, or was ready to be so produced.—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784.

55. Va.—Strother v. Lynchburg Trust & Savings Bank, 156 S.E. 426, 155 Va. 826, 73 A.L.R. 166.

56. Ky.—Newport News & M. V. Co. v. Glenn, 11 Ky.L. 579.

Minn.—Gendreau v. North American Life & Casualty Co., 197 N.W. 257, 158 Minn. 259.

Mo.—Ebert v. A. J. Kasper Co., 71 S.W.2d 859, 228 Mo.App. 589.

N.J.—Reggiori v. Forbes, 26 A.2d 145, 128 N.J.Law 391.

31 C.J. p 1083 note 59.

Releases see supra § 76 c.

Incapacity of parties as:

Affecting accord and satisfaction see Accord and Satisfaction § 11.

Ground for setting aside compromise see Compromise and Settlement § 32.

Showing as to liability and reasonableness of amount

An infant cannot be held liable on an agreement to pay damages resulting from his alleged tort where there is nothing to show that he was liable for the injuries caused or that the amount agreed to be paid was reasonable.—Quinley v. Desautels, 120 A. 65, 45 R.I. 106.

57. Ariz.—Pacheco v. Delgardo, 52 P.2d 479, 46 Ariz. 401, 103 A.L.R. 494.

Me.—Harding v. Skolfield, 134 A. 567, 125 Me. 438.

31 C.J. p 1084 note 62.

Compromise or settlement by:

General guardian see Guardian and Ward § 70.

Guardian ad litem or next friend see infra § 111.

58. S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.

31 C.J. p 1084 note 61.

Validity as to others than infant

The validity of a settlement agreement cannot be attacked on the ground of infancy of some of the parties where such parties themselves do not complain.—Smith v. Williams, supra.

59. Ga.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.

31 C.J. p 1083 note 60.

Family agreement settling estate, entered into by infant, is voidable only.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.

60. Pa.—Campbell v. Sears, Roebuck & Co., 161 A. 310, 307 Pa. 365.

a reasonable time after attaining majority.[61] The institution or maintenance by the infant of a suit against the other party to a contract of settlement, to recover damages sustained by the infant, amounts to a disaffirmance of the contract by the infant.[62] If the agreement is based on a consideration of all parties thereto jointly, on its avoidance by the infant the adult parties to the agreement are released therefrom.[63]

Restoration of amount received or paid. On disaffirming a compromise or settlement the infant need not return or tender the amount paid on the compromise,[64] unless he is able to make restitution,[65] although the amount received will be credited against any ultimate recovery by the infant and thus reduce his claim pro tanto;[66] but such return or tender has been held necessary where the entire sum was paid to him, or remained in his hands, after he attained majority.[67] Where the consideration has been paid not to the infant, but to a third person, the infant is under no obligation to make a tender in order to disaffirm.[68]

An infant who repudiates a settlement under which he has agreed to pay certain sums in installments may by his conduct be estopped to recover installments which he has already paid under the settlement.[69]

§ 81. Engaging in Business

At common law the fact that an infant engages in business does not avoid application of the rule that his contracts are voidable; but by statute in some jurisdictions an infant is, with certain qualifications, liable on contracts connected with a business in which he is engaged.

At common law, and in the absence of statute providing otherwise, the fact that an infant undertakes to trade or engages in business for himself does not of itself cure the incapacity to contract resulting from his infancy, and his trading contracts may be avoided by him,[70] although such contracts, like other contracts, are not void[71] but merely voidable.[72]

By force of statute in some jurisdictions an infant who engages in business may render himself liable on contract, the scope of his liability varying according to the terms of the different statutes.[73] Under some statutes an infant cannot disaffirm a contract where, from his having engaged in business as an adult, the other party had good reasons to believe the infant capable of contracting.[74] Under other statutes an infant who, by permission of his parent or guardian, or by permission of the law, practices a profession or trade or engages in business as an adult is bound by all contracts connected with the occupation in which he is engaged,[75] although liability of the infant is limited to contracts connected with the profession, trade, or business in which he is engaged.[76]

To be engaged in business within the meaning of these statutes the infant must have a regular em-

61. S.C.—Smith v. Williams, 139 S. E. 625, 141 S.C. 265, 54 A.L.R. 964.

62. Ga.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.

63. Pa.—Patchell's Estate, 23 Pa. Dist. 1104.

64. Ga.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.
S.C.—Simpson v. Doggett, 156 S.E. 771, 159 S.C. 294.
Va.—Clinchfield Coal Corp. v. Couch, 104 S.E. 802, 127 Va. 634, 13 A.L.R. 398.
Return of consideration generally see supra § 75.

65. Ga.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.
Tenn.—Lane v. Dayton Coal, etc., Co., 48 S.W. 1094, 101 Tenn. 581.

66. Ky.—Newport News & M. V. Co. v. Glenn, 11 Ky.L. 579.
Va.—Clinchfield Coal Corp. v. Couch, 104 S.E. 802, 127 Va. 634, 13 A.L.R. 398.
31 C.J. p 1084 note 68 [a].

67. N.Y.—Lefler v. Oelrichs, 160 N. Y.S. 119, 173 App.Div. 759.
Tenn.—Glover v. Louisville & N. R. Co., 40 S.W.2d 1031, 163 Tenn. 85.

68. Tenn.—Turney v. Mobile & O. R. Co., 156 S.W. 1085, 127 Tenn. 673.

69. N.J.—Reggiori v. Forbes, 26 A. 2d 145, 128 N.J.Law 391.

Estoppel held shown

Where a nineteen-year-old infant was sued for damages caused in an automobile accident, entered into a settlement agreement requiring him to pay certain sums, complied with the agreement until majority thereby leading the other party to believe that a valid agreement had been made and thus procuring a suspension of action for over two years until the case could no longer be restored to the calendar, he was held estopped to recover the sums which he had paid under the agreement.—Reggiori v. Forbes, supra.

70. U.S.—Ex parte Chan Hai, D.C. Wash., 11 F.2d 667, affirmed, C.C.A., Chan Hai v. Weedin, 15 F.2d 296.
Wis.—Wallace v. Newdale Furniture Co., 205 N.W. 819, 820, 188 Wis. 205, citing **Corpus Juris.**
31 C.J. p 1084 notes 71, 73.
Infant employee's agreement not to engage in competing business see infra § 85.

71. N.Y.—Stern v. Meikleham, 10 N. Y.S. 216, 56 Hun 475.

72. N.C.—Skinner v. Maxwell, 66 N. C. 45.
31 C.J. p 1084 note 76.

73. Ga.—Southern Cotton Oil Co. v. Dukes, 49 S.E. 788, 121 Ga. 787.
Iowa.—Friar v. Rae-Chandler Co., 185 N.W. 32, 192 Iowa 427.
Kan.—McClure Motor Co. v. Irwin, 21 P.2d 403, 137 Kan. 528, modified on other grounds 23 P.2d 470, 138 Kan. 35.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.
31 C.J. p 1084 note 77.

74. Iowa.—Kuehl v. Means, 218 N. W. 907, 206 Iowa 539, 58 A.L.R. 1359.
Kan.—McClure Motor Co. v. Irwin, 21 P.2d 403, 137 Kan. 528, modified on other grounds 23 P.2d 470, 138 Kan. 35.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.

75. Ga.—Southern Cotton Oil Co. v. Dukes, 49 S.E. 788, 121 Ga. 787—Gibson v. Kyle, 167 S.E. 547, 46 Ga.App. 295.
31 C.J. p 1084 note 77.

76. Ga.—Pearson v. White, 78 S.E. 864, 13 Ga.App. 117—James v. Sasser, 60 S.E. 329, 3 Ga.App. 568.

ployment or occupation in which he is engaged as a means of livelihood or profit,[77] and a single transaction by an infant does not constitute him as one engaged in a business.[78] The infant must be carrying on a business of his own and not be engaged in business as a mere employee,[79] and under some statutes, in order to render the infant liable, he must have procured a license to engage in the business.[80]

Where the statute requires that the person contracting with the infant must have good reason to believe the infant capable of contracting, the fact that an infant has engaged in business as an adult does not, of itself, necessarily make his contracts binding and not subject to disaffirmance,[81] and such a statute will not prevent disaffirmance as against a person contracting with the infant who knew that the infant was not of age at the time the contract was made.[82] Where, under the statute, permission of the parent is required, such permission is not established by the mere fact that the infant works and collects the proceeds of his labor,[83] although knowledge of the parent that the infant was receiving the proceeds of his own labor may authorize an inference that permission had been granted the infant to engage in the occupation and receive for his own use the proceeds of his labor.[84]

§ 82. —— Partnership

An infant's agreement of partnership is voidable at his election, but may become binding by his ratification thereof after majority. By disaffirming he may avoid personal liability for partnership debts, although such debts can still be satisfied out of the infant's interest in the partnership assets. There is some conflict of authority as to whether an infant seeking a return of money paid into the partnership must show that he was induced to become a partner by fraud.

An infant may become a partner with an adult or competent person,[85] but as in the case of infants' contracts generally, considered supra § 71, the partnership agreement is voidable at the election of the infant,[86] although it is not entirely void,[87] and is binding on the adult partner.[88] A partnership agreement made during infancy may become binding on the infant by his ratification thereof after attaining majority; and such ratification may be implied from his conduct.[89] During the time he remains a partner, and before disaffirmance by him of the partnership agreement, the infant has the rights and powers of a partner equally with his adult copartner,[90] and his acts bind the firm.[91]

It is generally held that the infant may avoid personal or individual liability for partnership debts or contracts,[92] unless he has duly ratified the transaction,[93] although unless and until he elects to set up his personal plea of infancy he is responsible for all partnership engagements,[94] and if he ratifies the

77. Iowa.—Beickler v. Guenther, 96 N.W. 895, 121 Iowa 419.

78. Ga.—White v. Sikes, 59 S.E. 228, 129 Ga. 508, 121 Am.S.R. 228.

79. Iowa.—Beickler v. Guenther, 96 N.W. 895, 121 Iowa 419.
31 C.J. p 1084 note 79.

80. Md.—Crew Levick Co. v. Hull, 93 A. 208, 125 Md. 6.

81. Iowa.—Beller v. Marchant, 30 Iowa 350.
Kan.—McClure Motor Co. v. Irwin, 21 P.2d 403, 137 Kan. 528, modified on other grounds 23 P.2d 470, 138 Kan. 35.

82. Kan.—McClure Motor Co. v. Irwin, supra.
Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.
31 C.J. p 1084 note 77 [a].

83. Ga.—Southern Cotton Oil Co. v. Dukes, 49 S.E. 788, 121 Ga. 787.

84. Ga.—Southern Cotton Oil Co. v. Dukes, supra.

85. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing Corpus Juris—Ex parte Chan Hai, D.C.Wash., 11 F.2d 667, affirmed, C.C.A., Chan Hai v. Weedin, 15 F.2d 296.
31 C.J. p 1084 note 86.

86. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing Corpus Juris—Ex parte Chan Hai, D.C.Wash., 11 F.2d 667, affirmed, C.C.A., Chan Hai v. Weedin, 15 F.2d 296.
Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404.
31 C.J. p 1085 note 88.
Infant's agreement to sell his partnership interest see supra § 56.

87. Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
31 C.J. p 1085 note 89.

Valid until disaffirmed

A partnership agreement with an infant is valid until disaffirmed by the infant, and prior to such disaffirmance the partnership is a legal entity capable of entering into a contract.—Kuehl v. Means, 218 N.W. 907, 206 Iowa 539, 58 A.L.R. 1359.

88. Md.—Latrobe v. Dietrich, 78 A. 983, 114 Md. 8.
N.Y.—Avery v. Fisher, 28 Hun 508.

89. S.C.—Miller v. Sims, 20 S.C.L. 479.

90. Md.—Latrobe v. Dietrich, 78 A. 983, 114 Md. 8—Bush v. Linthicum., 59 Md. 344.

91. N.Y.—Avery v. Fisher, 28 Hun 508.

92. Iowa.—Kuehl v. Means, 218 N. W. 907, 206 Iowa 539, 58 A.L.R. 1359.
Mass.—Godfrey v. Mutual Finance Corp., 136 N.E. 178, 242 Mass. 197—Pelletier v. Couture, 19 N.E. 400, 148 Mass. 269, 1 L.R.A. 863.
Wis.—Olson v. Veum, 222 N.W. 233, 197 Wis. 342.
31 C.J. p 1085 note 3.
"As a general rule he may, before he becomes of age, or within a reasonable time thereafter, avoid liability for partnership debts by disaffirming past transactions."—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 214, 48 Nev. 319.

Disaffirmance of partnership unnecessary

He may, as far as concerns his personal liability, disaffirm a contract made by his firm without disaffirming the contract of partnership. —Mehlhop v. Rae, 57 N.W. 650, 90 Iowa 30.

93. Md.—Crew Levick Co. v. Hull, 93 A. 208, 125 Md. 6.
Mass.—Whitney v. Dutch, 14 Mass. 457, 7 Am.D. 229.

94. N.Y.—Continental Nat. Bank v. Strauss, 32 N.E. 1066, 137 N.Y. 148.
31 C.J. p 1085 note 6.

partnership agreement after coming of age he subjects himself to all the liabilities of the firm incurred during his minority and while he was a member of the firm.[95] The interest of an infant partner in the partnership assets is liable for firm debts,[96] notwithstanding his disaffirmance of the contract of partnership on attaining majority.[97] Infancy of a partner does not permit the partnership to repudiate agreements made between it and a third person, or transactions of the competent partners with respect to firm property;[98] the fact that one of the partners is an infant does not release his adult copartner or copartners from liability.[99]

Recovery of consideration. It has been held, that where an infant has paid money in consideration of being admitted as a partner in a business and he has become a partner and remained so for a certain time, he cannot recover back the money thus paid[1] unless he was induced to enter into the partnership by fraudulent representations;[2] but it has also been held that an infant who purchases a partnership interest in a losing business and who receives no benefits therefrom can, on reaching his majority, rescind the contract and recover the purchase price, regardless of whether or not he has been induced to enter into the contract by fraudulent representations.[3] In any event, when the infant rescinds, all he has received from the firm must be deducted from what he has put in and only the balance can be recovered by him.[4]

The infant cannot recover money which he has caused to be deposited in the bank account of the partnership and which has been paid out on partnership transactions, where neither the bank nor the payee knew of any infirmity in the transaction or that a minor had any interest in the firm;[5] nor can he recover on an implied assumpsit from his adult partner for services performed for the partnership under the partnership agreement.[6]

Assignment for benefit of creditors. Since the partnership relation does not of itself impliedly confer on a partner authority to make an assignment for benefit of creditors on behalf of the firm, as discussed in the C.J.S. title Partnership § 166, also 47 C.J. p 881 note 96–p 883 note 31, it has been held that an infant is not bound by an assignment of the partnership assets executed by his copartner without his consent and over his protest.[7] However, the infant can ratify the assignment on coming of age,[8] and on so doing he cannot thereafter maintain an action of trespass against the assignee for the alleged unlawful taking of the assets.[9]

Dissolution of partnership. The court may decree the dissolution of a partnership and wind up its affairs through the medium of a receiver, notwithstanding one of the partners is an infant;[10] and on a dissolution, whether by the court or by consent, the partnership debts must first be paid out of the partnership assets,[11] and, if what remains is insufficient to repay in full the contributions of all the partners to the capital, the loss must fall on all the partners pro rata, and the infant cannot throw on his copartners the obligation of making up the deficiency to him.[12]

§ 83. Gambling Contracts

An infant may repudiate a gambling contract, and may recover money in the possession of a stakeholder by virtue of a bet made by the infant.

An infant has been held entitled to recover money lost by him under a gambling contract.[13] Where an infant has made a bet he may repudiate his action and withdraw the money from the stakeholder with whom it was deposited;[14] but he cannot, after the result of the bet is known, and the stake-

95. S.C.—Salinas v. Bennett, 11 S. E. 968, 33 S.C. 285.
31 C.J. p 1085 note 9.

96. Me.—Conary v. Sawyer, 43 A. 27, 92 Me. 463, 69 Am.S.R. 525.
Mass.—Godfrey v. Mutual Finance Corp., 136 N.E. 178, 242 Mass. 197 —Pelletier v. Couture, 19 N.E. 400, 148 Mass. 269, 1 L.R.A. 863.
31 C.J. p 1085 note 1.

97. Mo.—Hill v. Bell, 19 S.W. 959, 111 Mo. 35.

98. Ala.—Johnson-Brown Co. v. Dominey Produce Co., 102 So. 606, 212 Ala. 377.
Iowa.—Kuehl v. Means, 218 N.W. 907, 206 Iowa 539, 58 A.L.R. 1359.
31 C.J. p 1086 notes 20, 22.

99. Md.—Latrobe v. Dietrich, 78 A. 983, 114 Md. 8.

1. Md.—Adams v. Beall, 8 A. 664, 67 Md. 53, 1 Am.S.R. 379.
31 C.J. p 1085 note 96.

2. Md.—Adams v. Beall, supra.

3. Mich.—Thomas v. Banks, 195 N. W. 94, 224 Mich. 488.

4. Ohio.—Lyghtel v. Collins, 11 Oh. Dec., Reprint, 161, 25 Cinc.L.Bul. 125.
31 C.J. p 1085 note 88 [a].

5. Iowa.—Kuehl v. Means, 218 N.W. 907, 206 Iowa 539, 58 A.L.R. 1359.

6. Mass.—Page v. Morse, 128 Mass. 99.
31 C.J. p 1085 note 98.

7. Miss.—Foot v. Goldman, 10 So. 62, 68 Miss. 529.
31 C.J. p 1086 note 16 [a].

8. N.Y.—Yates v. Lyon, 61 N.Y. 344.

9. Mass.—Furlong v. Bartlett, 21 Pick. 401.

10. Md.—Bush v. Linthicum, 59 Md. 344.
31 C.J. p 1086 note 17.

11. Mass.—Pelletier v. Couture, 19 N.E. 400, 148 Mass. 269, 1 L.R.A. 863.
31 C.J. p 1086 note 18.

12. Mass.—Moley v. Brine, 120 Mass. 324.

13. Pa.—Ruchizky v. De Haven, 97 Pa. 202, reversing 7 Wkly.N.C. 311.
Right to recover money in gambling transactions generally see Gaming §§ 35–41.

14. Ill.—McLean v. Wilson, 36 Ill. App. 657.

holder has paid over the money to the winner on his instructions, recover the amount from the stakeholder.[15]

§ 84. Loans and Advances

Loans or advances made to or by an infant may be avoided by him, subject to the usual rules respecting the necessity of making restitution.

In accord with the general rule that an infant is not bound by his contracts, as discussed supra § 71, an infant ordinarily is not liable on his undertaking to repay money lent to him,[16] although his promise to repay money borrowed is voidable only,[17] and may be ratified.[18] In repudiating a claim against him for money lent, the infant is subject to the usual rules, discussed supra § 75, as to the necessity of making or offering restitution.[19]

A loan made by an infant is voidable at the option of the infant, either during minority or within a reasonable time after attaining majority.[20] Where an infant has lent his money under a usurious agreement he may avoid the contract and with it the consequences of the usury, and recover the money lent under a count for money had and received.[21]

§ 85. Services

It is generally held that an infant's contract for the performance of services by him is voidable at his election, but may be ratified by him. On disaffirmance he can recover the reasonable value of services rendered regardless of the amount stipulated in the contract, although any sums already paid him must be credited against his ultimate recovery. There is some conflict as to the binding effect of a stipulation restricting his right to compete in business with his employer at a future time.

In accord with the general rule that an infant is not bound by his contracts, discussed supra § 71, it is generally held that an infant's contract for the performance of labor or personal services is not binding on him,[22] but is voidable at his election,[23] although it is not entirely void,[24] and cannot be avoided by the other party.[25] However, following the doctrine announced by some authorities that an infant's contracts which are beneficial to him are binding on him, discussed supra § 71, there are some cases holding an infant's contract of employment binding on him as beneficial;[26] and it has also been held that an infant is bound by his executed contract for services if it was reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage.[27] An infant cannot affirm the terms of a contract of em-

15. Ill.—McLean v. Wilson, supra.
Recovery from stakeholder generally see Gaming § 39.

16. N.Y.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
31 C.J. p 1087 notes 53, 58.
Loans and advances for necessaries see supra § 78 c.
Loans under insurance policies see supra § 76 b.

17. Mass.—Kennedy v. Doyle, 92 Mass. 161.
31 C.J. p 1087 notes 53, 55.
Assignment of wages
One who lends money to an infant, and takes an assignment of wages therefor, has no right of action against the infant to recover the amount lent where it does not appear that the infant has disaffirmed his contract on account of infancy or that the assignee has been prevented through fraud from collecting the wages assigned.—Tennessee Brokerage Co. v. Larkin, 1 Tenn.App. 276.

18. W.Va.—Carrigan v. Davis, 100 S.E. 91, 84 W.Va. 473.
31 C.J. p 1087 note 55.

19. Tex.—Keys v. Tarrant County Building & Loan Ass'n, Civ.App., 286 S.W. 593.
Proceeds in infant's possession
Where the infant, on attaining majority, disaffirms a loan made to him, his offer to return all the proceeds of the funds in his possession at the time of disaffirmance is sufficient, none of the original funds being in his possession at the time.—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.

20. Mo.—Stinson v. Bank of Queen City, App., 101 S.W.2d 537.
Time deposit
A time deposit made by an infant with a bank is not a "deposit" in the usual sense, but constitutes a loan of money to the bank and is governed by the rule set forth in the text.—Stinson v. Bank of Queen City, supra.

21. N.Y.—Millard v. Hewlett, 19 Wend. 301.

22. Pa.—Williams v. Rheas, Inc., 99 Pa.Super. 438.
31 C.J. p 1088 note 75.

23. U.S.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.
Ala.—Cleveland v. Towle, 106 So. 58, 59, 21 Ala.App. 161, citing **Corpus Juris**, and certiorari granted Ex parte Towle, 106 So. 60, 213 Ala. 129.
N.Y.—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.
Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct.
Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.
31 C.J. p 1088 note 75.

24. Tex.—Chauncey v. Gambill, Civ. App., 126 S.W.2d 775, error dismissed, judgment correct.
31 C.J. p 1088 note 76.
Contract to assign inventions
Even in a jurisdiction in which the contract of an infant which is not beneficial to him is not merely voidable but void ab initio, a contract of employment under which the infant agrees to assign to his employer all inventions made by him is not necessarily to his prejudice so as to be absolutely void and incapable of being ratified by him.—Crown Cork & Seal Co. v. Fankhanel, D.C. Md., 49 F.Supp. 611.

25. Ala.—Cleveland v. Towle, 106 So. 58, 59, 21 Ala.App. 161, citing **Corpus Juris**, and certiorari granted Ex parte Towle, 106 So. 60, 213 Ala. 129.
Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct.
31 C.J. p 1088 note 77.

26. Ark.—Robinson v. Van Vleet, 121 S.W. 288, 91 Ark. 262.
31 C.J. p 1088 note 79.

27. Mich.—Spicer v. Earl, 1 N.W. 923, 41 Mich. 191, 32 Am.R. 152.
31 C.J. p 1088 note 90.

ployment as far as the terms are beneficial to him and at the same time repudiate provisions which he deems detrimental.[28]

It is sometimes broadly asserted, following the view that the contract can be avoided only by the infant and not by the other party, that the infant can recover for services rendered by him under his contract of employment;[29] but other authorities hold, more particularly, that, while such recovery may be had in the case of an emancipated minor,[30] an infant who has not been emancipated is without contractual capacity with respect to his services during infancy and cannot recover therefor.[31]

Basis and extent of recovery. Where the infant has the right to disaffirm a contract of employment, and elects so to do, he is entitled to recover for services rendered on a quantum meruit;[32] but he cannot, after disaffirming the contract, maintain an action on the contract for the wages called for thereby.[33] The amount of recovery is the reasonable value of the services rendered,[34] regardless of the contract terms,[35] taking into consideration all the circumstances;[36] and if the services were worthless the infant cannot recover.[37] If an infant has received a portion of his wages prior to his election to avoid the contract, the amount paid him should be deducted from the sum due him,[38] and an infant who has been paid the full amount of the claim sued on cannot recover payment again.[39] An infant who obtains employment by misrepresenting his age, and who makes a deposit with his employer to cover contingent losses arising during his employment, has been held not entitled, after losses have occurred in excess of the deposit, to recover the sum deposited.[40]

Although it has been held that the value of articles, not constituting necessaries, received by the infant will not be deducted,[41] where the consideration for an infant's contract to serve is the agreement of the employer to furnish him with necessaries during the term of service, and the agreement is faithfully performed by the employer, the value of the necessaries furnished him may be pleaded as a set-off to the infant's claim for compensation.[42]

Whether the employer can claim as a set-off the damage caused by the avoidance or breach of the contract is a question on which there is a conflict of authorities, some authorities holding that no such deduction can be allowed,[43] and others holding that it can.[44]

Injunction against infant. Equity will not enforce an infant's contract for personal services by injunction compelling him not to render similar services to others.[45] It has been held that an injunction will lie to restrain an infant from violating an agreement not to compete in business with his employer for a certain length of time after leaving his employ,[46] but there is also authority holding that such injunction will not lie,[47] at least where

28. N.D.—Yancey v. Boyce, 148 N.W. 539, 28 N.D. 187, Ann.Cas.1916E 258.
N.Y.—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490.

29. N.Y.—Farin v. Sercarz, supra.
Pa.—Cohen v. A. F. Bornot Bros. Co., 80 Pa.Super. 251.
Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.
31 C.J. p 1088 note 78.

30. Ala.—Waugh v. Emerson, 79 Ala. 295.
31 C.J. p 1088 note 78 [b].

31. Mich.—Stanaback v. McFadden, 196 N.W. 526, 225 Mich. 452.
Or.—Potter v. Davidson, 20 P.2d 409, 143 Or. 101, rehearing denied 21 P.2d 785, 143 Or. 101.
Emancipation see supra §§ 28–30.
Rights of parent with respect to contracts for child's services see the C.J.S. title Parent and Child § 31, also 46 C.J. p 1284 notes 18–31.
Mechanic's lien
Unemancipated infant cannot impress mechanic's lien for services rendered by him.—Potter v. Davidson, supra.

32. Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.
31 C.J. p 1088 note 84.

33. N.D.—Yancey v. Boyce, 148 N.W. 539, 28 N.D. 187, Ann.Cas.1916E 258.

34. Me.—Vehue v. Pinkham, 60 Me. 142.
31 C.J. p 1088 note 85.

35. U.S.—Belyea v. Cook, D.C.Cal., 162 F. 180.
Receipt of agreed wages
The infant may recover the value of his services notwithstanding he has received the full wages agreed on, if such wages were not as much as the services were worth.—Dube v. Beaudry, 23 N.E. 222, 150 Mass. 448, 15 Am.S.R. 228, 6 L.R.A. 146—31 C.J. p 1088 note 89.

36. Ind.—Garner v. Board, 27 Ind. 323.
Me.—Vehue v. Pinkham, 60 Me. 142.

37. Vt.—Thomas v. Dike, 11 Vt. 273, 34 Am.D. 690.

38. N.H.—Hagerty v. Nashua Lock Co., 62 N.H. 576.
Vt.—Holden v. Pike, 14 Vt. 405, 39 Am.D. 228.

39. Ind.—Hobbs v. Godlove, 17 Ind. 359.

40. Ohio.—Smith v. Newark Shoe Co., 182 N.E. 347, 42 Ohio App. 437.

41. Mass.—Morse v. Ely, 28 N.E. 577, 154 Mass. 458, 26 Am.S.R. 263.

42. Mich.—Spicer v. Earl, 1 N.W. 923, 41 Mich. 191, 32 Am.R. 152.
31 C.J. p 1089 note 94.

43. Vt.—Meeker v. Hurd, 31 Vt. 639.
31 C.J. p 1089 note 95.

44. U.S.—The Hotspur, D.C.Or., 12 F.Cas.No.6,720, 3 Sawy. 194.
Mo.—Lowe v. Sinklear, 27 Mo. 308.

45. Ky.—Cain v. Garner, 185 S.W. 122, 169 Ky. 633, L.R.A.1916E 682, Ann.Cas.1918B 824.
31 C.J. p 1088 note 80.

46. N.Y.—Mutual Milk & Cream Co. v. Prigge, 98 N.Y.S. 458, 112 App. Div. 652.
31 C.J. p 1088 note 81.

47. **In Pennsylvania**
(1) It has been held that injunction will not lie against the infant.—J. E. Harshbarger Dairy v. Hoover, 13 Pa.Dist. & Co. 701.
(2) However, there is also authority to the contrary.—Harbison v. Mawhinney, 8 Pa.Dist. 697.

the infant had been previously engaged in the same business and acquired no new knowledge or customers from the complaining employer.[48]

Ratification. As in the case of other voidable contracts made by him, discussed supra § 74, an infant may ratify his voidable contract of employment.[49] If the infant continues under the contract of service after he becomes of age, it is evidence of his affirmance of the contract,[50] and the contract may become ratified thereby.[51]

§ 86. Subscription to Corporate Stock

The general rule that an infant is not bound by his contracts applies to an infant's contract to subscribe to the stock of a corporation.

In accord with the general rule that an infant is not bound by his contracts, discussed supra § 71, an infant may avoid his contract of subscription to the stock of a corporation,[52] and on his offer to return the stock which he has received on the contract he is entitled to the purchase money paid,[53] without any allowance for the depreciation in the capital of the corporation.[54]

VI. TORTS

§ 87. Liability of Infant in General

In general an infant is liable for a tort committed by him.

It is well settled by the authorities on the question that an infant is civilly liable for his torts[55]

48. Ohio.—Eagle Dairy Co. v. Dylag, 168 N.E. 754, 33 Ohio App. 113.

49. Mich.—Spicer v. Earl, 1 N.W. 923, 41 Mich. 191, 32 Am.R. 152.
31 C.J. p 1089 note 98.

50. Mich.—Spicer v. Earl, supra.
31 C.J. p 1089 note 99.

51. D.C.—Baltimore & O. R. Co. v. Duke, 38 App.D.C. 164, Ann.Cas. 1913E 832.

Ratification held shown

U.S.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.

Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct.

52. N.C.—In re Goldsboro Savings & Trust Co., 165 S.E. 705, 203 N.C. 238.
31 C.J. p 1089 note 13.
Infant as original subscriber or incorporator see Corporations § 35 c.
Liability of infant stockholder:
For corporate debts generally see Corporations § 642.
On:
Bank stock generally see Banks and Banking § 74 d (4).
Stock of national bank see Banks and Banking § 593.

Building and loan associations

(1) On reaching majority an infant can recover from an insolvent building and loan association all moneys theretofore paid by him into the association, free from all claims for premiums, fines, and losses.—Prudential Building & Loan Ass'n v. Shaw, 26 S.W.2d 168, 119 Tex. 228, rehearing denied 27 S.W.2d 157, 119 Tex. 228.

(2) A statute permitting minors to become shareholders and investors in building and loan associations does not authorize an executory contract by a minor, imposing on him a personal indebtedness to be paid in installments over an extended period of time, for a stock subscription in such an association or for membership fees in connection with such a stock subscription.—Southern Building & Loan Ass'n v. Davis, 135 So. 164, 223 Ala. 222.

53. Ill.—Wuller v. Chuse Grocery Co., 89 N.E. 796, 241 Ill. 398, 132 Am.S.R. 216, 28 L.R.A.,N.S., 128, 16 Ann.Cas. 522.
31 C.J. p 1089 note 14.

54. Mass.—Godfrey v. Mutual Finance Corp., 136 N.E. 178, 242 Mass. 197.

55. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211, stating rule in Indiana.

Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 230 Ala. 275—Hooper Motor Co. v. Harris, 146 So. 618, 226 Ala. 278.

Iowa.—Lind v. Eddy, 6 N.W.2d 427, 232 Iowa 1328, 146 A.L.R. 695—Beardsley v. Clark, 294 N.W. 887, 229 Iowa 601—Daggy v. Miller, 162 N.W. 254, 180 Iowa 1146.

Mass.—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132.

Mich.—Brown v. Wood, 291 N.W. 255, 293 Mich. 148, 127 A.L.R. 1436.

Mo.—Gerkey v. Hampe, App., 274 S.W. 510—McKerall v. St. Louis-San Francisco Ry. Co., App., 257 S.W. 166—Swoboda v. Nowak, 255 S.W. 1079, 1082, 213 Mo.App. 452, citing **Corpus Juris.**

Neb.—Ahlstedt v. Smith, 264 N.W. 889, 130 Neb. 372.

N.H.—Smith v. Bailey, 23 A.2d 363, 91 N.H. 507.

N.J.—Steelman v. Gilbert, 186 A. 47, 48, 14 N.J.Misc. 490, citing **Corpus Juris.**

N.Y.—Rozell v. Rozell, 22 N.E.2d 254, 281 N.Y. 106, 123 A.L.R. 1015, affirming 8 N.Y.S.2d 901, 256 App. Div. 61—Taksen v. Kramer, 283 N.Y.S. 609, 239 App.Div. 756.

N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.

Ohio.—Wery v Seff, 25 N.E.2d 692, 694, 136 Ohio St. 307, citing **Corpus Juris**—Termuhlen v. Campbell, 48 N.E.2d 891, 895, 71 Ohio App. 285, citing **Corpus Juris.**

Tenn.—Wilson v. Mullen, 11 Tenn. App. 319.

Tex.—Miller v. Peck, Civ.App., 258 S.W. 887.

Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, 228 N.W. 484, 201 Wis. 101, 67 A.L.R. 1259.
31 C.J. p 1090 note 26.

In Louisiana

(1) The liability of a minor for tort is dependent on statute.—Gott v. Scott, App., 199 So. 460.

(2) Liability for a minor's torts exists under Civ.Code arts 1784, 1874, 2227.

U.S.—Nehrbass v. Home Indemnity Co., D.C.La., 37 F.Supp. 123.

La.—Seither v. Poter, App., 194 So. 467—Kern v. Knight, 127 So. 133, 13 La.App. 194—Lutcher & Moore Cypress Co. v. Schexnaydre, 122 So. 911, 11 La.App. 72.

(3) Such articles of the Civil Code are the only articles of the Code or statutes which create liability of a minor for his or her torts.—Gott v. Scott, supra.

Otherwise stated

Minor of sufficient age to be criminally responsible is liable for torts.—Kibler v. Kibler, 24 S.W.2d 867, 180 Ark. 1152.

Personal torts of infant

In general an infant may be held liable for his personal torts.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E.2d 104, 310 Ill.App. 582—31 C.J. p 1090 note 26.

Conversion

Vt.—Vermont Acceptance Corporation v. Wiltshire, 153 A. 199, 103 Vt. 219, 73 A.L.R. 792.
31 C.J. p 1090 note 26 [e].

unconnected or disconnected with his contract,[56] unless in the commission of the tort there is required to exist some element which the infant is not presumed to possess.[57] The infant is liable regardless of whether he acted at the command of another,[58] except in a case of actual duress.[59] Therefore, usually liability is not affected by the fact that the tort was committed under the express orders or by the authority of the infant's parent or guardian.[60] An infant is not liable in an action sounding in tort, however, where the action is merely a method of attempting to enforce a claim for which he is not liable.[61]

In view of the limitations on the authority of an infant to create the relationship of principal and agent, considered supra § 23, it is generally held that an infant cannot be made liable for the torts of one impliedly acting for him.[62] Some cases, however, have expressed the view that an infant may be liable for the tort of his agent committed in the performance of a duty involved in the agency.[63] An infant may be liable for a joint tort committed by himself and another if the basis of the alleged liability is not a breach of contract.[64] An infant's liability in tort may extend to torts which he procures another to commit,[65] or to torts committed in the presence of the infant by one who

Wrongful detention of property

Ala.—Hooper Motor Co. v. Harris, 146 So. 618, 226 Ala. 278.

Right of action for tort see infra § 104.

56. N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.

Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, 228 N.W. 484, 201 Wis. 101, 67 A.L.R. 1259.

31 C.J. p 1090 note 26, p 1092 note 46.

Personal torts of infant

Infant is responsible for personal torts directly committed by him and unconnected with contract.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313.

Tort connected with contract see infra § 89.

57. Ky.—Stephens v. Stephens, 189 S.W. 1143, 172 Ky. 780.

Otherwise stated

An infant is not liable for a tort which involves an element necessarily wanting in the case of infancy.—Swoboda v. Nowak, 255 S.W. 1079, 213 Mo.App. 452.

Malicious or intentional tort see infra § 88.

58. Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, 228 N.W. 484, 201 Wis. 101, 67 A.L.R. 1259.

31 C.J. p 1090 note 29.

59. Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, supra.

60. Me.—Kilpatrick v. Hall, 67 Me. 543.

31 C.J. p 1090 note 29.

61. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 230 Ala. 275.

Tort connected with contract see infra § 89.

62. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211, stating rule in Indiana.

Mo.—Hodge v. Feiner, 90 S.W.2d 90, 92, 338 Mo. 268, 103 A.L.R. 483, citing **Corpus Juris**, and affirming, App., 78 S.W.2d 478—Haynie v. Jones, 127 S.W.2d 105, 107, 233 Mo.App. 948, citing **Corpus Juris**.

31 C.J. p 1091 note 31.

In Louisiana

(1) A minor is liable in damages only for his or her personal offenses or quasi offenses, as imposed by Rev. Civ.Code arts 1785, 1874, 2227.—Gott v. Scott, App., 199 So. 460.

(2) Since there is no specific provision of the law of Louisiana which authorizes a minor to bind him or herself for the torts of another either by express agreement or by silent acquiescence, a person cannot be the agent or servant of a minor so as to render the minor liable for the torts of such person.—Gott v. Scott, supra.

Other statements

(1) An infant cannot be held liable for the tort of another under the doctrine of respondeat superior. Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E.2d 104, 310 Ill.App. 582—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.

Mo.—Hodge v. Feiner, 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483, affirming, App., 78 S.W.2d 478.

31 C.J. p 1091 note 31.

(2) An infant cannot be held liable for the tortious acts of one to whom the infant has attempted to delegate authority to act as his agent.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356—Wilson v. Mullen, 11 Tenn.App. 319, 337, citing **Corpus Juris**.

(3) An infant is not liable for his alleged servant's torts in the course of employment.—Hodge v. Feiner, App., 78 S.W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483—31 C.J. p 1091 note 31.

(4) An infant is not liable for tort committed by his agent or employee.—Fernandez v. Lewis, Tex.Civ. App., 92 S.W.2d 305, error dismissed.

(5) It seems that to render an infant liable the "tortious acts must be committed by the infant himself, or under his immediate view, or by his direction or authority."—Haynie v. Jones, 127 S.W.2d 105, 111, 233 Mo. App. 948.

63. N.J.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.

In Virginia

(1) In a case in which the law of Virginia was applicable, the federal district court took the broad view that, where an infant does, through his agent, something which he is entirely capable of legally doing, he may be held liable for the torts of the agent within the scope of his authority.—Carroll v. Harrison, D.C. Va., 49 F.Supp. 283, affirmed, C.C.A., Harrison v. Carroll, 139 F.2d 427.

(2) The circuit court of appeals, in affirming the judgment of the district court in the foregoing case, based the liability of the infant on the ground that, under the circumstances, his act was the commencement of the wrong which caused the injury, notwithstanding he was not present when the injury occurred.—Harrison v. Carroll, C.C.A.Va., 139 F.2d 427, affirming, D.C., Carroll v. Harrison, 49 F.Supp. 283.

Tort committed in presence of infant

It has been held that an infant may be liable for a tort committed in his presence by his agent in the performance of a duty involved in the agency, on the theory that the appointment of an agent by an infant is not void but is merely voidable.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.

64. Mo.—Haynie v. Jones, 127 S.W. 2d 105, 233 Mo.App. 948.

Joint tort in general see the C.J.S. title Torts §§ 34–39, also 62 C.J. p 1130 note 42–p 1136 note 96.

Torts connected with contract see infra § 89.

65. Mass.—Sikes v. Johnson, 16 Mass. 389.

Assault and battery

Mass.—Sikes v. Johnson, supra.

acts pursuant to direction and control by the infant,[66] or who, according to some cases, is subject to such direction and control.[67] The liability of an infant for the negligence of another, including liability for negligence of another in operating an automobile, is considered infra § 91.

An infant cannot be made a trespasser by relation through the ratification of a wrongful act which another has assumed to perform in behalf of, but without the consent of, the infant.[68]

§ 88. Malicious or Intentional Injuries

Want of the existence of the essential element of intention or malice may exempt an infant from liability for torts of a certain character, but an infant who has reached an age at which intention or malice may be imputed to him may be liable.

An infant may be exempt from liability for his torts when in the commission of the tort there is required to exist some element of intention or malice which the infant does not possess;[69] but if the infant has arrived at such age that malice and intent may be fairly imputed to him, he may be liable for such tort,[70] as, for instance, libel[71] or slander.[72]

§ 89. Torts Connected with Contracts

An infant is not liable in an action sounding in tort if the effect of holding him liable would actually constitute the enforcement of liability on contract, but he may be liable for a distinct and willful or positive wrong which is independent of the contract.

The general liability of infants for their torts, considered supra § 87, does not take from them their immunity from liability on their contracts;[73] each rests on a policy of the law, and, when these two policies come into conflict, they cancel each other to the extent that they deal with the same subject matter.[74] If this cancellation is complete, so that all that is claimed as the foundation of the infant's tort is covered by the breach of his contract, nothing remains on which to found an action of tort independently of the contract.[75] Hence, it is generally held that an infant is not liable for tortious consequences of his breaches of contract;[76] that he cannot be held liable in tort where the effect of imposing such liability would be the enforcement of his liability on his contract;[77] and that, even though the action may be in form as for a tort, yet if the subject of it is based on contract, the suit will be attended with all the incidents of an action ex contractu.[78] However, it is generally held that the mere fact that the cause of action indirectly grows out of, or is connected with, a contract will not in every case shield the infant from liability; if the tort is independent of, or subsequent to, the contract, and not a mere breach of it, but is a distinct and willful, or positive wrong in itself, then,

66. Mo.—Haynie v. Jones, 127 S.W. 2d 105, 233 Mo.App. 948.
N.Y.—Taksen v. Kramer, 263 N.Y.S. 609, 239 App.Div. 756.

67. Ala.—Woodson v. Hare, 13 So.2d 172, 244 Ala. 301.
Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356—Wilson v. Mullen, 11 Tenn.App. 319.

68. Mass.—Burnham v. Seaverns, 101 Mass. 360, 100 Am.D. 123.
Mo.—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948.

69. Ky.—Stephens v. Stephens, 189 S.W. 1143, 172 Ky. 780.
31 C.J. p 1091 note 33.

70. Ky.—Drane v. Pawley, 8 Ky.L. 530.
Mo.—Fears v. Riley, 49 S.W. 836, 148 Mo. 49.

71. Mo.—Fears v. Riley, supra.

72. Ky.—Drane v. Pawley, 8 Ky.L. 530.
Mo.—Swoboda v. Nowak, 255 S.W. 1079, 213 Mo.App. 452.
31 C.J. p 1091 note 36.
Infant of nineteen years
Mo.—Swoboda v. Nowak, supra.

73. N.J.—Brunhoelzl v. Brandes, 100 A. 163, 90 N.J.Law 31.
Pa.—Frank Spangler Co. v. Haupt, 53 Pa.Super. 545.
31 C.J. p 1091 note 41.
Assumpsit for money tortiously taken see infra § 104.
Capacity of infant to contract and validity and effect of his contracts generally see supra § 71 et seq.
Particular torts connected with contract:
Fraud see infra § 90.
Misrepresentation as to age see infra § 90.
Negligence see infra § 91.

74. N.J.—Brunhoelzl v. Brandes, 100 A. 163, 90 N.J.Law 31.
31 C.J. p 1091 note 41.

75. N.J.—Brunhoelzl v. Brandes, supra.
31 C.J. p 1091 note 42.

76. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing **Corpus Juris.**
Mich.—Brown v. Wood, 291 N.W. 255, 257, 293 Mich. 148, 127 A.L.R. 1436, citing **Corpus Juris.**
Tex.—Dodson v. Roberts, Civ.App., 4 S.W.2d 155.
Utah.—Wilcox v. Wunderlich, 272 P. 207, 223, 73 Utah 1, citing **Corpus Juris.**
31 C.J. p 1091 note 43.

Distinct and substantive wrong
To make a minor liable for a tort connected with a contract, the tort must be a distinct and substantive wrong in itself, without reference to the contract.—Summit Auto Co. v. Jenkins, 153 N.E. 153, 20 Ohio App. 229.

77. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 230 Ala. 275.
Ill.—Hunter v. Egolf Motor Co., 268 Ill.App. 1.
Mich.—Brown v. Wood, 291 N.W. 255, 257, 293 Mich. 148, 127 A.L.R. 1436, citing **Corpus Juris.**
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Pa.—Yubas v. Witaskis, 95 Pa.Super. 296.
31 C.J. p 1091 note 44, p 1092 note 45.

78. Me.—Caswell v. Parker, 51 A. 238, 96 Me. 39.
Mass.—Brooks v. Sawyer, 76 N.E. 953, 191 Mass. 151, 114 Am.S.R. 594.
31 C.J. p 1092 note 45.

notwithstanding the contract, the infant may be liable.[79]

Breach of warranty. As a rule an infant is not liable in tort for a breach of warranty,[80] but the contrary has been held.[81]

Bailment. In accordance with rules hereinbefore stated, an infant is not liable in an action in tort with regard to property bailed to him where the action is based on a breach of duty expressly or impliedly imposed by the contract of bailment.[82] Thus, the mere neglect to perform the duty on the part of the bailee to use ordinary or reasonable care and diligence to protect the property from injury does not render the infant bailee liable to an action in tort;[83] but an infant may be liable in tort with regard to property bailed to him where such action is not based on a breach of the contract of bailment but is independent thereof.[84]

§ 90. Fraud and False Representations

a. General considerations
b. Misrepresentation as to age

a. General Considerations

An infant may be liable in tort for his fraud.

An infant may be liable in tort for his fraud[85] or his false representations,[86] unconnected with his contract.[87] Thus property obtained by an infant by fraud may be recovered from him in a proper ex delicto action for that purpose;[88] but an infant is not liable in tort for his fraud directly and inseparably connected with his contract.[89] According to some cases, in determining whether an infant may be held liable for, or whether relief against him may be granted because of, his fraud where a contract is involved, the test is whether or not liability may be imposed or relief granted without directly or indirectly enforcing the promise of the infant.[90]

79. Mass.—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132.
31 C.J. p 1092 note 46.

Tortious use or disposition of property after avoidance of contract
Infant is liable for tortious use or disposition of personalty after avoiding purchase or sale thereof and before its surrender.—Collins v. Norfleet-Baggs, 150 S.E. 177, 197 N.C. 659.

80. N.Y.—Collins v. Gifford, 96 N.E. 721, 203 N.Y. 465, 38 L.R.A.,N.S., 202, Ann.Cas.1913A 969, reversing 118 N.Y.S. 1100, 134 App.Div. 988.
31 C.J. p 1092 note 47.

81. S.C.—Vance v. Word, 10 S.C.L. 197, 9 Am.D. 683.

82. Ga.—Jones v. Milner, 185 S.E. 586, 587, 53 Ga.App. 304, citing **Corpus Juris.**
31 C.J. p 1092 note 51.

83. Ga.—Jones v. Milner, supra, citing **Corpus Juris.**
N.H.—Eaton v. Hill, 50 N.H. 235, 9 Am.R. 189.
31 C.J. p 1092 note 53.
Care and use of subject matter of bailment in general see Bailments §§ 26–29.

84. Neb.—Churchill v. White, 78 N.W. 369, 58 Neb. 22, 76 Am.S.R. 64.
N.H.—Eaton v. Hill, 50 N.H. 235, 9 Am.R. 189.
R.I.—Freeman v. Boland, 14 R.I. 39, 51 Am.R. 340.
31 C.J. p 1092 note 54.

Conversion
An infant is liable for conversion where he departs from the purpose of the bailment and makes an unauthorized use of the property.—Vermont Acceptance Corporation v. Wiltshire, 153 A. 199, 103 Vt. 219, 73 A.L.R. 792—31 C.J. p 1092 note 54 [a].

85. N.Y.—Chasser v. Hutton, 248 N.Y.S. 136, 139 Misc. 623.
Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246.
31 C.J. p 1092 note 55.

Fraud not excused by infancy
Infancy does not excuse parties guilty of fraudulent transactions.—Johanson v. Lunda, 195 N.W. 917, 157 Minn. 260.

86. N.Y.—Chasser v. Hunt, 248 N.Y.S. 136, 139 Misc. 623—Gaunt v. Taylor, 15 N.Y.S. 589.
31 C.J. p 1093 note 56.

Obtaining property by false representation
(1) Minor is liable to one whose property he has obtained by false representation.—Boshaw v. J. J. Newberry, 243 N.W. 46, 259 Mich. 333.

(2) An action will lie against an infant who has obtained property on the faith of a fraudulent representation, for loss actually sustained by one dealing with him in good faith and exercising reasonable diligence, providing recovery can be had without giving effect to a contract of the infant.—Butler Bros. v. Snyder, 142 N.E. 398, 81 Ind.App. 44.

(3) The rule has been applied where the action against an infant was based on his fraud in representing that a certain forged guaranty was genuine, thereby inducing plaintiff to furnish defendant certain merchandise under a void contract of sale.—Butler Bros. v. Snyder, supra.

87. N.Y.—Shenkein v. Fuhrman, 141 N.Y.S. 909, 80 Misc. 179.
31 C.J. p 1093 note 57.
Torts connected with contracts generally see supra § 89.

88. Ala.—Ex parte Pritchett, 65 So. 521, 187 Ala. 384, denying certiorari Pritchett v. Fife, 62 So. 1001, 8 Ala.App. 462.
31 C.J. p 1093 note 58.

89. Mass.—Brooks v. Sawyer, 76 N.E. 953, 191 Mass. 151, 114 Am.S.R. 594.
N.Y.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437—Collins v. Gifford, 96 N.E. 721, 203 N.Y. 465, 38 L.R.A.,N.S., 202, Ann.Cas.1913A 969—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App.Div. 1016.
31 C.J. p 1093 note 59.

90. Ind.—Rice v. Boyer, 9 N.E. 420, 108 Ind. 472, 58 Am.R. 53.
Mich.—Patterson v. Kasper, 148 N.W. 690, 182 Mich. 281, L.R.A.1915A 1221.

Suit to rescind contract
In a suit in equity against infant to rescind contract for purchase of a business and to recover sums paid under the contract on the ground that the contract was obtained by the fraud of the infant, the test as to whether the matter was one arising "ex contractu" so as to authorize defense of infancy or a matter "ex delicto" in which defense of infancy would be of no avail, was whether relief could be granted without directly or indirectly enforcing the promise of the infant; and it was held that the suit was one ex delicto and not ex contractu so that infancy could not be pleaded to avoid liability.—Beardsley v. Clark, 294 N.W. 887, 229 Iowa 601.

In order to impose the liability for fraud, all the elements of fraud must coexist.[91]

b. Misrepresentation as to Age

The liability of an infant in tort for his misrepresentation as to his age, which induces the making of a contract, has been denied on the ground that such misrepresentation is a part of the contract, but liability in tort has been asserted by some authorities on the ground that the misrepresentation is not a part of, and does not grow out of, the contract, or that the enforcement of liability does not constitute a method of enforcing liability on the contract.

There appears to be a conflict of authority as to the question whether an action will lie against an infant for falsely representing himself to be of full age.[92] However, such conflict is not due to any divergency from the rule, considered supra § 89, that an infant is not liable for his torts connected with, or growing out of, his contracts, although he may be liable if the tort is independent of, or subsequent to, the contract, and not a mere breach of it, but a distinct, willful, and positive wrong in itself. The conflict lies rather in the application of the rule. Some authorities consider that a false representation as to age inducing a contract is a part of the contract and accordingly hold that it cannot be the basis of an action in tort.[93] Other authorities hold that such misrepresentation may be the basis of such an action, on the theory that such misrepresentation is not a part of, and does not grow out of, the contract,[94] or that the enforcement of liability for such misrepresentation as a tort does not constitute an indirect method of enforcing liability on the contract.[95] In order to hold the infant liable, however, the fraud must be actual and not constructive.[96] It has been held that his mere silence when making a contract as to his age does not constitute a fraud which can be made the basis of an action of deceit.[97]

§ 91. Negligence

An infant may be liable for injuries caused by his negligence.

An infant may be guilty of actionable negli-

91. N.Y.—Collins v. Gifford, 96 N.E. 721, 208 N.Y. 465, 38 L.R.A.,N.S., 202, Ann.Cas.1913A 969.
Elements of fraud see Fraud §§ 3–45.

92. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 763, 230 Ala. 275, citing **Corpus Juris.**
Ind.—Rice v. Boyer, 9 N.E. 420, 108 Ind. 472, 58 Am.R. 53.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Ohio.—Mestetzko v. Elf Motor Co., 165 N.E. 93, 119 Ohio St. 575.
31 C.J. p 1093 note 62.
Effect of false representations as to age on right to disaffirm acts or transactions see supra § 27.

93. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 230 Ala. 275.
Mass.—Slayton v. Barry, 56 N.E. 574, 175 Mass. 513, 78 Am.S.R. 510, 49 L.R.A. 560.
N.C.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.
Ohio.—Summit Auto Co. v. Jenkins, 153 N.E. 153, 20 Ohio App. 229.
31 C.J. p 1093 note 64.

In New York

(1) The court of appeals, in a comparatively recent case in which it was held that an infant could disaffirm a contract, notwithstanding his misrepresentation as to his age, stated that an infant cannot be sued for damages in tort by reason of any false representation made in inducing or procuring the contract.—Sternlieb v. Normandie Nat. Securities Corporation, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437.

(2) An infant is not liable in tort for any misrepresentations concerning age implied from the fact that he purchased merchandise.—Hecker-Jones-Jewell Milling Co. v. Bernstein, 254 N.Y.S. 588, 142 Misc. 501.

(3) In some earlier cases the right to recover in an action in tort for a misrepresentation as to age was recognized.—Eckstein v. Frank, 1 Daly 334.
31 C.J. p 1093 note 65.

In Pennsylvania

(1) The view apparently has been taken that an action of deceit will not lie against an infant based on his false representation as to his age which induced the sale of goods to him.—Frank Spangler Co. v. Haupt, 53 Pa.Super. 545.

(2) But the right of the seller to disaffirm a sale induced by such misrepresentation and other fraudulent misrepresentations and to maintain replevin to recover the property from a person to whom the infant has transferred it has been upheld.—Neff v. Landis, 1 A. 177, 110 Pa. 204.

Infant is not liable for deceit in misrepresenting his age as an inducement to the sale of personal property to him, even though he has disaffirmed the contract.—Drennen Motor Car Co. v. Smith, 160 So. 761, 230 Ala. 275.

Pleading showing attempt to enforce contract

Where the original complaint against an infant alleged the execution of a note and mortgage by the infant, his default in payment, the seizure and sale of the mortgaged property, and sought to recover the balance due on the note after such sale, an amended complaint, alleging deceit by the infant in misrepresenting his age, which claimed the exact amount of the indebtedness as damages caused by the fraud, shows a manifest purpose to collect the unpaid balance due on the note by transforming an action on contract into an action in tort, which is not permitted.—Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261, 185 N.C. 109.

94. N.H.—Fitts v. Hall, 9 N.H. 441.
31 C.J. p 1093 note 65.

In Illinois, in a case in which it was pointed out that actually the infant did not make any false statement, it was stated that if an infant should falsely state that he is of age, for the purpose of inducing another to purchase, and take a deed of, the infant's lands, the infant would be liable in damages which might result to the purchaser from the deceit.—Davidson v. Young, 38 Ill. 145.

95. Ind.—Rice v. Boyer, 9 N.E. 420, 108 Ind. 472, 58 Am.R. 53.
Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246.
Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, 228 N.W. 484, 201 Wis. 101, 67 A.L.R. 1259.
31 C.J. p 1093 note 65.

96. Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, supra.

97. Wis.—Wisconsin Loan & Finance Corporation v. Goodnough, supra.
31 C.J. p 1093 note 66.

gence.[98] While it has been held that there are no presumptions as to the capability of infants with respect to the commission of negligence, or as to their liability in that regard,[99] according to some cases an infant of tender years is not chargeable with negligence.[1] The infancy of a person charged with negligence as affecting the degree of care required of him is discussed in the C.J.S. title Negligence § 11, also 31 C.J. p 1094 note 70, 45 C.J. p 699 note 69 et seq.

In accordance with the general rule as to torts, stated supra § 87, generally an infant is not liable for the negligence of another impliedly acting for him,[2] or, as sometimes stated, the infant is not liable for such negligence under the doctrine of respondeat superior.[3] It has been held that an infant is not liable for the negligence of another under the doctrine of imputed negligence, because of want of privity between the infant and such other which is an essential element of imputed negligence,[4] but it has also been held that, under certain circumstances, an infant may be liable under such doctrine.[5] Some cases have announced the broad rule that an infant may be liable for the negligence of his agent, on the theory that the appointment of an agent by an infant is not void but is merely voidable.[6]

In accordance with the general rules, considered supra § 89, an infant is not liable where the negligence consists in the mere breach of a contract,[7] but the rule is otherwise as to the gross negligence of an infant which constitutes a distinct and positive wrong of itself, wholly independent of a contract.[8]

Operation of motor vehicle. The general rule that an infant may be guilty of actionable negligence applies to the negligence of an infant in operating a motor vehicle.[9] An infant cannot avoid

98. U.S.—Carroll v. Harrison, D.C. Va., 49 F.Supp. 283, affirmed, C.C.A., Harrison v. Carroll, 139 F.2d 427, applying law of Virginia.
Ark.—Moore v. Wilson, 20 S.W.2d 310, 312, 180 Ark. 41, citing **Corpus Juris.**
N.Y.—Rozell v. Rozell, 22 N.E.2d 254, 281 N.Y. 106, 123 A.L.R. 1015, affirming 8 N.Y.S. 901, 256 App.Div. 61—Williams v. Hayes, 38 N.E. 449, 143 N.Y. 442, 26 L.R.A. 153, 42 Am.St.R. 743—Steinberg v. Cauchois, 293 N.Y.S. 147, 249 App.Div. 518.
31 C.J. p 1093 note 69.
In Louisiana it has been stated that liability of an infant for quasi offenses, under Rev.Civ.Code §§ 1785, 1874, 2227, must be founded on negligence, since there must be negligence before there can be any quasi offense. —Gott v. Scott, App., 199 So. 460.
Contributory negligence of infants see the C.J.S. title Negligence §§ 144–149, also 45 C.J. p 998 note 85–p 1011 note 18.

99. Ky.—Stephens v. Stephens, 189 S.W. 1143, 172 Ky. 780.
Capacity of person charged as element of actionable negligence see the C.J.S. title Negligence § 2, also 45 C.J. p 637 notes 2, 3.
Presumptions as to capacity of infants with respect to commission of crimes see infra § 96.

1. Neb.—Siedlik v. Schneider, 241 N.W. 535, 122 Neb. 763.
W.Va.—Washington v. Baltimore & O. R. Co., 17 W.Va. 190.

2. U.S.—Thompson v. Bell, C.C.A. Mich., 129 F.2d 211, stating rule in Indiana.
31 C.J. p 1091 note 31.
Persons liable for negligence generally see the C.J.S. title Negligence §§ 90–102, also 45 C.J. p 878 note 22–p 897 note 23.

3. Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E. 2d 104, 310 Ill.App. 582—Johnson v. Turner, 49 N.E. 297, 319 Ill.App. 265.
Wis.—Covault v. Nevitt, 146 N.W. 1115, 157 Wis. 113, 51 L.R.A.,N.S., 1092, Ann.Cas.1916A 959.
31 C.J. p 1091 note 31.

4. Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E. 2d 104, 310 Ill.App. 582.
Discussion of rule
In order to impute the negligence of one person to another, they must stand in a relation of privity, and there is no imputable negligence except in cases in which such a privity as master and servant or principal and agent exists, which relationship, with himself as master or principal, cannot be established by an infant. —Palmer v. Miller, supra.

5. Ala.—Woodson v. Hare, 13 So.2d 172, 244 Ala. 301.

6. N.J.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.
Pa.—Feaglas v. Sullivan, 32 Pa.Dist. & Co. 47.

7. U.S.—Potter v. Florida Motor Lines, D.C.Fla., 57 F.2d 313, 316, citing **Corpus Juris.**
Tenn.—Lowery v. Cate, 64 S.W. 1068, 108 Tenn. 54, 91 Am.S.R. 744, 57 L.R.A. 673.
31 C.J. p 1094 note 74.

8. Mass.—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132.

9. Ark.—Moore v. Wilson, 20 S.W. 2d 310, 180 Ark. 41.
Cal.—House v. Fry, 157 P. 500, 30 Cal.App. 157.
Iowa.—Daggy v. Miller, 162 N.W. 854, 180 Iowa 1146.
Mass.—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132.
N.H.—Smith v. Bailey, 23 A.2d 363, 91 N.H. 507.
N.Y.—Rozell v. Rozell, 22 N.E.2d 254, 281 N.Y. 106, 123 A.L.R. 1015, affirming 8 N.Y.S.2d 901, 256 App. Div. 61.
Ohio.—Wery v. Seff, 25 N.E.2d 692, 136 Ohio St. 307.
Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.
In Louisiana, under Civ.Code arts. 1785, 1874, 2227, a minor may be liable for his negligence in operating an automobile.—Seither v. Poter, App., 194 So. 467—Kern v. Knight, 127 So. 133, 13 La.App. 194.
Age of infant
(1) An infant nineteen years of age, which is three years beyond the age at which he may be licensed, under the laws of the state, to operate an automobile, is not incompetent, as a matter of law, to exercise average care in driving.—Smith v. Bailey, 23 A.2d 363, 91 N.H. 507.
(2) An infant under sixteen years of age, who was driving a motorcycle in violation of statute and who failed to exercise ordinary care with respect to speed, lookout, management, and control, was liable for injuries to a gratuitous guest.—Hopkins v. Droppers, 210 N.W. 684, 191 Wis. 334, 49 A.L.R. 1519.
Injury to automobile
An infant who takes control of a car without reason to believe that he has a contractual right so to do may be liable in tort for an injury to the car resulting from his negligent driving.—Miller v. Peck, Tex. Civ.App., 258 S.W. 887.

liability for his negligence merely because the injured person was an occupant of the automobile pursuant to an alleged contract with the infant, where such contract has no relation to, or connection with, the infant's negligence,[10] but an infant is not liable to the injured person where, notwithstanding the action sounds in tort, such action is merely an indirect method of enforcing liability on a contract.[11] The infant bailee of an automobile who is obligated to exercise only reasonable care in driving is not liable for injury thereto where he is guilty merely of want of reasonable care.[12]

Generally an infant is not liable for the negligence of another in operating an automobile, solely under the doctrine of respondeat superior,[13] and this rule applies even though the infant is in possession and control, and is an occupant, of the automobile when the tort of the driver is committed.[14] It has been held that an infant who is in possession of an automobile and who permits another to drive is not liable for the negligence of such other, notwithstanding the infant is an occupant of the automobile when the tort is committed,[15] or, at least, that the infant is not liable in

10. Mass.—Dow v. Lipsitz, 185 N.E. 921, 283 Mass. 132.

Action sounding in tort

The rule stated in the text was applied where the action was based on the infant's gross negligence and was not brought to recover for breach of contract but was brought to recover for the distinct and positive wrong of the infant, wholly independent of any contract.—Dow v. Lipsitz, supra.

11. Mich.—Brown v. Wood, 291 N. W. 255, 293 Mich. 148, 127 A.L.R. 1436.

Particular contract

(1) A minor who transported other minors to and from school pursuant to a contract to pay such minor for such transportation was not liable in a tort action for injuries sustained by them in an accident caused by his negligence, since the tort was inseparably connected with the contract.—Brown v. Wood, supra.

(2) The view apparently was taken that the minor operator would not be liable in such case even though the relationship might be regarded as one of joint enterprise, since the relationship of joint enterprise is based on contract, either express or implied.—Brown v. Wood, supra.

(3) The facts that the injured minors neither paid nor tendered payment for their transportation on the day of the accident and that the guardian of the minor defendant disaffirmed, at the trial, any contract of carrying for hire did not alter the determination that the minor defendant was not liable; if the injured minors were gratuitous passengers, there was no liability, in view of statutory regulation, because there was neither claim nor proof of gross negligence or of wanton or willful misconduct.—Brown v. Wood, supra.

12. N.J.—Brunhoelzl v. Brandes, 100 A. 163, 90 N.J.Law 31.
31 C.J. p 1091 note 42 [a].

Reason for rule

To hold the infant liable for the tort where the injury to the car was caused by his poor judgment or lack of caution and not by recklessness, wantonness, or gross negligence would enforce, in effect, his liability on a contract of bailment and deny his immunity from liability on contract.—Brunhoelzl v. Brandes, supra.

Gratuitous bailee

Infant bailee of borrowed automobile was not liable for damages to automobile caused by reckless driving at speed exceeding forty-five miles per hour, in absence of showing that he departed from object of bailment or that he intentionally caused damage.—Jones v. Milner, 185 S.E. 586, 53 Ga.App. 304.

Care and use of subject matter of bailment and negligence of bailee in general see Bailments §§ 26–29.

13. Ill.—Palmer v. Miller, 43 N.E. 2d 973, 380 Ill. 256, reversing 35 N. E.2d 104, 310 Ill.App. 582—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.

Mo.—Hodge v. Feiner, 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483, affirming, App., 78 S.W.2d 478.

In Louisiana, since there is no specific provision of the law of Louisiana which authorizes a minor to bind himself or herself for the torts of another either by express agreement or by silent acquiescence, a person cannot be the agent or servant of the minor owner of an automobile, so as to render the minor liable for the negligence of such person in driving the automobile.—Gott v. Scott, App., 199 So. 460.

Tort not committed in presence of infant

Where the infant, who had the privilege of using an automobile owned by his father and who had permitted another to drive the car, was not present when a collision which resulted from the negligent driving of such other occurred, and where, in order to hold the infant liable, it was necessary to show that the driver was the agent of the infant and was engaged on an errand in the infant's behalf, it was held that the infant could not be held liable under the doctrine of respondeat superior.—Hodge v. Feiner, 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483, affirming, App., 78 S.W.2d 478.

14. Ill.—Palmer v. Miller, 43 N.E. 2d 973, 380 Ill. 256, reversing 35 N.E.2d 104, 310 Ill.App. 582.

15. Tex.—Fernandez v. Lewis, Civ. App., 92 S.W.2d 305, error dismissed.

In Louisiana, in view of the provisions of Civ.Code arts. 1785, 1874, 2227, imposing liability on a minor with respect to his offenses or quasi offenses, which provisions constitute the basis of the liability of a minor for torts, the minor owner of an automobile, who occupied the back seat and did not exercise control over the operation of the automobile by a driver to whom the infant had given permission to drive, was not liable for the negligence of the driver, even though the infant had the right to control the operation of the automobile; the driver was not the agent or servant of the infant owner so as to render the infant liable for the negligence of the driver.—Gott v. Scott, App., 199 So. 460.

Reason for rule

An infant is not liable for a tort committed by his agent or employee. —Fernandez v. Lewis, Tex.Civ.App., 92 S.W.2d 305, error dismissed.

Coöwners

Where it was assumed that one of two infant coöwners of an automobile was an occupant of the automobile when an injury was caused by the negligent driving of the other owner, it was stated that there could be no liability based on any agency, or contractual relation between such coöwners, "for the reason that infants are not liable directly or indirectly on their contracts, and liability on this score necessarily involves the recognition of a contract." —Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.

such case on the theory that the negligence of the driver is imputable to the infant.[16] In some jurisdictions, however, the infant may be liable if he is present and has the authority to control and direct the driver.[17] An infant may be liable where he is present and is exercising his authority to control the operation of the automobile by the driver.[18] According to some cases, an infant who has control of an automobile may be liable for an injury immediately caused by the negligence of another whom the infant has permitted to drive, notwithstanding the infant is not present when the injury occurs.[19] A statutory provision that, in all cases where damage is done by any car by reason of the negligence of the driver who is driving with the consent of the owner, the owner shall be liable for such damage applies to an infant owner so as to render him liable in a case otherwise within the statute.[20]

§ 92. Damages

In general an infant tort-feasor is liable for compensatory damages, but not for punitive damages unless his age and intelligence are such as to render him criminally responsible for the tort.

In general an infant is liable for compensatory damages resulting from his tort,[21] but he is not liable for punitive damages if he is not criminally

16. Ill.—Palmer v. Miller, 43 N.E.2d 973, 380 Ill. 256, reversing 35 N.E.2d 104, 310 Ill.App. 582.

17. Pa.—Feaglas v. Sullivan, 32 Pa.Dist. & Co. 47.
Tenn.—Wilson v. Moudy, 123 S.W.2d 828, 22 Tenn.App. 356—Wilson v. Mullen, 11 Tenn.App. 319.

Imputable negligence

(1) In some jurisdictions the doctrine of imputable negligence applies to a minor who is present and has charge of the automobile, with the right and authority to direct the driver in the manner of operation.—Woodson v. Hare, 13 So.2d 172, 244 Ala. 301.

(2) The rule was applied where the owner of the automobile permitted the infant to use it and the tort was committed when the infant was an occupant of the automobile which was being driven by one to whom the infant had given permission to drive.—Woodson v. Hare, supra.

(3) In discussing the rule it has been stated that the person whom the infant has designated as driver is the alter ego of the infant, that is, an agent in law, and that there is an agency out of which liability can be imposed on the infant.—Woodson v. Hare, supra.

Agency

(1) It has been held that an infant who had control of an automobile and who was present when the tort was committed was liable for the negligence of another who was driving at the request, or with the permission, of the infant, on the theory that the driver was the infant's agent for whose negligence the infant was liable.
N.J.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.
Pa.—Feaglas v. Sullivan, 32 Pa.Dist. & Co. 47.

(2) This conclusion was reached on the theory that the appointment of an agent by an infant is not void but is merely voidable, and that, as long as the infant sees fit to continue the existence of the agency, he is answerable for the negligence of his representative in the performance of a duty which the agency carries with it.—Scott v. Schisler, supra.

18. Mo.—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948.
Tenn.—Thrasher v. Bratton, 6 Tenn.Civ.App. 454.

Acts under, and pursuant to, infant's direction and control

If the alleged tortious act was committed by the driver in the presence of the infant while the driver was operating the automobile under, and pursuant to, the infant's authority, direction, and control, the driver would be regarded as the alter ego of the infant so as to render the latter liable.—Taksen v. Kramer, 263 N.Y.S. 609, 239 App.Div. 756.

Joint enterprise

In a case in which a minor either borrowed an automobile or took it without the consent of the owner, and at first actually assisted in driving and continued to direct the movements of the car throughout the drive, the rule was announced that a minor who occupies an automobile and engages in the prosecution of a joint enterprise with another who drives may be liable for the negligence of the driver.—Ahlstedt v. Smith, 264 N.W. 889, 130 Neb. 372.

19. **In Virginia**

(1) In a case in which the law of Virginia was applicable, the federal district court took the broad view that, where an infant, in possession and control of an automobile, had left the car and had permitted another to drive it, the infant was liable for an injury caused by the negligence of the driver, on the theory that the infant and the driver were engaged in a joint enterprise and that the driver was the agent of the infant and was using the automobile for a purpose for which the infant was legally authorized to use it.—Carroll v. Harrison, D.C.Va., 49 F.Supp. 283, affirmed, C.C.A., Harrison v. Carroll, 139 F.2d 427.

(2) In affirming the judgment of the district court and in holding the infant liable, the circuit court of appeals based its holding on the ground that the infant was guilty of negligence in permitting the driver to take the car and drive it, in view of the fact that he permitted the driver to take the car with knowledge that the latter was intoxicated and unfit to drive, a ground on which the district court had also based liability.—Harrison v. Carroll, C.C.A.Va., 139 F.2d 427, affirming, D.C., Carroll v. Harrison, 49 F.Supp. 283.

20. Iowa.—Lind v. Eddy, 6 N.W.2d 427, 232 Iowa 1328, 146 A.L.R. 695.

Nature of liability and disaffirmance of limited agency

(1) The statutory liability, under Code 1939 § 5037.09, is analogous to the liability of a principal for the negligent acts of his agent, and the statute does not create a full and complete agency between the owner and user of the car permitting an infant owner to disaffirm the agency on reaching maturity so as to avoid liability.—Lind v. Eddy, supra.

(2) Under the statute, an infant owner of a truck was liable for an injury caused by negligent driving of one whom he had employed to drive it, and the infant could not disaffirm the limited agency so as to avoid liability.—Lind v. Eddy, supra.

21. Wis.—Briese v. Maechtle, 130 N.W. 893, 146 Wis. 89, 35 L.R.A.,N.S., 574, Ann.Cas.1912C 176.
31 C.J. p 1094 note 75.

Deceit

Infant misrepresenting age, not being liable on note, but being liable for deceit, was not liable for attorney's fees or for interest above legal rate.—Wisconsin Loan & Finance Corporation v. Goodnough, 228 N.W. 484, 201 Wis. 101, 67 A.L.R. 1259.
Compensatory damages, generally see Damages §§ 17–100.

responsible for the tort involved.[22] An infant may be liable for punitive damages, however, if he is of sufficient age and intelligence to be criminally responsible.[23]

VII. CRIMES AND COMMITMENT OF JUVENILE DELINQUENTS AND DEPENDENTS

§ 93. In General

While an infant criminal is at common law treated as an adult, such treatment is at variance with the modern spirit of penology.

As considered infra § 94, at common law and apart from contrary statute, an infant who violates the criminal law is generally treated as an adult. However, it is said to be contrary to the spirit of modern penology to impose on juvenile offenders, whose need is reclamation and reform rather than punishment, the penalties intended for adults,[24] and as a result of a growing sentiment in that direction, in many jurisdictions, special laws have been enacted for the juvenile offender, whereby an infant who has violated the criminal law is treated merely as a delinquent, and not as a criminal. Such statutes are discussed infra §§ 97–102. The law with respect to infants treated as criminals is considered infra §§ 94–96.

§ 94. Juvenile Offender Treated as Criminal

Except for contrary statute, and subject to any presumption of incapacity, an infant may be prosecuted for crime under the criminal law just as any adult.

Although it has been said that the law throws every reasonable protection about an infant accused of crime, and tends to resolve every doubt in his favor,[25] except as otherwise provided by statute,[26] and except for, or apart from, any presumption of incapacity to commit crime, as considered infra § 96, an infant who has developed sufficient intelligence and moral perception to distinguish between right and wrong, and to comprehend the legal consequence of his acts, is, as in the case of an adult, subject to the criminal law, and may be prosecuted and convicted thereunder.[27] Thus, under a statute

22. Ark.—Moore v. Wilson, 20 S.W. 2d 310, 180 Ark. 41.

Extreme youth and want of discretion

It seems that extreme youth and consequent want of discretion may be sufficient to prevent an award of punitive damages.—Huchting v. Engel, 17 Wis. 230, 84 Am.D. 741.

Exemplary or punitive damages generally see Damages §§ 117–127.

23. Ark.—Kibler v. Kibler, 24 S.W. 2d 867, 180 Ark. 1152—Moore v. Wilson, 20 S.W.2d 310, 180 Ark. 41.

24. U.S.—U. S. v. A Juvenile Offender, 3 Mill.Rev. 380.

Ohio.—Durst v. Griffith, 182 N.E. 519, 520, 43 Ohio App. 44, quoting **Corpus Juris.**

25. Ky.—Elmore v. Commonwealth, 138 S.W.2d 956, 282 Ky. 443.

26. Child below age of capacity

In view of statute declaring child under the age of ten years doli incapax, statute making it a misdemeanor to climb on railroad car without permission has no application to child under ten years of age. —Maskaliunas v. Chicago & W. I. R. Co., 149 N.E. 23, 318 Ill. 142.

Children below specified age

(1) Under some statutes, only minors over a specified age may be tried in the criminal courts for their crimes.

Ky.—Cloyd v. Commonwealth, 278 S. W. 595, 212 Ky. 178.

La.—State ex rel. Clayton v. Jones, 188 So. 737, 192 La. 671—State v. Bennett, 159 So. 385, 181 La. 269 —State v. Walker, 152 So. 215, 178 La. 635—State v. West, 139 So. 304, 173 La. 974—State v. Grayson, 127 So. 382, 170 La. 111—State v. Dabon, 111 So. 461, 162 La. 1075—State v. Duckett, 107 So. 696, 160 La. 920.

Mo.—State v. Carolla, 292 S.W. 721, 316 Mo. 213.

(2) Determining age of accused see infra § 98.

Preliminary investigation

(1) As discussed infra § 98, under some statutes a preliminary investigation is made to determine whether an infant accused of crime should be proceeded against as a delinquent or prosecuted for crime, such an investigation being essential in some jurisdictions, before the criminal court may take jurisdiction.—Ex parte Walker, 235 P. 266, 30 Okl.Cr. 149.

(2) Such a preliminary determination is not necessary under some statutes with respect to offenses excepted from operation of the Juvenile Court Act.—Howland v. State, 268 S.W. 115, 151 Tenn. 47.

Pendency of juvenile proceeding

Refusal to abate prosecution on the ground that accused was under seventeen years of age when alleged offense occurred, and that complaint charging him as juvenile delinquent was pending, was held not error, where accused was more than seventeen years old when indictment was returned and it did not appear why juvenile case had not been disposed of.—Smith v. State, 269 S.W. 793, 99 Tex.Cr. 402.

Infant criminal treated as mere delinquent see infra §§ 97–102.

Invalidity of Juvenile Court Act does not affect validity of trial of infant in criminal courts.—State v. Peterson, 190 N.W. 845, 153 Minn. 310.

27. Ala.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.

Ind.—McCutcheon v. State, 155 N.E. 544, 199 Ind. 247.

Iowa.—State v. Reed, 218 N.W. 609, 207 Iowa 557.

La.—State v. Bedford, 190 So. 347, 193 La. 104.

Me.—State v. Rand, 169 A. 898, 132 Me. 246.

Mo.—State v. Adams, 289 S.W. 948, 316 Mo. 157—State ex rel. Menth v. Porterfield, 264 S.W. 386—State ex rel. Corella v. Pence, 262 S.W. 360, 303 Mo. 598.

N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.

N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.

Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Wash.—State v. Melvin, 258 P. 859, 144 Wash. 687.

31 C.J. p 1094 note 84—25 C.J. p 617 note 27.

Grand jury may indict a minor who commits a felony.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Abandonment of wife

(1) An infant husband may be prosecuted for abandonment or non-

denouncing an act as a crime, without exception in favor of infants, they are to be regarded as included, if of sufficient maturity to be capable of committing a crime.[28]

Effect of civil disability. The disability of an infant to enter into a binding contract or conveyance, considered supra §§ 30, 71, may prevent criminal liability from attaching to him for any act which would otherwise be a crime.[29] On the other hand, notwithstanding the contract of a minor is voidable, as considered supra § 71, it may, nevertheless, be a means by which he perpetrates a criminal offense for which he may be criminally responsible.[30] For example, an infant may be liable under a statute punishing the procuring of money or other articles of value on a contract to perform services with intent to defraud a hirer,[31] or the obtaining of money or property under false pretenses,[32] or swindling.[33]

Effect of compulsion. An infant otherwise liable for a crime cannot escape liability by showing that he acted under the command of his parent;[34] and where the act is done under the direction of a parent it must appear that the child is of such immature years or mind as to be entirely under the domination, direction, and control of the parent in order that the crime may be that of the parent and not of the child.[35] So where a child between the ages of seven and fourteen commits a criminal act in obedience to the direction of its parent, it is necessary to establish as a distinct fact the capacity of the child to commit the crime.[36]

The construction of a statute, which excepts from the class of persons capable of committing crimes those who commit the act under fear of danger to their lives, is not affected, as to the question whether the fear must be of imminent danger or may be of remote danger, by the fact that the person claiming to have acted under compulsion is an infant.[37]

Reduction of grade of offense. By statute an offense which would be a felony if committed by an adult is sometimes made a misdemeanor merely, when committed by an infant.[38]

§ 95. —— Capacity and Responsibility

To be responsible under the law an infant must be capable of criminal intent, and must be found to have such intent if it is an essential element of the offense charged.

support of his wife.—Land v. State, 71 So. 279, 71 Fla. 270, L.R.A.1916E 760—31 C.J. p 1095 note 9.

(2) This is so although the marriage is a voidable one.—State v. McPherson, 130 P. 481, 72 Wash. 371, 375, Ann.Cas.1914D 587.

(3) For a consideration of the offense of abandonment or nonsupport see Husband and Wife §§ 630–652.

Aggravated or grave offenses

Tex.—Todd v. State, 267 S.W. 726, 99 Tex.Cr. 1.

Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

31 C.J. p 1094 note 84 [b].

Murder

La.—State v. Bedford, 190 So. 347, 193 La. 104.

N.Y.—People v. Roper, 181 N.E. 88, 259 N.Y. 170, motion denied 182 N. E. 213, 259 N.Y. 635.

Pa.—Commonwealth v. Cavalier, 131 A. 229, 284 Pa. 311.

Attempt, or assault with intent, to rape, by infant see the C.J.S. title Rape § 22, also 52 C.J. p 1027 notes 99–7.

Determining whether to proceed against infant as criminal or delinquent see infra § 98.

Offenses by infants which may be prosecuted in the Criminal Courts because excepted from the operation of juvenile delinquency statutes see infra § 98.

Rape, responsibility of infant for, see the C.J.S. title Rape § 6, also 52 C.J. p 1009 note 14–p 1010 note 30.

Seduction by infant see the C.J.S. title Seduction § 31 also 57 C.J. p 47 notes 61–65.

28. N.Y.—People v. Kendall, 25 Wend. 399, 37 Am.D. 240.

Presumptions as to capacity to commit crime see infra § 96.

"Man" as male minor

Under statutes designed to prevent illicit intercourse between the sexes, the word "man" is construed ordinarily to include male minors.—State v. Seiler, 82 N.W. 167, 106 Wis. 346—31 C.J. p 1094 note 89.

Violation of Alien Land Act

Seventeen-year-old girl, eligible to own agricultural lands, who by accepting conveyance of agricultural lands and in executing mortgages and notes had knowingly participated in conspiracy to violate Alien Land Act, prohibiting aliens ineligible to citizenship from owning or exercising incidents of ownership with respect to agricultural lands, was held responsible for her conduct, notwithstanding her youth, and subject to statute making it criminal offense to conspire to violate provisions of Alien Land Act.—Babu v. Petersen, 48 P.2d 689, 4 Cal.2d 276.

29. **Fraudulent disposition of mortgaged property**

N.C.—State v. Howard, 88 N.C. 650.

Tex.—Jones v. State, 20 S.W. 578, 31 Tex.Cr. 252.

30. Ga.—Anthony v. State, 55 S.E. 479, 126 Ga. 632.

31 C.J. p 1095 note 95.

31. Ga.—Anthony v. State, 55 S.E. 479, 126 Ga. 632—Vinson v. State, 52 S.E. 79, 124 Ga. 19.

32. Ky.—Commonwealth v. Ferguson, 121 S.W. 967, 135 Ky. 32, 24 L. R.A.,N.S., 1101, 21 Ann.Cas. 434.

N.Y.—People v. Kendall, 25 Wend. 399, 37 Am.D. 240.

31 C.J. p 1095 note 97.

33. Tex.—Neal v. State, Cr., 101 S. W. 212.

34. Cal.—People v. Richmond, 29 Cal. 414.

S.C.—State v. Thrailkill, 53 S.E. 482, 73 S.C. 314, 318.

31 C.J. p 1095 note 2.

Liability of person exercising duress as principal see Criminal Law § 84 b.

35. Fla.—Kelley v. State, 83 So. 909, 79 Fla. 182.

31 C.J. p 1095 note 3.

36. Mass.—Commonwealth v. Mead, 10 Allen 398.

Presumption of capacity see infra § 96.

37. Cal.—People v. Martin, 108 P. 1034, 13 Cal.App. 96.

38. N.Y.—People v. Kaminsky, 102 N.E. 515, 208 N.Y. 389, affirming 122 N.Y.S. 687, 137 App.Div. 941.

Apart from presumptions of capacity or incapacity of infants to commit crime, as considered infra § 96, in order that an infant may be responsible for crime, he must be capable of entertaining a criminal intent,[39] or, as it is sometimes otherwise stated, he must understand the nature or illegality of his acts.[40] Hence, the test of responsibility rests rather in his discretion and power to discriminate right from wrong,[41] and to comprehend the consequence of his acts,[42] than on the mere question of age.[43] A sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient.[44] However, it is not necessary to show actual knowledge of the unlawfulness of the act if sufficient legal capacity to commit crime is otherwise established.[45]

Felonious intent as an essential element of the crime charged must be found present to justify conviction of a minor.[46] However, where intent is not an ingredient of the statutory crime charged, the age and mentality of the infant is not taken into consideration.[47]

§ 96. —— Prosecution and Punishment

a. In general
b. Appearance and representation by counsel; guardian
c. Plea
d. Evidence
e. Trial
f. Review
g. Punishment

a. In General

Except as statute may otherwise provide or require, and subject to the duty of the court to safeguard the interests of minors appearing before it, the procedure in criminal cases in which infants are defendants is the same as in the case of adult defendants.

The procedure in criminal cases where infants are defendants is, in the absence of statute providing otherwise,[48] the same as in the cases of adult defendants.[49] This is true of cases wherein the juvenile court orders a delinquent child to be prosecuted for the crime.[50]

Jurisdiction. The court before which a minor

39. Miss.—Beason v. State, 50 So. 488, 96 Miss. 105.

Incapacity to form intent

Child too young to form an intent to steal cannot be guilty of larceny. —Allen v. State, Tex.Cr., 37 S.W. 757.

Preliminary determination of capacity of infant to commit crime see infra § 98.

Criminal capacity generally see Criminal Law § 55.

40. Tex.—Real v. State, 103 S.W.2d 741, 132 Tex.Cr. 178.
31 C.J. p 1095 note 14 [a].

41. Ariz.—Hernandez v. State, 32 P. 2d 18, 43 Ariz. 424.
31 C.J. p 1095 note 13.

Age as factor in determination

In murder prosecution against seventeen-year-old boy, instruction that age of accused was to be considered for purpose of determining whether he had at time of alleged crime sufficient mental capacity to entertain criminal intent, and to distinguish between right and wrong, was held proper.—Hernandez v. State, supra.

Knowledge of wrongfulness of act must be found.—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Pyzer, 232 P. 962, 29 Okl.Cr. 156—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.

42. Miss.—Beason v. State, 50 So. 488, 96 Miss. 105.

43. Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.
31 C.J. p 1095 note 15.

44. N.C.—State v. Yeargan, 23 S.E. 153, 117 N.C. 706, 36 L.R.A. 196.
31 C.J. p 1095 note 16.

45. Mass.—Commonwealth v. Mead, 10 Allen 398.

46. Murder

(1) Under 1932 law, proof that child under age of sixteen years participated in robbery in first degree cannot establish child's guilt of felony necessary to show felonious intent in murder prosecution.—People v. Roper, 181 N.E. 88, 259 N.Y. 170, motion denied 182 N.E. 213, 259 N.Y. 635.

(2) In prosecution of fifteen-year-old child for murder, wherein guilt of robbery was relied on to establish felonious intent, but court did not charge on degrees of robbery, accused's conviction of murder in first degree rested on no finding of felonious intent.—People v. Roper, supra.

47. Minn.—State v. Peterson, 190 N. W. 345, 153 Minn. 310.
31 C.J. p 1096 note 18.

48. Arrest

Where justice of the peace, at the time he issued warrant for arrest of infant, knew that rape had been committed and that confession of the infant and other circumstances pointed to infant as the criminal agent, the use of process of arrest was "imperative" within statute providing that no warrant of arrest shall be issued for a child between ages of twelve and eighteen years except when use of such process is imperative.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

Procedure when treated as delinquent see infra § 99.

49. Mo.—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.
Okl.—Fields v. State, Cr., 138 P.2d 124—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
31 C.J. p 1096 note 21.

Determination of whether infant should be proceeded against as criminal or delinquent see infra § 98.

As common-law rule

Me.—Richardson v. Dunn, 146 A. 904, 905, 128 Me. 316, citing **Corpus Juris.**

Courts should exercise care in use of printed forms furnished by institutions.—People ex rel. Boger v. Coon, 245 N.Y.S. 141, 230 App.Div. 370.

Indictment and information

Indictment charging arson committed by child under fifteen years, constituting aggravated offense, was held to give superior court jurisdiction without allegation that offense was aggravated.—State v. Rand, 169 A. 898, 132 Me. 246.

50. Minn.—State v. Peterson, 190 N. W. 345, 153 Minn. 310.
Mo.—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.

Grand jury action

Under some statutes when felony charge against minor is transferred

may or must be tried for a crime depends largely on the governing statutes, although the court before which an adult would be tried for the same offense generally has jurisdiction of a prosecution against a minor for a crime,[51] and not the juvenile court.[52] Under some statutes, however, the juvenile court may have jurisdiction of such a prosecution,[53] while under others, the juvenile courts and crim-

from juvenile court to court of common pleas, grand jury is empowered to return any indictment proper under facts submitted to it, notwithstanding general jurisdiction of delinquent minors conferred on juvenile court.—State v. Klingenberger, 149 N.E. 395, 113 Ohio St. 418.

51. Fla.—Ex parte Kitts, 147 So. 573, 109 Fla. 202.
Ga.—Thomas v. State, 163 S.E. 734, 174 Ga. 654.
Ill.—People v. Fitzgerald, 152 N.E. 542, 322 Ill. 54.
Iowa.—State v. Reed, 218 N.W. 609, 207 Iowa 557.
Ky.—Hall v. Commonwealth, 21 S.W. 2d 799, 231 Ky. 473.
Mo.—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233—State v. Adams, 289 S.W. 948, 316 Mo. 157—State ex rel. Menth v. Porterfield, 264 S.W. 386.
Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.
Or.—Ex parte Loundagin, 278 P. 950, 129 Or. 652.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S. Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
Jurisdiction of delinquency proceedings see infra § 99.

Determination of jurisdictional facts

(1) In prosecution of juvenile, circuit court has jurisdiction to determine any fact necessary to confer jurisdiction on such court.—Angel v. Commonwealth, 21 S.W.2d 150, 231 Ky. 132.

(2) Jurisdiction to determine whether juvenile should be prosecuted as criminal or proceeded against as a delinquent see infra § 98.

Exclusiveness of jurisdiction

Under some statutes the criminal court is the only court to try an infant under a specified age for a felony, even though the infant could be tried in the juvenile court for delinquency, where the juvenile court act does not expressly limit the jurisdiction of the criminal court.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Infant above specified age

(1) Criminal court has exclusive jurisdiction.—State v. Gregori, 2 S. W.2d 747, 318 Mo. 998.

(2) Statute, providing that when juvenile court obtains jurisdiction over delinquent child it shall continue until he becomes twenty-one, was construed to mean that such retention of jurisdiction is for purposes of proceeding in which jurisdiction was obtained, and not to exclude jurisdiction of criminal courts to proceed against youth, after he attains age of eighteen, for crimes committed between that time and age of twenty-one.—State ex rel. Corella v. Pence, 262 S.W. 360, 303 Mo. 598.

(3) Where judgment of juvenile court assuming jurisdiction of delinquent minor had by its own terms been fully satisfied and court's jurisdiction in that regard been exhausted, minor, being at time a charge of rape was preferred against him more than eighteen years of age, was subject to circuit court's ordinary criminal jurisdiction.—State ex rel. Menth v. Porterfield, Mo., 264 S. W. 386.

Infant formerly declared delinquent

The text rule applies although the infant had been declared to be a juvenile delinquent in a proceeding in the juvenile court in connection with another matter.—People ex rel. Malec v. Lewis, 199 N.E. 276, 362 Ill. 229—People v. Lattimore, 199 N.E. 275, 362 Ill. 206.

Murder

Criminal court has jurisdiction to try murder charge against infant.
Mo.—State v. Adams, 289 S.W. 948, 316 Mo. 157.
N.J.—State v. Goldberg, 11 A.2d 299, 124 N.J.Law 272, affirmed 17 A.2d 173, 125 N.J.Law 501—Ex parte Mei, 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080, affirming 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125—Ex parte Daniecki, 177 A. 91, 117 N.J. Eq. 527, affirmed 183 A. 298, 119 N.J.Eq. 359.

Police court

District of Columbia police court was held to have jurisdiction to commit minor under seventeen years to jail to await action of grand jury on charge of housebreaking, the jurisdiction of the juvenile court in such a case not being exclusive.—Peak v. Reed, 24 F.2d 619, 58 App.D.C. 44.

52. Cal.—In re Hulbert, 11 P.2d 50, 123 Cal.App. 362.
Fla.—Ex parte Kitts, 147 So. 573, 109 Fla. 202.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

Infant over specified age

Mo.—State v. Damico, 4 S.W.2d 424, 319 Mo. 440—State v. Gregori, 2 S.W.2d 747, 318 Mo. 998.

Particular offenses

(1) Juvenile court was held not to have jurisdiction of murder prosecution against an infant.—Ex parte Mei, 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J. Eq. 125, affirmed 192 A. 80, 122 N. J.Eq. 125, 110 A.L.R. 1080—Ex parte Daniecki, 177 A. 91, 117 N.J.Eq. 527, affirmed 183 A. 298, 119 N.J.Eq. 359.

(2) Juvenile court was held without jurisdiction of fifteen-year-old boy charged with capital offense.—State v. Smith, 195 S.E. 819, 213 N.C. 299.

(3) In Virginia the juvenile and domestic relations court is given no power to acquit or convict an infant over twelve years of age charged with an aggravated felonious offense and, in such case, such court acts only as a court of investigation, and, if the evidence for the commonwealth presents a prima facie case, the juvenile and domestic relations court should hold the infant for action by the grand jury, but, if the offense is not well founded, it should dismiss the case.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U. S. 717, 86 L.Ed. 570.

Juvenile court as committing magistrate

(1) Under the statutes involved the juvenile court was held without jurisdiction to pronounce infant, charged with commission of felony, a delinquent, but sits only as committing magistrate.—Appeal of McKendrick, 282 P. 784, 75 Utah 34.

(2) Statute providing that, if a juvenile offender is charged with a felony, the "juvenile court shall act as a committing magistrate was held not to give the juvenile court exclusive jurisdiction in preliminary hearings accorded juveniles charged with felonies.—State v. Tweed, 224 P. 443, 63 Utah 176.

53. **Infant below specified age**

Under the governing statute, the juvenile court was held to have exclusive jurisdiction in cases wherein persons under seventeen are charged with crime.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.

Violation of ordinance

The Allegheny County court has no jurisdiction to try a minor on an appeal for the alleged violation of a borough ordinance. All criminal or quasi-criminal proceedings against him must be in juvenile

inal courts have coördinate jurisdiction over minors below a specified age with respect to a prosecution for crime, the juvenile court having exclusive jurisdiction of such minors in other matters.[54]

Safeguards. Infants being considered wards of the court,[55] it is the duty of the court to protect the substantial rights of infants in criminal,[56] as well as in civil, cases, as considered infra § 105, and such rights cannot be waived by any attorney or guardian ad litem,[57] it even having been held that a minor under the age of seventeen years, charged with a felony, in the absence of parent, guardian, or counsel, is incapable of waiving the safeguards provided by law in a criminal prosecution, unless it appears beyond all doubt that the minor fully understands the effects and result growing out of such waiver.[58] However, it has been held that a minor is not precluded from waiving his right to be brought before a criminal court when arrested for crime,[59] and that an infant presumed to have capacity to commit crime, may waive his right to counsel, plead guilty, and waive the time within which judgment must be pronounced.[60]

Pendency of proceedings in juvenile court. Under some statutes requiring a criminal court, before whom an infant has been brought, first to submit the case to the juvenile court to pass on the question of whether the infant should be proceeded against as a delinquent or prosecuted as a criminal, as discussed infra § 98, the proceedings had in the criminal court before submission of such question to the juvenile court stand suspended, and if the infant be returned to the criminal court for prosecution, may be continued from the point at which they were so suspended.[61]

b. Appearance and Representation by Counsel; Guardian

An infant prosecuted for crime may appear and defend in person or by counsel. The authorities are not in accord as to whether a guardian ad litem must be appointed to represent the infant.

If the infant prosecuted for crime is above the age when criminal responsibility attaches, he may appear and defend in person or by attorney,[62] an infant, like any other person, being entitled to be represented by counsel,[63] unless he waives such right.[64]

In some jurisdictions, it has been held that, while the trial court may have incidental power to appoint a guardian ad litem for a minor charged with

court.—Commonwealth v. Smith, 90 Pittsb.Leg.J., Pa., 18.

54. Colo.—People v. Morley, 234 P. 178, 77 Colo. 25.

Courts having jurisdiction of delinquency proceedings see infra § 99.

55. Colo.—Reppin v. People, 34 P.2d 71, 95 Colo. 192.

Court as guardian

It is sometimes appropriate for court to exercise duty in nature of a guardian for minor accused of crime.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

56. Ill.—People v. Wunsch, 198 Ill. App. 437.

Ky.—McClure v. Commonwealth, 81 Ky. 448, 5 Ky.L. 468.

Minor without counsel or guardian

(1) A court in dealing with minors charged with felony, who appear without counsel, parent, or friend, should carefully guard their constitutional and statutory rights in all matters of procedure.—Ridge v. State, 220 P. 965, 25 Okl.Cr. 396.

(2) Thus preliminary trial of capital offense by infant under fourteen should be conducted with deliberation giving accused the benefit of every substantial rule of procedure in his favor.—Ridge v. State, supra.

57. Colo.—Reppin v. People, 34 P.2d 71, 95 Colo. 192.

58. Okl.—Fields v. State, Cr., 138 P. 2d 124—Ridge v. State, 220 P. 965, 25 Okl.Cr. 396.

Waiver induced by counsel

Where a child under fourteen years of age was induced by counsel appointed by court to waive preliminary hearing and right to a jury trial and time for pronouncement of sentence provided by statute, and was adjudicated a delinquent child by the juvenile court, pleaded guilty, and was sentenced to be electrocuted, all in one day, he was entitled to a new trial on the ground that he had not received the benefit of statutory rules of procedure, which he did not realize the importance of, and therefore could not waive.—Ridge v. State, supra.

59. Mass.—Shea v. Sullivan, 158 N. E. 771, 261 Mass. 255.

60. Okl.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

61. **Sentence on original plea of guilty**

Accused pleading guilty before disclosing that he was less than eighteen years old and consequent transfer of case to juvenile court, was properly sentenced on such plea, on retransfer of case to criminal court. —People v. Tossey, 259 P. 488, 85 Cal.App. 435.

62. Ga.—Summerour v. Fortson, 164 S.E. 809, 813, 174 Ga. 862, citing **Corpus Juris.**

Me.—Richardson v. Dunn, 146 A. 904, 905, 128 Me. 316, citing **Corpus Juris.**

Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

31 C.J. p 1096 note 26.

Appearance in civil actions see infra § 114.

63. Kan.—State v. Oberst, 273 P. 490, 127 Kan. 412.

If desired by infant

Mich.—People v. Crandell, 258 N.W. 224, 270 Mich. 124.

Constitutional guaranty

Under constitutional provision that "every person charged with an offense . . . shall have the . . . benefit of counsel," the right of infant criminally responsible to defend in person or by attorney cannot be interfered with by court's appointment of a guardian ad litem.—Summerour v. Fortson, 164 S.E. 809, 174 Ga. 862.

Permitting plea of guilty by infant not represented by counsel was held improper.—State v. Oberst, 273 P. 490, 127 Kan. 412.

64. **Right to counsel may be waived** by eighteen-year-old accused.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

crime,[65] the appointment of a guardian is not necessary,[66] and, in some cases, is not even proper.[67] In other jurisdictions, however, it is held that a guardian should be appointed to assist the infant defendant in his defense.[68]

Notice to parent or guardian. Unless expressly required by statute, a notice before trial to the parents or guardian of an infant being prosecuted in the criminal courts is unnecessary.[69] Under some statutes, however, notice of the charge against an unmarried minor must be given to the parents or guardian of such minor before the trial.[70] The notice required under such a statute has been held not to be jurisdictional,[71] although failure to give the required notice may constitute a material error justifying reversal of the judgment.[72]

c. Plea

An infant charged with crime must plead to the charge, and generally may enter a plea of guilty.

As an incident to the right to defend in person, discussed infra subdivision b of this section, the infant must plead,[73] and consequently may plead guilty,[74] although the court should exercise cau-

65. Ga.—Summerour v. Fortson, 164 S.E. 809, 174 Ga. 862.

66. Ga.—Summerour v. Fortson, 164 S.E. 809, 174 Ga. 862.
Ill.—People v. Crooks, 157 N.E. 218, 326 Ill. 266.
Me.—Richardson v. Dunn, 146 A. 904, 905, 128 Me. 316, citing **Corpus Juris.**
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
31 C.J. p 1096 note 27.

Appointment of attorney sufficient
Where attorney is appointed to represent criminally responsible minor, minor cannot complain of failure to appoint guardian ad litem.
Ga.—Summerour v. Fortson, 164 S.E. 809, 174 Ga. 862.
Ill.—People v. Crooks, 157 N.E. 218, 326 Ill. 266.

General statute inapplicable
Statute dealing with appointment of guardian ad litem for infant interested in "any litigation" was held not to apply to a criminal prosecution of an infant.—Summerour v. Fortson, 164 S.E. 809, 174 Ga. 862.

Statute as to determining delinquency has no relation to criminal prosecutions.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
Representation in civil actions see infra § 107.

67. N.Y.—In re Rousos, 119 N.Y.S. 34.
31 C.J. p 1096 note 28.

68. Conn.—State v. James, 37 Conn. 355—Fahay v. State, 25 Conn. 205.

Effect of failure to appoint
(1) The failure to appoint a guardian is error, rendering the judgment liable to be set aside on a writ of error.—State v. James, 37 Conn. 355—Fahay v. State, 25 Conn. 205.

(2) It does not render the proceedings void however.—State v. James, supra.

(3) It affords no ground for dismissing the complaint and setting accused at liberty.—Fahay v. State, supra.

69. Me.—Richardson v. Dunn, 146 A. 904, 128 Me. 316.
Mich.—People v. Crandell, 258 N.W. 224, 270 Mich. 124.
Notice of delinquency proceedings see infra § 99.

70. Fla.—State ex rel. Hamilton v. Chapman, 169 So. 658, 125 Fla. 235.

Purpose of statute
Statute as to notice is designed to insure notice to parent or guardian or other relative or friend of a minor unmarried defendant before trial for offense, but does not require or authorize person so notified to take part in trial or be present.—Pitts v. State, 102 So. 554, 88 Fla. 438.

Actual notice
(1) Formal notice is not jurisdictional, if actual notice is had.—James v. State, 111 So. 277, 92 Fla. 999—Pitts v. State, 102 So. 554, 88 Fla. 438.

(2) Actual notice takes the place of formal notice.—Milligan v. State, 147 So. 260, 109 Fla. 219.

Substantial compliance with the statute may be sufficient.—Clay v. State, 196 So. 462, 143 Fla. 204.

Married minor
In the case of a married minor, in which the question of his mental capacity was not involved, it was unnecessary to serve notice as to the charge against his parents or guardian.—Dicks v. State, 93 So. 137, 83 Fla. 717.

Effect of divorce or annulment
Statute requiring notice to parent before trial of unmarried minor was held inapplicable where minor had been married, although marriage was dissolved by annulment or divorce.—Milligan v. State, 147 So. 260, 109 Fla. 219.

Insufficient notice
A "notice before trial" contemplates an opportunity for the infant to see and confer with his parents or guardian before entering a plea; hence notice to defendant's parents, who were brought to court on day of original plea and were present when boy was immediately rearraigned, again pleaded guilty, and was sentenced, was held not sufficient.—State ex rel. Hamilton v. Chapman, 169 So. 658, 125 Fla. 235.

Minor detained in jail or police station
Under statute creating probation officer and requiring notice of time and place of trial to parents in case minor is detained in jail or police station, failure to notify parents of trial of minor was held not to have deprived criminal court of its jurisdiction, or to make the commitment of the minor convicted of larceny unlawful, where the record did not disclose when the arrest was made, or the conditions under which the minor was brought before the court.—Richardson v. Dunn, 146 A. 904, 128 Me. 316.

Where an infant of subnormal mentality is convicted without notice to parent or guardian and justice requires a new trial, the conviction will be reversed.—Whitten v. State, 89 So. 421, 82 Fla. 181.

71. Fla.—James v. State, 111 So. 277, 92 Fla. 999—Blocker v. State, 105 So. 316, 90 Fla. 136.

72. Fla.—Blocker v. State, supra.

73. D.C.—Ledrick v. U. S., 42 App. D.C. 381.
N.Y.—People v. Wandell, 21 Hun 515.

Doli incapax
In a prosecution for a felony or misdemeanor, plea of doli incapax is the only defense which may be made by a minor with respect to his years; such plea cannot be made by an adult.—State ex rel. Menth v. Porterfield, Mo., 264 S.W. 386.
Failure to file plea in abatement to jurisdiction of criminal court as waiver of exemption from criminal prosecution see infra § 98.

74. Ga.—Taylor v. Means, 77 S.E. 373, 139 Ga. 578.

tion in accepting such a plea.[75] However, the court should reject a plea of guilty by an infant charged with a crime of which a felonious intent is an essential element where it appears that the infant had no such intent.[76]

If a minor is wrongfully prosecuted in a criminal court for an offense within the jurisdiction of the juvenile court, as discussed infra § 97, the lack of jurisdiction in the criminal court may be attacked by a plea in abatement.[77]

d. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

(a) In general
(b) As to capacity or incapacity

(a) In General

An infant charged with crime is entitled to the same presumption of innocence as an adult. He must, however, prove himself to be within the years of incapacity if he seeks to escape responsibility on the ground of his age.

An infant charged with crime is entitled to the general presumption of innocence[78] which exists in favor of an adult so charged, as discussed in Criminal Law § 581.

An accused who seeks to shield himself from responsibility for crime on the ground of infancy must show that he is within the years under which the law either conclusively or prima facie presumes him to be incapable of committing a crime.[79] The burden of proof as to age is also on the infant in those jurisdictions where, in order to escape the death penalty, he must show that he has not passed the age limit.[80]

(b) As to Capacity or Incapacity

At common law and under statute various presumptions exist with respect to the capacity or incapacity of infants of varying ages to commit crime.

At common law, the time of infancy is usually regarded as divided into three distinct periods as to which distinct presumptions of capacity or incapacity prevail.[81] Thus, an infant under the age of seven is conclusively presumed to have no capacity to commit a crime.[82] Between the ages of seven and fourteen there is a presumption in favor of his incapacity,[83] but such presumption is merely prima facie and rebuttable,[84] and varies in strength with

Mich.—People v. Crandell, 258 N.W. 224, 270 Mich. 124.
Ohio.—State v. Klingenberger, 149 N. E. 395, 396, 113 Ohio St. 418, citing **Corpus Juris.**
Okl.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

Court may accept plea
N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.

Change of plea
In a prosecution before a New York city magistrate for being a wayward minor, where accused is young, inexperienced, and without counsel, and complaint is defective, she should be permitted to change a plea of guilty.—People v. Rosenkrantz, 205 N.Y.S. 861, 123 Misc. 335.
Plea of guilty as waiver of right to be treated as juvenile see infra § 98.

75. Advice of counsel
Where infant of more than eighteen pleaded guilty of murder on advice of counsel some three weeks after appointment of counsel and after the court had fully explained to infant consequences of such plea, court did not err in accepting plea of guilty.—Reppin v. People, 34 P.2d 71, 95 Colo. 192.

76. U.S.—U. S. v. Trinder, D.C. Mont., 1 F.Supp. 659.

77. Tenn.—Howland v. State, 268 S. W. 115, 151 Tenn. 47.

78. Tex.—Ragsdale v. State, 134 S. W. 234, 61 Tex.Cr. 145.
31 C.J. p 1096 note 41.

79. Ga.—Broadnax v. State, 25 S.E. 844, 100 Ga. 62.
31 C.J. p 1096 note 39.

Presumption
Where the burden is on accused to prove that he is under age, a presumption exists that he is over age in the absence of any evidence to the contrary.—People v. Ellis, 274 P. 353, 206 Cal. 353.

80. Ind.—Colip v. State, 55 N.E. 739, 153 Ind. 584, 74 Am.S.R. 322.
Tex.—Ake v. State, 6 Tex.App. 398, 32 Am.R. 586.

Under statute
Cal.—People v. Ellis, 274 P. 353, 206 Cal. 353—People v. Perry, 234 P. 890, 195 Cal. 623.

81. Ala.—Hampton v. State, 55 So. 1018, 1 Ala.App. 156, 157.
31 C.J. p 1096 note 43.

82. Ala.—Jackson v. State, 193 So. 417, 239 Ala. 38.
Fla.—Clay v. State, 196 So. 462, 463, 143 Fla. 204, citing **Corpus Juris.**
Miss.—Triplett v. State, 152 So. 881, 169 Miss. 306—Holmes v. State, 98 So. 104, 133 Miss. 610.
N.Y.—People v. Fields, 20 N.Y.S.2d 702, 174 Misc. 309.
N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.
31 C.J. p 1096 note 44.

83. Ala.—Berry v. State, 95 So. 453, 209 Ala. 120.
Ariz.—Hernandez v. State, 32 P.2d 18, 43 Ariz. 424.
Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.
Ky.—Watson v. Commonwealth, 57 S. W.2d 39, 247 Ky. 336.
Miss.—Triplett v. State, 152 So. 881, 169 Miss. 306—Holmes v. State, 98 So. 104, 133 Miss. 610.
Mo.—State v. Jackson, 142 S.W.2d 45, 346 Mo. 474.
N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.
31 C.J. p 1097 note 46.

Guilty knowledge of wrong
Boys between seven and fourteen years of age should be acquitted, unless evidence showed they had guilty knowledge that they were doing wrong when they pulled boy, unable to swim, into river where he drowned.—Watson v. Commonwealth, 57 S.W.2d 39, 247 Ky. 336.
Mental age of adult as factor see Criminal Law § 55.

84. Ala.—Berry v. State, 95 So. 453, 209 Ala. 120.
Ky.—Watson v. Commonwealth, 57 S. W.2d 39, 247 Ky. 336.
Miss.—Holmes v. State, 98 So. 104, 133 Miss. 610.
N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.
31 C.J. p 1097 note 47.

the age of the infant, decreasing in strength as the infant increases in years.[85] On the other hand, after fourteen years of age, he is presumed to be capable of committing crime and of being responsible therefor in the same manner as in the case of an adult,[86] although the presumption is subject to proof as to the real fact.[87]

These common-law rules are followed in the various states,[88] modified in many, however, by statutes which generally have tended to increase the limit of the age within which the presumptions of incapacity exist.[89]

A presumption of malice which would be indulged as against an adult will not be indulged against an infant who is prima facie without capacity to commit an offense.[90]

Burden of proof. When the presumption of capacity or incapacity is rebuttable, the burden of proof is on the person asserting the contrary to the fact presumed.[91] Thus, where a prima facie presumption of incapacity exists, the burden of proving capacity is on the prosecution.[92] Where, however, the presumption that the infant is capable of committing crime exists, the burden of proving mental incapacity is on the infant defendant.[93]

(2) Admissibility

Apart from contrary statute, general rules govern the admissibility of the evidence in prosecutions of infants.

Except as statute may provide otherwise,[94] the

Rule unchanged under Juvenile Court Law

The common-law rule that a child between the ages of seven and fourteen years is prima facie presumably incapable of committing a crime has not been modified by the Juvenile Court Law, fixing age for juvenile delinquents at sixteen years for males, and, where a cause is retransferred from the juvenile court to the circuit court thereunder, defendant is tried under the rules which govern others charged with offenses. —Berry v. State, 95 So. 453, 209 Ala. 120.

85. Fla.—Clay v. State, 196 So. 462, 463, 143 Fla. 204, citing **Corpus Juris.**
31 C.J. p 1097 note 48.

86. Ariz.—Hernandez v. State, 32 P. 2d 18, 43 Ariz. 424.
Ind.—McCutcheon v. State, 155 N.E. 544, 549, 199 Ind. 247, citing **Corpus Juris.**
Miss.—Triplett v. State, 152 So. 881, 169 Miss. 306.
N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.
Pa.—Commonwealth v. Cavalier, 131 A. 229, 284 Pa. 311.
31 C.J. p 1097 note 49.
"When a person reaches fourteen years of age, any presumption of incapacity to commit crime ceases, and he is practically an 'adult' in eyes of the criminal law."—Cooley v. State, 169 S.W.2d 848, 849, 179 Tenn. 651, certiorari denied Colley v. State of Tennessee, 64 S.Ct. 71.

87. Ky.—Stephens v. Stephens, 189 S.W. 1143, 172 Ky. 780.
Vt.—State v. Learnard, 41 Vt. 585.
31 C.J. p 1097 note 50.

88. Pa.—Commonwealth v. Cavalier, 131 A. 229, 284 Pa. 311.
As to capacity to commit rape see the C.J.S. title Rape § 46, also 52 C.J. p 1054 notes 86–89.

89. **Conclusive presumption of incapacity**
(1) Under seven years.—People v. Roper, 181 N.E. 88, 259 N.Y. 170, motion denied 182 N.E. 218, 259 N. Y. 635.
(2) Below nine years.—Smith v. State, 164 S.W. 838, 73 Tex.Cr. 273—31 C.J. p 1097 note 51 [a].
(3) Below ten years.
Ga.—Clemmons v. State, 16 S.E.2d 883, 66 Ga.App. 16, followed in Jowers v. State, 16 S.E.2d 886, 66 Ga.App. 20.
Ill.—Maskaliunas v. Chicago & W. I. R. Co., 149 N.E. 23, 318 Ill. 142. 31 C.J. p 1097 note 51 [b].
(4) Below twelve years.—Harrison v. State, 78 S.W. 763, 72 Ark. 117—Dove v. State, 37 Ark. 261.
(5) Under sixteen years.—State v. Goldberg, 11 A.2d 299, 124 N.J.Law 272, affirmed 17 A.2d 173, 125 N.J. Law 501—Ex parte Mei, 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080, affirming 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125.

Prima facie presumption of incapacity
(1) Seven to sixteen years.—People v. Fields, 20 N.Y.S.2d 702, 174 Misc. 309—31 C.J. p 1097 note 52 [a].
(2) Seven to twelve years.—State v. Kluseman, 55 N.W. 741, 53 Minn. 541.
(3) Nine to thirteen years.—Scott v. State, 158 S.W. 814, 71 Tex.Cr. 41—31 C.J. p 1097 note 52 [c].
(4) Ten to fourteen years.—Clemmons v. State, 16 S.E.2d 883, 66 Ga. App. 16, followed in Jowers v. State, 16 S.E.2d 886, 66 Ga.App. 20—31 C. J. p 1097 note 52 [d].
(5) Twelve to fourteen years.—Dove v. State, 37 Ark. 261.

In Oklahoma
Children over seven and under sixteen years of age are presumed incapable of committing crime, except on affirmative showing in juvenile proceeding that child knew and comprehended wrongfulness of his acts. —Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41—Ridge v. State, 229 P. 649, 28 Okl.Cr. 150.

In the Philippines a person over nine years of age and under fifteen is exempt from criminal liability unless in committing the crime he acted with discernment.—U. S. v. Maralit, 36 Philippine 155.

Presumption of capacity
(1) Over twelve years.—State v. Olson, 194 N.W. 942, 156 Minn. 181.
(2) Over sixteen years.
Ind.—McCutcheon v. State, 155 N.E. 544, 199 Ind. 247.
Okl.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

90. W.Va.—State v. Vineyard, 93 S. E. 1034, 81 W.Va. 98.
31 C.J. p 1096 note 42.

91. Tex.—Howard v. State, 298 S. W. 587, 107 Tex.Cr. 585.
31 C.J. p 1098 note 56.
Burden of proof as to nonage see supra subdivision d (1) (a) of this section.
As to capacity to commit rape see the C.J.S. title Rape § 46, also 52 C.J. p 1054 notes 90–92.

92. Okl.—Ex parte Hightower, 165 P. 624, 13 Okl.Cr. 472.
31 C.J. p 1098 note 58.

In Texas, where the age of the accused person is shown to be under thirteen years, the state must show that he had discretion to understand the nature and illegality of the act constituting the offense.—Howard v. State, 298 S.W. 587, 107 Tex.Cr. 585.

93. Okl.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.
31 C.J. p 1098 note 60.

94. **Prior juvenile proceedings**
Where accused was permitted to introduce evidence of his life history but omitted therefrom his com-

general rules governing the admissibility of evidence in criminal prosecutions ordinarily determine whether or not evidence offered in prosecutions against infants is admissible.[95]

All testimony as to an infant's mentality, whether of his acts or words, is competent if given by those who know him,[96] including the opinion of non-expert[97] or expert[98] witnesses.

Inspection. When no proof of defendant's age is produced, the court and jury may determine it by inspection,[99] but the court cannot, by inspection and observation of defendant who is of an age at which he is presumed to be incapable of crime, determine his capacity.[1]

(3) Weight and Sufficiency

General rules govern the weight and sufficiency of the evidence in prosecutions of infants for crime.

Questions as to the weight and sufficiency of evidence in criminal prosecutions of infants are determined in accordance with the rules applicable in criminal prosecutions in general.[2] Where the burden of proof to show capacity rests with the prosecution, as discussed supra subdivision d (1) (b) of this section, a conviction cannot be had or sustained unless it is affirmatively made to appear that defendant was at the time of the act of sufficient maturity of mind to understand and appreciate what he did,[3] and, if felonious intent is an element of the crime charged, that the infant had such intent,[4] the presumption of an infant's incapacity being removable only by evidence of the strongest and clearest character.[5]

It has been said that in order to convict the jury must be convinced beyond a reasonable doubt of defendant's capacity,[6] and it would seem that proof of an infant's capacity beyond a reasonable doubt is sufficient.[7]

Direct and positive evidence as to an infant's capacity is not required;[8] it may be shown by circumstantial evidence.[9]

The fact that accused is under the age at which the death penalty may be imposed must be estab-

mitment to boys' industrial school, he "waived" the protection of statute making inadmissible the disposition of a child or any evidence given against him, and was subject to cross-examination with reference to the disposition of any charge preferred against him as a juvenile.—State v. Marinski, 41 N.E.2d 387, 139 Ohio St. 559.

95. Age as evidence

(1) The only ground on which accused's age in murder prosecution may be admitted is to determine whether he could distinguish between right and wrong, and intend to do wrongful act with which he was charged.—Hernandez v. State, 32 P.2d 18, 43 Ariz. 424.

(2) However, the fact that evidence of age might aid in showing capacity of infant to commit the crime is all that is needed to authorize the jury to consider age in choosing punishment.—Hernandez v. State, supra.

Declarations of accused

In prosecution for aiding and abetting an assault with an offensive weapon with intent to rob, testimony of witnesses that defendant had stated that he was seventeen years of age was held admissible as substantive evidence and for purpose of contradiction on question whether defendant was over sixteen years of age at time of commission of crime so as to confer jurisdiction on circuit court.—Tomlinson v. Commonwealth, 87 S.W.2d 376, 261 Ky. 186.

Confessions by children see Criminal Law § 329.

96. Ala.—Neville v. State, 41 So. 1011, 148 Ala. 681.
31 C.J. p 1098 note 63.

97. Ala.—Martin v. State, 8 So. 858, 90 Ala. 602, 24 Am.S.R. 844.
Tex.—Carr v. State, 7 S.W. 328, 24 Tex.App. 562, 5 Am.S.R. 905.
Opinion of lay witness as to capacity generally see Criminal Law § 467 a.

98. La.—State v. Nickleson, 14 So. 134, 45 La.Ann. 1172.
Opinion of expert witness as to capacity generally see Criminal Law § 467 b.

99. N.Y.—People v. Kaminsky, 102 N.E. 515, 208 N.Y. 389, affirming 122 N.Y.S. 687, 137 App.Div. 941.
N.C.—State v. Arnold, 35 N.C. 184.
However, it has been held that the jury cannot make up their verdict from their own observation of accused while he was on the witness stand.—People v. Kielczewski, 109 N.E. 981, 269 Ill. 293.

1. N.Y.—People v. Domenico, 92 N.Y.S. 390, 45 Misc. 309.

Evidence held sufficient

2. Tex.—Flores v. State, 231 S.W. 786, 89 Tex.Cr. 506.

Evidence held insufficient

Ark.—Kear v. State, 104 S.W. 1097, 84 Ark. 146.
Weight and sufficiency of evidence as to age in proceedings to determine whether infant should be prosecuted for crime or as delinquent see infra § 98.

3. Ark.—Garner v. State, 132 S.W. 1010, 97 Ark. 63, Ann.Cas.1912C 1059.
31 C.J. p 1098 note 71.

4. Murder

(1) Child of fifteen may be guilty of crime of murder in first degree, but his guilt cannot be established without proof of felonious intent.—People v. Roper, 181 N.E. 88, 259 N.Y. 170, motion denied 182 N.E. 213, 259 N.Y. 635.

(2) Unless fifteen-year-old boy participated in robbery with felonious intent, he was not guilty of felony necessary to establish felonious intent in murder prosecution.—People v. Roper, supra.

(3) Participation of child under sixteen in robbery, or at least in robbery in second or third degrees, would not establish guilt of independent felony necessary to establish felonious intent in murder prosecution.—People v. Roper, supra.

5. Ark.—Garner v. State, 132 S.W. 1010, 97 Ark. 63, Ann.Cas.1912C 1059.
31 C.J. p 1099 note 72.

6. Ala.—Martin v. State, 8 So. 858, 90 Ala. 602, 24 Am.S.R. 844.
31 C.J. p 1099 note 73.

7. Tex.—Ragsdale v. State, 134 S.W. 234, 61 Tex.Cr. 145.

8. Tex.—Carr v. State, 7 S.W. 328, 24 Tex.App. 562, 5 Am.S.R. 905.
31 C.J. p 1099 note 75.

9. Tex.—Ragsdale v. State, 134 S.W. 234, 61 Tex.Cr. 145.
31 C.J. p 1099 note 76.

fished by a preponderance of the evidence,[10] where the burden of proving such fact is on accused, as discussed supra subdivision d (1) (a) of this section.

e. Trial

(1) In general
(2) Instructions
(3) Verdict and findings
(4) Judgment and sentence

(1) In General

General rules ordinarily govern the trial of a criminal cause in which an infant is the accused.

Apart from contrary or modifying statutes, the general rules governing the trial of criminal causes apply in prosecutions of infants for crime.[11] As an incident to the right to defend in person, discussed supra subdivision b of this section, the infant has a right to elect the mode of trial.[12] Some statutes providing for special proceedings against juvenile delinquents, as discussed infra §§ 97–102, have been construed as not depriving a child charged with a criminal offense in a court of ordinary criminal jurisdiction, of his constitutional right to a jury trial of such charge.[13]

Questions for jury. The general rules governing the province of the court and jury apply to these prosecutions.[14] Thus, in the absence of a conclusive presumption as to accused's capacity, the question ordinarily is one of fact for the jury.[15]

Under some statutes the jury is required to fix the term of imprisonment.[16]

Confinement pending trial. Unless otherwise provided by statute, an infant who is being proceeded against under the criminal law is subject to be confined the same as an adult while awaiting the trial, and statutes prohibiting the incarceration of a delinquent child while awaiting disposition of his case in the juvenile court, in jails in which adult persons are confined, do not apply to juvenile offenders awaiting trial under the criminal law.[17]

(2) Instructions

Appropriate instructions covering the law governing the case should be given the jury in a prosecution of an infant for crime. Matters such as capacity or incapacity must be covered by instructions where presented by the evidence.

Under the rules applicable to criminal prosecutions generally, the court should give proper instructions to the jury on the law governing the case in a prosecution of an infant for crime.[18]

It is the duty of the court to charge as to any presumption of incapacity which there is evidence to support,[19] and to give a correct charge on what

10. Cal.—People v. Ellis, 274 P. 353, 206 Cal. 353.
More reasonable doubt insufficient. —People v. Ellis, 274 P. 353, 206 Cal. 353.
Evidence insufficient
Cal.—People v. Ellis, supra—People v. Perry, 234 P. 890, 195 Cal. 623.

11. **In what court triable**
It was held that in the absence of statute relating to powers of juvenile court to declare a delinquent child a ward of the state, etc., a child charged with the commission of a felony would be triable in the circuit court of the county in which the offense was committed.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

12. N.Y.—People v. Wandell, 21 Hun 515.

13. Fla.—Ex parte Kitts, 147 So. 573, 109 Fla. 202.

14. **Age of accused**
In prosecution for aiding and abetting an assault, with an offensive weapon with intent to rob, whether defendant was over sixteen years of age at time crime was committed so as to confer jurisdiction upon circuit court was held for the jury under the evidence.—Tomlinson v. Commonwealth, 87 S.W.2d 876, 261 Ky. 186.

15. Ala.—Reynolds v. State, 45 So. 894, 154 Ala. 14.
31 C.J. p 1099 note 84.

16. Tenn.—Martin v. State, 172 S.W. 311, 130 Tenn. 508.

17. Tex.—Ex parte Thomas, 118 S. W. 1053, 56 Tex.Cr. 66.

18. Tex.—Hand v. State, 227 S.W. 194, 88 Tex.Cr. 422.
31 C.J. p 1099 note 87.
Aggravated assault
A minor not being guilty of aggravated assault, unless there be ground of aggravation other than the mere fact that he took hold of a female, and it being impossible to say, as matter of law, that in detaining her by grasping her arm and putting his arm about her he did not do so for an innocent purpose, or that such act constituted "indecent familiarity," there should be given the substance of a requested charge that, unless the jury believe beyond a reasonable doubt that he did as he did through lust or with intent to fondle her person, or intended more than to detain her for some innocent purpose, they could not convict of aggravated assault.—Davis v. State, 257 S.W. 254, 96 Tex.Cr. 235.
Duress
A mere disparity of age between accused, seventeen years old, and an accomplice, twenty-six years old, in the absence of any showing of duress which under statute would relieve accused from liability is insufficient to necessitate an instruction on the theory that accused may have been under the influence of his accomplice.—Robertson v. State, 245 S.W. 443, 93 Tex.Cr. 39.
Instructions held correct or sufficient
Ariz.—Hernandez v. State, 32 P.2d 18, 43 Ariz. 424.
Cal.—People v. Ellis, 274 P. 353, 206 Cal. 353.
31 C.J. p 1099 note 87 [a].
Instructions properly refused or erroneous
Ill.—Angelo v. People, 96 Ill. 209, 36 Am.R. 132.
Minn.—State v. Peterson, 190 N.W. 345, 153 Minn. 310.

19. Ky.—Owsley v. Commonwealth, 101 S.W. 366, 125 Ky. 384, 31 Ky. L. 5.
S.C.—State v. Nelson, 70 S.E. 445, 88 S.C. 125.
31 C.J. p 1099 note 89.
Evidence held insufficient
(1) To warrant instruction that child fourteen years of age is prima facie incapable of committing crime. —Triplett v. State, 152 So. 881, 169 Miss. 306.
(2) Where accused testified that

constituted capacity,[20] but the instructions should not assume a controverted fact as to capacity.[21] Some cases have held that the jury should be required to find that the infant had the necessary capacity to commit a crime or was of an age at which capacity is presumed.[22]

A failure to charge as to an included lesser offense not called for by the facts is not, for the mere reason that accused is a minor, error.[23] Where only a charge of murder in the first or second degree is within the jurisdiction of the criminal court, a lower degree of homicide being juvenile delinquency for the juvenile court to try, the criminal court trying a charge of murder need not charge on the lower degrees of homicide.[24] Where, however, a statute requires the court in a prosecution for homicide to give in the charge the law of the lesser grades of homicide, such as voluntary and involuntary manslaughter, the court on a trial of an indictment for murder is not relieved from the necessity of giving such charge by the fact that the lesser included offenses are within the exclusive jurisdiction of another court under a juvenile offender's act.[25]

(3) Verdict and Findings

Statutory requirements as to the verdict and findings in a prosecution of an infant for crime must be complied with. A specific finding of guilt is unnecessary where the infant properly enters a plea of guilty.

Under some statutes the jury are required to find, as nearly as may be, the age of accused, if they find the further fact that he is a minor between certain specified ages.[26] Other statutes require the jury to find specially the age of a youthful offender, and to specify the place of confinement;[27] but a finding of age under such a statute may be dispensed with where, from the term of punishment imposed, accused must be imprisoned in the penitentiary and not in the reformatory.[28]

Unless the statute providing for the commitment of an infant under a specified age to the board of welfare or state industrial school so requires,[29] written findings of fact showing accused to be within the statute are unnecessary.[30]

The facts that the criminal court took jurisdiction of the case and sentenced accused have been held equivalent to a finding that he was over the age which would have required the juvenile court to take jurisdiction.[31]

Where an infant accused of crime properly enters a plea of guilty, a specific finding of his guilt is not necessary to sustain a commitment.[32]

(4) Judgment and Sentence

Apart from modifying or contrary statutes, general

he did not know whether he was fourteen or fifteen, instruction taking into consideration age and probable lack of accountability of accused was not required, since an infant over fourteen is presumed to have capacity to commit crime.—Hall v. Commonwealth, 21 S.W.2d 799, 231 Ky. 473.

20. Tex.—Pryon v. State, 138 S.W. 705, 62 Tex.Cr. 639.
W.Va.—State v. Vineyard, 93 S.E. 1034, 81 W.Va. 98.
31 C.J. p 1099 note 90.
Instructions on mental capacity generally see Criminal Law § 1200.

21. Ala.—Neville v. State, 41 So. 1011, 148 Ala. 681.
31 C.J. p 1099 note 88.

22. Miss.—Bass v. State, 163 So. 838, 174 Miss. 55.

23. Tex.—Hand v. State, 227 S.W. 194, 88 Tex.Cr. 422.
31 C.J. p 1099 note 91.

24. N.Y.—People v. Murch, 189 N.E. 220, 263 N.Y. 285, affirming 266 N.Y.S. 907, 240 App.Div. 786.

Substantial rights of infant not affected

Construction of statute so as not to require court, in murder prosecution against child under sixteen years of age, to charge on lesser degrees of homicide after charging on murder in first and second degree, was held not to deprive such child of substantial rights.—People v. Murch, supra.

Preferred practice

Where child under sixteen years of age may be convicted only of murder in first or second degree, jury should be instructed as to what acts by adult would constitute manslaughter, what acts of child would not be crime but would constitute juvenile delinquency, and that child nevertheless could be proceeded against as juvenile delinquent, and consequences of such proceedings.—People v. Murch, supra.

25. Tenn.—Templeton v. State, 240 S.W. 789, 146 Tenn. 272.

Verdicts returnable by jury

Where accused in murder prosecution is a juvenile, the trial judge should instruct jury as to verdict they may render in same manner he is required under law to instruct jury where accused in murder prosecution is an adult, namely, that jury may return verdict of guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.—State v. Bedford, 190 So. 347, 193 La. 104.

26. Ill.—People v. Kielczewski, 109 N.E. 981, 269 Ill. 293.
31 C.J. p 1099 note 96.

27. Tex.—Simmons v. State, 97 S.W. 1052, 50 Tex.Cr. 527.

28. Tex.—Perry v. State, 133 S.W. 685, 61 Tex.Cr. 2.
31 C.J. p 1099 note 99.

29. **Finding as to age**

An order pursuant to Acts 1922 c 105, and Code 1919 § 1908, sentencing and committing defendants to the state board of public welfare after pleas of guilty to a misdemeanor charge containing the recital "each of said defendants being eighteen years of age," was held void for lack of a finding of fact that defendants were under the age of eighteen years and properly disregarded as being null and void after refusal of board of public welfare to take custody of defendants because they were over eighteen years of age, and upon their application for permission to withdraw such pleas and to enter pleas of not guilty.—Dillehay v. Jones, 122 S.E. 343, 138 Va. 838.

30. Neb.—Leiby v. State, 113 N.W. 125, 79 Neb. 485.

31. Ky.—Cloyd v. Commonwealth, 278 S.W. 595, 212 Ky. 178.

32. Neb.—Leiby v. State, 113 N.W. 125, 79 Neb. 485.

rules govern the judgment and sentence in a prosecution of an infant for crime. The statutes must, of course, be complied with.

Apart from any modifying or contrary statutory provisions, general rules govern the judgment and sentence in the prosecution of an infant for crime.[33] Thus it has been held that an infant convicted of a misdemeanor is not entitled at common law to be asked whether he has any cause to show why judgment should not be pronounced against him.[34] So, as is generally the rule, the judgment and sentence must follow the verdict.[35]

Under some statutes, after a plea of guilty by, or the conviction of, a juvenile under a specified age, the trial court does not impose sentence on accused, but remands him to the juvenile court for appropriate proceedings against him as a juvenile delinquent.[36] Under others a discretion is conferred on the trial court to sentence the infant as a criminal or to remand him to the juvenile court for disposition.[37]

A recital in the sentence that accused is fourteen years of age is a sufficient showing that he is under sixteen, authorizing him to be sentenced to the reformatory as a person less than sixteen years of age.[38]

A sentence to the state reform school is not invalid for the reason that notice of the pendency of the case was not given to the mayor of the city or one of the selectmen of the town as required by statute before sentence.[39]

Under a statute requiring accused to be sentenced to the reformatory, a sentence is not invalidated by the fact that it directs that accused be confined in the county jail until released to the proper authorities of the reformatory.[40]

Statement of term. Where the law fixes the time when accused shall be released, the court should not fix a definite and determinate sentence, and it is sufficient if the warrant of commitment contains a statement of his residence and age.[41]

Suspension of sentence and probation. Under some statutes the court has a discretionary power to suspend sentence and place on probation any minor found guilty of a misdemeanor, or even a felony, within the terms of the statute.[42]

Error in sentence. During the term, the court may correct its error in sentencing accused to the wrong institution.[43] So, where a minor accused of crime is erroneously sentenced to imprisonment in the penitentiary instead of in a reformatory, leave may be granted by the court on disposition of proceedings in error to the prosecuting attorney to apply for a proper judgment on the verdict and resentence by the trial court,[44] but in a case where accused is at the time of the disposition of the appeal too old for resentence to the reformatory this course cannot be pursued.[45]

33. Time for pronouncing sentence
It has been held that an eighteen-year-old accused may waive the statutory time in which judgment must be pronounced.—Ex parte Barton, 239 P. 944, 32 Okl.Cr. 41.

A motion in arrest of judgment lies after verdict in the case of an infant charged with an offense falling within the exclusive jurisdiction of the juvenile court.—Howland v. State, 268 S.W. 115, 151 Tenn. 47.

Judgment under statutes relating to juvenile delinquents see infra § 99.

34. N.Y.—People v. Kaminsky, 102 N.E. 515, 208 N.Y. 389, affirming 122 N.Y.S. 687, 137 App.Div. 941.

Asking whether prisoner has anything to say generally see Criminal Law § 1576.

35. Tex.—Zimmer v. State, 141 S.W. 781, 64 Tex.Cr. 114.

Conformity of judgment with verdict generally see Criminal Law § 1579.

36. Fla.—Powell v. Stone, 169 So. 411, 124 Fla. 789—State ex rel. Stiegel v. Chapman, 161 So. 424, 119 Fla. 347—State ex rel. Johnson v. Quigg, 90 So. 695, 83 Fla. 1.

Reference by juvenile court
Where a juvenile court referred the case of a sixteen-year-old infant to the criminal court for trial of a charge of rape, the latter court was held not to have jurisdiction to sentence such child, but was required to remand him to the juvenile court for disposition.—State v. Dubray, 250 P. 316, 121 Kan. 886.

Commitment in delinquency proceedings see infra § 102.

Judgment in juvenile delinquency proceedings see infra § 99.

37. Iowa.—State v. Reed, 218 N.W. 609, 207 Iowa 557.

38. Ga.—Jackson v. Baxter, 88 S.E. 819, 145 Ga. 223.

39. Mass.—Fanning v. Commonwealth, 120 Mass. 388.

40. Ga.—Jackson v. Baxter, 88 S.E. 819, 145 Ga. 223.

41. Neb.—Leiby v. State, 113 N.W. 125, 79 Neb. 485.

42. Okl.—Wallace v. State, 14 P.2d 956, 54 Okl.Cr. 90.

Sentence after violation of parole
Wis.—Ex parte Knox, 192 N.W. 395, 180 Wis. 622.

Disposition of child in delinquency proceedings see infra § 100.

Suspension of sentence in criminal prosecutions generally see Criminal Law §§ 1571–1572.

43. From school for boys to reformatory
Where the trial court sentenced a boy over sixteen years of age to the St. Charles school for boys, and thereafter during the same term the sentence was set aside and he was committed to the state reformatory, it was held in view of the fact that the age of accused was fully understood by all the parties at the time he pleaded guilty of burglary, and that he was not misled by the corrected order, there was no error, because the circuit court retains jurisdiction over a judgment during the term in which it was rendered, and may for proper cause vacate the judgment during the term, and in a criminal case may, while such order remains unexecuted, commit an accused to a proper institution designated by law.—People v. Jones, 139 N.E. 122, 308 Ill. 125.

44. Ill.—People v. Rardin, 99 N.E. 59, 255 Ill. 9, Ann.Cas.1913D 282.

45. Ill.—People v. Smith, 97 N.E. 649, 253 Ill. 283.

Where a prisoner has been sentenced and committed to a reformatory as under a given age, the court sentencing him cannot give a new sentence on a ground of mistake in age.[46]

f. Review

Apart from modifying or contrary statutes, the review of the case in the prosecution of an infant for crime is governed by general rules.

Except as special statute or rule may provide otherwise, general rules govern review in a criminal prosecution of an infant.[47]

By statute in some jurisdictions judgments and commitments of juvenile offenders by police courts and justices of the peace are subject to review by either the circuit judge or the probate judge of the county,[48] and, if not so approved, will be invalid.[49] Provision is also sometimes made by statute for the modification of a sentence on appeal.[50]

On appeal it will be presumed that the court ascertained that accused was of sound mind and of the requisite age before making an order committing him to an industrial school.[51]

As is the rule generally, nonprejudicial error is not ground for reversal of a judgment of conviction of an infant.[52] On the other hand, prejudicial errors committed in the course of a prosecution against an infant will justify a reversal.[53]

Prejudicial error in the admission of evidence has been held ground for reversal even though no objection was made to the evidence.[54] Similarly, failure of the court to give a necessary instruction has been held ground for reversal, although no request for such instruction was made.[55]

Mere severity of the sentence in view of the age of accused has been held not to be a ground for reversal, the question being one for the board of pardons.[56]

g. Punishment

Apart from contrary statute, an infant convicted of crime may be punished as an adult. Under various statutes existing in many jurisdictions the infancy of the accused is a factor in determining the punishment to be imposed, the place of confinement, and the period of detention.

Except as statutes otherwise provide or require,[57]

46. Mich.—In re Mason, 8 Mich. 70.

47. Late filing of papers

Court could consider bill of exceptions and statement of facts even though not filed within statutory period, where failure was not due to accused's or counsel's fault or laches, especially where accused was minor defended by appointed attorney.—Green v. State, 51 S.W.2d 391, 121 Tex.Cr. 349.

Review of delinquency proceedings see infra § 99.

48. Mich.—In re O'Leary, 25 Mich. 144.

31 C.J. p 1100 note 16.

49. Mich.—In re Amidon, 40 Mich. 628.

50. N.Y.—People v. Loomis, 121 N. Y.S. 91, 65 Misc. 156, 24 N.Y.Cr. 140.

31 C.J. p 1100 note 15.

51. Neb.—Leiby v. State, 113 N.W. 125, 79 Neb. 485.

52. Minn.—State v. Peterson, 190 N.W. 345, 153 Minn. 310.

Absence of finding of age

Verdict failing to find age of accused was held no ground for reversing judgment and penitentiary sentence, where, by agreement of record, her age appeared such as would subject her to penitentiary sentence.—People v. Collins, 163 N. E. 694, 332 Ill. 222.

Error of fact

Failure of trial judge, in murder prosecution against child under sixteen years of age, to charge on degrees of homicide lesser than murder in first and second degree, if error, was held error of fact, and not of law, in absence of request to charge.—People v. Murch, 189 N.E. 220, 263 N.Y. 285, affirming 266 N.Y. S. 907, 240 App.Div. 786.

Irregularities in printed form of certificate of conviction of one confined to state training school held harmless.—People ex rel. Boger v. Coon, 245 N.Y.S. 141, 230 App.Div. 370.

53. Absence of counsel

(1) Permitting seventeen-year-old boy without counsel to plead guilty of murder, first degree, and sentencing him to life imprisonment, held material error.—State v. Oberst, 273 P. 490, 127 Kan. 412.

(2) Refusal to set aside judgment and sentences of seventeen-year-old boy to life imprisonment for murder, on motion of counsel belatedly employed was held material error.—State v. Oberst, supra.

54. Colo.—Reppin v. People, 34 P. 2d 71, 95 Colo. 192.

55. Colo.—Reppin v. People, supra.

56. Fla.—Hamilton v. State, 182 So. 854, 133 Fla. 481.

57. Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.

Minn.—State v. Olson, 194 N.W. 942, 156 Minn. 181.

31 C.J. p 1100 note 20.

Statutory provisions determine punishment to be imposed on infants convicted of crime.—Chism v. State, 179 N.E. 718, 203 Ind. 241.

County jail

Under some statutes infants of less than a specified age may, in the discretion of the court, be committed to the county jail rather than the penitentiary.—Kidd v. State, 102 So. 68, 137 Miss. 419—31 C.J. p 1100 note 20 [a].

Discretion of court

(1) Under some statutes the punishment of an infant between twelve and eighteen years for an aggravated offense is left to the discretion of the jury or court trying the case without a jury, the quantum of the punishment being required to be within the limits fixed by statute for the particular crime.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U. S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

(2) Under some statutes whether minors should be given lighter sentence under statute respecting them, or should be sentenced under general statute prescribing punishment for robbery is within discretion of trial court.—Chism v. State, 179 N.E. 718, 203 Ind. 241.

(3) Fact that accused convicted of burglary was only twenty years old, had no police record, and that value of articles taken was only thirty-seven dollars was held not to justify determination that trial court in imposing penitentiary sentence rather than fine and jail sentence so abused its discretion as to require modifica-

an infant convicted of crime is punishable in the same manner as an adult,[58] even to the extent of capital punishment,[59] and in cases in which the infant has not timely taken the necessary steps to bring himself within the provisions of a juvenile court law punishment may be imposed under the general law.[60]

However, under the statutes, provision is ordinarily made for the sentence of infant offenders who have not attained specified ages to such institutions as state reformatories or industrial schools,[61]

tion of sentence.—State v. Cooley, 264 N.W. 714, 220 Iowa 1384.

Death penalty

(1) Statutory provisions may exempt from liability to punishment by death.

Mass.—In re Kenney, 108 Mass. 492.

Tex.—Gibson v. State, 110 S.W. 41, 53 Tex.Cr. 349—Ingram v. State, 14 S.W. 457, 29 Tex.App. 33—Ake v. State, 6 Tex.App. 398, 32 Am. R. 586.

(2) Under some statutes, to warrant the death penalty for a juvenile offender convicted of murder, the offense must be reprehensible in a superlative degree, coupled with the fact that the perpetrator was a person having an ordinary comprehension of the enormity of the offense and its consequences.—Ridge v. State, 229 P. 649, 28 Okl.Cr. 150.

(3) Under some statutes the death penalty should not be imposed against a boy under fourteen years of age on conviction of murder, unless it appears clearly that such boy is a person with a sense of responsibility, intelligence, and understanding equal to that of an ordinary person of the age of sixteen years. —Ridge v. State, supra.

Compliance with statute essential

Where under the applicable statutes an infant of seventeen years and six months convicted of a misdemeanor must be sentenced to either the workhouse or jail, a sentence to training school is void.—Lynch v. State ex rel. Killebrew, 166 S.W.2d 397, 179 Tenn. 339.

Repeal of statute

Sentence to county jail under repealed statute was held improper.—People ex rel. Courtney v. David, 4 N.E.2d 376, 364 Ill. 259.

58. Cal.—In re Tom, 121 P. 294, 17 Cal.App. 678.

31 C.J. p 1100 note 21.

Power of state

Under its general power as parens patriæ, the state has the right within reasonable limits to deprive children of their liberty.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.

Sentence to penitentiary

Sixteen-year-old boy who was found guilty of larceny was held not entitled to be sentenced under statute providing for confinement of persons under eighteen years old in county jail instead of penitentiary for certain crimes, since such statute was repealed by subsequent statute covering complete subject of punishment for those guilty of felony except in case of death penalty. —People ex rel. Courtney v. David, 4 N.E.2d 376, 364 Ill. 259.

Statutes construed

Minn.—State v. Olson, 194 N.W. 942, 156 Minn. 181.

Age as affecting punishment generally see Criminal Law § 1939.

Custody and restraint of delinquent children see infra § 100.

Mitigation of punishment by reason of age generally see Criminal Law § 1983 b (1).

Prevention of crime generally see Criminal Law §§ 2008–2010.

59. Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.

Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

31 C.J. p 1100 note 22.

Discretion of court

(1) Where fifteen-year-old negro boy who had a prior criminal record was convicted of rape, and the evidence disclosed that the crime was heinous and aggravated, the action of the trial judge, who saw the prosecuting witness and the negro boy at the time they gave their testimony, in imposing the death penalty was not abuse of discretion.—Mickens v. Commonwealth, supra.

(2) Under the statutes it was held that, after first-degree murder convictions of boys under sixteen years old when they committed crime, without recommendation to mercy, the trial court was not bound to commit them as delinquents and had no power to sentence or commit them to reform school for boys, but had power to sentence them to electrocution. —Clay v. State, 196 So. 462, 143 Fla. 204.

60. Cal.—In re Tom, 121 P. 294, 17 Cal.App. 678.

Tex.—Slade v. State, 212 S.W. 661, 85 Tex.Cr. 358.

Discretion of court

Denying motion to sentence accused convicted of perjury, as juvenile made after pronouncement of judgment, was held not abuse of discretion, where accused was arraigned in October and sentenced following December.—People v. Keylon, 10 P.2d 86, 122 Cal.App. 408.

61. Ark.—Freeman v. State, 249 S. W. 582, 158 Ark. 262, rehearing overruled 250 S.W. 522, 158 Ark. 262.

31 C.J. p 1100 note 25.

Infant as ward of state

Under some statutes a minor tried in court of common pleas becomes state ward, and subject to reformatory discipline.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Statutory exception

(1) The statute providing that male persons between the ages of sixteen and twenty-one years, who are convicted of felonies, shall be sentenced to the reformatory instead of to the penitentiary, was controlling as an exception of such persons from the operation, as to place of imprisonment, of the robbery statute, providing for imprisonment in the penitentiary.—State v. Catalfo, 17 N.E.2d 289, 59 Ohio App. 95.

(2) The repeal and reënactment of the robbery statute without any change except for an increase in the term of imprisonment did not affect the exception, as to place of imprisonment, created by enactment of statute providing that male persons between the ages of sixteen and twenty-one years who are convicted of felony shall be sentenced to the reformatory instead of to the penitentiary.—State v. Catalfo, supra.

Discretion of court

(1) Under some statutes it has been held that trial court has discretion to sentence person under seventeen to penitentiary instead of house of reform.—Asher v. Commonwealth, 299 S.W. 568, 221 Ky. 700—31 C.J. p 1101 note 35 [b].

(2) Crawford & M.Dig. § 804, providing that all convicts and other persons hereinafter sentenced to the penitentiary under the age of eighteen years shall be committed to a reform school, provided such persons convicted of felonies may be sent to the penitentiary if, in the judgment of the trial court, such course may be expedient, invests the trial court with discretionary power to impose either sentence on minors so convicted.—Freeman v. State, 249 S.W. 582, 158 Ark. 262, rehearing overruled 250 S.W. 522, 158 Ark. 262.

(3) This statute has been held to give the trial court no jurisdiction to modify its judgment after the term has expired.—Freeman v. State, supra.

(4) Sentence to penitentiary on

houses of refuge,[62] or industrial farms,[63] and the validity of such statutes has been sustained.[64] Some statutes requiring imprisonment to be in such institutions are applicable to all crimes,[65] while others except certain particular crimes.[66]

The statutes further may provide that children shall not be confined in such a manner as to come in contact with adult convicts.[67]

Where infants under a specified age must be tried in a juvenile court as delinquents as discussed infra §§ 97–102, a regular criminal court trying an infant of approximately such age must ascertain the true age of the infant before imposing sentence on him.[68]

Where proper place of punishment not provided. Where the statute requires the minor to be sentenced to imprisonment in a state reformatory, the fact that there is no such institution in the state will not justify his sentence to the penitentiary.[69] On the other hand, although a statute provides that any child sentenced to confinement in any institution to which adult convicts are sentenced shall not be confined in the same building with such convicts or permitted in any yard where adult convicts may be present, nevertheless, where, under the statute, a child is subject to sentence to the penitentiary, the fact that no provisions for his proper custody in such institution has been made will not prevent the trial court from pronouncing judgment.[70]

Transfer to penitentiary. Where the term of his punishment extends beyond the time when the minor attains majority, he is under some statutes to be transferred from the reformatory to the penitentiary.[71]

Period of detention. While, in the absence of statute providing otherwise, the period of confinement of an infant convicted of a crime is the same as in the cases of adults,[72] in some jurisdictions the statutes provide the period for his confinement and for his discharge. Under some of such statutes the court has no discretion to confine him for a period less than that provided by the statute or to discharge him before such period has been completed.[73]

Under some statutes the power to parole or discharge is vested in the authorities of the institution wherein he has been confined.[74]

Under some statutes on conviction of a juvenile offender he may be committed to a reformatory for a period of any time not exceeding his minority, and under such statute the court may commit him for such period without limiting his sentence to the time of confinement fixed by the jury, although such commitment will not deprive him of the right to a

jury's finding that accused committed assault with intent to ravish and was about eighteen years of age was held proper as within discretion of judge.—People v. Dravilles, 152 N.E. 212, 321 Ill. 390.

(5) The statute authorizing sentence of persons under sixteen to reformatory did not require sentencing fifteen-year-old boy convicted of rape to reformatory rather than imposing death sentence, in absence of finding that reformatory sentence was best for him and the community or request for such finding.—State v. Smith, 195 S.E. 819, 213 N.C. 299.

(6) In Florida, boy fifteen years old who pleaded guilty to armed robbery could within court's discretion be committed to state penitentiary or industrial school for boys.—State ex rel. Hamilton v. Chapman, 169 So. 658, 125 Fla. 235.

Discretion of jury

A minor sixteen years of age or less, guilty of sodomy, may in the discretion of the jury be sentenced to the reformatory instead of to the penitentiary.—Brown v. State, 99 S.W. 1001, 50 Tex.Cr. 626.

Statutes inapplicable

Fla.—Clay v. State, 196 So. 462, 143 Fla. 204.

Imprisonment in reformatories generally see Criminal Law § 2000 a.

62. Ind.—State v. Smith, 59 Ind. 179.
Puerto Rico.—U. S. v. Garcia, 8 Puerto Rico Fed. 563.
31 C.J. p 1101 note 26.

Discretion

It is discretionary with the court whether a minor under sixteen years of age shall be confined in the workhouse or house of refuge.—Ex parte Walker, 8 Ohio Dec., Reprint, 480, 8 Cinc.L.Bul. 198.

63. Ga.—Taylor v. Means, 77 S.E. 373, 139 Ga. 578.

64. Ill.—People v. Illinois State Reformatory, 36 N.E. 76, 148 Ill. 413, 23 L.R.A. 139.
31 C.J. p 1101 note 28.
As deprivation of:
Due process of law see Constitutional Law § 597.
Equal protection of law see Constitutional Law § 565.

65. Ill.—People v. Rardin, 99 N.E. 59, 255 Ill. 9, Ann.Cas.1913D 282—People v. Smith, 97 N.E. 649, 253 Ill. 283.

66. **Murder or manslaughter**
Neb.—Roberts v. State, 118 N.W. 574, 82 Neb. 651.

Rape
Ill.—People v. Marx, 125 N.E. 719, 291 Ill. 40.

67. Wash.—State v. Pierce County Super. Ct., 179 P. 79, 105 Wash. 684—State v. McPherson, 130 P. 481, 72 Wash. 371, Ann.Cas.1914D 587.
31 C.J. p 1101 note 31.

68. Ala.—Hart v. State, 113 So. 471, 22 Ala.App. 135.

69. La.—State v. Praeter, 51 So. 647, 125 La. 573.

70. Wash.—State v. Pierce County Super. Ct., 179 P. 79, 105 Wash. 684.

71. Ky.—Black v. Commonwealth, 156 S.W. 1043, 154 Ky. 144.
31 C.J. p 1101 note 34.

72. Cal.—In re Tom, 121 P. 294, 17 Cal.App. 678.
31 C.J. p 1101 note 35.

Excessive sentence

Penalty of two years' imprisonment was held excessive by one year in case of seventeen year old boy convicted of assault with dangerous weapon under sharply conflicting evidence.—Felder v. State, 287 P. 792, 47 Okl.Cr. 214.

73. Ga.—Taylor v. Means, 77 S.E. 373, 139 Ga. 578.
31 C.J. p 1101 note 36.

74. Ga.—Taylor v. Means, supra.

parole as in the case of an adult.[75]

An infant cannot be retained in custody for a term longer than that specified in the commitment without further proceedings.[76]

§ 97. Commitment of Juvenile Delinquents and Dependents

Statutes for the protection, correction, and disciplining of delinquent, dependent, or neglected children have generally been upheld. They are not criminal or penal, and their design is not punishment, but reformation and protection; and they are to be liberally construed in favor of the child's good and welfare.

A number of statutes having for their purpose the protecting, correcting, and disciplining of delinquent, dependent, neglected, or vagrant children have been upheld as within the powers of the legislatures or as constitutional;[77] but some have been held unconstitutional.[78] Such legislation may be characterized as progressive and humanitarian,[79] paternal and benevolent,[80] and not criminal or penal.[81] Such legislation has been construed by the

75. Ky.—Waters v. Commonwealth, 188 S.W. 490, 171 Ky. 457.

76. Mo.—In re Lorkowski, 68 S.W. 610, 94 Mo.App. 623.
31 C.J. p 1101 note 43.

77. Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320.
Idaho.—In re Allmon, 294 P. 528, 50 Idaho 223.
Minn.—State ex rel. White v. Patterson, 249 N.W. 187, 188 Minn. 492—State ex rel. White v. Patterson, 247 N.W. 573, 249 N.W. 187, 188 Minn. 492.
Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.
Mo.—State v. Campbell, 32 S.W.2d 69, 325 Mo. 561—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A.2d 299, 124 N.J.Law 272.
N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.
N.Y.—In re Vasko, 263 N.Y.S. 552, 238 App.Div. 128.
Or.—Ex parte Packer, 298 P. 234, 136 Or. 159—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
31 C.J. p 1101 note 46.

"**The universal holding** is that such statutes are constitutional."—Wissenberg v. Bradley, 229 N.W. 205, 207, 209 Iowa 813, 67 A.L.R. 1075.

State as parens patriæ

The commitment is based on the power of the state to act as parens patriæ where the parent or natural guardian is unable or unwilling or is an improper person to serve.
Ark.—Ex parte King, 217 S.W. 465, 141 Ark. 213.
Cal.—Ex parte Ah Peen, 51 Cal. 280.
Mo.—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.
Pa.—Commonwealth v. Carnes, 32 Pa. Super. 335.
35 C.J. p 195 note 28.

Constitutional limitation on legislation

"The Legislature can only enact such laws relative to the care, protection, guardianship, and disposition of delinquent, neglected, and dependent minors as is conferred upon it by section 18 of article 6 of the Constitution."—In re Petersen, 269 N.Y.S. 646, 648, 149 Misc. 869.

Particular grounds of objection not sustained

Indefinite character of portion of act having to do with arrest of the juvenile on failure to appear; designation of the juvenile as a juvenile delinquent before hearing and determination of his status; failure to prescribe a method for conduct of hearing and to require that a record be made of the evidence; indefinite character of that part of act having to do with order to be issued for arrest of parents or juvenile upon failure to appear.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

Creation of juvenile courts see supra § 6.

Delinquent and homeless children as subject to restraint see Constitutional Law § 597.

78. Idaho.—In re Allmon, 294 P. 528, 50 Idaho 223.
Mo.—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233—State v. Gregori, 2 S.W.2d 747, 318 Mo. 998.

79. D.C.—Rule v. Geddes, 23 App.D.C. 31.
Ill.—In re Brown, 117 Ill.App. 332.
Mo.—State v. Tincher, 166 S.W. 1028, 258 Mo. 1, Ann.Cas.1915D 696.
"Juvenile legislation is a response to the modern spirit of social justice."—State v. Johnson, 194 N.W. 202, 196 Iowa 300.

80. Minn.—State ex rel. Johnson v. Wiecking, 274 N.W. 585, 200 Minn. 490.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
R.I.—Givardi v. Juvenile Court of Sixth Judicial Dist., 142 A. 542, 49 R.I. 336.
31 C.J. p 1102 note 49.

81. Ark.—Underwood v. Farrell, 299 S.W. 5, 175 Ark. 217—Ex parte King, 217 S.W. 465, 141 Ark. 213.
Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320.
Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.
D.C.—Richardson v. Browning, 18 F. 2d 1008, 57 App.D.C. 186.
Idaho.—Ex parte Small, 116 P. 118, 19 Idaho 1.
Iowa.—Wissenberg v. Bradley, 229 N. W. 205, 209 Iowa 813, 67 A.L.R. 1075.
Mo.—State v. Trimble, 63 S.W.2d 37.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464—Zambrotto v. Jannette, 290 N.Y.S. 338, 160 Misc. 558—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.
Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.
Okl.—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Pa.—Commonwealth v. Carnes, 32 Pa. Super. 335.
R.I.—Givardi v. Juvenile Court of Sixth Judicial Dist., 142 A. 542, 49 R.I. 336.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
31 C.J. p 1102 note 50.

"The fundamental philosophy of juvenile court laws is that a delinquent child should be considered and treated not as a criminal but as a person requiring care, education and protection. . . . The primary function of juvenile courts, properly considered, is not conviction or punishment for crime, but crime prevention and delinquency rehabilitation."—Thomas v. U. S., 121 F.2d 905, 908, 74 App.D.C. 167.

"**No child is to be deemed a criminal** by reason of any adjudication

courts as remedial;[82] its design is not punishment,[83] but reformation[84] correction,[85] protection,[86] or probation;[87] nor is the restraint imprisonment.[88] The legislation is designed for the child's good and welfare[89] and, according to the decisions on

of delinquency."—Akers v. State, Ind. App., 51 N.E.2d 91, 94.

Constitutional guaranties

(1) The constitutional guaranties respecting an accused in a criminal case do not apply in a delinquency case.

Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320.

Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.

Ind.—Akers v. State, App., 51 N.E.2d 91.

Iowa.—Wissenberg v. Bradley, 229 N. W. 205, 209 Iowa 813, 67 A.L.R. 1075.

Mo.—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Pa.—Commonwealth v. Carnes, 82 Pa. Super. 335.

(2) Commitment to industrial schools and reformatories as involving right to trial by jury see the C. J.S. title Juries § 80, also 35 C.J. p 195 note 24.

A wayward minor, under the New York statute providing for the commitment of such minor, is not a criminal.—People ex rel. Peltz v. Brewster, 248 N.Y.S. 599, 232 App. Div. 1, reversing 247 N.Y.S. 672, 139 Misc. 161, and affirmed People ex rel. Peltz v. Warden of Second Dist. Prison of City of New York, 177 N. E. 139, 256 N.Y. 599—People ex rel. Deordio v. Palmer, 244 N.Y.S. 727, 230 App.Div. 397.

Procedure as not criminal see infra § 99.

82. Tex.—Phillips v. State, Cr., 20 S.W.2d 790—Stewart v. State, 8 S. W.2d 140, 110 Tex.Cr. 145.

Wash.—State v. King County Super. Ct., 180 P. 875, 106 Wash. 619.

83. Ala.—Harris v. State, 129 So. 795, 24 Ala.App. 59.

Ark.—Underwood v. Farrell, 299 S.W. 5, 175 Ark. 217—Ex parte King, 217 S.W. 465, 141 Ark. 213.

Cal.—Ex parte Ah Peen, 51 Cal. 280.

D.C.—Thomas v. U. S., 121 F.2d 905, 74 App.D.C. 167—Richardson v. Browning, 18 F.2d 1008, 57 App.D. C. 186—Rule v. Geddes, 23 App.D. C. 31.

Iowa.—Wissenberg v. Bradley, 229 N.W. 205, 209 Iowa 813, 67 A.L.R. 1075—State v. Johnson, 194 N.W. 202, 196 Iowa 300.

La.—State v. Malone, 100 So. 788, 156 La. 617.

Minn.—State ex rel. Johnson v. Wiking, 274 N.W. 585, 200 Minn. 490.

Mo.—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654—Ex parte Bass, 40 S.W.2d 457, 328 Mo. 195—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.

N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A. 2d 299, 124 N.J.Law 272.

N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464—Zambrotto v. Jannette, 290 N.Y.S. 338, 160 Misc. 558—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.

Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248.

Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.

Pa.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142—Commonwealth v. Carnes, 82 Pa.Super. 335.

Tex.—Phillips v. State, Cr., 20 S.W. 2d 790.

Wash.—State ex rel. Pulakis v. Superior Court of Washington, King County, 128 P.2d 649, 14 Wash.2d 507.

31 C.J. p 1102 note 52—35 C.J. p 195 note 27.

But it has been said that "one who is in fact a juvenile, who is found guilty of any penal law, may be punished by confinement as a delinquent child."—Morgan v. State, 25 S.W.2d 842, 843, 114 Tex.Cr. 434.

"It does not seek to punish the child or its parents for misdeeds or shortcomings."—In re Gomez, 32 A.2d 138, 140, 113 Vt. 224.

84. Ala.—Harris v. State, 129 So. 795, 24 Ala.App. 59.

Ark.—Underwood v. Farrell, 299 S. W. 5, 175 Ark. 217—Ex parte King, 217 S.W. 465, 141 Ark. 213.

Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320—Ex parte Ah Peen, 51 Cal. 280.

D.C.—Rule v. Geddes, 23 App.D.C. 31.

Idaho.—Ex parte Small, 116 P. 118, 19 Idaho 1.

Iowa.—Wissenberg v. Bradley, 229 N. W. 205, 209 Iowa 813, 67 A.L.R. 1075.

La.—State v. Malone, 100 So. 788, 156 La. 617—In re Parker, 43 So. 54, 118 La. 471.

Mo.—State v. Trimble, 63 S.W.2d 37—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654—Ex parte Bass, 40 S.W.2d 457, 328 Mo. 195—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090—State ex rel. Menth v. Porterfield, 264 S.W. 386—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.

Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A.2d 299, 124 N.J.Law 272.

Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Okl.—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10.

Pa.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142—Commonwealth v. Carnes, 82 Pa.Super. 335.

Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145—Hogue v. State, 220 S.W. 96, 87 Tex.Cr. 170.

35 C.J. p 195 note 27.

85. La.—State v. Kelly, 126 So. 49, 169 La. 753—In re Parker, 43 So. 54, 118 La. 471.

Mo.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.

Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248.

86. Ark.—Ex parte King, 217 S.W. 465, 141 Ark. 213.

Cal.—People v. Calkins, 119 P.2d 142, 48 Cal.App.2d 33.

Ill.—In re Brown, 117 Ill.App. 332.

Iowa.—Wissenberg v. Bradley, 229 N.W. 205, 209 Iowa 813, 67 A.L.R. 1075.

Mo.—State v. Trimble, 63 S.W.2d 37.

Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.

N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.

N.Y.—Zambrotto v. Jannette, 290 N. Y.S. 338, 160 Misc. 558.

Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.

Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.

Tex.—Hogue v. State, 220 S.W. 96, 87 Tex.Cr. 170.

Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224—In re Hook, 115 A. 730, 95 Vt. 497, 19 A.L.R. 610.

87. Iowa.—State v. Johnson, 194 N. W. 202, 196 Iowa 300.

88. Ark.—Underwood v. Farrell, 299 S.W. 5, 175 Ark. 217—Ex parte King, 217 S.W. 465, 141 Ark. 213.

31 C.J. p 1102 note 53.

89. D.C.—Richardson v. Browning, 18 F.2d 1008, 57 App.D.C. 186.

Iowa.—Wissenberg v. Bradley, 229 N.

the question, for the welfare of the public.[90] It must be so construed as to further the end sought by the legislature,[91] and should be liberally construed and applied to that end and in favor of the

W. 365, 209 Iowa 813, 67 A.L.R. 1075.
Minn.—State ex rel. Johnson v. Wiecking, 274 N.W. 585, 200 Minn. 490.
N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.
N.Y.—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
31 C.J. p 1102 note 54.

Particular purposes

(1) "To help children who need the court's protection."—Ex parte Day, 65 P.2d 1049, 1054, 189 Wash. 368.

(2) "To prevent minors from growing up to lead an idle, dissolute, or immoral life."—State v. Superior Court in and for Pacific County, 245 P. 409, 411, 139 Wash. 1, 45 A.L.R. 1530.

(3) "To place the child under guardianship of proper authorities for proper care and discipline until he has reformed or arrives at the age of majority."—Gerak v. State, 153 N.E. 902, 903, 22 Ohio App. 357.

(4) "To protect children against association with adult criminals . . . and to make more effective the techniques and efforts and treatment to rehabilitate such children."—In re X, Y and Z, 43 N.Y.S.2d 361, 363.

(5) "To restrain the criminal tendencies of the juvenile offender in their inception to the end that a fair opportunity might be afforded for the development of the elements of good citizenship."—Phillips v. State, Tex.Cr., 20 S.W.2d 790, 791.

(6) "To safeguard and reform children that may have erred and have been declared delinquent and to provide for children that may be declared neglected."—State v. Trimble, Mo., 63 S.W.2d 37, 38, citing **Corpus Juris.**

(7) "To prevent a trial and thus save children, under the age of sixteen years, from the ordeal of a trial if the child's own good and the best interests of the commonwealth justify it."—Commonwealth v. Carnes, 82 Pa.Super. 335, 338.

(8) "To protect and reform erring ones who have not reached an age of discretion and mature judgment; but, while this is the primary object of the act, the statute performs a secondary and wholesome purpose, in that it protects youthful society from the pernicious influence of the wayward ones."—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 975, 77 Mont. 290, 49 A.L.R. 398.

(9) "To protect both society and minor children, which form such a large part of it, from the effect of delinquency on the part of the child and neglect on the part of parents and custodians—not any more as to parents than as to others having the care and custody of children."—Ward v. Howard, 7 S.E.2d 625, 627, 217 N.C. 201.

(10) "To humanely deal with minors of the ages specified in the act, who have violated some ordinance of a city or town, or who have committed an offense against the laws of the state, or who from various specified causes are tending towards an immoral, vicious, or criminal life. The aim of the act is to treat such minors, not as criminals, but as wards of the state."—Givardi v. Juvenile Court of Sixth Judicial Dist., 142 A. 542, 49 R.I. 336.

(11) "The main purpose of the Juvenile Court law is to prevent the delinquency of children. . . . It is the purpose of the statute to safeguard children from those influences which would tend to cause them to become delinquent."—People v. Calkins, 119 P.2d 142, 144, 48 Cal.App. 2d 33.

(12) The "aim [of such statutes] is amnesty and oblivion for the transgressions of youthful offenders."—Thomas v. U. S., 121 F.2d 905, 908, 74 App.D.C. 167.

(13) Other statements of purpose.
Ark.—Ex parte King, 217 S.W. 465, 141 Ark. 213.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A.2d 299, 124 N.J.Law 272.
N.Y.—Zambrotto v. Jannette, 290 N.Y.S. 338, 160 Misc. 558.
N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.
Pa.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
Wash.—State ex rel. Pulakis v. Superior Court of Washington, King County, 128 P.2d 649, 14 Wash.2d 507.
31 C.J. p 1102 note 50 [a].

"In the case of a 'dependent child,' the purpose of juvenile court statutes is to place the child in an approved family to become a member of that family where such child may receive as nearly as possible the care it should have been given by its natural parents."—In re Hudson, 126 P. 2d 765, 777, 13 Wash.2d 673.

Hiding errors from public

(1) "The policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."—State v. Guerrero, 120 P.2d 798, 802, 58 Ariz. 421.

(2) The purpose of statute providing that the disposition of any child under the juvenile act or any evidence given in such case shall not be evidence against the child for any purpose is to protect the child when it becomes a ward of the state and to hide youthful errors from the gaze of the public.—People v. Smallwood, 10 N.W.2d 303, 306 Mich. 49.

"The court's adjudication looks alone to the welfare of the child."—State v. Wickliff, Mo.App., 114 S.W. 2d 158, 160.

Rights of parents

Such a statute has been said to be designed to protect the "natural right" of parents to the custody of their children, subject to judicial control only when the safety or interests of the child demand it.—Oversmith v. Lake, 295 N.W. 339, 295 Mich. 627.

Care of arrested child by juvenile officer

"Section 11416, which required the officer making the arrest to give into the care of a juvenile officer all children arrested under 18 years of age, is to prevent children of tender years from being thrown in jail with hardened criminals."—State v. Overby, 209 N.W. 552, 555, 54 N.D. 295.

90. Minn.—State ex rel. Johnson v. Wieking, 274 N.W. 585, 200 Minn. 490.

91. Ala.—Harris v. State, 129 So. 795, 24 Ala.App. 59.
Cal.—Los Angeles County v. Superior Court in and for Alameda County, 18 P.2d 112, 128 Cal.App. 522.
Iowa.—State v. Johnson, 194 N.W. 202, 196 Iowa 300.
Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248.

Avoidance of public trial and prosecution

The statute relating to juvenile delinquents should be construed, so far as the law and the constitution will permit, so as not to compel a public trial and a prosecution by district attorney of a delinquent of tender years.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

child's good and welfare;[92] but in so far as it purports to restrain the liberty of the child it should be strictly construed.[93] The courts must follow the positive and unambiguous provisions of the delinquency statutes.[94]

Repeal; amendment. Particular statutes of this character have been held repealed[95] or held not repealed[96] by others.

An amendment extending the juvenile court age has been held not to change the law relating to the detention or commitment of children under the former age.[97]

§ 98. —— Children Who May Be Committed

a. In general
b. Juvenile offenders as delinquents

a. In General

In order to justify commitment, the child must fall within the classification established by law, including that of age. Under most authorities, the delinquency statutes apply to married infants.

In order to justify commitment, the child must fall within the classification established by law.[98]

Abandoned children. Under governing statutes, the intent to abandon has been held essential to declare a child free of his parents' custody and control,[99] and in particular circumstances children have been held not to be "abandoned and neglected."[1]

Children growing up in crime. The term "growing up in crime," as used with respect to the commitment of children, has been said to refer not only to a minor who is a criminal, or who has been or is committing a crime, but also to a status, that is, a tendency in the direction of crime, and to include a youth who is incorrigible.[2]

Children incapable of self-support. The term "any infant unable to support itself" includes a feeble-minded child who is prevented by such in-

92. Cal.—Hills v. Pierce, 231 P. 652, 654, 69 Cal.App. 447, citing **Corpus Juris.**
Iowa.—State v. Johnson, 194 N.W. 202, 196 Iowa 300.
La.—State v. Duckett, 107 So. 696, 160 La. 920.
Mo.—State v. Robertson, App., 13 S.W.2d 566.
N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.
Okl.—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Tex.—Phillips v. State, Cr., 20 S.W.2d 790—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
Wash.—Ex parte Day, 65 P.2d 1049, 189 Wash. 368.
31 C.J. p 1102 note 55.

"The courts . . . have universally held that . . . [these statutes] are entitled to a liberal construction."—Wilson v. State, 82 P.2d 808, 809, 65 Okl.Cr. 10.

Statutory requirement
Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248.

93. Tex.—Phillips v. State, Cr., 20 S.W.2d 790.
Wash.—In re Lundy, 143 P. 885, 82 Wash. 148, Ann.Cas.1916E 1007.

94. Ala.—Powell v. State, 141 So. 201, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, reversed on other grounds Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527.

Statute held permissive
Comp.St.Suppl.1924 § 5913 (d), providing for commitment of delinquent negro boys to training school, is permissive and not compulsory.—State v. Smith, 195 S.E. 819, 213 N.C. 299.

95. **Statutes held repealed**
(1) Statute relating to punishment of delinquent children under sixteen years of age held to repeal prior statute relating to punishment to be imposed upon persons under eighteen years of age convicted of crimes punishable by less than life sentence, except as to children between sixteen and eighteen years of age.—State ex rel. Hamilton v. Chapman, 169 So. 658, 125 Fla. 235.

(2) Acts 1910 c 289 is impliedly repealed by Acts 1914 c 350.—Ex parte Mallory, 94 S.E. 782, 122 Va. 298.

96. **Statutes held not repealed**
(1) A provision of criminal code punishing failure to provide for minors was not repealed by provision in juvenile court code that the juvenile court or court of common pleas, division of domestic relations, should have jurisdiction and exercise the powers and jurisdiction conferred in the juvenile court code.—In re Cooper, 15 N.E.2d 634, 134 Ohio St. 40, affirming 16 N.E.2d 954, 58 Ohio App. 519.

(2) Statute relating to jurisdiction of probate court over delinquent children does not by implication repeal statute recognizing criminal accountability of children over fourteen years of age.—People v. Ross, 209 N.W. 663, 235 Mich. 433.

(3) Statute requiring commitments of boys under seventeen by juvenile court held not impliedly repealed.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.

(4) Other statutes.—Flannery v. State, 117 S.W.2d 1111, 135 Tex.Cr. 235.

97. Pa.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142.

98. Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143, and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
31 C.J. p 1102 note 58.

99. Cal.—Moch v. Los Angeles County Super. Ct., 179 P. 440, 39 Cal. App. 471.

Presumption
Failure to provide for child for one year is only presumptive evidence of abandonment.—Moch v. Los Angeles County Super. Ct., supra.

Abandonment by both parents; communication
To warrant order adjudging minor free from parents' custody and control, both parents must join in acts of abandonment, or parent not joining must have consented to other's acts; child receiving communication from either parent during year, abandoned by one parent only, or supported by mother, is not abandoned.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.

1. Mich.—In re Adams, 183 N.W. 241, 214 Mich. 199—Graham v. Gardner, 137 N.W. 823, 171 Mich. 540.

2. Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

firmity from being taught a vocation which would provide support.[3]

Delinquent children. "Delinquency," as the term is used in this connection, was unknown to the common law.[4] The term "delinquent child" is variously defined, in the statutes of the several states, as meaning, in general, any child under a stated age who violates any law, or who is incorrigible or immoral, or who is growing up in idleness or crime;[5] delinquency has been said to involve an intent to do wrong.[6]

The terms of the law defining a delinquent child have been required to be strictly construed, to justify commitment as such;[7] and a child may not be committed as a delinquent for an act not coming within such statute.[8] Various particular acts have been held[9] or held not[10] to constitute delinquency.

The question as to what constitutes delinquency in connection with the crime of contributing to the delinquency of a child is considered supra § 13.

Dependent children. "Dependent child" has been said to be the term applied to normal children who must be supported by others than their natural guardians;[11] a dependent child is a child who is dependent on another, or on the public, for support.[12] A minor is not dependent merely because the child

3. Pa.—In re Pennsylvania S. P. C. C., 22 Pa.Dist. 347.

4. Or.—State v. Dunn, 99 P. 278, 53 Or. 304, rehearing denied 100 P. 258, 53 Or. 304.

5. Ala.—Bell v. State, 101 So. 68, 20 Ala.App. 101.
Hawaii.—In re Begas, 29 Hawaii 830.
La.—State v. Dabon, 111 So. 461, 162 La. 1075—State v. Ebarbo, 78 So. 973, 143 La. 591.
Mo.—State v. Trimble, 63 S.W.2d 37.
N.Y.—In re Jones, 24 N.Y.S.2d 10, 175 Misc. 451.
Pa.—Commonwealth v. Carnes, 82 Pa. Super. 335—U. S. v. Allegheny County Juvenile Ct., 25 Pa.Dist. 780.
Tenn.—Howland v. State, 268 S.W. 115, 151 Tenn. 47.
Tex.—Rose v. State, 129 S.W.2d 639, 137 Tex.Cr. 316—Simpson v. State, 220 S.W. 777, 87 Tex.Cr. 277—Hogue v. State, 220 S.W. 96, 87 Tex.Cr. 170—Tippins v. State, 217 S.W. 380, 86 Tex.Cr. 205.
18 C.J. p 475 note 84.

"The violation of a criminal statute by a person under 17 years of age is still a crime, if such person has the capacity at common law to commit crime; the Juvenile Court Act merely makes such violation also an act of delinquency, a jurisdictional ground for the administration, in a proper case, of its corrective and reformatory measures."—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 1065, 321 Mo. 1090.

"A neglected and dependent child is not necessarily a delinquent child, though frequently he becomes one if neglect continues; and, indeed, he may be at one and the same time, both. But the legislature has seen fit to enact distinct legislation controlling the problems presented by each class of cases, and we are not prepared to say it may not do so, that the classification it seeks to make and the distinction it draws . . . is not reasonable."—In re Santillanes, 138 P.2d 503, 513, 47 N. M. 140.

6. N.Y.—In re Jones, 24 N.Y.S.2d 10, 15, 175 Misc. 451.

Surrounding circumstances
"An intent can be shown by the surrounding circumstances, but these circumstances must obviate the inference that the act was committed in good faith."—In re Jones, supra.

7. Tex.—Ex parte Douglas, 5 S.W. 2d 153, 109 Tex.Cr. 463.

Necessity of want of parental care
Under some statutes it is required, for commitment, not only that the child be delinquent, but also that the parent or legal guardian has failed to provide the proper parental care.
Mont.—In re Satterthwaite, 160 P. 346, 52 Mont. 550.
Utah.—Mill v. Brown, 88 P. 609, 31 Utah 473, 120 Am.S.R. 935.

8. Tex.—Ex parte Douglas, 5 S.W. 2d 153, 109 Tex.Cr. 463.

Repeated or habitual actions
(1) Minor's desertion of home on single occasion without good cause did not justify commitment as a child who "repeatedly" deserts his home.—People v. Pikunas, 182 N.E. 675, 260 N.Y. 72, 85 A.L.R. 1097, reversing 257 N.Y.S. 1071, 236 App. Div. 737.

(2) Single or occasional acts do not authorize child's conviction as delinquent for habitually wandering about streets at night on no business.—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461—Meggs v. State, 276 S.W. 262, 101 Tex.Cr. 415.

(3) Minors' taking of one automobile held not "incorrigibility" or "growing up in idleness or crime" authorizing declaration of delinquency.—Kahm v. People, 264 P. 718, 83 Colo. 300.

9. **Failure to attend school**
Wis.—State v. Freudenberg, 163 N. W. 184, 166 Wis. 35.

"Habitual truancy" which amounts to delinquency is a refusal to attend school in defiance of parental authority.—In re Alley, 182 N.W. 360, 174 Wis. 85.

Singing in café
A girl under the age prescribed by the statute, singing in a café where intoxicants are sold, is a delinquent child.—In re Lundy, 143 P. 885, 82 Wash. 148, Ann.Cas.1916E 1007.

10. **Refusal to salute flag**
N.Y.—In re Reed, 28 N.Y.S.2d 92, 262 App.Div. 814, certiorari denied 30 N.Y.S.2d 702, 262 App.Div. 986—In re Jones, 24 N.Y.S.2d 10, 175 Misc. 451.

Exclusion from public school for refusal to salute flag.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.

"The accidental discharge of a gun cannot be said to be an act of delinquency."—State v. Butcher, 279 P. 497, 498, 74 Utah 275.

Being on streets or auto riding at night
Girl under eighteen does not become delinquent by being on streets, or going auto riding, at night, unless on no business or legitimate mission.—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461.

11. N.Y.—In re Souers, 238 N.Y.S. 738, 135 Misc. 521.
Support and maintenance generally see supra § 9.

12. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.

Nature of home or advantages provided
The dependent child statute was not intended to take a child from a parent who enforces proper discipline and gives child the proper moral training and furnishes sufficient food, clothing, and shelter for child, merely because parent is financially unable to provide home with modern appliances found in ordinary city home, or because some one in better financial circumstances can give child greater advantages.—In re Schein, 69 P.2d 293, 156 Or. 661.

Children held dependent
(1) A child who has been a ward

of divorced parents;[13] and a child of separated parents is not a dependent child so long as he is maintained by a parent.[14] The mere fact that a parent has been convicted of violating the prohibitory law of the state does not justify the state in taking from him custody and control of his children, as being dependent and neglected.[15]

In determining whether a child should be given into the custody of the state as dependent, the court is not concerned with the relative qualifications of his father and mother to have his custody.[16]

The definitions of "dependent child" and "delinquent child" have been said to be different;[17] a dependent child is not a criminal, while a delinquent child may be one who commits crime.[18]

The question as to what constitutes dependency in connection with the crime of contributing to the dependency of a child is considered supra § 13.

Incorrigible children. The term "incorrigible," as applied to children, has been held to mean deliberately unmanageable,[19] or unmanageable by parents or guardians;[20] it does not imply absolute impossibility of correction or reform, but implies that a child is incapable of being corrected or reformed in his present situation and under the control to which he is subject.[21]

A single act of disobedience is not sufficient basis for a charge of incorrigibility.[22] Thus incorrigibility and delinquency have been said to be two different offenses,[23] in that the former has in it elements of continuous disobedience of parental commands, viciousness, and general bad conduct, while the latter may be a single offense, the violation of any law.[24]

Neglected children. It has been said that a statute providing as to who are neglected children should be liberally construed to aid the purpose of its enactment.[25] Whether a child is a neglected child within such a statute is a question of fact,[26]

of the juvenile court and is receiving county aid.—Dumes v. Deckard, 17 N.E.2d 481, 105 Ind.App. 674.

(2) Children cared for by friends who had taken charge of them during divorced mother's illness at her request.—Ex parte Day, 65 P.2d 1049, 189 Wash. 368.

(3) Other children.—Stanley v. State, 179 N.W. 1019, 105 Neb. 260.

Children held not dependent

(1) Nine-year-old child whose father is temporarily disabled from supporting her, and who is suitably maintained by step-mother.—State v. Juvenile Court of Ramsey County, 204 N.W. 21, 163 Minn. 312.

(2) Where parents of twelve-year-old child were divorced, father had custody of child and arranged and paid for her to live in a private home and attend public school, and child attended Sunday School and church with her father and people with whom she lived, child was not a "dependent child" within statute, so as to justify depriving father of her custody.—Reynolds v. Rayborn, Tex. Civ.App., 116 S.W.2d 836.

(3) Other children.

Colo.—In re People in Interest of McChesney, 83 P.2d 772, 103 Colo. 115.

Ind.—Orr v. State, 123 N.E. 470, 70 Ind.App. 242.

12. Ohio.—Sonnenberg v. State, 178 N.E. 855, 40 Ohio App. 475.

14. N.Y.—Berman v. Berman, 8 N.Y.S.2d 499, 169 Misc. 921.

15. Colo.—Ziemer v. Wheeler, 1 P.2d 579, 89 Colo. 242.

16. Colo.—In re People in Interest of McChesney, 83 P.2d 772, 103 Colo. 115.

17. Wash.—State v. Pierce County Super. Ct., 179 P. 79, 105 Wash. 684, 686.

18. Wash.—State v. Pierce County Super. Ct., supra.

19. Vt.—In re Hook, 115 A. 730, 95 Vt. 497.

20. Colo.—People v. Pursall, 201 P. 881, 70 Colo. 399.

La.—In re Parker, 43 So. 54, 118 La. 471, 472.

Pa.—U. S. v. Allegheny County Juvenile Ct., 25 Pa.Dist. 780.

21. Miss.—Mahaffey v. Mahaffey, 170 So. 289, 176 Miss. 733.

Tex.—Hogue v. State, 220 S.W. 96, 87 Tex.Cr. 170.

Vt.—In re Hook, 115 A. 730, 95 Vt. 497.

22. Vt.—In re Hook, supra.

23. Pa.—In re Shelton, 11 Pa.Dist. 155.

24. Pa.—In re Shelton, supra.

25. Mo.—State v. Robertson, App., 13 S.W.2d 566.

26. N.Y.—In re Richards, 2 N.Y.S.2d 608, 166 Misc. 359, affirmed 7 N.Y.S.2d 722, 255 App.Div. 922.

Children held neglected

(1) Children made public charges through refusal of their father to comply with regulation of welfare officer requiring father's surrender of automobile license plates as condition to obtaining public work.—In re Kinney, 272 N.Y.S. 520, 151 Misc. 769.

(2) A father who struck child with belt in correcting her for lying was "unnecessarily assaultive," and the child was a "neglected" child.—In re Carl, 22 N.Y.S.2d 782, 785, 174 Misc. 985.

(3) Other children.

Neb.—Stanley v. State, 179 N.W. 1019, 105 Neb. 260.

N.Y.—In re Schwartz, 35 N.Y.S.2d 930.

Children held not neglected

(1) Children ten, twelve, and fifteen years of age, who were suspended from public school for refusal to salute the flag of account of good-faith conscientious objections based upon teachings of religious sect, and who because of parents' poverty were not provided with satisfactory private schooling.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.

(2) An eight-year-old girl was not a "neglected child," because of the fact that her mother did not send her to school, where refusal was not prompted by any spirit of defiance or willfulness, but rather from a conviction that it would not be safe or conducive to child's health, in view of conditions under which child would be obliged to travel to attend school, and where mother taught child at home as well as she could. —In re Richards, 2 N.Y.S.2d 608, 166 Misc. 359, affirmed 7 N.Y.S.2d 722, 255 App.Div. 922.

(3) A ten-year-old girl placed in an orphans' asylum by its mother under agreement to pay its board, and given to childless parents, from whom the mother made repeated attempts to retake it, culminating in court actions by both parties, is not a "neglected or delinquent child."—Scott v. Brown, 254 S.W. 1074, 160 Ark. 489.

(4) That father restricted child's activities to conform to his beliefs in religious cult, and limited bedrid-

and each case must be determined on its own facts.[27] Neglect, in this sense, is not limited to mere failure to provide for the child's physical needs,[28] but extends to a denial to a child of affection, guidance, and consideration, amounting to a rejection of the child by the parent or the person in custodial care;[29] willful conduct[30] or intent to commit a crime[31] need not be proved. A mere showing that some one other than the present custodian has a paramount right to the child's custody is not a showing of "neglect," in the statutory sense.[32]

The terms "neglected child" and "delinquent child" have been said to have distinct and separate meanings; a child may be of good character and yet, through no fault of its own, be declared a neglected child.[33]

Classification as to age. It is within the power of the legislature to classify persons by their age for the purpose of dealing with them as dependent or delinquent persons,[34] and when such power is exercised the infant must fall within the age prescribed by statute in order to be subject to its provisions.[35]

Married infants. The authorities are not in full accord on the question whether the statutes providing for the commitment of delinquent juveniles apply to married infants who otherwise fall within the classification provided;[36] but it has been said that the cases seem to be few in which it has been asserted that the statute does not apply to married female infants,[37] and the weight of authority is that married infants are within the operation of the statute,[38] and that, where the juvenile court has obtained jurisdiction of an infant for delinquency proceedings, the infant's subsequent marriage does not deprive the court of jurisdiction, suspend the operation of the statute, or render her commitment invalid,[39] although appropriate steps may be taken

den wife's attention in caring for child did not make child "neglected." —In re Sisson, 274 N.Y.S. 857, 152 Misc. 806.

(5) Other children.

La.—State v. McMillan, 185 So. 269, 191 La. 317.

Pa.—Commonwealth v. Bickel, 78 Pa. Super. 348.

27. N.Y.—In re Carl, 22 N.Y.S.2d 782, 174 Misc. 985.

28. N.Y.—In re Carl, supra.

29. N.Y.—In re Carl, supra.

30. N.Y.—In re Carl, supra.

31. N.Y.—In re Carl, supra.

32. N.Y.—Caposella v. Leonardo, 7 N.Y.S.2d 606, 255 App.Div. 863, reargument denied In re Caposella, 8 N.Y.S.2d 509, 255 App.Div. 987.

33. N.Y.—State v. Trimble, 63 S.W. 2d 37.

34. Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
31 C.J. p 1103 note 65.

35. Ala.—Williamson v. State, 4 So. 2d 734, 242 Ala. 42.
31 C.J. p 1103 note 66.

36. D.C.—Richardson v. Browning, 18 F.2d 1008, 57 App.D.C. 186.
Tex.—Phillips v. State, Cr., 20 S.W. 2d 790, 791, citing **Corpus Juris.**
Vt.—In re Hook, 115 A. 730, 95 Vt. 497.
Emancipation by marriage see supra § 29.

37. Tex.—Phillips v. State, Cr., 20 S. W.2d 790, 791, citing **Corpus Juris.**

Injunction against marriage

An injunction issued by a juvenile court forbidding the marriage of a female infant who was under bail in delinquency proceedings before that court was held of no force, on the ground that, at the time the injunction was issued, no adjudication of delinquency had been made, and the girl was not within the control of the court.—State v. Hennepin County Dist. Court, 136 N.W. 746, 118 Minn. 170.

38. D.C.—Richardson v. Browning, 18 F.2d 1008, 57 App.D.C. 186.
Hawaii.—In re Begas, 29 Hawaii 830.
Mich.—Ex parte Drye, 229 N.W. 623, 625, 250 Mich. 210, citing **Corpus Juris.**
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
N.Y.—In re Palumbo, 14 N.Y.S.2d 329, 172 Misc. 55.
Ohio.—State v. Wilcox, 26 Ohio N.P., N.S., 343.
Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248—Ex parte Rothrock, 199 P. 581, 19 Okl.Cr. 234.
Or.—Ex parte Packer, 298 P. 234, 136 Or. 159.
Contra State v. Gates, 193 P. 197, 98 Or. 110—State v. Eisen, 99 P. 282, 100 P. 257, 53 Or. 297.
31 C.J. p 1103 note 69.

Reason for rule

"Marriage does not remove the parties thereto from the operation of the general laws of the state enacted in the interest of public welfare. To achieve . . . [the] purpose [of the delinquency statute] it is essential for the protection and welfare of both the child and the public that marriage should not exclude the child from the benevolent operation of the law."—State ex rel. Johnson v. Wiecking, 274 N.W. 585, 200 Minn. 490.

"Juvenile delinquent person"

In a statute providing that any child under eighteen years of age found in the situation therein described "shall be deemed a delinquent child or a juvenile delinquent person," the use of the two phrases in the disjunctive, the latter being broader than the former, "reveals the legislative intention to include, rather than exclude, married minors." —State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 974, 77 Mont. 290, 49 A.L.R. 398.

Effect of statute as to rights of married female

Married females under the age of eighteen years are not withdrawn from the operation of a statute providing that "the term 'delinquent child' shall include . . . any girl under eighteen years of age" by another statute providing that "every female under the age of twenty-one years who shall marry . . . shall, from and after the time of such marriage, be deemed to be of full age and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age." —Phillips v. State, Tex.Cr., 20 S.W. 2d 790, 791.

39. Mich.—Ex parte Drye, 229 N.W. 623, 250 Mich. 210.
Or.—Ex parte Packer, 298 P. 234, 136 Or. 159.
31 C.J. p 1103 note 69.

for her release.[40] Where the marriage was annulled prior to the court's obtaining jurisdiction the statute has been held to apply.[41]

b. Juvenile Offenders as Delinquents

(1) In general

(2) Determining whether to proceed against infant as criminal or delinquent

(1) In General

Statutes providing that certain acts committed by certain infants, which in the case of adults would be crimes, shall constitute juvenile delinquency only preclude the prosecution under criminal laws or before ordinary criminal tribunals of infants falling within the statutory classification. However, under some authorities, although not others, an infant may waive the right to be treated as a delinquent instead of as a criminal.

While in the absence of express provision to that effect statutes providing for the commitment of delinquent infants and including as delinquent those who violate the criminal law do not except such infants from prosecution under the criminal law,[42] the progressive and humanitarian tendency of modern legislation toward infants, as considered supra § 97, is best evidenced by the statutory enactments providing that certain acts committed by certain infants, which in cases of adults would be crimes, shall be considered as constituting juvenile delinquency only.[43] These statutes preclude the prosecution under the criminal law or before ordinary criminal tribunals of infant defendants who fall within the statutory classification.[44] The validity of such legislation has been repeatedly upheld,[45] except as it has conflicted with constitutional limitations.[46] Statutes enacting it should be construed liberally in favor of the welfare of the infant.[47] To justify a proceeding against an infant as a delinquent and not a criminal, he must fall within the classification established by statute;[48] the crime charged[49] and, as appears infra subdivision b (2)

40. Utah.—Stoker v. Gowans, 147 P. 911, 45 Utah 556, Ann.Cas.1916E 1025.

41. Wash.—In re Lundy, 143 P. 885, 82 Wash. 148, Ann.Cas.1916E 1007.

42. Ga.—Thomas v. State, 163 S.E. 734, 174 Ga. 654—Mills v. State, 192 S.E. 730, 56 Ga.App. 390—Johnson v. State, 159 S.E. 295, 43 Ga.App. 474.
Iowa.—State v. Reed, 218 N.W. 609, 207 Iowa 557.
31 C.J. p 1103 note 75.
Contra People v. Butts, 14 N.Y.S.2d 881, stating Georgia law.

In Ohio "the Juvenile Court Act does not in any way change the common-law rule which has always governed in Ohio as to the capacity of a minor to commit a crime. . . . The fact that under the Juvenile Court Act the commission of a felony by a minor constitutes him a delinquent and authorizes such court to take charge of him, as such delinquent, does not relieve him of the consequences of his crime or abridge the right of the grand jury to indict him for such crime, or the right of the common pleas court to try him for such act, unless the juvenile court acquires jurisdiction of him for such delinquency before the common pleas court acquires jurisdiction of him for such crime."—Gerak v. State, 153 N.E. 902, 903, 22 Ohio App. 357.

43. U.S.—Ex parte Januszewski, C.C.Ohio, 196 F. 123.
31 C.J. p 1103 note 77.

44. Conn.—State v. Ebert, 162 A. 769, 115 Conn. 589.
Kan.—Ex parte Swehla, 220 P. 299, 114 Kan. 712.
La.—State v. Bedford, 190 So. 347, 193 La. 104—State v. West, 139 So. 804, 173 La. 974—State v. Kelly, 126 So. 49, 169 La. 753—State v. Dabon, 111 So. 461, 162 La. 1075.
Mo.—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.
N.Y.—People v. Murch, 189 N.E. 220, 263 N.Y. 285, affirming 266 N.Y.S. 907, 240 App.Div. 786—People v. Glowacki, 22 N.Y.S.2d 22, 174 Misc. 415—In re X, Y and Z, 43 N.Y.S.2d 361.
Tex.—Brown v. State, 268 S.W. 460, 99 Tex.Cr. 70.
31 C.J. p 1104 note 78.

Entire proceeding illegal

A criminal proceeding, begun by complaint and warrant against one then under sixteen years old in district court, which bound him over under bail to await grand jury's action, was illegal from start until its conclusion, including finding of indictment and accused's arraignment and sentence thereon after he reached such age, as only juvenile court had jurisdiction over him.—Ex parte Albiniano, 6 A.2d 554, 62 R.I. 429, 123 A.L.R. 441.

In New Jersey

(1) The statute providing that person under age of sixteen is deemed incapable of committing a crime is intended to go only as far as correlative features of the statute defining juvenile delinquency as commission by child under sixteen years of age of any act which when committed by person of age of sixteen years or over, would constitute a felony.—State v. Goldberg, 11 A.2d 299, 124 N.J.Law 272, affirmed 17 A.2d 173, 125 N.J.Law 501—Ex parte Mei, 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080, affirming 186 A. 577, 121 N.J. Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125.

(2) Under juvenile court act, person under sixteen years of age could be found guilty of delinquency in that he had committed act which would constitute murder if committed by adult, only on finding that he has combined all factors of crime including criminal intent, and is saved from prosecution only by his age.—Ex parte Mei, supra.

45. Conn.—State v. Elbert, 162 A. 769, 115 Conn. 589.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.
31 C.J. p 1104 note 79.

46. Mo.—State v. Tincher, 166 S.W. 1028, 258 Mo. 1, Ann.Cas.1915D 696.

47. Okl.—In re Powell, 120 P. 1022, 6 Okl.Cr. 495.
Wash.—McClain v. Chelan County Super. Ct., 191 P. 852, 112 Wash. 260.

48. N.C.—State v. Smith, 195 S.E. 819, 213 N.C. 299.
31 C.J. p 1104 note 82.

49. Fla.—State ex rel. Interlandi v. Petteway, 155 So. 319, 114 Fla. 850.
Me.—State v. Rand, 169 A. 898, 132 Me. 246.
Mass.—Commonwealth v. Dies, 143 N.E. 506, 248 Mass. 482.
Mich.—People v. Crandell, 258 N.W. 224, 270 Mich. 124.
N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A.2d 299, 124 N.J.Law 272.

(b) of this section, his age must include him within the benefits of the statute.

Waiver of right to be treated as juvenile delinquent. In some jurisdictions it has been held that a juvenile offender falling within the statutory classification entitling him to be treated as a delinquent and not as a criminal cannot waive such right.[50] In other jurisdictions it has been held that the right of an infant to be exempt from criminal prosecution and to be prosecuted merely as a delinquent may be waived by the infant,[51] and such right is considered waived by failure to plead his juvenility[52] and plead-

Tex.—Morgan v. State, 25 S.W.2d 842, 114 Tex.Cr. 434.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S. Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
31 C.J. p 1104 note 83.

Capital felony

"The juvenile courts created by the Legislature are without jurisdiction to try boys 15 years of age charged with a capital felony. State v. Burnett, 102 S.E. 711, 179 N.C. 735. The jurisdiction of such offenses was not taken from the superior court by the passage of the juvenile court act, C.S. § 5039 et seq."—State v. Smith, 195 S.E. 819, 821, 213 N.C. 299.

Murder; manslaughter

(1) Murder not included within statute.
La.—State v. Bedford, 190 So. 347, 193 La. 104—State v. West, 139 So. 304, 173 La. 974.
N.J.—Ex parte Mei, 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125, affirmed 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080.
Tenn.—Howland v. State, 268 S.W. 115, 151 Tenn. 47—Templeton v. State, 240 S.W. 789, 146 Tenn. 272.
31 C.J. p 1104 note 83 [a].

(2) Delinquency grounded in murder constitutes "crime" and charge thereof constitutes criminal "accusation" within constitutional provisions relating to criminal procedure. —Ex parte Mei, 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080, affirming 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125.

(3) Where the juvenile court's jurisdiction over delinquent children under a stated age is not made to extend to capital crimes, the prosecuting counsel's statement in a prosecution of a child under that age for murder, that he would not ask for a capital verdict does not divest the district court of jurisdiction.—State v. Dabon, 111 So. 461, 162 La. 1075.

(4) As manslaughter is not a capital offense, whenever the charge is against a person under seventeen years of age, the offense falls within the exclusive original jurisdiction of the juvenile court, in which it is charged and tried, not as a crime, but as a mere delinquency.—State v. West, 139 So. 304, 173 La. 974—State v. Dabon, supra.

(5) "When a juvenile is indicted for murder, only the jury can decide whether a felonious homicide was committed and if so whether the homicide was murder or manslaughter. But when the jury decides that the crime was not murder but manslaughter, the verdict does not mean that the juvenile should be dealt with and punished as a felon, but it means that the juvenile should be dealt with in the juvenile court as a delinquent child in the manner provided by special laws."—State v. Bedford, 190 So. 347, 350, 193 La. 104.

(6) Where indictment charges one with murder without alleging his age, evidence is admissible to show that he is under seventeen to establish want of jurisdiction of district court of included offense of manslaughter; and if from evidence jury finds accused under seventeen and not guilty of murder, verdict should be "not guilty," but as to included offense of manslaughter merely that accused is "under seventeen."—State v. West, supra.

Bastardy

Statute providing that minors under eighteen, when arrested, shall be taken before juvenile judge, applies only to arrests in criminal cases and therefore does not apply in bastardy proceedings.—Durst v. Griffith, 182 N.E. 519, 43 Ohio App. 44.

Crime included in crime charged

In prosecution in district court, juvenile cannot be convicted of crime over which court has no jurisdiction to try juvenile and for which he must be dealt with as a delinquent child, in the juvenile court, although such crime is essentially included in crime charged in indictment.—State v. Neal, 125 So. 442, 169 La. 441.

In New York

(1) A child is not deemed to be guilty of a crime except where the punishment for an offense committed by a child would, if committed by an adult, be life imprisonment or the extreme penalty.—In re Cotton, 30 N.Y.S.2d 421.

(2) Under statute providing that acts of child in all cases other than acts constituting felony punishable by death or life imprisonment shall be treated as if done without evil mind which characterizes felonious intent, only crimes which child under sixteen years of age is capable of committing are treason, murder in first degree, and murder in second degree.—People v. Murch, 189 N.E. 220, 263 N.Y. 235, affirming 266 N.Y.S. 907, 240 App.Div. 786—People v. Fields, 20 N.Y.S.2d 702, 174 Misc. 809.

(3) Kidnapping, in some circumstances, is to be added to crimes listed in preceding statement.—People v. Fields, 20 N.Y.S.2d 702, 174 Misc. 809.

(4) The children's division of the domestic relations court of the City of New York has exclusive original jurisdiction of a child under the age of sixteen who is charged with having committed an unlawful act, or omitted to do that which the law requires in all instances except where the act or omission if committed by an adult is punishable by life imprisonment, or death, and the court has the power to inquire as to the degree of the crime committed by a child as by determining whether children under sixteen who allegedly stabbed a boy to death were guilty of murder in the first degree or murder in the second degree; but regardless of its determination of the question, indictment of children by grand jury of murder in the first or second degree would supersede action by the court.—In re X, Y, and Z, 43 N.Y.S.2d 361.

50. R.I.—Ex parte Albiniano, 6 A.2d 554, 62 R.I. 429, 123 A.L.R. 441.
31 C.J. p 1104 note 85.

Failure to raise age question

A minor did not waive right to attack validity of indictments on ground that he was under statutory age at times of offenses charged by permitting himself to be arraigned thereon before superior court and voluntarily pleading thereto without then raising any question regarding his age.—Ex parte Albiniano, supra.

51. Tex.—Valdez v. State, 265 S.W. 161, 98 Tex.Cr. 166.
31 C.J. p 1104 note 86.

52. Ohio.—State v. Klingenberger, 149 N.E. 395, 113 Ohio St. 418.
Tex.—Fifer v. State, 234 S.W. 409, 90 Tex.Cr. 282.

Written "motion" to transfer prosecution to juvenile court on statutory ground that accused was not sixteen years of age operated as plea to jurisdiction of court.—Keenum v. State, 146 So. 622, 25 Ala.App. 359.

ing guilty to the offense.[53] The right of a minor under the specified age not to be prosecuted for crime until the matter has first been submitted to the juvenile court relates to jurisdiction of the person and not of the subject matter, and may therefore be waived;[54] and where, under the statute, it is not mandatory that an accused under the statutory age and charged with crime shall be tried by the juvenile court unless his age is suggested or appears to the judge, the privilege is waived by failure to call the minor's age to the court's attention.[55]

(2) Determining whether to Proceed against Infant as Criminal or Delinquent

(a) In general

(b) Age

(a) In General

Ordinarily, a preliminary inquiry is made by the juvenile court to determine whether the infant shall be proceeded against as a criminal or as a delinquent; if it decides the former, it must transfer the case to the court having jurisdiction. Conversely, a criminal court in which proceedings are instituted may be required, on ascertaining that the delinquency statutes apply, to transfer the case to the court having jurisdiction of delinquency proceedings, or may be given discretion as to making such transfer.

Ordinarily there is had a preliminary investigation or hearing with a view of determining whether the infant shall be proceeded against as a criminal or as a delinquent,[56] as by determining whether or not he committed the act charged, and, if so, whether he knew the wrongfulness thereof in a criminal sense.[57] In determining such preliminary questions the court having authority in the premises ordinarily exercises its discretion or judgment.[58] The manner or method of determining the question is mostly regulated by statute,[59] and compliance with

53. Tex.—Fifer v. State, 234 S.W. 409, 90 Tex.Cr. 282.

54. Cal.—Ex parte Tassey, 253 P. 948, 950, 81 Cal.App. 287.

55. Cal.—People v. Luzovich, 16 P. 2d 144, 127 Cal.App. 465—Ex parte Bastiani, 253 P. 951, 81 Cal.App. 294.

56. Ala.—Lane v. State, 101 So. 521, 20 Ala.App. 192, certiorari denied Ex parte Lane, 101 So. 522, 211 Ala. 615—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.
Ind.—Akers v. State, App., 51 N.E.2d 91.
N.Y.—In re X, Y and Z, 43 N.Y.S.2d 361.
Okl.—Marks v. State, 102 P.2d 955, 69 Okl.Cr. 330—Wilson v. State, 82 P. 2d 308, 65 Okl.Cr. 10—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45.
Pa.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.
Tex.—Valdez v. State, 265 S.W. 161, 98 Tex.Cr. 166.

Provision for petition as directory

Under provisions of the welfare and institutions code, the provision that the probation officer shall file a petition asking that a minor against whom a criminal cause is pending be declared a ward of the juvenile court is "directory" and not "mandatory," where the juvenile court considers only whether the minor is a fit subject for consideration under the juvenile court law, and does not retain the case in the juvenile court but remands it for proceedings under the general law.—People v. Renteria, Cal.App., 141 P.2d 37, 40.

57. Okl.—Ex parte Brown, 278 P. 671, 48 Okl.Cr. 339—Ex parte Alton, 262 P. 215, 38 Okl.Cr. 383—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369—Ex parte Pyzer, 232 P. 962, 29 Okl.Cr. 156.
31 C.J. p 1104 note 88.

58. Ala.—Lane v. State, 101 So. 521, 20 Ala.App. 192, certiorari denied Ex parte Lane, 101 So. 522, 211 Ala. 615.
Cal.—People v. Renteria, App., 141 P. 2d 37.
Ky.—Wooton v. Commonwealth, 75 S.W.2d 556, 255 Ky. 810—White v. Commonwealth, 47 S.W.2d 548, 242 Ky. 736—Hayes v. Commonwealth, 276 S.W. 160, 210 Ky. 449.
Mo.—Bonzo v. Kroger Grocery & Baking Co., 125 S.W.2d 75, 344 Mo. 127.
Okl.—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45.
Or.—Ex parte Loundagin, 278 P. 950, 129 Or. 652.
Pa.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.
31 C.J. p 1104 note 89.

Investigation

"The practicability of . . . an investigation [of the home and environment of the child] is and must necessarily be left to the court in the exercise of its sound discretion."—Akers v. State, Ind.App., 51 N.E. 2d 91, 95.

Suspension of criminal proceedings against child under eighteen is discretionary with judge.—Burrows v. State, 297 P. 1029, 38 Ariz. 99.

"Incorrigible" delinquent

A juvenile delinquent who by his conduct has placed himself within the statutory definition of "incorrigibles" if so adjudged must be proceeded against criminally, and a juvenile court would under the statute have jurisdiction only to sit as a committing magistrate.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

59. **Act held constitutional**

A statute providing that if the juvenile court, after investigation made, concludes that a juvenile offender is past reformation, it may put him or her to trial in a court which would have original jurisdiction but for the juvenile law, is not invalid as violating the constitution.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

Time for raising or determining question

(1) The question of juvenility of accused, entitling him to trial as a delinquent child, is to be presented to and passed on by judge, on proper sworn statement, before plea to the indictment, and ordinarily cannot be raised for the first time on motion for new trial.—Valdez v. State, 265 S.W. 161, 98 Tex.Cr. 166.

(2) Accused could not raise the question of juvenility, entitling him to trial as a delinquent child, for the first time when the court pronounced sentence on him.—Rice v. State, 127 S.W.2d 889, 137 Tex.Cr. 21.

(3) Where issue of accused's age was not suggested until after filing of information, filed after accused reached eighteen, juvenile code did not apply.—Burrows v. State, 297 P. 1029, 38 Ariz. 99.

(4) Determination as to whether minor should be dealt with under juvenile law or proceeded against under general criminal law need not necessarily be made at close of trial.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4, 332 Mo. 622.

such statutory provisions is necessary.[60]

Jurisdiction. In most of the states the jurisdiction to determine this preliminary question resides exclusively in the juvenile court,[61] in which case no other court has jurisdiction to initiate, try, or review on appeal a proceeding against an infant offender unless proceedings have been first had in the court exercising juvenile jurisdiction.[62] It has been held that a juvenile offender is incapable, by waiver or consent, of transferring this jurisdiction from the juvenile court to the criminal court.[63]

Operation and effect of determination. When the authority is vested in the juvenile court, and it determines that the infant should be proceeded against in accordance with the criminal law, its jurisdiction ceases,[64] and it must transfer the case to the court

Record of investigation

"It is not contemplated nor is it compatible with the purposes of the Juvenile Act that . . . [an] investigation [of the home and environment of the child] be made a matter of record."—Akers v. State, Ind.App., 51 N.E.2d 91, 95.

Notice to parent or guardian required

Ky.—Compton v. Commonwealth, 240 S.W. 36, 194 Ky. 429.

Contra Singleton v. State, 282 S.W. 804, 104 Tex.Cr. 9.

Certified copy of complaint

The requirement of Juvenile Ct.L. § 6, that, the committing magistrate, in certifying the cause to the juvenile court after finding defendant to be under eighteen, shall attach to the certificate a certified copy of the original deposition or complaint filed before him, is merely directory, and failure to comply with it is not jurisdictional.—People v. Wolff, 190 P. 22, 182 Cal. 728.

60. Fla.—Ex parte Kitts, 147 So. 573, 109 Fla. 202.

Ky.—Waters v. Commonwealth, 188 S.W. 490, 171 Ky. 457.

Okl.—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10.

61. Ala.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

Mich.—People v. Ross, 209 N.W. 663, 235 Mich. 433.

Okl.—Marks v. State, 102 P.2d 955, 69 Okl.Cr. 330—Wilson v. State, 82 P. 2d 308, 315, 65 Okl.Cr. 10, quoting **Corpus Juris**—Ex parte Alton, 262 P. 215, 38 Okl.Cr. 383—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45.

Pa.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.

31 C.J. p 1104 note 92.

In Illinois

(1) Under constitution placing jurisdiction of criminal cases in criminal court of Cook County, such court had jurisdiction of prosecution of child who had previously been declared delinquent by juvenile court, without procuring consent of or giving notice to juvenile court, notwithstanding statute giving juvenile court discretionary right to permit delinquent child to be proceeded against in accordance with criminal laws.—People ex rel. Malec v. Lewis, 199 N.E. 276, 362 Ill. 229—People v. Lattimore, 199 N.E. 275, 362 Ill. 206.

(2) Criminal court held to have jurisdiction over sixteen-year-old boy accused of rape who had not been declared delinquent by juvenile court.—People v. Fitzgerald, 152 N.E. 542, 322 Ill. 54.

Appeal under Kentucky statute

Statute authorizing appeals to circuit court from county court juvenile session's orders and judgments restraining infants of liberty or punishing them deprives county court of exclusive jurisdiction over delinquent children, but does not affect its exclusive original jurisdiction over or supervisory control of them; statute contemplates that question of infant's delinquency, adjudged by such session, be tried de novo in circuit court and that judgment appealed from be considered affirmed and enforced by county judge if circuit court again finds child delinquent.—Wooton v. Commonwealth, 75 S.W.2d 556, 255 Ky. 810.

62. Cal.—Ex parte Tassey, 253 P. 948, 81 Cal.App. 287.

Ky.—Mauk v. Commonwealth, 104 S. W.2d 955, 268 Ky. 237—Crawford v. Commonwealth, 95 S.W.2d 12, 264 Ky. 498—Commonwealth v. McIntosh, 78 S.W.2d 320, 257 Ky. 465—Wooton v. Commonwealth, 75 S. W.2d 556, 255 Ky. 810—Watson v. Commonwealth, 57 S.W.2d 39, 247 Ky. 336—Grise v. Commonwealth, 53 S.W.2d 362, 245 Ky. 220—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1—White v. Commonwealth, 47 S.W.2d 548, 242 Ky. 736—Ashley v. Commonwealth, 33 S. W.2d 614, 236 Ky. 543—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363—Goodfriend v. Commonwealth, 288 S.W. 330, 216 Ky. 573—Harman v. Commonwealth, 263 S. W. 733, 204 Ky. 186—Clark v. Commonwealth, 256 S.W. 398, 201 Ky. 261.

Okl.—Ex parte Dickerson, 94 P.2d 951, 67 Okl.Cr. 439—Wilson v. State, 82 P.2d 308, 315, 65 Okl.Cr. 10, quoting **Corpus Juris**—Ex parte Brown, 278 P. 671, 43 Okl.Cr. 339—Ex parte Alton, 262 P. 215, 38 Okl.Cr. 383—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45. 31 C.J. p 1105 note 93.

"A justice of the peace has no jurisdiction to hold a preliminary hearing."—Ex parte Dickerson, 94 P.2d 951, 952, 67 Okl.Cr. 439—Ex parte Parnell, 200 P. 456, 19 Okl.Cr. 273.

Waiver of jurisdiction by probate court over child held valid, although child had not then been charged under criminal procedure with a felony. —People v. Ross, 209 N.W. 663, 235 Mich. 433.

In Missouri

(1) A circuit court may determine that defendant, under age of seventeen years, is not proper subject to be dealt with under juvenile law.—State v. Naylor, 40 S.W.2d 1079, 328 Mo. 335—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.

(2) "When a delinquent child is brought before a juvenile court charged with the violation of a criminal statute, the judge of that court must determine in the first instance whether such child shall be proceeded against as a delinquent, or prosecuted under the criminal law. . . . When a child who has passed his seventeenth birthday is brought before a court of general criminal jurisdiction, charged with having committed a criminal offense while under 17 years of age, that court may determine whether he should be dealt with as a delinquent, or prosecuted under the general law. . . . But a court of general criminal jurisdiction is wholly without jurisdiction in cases in which a child under 17 years of age is charged with the violation of criminal law; without jurisdiction to even determine which course should be pursued with respect to the child. . . . The decision of the court first having occasion to pass on the question must . . . be deemed final."—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 1066, 321 Mo. 1090, criticized in State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.

63. Okl.—Ex parte Pyzer, 232 P. 962, 29 Okl.Cr. 156.

31 C.J. p 1104 note 92 [a].

64. Mo.—Ex parte Bass, 40 S.W.2d 457, 328 Mo. 195.

having jurisdiction,[65] certifying to such court its finding,[66] such as a finding that the child is capable

Order of commitment void

"Under ordinary circumstances an order holding a delinquent to bail for the grand jury or certifying the case to the district attorney, ends the jurisdiction of the juvenile court and nullifies an order of commitment to a correctional institution."—In re Trignani, 28 A.2d 702, 703, 150 Pa. Super. 491.

"Punishment"

Statute providing that nothing therein shall prevent juvenile court from inflicting punishment means "punishment" inflicted on delinquent minor, and "it has nothing to do with whether the child shall be tried as a delinquent or under the criminal law."—State ex rel. Wells v. Walker, 34 S.W.2d 124, 127, 326 Mo. 1233, not following State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.

65. Cal.—People v. Renteria, App., 141 P.2d 37.
Mo.—Bonzo v. Kroger Grocery & Baking Co., 125 S.W.2d 75, 344 Mo. 127—Ex parte Bass, 40 S.W.2d 457, 328 Mo. 195.
N.Y.—In re X, Y, and Z, 43 N.Y.S. 2d 361.
Okl.—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369.
31 C.J. p 1104 note 89 [a], p 1105 note 94.

Refusal to hear case as transfer

Under a statute authorizing a juvenile court to transfer to the criminal court the cause of an infant charged with a felony, refusal by the juvenile court to hear a felony case transferred to it is equivalent to transfer of the cause to the criminal court.—State v. Hoffman, 155 N. E. 499, 23 Ohio App. 348.

Incorrigibility

(1) "The law recognizes . . . that a minor may have such a record of delinquency and his derelictions be of such character that to make him a ward of the juvenile court would not aid him or serve the purpose of the juvenile court law, and probably would defeat such purpose insofar as the protection of other words of the court is concerned."—People v. Renteria, Cal. App., 141 P.2d 37, 41.

(2) Under the Alabama statute, if juvenile court becomes convinced that delinquent cannot be made to lead correct life and cannot be properly disciplined, it may retransfer cause to circuit court to be tried as other criminal cases.—Powell v. State, 141 So. 201, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S.Ct. 643, 286 U.S. 540, 76 L.Ed. 1278, reversed on other grounds Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527.

(3) "It was as competent for the Legislature to confer jurisdiction on the juvenile court to determine whether the child was past reformation, as it was to confer on that court jurisdiction to determine the age of the child and the fact of its delinquency."—Macon v. Holloway, 96 So. 933, 935, 936, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

(4) Such statute is not affected by the rule that a statute creating an offense must define the offense with reasonable certainty, since it is not an offense for a child to be incorrigible and no punishment is prescribed for incorrigibility; the investigation by a juvenile court, under the statute, of the question whether a child can be reformed means an impartial judicial survey of all the conditions affecting and influencing the juvenile offender, and does not necessarily contemplate an actual trial in open court, or any affidavit, complaint, or indictment by a grand jury; the language of the statute is used in its ordinary sense, and, when it is shown that, by reason of physical and mental deficiency or environment or other cause, in all probability the child will not be a reasonably useful citizen but an enemy to society, it may be said that he "cannot be made to lead a correct life."—Macon v. Holloway, supra.

(5) Order of retransfer held proper.—Berry v. State, 95 So. 458, 209 Ala. 120.

(6) Under the Tennessee statute, "a finding [of the juvenile court that children were incorrigible] justified the juvenile court in turning them over to the criminal court and the latter court in assuming jurisdiction of the charges against them. . . . It was a matter within the jurisdiction of the juvenile court to determine whether the boys were incorrigible, and such a question could not again be litigated in the criminal court after the cause was transferred to the latter tribunal. . . . The only method of obtaining a review of the finding of the juvenile court that plaintiffs in error were incorrigible was by a petition for certiorari to the circuit court. . . . Such a judgment of the juvenile court is not subject to collateral attack in a habeas corpus proceeding, injunction suit, criminal prosecution, or otherwise."—Wiggins v. State, 289 S.W. 498, 499, 154 Tenn. 83.

In Kentucky

(1) In prosecution in circuit court of a juvenile charged with felony, it must appear not only that juvenile court had made order transferring prosecution to circuit court, but also that all necessary steps to give juvenile court jurisdiction to render such an order were followed.—Edwards v. Commonwealth, 94 S.W.2d 25, 264 Ky. 4.

(2) "If the facts disclose the offender to be a juvenile, the burden is on the commonwealth to show a proper transfer from the juvenile court in order to give the circuit court jurisdiction of a criminal prosecution."—Goodfriend v. Commonwealth, 288 S.W. 330, 331, 216 Ky. 573.

(3) Immaterial or highly technical irregularities in proceedings with respect to transfer will not be regarded as invalidating them; thus, where juvenile court had actually made order transferring prosecution to circuit court, failure to furnish that court or its prosecuting officer with copy of order prior to return of indictment was not fatal to circuit court's jurisdiction.—Baughman v. Commonwealth, 267 S.W. 231, 206 Ky. 441.

(4) Clerical error in recital of accused's age in juvenile court's judgment held not to affect its jurisdiction to declare him a delinquent and transfer case.—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363.

(5) Proceedings for transfer to circuit court held proper.—Turner v. Commonwealth, 104 S.W.2d 1087, 268 Ky. 314—Crawford v. Commonwealth, 95 S.W.2d 12, 264 Ky. 498—Hall v. Commonwealth, 21 S.W.2d 799, 231 Ky. 473—Angel v. Commonwealth, 21 S.W.2d 150, 231 Ky. 132—Asher v. Commonwealth, 299 S.W. 568, 221 Ky. 700—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363—Meade v. Commonwealth, 282 S.W. 781, 214 Ky. 88—Hayes v. Commonwealth, 276 S. W. 160, 210 Ky. 449—Baughman v. Commonwealth, 267 S.W. 231, 206 Ky. 441.

(6) Juvenile court order holding juvenile offender in custody, referring case to grand jury, and recommending that he be proceeded against under criminal laws, cannot be attacked collaterally.—Hayes v. Commonwealth, supra.

(7) Juvenile court may make order of transfer, on proper notice to the parties, after reversal of conviction in circuit court for lack of jurisdiction.—Harman v. Commonwealth, 268 S.W. 733, 204 Ky. 186.

66. Okl.—Marks v. State, 102 P.2d 955, 69 Okl.Cr. 330—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10—Ex parte Raymer, 258 P. 1063, 38

of committing the crime charged[67] or knew the wrongfulness of the acts complained of,[68] or that there is probable cause to believe him guilty,[69] or that he is incorrigible;[70] but under at least one statute special findings are not necessary.[71] If the juvenile court finds that the infant should be treated as a delinquent and not as a criminal, it proceeds to final disposition of the case as in other cases of juvenile dependents, delinquents, and vagrants, as discussed infra §§ 99–102.

A criminal court in which proceedings are instituted may be required, on ascertaining that the delinquency statutes apply, as by reason of the age of accused, to transfer the case to the court having jurisdiction of delinquency proceedings,[72] or it may be given discretion as to making such transfer;[73] and a juvenile may be required by statute to petition the court to conduct the case as one of delinquency and not under the general criminal law, or to transfer it to the juvenile court, if he desires such procedure.[74]

(b) Age

Whether an offender is under or over the statutory age below which he is to be treated as a delinquent, and not as a criminal, is determined, in some jurisdictions, by his age at the time of the commission of the offense, and not at the time of the indictment or trial; in other jurisdictions a contrary rule is followed. Whether the accused is within the prescribed age is a jurisdictional question for the court; to justify criminal, instead of delinquency, proceedings, an affirmative showing, or clear and convincing evidence, of the requisite age has been required, but the accused has been held to have the burden of proof with respect to his age.

In order to justify a proceeding against an offender as a delinquent only, and not as a criminal, he must fall within the classification as to age prescribed by statute.[75] Whether an offender is to be regarded as under or over the statutory age below which he is exempt from criminal prosecution and must be proceeded against as a delinquent is determined, in some jurisdictions, by his age at the time

Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369.
Pa.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.
31 C.J. p 1105 note 95.

67. Okl.—Marks v. State, 102 P.2d 955, 69 Okl.Cr. 330—Ex parte Dickerson, 94 P.2d 951, 67 Okl.Cr. 439—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10.

68. Okl.—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369.

69. Okl.—Marks v. State, 102 P.2d 955, 69 Okl.Cr. 330—Ex parte Dickerson, 94 P.2d 951, 67 Okl.Cr. 439—Wilson v. State, 82 P.2d 308, 65 Okl.Cr. 10—Ex parte Raymer, 258 P. 1063, 38 Okl.Cr. 31—Ex parte Bonitz, 234 P. 780, 30 Okl.Cr. 45—Ex parte Brown, 233 P. 1098, 29 Okl.Cr. 369.

70. **Order held informal but not void**
Tenn.—Wiggins v. State, 289 S.W. 498, 154 Tenn. 83.

71. Cal.—In re Wolff, 192 P. 33, 183 Cal. 602.

72. Ala.—Powell v. State, 141 So. 201, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S. Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, reversed on other grounds Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527—Keenum v. State, 146 So. 623, 25 Ala.App. 359—Hart v. State, 113 So. 471, 22 Ala.App. 135.
Cal.—Ex parte Tassey, 253 P. 948, 81 Cal.App. 287.
Fla.—Ex parte Kitts, 147 So. 573, 109 Fla. 202.
Mo.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.
N.J.—State v. Goldberg, 17 A.2d 173, 125 N.J.Law 501, affirming 11 A.2d 299, 124 N.J.Law 272.
N.D.—State v. Overby, 209 N.W. 552, 54 N.D. 295.
Ohio.—State v. Hoffman, 155 N.E. 499, 23 Ohio App. 348.
31 C.J. p 1104 note 90 [a].

Transfer held irregular for want of jurisdiction in juvenile court.—State v. Gregori, 2 S.W.2d 747, 318 Mo. 998.

Conviction of lesser offense
Jurisdiction of criminal court, on indictment of minor under sixteen for murder, being exclusive, held not lost on conviction of homicide of lesser degree, since judgment must be on verdict of jury, and, jeopardy having once attached, jurisdiction may not be relinquished and cause committed to juvenile court on the ground that the offense of which he was convicted was not within the criminal court's jurisdiction.—Howland v. State, 268 S.W. 115, 151 Tenn. 47.

73. Ala.—Clark v. State, 195 So. 260, 239 Ala. 380, certiorari denied Clark v. State of Alabama, 61 S. Ct. 70, 311 U.S. 688, 85 L.Ed. 445—Whitfield v. State, 182 So. 42, 236 Ala. 312.
Pa.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.

Discretion subject to review only for abuse
Miss.—Parker v. State, 18 So.2d 620.

Discretion held not abused
Miss.—Parker v. State, supra.

74. Mo.—State v. Flores, 55 S.W.2d 953, 332 Mo. 74—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.

75. Ala.—Whitfield v. State, 182 So. 42, 236 Ala. 312.
Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1.
La.—State v. Lanassa, 51 So. 688, 125 La. 687.
N.J.—Ex parte Williams, 177 A. 85, 117 N.J.Eq. 517.
Tex.—Smith v. State, 266 S.W. 153, 98 Tex.Cr. 409.

Commitment showing that child was over statutory age when the proceeding started shows lack of jurisdiction of the juvenile court.—Ex parte Williams, 177 A. 85, 117 N.J.Eq. 517.

Age between birthdays
Under a statute governing the jurisdiction of delinquent or dependent children, and providing that it shall apply "only to male children seventeen years of age or under," a contention that a male child is to be treated as only seventeen years of age until he arrives at his eighteenth birthday cannot be sustained.—Wilson v. Commonwealth, 271 S.W. 1055, 208 Ky. 707—Thompson v. Commonwealth, 255 S.W. 852, 201 Ky. 19.

Revival of suspended sentence
Where a child was adjudged a delinquent child under the statutory age, and committed to the reform school, but the order of commitment was suspended, the juvenile court cannot subsequently, when the child is over the statutory age, revive the sentence and commit him, since after that age he is not a ward of the state and not subject to the jurisdiction of the juvenile court.—Ex parte Blackey, 208 N.W. 238, 53 N.D. 852.

of the commission of the offense, and not at the time of indictment or trial;[76] in other jurisdictions the question is determined not by his age at the time of the commission of the offense, but at the time of trial or of the institution of proceedings against him.[77] Further, jurisdiction has been held to be determined by the age of the offender at the time of the charge, and not by the age at the time the trial is completed or judgment entered.[78]

The question whether accused is or is not within the age prescribed is a jurisdictional one,[79] which the court may,[80] and, according to some authorities, should, or must,[81] pass on instead of submitting it to the jury, and in the determination of which the court exercises a large discretion,[82] although such discretion cannot be exercised arbitrarily.[83] On

76. Ky.—White v. Commonwealth, 47 S.W.2d 548, 242 Ky. 736—Goodfriend v. Commonwealth, 288 S.W. 330, 216 Ky. 573—Harman v. Commonwealth, 263 S.W. 733, 204 Ky. 186—Mattingly v. Commonwealth, 188 S.W. 370, 171 Ky. 222.

La.—State ex rel. Clayton v. Jones, 188 So. 737, 192 La. 671—State v. Connally, 182 So. 318, 190 La. 175—State v. Walker, 152 So. 315, 178 La. 635—State v. Grayson, 127 So. 382, 170 La. 111.

Mo.—State ex rel. Wells v. Walker, 84 S.W.2d 124, 326 Mo. 1233.

Reason for rule

"Relator, having violated a law of this state when under 17 years of age, thereby became a delinquent child and subject to commitment by the juvenile court until his majority or complete reformation. The accidental arrival of the seventeenth anniversary of his birthday before his trial no more operated to deprive that court of jurisdiction over him than it operated to magnify his offense and subject him to the jurisdiction of the district court. . . . Reformation is to be under the eye of the juvenile court."—State v. Malone, 100 So. 788, 789, 156 La. 617, overruling State v. Ebarbo, 78 So. 973, 143 La. 591.

77. Ala.—Kennum v. State, 146 So. 623, 25 Ala.App. 359—Broughton v. State, 120 So. 307, 23 Ala.App. 43—Davis v. State, 111 So. 645, 21 Ala.App. 649—Lane v. State, 101 So. 521, 20 Ala.App. 192, certiorari denied Ex parte Lane, 101 So. 522, 211 Ala. 615.

Ariz.—Burrows v. State, 297 P. 1029, 38 Ariz. 99.

Ohio.—Scopillitti v. State, 180 N.E. 740, 41 Ohio App. 221.

Tex.—Hardie v. State, 144 S.W.2d 571, 140 Tex.Cr. 368—Walker v. State, 45 S.W.2d 987, 119 Tex.Cr. 330.

Wash.—State v. Melvin, 258 P. 859, 144 Wash. 687.

31 C.J. p 1105 note 1.

But without reference to age at the time of trial accused's plea that at time alleged offense was committed he was under the statutory age was held complete answer to indictment.—Bell v. State, 101 So. 68, 20 Ala. App. 101.

Reason for rule

"The underlying intent in statutes of this type is adjudged to be the desire to prevent children under a certain age from being considered as criminals, and from being so dealt with that they become associated with those experienced in the ways of crime. Hence, the time at which proceedings against such children are instituted becomes decisive and the child's age at that time is held to be controlling on the question of whether or not the child comes within the provisions of the statute."—Ex parte Albiniano, 6 A.2d 554, 557, 62 R.I. 429, 123 A.L.R. 441.

Prosecution's refusal to rush into trial, in order that accused might be proceeded against as a juvenile, held not unfair.—Hardie v. State, 144 S.W.2d 571, 140 Tex.Cr. 368.

Retrial after conviction

By reason of the rule stated in the text, alleged delinquent child who becomes seventeen years of age after conviction cannot, in case of reversal, be retried as delinquent child.—Stallings v. State, 87 S.W.2d 255, 129 Tex.Cr. 300.

"Charged with a felony"

A statute providing that, where a child over the age of fifteen is "charged with a felony," judge of probate may waive jurisdiction, contemplates age at time of charge in a court of criminal jurisdiction, and not age at time of committing felony, "charged with a felony" meaning "an accusation of crime in a proceeding in a court having cognizance of criminal prosecutions."—People v. Ross, 209 N.W. 663, 666, 235 Mich. 433.

78. Ind.—Miller v. Superintendent of Indiana Boys' School, 198 N.E. 66, 209 Ind. 115.

79. Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1.

La.—State v. Bedford, 190 So. 347, 193 La. 104—State v. Grayson, 127 So. 382, 170 La. 111.

31 C.J. p 1105 note 2.

80. Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1.

Tex.—Brown v. State, 268 S.W. 460, 99 Tex.Cr. 70.

31 C.J. p 1105 note 3.

81. Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1—Ashley v. Commonwealth, 33 S.W.2d 614, 236 Ky. 543.

La.—State v. Bedford, 190 So. 347, 193 La. 104—State v. Grayson, 127 So. 382, 170 La. 111.

N.Y.—People v. Jones, 38 N.Y.S.2d 207.

Review; reducing testimony to writing

(1) The court's adjudication as to juvenility is reviewable.

Ky.—Ashley v. Commonwealth, 33 S.W.2d 614, 236 Ky. 543.

La.—State v. Bedford, 190 So. 347, 193 La. 104—State v. Grayson, 127 So. 382, 383, 170 La. 111.

(2) "The trial judge as requested should have permitted testimony to be heard and reduced to writing on defendant's written objection against being tried in the district court . . . in order that the appellate court might be placed in possession of all the facts."—State v. Grayson, supra.

(3) Finding on conflicting evidence that infant was not under age of eighteen at time of crime is conclusive on appeal.—State v. Carolla, 292 S.W. 721, 316 Mo. 213.

Suggestion as to age; appearance

"It became the duty of the trial court, upon suggestion that the defendant . . . was under sixteen years of age, or if his personal appearance suggested a doubt as to his age, to ascertain his age."—Powell v. State, 141 So. 201, 212, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, reversed on other grounds Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527.

82. Cal.—People v. Alexander, 216 P. 968, 62 Cal.App. 306.

31 C.J. p 1105 note 4.

Failure to notify father of accused of proceeding to ascertain age held not error.—Singleton v. State, 282 S.W. 804, 104 Tex.Cr. 9.

83. Tex.—McRuffin v. State, 240 S.W. 309, 91 Tex.Cr. 569.

Discretion held not abused

(1) Continuance, on state's motion, of hearing on affidavit stating that accused was a juvenile and requesting that he be proceeded against as a juvenile delinquent, held not erroneous or arbitrary.—Smith v. State, 266 S.W. 153, 98 Tex.Cr. 409.

(2) Other holdings.

Cal.—People v. Alexander, 216 P. 968, 62 Cal.App. 306.

the other hand, it has been held that, on a plea in abatement in a criminal trial in the criminal court, alleging accused to be under the age exempting him from criminal prosecution, an issue of fact is raised, on which accused is entitled to have a jury trial.[84]

To justify criminal, instead of delinquency, proceedings, it must appear affirmatively that the person charged is of the age fixed by statute for criminal prosecution;[85] clear and convincing evidence,[86] or ascertainment with certainty,[87] has been required, and a serious and substantial doubt arising from the evidence on the question of age should be resolved in favor of the child.[88] On the other hand, on the ground that the presumption is in favor of the court's jurisdiction,[89] and that the court will not assume that a person indicted is under the statutory age,[90] it has been held that, when that issue is raised, accused has the burden of proof with respect to his age.[91]

The child's appearance, while it should be given due consideration in determining his age,[92] should not be permitted to outweigh or overcome positive testimony, facts, and circumstances tending to show him to be under the given age;[93] and his statements or admissions as to his age, although admissible on that issue,[94] are not controlling as against positive evidence.[95] In particular cases, evidence has variously been held to show that the offender was[96] or was not[97] a juvenile at the time of the commission of the offense, or was not such at the time of trial[98] or conviction.[99]

§ 99. —— Procedure Affecting Custody or Commitment

a. In general
b. Jurisdiction and venue
c. Parties
d. Application or accusation
e. Notice
f. Evidence
g. Trial or hearing
h. Findings
i. Judgment, order, or decree
j. Review
k. Costs

Tex.—Tucker v. State, 43 S.W.2d 103, 119 Tex.Cr. 490.

84. Kan.—State v. Dunn, 90 P. 231, 75 Kan. 799.

85. Ala.—Hart v. State, 113 So. 471, 22 Ala.App. 135.

86. La.—State v. Connally, 182 So. 318, 190 La. 175—State v. Duckett, 107 So. 696, 160 La. 920.

Unsatisfactory evidence for accused Where the only evidence offered by accused in a prosecution for murder to show that he was under the age of eighteen was uncertain and unsatisfactory, the trial court did not abuse its discretion by refusing to certify him to the juvenile court.—People v. Alexander, 216 P. 968, 62 Cal.App. 306.

87. Ala.—Hart v. State, 113 So. 471, 472, 22 Ala.App. 135.

Showing that child is "about sixteen" years of age is insufficient.—Hart v. State, supra.

88. La.—State ex rel. Clayton v. Jones, 188 So. 737, 192 La. 671—State v. Connally, 182 So. 318, 190 La. 175—State v. Duckett, 107 So. 696, 160 La. 920.

89. Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1—Eldridge v. Commonwealth, 17 S.W.2d 403, 229 Ky. 499—Goodfriend v. Commonwealth, 288 S.W. 330, 216 Ky. 573.

90. Ky.—Eldridge v. Commonwealth, 17 S.W.2d 403, 229 Ky. 499.

91. Ky.—Carsons v. Commonwealth, 47 S.W.2d 997, 243 Ky. 1—Eldridge v. Commonwealth, 17 S.W.2d 403, 229 Ky. 499.
Tex.—Tucker v. State, 43 S.W.2d 103, 119 Tex.Cr. 490—Flores v. State, 231 S.W. 786, 89 Tex.Cr. 506.

On motion for new trial, burden of showing transgression of right of accused to be tried as juvenile is on him.—Walker v. State, 45 S.W.2d 987, 119 Tex.Cr. 330.

Statute as to child's appearance Under a statutory provision that "when . . . said child is alleged to be under any given age and shall appear to the court to be under that age, such child shall be presumed under that age, unless the contrary be proved," it was held that "where it is alleged that the child is under 17 and appears so to be to the presiding judge, then the presumption is in favor of the age alleged and it is incumbent on the state to rebut that presumption; but, where the allegation as to under age is made, but the judge, from the appearance of the child, is of the opinion that the child is over the age of 17, then it devolves upon the party claiming to be under the given age to prove it."—State v. Duckett, 107 So. 696, 697, 160 La. 920.

92. La.—State v. Connally, 182 So. 318, 190 La. 175—State v. Duckett, 107 So. 696, 160 La. 920.

93. Ky.—Cody v. Commonwealth, 276 S.W. 970, 210 Ky. 849.
La.—State v. Connally, 182 So. 318, 190 La. 175—State v. Duckett, 107 So. 696, 160 La. 920.

94. La.—State v. Walker, 152 So. 315, 178 La. 635.

95. La.—State ex rel. Clayton v. Jones, 188 So. 737, 192 La. 671—State v. Connally, 182 So. 318, 190 La. 175—State v. Walker, 152 So. 315, 178 La. 635.
But it was held that refusal of accused's request to hear evidence on his affidavit claiming him to be a juvenile under seventeen years of age was not erroneous where accused admitted that he was seventeen years old.—Smith v. State, 266 S.W. 153, 98 Tex.Cr. 409.

96. La.—State ex rel. Clayton v. Jones, 188 So. 737, 192 La. 671—State v. Connally, 182 So. 318, 190 La. 175—State v. Bennett, 159 So. 385, 181 La. 269—State v. Walker, 152 So. 315, 178 La. 635—State v. Duckett, 107 So. 696, 160 La. 920.

Prima facie case held made out.—Ashley v. Commonwealth, 33 S.W.2d 614, 236 Ky. 543—Goodfriend v. Commonwealth, 288 S.W. 330, 216 Ky. 573.

97. Mich.—People v. Carter, 209 N. W. 112, 235 Mich. 412.

98. Mo.—State ex rel. Corella v. Pence, 262 S.W. 360, 303 Mo. 598.
Tex.—Singleton v. State, 282 S.W. 304, 104 Tex.Cr. 9.

Prior order of juvenile court reciting that accused was an infant of a stated age and finding him delinquent held not conclusive as to his age.—State ex rel. Corella v. Pence, 262 S.W. 360, 303 Mo. 598.

99. N.Y.—People v. Jones, 33 N.Y.S. 2d 207.

a. In General

The procedure affecting custody or commitment of delinquent or dependent children is purely statutory, and in the absence of statutes so providing it is not considered criminal, but usually is regarded as a special proceeding of a civil nature. At least substantial compliance with the terms of the statute is essential to the validity of the proceedings.

The procedure affecting custody or commitment of delinquent or dependent children is purely statutory,[1] and it is not considered criminal[2] or even quasi-criminal,[3] or a proceeding according to the course of the common law[4] or to the rules of chancery.[5] According to some authorities the proceeding is a civil action,[6] but there is also authority to the contrary.[7] It is held to be a special proceeding[8] of a civil nature,[9] with certain incidents common to both criminal and civil actions.[10] The proceeding is not transformed into a prosecution for crime by the mere adoption of practice in criminal cases as far as applicable;[11] and the constitutional guaranties respecting defendants in criminal cases do not apply.[12] However, in some cases it has been

1. Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
Ill.—People v. McDonald, 225 Ill. App. 447.
Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143, and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.
Ohio.—Cowin v. Cowin, App., 43 N.E.2d 360.
31 C.J. p 1105 note 7.

2. Ala.—Hymes v. State, 95 So. 383, 209 Ala. 91—Prince v. State, 98 So. 320, 19 Ala.App. 495.
Cal.—People v. Sanchez, 132 P.2d 310, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137—In re People, on Behalf of Jones, 112 P.2d 892, 44 Cal.App.2d 670—Ex parte Jones, 93 P.2d 185, 34 Cal.App.2d 77—Ex parte Leach, 279 P. 157, 99 Cal.App. 645—Ex parte Edwards, 278 P. 910, 99 Cal.App. 541—Ex parte Black, 271 P. 860, 94 Cal.App. 402—People v. De Fehr, 254 P. 588, 81 Cal.App. 562.
Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.
D.C.—Thomas v. U. S., 121 F.2d 905, 74 App.D.C. 169.
Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.
Ind.—Board of Children's Guardian v. Gioscio, 4 N.E.2d 199, 210 Ind. 581—Akers v. State, App., 51 N.E.2d 91.
Mass.—Sylvester v. Commonwealth, 148 N.E. 449, 253 Mass. 244.
Miss.—Bryant v. Brown, 118 So. 134, 151 Miss. 398, 60 A.L.R. 1325.
Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 39, 333 Mo. 888, citing **Corpus Juris**—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.
Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143, and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.M.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464—People v. Pikunas, 182 N.E. 675, 260 N.Y. 72, reversing 257 N.Y.S. 1071, 236 App.Div. 737.
Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Pa.—Commonwealth v. Lash, 30 A.2d 609, 151 Pa.Super. 601.
Wis.—Lueptow v. Schraeder, 277 N.W. 124, 226 Wis. 437.
31 C.J. p 1105 note 8—35 C.J. p 195 note 26.

Entitling and docketing

(1) A proceeding in the matter of children charged with delinquency should not be entitled "State against" such children, naming them, as in the case of a criminal prosecution.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.
Pa.—Commonwealth v. Mountain, 82 Pa.Super. 523—Commonwealth v. Carnes, 82 Pa.Super. 335.

(2) Preferably the caption should be, "In re John Doe, an alleged delinquent child."—Commonwealth v. Carnes, supra.

3. Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.
31 C.J. p 1105 note 9.

4. Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.
Ohio.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.
Wis.—In re Willard, 275 N.W. 541, 225 Wis. 562.
31 C.J. p 1105 note 10.

5. Ill.—People v. Piccolo, 114 N.E. 145, 275 Ill. 453.
6. Ind.—Board of Children's Guardians v. Gioscio, 4 N.E.2d 199, 210 Ind. 581.
Miss.—Bryant v. Brown, 118 So. 134, 151 Miss. 398, 60 A.L.R. 1325.
7. Ala.—Hymes v. State, 95 So. 383, 209 Ala. 91.
Wis.—Lueptow v. Schraeder, 277 N.W. 124, 226 Wis. 437.
8. Cal.—In re Peterson, 133 P.2d 831, 56 Cal.App.2d 791.
Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
Ohio.—In re Anteau, 36 N.E.2d 47, 67 Ohio App. 117.
Wis.—Lueptow v. Schraeder, 277 N.W. 124, 226 Wis. 437—In re Willard, 275 N.W. 541, 225 Wis. 562.
31 C.J. p 1105 note 12.

Dependency proceeding held one to appoint guardian

Tex.—Ex parte Grimes, Civ.App., 216 S.W. 251, reversed on other grounds Whittenberg v. Craven, Com.App., 258 S.W. 152.

In New Mexico

(1) Proceeding in juvenile court against alleged juvenile delinquent is a special statutory proceeding.—In re Santillanes, 138 P.2d 503, 47 N.M. 140—State v. Florez, 8 P.2d 786, 36 N.M. 80.

(2) But a statutory proceeding relative to the care, custody, and control of dependent and neglected children is not a special proceeding but a civil action.—Blanchard v. State, 224 P. 1047, 29 N.M. 584.

9. Cal.—Ex parte Edwards, 278 P. 910, 99 Cal.App. 541.
Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.
Okl.—In re Morrison, 54 P.2d 198, 176 Okl. 55.
31 C.J. p 1105 note 13.

10. Wis.—Lueptow v. Schraeder, 277 N.W. 124, 226 Wis. 437.
11. Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.
12. Mo.—State ex rel. Matacia v. Buckner, supra.

held that the proceeding is quasi-criminal in character[13] and acts as between the state and the parents or as between the state and the child.[14] Furthermore, in some jurisdictions, by force of statute, procedure for commitment of juvenile delinquents, where the delinquency arose out of the violation of the criminal law of the state, is regarded as a misdemeanor case;[15] then it is considered criminal in its nature,[16] not civil,[17] and it follows the usual course of criminal procedure.[18] Statutes which include or provide within their scope for commitment for strictly criminal offenses without requiring the constitutional procedure in prosecutions for public offenses generally have been declared unconstitutional.[19]

Compliance with statute. The procedure provided by statute should be followed,[20] and at least substantial compliance with the terms of the statute is essential to the validity of the proceedings.[21] Although the proceedings are in a measure informal[22] and summary,[23] and, if the order is authorized, mere irregularities will not invalidate it,[24] yet the proper

N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.

13. Ala.—Hymes v. State, 95 So. 383, 209 Ala. 91.
La.—State ex rel. Graham v. Graham, 137 So. 855, 178 La. 469—In re Owen, 127 So. 619, 170 La. 255—State ex rel. Herbert v. Renaud, 103 So. 101, 157 La. 776—Brana v. Brana, 71 So. 519, 139 La. 305.
31 C.J. p 1105 note 9.

14. La.—Brana v. Brana, 71 So. 519, 139 La. 305.

15. Mo.—Ex parte Parsons, App., 232 S.W. 740.
Tex.—Simpson v. State, 220 S.W. 777, 87 Tex.Cr. 277.

16. Tex.—Hostetter v. State, 36 S.W. 2d 165, 117 Tex.Cr. 102.
31 C.J. p 1105 note 15.

17. Tex.—Miller v. State, 200 S.W. 389, 82 Tex.Cr. 495—Ex parte McDowell, 172 S.W. 213, 76 Tex.Cr. 1.

18. Tex.—Hostetter v. State, 36 S.W.2d 165, 117 Tex.Cr. 102—Ex parte Cain, 217 S.W. 386, 86 Tex. Cr. 509.

19. Mo.—State v. Tincher, 166 S.W. 1028, 258 Mo. 1, Ann.Cas.1915D 696.

20. Ill.—People v. McDonald, 225 Ill. App. 447.
N.Y.—People v. Fitzgerald, 155 N.E. 584, 244 N.Y. 307.
31 C.J. p 1105 note 19.

Applicability of general law

A proceeding in Mobile County juvenile court for commitment of minor to state training school for girls as incorrigible is controlled by law establishing such court, but provisions of general law relating to delinquent children must be considered in connection with special provisions for such court and given effect when not inconsistent therewith. The theory of statute concerning transfer of cause, in which child over sixteen and under eighteen years of age is charged with crime, from criminal court to juvenile court, is that charge shall be heard and proceeded with in juvenile court, and statute does not contemplate that original charge be abandoned on such transfer and that trial in juvenile court proceed on entirely different theory, such as that of child's incorrigibility, not charged in criminal court.—Williamson v. State, 4 So.2d 734, 242 Ala. 42.

Investigation by, or approval of, probation officer

(1) The statute providing that, prior to filing of petition to have a child declared an abandoned child and free from parental custody and control, county probation officer shall make such investigation as is deemed necessary, and that no petition shall be filed without approval of probation officer except by order of juvenile court, is not mandatory and does not require probation officer to make an investigation in every case before petition is filed.—In re Peterson, 133 P.2d 831, 56 Cal.App.2d 791.

(2) So objection that no investigation was made by probation officer before filing of petition asking that minor be adjudged ward of the juvenile court was without merit, since provision of juvenile court law requiring such investigation is applicable only when petition is filed by other than probation officer; and the fact that probation officer made no report of investigation was insufficient to deprive juvenile court of jurisdiction of proceeding, since statutory requirement relates specifically to duties of probate officer.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.

(3) It has been held, however, that petition that minor be made ward of juvenile court, filed without approval of probation officer or order of juvenile court, did not confer jurisdiction on juvenile court.—In re People on Behalf of Bullock, 34 P.2d 769, 139 Cal.App. 664.

Proceeding under criminal statute improper

In proceeding by parents under penal statute, wherein each filed a criminal affidavit, purpose of which was basis of prosecution against each parent for neglecting child, juvenile court had no jurisdiction to find that child was a neglected child and make it a ward, since proceeding under criminal statute could not usurp provisions of civil statute whereby neglected or dependent child may be made a ward.—Board of Children's Guardians v. Gioscio, 4 N.E.2d 199, 210 Ind. 581.

Consent of mother

Where expressly required by statute in proceedings to commit an illegitimate child as a dependent to the care of the state board of control, the consent of the mother is essential, in the absence of a showing that the commitment is needful in order to prevent serious detriment to the child.—State v. Juvenile Court of Ramsey County, 179 N.W. 1006, 147 Minn. 222.

21. Tenn.—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752.
31 C.J. p 1106 note 20.

Statute liberally construed

The law respecting juvenile delinquents must be liberally construed concerning all matters of procedure.—Williamson v. State, 4 So.2d 734, 242 Ala. 42.

22. Mo.—State v. Campbell, 32 S.W. 2d 69, 325 Mo. 561—Ex parte Label, App., 156 S.W.2d 37.
N.Y.—People ex rel. Reisner v. New York Nursery & Child's Hospital, 180 N.Y.S. 372, 190 App.Div. 562, affirmed 129 N.E. 341, 230 N.Y. 119.

Strict rules of criminal procedure are inapplicable to proceedings for commitment of delinquent child to state disciplinary institution.—People v. Pikunas, 182 N.E. 675, 260 N.Y. 72, reversing 257 N.Y.S. 1071, 236 App.Div. 737.

23. Mo.—In re Von Talge, App., 67 S.W.2d 999.

24. N.C.—Ex parte Watson, 72 S.E. 1049, 157 N.C. 340.
Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248.
Tex.—Ex parte Johnson, 99 S.W.2d 598, 131 Tex.Cr. 438.

Technicalities of procedure will be

elements of a judicial proceeding should be present,[25] and rules protecting substantial rights cannot be disregarded.[26] A short delay in bringing a juvenile delinquency proceeding after the offense was committed is not unreasonable.[27] The courts may prescribe such rules of procedure not inconsistent with the statutes as may be deemed reasonable and proper.[28]

Lapse of proceeding. A proceeding for commitment on the ground of the immorality of the parent lapses with his death.[29]

Appointment of attorney. The court may appoint an attorney to represent the infant, but it is not obliged to do so.[30]

b. Jurisdiction and Venue

The jurisdiction of particular courts and matters relating to venue depend on, and are controlled by, statute.

Within its constitutional limitations, the legislature may confer on particular courts the jurisdiction of the proceeding.[31] The proceeding being purely statutory, the jurisdiction of particular courts depends on, and is limited by, the constitutional and statutory provisions.[32] Ordinarily it is conferred on juvenile courts,[33] or in courts of like nature, as, for instance, children's courts,[34] circuit courts,[35]

disregarded in summary proceeding to declare minor ward of juvenile court.—In re Hill, 247 P. 591, 78 Cal.App. 23.

Irregular investigation

Fact that probation officer made investigation with regard to delinquent juvenile before formal appointment did not render proceeding so irregular as to deprive juvenile court of jurisdiction, the proceeding being a substantial compliance with the statute.—Wissenberg v. Bradley, 229 N.W. 205, 209 Iowa 813, 67 A.L.R. 1075.

25. Tex.—Ex parte Brooks, 211 S.W. 592, 85 Tex.Cr. 252.
31 C.J. p 1106 note 23.
Hearing see infra subdivision g of this section.
Notice see infra subdivision e of this section.
Order or decree see infra subdivision i of this section.

26. Cal.—In re Hill, 247 P. 591, 78 Cal.App.2d 23.

27. **Delay of about a month and a half**
Cal.—In re Pierce, 16 P.2d 765, 127 Cal.App. 773.

28. Ala.—Powell v. State, 141 So. 201, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S. Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, reversed on other grounds Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527.

29. La.—State v. Norris, 81 So. 385, 144 La. 895.

30. Ga.—Rooks v. Tindall, 76 S.E. 378, 138 Ga. 863.

31. N.Y.—People ex rel. Chapman v. Hinkley, 199 N.Y.S. 101.
N.C.—State v. Ferguson, 132 S.E. 664, 191 N.C. 668.
31 C.J. p 1106 note 32.
Constitutional and legislative power with respect to the creation, organization, abolition, reorganization, consolidation, and transfer of jurisdiction of courts see Courts §§ 121-125.

32. N.M.—In re Santillanes, 138 P. 2d 503, 47 N.M. 140.
N.Y.—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427—Berman v. Berman, 8 N.Y.S.2d 499, 169 Misc. 921—Abeles v. Abeles, 299 N.Y.S. 206, 164 Misc. 418—In re Petersen, 269 N.Y.S. 646, 149 Misc. 869—People ex rel. Our Lady of Victory Infant Home v. Venniro, 212 N.Y.S. 741, 126 Misc. 135.
Pa.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142—In re Eaton, 37 Pa. Dist. & Co. 191.
R.I.—Ex parte Albiniano, 6 A.2d 554, 62 R.I. 429, 123 A.L.R. 441.

Repeal of statute

The statute providing that all commitments of boys under seventeen should be made by juvenile court was held repealed by statutes giving circuit court jurisdiction to proceed against delinquent minor under general law.—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233.

Jurisdiction from standpoint of child

(1) A provision of Juvenile Court Code providing that juvenile court should have exclusive original jurisdiction concerning any child who was delinquent, neglected, dependent, or crippled meant exclusive original jurisdiction concerning any child from the standpoint of the child.—In re Cooper, 15 N.E.2d 634, 134 Ohio St. 40, affirming 16 N.E.2d 954, 58 Ohio App. 519.

(2) The Code vests jurisdiction in the juvenile court, not over the crime but over the infant.—In re Evans, 35 N.E.2d 887, 67 Ohio App. 66.

Age of infant

(1) Whether under statute relating to care and custody of delinquent children, state may constitutionally continue reformatory methods after the minor attains majority, does not affect the jurisdiction of the juvenile court.—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

(2) Juvenile court acquiring custody of child under eighteen, through arrest for delinquency, retains jurisdiction of child until child attains age of twenty-one, although court failed to adjudicate complaint before child's eighteenth birthday.—State ex rel. Heth v. Moloney, 186 N.E. 362, 126 Ohio St. 526.

33. Cal.—People v. Sanchez, 132 P.2d 810, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137—In re Hulbert, 11 P.2d 50, 123 Cal.App. 362.
Colo.—People v. Juvenile Court of City and County of Denver, 226 P. 866, 75 Colo. 463.
Conn.—State v. Elbert, 162 A. 769, 115 Conn. 589.
Del.—Thompson v. Thompson, 145 A. 9, 4 W.W.Harr. 156.
D.C.—Richardson v. Browning, 18 F. 2d 1008, 57 App.D.C. 186.
Kan.—State v. O'Keith, 15 P.2d 443, 136 Kan. 283.
Mo.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.
N.C.—State v. Ferguson, 132 S.E. 664, 191 N.C. 668.
Ohio.—In re Cooper, 15 N.E.2d 634, 134 Ohio St. 40, affirming 16 N.E.2d 954, 58 Ohio App. 519—State ex rel. Heth v. Moloney, 186 N.E. 362, 126 Ohio St. 526.
Tenn.—State ex rel. Purdy v. Patton, 140 S.W.2d 1087, 176 Tenn. 296.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
31 C.J. p 1106 note 35.
Juvenile courts generally see supra § 6.

34. N.Y.—People v. Murch, 189 N.E. 220, 263 N.Y. 285, affirming 266 N. Y.S. 907, 240 App.Div. 786—In re Cotton, 30 N.Y.S.2d 421.

35. Mo.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4, 332 Mo. 622—State ex rel. Wells v. Walker, 34 S.W.2d 124, 326 Mo. 1233—State v. Woerner, App., 294 S.W. 423.
S.D.—State v. Isenhuth, 148 N.W. 9, 34 S.D. 218.

county courts,[36] courts of quarter sessions,[37] district courts,[38] domestic relations courts,[39] police courts,[40] probate courts,[41] and superior courts;[42] but it must be exercised by a court having authority so to do.[43] The jurisdiction is usually held to be exclusive,[44] and the court cannot be deprived thereof by proceedings in another court in a divorce case.[45] So where a court having jurisdiction of proceedings affecting the custody of a child,[46] such as a divorce court,[47] has awarded the child to one parent, there is nothing to prevent the juvenile court from finding that the child is being neglected, and therefore should be taken away from the parent. On the other hand the juvenile court will not adjust parental disputes concerning the care and education of a minor, such matters being for a court of equity where the parents are actual parties.[48]

A trial for delinquency based on the ground that the infant had violated the criminal law is not a criminal trial within the meaning of constitutional and statutory provisions conferring on particular courts exclusive jurisdiction over the trial of criminal cases, and hence the juvenile court is not ousted of jurisdiction on the premises.[49] The jurisdiction of the court to fix the status of the child as a ward of the state is not altered by the fact that the child's parents cannot readily be found where the statutes provide that in such case the warrant may be issued either against the parent, or guardian, or person having custody of the child or against the child himself.[50] Infant children produced in court by lawful process become subject to the jurisdiction of the court,[51] notwithstanding their release to their mother on her recognizance to produce them

36. Ky.—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363.
31 C.J. p 1106 notes 37, 45 [b].

37. Pa.—Commonwealth v. Pennsylvania S. P. C. C., 18 Pa.Dist. 19.

38. Iowa.—De Kay v. Oliver, 143 N. W. 508, 161 Iowa 550.
Tex.—Cheney v. Cheney, Civ.App., 82 S.W.2d 1024, reversed on other grounds Cheney v. Coffey, 113 S.W. 2d 162, 131 Tex. 212, rehearing denied 114 S.W.2d 533, 131 Tex. 212.

District court sitting as juvenile court

Under Louisiana constitution and statutes, the district court had jurisdiction only as a juvenile court, and not when sitting as an ordinary court, of charges of burglary and larceny against one under seventeen years of age, at least where it did not consider the question of juvenility and find him to be over that age. —State v. Louis, 94 So. 446, 152 La. 924.

39. N.Y.—In re Montana, 30 N.Y.S. 2d 199, 177 Misc. 171—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784 —In re Jackson, 293 N.Y.S. 19, 161 Misc. 702.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.

40. Va.—Ex parte Smith, 98 S.E. 10, 124 Va. 791.

41. Minn.—State ex rel. White v. Patterson, 249 N.W. 187, 188 Minn. 492.
31 C.J. p 1106 note 41.

42. N.C.—State v. Newell, 90 S.E. 594, 172 N.C. 933.

43. N.C.—State v. Ferguson, 132 S. E. 664, 191 N.C. 668.
31 C.J. p 1106 note 43.

44. Colo.—People v. Juvenile Court of City and County of Denver, 226 P. 866, 75 Colo. 463.
Kan.—State v. O'Keith, 15 P.2d 443, 136 Kan. 283.
Ky.—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363.
La.—In re Owen, 127 So. 619, 170 La. 255—State ex rel. Herbert v. Renaud, 103 So. 101, 157 La. 776—Buffington v. Goldman, 94 So. 147, 152 La. 647—Brana v. Brana, 71 So. 519, 139 La. 305.
Mo.—State ex rel. Boyd v. Rutledge, 13 S.W.2d 1061, 321 Mo. 1090.
N.Y.—People v. Murch, 189 N.E. 220, 263 N.Y. 285, affirming 266 N.Y.S. 907, 240 App.Div. 786—In re X, Y and Z, 43 N.Y.S.2d 361.
N.C.—State v. Ferguson, 132 S.E. 664, 191 N.C. 668.
Ohio.—State ex rel. Heth v. Moloney, 186 N.E. 362, 126 Ohio St. 526.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
Va.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.
31 C.J. p 1106 note 45.

Constitutionality

Except where, as in the case with murder, the very laying of accusation is an affront which should not be permitted without finding of charge by grand jury, the general scheme of vesting juvenile court with exclusive jurisdiction to try juvenile offenders is for and not against rights of child and increases rather than violates constitutional protection of individual against governmental abuses; and the Juvenile Court Act, constitutionally, deprives court of oyer and terminer of jurisdiction to try juvenile defendant for assault with intent to kill and carrying concealed weapons.—State v. Goldberg, 11 A.2d 299, 124 N.J.Law 272, affirmed 17 A.2d 173, 125 N.J. Law 501.

On dismissal of indictment

Circuit court order, directing prosecuting attorneys to proceed in juvenile court against boy charged with murder, was held equivalent to dismissal of indictment giving juvenile court jurisdiction.—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363.

45. Colo.—People v. Juvenile Court of City and County of Denver, 226 P. 866, 75 Colo. 493.
Effect of dependency proceedings on jurisdiction of divorce court:
In awarding custody see Divorce § 303 a.
To modify decree awarding custody see Divorce § 317 a.

46. N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.

47. La.—State ex rel. Graham v. Graham, 137 So. 855, 173 La. 469—Buffington v. Goldman, 94 So. 147, 152 La. 647.
31 C.J. p 1106 note 35 [a].

48. Cal.—In re People on Behalf of Bullock, 34 P.2d 769, 139 Cal.App. 664.

49. Ga.—Williams v. Davidson, 94 S. E. 564, 147 Ga. 491.

50. N.C.—In re Coston, 122 S.E. 183, 187 N.C. 509.

51. Va.—Brown v. Commonwealth, 132 S.E. 332, 144 Va. 676.

In Pennsylvania

(1) A child may be brought into juvenile court by petition, by commitment by magistrate without preliminary hearing, or by transfer from criminal court which is "mandatory" if the child is under sixteen. —In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.

(2) Where the district attorney has certified that, in his opinion, the welfare of the child and the interests of the state do not require a prosecution on an indictment, under the criminal laws of the commonwealth, the juvenile court acquires

later.[52] The court has jurisdiction to deal with a delinquent child who committed an offense within the state notwithstanding that the child was a fugitive from another state.[53] It is the duty of the court to determine, in the light of the facts established by the evidence, what order the child's own good and the best interests of the state may require,[54] but the state should not be substituted as a delinquent child's guardian unless society and the child's welfare are endangered.[55] In a proceeding seeking commitment of children to a public institution as neglected or dependent children, the court has no jurisdiction to order school authorities, who suspended them from public school on account of their refusal to salute the flag, to revoke the suspension, or to order the children, in spite of their conscientious scruples, to salute the flag so that they might again be accepted as students in the school.[56]

Where a statute gives the court jurisdiction for the protection, guardianship, and disposition of neglected or dependent minors, the court has no jurisdiction to determine who is entitled to the custody of an infant not shown to be neglected or dependent,[57] or to deprive a parent, who is a fit person, of the custody and control of the child, even temporarily, or to subject the child, over the parents' objection to a surgical operation imperiling the child's life, even though the court is convinced of the necessity of the operation, and notwithstanding the custody of the child would be returned to the parents if the child recovered from the effects of the operation.[58] The court has, however, jurisdiction to look into the facts regarding a neglected or dependent child,[59] and jurisdiction over all persons who contribute to such neglect, including the child's parents.[60] So on a finding of neglect, the child becomes the ward of the court,[61] and it is within the court's province to direct who shall have custody of the child;[62] and where parental neglect of the child is shown, the court should not hesitate to exercise its jurisdiction, even if it results in interference with the parents' natural guardianship of the child.[63]

Residence. Actual or legal residence ordinarily is not essential to obtain jurisdiction.[64] It is sufficient if the infant is present within the jurisdiction, although he may be a legal resident of another state,[65] or his parents may reside in another state.[66] Under some statutes, however, the court has no jurisdiction to adjudicate the dependency of a child who is in the state for a temporary purpose but whose domicile is in another state.[67] Where the court has obtained jurisdiction in a proceeding against a neglected child, however, removal of the child beyond the state cannot defeat the jurisdiction.[68] Under some statutes, the court of the county in which the child resides has jurisdiction of the proceedings.[69] The court of one county has no jurisdiction over children before it who are not residents of, and are not in, the county of the court's jurisdiction.[70] The child has been held to be a resident of the county of his father's residence for the

jurisdiction for the purpose of subjecting the child to the state's guardianship and protection.—Commonwealth v. Carnes, 82 Pa.Super. 335.

52. Va.—Brown v. Commonwealth, 132 S.E. 332, 144 Va. 676.

53. N.Y.—In re Cotton, 30 N.Y.S.2d 421.

54. Pa.—Commonwealth v. Carnes, 82 Pa.Super. 335.

55. Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

56. N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.

57. La.—State v. McMillan, 185 So. 389, 191 La. 317.
N.Y.—Caposella v. Leonardo, 7 N.Y.S.2d 606, 255 App.Div. 863, reargument denied In re Caposella, 8 N.Y.S.2d 509, 255 App.Div. 987—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427—Berman v. Berman, 8 N.Y.S.2d 499, 169 Misc. 921—Abeles v. Abeles, 289 N.Y.S. 206, 164 Misc. 418—In re Joffe, 33 N.Y.S.2d 481.
Wash.—In re Hudson, 126 P.2d 765, 13 Wash.2d 673.

58. Wash.—In re Hudson, supra.

59. La.—In re Owen, 127 So. 619, 170 La. 255.
N.Y.—In re Joffe, 33 N.Y.S.2d 481.
Wash.—Ex parte Day, 65 P.2d 1049, 189 Wash. 368.

60. La.—In re Owen, 127 So. 619, 170 La. 255.

61. N.Y.—In re Joffe, 33 N.Y.S.2d 481.

62. N.Y.—In re Schwartz, 35 N.Y.S.2d 930—In re Joffe, 33 N.Y.S.2d 481.
Disposition of child see infra § 100.

63. N.Y.—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427.

64. U.S.—Henn v. Children's Agency, Cal., 204 F. 766, 123 C.C.A. 216.
Cal.—Ex parte Maginnis, 121 P. 723, 162 Cal. 200.

65. Cal.—Ex parte Maginnis, supra.

66. U.S.—Henn v. Children's Agency, Cal., 204 F. 766, 123 C.C.A. 216.

67. Minn.—State v. Juvenile Court of Ramsey County, 204 N.W. 21, 163 Minn. 312.

68. Mo.—State ex rel. Frank v. Porterfield, 285 S.W. 786, 221 Mo.App. 847.

69. Mich.—Ex parte Mould, 126 N.W. 1049, 162 Mich. 1.

Residence or legal settlement
Where custodians of minor child had their residence or legal settlement in county in which juvenile court assumed jurisdiction of child and made it a dependent child, fact that mother of the child might have had a different residence or legal settlement would not deprive juvenile court of the right to entertain jurisdiction. So under statute authorising filing a complaint to have child declared to be either a delinquent, neglected, crippled, or dependent child in juvenile court of county in which such child has a residence or legal settlement, a juvenile court can exercise jurisdiction over a child that has a residence within county even though its legal settlement is not in county.—In re Strininger, 11 Ohio Supp. 60.

70. Mo.—State ex rel. Emory v. Porterfield, 244 S.W. 956, 211 Mo.App. 499.

purpose of venue,[71] but under some statutes the venue of proceedings relating to neglected and dependent children is held to be in the county where the child is found rather than where the parents reside.[72]

Defect of venue may be waived by answer.[73]

Change of venue is not permitted under the statutes in some jurisdictions.[74]

c. Parties

Ordinarily the proceedings are instituted by the people, as party plaintiff, against the infant, but the parents or natural guardians of the child should be made parties. A guardian ad litem need not be appointed unless the statute requires it.

Ordinarily, the proceedings are against the infant,[75] and not merely against the infant's parent.[76] The state, through one of its probation officers, is the principal and moving actor;[77] and the people and not the person or persons filing the application are considered as parties complainant.[78]

Parents or natural guardians. Ordinarily the parents or natural guardians of the child should be made parties to proceedings of this character,[79] and under some statutes the persons named as such in the complaint or petition must be made defendants by name.[80] A judgment that a child was neglected and making it the ward of the court is not void, however, as to a person with whom the child was alleged in the information to live because such person was not a party to the action.[81]

Guardian ad litem. In the absence of statute requiring it, a guardian ad litem need not be appointed;[82] but under some statutes the court is required to appoint some suitable person to act in behalf of the child.[83]

d. Application or Accusation

While the procedure varies under different statutes with respect to whether the application or accusation is made by petition, complaint, information, or affidavit, generally no indictment is required, but the jurisdictional facts must be sufficiently averred.

The necessity, nature, and sufficiency of the accusation are regulated by statute. Ordinarily the application is made by a petition or complaint,[84] in writing,[85] stating or alleging sufficient facts to confer jurisdiction,[86] and such petition or

71. Colo.—Hudson v. Mattingley, 195 P. 113, 69 Colo. 528.

72. N.M.—Blanchard v. State, 238 P. 1004, 30 N.M. 459.
Okl.—Argabright v. Christison, 286 P. 847, 142 Okl. 248.

73. Colo.—Hudson v. Mattingley, 195 P. 113, 69 Colo. 528.

74. Ind.—Heber v. Drake, 118 N.E. 864, 68 Ind.App. 448.

75. U.S.—U. S. v. Behrendsohn, D.C. La., 197 F. 953.
31 C.J. p 1107 note 58.

76. U.S.—U. S. v. Behrendsohn, supra.
Mass.—Robinson v. Commonwealth, 136 N.E. 241, 242 Mass. 401.
31 C.J. p 1107 note 59.
Notice to parent see infra subdivision e of this section.

77. Fla.—In re Whetstone, 188 So. 576, 137 Fla. 712.

78. Ill.—People v. Piccolo, 114 N.E. 145, 275 Ill. 453.

79. Cal.—Ex parte Becknell, 51 P. 692, 119 Cal. 496.
Mont.—In re Satterthwaite, 160 P. 346, 52 Mont. 550.

Right to produce evidence and be represented

In proceeding to declare minor ward of juvenile court, parents are sufficiently "interested parties" to entitle them to be present, to produce evidence, and be represented by counsel.—In re Hill, 247 P. 591, 78 Cal.App. 22.

80. Mont.—In re Satterthwaite, 160 P. 346, 52 Mont. 550.
31 C.J. p 1107 note 62.

81. Mo.—State v. Wickliff, App., 114 S.W.2d 158.

82. Iowa.—King v. Sears, 158 N.W. 513, 177 Iowa 163.

83. Wash.—State v. King County Super.Ct., 180 P. 875, 106 Wash. 619.
31 C.J. p 1107 note 64.

84. Ark.—Kelley v. State, 88 S.W. 2d 65, 191 Ark. 848.
Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
Mont.—State ex rel. Palagi v. Hutton, 262 P. 168, 81 Mont. 143, followed in state ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.
31 C.J. p 1107 note 67.

In Kentucky filing of petition by reputable resident of county is prerequisite to county court's jurisdiction over delinquent or dependent child, unless child is charged with crime, in which case the statute providing for such filing is inapplicable.—Tipton v. Commonwealth, 298 S.W. 990, 221 Ky. 363.

85. Mont.—In re Satterthwaite, 160 P. 346, 52 Mont. 550.
31 C.J. p 1107 note 68.

86. Ind.—State ex rel. Jones v. Geckler, 16 N.E.2d 875, 214 Ind. 574.
Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.
N.J.—Ex parte Mei, 192 A. 80, 122 N.J.Eq. 125, 110 A.L.R. 1080, affirming 186 A. 577, 121 N.J.Eq. 123, supplemented 186 A. 721, 121 N.J.Eq. 125.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S. Ct. 786, 289 U.S. 709, 77 L.Ed. 1464—People v. Pikunas, 182 N.E. 675, 260 N.Y. 72, reversing 257 N.Y.S. 1071, 236 App.Div. 737—People v. Fitzgerald, 155 N.E. 584, 244 N.Y. 307.
31 C.J. p 1107 note 69.

Petitions or complaints held sufficient

Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487—Hills v. Pierce, 231 P. 652, 69 Cal.App. 447.

Ind.—Bradburn v. Bradburn, 197 N. E. 905, 209 Ind. 61—Freestone v. State, 176 N.E. 877, 98 Ind.App. 523.

Mich.—Ex parte Drye, 229 N.W. 623, 250 Mich. 210.

N.Y.—People ex rel. Pogoda v. Superintendent of Wayside Home for Girls, 216 N.Y.S. 388, 217 App.Div.

complaint should be verified,[87] although the failure to verify the complaint may not entitle the child to a discharge.[88] Under some statutes it has been held that formal pleadings are not required in proceedings involving disposition of a neglected child.[89] Withholding the petition in juvenile delinquency proceedings from the files after judgment affecting the child's custody is unauthorized.[90]

Indictment, information, and affidavit. Under some statutes an indictment or written accusation signed by a prosecuting attorney or the prosecutor is not necessary.[91] On the other hand, in some jurisdictions, in cases where the ground for the commitment is delinquency or incorrigibility, the proceedings are begun by information or complaint,[92] but need not be by indictment.[93] The information should contain averments sufficiently describing the conduct claimed to render the child subject to the proceedings,[94] but need not conform to the essential requirements of an indictment or criminal information.[95] In some jurisdictions the proceedings are begun by affidavit[96] or information[97] which must set forth the jurisdictional facts,[98] and not by indictment.[99]

e. Notice

Ordinarily notice to persons interested in the pro-

763—People ex rel. Chapman v. Hinkley, 199 N.Y.S. 101.
Ohio.—In re Anteau, 36 N.E.2d 47, 67 Ohio App. 117.
Okl.—Killian v. Burnham, 130 P.2d 538, 191 Okl. 248—Argabright v. Christison, 286 P. 347, 142 Okl. 243.
31 C.J. p 1107 note 69 [c].

Petitions or complaints held insufficient

Cal.—Ex parte Edwards, 284 P. 916, 208 Cal. 725—In re People on Behalf of Bullock, 34 P.2d 769, 139 Cal.App. 664.
Mich.—Ex parte Drye, 229 N.W. 623, 250 Mich. 210.
Miss.—Yarborough v. Coulter, 138 So. 591, 162 Miss. 50.
N.Y.—People v. Slater, 29 N.Y.S.2d 164, 176 Misc. 641—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784—People v. Rosenkrantz, 205 N.Y.S. 861, 123 Misc. 335.
Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.
31 C.J. p 1107 note 69 [d].

Sufficiency to authorize that child report

Petition, although insufficient to give jurisdiction to order minor committed as delinquent, since it merely charged minor with being delinquent, was held to authorize that child report as provided in the statute.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.

Variance between allegation and proof

Difference between allegation of delinquency of minor because of violating traffic ordinances and evidence before police judge at hearing on violation was immaterial, any evidence tending to show violation being admissible to show delinquency.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.

87. Tenn.—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752.
31 C.J. p 1107 note 70.

88. Kan.—In re Turner, 145 P. 871, 94 Kan. 115, Ann.Cas.1916E 1022.

89. Mo.—State v. Campbell, 32 S.W. 2d 69, 325 Mo. 561—In re Von Talge, App., 67 S.W.2d 999.

90. N.D.—State v. Schelin, 230 N.W. 9, 59 N.D. 386.

91. Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463—Wingate v. Gornto, 93 S.E. 206, 147 Ga. 192.
Mont.—State ex rel. Palagi v. Hutton, 262 P. 168, 81 Mont. 143, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

92. Tex.—Ex parte Boggs, Cr., 171 S.W.2d 879—Davis v. State, 21 S.W.2d 1068, 113 Tex.Cr. 429—Brown v. State, 268 S.W. 460, 99 Tex.Cr. 70.
31 C.J. p 1107 note 72.

Who may file

Under the Juvenile Court Act, an information may be filed by any reputable person having either knowledge or information of a child who appears to be neglected, and it is not necessary that the information be filed by one learned in the law as is necessary in criminal information.—Ex parte Label, Mo.App., 156 S.W.2d 37.

Information and sworn complaint or affidavit

(1) Prosecution of infant for delinquency on information alone, without sworn complaint or affidavit, was held null under statute.—Ex parte Tomlin, 298 S.W. 902, 107 Tex. Cr. 643.

(2) So where prosecution was on a complaint only, the absence of information was fatal to conviction of being a delinquent child.—Barron v. State, 152 S.W.2d 760, 142 Tex.Cr. 292.

93. Tex.—Brown v. State, 268 S.W. 460, 99 Tex.Cr. 70—Ex parte Bartee, 174 S.W. 1051, 76 Tex.Cr. 285.

94. Mo.—Ex parte See, 145 S.W. 419, 241 Mo. 292.
Tex.—Guerrero v. State, 220 S.W. 1095, 87 Tex.Cr. 269.
31 C.J. p 1107 note 74.

Information or complaint held sufficient

Mo.—Ex parte Label, App., 156 S.W. 2d 37—State v. Wickliff, App., 114 S.W.2d 158—State v. Robertson, App., 13 S.W.2d 566.
Tex.—Rose v. State, 129 S.W.2d 639, 137 Tex.Cr. 316—Davis v. State, 21 S.W.2d 1068, 113 Tex.Cr. 429—Phillips v. State, Cr., 20 S.W.2d 790—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145—Meggs v. State, 276 S.W. 262, 101 Tex.Cr. 415—Ex parte Chandler, 268 S.W. 749, 99 Tex.Cr. 255.
31 C.J. p 1107 note 74 [b].

Information or complaint held insufficient

Tex.—Barron v. State, 152 S.W.2d 760, 142 Tex.Cr. 292—Beadles v. State, 138 S.W.2d 809, 139 Tex.Cr. 1—Haywood v. State, 136 S.W.2d 866, 138 Tex.Cr. 413—Rose v. State, 129 S.W.2d 639, 137 Tex. Cr. 316—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461—Ex parte Douglas, 5 S.W.2d 153, 109 Tex.Cr. 463—Meggs v. State, 276 S.W. 262, 101 Tex.Cr. 415.
31 C.J. p 1107 note 74 [c].

95. Iowa.—State v. Johnson, 194 N. W. 202, 196 Iowa 300.
Tex.—Rose v. State, 129 S.W.2d 639, 137 Tex.Cr. 316, disapproving Fleming v. State, 278 S.W. 846, 102 Tex.Cr. 530.

Held to charge delinquency, and not crime

Mo.—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

96. La.—State ex rel. Herbert v. Renaud, 103 So. 101, 157 La. 776.
31 C.J. p 1107 note 75.

97. La.—State ex rel. Herbert v. Renaud, supra.

98. La.—State ex rel. Herbert v. Renaud, supra.

Affidavit held sufficient

La.—In re Owen, 127 So. 619, 170 La. 255.

99. La.—State v. Breaux, 90 So. 413, 149 La. 1086.
31 C.J. p 1107 note 76.

ceedings is required, and under some statutes the notice is a jurisdictional fact, but under others the right to notice may be waived.

Ordinarily notice to persons interested in the proceedings[1] and specifically named in the statutes[2] is required; and generally the proceedings are required to be on notice to the child's parent or parents,[3] guardian,[4] custodian,[5] or near relative[6] or to some public officer or board.[7] Furthermore, service thereof must be timely.[8] Under some statutes, if the delinquency of the child is the only point in issue, it has been held that the person who has the right to control, and custody of, the child has no right to notice,[9] but, that if the court is to determine the right to the custody of the child, then the parent or guardian of the child is entitled to notice of the proceedings.[10] The court has no jurisdiction of delinquency proceedings where no process was issued for the minor or served on him and the minor was not present at the hearing;[11] but the jurisdiction of the court is not impaired by the manner in which accused is brought before it,[12] and, accordingly, the jurisdiction has been upheld where the minor was brought in by warrant[13] or summary

1. Colo.—Ziemer v. Wheeler, 1 P.2d 579, 89 Colo. 242.
31 C.J. p 1107 note 78.
Notice in custody proceedings generally see supra § 8.

Purpose of citation
Juvenile Delinquency Act contemplates that citation shall serve the purpose of summons in civil action or citation in special proceeding.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

2. Ariz.—In re Mendevil, 193 P. 17, 21 Ariz. 586.
31 C.J. p 1108 note 79 [a].

3. Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.
Ill.—People v. McDonald, 225 Ill.App. 447.
Mich.—Oversmith v. Lake, 295 N.W. 339, 295 Mich. 627—In re Petrovich, 192 N.W. 657, 222 Mich. 79.
Tex.—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461—Ex parte Tomlin, 298 S.W. 902, 107 Tex.Cr. 643—Ex parte Burkhart, 253 S.W. 259, 94 Tex.Cr. 583.
Utah.—In re State, in Interest of Bennett, 293 P. 963, 77 Utah 247.
31 C.J. p 1108 note 80.
Due process as requiring hearing before court on notice to parent before depriving parent of child's custody see Constitutional Law § 612.

Abandoned child
The mere fact that parent has neglected or abandoned child does not dispense with parent's right to actual or constructive notice of abandonment proceedings.—In re Hampton's Estate, 131 P.2d 565, 55 Cal. App.2d 543, prior opinion, App., 127 P.2d 38.

Notice of hearings before commissioner and judge
Both parents of child alleged to be delinquent are entitled to notice of hearing before juvenile commissioner, and also to notice of hearing before district judge on report and recommendations of such commissioner.—Ex parte Solberg, 203 N.W. 898, 52 N.D. 518.

Oral notice
The statute requiring that written notice be served on parent or guardian of allegedly delinquent child, and permitting officer who serves such notice to accept promise of parent or guardian to be responsible for presence of the child, is intended to relieve delinquent child from confinement with older persons charged with crime during pendency of prosecution and to require that parent or guardian have child present in court when case is called for trial, and, if that object is attained, the notice may be either in writing or oral. So, where parent with allegedly delinquent child appeared at trial, fact that notice was oral was harmless.—Saliz v. State, 152 S.W.2d 367, 142 Tex.Cr. 278.

Service by probation officer
In proceeding to place minor in custody of probation officer, where the latter testified that he had made service of citation by personally handing to the mother a copy of citation, juvenile court had jurisdiction, the probation officer not being a party to the proceeding so as to be disqualified from making such service.—In re Spiers, 89 P.2d 456, 32 Cal.App.2d 124.

Insertion of names on summons
Where summons, issued against widow and her two minor children, fully identified them as her children, and their address, insertion, by clerk of court, of names of children, on such summons, was held not to render summons defective.—Brown v. Commonwealth, 132 S.E. 332, 144 Va. 676.

Notice held sufficient
Ill.—In re Ferrier, 103 Ill. 367, 42 Am.R. 10.
Ind.—Bradburn v. Bradburn, 197 N. E. 905, 209 Ind. 61.
Ohio.—Ex parte Cunningham, 160 N. E. 733, 27 Ohio App. 306—In re Veselich, 154 N.E. 55, 22 Ohio App. 528.

Bastard child
The mother of a bastard child is entitled to notice.
N.Y.—Matter of Remske, 160 N.Y.S. 715, 95 Misc. 330.
Ohio.—Lewis v. Reed, 157 N.E. 897, 117 Ohio St. 152—In re McLean's Adoption, 29 N.E.2d 425, 65 Ohio App. 106.
31 C.J. p 1108 note 80 [c].

4. Tex.—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461.
31 C.J. p 1108 note 81.

5. Mich.—In re Petrovich, 192 N.W. 657, 222 Mich. 79.
31 C.J. p 1108 note 82.

Physical possession not custody
Person having "custody" of child, as the word is used in statute relating to declaring child dependent, is one having custody by law or judicial act, and one having mere physical possession of child is not one having custody within statute.—Rarey v. Schmidt, 154 N.E. 914, 115 Ohio St. 518.

6. Ky.—Compton v. Commonwealth, 240 S.W. 36, 194 Ky. 429.

7. Ohio.—Girls' Industrial Home v. Steffen, 9 Ohio S. & C.P. 696, 7 Ohio N.P. 409.

8. Colo.—Ziemer v. Wheeler, 1 P.2d 579, 89 Colo. 242.

9. Ohio.—State ex rel. Heth v. Moloney, 186 N.E. 362, 126 Ohio St. 526.
Utah.—Jensen v. Hinckley, 185 P. 716, 55 Utah 306.

10. Ohio.—Lewis v. Reed, 157 N.E. 897, 117 Ohio St. 152—Rarey v. Schmidt, 154 N.E. 914, 115 Ohio St. 518.
Utah.—Jensen v. Hinckley, 185 P. 716, 55 Utah 306.

11. Miss.—Maddox v. Bush, 4 So.2d 302, 191 Miss. 748.

12. N.Y.—People v. Slater, 29 N.Y.S. 2d 164, 176 Misc. 641.

13. Mo.—Ex parte Schrier, 41 S.W. 2d 178, 328 Mo. 726—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654.
N.Y.—People v. Slater, 29 N.Y.S.2d 164, 176 Misc. 641.

arrest.[14]

Jurisdictional fact; waiver. Under some statutes, the notice is a jurisdictional fact,[15] and, where the statute requires a summons to be issued, setting up the substance of the charge and the time and place of hearing, the failure to issue the summons is a jurisdictional defect[16] which cannot be cured by appearance.[17] Under other statutes the right to notice may be waived[18] by conduct,[19] as, for instance, by appearance,[20] but no waiver by voluntary appearance should be recognized unless it is based on full knowledge and is clearly "voluntary" in the broadest sense of that term.[21] In the absence of statute requiring notice to persons other than the minor, it has been held that want of notice to persons interested is not a jurisdictional defect.[22] Where the proceedings are had before a court of general jurisdiction, it will be assumed, in support of the jurisdiction of the court, that notice was given to the proper parties.[23]

A provisional commitment pending final determination may be made without notice.[24]

f. Evidence

The evidence must show that the child sought to be committed is in such condition as to be within the purview of the statute.

The evidence must show that the child sought to be committed is in such a condition or such circumstances as to be within the purview of the statute,[25] and the burden is on the party instituting

14. N.Y.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

15. Ky.—Compton v. Commonwealth, 240 S.W. 36, 194 Ky. 429.
Mich.—Oversmith v. Lake, 295 N.W. 339, 295 Mich. 627—In re Petrovich, 192 N.W. 657, 222 Mich. 79.
Ohio.—Lewis v. Reed, 157 N.E. 897, 117 Ohio St. 152.

16. Ill.—People v. McDonald, 225 Ill.App. 447.
31 C.J. p 1108 note 88.

17. Mass.—Fitzgerald v. Commonwealth, 5 Allen 509.
Mich.—Karrib v. Bailey, 180 N.W. 386, 212 Mich. 502.

18. Ind.—Akers v. State, App., 51 N.E.2d 91.
31 C.J. p 1108 note 90.

19. Ariz.—In re Mendevil, 193 P. 17, 21 Ariz. 586.
La.—State v. Neal, 125 So. 442, 169 La. 441.
Ohio.—Ex parte Province, 188 N.E. 550, 127 Ohio St. 333.
Okl.—Argabright v. Christison, 286 P. 347, 142 Okl. 243.
Tex.—Matthews v. Whittle, Civ.App., 149 S.W.2d 601.
31 C.J. p 1108 note 91.

20. La.—State v. Neal, 125 So. 442, 169 La. 441.
31 C.J. p 1108 note 92.

21. Wash.—State v. Superior Court of Lewis County, 227 P. 849, 130 Wash. 464.

22. Ohio.—State ex rel. Heth v. Moloney, 186 N.E. 362, 126 Ohio St. 526.
31 C.J. p 1108 note 93.

23. Iowa.—In re East Minors, 122 N.W. 153, 143 Iowa 370.

24. N.Y.—People v. New York Nursery & Child's Hospital, 129 N.E. 341, 230 N.Y. 119.

25. Miss.—Holden v. Smith, 100 So. 27, 135 Miss. 322.
31 C.J. p 1108 note 96.

Evidence held sufficient

(1) To authorize an order taking minor from custody of parents.
Cal.—In re Eichelberger, 250 P. 201, 79 Cal.App. 525—In re De Vore, 221 P. 706, 64 Cal.App. 347.
Wash.—Sumner v. Superior Court for Clallam County, 140 P.2d 784.

(2) To establish that mentally defective child was a psychopathic personality and committed acts of delinquency while under the age of sixteen years.—In re Cotton, 30 N.Y.S.2d 421.

(3) To justify finding that custody should be taken from child's adoptive mother who was also her grandmother.—In re Williams' Welfare, 117 P.2d 202, 10 Wash.2d 542.

(4) To show that child was a dependent child.—In re Reed, 117 P.2d 503, 189 Okl. 389.

(5) To show that minor child was neglected.
N.Y.—In re Ford, 9 N.Y.S.2d 932, affirmed 24 N.Y.S.2d 871, 260 App. Div. 950.
Okl.—In re Reed, supra.
Va.—Rogers v. Commonwealth, 11 S.E.2d 584, 176 Va. 355.

(6) To show that child was dependent and neglected.—Stanley v. State, 179 N.W. 1019, 105 Neb. 260.

(7) To show that minors were incorrigible.—Kahm v. People, 264 P. 718, 83 Colo. 300.

(8) To support finding that child was an abandoned child.—In re Peterson, 132 P.2d 831, 56 Cal.App.2d 791.

(9) To support finding that home in which child was living was unfit place for child.—In re Schultz, 277 P. 1049, 99 Cal.App. 134.

(10) To sustain judgment finding defendant to be a delinquent.
Ind.—Akers v. State, App., 51 N.E.2d 91.
N.Y.—Hambel v. Levine, 275 N.Y.S. 702, 243 App.Div. 530—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.
Tex.—Noble v. State, 61 S.W.2d 494, 124 Tex.Cr. 162—Davis v. State, 21 S.W.2d 1068, 113 Tex.Cr. 429—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.
31 C.J. p 1108 note 96 [b].

Evidence held insufficient

(1) To establish that child was delinquent.
Colo.—Carmean v. People, 134 P.2d 1056, 110 Colo. 399.
Kan.—Hollis v. Brownell, 284 P. 388, 129 Kan. 818.
Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.
N.Y.—In re Madik, 251 N.Y.S. 765, 233 App.Div. 12—People ex rel. Deordio v. Palmer, 244 N.Y.S. 727, 230 App.Div. 397.
Tex.—Purvis v. State, 112 S.W.2d 186, 133 Tex.Cr. 441—Moore v. State, 14 S.W.2d 1041, 111 Tex.Cr. 461—Meggs v. State, 276 S.W. 262, 101 Tex.Cr. 415—31 C.J. p 1108 note 96 [c] (2).

(2) To justify taking of custody of minor from mother.—State ex rel. Everitt v. Superior Court in and for Pacific County, 33 P.2d 897, 178 Wash. 90.

(3) To show that child was dependent.
Ind.—Orr v. State, 123 N.E. 476, 70 Ind.App. 242.
Kan.—Hollis v. Brownell, 284 P. 388, 129 Kan. 818.
Or.—In re Schein, 69 P.2d 293, 156 Or. 661.

(4) To show that minor child was neglected.
Cal.—In re People on Behalf of Bullock, 34 P.2d 769, 139 Cal.App. 664.
Kan.—Hollis v. Brownell, 284 P. 388, 129 Kan. 818.

the proceedings to prove such fact[26] by competent evidence[27] which satisfies the court of the truth of the facts on which the commitment rests.[28] Under some statutes it has been held that a charge of delinquency can be established by a plea of guilty,[29] but, on the other hand, it has been held that such a plea by the minor is not binding on the parents and therefore does not warrant a commitment or a finding against them as to their ability to care for and control the child.[30]

An indorsement upon the petition by the probation officer approving the petition creates a presumption that he has made an investigation.[31]

g. Trial or Hearing

The parties are entitled to a hearing and trial in accordance with established rules of law.

In proceedings to commit a child for delinquency, the parties are entitled to a hearing and trial.[32] It is generally held that the parents, guardians, or

La.—State v. McMillan, 185 So. 269, 191 La. 317.
N.Y.—In re Fournier, 37 N.Y.S.2d 181—In re Joffe, 33 N.Y.S.2d 481.
N.D.—In re Kelber, 200 N.W. 786, 51 N.D. 698.
Pa.—Commonwealth v. Bickel, 78 Pa. Super. 348.

(5) To show that child was dependent and neglected.—McGrath v. Vail, 37 P.2d 3, 140 Kan. 312.

(6) To show that child had been abandoned.—In re Edwards, 4 P.2d 560, 117 Cal.App. 667.

(7) To support finding that orphans were destitute and without means of support.—In re People, on Behalf of Jones, 112 P.2d 892, 44 Cal.App.2d 670.

(8) To establish other matters see 31 C.J. p 1108 note 96 [c] (3)-(5).

26. La.—State v. Tomasella, 7 So. 2d 615, 200 La. 60.

27. N.Y.—People ex rel. Peltz v. Brewster, 248 N.Y.S. 599, 232 App. Div. 1, reversing 247 N.Y.S. 672, 139 Misc. 161, and affirmed People ex rel. Peltz v. Warden of Second Dist. Prison of City of New York, 177 N.E. 139, 256 N.Y. 599—People ex rel. Deordio v. Palmer, 244 N.Y. S. 727, 230 App.Div. 397.
Tex.—Miller v. State, 200 S.W. 389, 82 Tex.Cr. 495.

Customary rules of evidence

In juvenile delinquency proceeding, customary rules of evidence shown by long experience as essential to getting at truth with reasonable certainty in civil trials must be adhered to.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.

Evidence held admissible

(1) Evidence of commission of crime.
Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.
Tex.—Rose v. State, 129 S.W.2d 639, 137 Tex.Cr. 316.

(2) In prosecution of infant as delinquent for seduction, evidence of subsequent acts of intercourse.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888.

(3) Evidence regarding what physician said about use of finger by boy injured by defendant and evidence that neighbor told injured boy he had better have finger taken care of.—Campbell v. Siegler, 162 A. 154, 10 N.J.Misc. 987.

(4) Immoral conduct of father, although prior to the effective date of the statutes under which the proceeding was taken.—In re Hayes, 23 N.E.2d 956, 62 Ohio App. 289.

Evidence held inadmissible

Evidence of minor, charged with being delinquent because of violation of traffic laws, showing that other drivers were in habit of speeding at place where he was charged to have done so.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.

28. N.Y.—People ex rel. Peltz v. Brewster, 248 N.Y.S. 599, 232 App. Div. 1, reversing 247 N.Y.S. 672, 139 Misc. 161, and affirmed People ex rel. Peltz v. Warden of Second Dist. Prison of City of New York, 177 N.E. 139, 256 N.Y. 599.

Degree of proof required

(1) Finding of fact must rest on preponderance of evidence adduced under rules of evidence applying in civil trials.
N.Y.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App. Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.
Wash.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.

(2) However, it has been held that child, to be adjudicated delinquent for committing arson, must be proved guilty beyond reasonable doubt and that suspicion pointing to child's guilt of crime is not such proof.—In re Madik, 251 N.Y.S. 765, 233 App. Div. 12.

(3) To warrant finding that the mother of an infant is guilty of neglect the testimony must be conclusive.—In re Joffe, 33 N.Y.S.2d 481.

29. Tex.—Saliz v. State, 152 S.W.2d 367, 142 Tex.Cr. 278.

In New York

(1) Adjudication that boy was delinquent child, resting solely on his own confession made without warning against self-incrimination was held proper under L.1930 c 393, § 45.—People v. Lewis, 183 N.E. 353, 260 N.Y. 171, 86 A.L.R. 1001, reversing 257 N.Y.S. 457, 235 App.Div. 559, and appeal dismissed and certiorari denied Lewis v. People of State of New York, 53 S.Ct. 786, 289 U.S. 709, 77 L.Ed. 1464.

(2) Under an earlier statute, which was subsequently repealed. proceedings not based on a criminal charge could be informal, but where the contrary was true the evidence was required to be competent, and it was held that a child's conviction of delinquency on uncorroborated testimony of accomplice and confession extorted by threats was unwarranted.—People v. Fitzgerald, 155 N.E. 584, 244 N.Y. 307.

(3) So a minor's plea of guilty of waywardness was held insufficient to support commitment, because not equivalent to statutory requirement of competent evidence on hearing.—People ex rel. Peltz v. Brewster, 248 N.Y.S. 599, 232 App.Div. 1, reversing 247 N.Y.S. 672, 139 Misc. 161, and affirmed People ex rel. Peltz v. Warden of Second Dist. Prison of City of New York, 177 N.E. 139, 256 N.Y. 599—People ex rel. Deordio v. Palmer, 244 N.Y.S. 727, 230 App.Div. 397.

30. Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

31. Cal.—In re Peterson, 133 P.2d 831, 56 Cal.App.2d 791.

32. Ind.—State ex rel. Jones v Geckler, 16 N.E.2d 875, 214 Ind. 574.
Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325—Holden v. Smith, 100 So. 27, 135 Miss. 322.
N.Y.—People ex rel. Peltz v. Brewster, 248 N.Y.S. 599, 232 App.Div. 1, reversing 247 N.Y.S. 672, 139

custodians of the child shall have an opportunity to be heard,[33] and that a parent cannot be deprived of the custody of his minor child without a hearing before a court of competent jurisdiction in which he has been served with process or entered an appearance.[34] The court must determine the questions before it in accordance with the established rules of law,[35] but such hearings need not be conducted with all the strict formality of a criminal proceeding[36] unless the statute so provides.[37] Nevertheless one charged with being a wayward minor is entitled to all the safeguards surrounding trials,[38] and is entitled to have all the testimony of the witnesses taken on the hearing.[39] Process of law is available to bring witnesses before the hearing, and a final order may not be based on details privately whispered to the judge in chambers.[40] On transfer under statute to the chancery court for trial, the case is tried according to the chancery procedure under the rules for the trial of civil cases.[41] In the investigation of a charge of dependency the court may require production of the child in court, designate who may be its guardian, and employ means to ascertain what, if any, probable relationships and contacts may be detrimental to the child's welfare, and, as incident to the conduct of the proceeding, may order an examination of the child by a physician to ascertain such facts.[42] In performing its functions of rehabilitating children brought before it, the court must consider not only the bare and apparent facts, but must go behind the facts and inquire concerning the causative factors productive of those facts.[43] Admission of evidence after both sides have closed is discretionary.[44]

In delinquency proceedings the court should not proceed with the hearing on the return day unless the parties signify their readiness for hearing, but should fix the time therefor;[45] but a case may be heard and disposed of before the time set in the capias on which the infant was arrested where she, with her mother and attorneys representing her, requested such disposal.[46] The failure to fix the time for hearing may be considered waived by appearing and failing to object.[47] A statute entitling a person in custody to be released when more than a certain number of days have elapsed without trial does not apply to proceedings against delinquent children.[48]

Where the court has jurisdiction of the parties and proceedings, denial of petitioner's request for permission to withdraw his petition that orphans be adjudged wards of the court as destitute persons is within the discretion of the court,[49] but where petitioner, who was guardian of the orphans, instituted the proceedings only to settle a controversy as to which of two counties should contribute to the support of the orphans and did not intend to put their custody in issue, and was willing to give up his right to aid rather than give up the custody, it is error to refuse to permit him to dismiss the proceedings.[50]

Misc. 161, and affirmed People ex rel Peltz v. Warden of Second Dist. Prison of City of New York, 177 N.E. 139, 256 N.Y. 599—People ex rel. Deordio v. Palmer, 244 N.Y.S. 727, 230 App.Div. 397.

Hearing before juvenile commissioner not sufficient.—State v. Schelin, 230 N.W. 9, 59 N.D. 386.

33. Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.
Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.
N.D.—Ex parte Solberg, 203 N.W. 898, 52 N.D. 518.
31 C.J. p 1109 note 98.

Right to cross-examine
Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

Presence of mother held unnecessary
Ind.—Akers v. State, App., 51 N.E. 2d 91.

34. Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.
Due process as requiring hearing before court on notice to parent before depriving parent of child's custody see Constitutional Law § 612.
Requirement of notice to parent generally see supra subdivision e of this section.
Rights of state and parents as to custody and control of child generally see the C.J.S. title Parent and Child §§ 10–11, also 46 C.J. p 1222–p 1235 note 67.

35. Wash.—Ex parte Day, 65 P.2d 1049, 189 Wash. 368.

36. Cal.—Ex parte Jones, 93 P.2d 185, 34 Cal.App.2d 77.

37. Ind.—State ex rel. Jones v. Geckler, 16 N.E.2d 875, 214 Ind. 574.

38. N.Y.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

Where delinquent child is charged with capital offense, the proceedings in the juvenile court should be conducted with deliberation giving the accused the benefit of every substantial rule of procedure in his favor.—Ridge v. State, 220 P. 965, 25 Okl.Cr. 396.

39. N.Y.—People v. Slater, 29 N.Y.S. 2d 164, 176 Misc. 641.
N.D.—State v. Schelin, 230 N.W. 9, 59 N.D. 386.

40. Cal.—In re Hill, 247 P. 591, 78 Cal.App. 23.

41. Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.

42. Or.—State ex rel. Cole v. Cole, 73 P.2d 384, 157 Or. 568.

43. N.Y.—In re Z Y X, 24 N.Y.S.2d 456.

44. Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.

45. Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

46. Tex.—Ex parte Chandler, 268 S.W. 749, 99 Tex.Cr. 255.

47. Iowa.—King v. Sears, 158 N.W. 513, 177 Iowa 163.

48. Wash.—In re Chartrand, 182 P. 610, 107 Wash. 560.

49. Cal.—Ex parte Jones, 93 P.2d 185, 34 Cal.App.2d 77.

50. Cal.—In re People, on Behalf of Jones, 112 P.2d 892, 44 Cal.App.2d 670.

Trial by jury. Under some statutes the parties have a right to a jury trial if one is demanded,[51] and such statutes place a positive duty on the interested person to make a demand if a jury is desired;[52] under other statutes a jury trial is not required.[53] If the trial is by jury the parties should be allowed jury strikes and the jury should be sworn and charged as in civil cases instead of following the procedure applicable to criminal cases.[54] The court should fairly submit to the jury instructions embodying a correct statement of the law applicable to the issues and facts.[55] The guilt of accused is a matter within the province of the jury;[56] and in such case the jury's verdict is not considered as merely advisory; accused is entitled to the benefit of the jury's verdict, and the court cannot disregard a verdict of not guilty and commit defendant.[57]

Arraignment. If the proceedings are not considered criminal, arraignment of an infant defendant charged with delinquency is not necessary.[58]

The granting of separate trials for each infant, where the same circumstances would necessarily be brought in evidence as to each, rests in the discretion of the trial court;[59] but it is error to try a girl charged with being a wayward minor together with two women charged with prostitution even though the arrests grew out of the same transaction.[60]

Adjournment. The court has the right to adjourn the proceeding at its discretion.[61]

New trial. In a proper case, a new trial or hearing may be allowed,[62] but denial of a new trial for newly discovered evidence is proper where diligence is not shown.[63]

h. Findings

When required by statute, findings on the issues presented are essential to sustain a valid order of commitment.

Findings are not necessary in the absence of a provision in the statute under which the proceeding was had requiring findings.[64] Under some statutes, however, findings on the issues presented are required to be made by the court,[65] and the making

51. Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.
35 C.J. p 195 note 29.
Right to trial by jury in juvenile delinquency proceedings generally see Juries, § 80, also 35 C.J. p 195 notes 23, 24.

52. Nev.—Ex parte Guisti, 269 P. 600, 51 Nev. 105.

53. Miss.—Bryant v. Brown, 118 So. 184, 151 Miss. 398, 60 A.L.R. 1325.

54. Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.

55. **Instructions held proper**
(1) Instruction that, if guilty, the jury would assess punishment at confinement in the industrial school for an indeterminate period, not to extend beyond defendant's majority; also instruction on the elements of aggravated assault.—De La O v. State, 250 S.W. 182, 94 Tex.Cr. 204.
(2) Instruction as to speed law of state in proceeding to determine delinquency of minor, as bearing on question whether car was operated recklessly.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.
Instruction held error
Instruction that recent possession of stolen property is a presumption of guilt.—Purvis v. State, 112 S.W.2d 186, 133 Tex.Cr. 441.
Failure to instruct on issue of suspended sentence under revision in force at time of trial, which omitted reference to suspended sentence, was not error.—Meggs v. State, 291 S.W. 545, 106 Tex.Cr. 136.

56. Wash.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.
31 C.J. p 1109 note 3.

57. Mo.—Ex parte Parsons, App., 232 S.W. 740.

58. Cal.—Hills v. Pierce, 231 P. 652, 69 Cal.App. 447.
Neb.—Laurie v. State, 188 N.W. 110, 108 Neb. 239.
Nature of proceedings see supra subdivision a of this section.

59. Wis.—In re Johnson, 181 N.W. 741, 173 Wis. 571.

60. N.Y.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

61. Mich.—In re Broughton, 158 N.W. 884, 192 Mich. 418.
Refusal held not abuse of discretion
N.Y.—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.
Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.

62. Mo.—State v. Calhoun, 211 S.W. 109, 201 Mo.App. 374.
31 C.J. p 1109 note 10.
Grounds
Proceeding by which juvenile delinquent was convicted under original felony indictment instead of complaint and information, and sentenced to juvenile training school, might be taken advantage of on motion for new trial, although no objection was urged until then.—Brown v. State, 268 S.W. 460, 99 Tex.Cr. 70.
Matters considered on new trial
Statute authorising a rehearing by a juvenile court on the discovery of additional evidence raising a question as to the advisability of a commitment of a child to the Wisconsin industrial school for girls by any juvenile court confers power to rehear the original case on evidence not produced at the trial bearing on the propriety of the original commitment, but does not vest power in juvenile court to consider evidence bearing on the present advisability of discharging or paroling the child after a valid and proper commitment.—In re Willard, 275 N.W. 537, 225 Wis. 553.

63. Mont.—State ex rel. Palagi v. Freeman, 262 P. 168, 81 Mont. 132, followed in State ex rel. Palagi v. Hutton, 262 P. 172, 81 Mont. 143 and State ex rel. Palagi v. Ireland, 262 P. 172, 81 Mont. 144.

64. Cal.—In re Peterson, 133 P.2d 831, 56 Cal.App.2d 791.

65. N.Y.—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427.
N.D.—State v. Schelin, 230 N.W. 9, 59 N.D. 386—Ex parte Solberg, 203 N.W. 898, 52 N.D. 518.
31 C.J. p 1109 note 11.
Finding held warranted
Where children's delinquencies stem from neglect, a finding of delinquency must be predicated on the factors responsible, and hence when a child is delinquent because of neglect such a finding is warranted.—In re Z Y X, 24 N.Y.S.2d 456.
Findings held sufficient
Cal.—Ex parte Daedler, 228 P. 467, 194 Cal. 320.
Ind.—Akers v. State, App., 51 N.E.2d 91—In re Fickle, 192 N.E. 104, 99 Ind.App. 476—Heber v. Drake, 118 N.E. 864, 68 Ind.App. 448.
Mo.—Label v. Sullivan, 165 S.W.2d

of such finding has been held essential to sustain a valid order of commitment.[66] So-called findings of facts which are mere conclusions will not support a judgment committing a juvenile as delinquent.[67] A finding affecting a child may be modified when the best interests of the child and the needs of the community require such modification.[68]

i. Judgment, Order, or Decree

The proceedings require a judgment, order, or decree stating all jurisdictional facts and certain in meaning so as to be enforceable; and such judgment carries none of the implications of a judgment in a criminal court.

The proceedings in the juvenile court require a judgment, order, or decree,[69] which should state all the jurisdictional facts[70] and should show that the case is within the statute.[71] It should be intelligible and certain in meaning so as to be possible of enforcement.[72] Ordinarily it should show the nature of the offense or grounds for commitment,[73] the age of the child,[74] that a petition has been filed as required by statute,[75] that notice was given,[76] that a hearing was held,[77] the time or duration of the commitment,[78] and the place of confinement.[79] Mere irregularities, however, do not warrant a discharge of the child.[80] Where a child is proceeded against as a delinquent, the final judgment, if against the child, can be only a judgment declaring the child to be a delinquent even though the conduct charged consisted of violations of the criminal statutes, or conduct which renders the child incorrigible, vicious, or immoral.[81] A provision in a judgment declaring the child a public ward that the child should return to the home in which it had been living does not render the judgment erroneous.[82]

Nature. The judgment, order, or decree is not a judgment in a criminal action,[83] and none of the implications of a conviction in a criminal court should result therefrom.[84]

j. Review

(1) In general
(2) Persons entitled and parties
(3) Decisions reviewable
(4) Appellate jurisdiction
(5) Objections and exceptions
(6) Perfection of appeal
(7) Supersedeas
(8) Record
(9) Assignment of errors
(10) Proceedings on appeal
(11) Dismissal or withdrawal
(12) Scope and extent of review
(13) Determination and disposition of cause

639, 350 Mo. 286—Ex parte Label, App., 156 S.W.2d 37.

Petition and findings held not in variance

Cal.—In re Spiers, 89 P.2d 456, 32 Cal.App.2d 124.

66. Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487—In re Pierce, 16 P.2d 765, 127 Cal.App. 773—In re Brodie, 166 P. 605, 33 Cal.App. 751.
Mo.—State ex rel. Dew v. Trimble, 269 S.W. 617, 306 Mo. 657—Ex parte Walbridge, 285 S.W. 167, 220 Mo.App. 29.
N.Y.—People v. Pikunas, 182 N.E. 675, 260 N.Y. 72, reversing 257 N.Y.S. 1071, 236 App.Div. 737.
Wash.—State ex rel. Helwig v. Superior Court in and for Pacific County, 29 P.2d 930, 176 Wash. 478.

67. Utah.—State v. Butcher, 279 P. 497, 74 Utah 275.

68. N.Y.—In re Z Y X, 24 N.Y.S.2d 456.

69. N.Y.—People v. Fitzgerald, 155 N.E. 584, 244 N.Y. 307.

70. Ark.—Kelley v. State, 88 S.W. 2d 65, 191 Ark. 848.
Or.—Hills v. Pierce, 231 P. 652, 113 Or. 386.
31 C.J. p 1109 note 13.

71. Tenn.—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752.
31 C.J. p 1109 note 14.

72. Cal.—In re Fowler, 141 P. 1053, 24 Cal.App. 529.

73. Mont.—In re Satterthwaite, 160 P. 346, 52 Mont. 550.
31 C.J. p 1109 note 16.

74. Tenn.—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752.

75. Ark.—Kelley v. State, 88 S.W.2d 65, 191 Ark. 848.

76. Cal.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.
31 C.J. p 1109 note 18.

77. Cal.—In re Fowler, 141 P. 1053, 24 Cal.App. 529—People v. New York Nursery & Child's Hospital, 180 N.Y.S. 372, 190 App.Div. 562, affirmed 129 N.E. 341, 230 N.Y. 119.

78. Tex.—Ex parte Douglas, 5 S.W. 2d 153, 109 Tex.Cr. 463.
31 C.J. p 1109 note 20.

Judgment held sufficient where it directed that delinquent be detained until she reached the age of twenty-one years, unless court made a different disposition of her.—Ex parte Chandler, 268 S.W. 749, 99 Tex.Cr. 255.

Judgment held erroneous in committing child for term of years not "less" than four, not "more" than four being proper.—Phillips v. State, Tex.Cr., 20 S.W.2d 790.

79. Tex.—Ex parte Roach, 221 S.W. 975, 87 Tex.Cr. 370.

80. Tex.—Ex parte Bartee, 174 S.W. 1051, 76 Tex.Cr. 285.

81. Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888—State v. Johnson, App., 174 S.W. 2d 139.

Record held to show that defendant was delinquent child, in view of finding that defendant was under seventeen.—Morgan v. State, 25 S.W.2d 842, 114 Tex.Cr. 434.

82. Ind.—Bradburn v. Bradburn, 197 N.E. 905, 209 Ind. 61.

83. Cal.—People v. Sanchez, 132 P. 2d 810, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137.
D.C.—Thomas v. U. S., 121 F.2d 905, 74 App.D.C. 167.
Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888.
Or.—Ex parte Bowers, 158 P. 412, 78 Or. 390.
Wash.—State v. Webster, 211 P. 274, 122 Wash. 526.

84. D.C.—Thomas v. U. S., 121 F.2d 905, 74 App.D.C. 167.

(1) In General

Review of the proceedings in the juvenile court depends on constitutional and statutory provision and the practice of the particular jurisdictions, under which it is variously held that the review may, or may not, be by appeal, writ of error, or certiorari.

Since the right of appeal, as discussed in Appeal and Error § 1, is purely a matter of legislative discretion, in the absence of statute so providing there is no appeal from an order of commitment,[85] especially where the statute provides the remedy of writ of error for the purpose of review.[86] In some jurisdictions, by force of constitutional or statutory provisions, appeals are allowed[87] and it has been held that statutes authorizing appeals in civil cases include an appeal from a final judgment of dependency by the court.[88] Where the statute applicable to juvenile court proceedings provides for an appeal, the right of appeal is controlled by that statute rather than by the general statute applicable to appeals.[89] Under a statute giving a right of appeal from orders within the juvenile court's jurisdiction, an appeal will not lie where the sole question was as to whether, under the facts, the juvenile court had exceeded its jurisdiction.[90] The right of appeal of a child adjudged a delinquent is not defeated by the juvenile court's exercise of continuing jurisdiction over the child.[91] A constitutional provision for appeals from the juvenile court does not permit suspensive appeals where there is an express provision that appeals shall not suspend the juvenile court's judgment.[92] Where no right of appeal exists, a denial of bail pending appeal from an order of commitment is not error, since a right of appeal is a prerequisite to a right of bail pending appeal.[93]

Writ of error. Since, in the absence of statute giving it a broader application, a writ of error, as discussed in Appeal and Error § 14 a, lies only in proceedings which are according to the course of the common law, and since these proceedings, as discussed supra subdivision a of this section, are not according to the common law, but statutory, there is no right of review by writ of error in the absence of statute providing otherwise.[94] Where, however, the proceeding is regarded not as a special proceeding but as a civil action, it has been held reviewable on writ of error.[95]

Certiorari. Following the general rule discussed in Certiorari § 39, certiorari will not lie to review these proceedings where it is not shown why an appeal will not be adequate,[96] although it has been held available where there is no right of appeal.[97]

(2) Persons Entitled and Parties

Only a person who has been accorded the right by statute is entitled to appeal; and on appeal from a judgment awarding custody, the parties to whom the custody of the child was given should be joined as appellees.

The appeal may be brought by any person who has been accorded such right by the statute.[98] Under some statutes the parents are entitled to appeal from an order which found them incapable of controlling the child and adjudged the child delinquent,[99] but under a statute allowing an appeal to the child and providing that the right may be demanded on the part of the child by its guardian, parent, or previous custodian, a parent who does not demand the right on the part of the child has no right of appeal.[1] On appeal from a judgment awarding custody of a child, the parties to whom the custody of the child was given should be joined as appellees.[2]

85. Minn.—State v. Zenzen, 227 N.W. 356, 357, 178 Minn. 394, citing **Corpus Juris.**
R.I.—Givardi v. Juvenile Court of Sixth Judicial Dist., 142 A. 542, 49 R.I. 336.
Wash.—State v. Webster, 211 P. 274, 122 Wash. 526.
31 C.J. p 1109 note 25.

86. Ill.—People v. Piccolo, 114 N.E. 145, 275 Ill. 453.

87. Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.
Mo.—State v. Woerner, App., 294 S.W. 423.
Okl.—In re Morrison, 54 P.2d 198, 176 Okl. 55.
31 C.J. p 1109 note 27.

88. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.
N.M.—Blanchard v. State, 224 P. 1047, 29 N.M. 584.

89. Wis.—In re Willard, 275 N.W. 537, 225 Wis. 553.

90. Wis.—In re Willard, supra.

91. Mo.—Ex parte Naccarat, 41 S.W. 2d 176, 328 Mo. 722, 76 A.L.R. 654.

92. La.—State v. Clark, 173 So. 137, 186 La. 655.

93. Wash.—State v. Webster, 211 P. 274, 122 Wash. 526.

94. Mo.—State v. Woerner, App., 294 S.W. 423.
Wis.—In re Willard, 275 N.W. 541, 225 Wis. 562—Ogden v. State, 156 N.W. 476, 162 Wis. 500.

95. N.M.—Blanchard v. State, 224 P. 1047, 29 N.M. 584.

96. La.—State v. Nicolosi, 55 So. 475, 128 La. 836.

97. Minn.—State v. Zenzen, 227 N.W. 356, 178 Minn. 394.
Wis.—In re Willard, 275 N.W. 537, 225 Wis. 553.

Writ granted where mother was taken by school authorities, with her minor son, before judge of superior court, without service of notice of hearing in proceedings to commit son to state training school, as required by statute, and again by same authorities on next day, after filing of petition for formal hearing, without realizing that trial was to be had which might result in son's being taken from her custody.—State v. Superior Court of Lewis County, 227 P. 849, 130 Wash. 464.

98. Mo.—State v. Calhoun, 211 S.W. 109, 201 Mo.App. 374.
31 C.J. p 1109 note 27 [c].

99. Idaho.—In re Farnsworth, 266 P. 421, 46 Idaho 47.

1. Mo.—State v. Jahnke, 273 S.W. 155, 221 Mo.App. 366.

2. Ind.—Korth v. State, 193 N.E. 673, 100 Ind.App. 368.

(3) Decisions Reviewable

Generally only those orders or decisions which are of a final and determinative nature are appealable.

General rules of appeal and error and the provisions of the applicable statutes determine the decisions which are reviewable. Generally only those orders or decisions which are of a final and determinative nature are appealable.[3] Applying these rules, orders which have been held reviewable or appealable include a judgment ordering a child made a ward of the juvenile court and remanding it to a probation officer,[4] a judgment denying a petition for rehearing in dependency proceedings,[5] a judgment that a child was a dependent and awarding its custody to one parent,[6] and a judgment determining the status of the infant as a neglected child, ordering him made a ward of the court, and further providing for commitment to be made later.[7] Under a statute authorizing an appeal from a final order of commitment, an order finding that a child was neglected and dependent and committing the child to the custody of a named person subject to the further order of the court is a final appealable order, since the word "final" as used in the statute does not contemplate the last order of commitment that might or could be made, and the word "commitment" does not apply solely to the commitment of delinquent children but applies equally to the commitment of dependent and neglected children.[8]

(4) Appellate Jurisdiction

A proceeding to review a determination in a proceeding to commit a juvenile delinquent or dependent can be taken to, and heard and determined by, only a court possessing the requisite jurisdiction.

An appeal or other proceeding to review a determination in a proceeding to commit a juvenile delinquent or dependent can be taken to, and heard and determined by, only a court possessing the requisite appellate jurisdiction.[9] Under the judicial system of some states the appeal is taken to an intermediate appellate court,[10] such as the court of common pleas[11] or circuit court.[12] Under a statute authorizing appeals from the juvenile court to the circuit court, or, if the circuit judge is judge of the juvenile court, directly to the supreme court, the latter court will take judicial notice that in a particular county the circuit judge is not the juvenile judge as respects the right to appeal directly to the supreme court.[13]

(5) Objections and Exceptions

Where the trial on appeal is not de novo, questions not sufficiently raised and preserved in the trial court by proper objections and exceptions will not be reviewed.

Where the trial on appeal is not de novo, the court will usually not review or consider points or questions which have not been sufficiently raised and preserved in the trial court by proper objections and exceptions.[14]

(6) Perfection of Appeal

The appellate proceeding should be taken and perfected in the time and manner prescribed in the governing statute.

The appellate proceedings should be taken and perfected in the time[15] and manner[16] prescribed in the governing statute. The time for appeal begins to run from the rendition of the judgment, and not from the time the order book entry was signed by the judge.[17] Where one adjudged a delinquent fails to appeal within the statutory time, it will be assumed that he waived his right of appeal even though he has not been notified of such right.[18] Error of the juvenile court in disallowing an appeal from a final judgment determining the status of a neglected child does not nullify the judgment or oust the juvenile court of all jurisdiction of the case.[19]

(7) Supersedeas

An appeal acts as supersedeas only when it is allowed; and an appeal with supersedeas from a judgment finding possession of a child in another does not change the possession to appellant.

3. Kan.—State ex rel. Hedrick Co. v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.
4. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.
5. Colo.—Jones v. Wheeler, 105 P.2d 848, 106 Colo. 378.
6. Ohio.—In re Anteau, 36 N.E.2d 47, 67 Ohio App. 117.
7. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.
8. Kan.—State ex rel. Hedrick Co. v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.
9. Wis.—In re Willard, 275 N.W. 541, 225 Wis. 562.
31 C.J. p 1109 note 27 [a].
10. Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.
11. Conn.—Cinque v. Boyd, supra.
12. Wis.—In re Willard, 275 N.W. 541, 225 Wis. 562.
13. Wis.—In re Willard, supra.
14. Va.—Brown v. Commonwealth, 132 S.E. 332, 144 Va. 676.
Wash.—In re Williams' Welfare, 117 P.2d 202, 10 Wash.2d 542.
15. Mass.—Sylvester v. Commonwealth, 148 N.E. 449, 253 Mass. 244.
31 C.J. p 1109 note 27 [b].
16. Mo.—State v. Jahnke, 273 S.W. 155, 221 Mo.App. 366.
17. Ind.—State ex rel. Bernard v. Geckler, 189 N.E. 842, 98 Ind.App. 436.
18. Mass.—Sylvester v. Commonwealth, 148 N.E. 449, 253 Mass. 244.
19. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.

An appeal from a final judgment of delinquency or dependency or final order of commitment acts as supersedeas only when the appeal is allowed.[20] An appeal with supersedeas from a judgment finding possession of a child in another does not change the possession to the appellant, the only result of the supersedeas being to leave the status and possession of the child where it was.[21]

(8) Record

The settlement of the record must comply with the applicable statutes, rules of court, or practice of the particular jurisdiction.

The settlement of the record must comply with the applicable statutes, rules of court, or practice of the particular jurisdiction to enable the appellate court to review the alleged errors complained of;[22] and under some statutes when the right to review on the facts is given, the evidence should be reduced to writing[23] or made a matter of record.[24]

(9) Assignment of Errors

When required by statute or rule of court, an assignment of errors or statement of the grounds or reasons for the appeal is necessary.

When required by statute or rule of court, appellant must make and file a proper and sufficient assignment of errors or statement of the grounds or reasons for the appeal,[25] and a statute dispensing with assignments of errors in criminal cases has been held inapplicable to proceedings to commit a juvenile delinquent.[26] Under some statutes the only assignment of error permitted is that the decision of the court is contrary to law,[27] and where this is the rule, an assignment that the juvenile court did not have jurisdiction of the person of appellant, that the court erred in overruling appellant's motion for new trial, and that the court did not have jurisdiction of the subject matter of the action, presents no question to the appellate court.[28]

(10) Proceedings on Appeal

Under statutes so providing, the proceedings in the appellate court take the form of a trial de novo, either with or without a jury, according to the rights of the parties.

Under statutes so providing, the proceedings in the appellate court take the form of a trial de novo,[29] either with or without a jury, according to the rights of the parties.[30] An infant adjudged a delinquent in juvenile court is not entitled to a jury trial on appeal to the county circuit court where the statute does not provide it, nor has the court authority to grant it.[31] Under some statutes the appellate court in a dependency case has no broader jurisdiction than the juvenile court, and must try the case de novo;[32] and in such case the appellate court is in effect constituted a juvenile court in cases within its jurisdiction on appeal, and has power to modify the order of the juvenile court from which the appeal is taken,[33] and, on their failure to comply with such modified order, can properly find that the parents of the dependent child were in contempt of court and that the condition of the performance bond required by the juvenile court was broken, and can declare a forfeiture.[34]

(11) Dismissal or Withdrawal

An appeal from a judgment awarding custody of a child or committing a delinquent child may be dismissed or withdrawn if ground therefor appears or if requested by appellant.

An appeal from a judgment awarding custody of a child will be dismissed where it was taken by a person unauthorized to appeal,[35] or where the state was named as sole appellee without joining as appellees the parties to whom custody of the child was given.[36] So an appeal in delinquency proceedings will be dismissed where the case became moot because the adjudged delinquent became of age prior to disposition of the case on appeal,[37] where the original charge against the minor has been withdrawn,[38] where an appeal bond or recognizance was

20. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.

21. Mo.—State ex rel. Washer v. Porterfield, App., 258 S.W. 722.

22. Cal.—In re Fowler, 141 P. 1053, 24 Cal.App. 529.
31 C.J. p 1109 note 27 [e].

Time for filing bill of exceptions
Under the controlling statute, it was held that the court could not extend time for filing bills of exception more than ninety days from notice of infant's appeal from conviction of delinquency.—Bradshaw v. State, 6 S.W.2d 230, 110 Tex.Cr. 216.

23. N.Y.—People v. Gyles, 46 N.E. 326, 152 N.Y. 136, reversing 42 N.Y.S. 749, 12 App.Div. 495.

Pa.—Commonwealth v. Mountain, 82 Pa.Super. 523.

24. Pa.—Commonwealth v. Mountain, supra.

25. Ala.—Hymes v. State, 95 So. 383, 209 Ala. 91.

26. Ala.—Hymes v. State, supra.

27. Ind.—In re State ex rel. Wynn, 48 N.E.2d 63, 113 Ind.App. 360.

28. Ind.—In re State ex rel. Wynn, supra.

29. Conn.—Cinque v. Boyd, 121 A. 678, 99 Conn. 70.

30. Conn.—Cinque v. Boyd, supra.

31. Ala.—Prince v. State, 98 So. 320, 19 Ala.App. 495.

32. Kan.—Hollis v. Brownell, 284 P. 388, 129 Kan. 818.

33. Kan.—State ex rel. Hedrick Co. v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.

34. Kan.—State ex rel. Hedrick v. Hartford Accident & Indemnity Co. of Hartford, Conn., supra.

35. Mo.—State v. Jahnke, 273 S.W. 155, 221 Mo.App. 366.

36. Ind.—Korth v. State, 193 N.E. 673, 100 Ind.App. 368.

37. Mo.—State v. Witt, 67 S.W.2d 817, 228 Mo.App. 432.

38. Ala.—Williamson v. State, 4 So. 2d 734, 242 Ala. 42.

not filed, as required by statute,[39] or where the dismissal is requested by appellant.[40] An appeal taken by the infant's parent in his behalf may be withdrawn by the infant without the consent of the parent.[41]

(12) Scope and Extent of Review

On review of proceedings for the commitment of a delinquent or dependent child, presumptions of regularity will be indulged, and the court will consider only such matters as are properly presented by the record. In the absence of abuse of discretion, discretionary orders will not be disturbed, nor will a judgment be disturbed on account of harmless or invited error. Questions of fact may be reviewed in a proper case if the procedure is authorized by statute.

In the absence of a showing to the contrary, it will be presumed that the actions of the lower court in a proceeding for the commitment of a delinquent or dependent child were legal and regular in all respects,[42] and that the court acted with the welfare of the child in mind.[43] At least where the proceedings are not in the form of a trial de novo, the appellate court will consider and review only such matters as are properly contained in, and presented by, the record,[44] and cannot consider errors presented in a bill of exceptions filed subsequent to the taking of the appeal[45] or to the time granted by the trial court.[46] The denial of a motion for continuance not brought forward by a bill of exception is not preserved by an order entered on the minutes reciting the presentment of the motion.[47] A judgment awarding the custody of a child will not be disturbed in the absence of a complete statement of facts.[48] In determining whether the court proceeded without jurisdiction the entire judgment roll must be looked to.[49] Orders discretionary with the juvenile court will not be disturbed in the absence of an abuse of discretion;[50] and the appellate court will not review or reverse on account of errors or matters which have been invited, induced, or consented to, by the party complaining,[51] or errors of a harmless or nonprejudicial nature.[52]

Under some statutes the appeal is allowed on questions of law only,[53] and not on questions of fact.[54] Under other statutes the appellate court is not bound by the juvenile court's findings on disputed evidence and may read the entire record to determine where the evidence preponderates.[55] As a general rule, however, the weight of the testimony[56] and the credibility of the witnesses[57] are matters for the trial court which will not be disturbed on review. Thus where the order is based on conflicting evidence,[58] or the jury's verdict is reasonably supported by evidence offered on the material issues,[59] it will not be disturbed. It has been held, however, that the judgment or order may be reversed in the absence of sufficient evidence to sustain it.[60] If the evidence is not reduced to writing or made a matter of record, the appellate court has nothing before it but consideration of the order of the court and cannot consider the action below on its merits;[61] but the failure to reduce the evidence to writing is no ground for reversal where the affidavit of appeal is insufficient to show that a review on the facts is desired.[62] On appeal it must be pre-

39. Tex.—Reyes v. State, Cr., 174 S.W.2d 323.

40. Tex.—Green v. State, Cr., 112 S.W.2d 451.

41. Mass.—Robinson v. Commonwealth, 136 N.E. 241, 242 Mass. 401.

42. Cal.—In re Pierce, 16 P.2d 765, 127 Cal.App. 773.
N.Y.—People v. Sullivan, 200 N.Y.S. 214, 120 Misc. 618.

Acquisition of jurisdiction
The appellate court is required to assume that the juvenile court made such inquiry as in its judgment was practicable and as a result thereof was satisfied that jurisdiction ought to be acquired.—Akers v. State, Ind.App., 51 N.E.2d 91.

43. Mo.—State v. Wickliff, App., 114 S.W.2d 158.

44. Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.
31 C.J. p 1109 note 27 [f].

45. Mo.—State v. Campbell, 32 S.W.2d 69, 325 Mo. 561.

46. Tex.—Bradshaw v. State, 6 S.W.2d 230, 110 Tex.Cr. 216.

47. Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.

48. Tex.—Whatley v. Nelson, Civ.App., 86 S.W.2d 517.

49. Mo.—Ex parte Schrier, 41 S.W.2d 178, 328 Mo. 726.

50. Ohio.—In re Anteau, 36 N.E.2d 47, 67 Ohio App. 117.

51. Wash.—In re Williams' Welfare, 117 P.2d 202, 10 Wash.2d 542.

52. Wash.—In re Williams' Welfare, supra.

Failure to give timely notice
A judgment finding that a child was a neglected child within statute was not reversible for failure to give twenty-four hour notice of hearing on information, where judgment showed that all parties of interest were in court and no objections were made to proceeding to hearing.—State v. Wickliff, Mo.App., 114 S.W.2d 158.

53. La.—State v. Dunn, 73 So. 240, 140 La. 385.

Tex.—Ex parte Brooks, 211 S.W. 592, 85 Tex.Cr. 252.

54. La.—State v. Dunn, 73 So. 240, 140 La. 385.

55. Cal.—In re De Vore, 221 P. 706, 64 Cal.App. 347.

56. Cal.—In re Stein, 260 P. 566, 86 Cal.App. 226.
Mo.—State v. Wickliff, App., 114 S.W.2d 158.

57. Cal.—In re Stein, 260 P. 566, 86 Cal.App. 226—In re Cannon, 150 P. 794, 27 Cal.App. 549.

58. Colo.—Hudson v. Mattingley, 195 P. 113, 69 Colo. 528.

59. Okl.—In re Reed, 117 P.2d 503, 189 Okl. 389.

60. Pa.—Commonwealth v. Carnes, 32 Pa.Super. 335.
Tex.—Miller v. State, 200 S.W. 389, 82 Tex.Cr. 495.

61. Pa.—Commonwealth v. Mountain, 32 Pa.Super. 523.

62. N.Y.—People v. Gyles, 46 N.E. 326, 152 N.Y. 136, reversing 42 N.Y.S. 749, 12 App.Div. 495.

sumed that the evidence justified the order where the evidence on which the lower court acted is not presented to the appellate court.[63] Where a finding is unsupported by evidence in the record, it cannot be contended on appeal that a stipulation that the court could examine the minor alone showed that the finding was supported by evidence outside the record, the judge having certified that the reporter's transcript contained all testimony taken.[64]

Under a statute providing that no judgment shall be reversed except as the finding of facts or evidence to sustain the same shall be found by the appellate court to be insufficient,[65] an assignment that the decision is contrary to law presents both the sufficiency of the facts found and the sufficiency of the evidence to sustain the finding,[66] but the court is not authorized to consider a question raised by assignment that the juvenile court erred in overruling defendant's motion to vacate a judgment finding him guilty of being a delinquent or to reverse a juvenile court judgment on the ground that defendant did not plead to the charge, that the trial court ignored legislative directions as to a preliminary investigation and notice of trial, that defendant was not properly advised of his constitutional rights to counsel or trial by jury where the undisputed facts were such that the service of counsel and trial by jury could not justifiably result in other than a finding of guilt, and that the purpose of the Juvenile Act was frustrated. So where the corrective remedy the juvenile court chose out of the several provided by the statute was within its exclusive province, its judgment in that regard is beyond the reach of the appellate court, and the fact that any one of several other judgments less drastic than the one pronounced would have been proper is no concern of the appellate court.[67]

In certiorari to review delinquency proceedings, the only questions reviewable are the alleged illegal acts or want of jurisdiction.[68]

(13) Determination and Disposition of Cause

As required by the circumstances of the case, the judgment or decree may be affirmed, reversed, or modified; but a determination that a child was neglected will not be made on the record where the lower court failed to make such finding.

A decree will be affirmed on appeal where no errors are assigned by appellant.[69] On affirming a judgment of commitment the appellate court may authorize the juvenile court to make further investigation and such final disposition of the case as in the judgment of the court will bring about the minor's reformation.[70] An order on appeal in proceedings sustaining the jurisdiction of the juvenile court determines only that under the facts the juvenile court had jurisdiction over the minor, and does not confer on the juvenile court any jurisdiction over the minor.[71]

If the record discloses substantial and prejudicial error in the lower court, the judgment should be reversed.[72] Thus it has been held ground for reversal that the court made an order of committal without evidence to support it,[73] or failed to grant a jury trial on proper demand therefor,[74] or failed to make findings of fact,[75] or erroneously tried the infant together with others over objection and exception of his attorney,[76] or rendered the decree without a note of testimony required by court rule.[77]

In a proper case the court may modify the judgment before it, for example, with respect to the place of confinement of a juvenile delinquent.[78]

Determination that the child was neglected will not be made on the record by the appellate court where the lower court failed to make such a finding.[79]

k. Costs

In the absence of statute the county is not liable for costs.

In the absence of statute the county is not liable for the costs of the proceedings.[80]

63. Cal.—In re Cannon, 150 P. 794, 27 Cal.App. 549.
Iowa.—In re East Minors, 122 N.W. 153, 143 Iowa 370.

64. Cal.—In re People on Behalf of Bullock, 34 P.2d 769, 139 Cal.App. 664.

65. **Purpose of legislature** in restricting the appellate court's powers to review juvenile court judgments was that in the event the evidence supports the ultimate fact of guilt and the judgment was such as the court had power to render, nothing else should matter.—Akers v. State, Ind.App., 51 N.E.2d 91.

66. Ind.—Heber v. Drake, 118 N.E. 864, 68 Ind.App. 448.

67. Ind.—Akers v. State, App., 51 N.E.2d 91.

68. Iowa.—Wissenberg v. Bradley, 229 N.W. 205, 209 Iowa 813, 67 A.L.R. 1075.

69. Ala.—Hymes v. State, 95 So. 383, 209 Ala. 91.

70. Neb.—Laurie v. State, 188 N.W. 110, 108 Neb. 239.

71. Cal.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.

72. N.Y.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

73. Miss.—Holden v. Smith, 100 So. 27, 135 Miss. 322.

74. Colo.—Kahm v. People, 264 P. 718, 83 Colo. 300.

75. Cal.—In re Hill, 247 P. 591, 78 Cal.App. 23.

76. N.Y.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

77. Ala.—Martin v. State, 97 So. 57, 210 Ala. 44—Hymes v. State, 95 So. 383, 209 Ala. 91.

78. Tex.—Stewart v. State, 8 S.W.2d 140, 110 Tex.Cr. 145.

79. N.Y.—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427.

80. Pa.—Commonwealth v. Watts, 21 Pa.Co. 556.
Wash.—Pierce County v. Magnuson, 127 P. 302, 70 Wash. 639, Ann.Cas. 1914B 889.

§ 109. —— Disposition of Child

a. In general
b. Period of detention
c. Place of confinement

a. In General

In the absence of a statute to the contrary, the court in disposing of an infant found to be delinquent or dependent may make such orders as it may deem best for the interest of the child.

Unless the matter is otherwise controlled by statute,[81] the disposition to be made of the child is, as a rule, largely within the discretion of the court[82] which may make such orders as it may deem best for the interest of the child.[83] If the evidence warrants such an order, the court may declare a ward free from the custody and control of his or her parents;[84] but ordinarily this should be done only on a clear showing that the family environment is defective and that the state can plainly better the child by a change of custody and control,[85] and only where there has been a strict compliance with statutory procedure.[86] The court may place the child on probation.[87] It may also allow

81. Cal.—In re Hulbert, 11 P.2d 50, 123 Cal.App. 362.
N.Y.—People v. Rosenkrantz, 205 N.Y.S. 861, 128 Misc. 335.

Child past reformation
Where a juvenile court finds that a delinquent child is past reformation, the law, and not the court, says what becomes of the delinquent.—Macon v. Holloway, 96 So. 933, 19 Ala.App. 234, certiorari denied Ex parte Macon, 96 So. 936, 209 Ala. 580.

State board of public welfare
Under some statutes the juvenile courts may only adjudge a child a delinquent, if such is the case, and commit him to the state board of public welfare, which is given power to make proper disposition of the child.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

82. Cal.—Ex parte McDermott, 246 P. 89, 77 Cal.App. 109.
Tex.—Reyes v. State, Cr., 174 S.W. 2d 323.
31 C.J. p 1110 note 42.

Discretion held not abused
Ala.—Ellis v. Jones, 93 So. 832, 208 Ala. 45.
La.—In re Caronna, 2 So.2d 1, 197 La. 494.
Tex.—Whatley v. Nelson, Civ.App., 86 S.W.2d 517.

Nature of commitment, and the place of commitment, within the statutory limitations, are within the exclusive jurisdiction of the juvenile court.—Huff v. O'Bryant, 121 F.2d 890, 74 App.D.C. 19.

To commit or prosecute
The juvenile court after assuming jurisdiction of delinquent child had authority to commit child who was almost eighteen years of age to state industrial school or to direct prosecution on charge of misdemeanor in quarter sessions, but could not do both.—In re Trignani, 28 A.2d 702, 150 Pa.Super. 491.

Traffic violations
Proper action in case of infant convicted of delinquency because of traffic violations was to deprive him of license to drive automobile for sufficient time for him to realize necessity of observing traffic ordinances.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.

83. Cal.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.
Iowa.—State v. Franks, 192 N.W. 815.
Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.
Ohio.—In re Veselich, 154 N.E. 55, 22 Ohio App. 528.
Tex.—Whatley v. Nelson, Civ.App., 86 S.W.2d 517.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
Wash.—In re Williams' Welfare, 117 P.2d 202, 10 Wash.2d 542.
31 C.J. p 1110 note 43.
"The welfare and best interest of the child must govern, guide, and control the court in determining the custody, care, control, supervision, etc., of the child."—Ellis v. Jones, 93 So. 832, 208 Ala. 45.

84. N.Y.—In re Joffe, 33 N.Y.S.2d 481.
Parents' general right to custody of child, see the C.J.S. title Parent and Child § 9, also 46 C.J. p 1223 note 69–p 1224 note 74.
State's rights as parens patriæ, see the C.J.S. title Parent and Child § 10, also 46 C.J. p 1222 note 59–p 1223 note 67.

Communication with adoptive parents
In proceeding under neglected and dependent children's act, order for temporary care and custody of children, restricting their communication with their parents by adoption is not abuse of discretion.—Blanchard v. State, 238 P. 1004, 30 N.M. 459.

Pending such order, the parents are entitled to the custody of the minor.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.

Under its general power as parens patriæ, the state has the right within reasonable limits to deprive children of their liberty, and their parents of their custody.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.

85. N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
N.Y.—In re Cole, 208 N.Y.S. 753, 212 App.Div. 427.
Wash.—State ex rel. Helwig v. Superior Court in and for Pacific County, 29 P.2d 930, 176 Wash. 478.

Opportunity to effect reformation
(1) Juvenile delinquent cannot be committed to state industrial school if parents are generally fit to have his custody, unless unable to control him, and where the parents were ignorant of child's wrongdoing, they should be given opportunity to effect reformation before being deprived of custody.—In re State, in Interest of Bennett, 293 P. 963, 77 Utah 247.

(2) Under statute stating that no dependent or delinquent child shall be taken from the custody of its parent or legal guardian without consent unless the court finds that the parent or guardian is incapable or has failed or neglected to provide for child properly, or unless child has been tried on probation in that custody and has failed to reform, or unless the court finds that welfare of child requires that his custody be taken from the parent or guardian, a finding that any one of those conditions exists is a sufficient basis for a change of custody.—In re Williams' Welfare, 117 P.2d 202, 10 Wash.2d 542.

(3) The provision of the law, as to failure to reform, has reference to acts committed or conduct persisted in by the child itself, and not to circumstances, conditions, and surroundings over which the child has no control or for the existence of which it has not been responsible. —In re Williams' Welfare, supra.

86. Cal.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.

87. Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888 —State v. Johnson, App., 174 S.W. 2d 139.
31 C.J. p 1110 note 44.

Imposition of terms
(1) In placing a juvenile on proba-

the child to remain at its home with its parents,[88] subject to visitation by a probate officer or other person designated by the court;[89] it may place the child in the custody of one of its parents,[90] or it may place the child in the care or custody of any other proper person,[91] in some suitable home.[92]

A child placed on probation,[93] or committed to the care of a private person,[94] is not considered as discharged by the court, but is still amenable to the law, and the probation may be terminated at any time by the court.[95] Also, under some statutes, the jurisdiction of a juvenile court over the infant continues until he reaches majority,[96] notwithstanding the expiration of the period during which he was committed to a home;[97] but such a statute does not mean that the jurisdiction of the court must continue until the infant reaches majority regardless of the circumstances of the particular case,[98] and under some statutes jurisdiction over a ward continues until he reaches majority or until the court is sat-

tion, a court may impose such terms as will bring home to the minor a realization of the seriousness of his delinquency.—In re Trignani, 24 A.2d 743, 148 Pa.Super. 142.

(2) The terms imposed, however, must be wholly in the interest of the child, looking toward his reformation and not to make good the damages flowing from his illegal act.—In re Trignani, supra.

(3) Accordingly, where the infant violated terms imposed that he make restitution to the injured person, the court was without authority to commit him to the county prison.—In re Trignani, supra.

Last year of minority

Under some statutes a wayward minor may not be placed on probation during any part of the last year of his or her minority.—People v. Harris, 230 N.Y.S. 767, 132 Misc. 741.

In California

(1) Under Juvenile Ct.L. § 8, as amended by St.1933, p 2209, the court may make an order committing a ward on probation to the care of the probation officer.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.

(2) It was formerly held that no authority was vested in either the juvenile court or the superior court to place a minor on probation.—In re Hulbert, 11 P.2d 50, 123 Cal.App. 362.

88. La.—State v. Ragan, 51 So. 89, 125 La. 121.
Mich.—In re Broughton, 158 N.W. 884, 192 Mich. 618.

89. Tex.—Ex parte McDowell, 172 S.W. 213, 76 Tex.Cr. 1.

90. **Motion** by father to modify previous judgment awarding custody of child to mother, although not expressly alleging that movant is fit person, was sufficient, where such fact appeared by reasonable intendment.—In re Von Talge, Mo.App., 67 S.W.2d 999.

Production of child

Under order directing that mother be given opportunity to visit with her son in presence of an officer of the court, it was the duty of the father having custody of the child to produce child in court when ordered to do so.—State ex rel. Cole v. Cole, 73 P.2d 384, 151 Or. 560.

91. Ala.—Ellis v. Jones, 93 So. 832, 208 Ala. 45.
La.—State v. Tomasella, 7 So.2d 615, 200 La. 60.
N.Y.—In re Joffe, 33 N.Y.S.2d 481.
Tex.—Ex parte McDowell, 172 S.W. 213, 76 Tex.Cr. 1.

Bond

Under a statute providing that the custody of a child found neglected and dependent may be committed to some suitable person subject to such conditions as may be imposed by the court, a bond required of a nonresident to whom the custody of such a child is awarded is not void, nor is the bond unsupported by a consideration.—State ex rel. Hedrick v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.

92. La.—State v. Ragan, 51 So. 89, 125 La. 121.
Tex.—Ex parte McDowell, 172 S.W. 213, 76 Tex.Cr. 1.

Determination of suitable home

Statute authorizing juvenile court to commit ward to home and care of some reputable person of good moral character or to the care of some association, society, or corporation engaged in business of caring for or obtaining homes for such persons does not authorize probation officer to determine fitness of home or place to which court may commit ward, since such question is for juvenile court after proper investigation.—In re Spiers, 59 P.2d 838, 15 Cal.App.2d 487.

Right of parent

Where, in a proper proceeding, children were taken from the custody of their parents because of neglect and ill treatment and placed with an institution which found homes for them, the parents after a lapse of several years could not, in an action in equity, compel such institution, in violation of its rules, to disclose the whereabouts of the children so located, in order that the parents might communicate with them.—Lieske v. Iowa Children's Home Soc., 194 N.W. 239, 196 Iowa 143.

93. Pa.—In re Juvenile Ct., 17 Pa. Dist. 207.

94. **Subject to further orders**

Commitment of juvenile delinquent to private person must be subject to court's further orders.—Harris v. State, 129 So. 795, 24 Ala.App. 59.

95. Pa.—In re Juvenile Ct., 17 Pa. Dist. 207.

96. Mo.—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654.

Compelling support

County court in proceeding under juvenile act retains jurisdiction of child and may compel its parents to support it.—State v. Campbell, 32 S.W.2d 69, 325 Mo. 561.

Statute construed

Rev.St.1919 § 2591, not changed in the amendment of 1923 p 153, providing that juvenile court's jurisdiction, over a person of a child for the purpose of the statute shall continue until its majority, merely confers power on courts of otherwise general jurisdiction to take neglected and delinquent children from their parents and commit them to care and custody of state for purpose of their reformation.—State ex rel. Menth v. Porterfield, Mo., 264 S.W. 386.

Unless sooner discharged

From the time when the juvenile court determines that a child comes within the classes specified in statute relating to delinquent children, such child becomes a "ward" of the court and so remains during the remainder of his minority unless sooner discharged.—In re Gomez, 32 A.2d 138, 113 Vt. 224.

97. Mo.—State ex rel. Corella v. Pence, 262 S.W. 360, 303 Mo. 598.

98. **Term limited**

Where court in assuming jurisdiction of a delinquent minor limited term of its wardship to four years, his commitment being stayed during good behavior leaving his actual supervision to his father, court's action constituted a judgment, and its jurisdiction over delinquent minor ceased with expiration of time fixed by judgment.—State ex rel. Menth v. Porterfield, Mo., 264 S.W. 386.

isfied that further supervision is unnecessary or inadvisable.[99]

Religious education. In determining the religious education to be given children who have been found to be neglected, no interests are entitled to consideration except those of the parents and children.[1] Where the parents disagree as to the religious education to be given the wards, the court must consider whether there was an admission of the child to any church, whether there was an antenuptial agreement relating to religious education, whether the child's admission to a church was with the knowledge and consent of both parents, the extent to which the child has received any form of religious education, whether the child has reached years of discretion and, if so, what preference the child feels, and in which religious environment the particular child is most likely to develop fully and happily.[2] The welfare of the children outweighs the legal rights of either parent in this respect.[3]

Modification of order. While under some statutes the order placing a child in the custody of a person, society, or institution terminates the court's guardianship and jurisdiction, and thereafter exclusive jurisdiction on the premises is given to particular boards,[4] which the legislature has a power to do,[5] ordinarily the court may change or modify its order at any time;[6] and it may make a provisional commitment retaining the right to change or modify its judgment at any time during the provisional term.[7] In some jurisdictions, by force of statute, the jurisdiction of the court continues for all the purposes of the statute until the child has attained his majority.[8]

A modification or change of the order as to the custody of the ward involves purely a matter of discretion,[9] and, in the absence of a statute to the contrary,[10] no trial or hearing is involved.[11]

Suspension of order of commitment. The court may suspend the execution of its order of commitment during the good behavior of the delinquent child.[12] It has been held that a delinquent child, proceeded against for the first time, is entitled to the benefit of the Suspended Sentence Law.[13]

99. Cal.—People v. Sanchez, 132 P. 2d 810, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137.

1. N.Y.—In re Vardinakis, 289 N.Y. S. 355, 160 Misc. 13.

2. Catholic and Mohammedan parents

Three young children of Catholic mother and Mohammedan father of whom two had been inducted into Mohammedan faith against wishes of mother and third had never been formally admitted to any church, and all of whom had been committed to care of court on petition of mother as neglected children would be placed in Protestant foster home under supervision of court with provision that there should be no religious instruction given them by foster parents and that oldest child who had indicated preference for mother and Catholic religion should be permitted to accompany mother to Catholic church and that father should be permitted to take two younger children to Mohammedan church.—In re Vardinakis, 289 N.Y.S. 355, 160 Misc. 13.

Positive choice of religion by an intelligent child of thirteen or fourteen must be seriously considered, but children who are but nine and five are too young to be seriously concerned with religious education.—In re Vardinakis, supra.

3. N.Y.—In re Vardinakis, supra.

4. Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.
Wash.—State v. Superior Court of King County, 210 P. 674, 122 Wash. 407.
Wis.—In re Willard, 275 N.W. 537, 225 Wis. 553.
31 C.J. p 1110 notes 54, 55.

5. N.J.—Ex parte Newkosky, Sup., 116 A. 716, 94 N.J.Law 314.

6. Cal.—People v. Sanchez, 132 P.2d 810, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137—In re Spiers, 89 P.2d 456, 32 Cal.App.2d 124—In re Stein, 260 P. 566, 86 Cal.App. 226—People v. De Fehr, 254 P. 588, 81 Cal.App. 562—Ex parte McDermott, 246 P. 89, 77 Cal.App. 109.
Fla.—In re Whetstone, 188 So. 576, 137 Fla. 712.
N.H.—State v. Lefebvre, 20 A.2d 185, 91 N.H. 382.
Or.—In re Baker, 54 P.2d 309, 152 Or. 574.
Vt.—In re Gomez, 32 A.2d 138, 113 Vt. 224.
31 C.J. p 1110 note 57.

Commitment to state school

Juvenile court finding minor delinquent and declaring her ward of state, but leaving her in custody of her parents until further order of court, had jurisdiction, on minor's further delinquency, to order minor's commitment to state training school.—Glass v. State, 163 So. 819, 26 Ala.App. 570.

7. Cal.—In re Johnson, 171 P. 1074, 36 Cal.App. 319.

8. Tenn.—Sams v. State, 180 S.W. 173, 133 Tenn. 188—State v. Griffin, 7 Tenn.Civ.A. 230.

9. Cal.—In re Spiers, 89 P.2d 456, 32 Cal.App.2d 124.

10. Retransfer of case

Juvenile court committing juvenile delinquent to care of private person cannot retransfer case to circuit court until juvenile court is convinced delinquent cannot be disciplined. The juvenile court could not retransfer case to circuit court on mere suggestion of circuit court that it would try case if delinquent should be recommitted, since after the juvenile court has assumed jurisdiction and made a disposition of the delinquent, its future orders regarding him must be based on facts arising after commitment.—Harris v. State, 129 So. 795, 24 Ala. App. 59.

11. Interview with attorney

No occasion or necessity exists, under such circumstances, for the advice of an attorney with relation thereto.—Ex parte McDermott, 246 P. 89, 77 Cal.App. 109.

Notice

Mother having received notice in original dependency proceeding, juvenile court acquired continuing jurisdiction and could enter judgment permanently committing infant to children's home without notice to mother.—Ex parte Cunningham, 160 N.E. 733, 27 Ohio App. 306.

12. Me.—O'Malia v. Wentworth, 65 Me. 129.
Suspension of execution of sentence generally see Criminal Law § 1618.

13. Tex.—Ex parte Gordon, 232 S. W. 520, 89 Tex.Cr. 125—Hogue v. State, 230 S.W. 94, 87 Tex.Cr. 176.

b. Period of Detention

The duration of the custody or commitment of an infant found delinquent or dependent ordinarily is within the discretion of the court.

The duration of the custody or commitment ordinarily is within the discretion of the court.[14] However, in some jurisdictions, where a child is entitled to a jury trial, in prosecutions for delinquency, the extent of the punishment is exclusively within the province of the jury, and the court is without authority to fix it.[15] The period of commitment or detention often is regulated by statute,[16] and, in such case, it must comply with that designated.[17] Ordinarily it lasts until the child has obtained his majority,[18] and this is so, even though the power of the court to commit was limited to children under certain age and the child in question has passed that age.[19] Under some statutes a female minor may be detained until she becomes twenty-one years of age, although she attained her majority at eighteen.[20]

Discharge from custody. Where there is evidence of reformation, no longer requiring the child to remain under commitment as a subject of the jurisdiction of the court, he may be discharged.[21] The application for such discharge may be by motion or petition.[22]

Under some statutes a juvenile committed to an institution for delinquent infants must seek release through the executive board of such institution, the courts having no jurisdiction in the matter.[23] Under such statutes the authorities of the institution wherein the child is committed may, on a showing sufficient to justify his discharge, discharge him; and it has been held that, where the authorities have acted in discharging the child, the court committing him has no further jurisdiction, although the order of commitment was provisional.[24] Under other statutes, however, the court, of its own motion, may discharge the infant without the recommendation of the board of the institution.[25]

Restoration of child to parents. An adjudication committing a child because of the neglect or failure of the parent to provide for it does not deprive the parent of his right to the custody of the child if he subsequently becomes competent and willing to care for it properly,[26] and in such case the court, in the exercise of its general equitable power, may restore the child to the custody of its parent,[27] even

14. D.C.—Huff v. O'Bryant, 121 F. 2d 890, 74 App.D.C. 19.
31 C.J. p 1111 note 60.

In Wisconsin the juvenile court does not have jurisdiction to fix the term of a commitment to the Wisconsin industrial school for girls.—In re Willard, 275 N.W. 537, 225 Wis. 553.

15. Tex.—Gebhardt v. State, 218 S. W. 1047, 87 Tex.Cr. 25.

16. Tex.—Ex parte Bartee, 174 S.W. 1051, 76 Tex.Cr. 285.
31 C.J. p 1111 note 65.

17. Tex.—Ex parte Brooks, 211 S.W. 592, 85 Tex.Cr. 252.
31 C.J. p 1111 note 66.

18. N.D.—State v. McClelland, 226 N.W. 540, 58 N.D. 365.
Tex.—Uwanich v. State, 101 S.W.2d 567, 131 Tex.Cr. 623.
31 C.J. p 1111 note 67.

Escape

Where the infant was sentenced to a correctional institution "until he reaches twenty-one years of age," although the time of expiration of such sentence might have been ascertained and stated, the sentence was not void, and an escape from the institution before he reached twenty-one years of age constituted a violation of the statute.—Aderhold v. Soileau, C.C.A.Ga., 67 F.2d 259.

Indefinite term

(1) Under some statutes, the juvenile court may commit an infant for an indefinite term, since, under the law, any commitment will terminate by operation of law when the infant reaches majority.—Ex parte Naccarat, 41 S.W.2d 176, 328 Mo. 722, 76 A.L.R. 654.

(2) Under a statute permitting courts to commit delinquents for "terms not exceeding the minority" of such infants, a sentence "until further order of the court" is unauthorized.—Robinson v. State, 287 P. 288, 34 N.M. 557.

Nineteen years

Where a statute frees any child placed under guardianship of the court on arriving at the age of nineteen years, the fact that the adjudication of the delinquency of a child committed her to guardianship until twenty-one years of age instead of until nineteen years of age does not release her, where she has not yet attained the age of nineteen at the time of her application for release.—State v. Patterson, 247 N.W. 573, 249 N.W. 187, 188 Minn. 492.

19. Pa.—Commonwealth v. Murray, 26 Pa.Dist. 489—In re Juvenile Ct., 18 Pa.Dist. 79.

20. Iowa.—McPherson v. Day, 144 N.W. 4, 162 Iowa 251.

Age controlling

Controlling element in juvenile law is age, not minority.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.

21. Pa.—In re Juvenile Ct., 18 Pa. Dist. 79.
Tex.—Ex parte McDowell, 172 S.W. 213, 76 Tex.Cr. 1.

22. Pa.—In re Juvenile Ct., 18 Pa. Dist. 79.

23. Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 250 P. 973, 77 Mont. 290, 49 A.L.R. 398.

24. Cal.—In re Johnson, 171 P. 1074, 36 Cal.App. 319.

25. La.—State ex rel. Carter v. Gill, 111 So. 666, 163 La. 172.

26. Colo.—Rose v. People, 139 P.2d 261.
31 C.J. p 1111 note 75.

Matter to be considered

Change of condition of mother of minors adjudged wards of juvenile court is matter for presentation to juvenile court.—In re Stein, 260 P. 566, 86 Cal.App. 226.

Petition properly denied

Father's petition seeking custody of delinquent child was properly denied, where no showing was made of change in child's condition since commitment.—In re Genua, 156 A. 558, 102 Pa.Super. 286.

27. N.Y.—In re Knowack, 53 N.E. 676, 158 N.Y. 482, 44 L.R.A. 699, affirming 52 N.Y.S. 1144, 29 App. Div. 627.
31 C.J. p 1111 note 76.

No retention of jurisdiction in order

The juvenile court committing de-

though he had notice of, and appeared in, the proceeding for commitment,[28] and no appeal has been taken from the order of commitment and the time for appealing has expired,[29] and although the institution does not consent to the child's discharge.[30] In determining whether custody of the child should be returned to the parents, the physical and moral welfare of the child is the paramount question,[31] and restoration may be refused where it would not be to the child's benefit.[32] Even if the cause stated for the original commitment no longer exists and the parents are at the time competent and fit to have the care of the child, the court in its discretion may decide that the welfare of the child will not permit its removal from its present custody.[33] A denial of a request for a return of the child should not be based merely on a comparison of the home of the parents with the home of the persons given custody of the child.[34] In determining the child's interest in this respect, the court is not bound by the evidence introduced on the hearing of the application for the child's restoration, but may take judicial cognizance of any records that may be in the court touching on the matter.[35] The court may even go so far as to institute an independent investigation of its own into the habits and character, as well as the circumstances surrounding the lives, of the parents.[36]

A parent who defaults in proceedings to declare his child abandoned ceases to have any right to his custody and thereafter his legal rights with regard to the child are no greater than those of any person who might ask the court for leave to take control and custody of the child. There is no appeal from an order denying an application for the custody of an abandoned child by its mother after the custody had been given to another.[37]

c. Place of Confinement

The place of confinement of a delinquent or dependent child is primarily a matter of statutory regulation.

The place of commitment is a matter regulated by statute,[38] and in some jurisdictions the place of confinement of a delinquent child is for the determination of the jury.[39] Ordinarily, if the child's delinquency is such as to warrant confinement,[40] the child is confined to a public institution,[41] such as a

pendent and neglected child to the custody of his sister had authority at any later date and on proper showing to set aside the order of commitment and to change the custody of the child even if it had not provided in its order that the child was committed to the custody of sister subject to further order of court. —State ex rel. Hedrick Co. v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.

Power of state

Where, because of improper care, children are taken from parents and placed with an institution which found homes for them, the state still has the power as parens patriæ through the courts, if the welfare of the children so demands, to retake them and hand them back to their parents or place them elsewhere.—Lieske v. Iowa Children's Home Soc., 194 N.W. 239, 196 Iowa 143.

28. Mass.—In re Kelley, 25 N.E. 615, 152 Mass. 432.

29. S.D.—McFall v. Simmons, 81 N. W. 898, 12 S.D. 562.

30. Mass.—In re Kelley, 25 N.E. 615, 152 Mass. 432.
N.Y.—In re Knowack, 53 N.E. 676, 158 N.Y. 482, 44 L.R.A. 699, affirming 52 N.Y.S. 1144, 29 App.Div. 627.

31. La.—In re Caronna, 2 So.2d 1, 197 La. 494.
Mass.—Commonwealth v. Ball, 156 N. E. 21, 259 Mass. 148.

32. N.Y.—Ex parte Sarcona, 133 N. Y.S. 913.

33. Mass.—Commonwealth v. Ball, 156 N.E. 21, 259 Mass. 148.

34. Mass.—Commonwealth v. Ball, supra.

35. La.—In re Caronna, 2 So.2d 1, 197 La. 494.

36. La.—In re Caronna, supra.

37. Or.—Foster v. Myers, 117 P. 806, 59 Or. 549.

38. Nev.—McKinnon v. Washoe County Second Judicial Dist. Ct., 130 P. 465, 35 Nev. 494.
31 C.J. p 1111 note 84.
Place of imprisonment of criminals generally see Criminal Law § 2000.

Inmates of industrial school

(1) Statute under which inmates of boys' industrial school may be committed to state reformatory on conviction of any of the offenses therein named was not repealed by juvenile court act and is not in conflict with statute under which male offenders, generally, between certain ages may be sentenced to state reformatory.—Burris v. State Board of Administration, 134 P.2d 649, 156 Kan. 600.

(2) A boy fourteen years of age, who had been committed at age of twelve to boys' industrial school because of truancy, incorrigibility, and what would have been larceny had the boy been more than sixteen years old, and who had persistently displayed disregard of law, was properly committed to state reformatory. —Burris v. State Board of Administration, supra.

39. Tex.—Curry v. State, 296 S.W. 307, 107 Tex.Cr. 265.

40. **Traffic violations**

Sentencing infant convicted of delinquency on ground of traffic violations to state training school was too drastic, in absence of showing that parents were unfit.—State v. Superior Court in and for Pacific County, 245 P. 409, 139 Wash. 1, 45 A.L.R. 1530.

41. Tex.—Ex parte Hughes, 11 S.W. 2d 319, 111 Tex.Cr. 66.
31 C.J. p 1111 note 85.

Liability for maintenance

Under some statutes the juvenile court may commit children to the care of proper persons or institutions and make suitable orders for their support. Maintenance furnished to a child so committed, in case he has no parent, may be recovered from his estate, and this applies to expenditures made by the county for his maintenance.—In re Colucci's Estate, 83 Pa.Super. 224.

Location

The child may be committed to an institution not in the county where the proceedings originated, and by doing so the court does not lose its jurisdiction.—In re Chartrand, 173 P. 728, 103 Wash. 36.

Power of state

"The tendency of the decisions, and especially in more recent cases,

reformatory,[42] or he may be surrendered to a society established to secure homes for destitute children;[43] but he should not be sentenced to a penitentiary.[44] Under some statutes, in order to commit a child to the state industrial school on a charge that the child is delinquent by reason of theft, and is immoral, a finding against the parents that they are incompetent is unnecessary.[45] The court may change the place of commitment whenever the circumstances require it.[46] Thus the court may, under some statutes, place a delinquent child in care of his family after having committed him to a reformatory or other institution.[47]

Pending proceedings. It has been held that, pending proceedings, a female delinquent may be detained in the common jail, and such commitment is not deemed a commitment to jail.[48]

§ 101. —— Conclusiveness and Effect of Adjudication

An order or decree that a child is dependent or delinquent fixes the status of the child and is final, if the court has jurisdiction in the premises, until set aside in some direct proceeding.

The order or decree of the court is one in personam and acts on the child alone.[49] Under some statutes, where an infant has been judicially declared to be a ward of the state, such adjudication fixes the status of the child until it becomes of age, unless such adjudication is modified or reversed by the court itself,[50] and the right of the parents to its custody and control, by virtue of their parenthood, is foreclosed and cut off.[51] The order of the court by which the infant is made a ward of the court has the effect of transferring the matter of the infant's guardianship from the parents to the court itself;[52] but, where the statute requires certain preliminary findings before a ward may be taken from the custody of his parents,[53] a mere adjudication that a minor is a ward of the court is insufficient to deprive the parents of the minor's custody.[54]

If the court has jurisdiction in the premises,[55]

is to hold that the right to parental control is a natural, but not an inalienable, right, and that the commonwealth, in all cases of delinquent and dependent children, may, under proper regulations, take the custody of a delinquent or dependent child from its parents and transfer its guardianship to state agencies, whenever, in the judgment of a competent tribunal, such action is for the common welfare of the child and the state."—Hills v. Pierce, 231 P. 652, 654, 69 Cal.App. 447.

42. Ohio.—Leonard v. Licker, 23 Ohio Cir.Ct.,N.S., 442, 3 Ohio App. 377.

Commitments held illegal

(1) Under some statutes a child who has never been convicted of violation of a law involving moral turpitude, and who is shown by undisputed evidence to be obedient to constituted authority, cannot be committed to the industrial training school for delinquent and criminally inclined children.—Holden v. Smith, 100 So. 27, 135 Miss. 322.

(2) Commitment of "wayward minor" to state reformatory for women at Bedford was held to be illegal.—People ex rel. Tave v. Palmer, 228 N.Y.S. 286, 132 Misc. 119, affirmed 227 N.Y.S. 875, 223 App.Div. 777.

(3) Reviving suspended reform school sentence and committing delinquent over twenty years old to reform school is without jurisdiction and void.—Ex parte Blackey, 208 N. W. 238, 53 N.D. 852.

Not punishment

A commitment to the state reformatory is not a punishment for crime, the whole proceeding being correctional and not criminal.—Gerak v. State, 153 N.E. 902, 22 Ohio App. 357.

43. La.—State v. Ragan, 51 So. 89, 125 La. 121.
S.D.—State v. Isenhuth, 148 N.W. 9, 34 S.D. 218.

44. La.—State v. Prater, 51 So. 647, 125 La. 573.
Mo.—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888—Ex parte Bass, 40 S.W.2d 457, 328 Mo. 195—State v. Johnson, App., 174 S.W.2d 139.

"The object of the law is to place the child under guardianship of public authorities for proper care and discipline until he has reformed or arrives at the age of majority, and he can in no event be placed in an institution used exclusively for the punishment of criminals."—Gerak v. State, 153 N.E. 902, 903, 22 Ohio App. 357.

45. Cal.—Hills v. Pierce, 231 P. 652, 69 Cal.App. 447.

46. Cal.—In re Spiers, 89 P.2d 456, 32 Cal.App.2d 124.
N.Y.—In re Montana, 30 N.Y.S.2d 199, 177 Misc. 171.
Tex.—Ex parte Lassiter, 18 S.W.2d 637, 113 Tex.Cr. 18.
Wash.—In re Chartrand, 173 P. 728, 103 Wash. 36.

Resentence to state prison held not to be an abuse of discretion.—People v. De Fehr, 254 P. 588, 81 Cal. App. 562.

47. Ky.—Sullivan v. State Bd. of Charities and Corrections, 236 S.W. 252, 193 Ky. 330.
N.Y.—In re Montana, 30 N.Y.S.2d 199, 177 Misc. 171.

48. Vt.—In re Edson, 82 A. 664, 85 Vt. 366.

49. Idaho.—In re Sharp, 96 P. 563, 15 Idaho 120, 18 L.R.A.,N.S., 886.

50. N.C.—In re Coston, 122 S.E. 183, 187 N.C. 509.

51. Iowa.—Stephens v. Treat, 209 N. W. 282, 202 Iowa 1077.

52. Cal.—Ex parte McDermott, 246 P. 89, 77 Cal.App. 109.

Probate officer

The effect of an order of commitment to a probate officer is to make such officer the guardian of the child.—Ex parte Grimes, Tex.Civ. App., 216 S.W. 251, reversed on other grounds Whittenberg v. Criven, Com. App., 258 S.W. 152.

53. **Sufficiency of finding**

Where the statute requires that the court shall find the parent or guardian incapable of providing, or to have failed or neglected to provide, proper maintenance, training, and education of the ward, a finding that the child has no parent or guardian actually exercising proper parental control over it and that such child is in need of such control is insufficient.—Ex parte Edwards, 284 P. 916, 208 Cal. 725.

54. Cal.—Ex parte Edwards, supra.

55. La.—State ex rel. Herbert v. Renaud, 103 So. 101, 157 La. 776.

If a parent is not a party to proceedings in juvenile court or if he has no notice when his child is proceeded against, such parent's right is not foreclosed to thereafter liti-

the judgment, order, or decree is final[56] as to all parties to the proceeding[57] on the same state of facts,[58] and is not subject to collateral attack,[59] and cannot be challenged except in a direct action brought for the purpose or in some appellate tribunal.[60] An order or decree made by a court of general jurisdiction will be presumed to be valid, and the burden is on him who attacks the order or decree to show that it was made without jurisdiction;[61] but if the proceedings are had in a court of limited or special jurisdiction the presumption applicable to judgments of courts of general jurisdiction does not apply,[62] and the record must disclose all jurisdictional facts.[63]

After dismissal of all pending proceedings for delinquency, such proceedings cannot be made the basis, in another and subsequent proceeding, for a commitment.[64] Although the statute provides that a discharge or dismissal shall bar further proceedings on the charge, a discharge under one petition does not require a discharge under a second petition charging different acts of moral delinquency.[65]

gate such right.—In re Santillanes, 138 P.2d 503, 47 N.M. 140.

Estoppel

Testatrix' illegitimate daughter, who would not have right to inherit from testatrix if order and decree of Kansas probate court entered in 1901 relating to abandonment and adoption of such daughter were valid, was not "estopped" to make a collateral attack in will contest of the Kansas proceeding, where it appeared that daughter was non sui juris at time of her alleged adoption by reason of her minority and that she did not learn of alleged adoption until during second trial of the will contest.—In re Hampton's Estate, 131 P.2d 565, 55 Cal.App.2d 543, prior opinion, App., 127 P.2d 38.

Recitals not conclusive

In collateral attack on Kansas order placing child in custody of childrens' home as a neglected, abandoned, and dependent child, recitals in order that notice was issued to mother of child and that notice was returned by sheriff with report that sheriff was unable to find the mother within the county, were not conclusive that Kansas probate court had jurisdiction over child's mother and over custody of the child.—In re Hampton's Estate, supra.

56. Tex.—Cheney v. Cheney, Civ. App., 82 S.W.2d 1024, reversed on other grounds Cheney v. Coffey, 113 S.W.2d 162, 131 Tex. 212, rehearing denied 114 S.W.2d 533, 131 Tex. 212.
31 C.J. p 1112 note 97.

In Virginia, the judgment of juvenile and domestic relations court which dismisses case against infant over twelve years of age who is charged with an aggravated felonious offense is not conclusive, and the judgment of dismissal is not sufficient to bar action by the grand jury.—Mickens v. Commonwealth, 16 S.E.2d 641, 178 Va. 273, certiorari denied 62 S.Ct. 362, 314 U.S. 690, 86 L.Ed. 552, rehearing denied 62 S.Ct. 484, 314 U.S. 717, 86 L.Ed. 570.

57. Ariz.—In re Mendevil, 193 P. 17, 21 Ariz. 586.

58. Tenn.—Shelby County Juvenile Ct. v. State, 201 S.W. 771, 139 Tenn. 549, Ann.Cas.1918D 752—State v. West, 201 S.W. 743, 139 Tenn. 522, Ann.Cas.1918D 749.

Subsequent facts

Prior order concerning minor's custody was not res judicata in a subsequent juvenile court proceeding where order was supported by facts relative to conditions surrounding minor subsequent to prior order.—Ex parte Marmaduke, 299 P. 835, 114 Cal.App. 278.

Subsequent guardianship

A decree or order finding or not finding a child to be abandoned by his parents or legal custodian is not binding in a subsequent proceeding in guardianship.—In re Lew Choy Foon, 159 P. 440, 173 Cal. 159—In re Michels, 149 P. 587, 170 Cal. 339.

59. Cal.—Los Angeles County v. Superior Court in and for Alameda County, 18 P.2d 112, 128 Cal.App. 522.
31 C.J. p 1112 note 1.

Appeal from judgment of adoption was collateral attack on juvenile court's judgment declaring children to be dependent and neglected.—Jackson v. Roach, 3 S.W.2d 976, 176 Ark. 688.

Formal defects in the judgment or order do not render it subject to collateral attack.
Cal.—Hills v. Pierce, 231 P. 652, 69 Cal.App. 447.
Ind.—Bradburn v. Bradburn, 197 N. E. 905, 209 Ind. 61.

60. Cal.—People v. Sanchez, 132 P. 2d 810, 21 Cal.2d 466, prior opinion, App., 126 P.2d 137.
La.—Brana v. Brana, 71 So. 519, 139 La. 305.

Fraud

(1) The decree may be attacked on grounds of fraud, and such attack is a direct attack.
Colo.—Nielsen v. Nielsen, 141 P.2d 415.
Ohio.—Lewis v. Reed, 157 N.E. 897, 117 Ohio St. 152—In re McLean's Adoption, 29 N.E.2d 435, 65 Ohio App. 106.

(2) Petition to vacate decree, in dependency proceedings awarding child to paternal grandmother, which was obtained after mother of child had been lulled into sense of security, stated cause of action in fraud.—Nielsen v. Nielsen, supra.

In juvenile court

The orders and decrees of juvenile court in proceedings involving neglected and dependent children are, subject to right of review, valid under statute until modified or set aside by juvenile court.—State ex rel. Geckler v. Cox, 9 N.E.2d 93, 212 Ind. 440.

Remedies of parent

Parents injured by order of court of domestic relations committing child to industrial school as delinquent should appeal, and have case heard de novo in circuit court, under L. § 9804, as amended by L.1923 c 216, or apply to court of domestic relations for order setting aside or modifying order of commitment.—Hills v. Pierce, 231 P. 652, 113 Or. 386.

61. Iowa.—King v. Sears, 158 N.W. 513, 177 Iowa 163.
31 C.J. p 1112 note 5.

Affidavits held insufficient

Uncontradicted affidavits that court had placed children in third person's custody after mother left home, and that father was man of good character and had paid support money for children were insufficient to set aside orders adjudging children to be wards of court and committing them to custody of a society, where testimony in dependency proceeding was not before supreme court.—In re Baker, 54 P.2d 309, 152 Or. 574.

62. Wyo.—Kelsey v. Carroll, 138 P. 867, 22 Wyo. 85.
31 C.J. p 1112 note 6.

63. Miss.—Yarborough v. Coulter, 138 So. 591, 162 Miss. 50.

64. Wis.—State v. Zirbel, 177 N.W. 601, 171 Wis. 498.

65. Cal.—Ex parte Black, 271 P. 360, 94 Cal.App. 402.

§ 102. —— Commitment

The commitment of a delinquent or neglected child should express a judgment of the court.

The commitment should express a judgment of the court.[66] Although the contrary has also been held,[67] it must set out the jurisdictional facts,[68] and show that the case is within the statute.[69] The commitment should specify the period of detention.[70] Where the term of detention is fixed by law, it need not be specified in the commitment.[71] It has been held that even if an order of commitment may be subject to criticism, as fixing the period of detention for a designated time, the commitment will not be void, but will hold good, the period of detention being left open to be met by further contingencies.[72] In some jurisdictions the commitment has been held to have all the force and effect of a final judgment of a court of competent jurisdiction;[73] but in other states it has been held otherwise.[74]

Surplusage contained in the commitment may be disregarded.[75] If the commitment is defective by reason of mere irregularities, a new one may be made,[76] except where the court is without jurisdiction in the premises.[77]

Time for commitment. The commitment of an infant ordinarily occurs after the entry of a proper judgment or order.[78] A mittimus, directing the commitment to a public institution "forthwith" has been construed to mean as soon as may be, so that the fact that the commitment is not made immediately by reason of a legal quarantine does not entitle the person committed to his discharge.[79]

VIII. ACTIONS

§ 103. In General

An infant generally may sue or be sued, and is subject to, and bound by, the same rules of procedure as an adult litigant.

The fact that a person is an infant does not in any way prevent his suing,[80] or his being sued,[81] either at law[82] or in equity.[83] An infant, however, cannot bring or defend a legal proceeding in per-

66. N.Y.—People ex rel. Reisner v. New York Nursery & Child's Hospital, 180 N.Y.S. 372, 190 App.Div. 562, affirmed 129 N.E. 341, 230 N.Y. 119.
31 C.J. p 1112 note 7.

67. Mo.—Ex parte Schrier, 41 S.W. 2d 178, 328 Mo. 726.

68. N.Y.—People v. Baker, 3 N.Y.S. 536.
Wyo.—Kelsey v. Carroll, 138 P. 867, 22 Wyo. 85.
31 C.J. p 1112 note 8.
Facts which should appear
Order committing a delinquent child to industrial school should show title of court and cause, filing of petition stating facts constituting delinquency, court's order directing service of process on child's legal custodian, service of notice, or waiver thereof, facts found at hearing constituting delinquency, and violation of specified law, or that child is incorrigible or otherwise delinquent within statute.—Hills v. Pierce, 231 P. 652, 113 Or. 386.

69. N.Y.—People v. New York S. P. C. C., 44 N.Y.S. 1098, 19 Misc. 561, 12 N.Y.Cr. 86.
Wyo.—Kelsey v. Carroll, 138 P. 867, 22 Wyo. 85.
Notice and presence at hearing
It is sometimes required that the commitment shall show that those to whom notice is required had such notice and were present at the examination, hearing, or trial.—People v. Carpenter, 55 N.Y.S. 521, 25 Misc. 341—31 C.J. p 1112 notes 10, 11.

70. **Commitment held sufficient**
N.Y.—People v. House of Good Shepherd, 115 N.Y.S. 887, 62 Misc. 24, 23 N.Y.Cr. 84.

71. N.Y.—People v. Degnen, 54 Barb. 105, 6 Abb.Pr.,N.S., 87.

72. La.—State v. Marmouget, 35 So. 529, 111 La. 225.

73. N.Y.—People v. Protestant Episcopal House of Mercy, 30 N.E. 853, 133 N.Y. 207, reversing 17 N.Y.S. 166.
31 C.J. p 1112 note 15 [a].

74. La.—State v. Marmouget, 35 So. 529, 111 La. 225.
Pa.—Commonwealth v. McKeagy, 1 Ashm. 248.

75. **Nonexistent institution**
A commitment of boys convicted of larceny to "State Training and Agricultural School for Colored Boys at Pikeville, Tennessee," by juvenile court was not void because there is no institution with such title, as there is but one state training and agricultural school for boys with departments at Nashville and Pikeville, so that words, "for Colored Boys at Pikeville," may be treated as surplusage.—State ex rel. Purdy v. Patton, 140 S.W.2d 1087, 176 Tenn. 296.

76. N.Y.—People ex rel. Reisner v. New York Nursery & Child's Hospital, 180 N.Y.S. 372, 190 App.Div. 562, affirmed 129 N.E. 341, 230 N.Y. 119—People v. Protestant Episcopal House of Mercy, 110 N.Y.S. 172, 57 Misc. 657.

77. N.Y.—People ex rel. Reisner v. New York Nursery & Child's Hospital, 180 N.Y.S. 372, 190 App.Div. 562, affirmed 129 N.E. 341, 230 N.Y. 119.

78. Mo.—In re Campbell, 19 S.W.2d 752, 323 Mo. 757.

79. Vt.—In re Edson, 82 A. 664, 85 Vt. 366.

80. Ill.—Walgreen Co. v. Industrial Commission, 153 N.E. 831, 323 Ill. 194, 48 A.L.R. 1199.
N.Y.—Torrey v. State, 23 N.Y.S.2d 370, 175 Misc. 259.
31 C.J. p 1113 note 22.
Infant married woman can sue or be sued when husband is joined as party.—Drinkard v. George, 36 S.W. 2d 56, 237 Ky. 560.
Action by or against general guardian or ward see Guardian and Ward §§ 168–172.

81. Tex.—Grogan v. Spaulding, Civ. App., 155 S.W. 1014.
31 C.J. p 1113 note 23.

82. Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 150 Kan. 738.
Md.—Roche v. Waters, 19 A. 535, 72 Md. 264, 7 L.R.A. 533.

83. Md.—Roche v. Waters, supra.
Suit in equity against infant improper
Pa.—Yubas v. Witaskis, 95 Pa.Super. 296.

son;[84] he must sue or be sued by next friend or guardian ad litem, as discussed infra §§ 107–114. Except as otherwise provided by statute or constitutional provision,[85] he may sue to enforce his rights,[86] or he may be sued, to enforce against him responsibilities recognized by law.[87] If properly represented by next friend or guardian ad litem, as discussed infra §§ 107–113, and has proper counsel, as discussed infra § 114, he is subject to, and bound by, the same rules of procedure as an adult litigant,[88] in the absence of fraud or conduct amounting to fraud on the part of the parties representing him.[89] If a late infant defendant neglects to assert his rights for himself he cannot, as a rule, complain of the acts of his guardian ad litem;[90] he cannot complain of any irregularity in the action or proceedings during minority which have not worked to his prejudice.[91]

§ 104. Rights of Action and Defenses

a. In general
b. On contracts
c. Respecting property rights
d. For torts

a. In General

An infant may maintain an original bill for relief, and may sue to recover a penalty; but ordinarily cannot bring an action dependent on an election between conflicting rights.

An infant may maintain an original bill for relief from a decree against him during his minority for fraud or error appearing on the face of the proceedings.[92] He also may bring suit to recover a penalty under a statute giving the right of action therefor to the aggrieved party;[93] but ordinarily he cannot bring an action dependent on an election between two conflicting rights,[94] except by direction of the court.[95]

Examine Pocket Parts for later cases.

b. On Contracts

An infant may sue on a contract made by him or for his benefit, or he may sue to disaffirm the contract; and under proper conditions he may be sued on such contract.

An infant may sue on a contract made by him or for his benefit,[96] unless his benefit or interest in the contract is indirect and merely incidental;[97] and such an action is subject to the defense of want of consideration.[98] He may sue to recover what is due him under a contract,[99] or damages for a

84. Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535.
N.Y.—Mortgage Commission of New York v. Great Neck Improvement Co., 295 N.Y.S. 107, 162 Misc. 416.
Statute providing that "party who is of full age" may prosecute or defend civil action in person unless he has been judicially declared to be incompetent is indicative of intent to exclude minors from those entitled to prosecute or defend civil action in person.—Mortgage Commission of New York v. Great Neck Improvement Co., supra.

85. Ill.—Waechter v. Industrial Commission, 11 N.E.2d 378, 367 Ill. 256—Walgreen Co. v. Industrial Commission, 153 N.E. 831, 323 Ill. 194, 48 A.L.R. 1199—Desiron v. Peloza, 32 N.E.2d 316, 308 Ill.App. 582.
Ind.—Norris v. Mingle, 29 N.E.2d 400, 217 Ind. 516.
Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.

86. Ill.—Waechter v. Industrial Commission, 11 N.E.2d 378, 367 Ill. 256—Walgreen Co. v. Industrial Commission, 153 N.E. 831, 323 Ill. 194, 48 A.L.R. 1199—Desiron v. Peloza, 32 N.E.2d 316, 308 Ill.App. 582.
Ind.—Norris v. Mingle, 29 N.E.2d 400, 217 Ind. 516.
Md.—Roche v. Waters, 19 A. 535, 72 Md. 264, 7 L.R.A. 533.

87. Ind.—Colvert v. Colvert, 180 N. E. 192, 95 Ind.App. 325.
Md.—Roche v. Waters, 19 A. 535, 72 Md. 264, 7 L.R.A. 533.
31 C.J. p 1113 note 30.

88. Ind.—Colvert v. Colvert, 180 N. E. 192, 95 Ind.App. 325, quoting **Corpus Juris.**
Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 150 Kan. 738.
Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.
31 C.J. p 1113 note 29.
A mortgagee enforcing mortgage against infant heirs of mortgagor must proceed in the manner prescribed by the code, where mortgagor is owner of complete title to land covered by mortgage.—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.

89. Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 150 Kan. 738.

90. Ky.—Mitchell v. Berry, 1 Metc. 602.

91. D.C.—Prall v. Imlay, 270 F. 688, 50 App.D.C. 252.

92. Ill.—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316.

93. N.Y.—Fox v. Interurban St. R. Co., 86 N.Y.S. 64, 42 Misc. 538.

94. N.Y.—Chipman v. Montgomery, 63 N.Y. 221.
Capacity to exercise right or power of election see supra § 25.

95. N.Y.—Chipman v. Montgomery, supra.

96. U.S.—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied McGurren v. McVeigh, 61 S. Ct. 960, 313 U.S. 573, 85 L.Ed. 1531.
Minn.—Jentzen v. Pruter, 180 N.W. 1004, 148 Minn. 8.
N.Y.—Slocum v. Hooker, 13 Barb. 536, reversing 12 Barb. 563, 6 How.Pr. 167.
Ratification see supra § 74.

97. U.S.—Percival v. Luce, C.C.A. Nev., 114 F.2d 774.

98. Ky.—Younce v. Duty, 265 S.W. 776, 205 Ky. 274.
Note given for stock
Infant cannot recover on a note given for corporate stock until he delivers or tenders stock.—Younce v. Duty, supra.

99. Ark.—Harris v. Columbia County Bank, 298 S.W. 872, 175 Ark. 143.
Me.—Shaw v. Philbrick, 151 A. 423, 129 Me. 259, 74 A.L.R. 290.
Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.
31 C.J. p 1113 note 34.
Recovery of deposit in bank
Under a statute authorizing a bank to pay a minor's deposit to him, and making the receipt or check of the minor valid, a minor may recover a deposit which the bank has refused to return, because the money had

breach,[1] or he may sue to disaffirm a contract.[2]

Under the rule that the infancy of a person does not prevent him from being sued, as stated supra § 103, an infant may be sued on a contract which he cannot disaffirm, as discussed supra §§ 76, 78 as well as on a contract which he can disaffirm but has not disaffirmed, as discussed supra §§ 75–86, or which he has ratified, as discussed supra § 74; but in a proper case he can avoid liability under the contract by interposing his infancy as a defense.[3] It has been held that he may be held liable in assumpsit for money tortiously taken by him.[4]

c. Respecting Property Rights

In the absence of statute to the contrary, an infant may sue to maintain his property rights, as by an action for partition; or he may be sued for the enforcement of property rights against him.

An infant may institute and maintain such actions as may be necessary and appropriate to maintain his property rights.[5] In a proper case an infant owner of realty may bring a writ of entry[6] or trespass,[7] or he may maintain an action for use and occupation[8] or for damages for injury to his land[9] or to his interest in land,[10] or he may bring ejectment for the recovery of his land,[11] and it is not necessary for him to go into equity to disaffirm his voidable conveyance.[12] An infant may contest a will.[13] The remedy of an infant, who has been induced by fraud to sell his land, on the disaffirmance of the transaction, but not seeking to set aside the sale, is at law for damages[14] and not in equity.[15]

Against infant. In the absence of statutory provision to the contrary,[16] property rights may be enforced in actions or suits against infants as defendants,[17] when such rights exist.[18] Ejectment

been withdrawn by another on a forged check, and the minor had executed an agreement to release the bank from responsibility in regard to the money.—Harris v. Columbia County Bank, 298 S.W. 872, 175 Ark. 143.

No right of action for services paid for

Iowa.—Murphy v. Johnson, 45 Iowa 57.

1. Ala.—Cleveland v. Towle, 106 So. 58, 21 Ala.App. 161, certiorari granted Ex parte Towle, 106 So. 60, 213 Ala. 129.
Va.—Humphries v. Boxley Bros. Co., 135 S.E. 890, 146 Va. 91, 49 A.L.R. 1427.
31 C.J. p 1113 note 35.

Measure of damages

N.Y.—Joseph v. Schatzkin, 181 N.E. 464, 259 N.Y. 241, reversing 253 N.Y.S. 985, 234 App.Div. 747—Fishman v. All American Sportwear Co., 4 N.Y.S.2d 48, 167 Misc. 861.

2. Ark.—Bailey v. Runyan, 27 S.W. 2d 1020, 181 Ark. 755.
Ga.—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784.

At law or in equity

Ark.—Bailey v. Runyan, 27 S.W.2d 1020, 181 Ark. 755.
Avoidance of contract generally see supra § 75.
Rights and remedies on disaffirmance see supra § 75.

3. N.Y.—Munger v. Hees, 28 Barb. 75.
Pa.—Yubas v. Witaskis, 95 Pa.Super. 296.
Pleading infancy as a defense see infra § 116.

4. Me.—Shaw v. Coffin, 58 Me. 254, 4 Am.R. 290.
Vt.—Elwell v. Martin, 32 Vt. 217.
Liability for tort connected with contracts see supra § 89.

5. Kan.—Guy v. Hansow, 122 P. 879, 86 Kan. 933.
31 C.J. p 1113 note 44.

6. Mass.—Jennings v. Collins, 99 Mass. 29, 96 Am.D. 687.

7. N.Y.—Muller v. Manhattan R. Co., 108 N.Y.S. 852, 124 App.Div. 295, affirmed 88 N.E. 1126, 195 N.Y. 539.
31 C.J. p 1114 note 47.

8. N.Y.—Porter v. Bleiler, 17 Barb. 149.

9. N.Y.—Muller v. Manhattan R. Co., 108 N.Y.S. 852, 124 App.Div. 295, affirmed 88 N.E. 1126, 195 N.Y. 539.
W.Va.—McDodrill v. Pardee & Curtin Lumber Co., 21 S.E. 878, 40 W. Va. 564.

10. N.J.—Jackson v. Todd, 25 N.J. Law 121, reversed on other grounds 26 N.J.Law 525.

Waste

An infant owner of his reversionary interest in lands may have an action for injury of a permanent character amounting to waste.—Jackson v. Todd, supra.

11. Miss.—Conn v. Boutwell, 58 So. 105, 101 Miss. 353.
N.Y.—Weidersum v. Naumann, 10 Abb.N.Cas. 149, 62 How.Pr. 369.

12. Miss.—Conn v. Boutwell, 58 So. 105, 101 Miss. 353.

13. Ind.—Campbell v. Fichter, 81 N. E. 661, 168 Ind. 645, 11 Ann.Cas. 1089.
Who may contest will generally see the C.J.S. title Wills § 329, also 68 C.J. p 928 note 29–p 933 note 11.

14. Or.—Marshall v. Gustin, 170 P. 312, 89 Or. 53, opinion adhered to 173 P. 461, 89 Or. 53.

15. Or.—Marshall v. Gustin, supra.

16. Okl.—Pfister v. Johnson, 49 P. 2d 174, 173 Okl. 541, 102 A.L.R. 31.
31 C.J. p 1114 note 58.

17. Okl.—Pfister v. Johnson, supra.
31 C.J. p 1114 note 59.

Foreclosure of mortgage

Under statute providing that when an infant is seized of any estate in trust, whether by mortgage or otherwise, for another person who may be entitled in law to have conveyance of such estate, court may "decree" that infant shall convey such estate in such manner as it may direct, where trustee under a deed of trust is an infant and a foreclosure of the deed of trust is sought, mortgagee's exclusive remedy is an action in the nature of an equitable proceeding to foreclose a mortgage since no other remedy is given by statute.—Riddick v. Davis, 16 S.E.2d 662, 220 N.C. 120.

18. Tex.—Brady v. Brady, 139 S.W. 867, 61 Tex.Civ.App. 288.
31 C.J. p 1114 note 60.

Quieting title

(1) An action to quiet title will not lie against an infant for the purpose of indirectly defeating his right to appeal, especially where its effect is merely to subject the same parties to repeated litigation over the same subject matter.—Sawyer v. Ware, 128 P. 273, 36 Okl. 139.

(2) Nor will such an action lie where only purpose thereof is to defeat minor's right to show cause against final order rendered against him in proceeding to authorize administrator's sale of land.—Pfister v. Johnson, 49 P.2d 174, 173 Okl. 541, 102 A.L.R. 31.
31 C.J. p 1114 note 60 [a].

Failure to till land, or loss of opportunity to lease

Recovery for failure properly to

may lie against an infant.[19] Where an action is brought to recover property sold to an infant, and infancy and partial payments are pleaded, the right to recover the property and the right of the infant to be repaid what he claims he has paid on the purchase price may both be tried in the same action.[20]

Partition. Except to the extent that the right is prohibited or limited by statute,[21] an infant, when properly represented by some one who may adequately enforce or protect his rights, as discussed infra §§ 107–113, generally is entitled to sue for, and obtain, partition under the same circumstances as an adult.[22] The rule, however, is subject to the important limitation that the courts will decree partition in proceedings instituted by infants for partition only where it would be for their best interests to do so,[23] especially where there is a positive statutory declaration to that effect;[24] and this limitation is not affected by a statute providing that, when land is held by several persons jointly, "whether any or all of the claimants are minors or of full age, any one of the persons interested therein may compel a partition."[25]

d. For Torts

An infant may sue or be sued for tort. In case of injury through another's negligence or tort, damages may be awarded to him for pain and suffering, permanent injuries, and the impairment of his earning power after attaining majority, but, ordinarily, not for the impairment of his earning capacity during infancy, for loss of time or services, for expenses in curing his injuries, or for prenatal injuries.

An infant may maintain an action against a wrongdoer for tort.[26] He may maintain trover,[27] slander,[28] or libel,[29] or sue for damages for personal injuries received through the negligence or other tort of another.[30]

Damages. An infant injured through another's tort or negligence is entitled to reasonable compensation for his injuries,[31] and may recover for his mental or physical pain and sufferings,[32] his permanent injuries,[33] and for the impairment of his pow-

till and sow the land or for the loss of an opportunity to lease it cannot be had by seller from minors rescinding purchase of land.—Le Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal.App. 536.

19. Me.—Marshall v. Wing, 50 Me. 62.
N.Y.—McCoon v. Smith, 3 Hill 147, 38 Am.D. 623.
W.Va.—Stewart v. Parr, 82 S.E. 259, 74 W.Va. 327.

20. Neb.—Curtice Co. v. Kent, 131 N.W. 944, 89 Neb. 496, 52 L.R.A., N.S., 723.
31 C.J. p 1114 note 62.

21. **In New York**
(1) Under Code Civ.Proc. § 1534, now Civ.Pract.Act § 1015, an infant can bring an action for partition only on the written authority of the surrogate.—Thompson v. Hart, 69 N.Y.S. 223, 58 App.Div. 439, affirmed 61 N.E. 1135, 169 N.Y. 571—47 C.J. p 347 note 5.

(2) The surrogate's consent may be supplied after the commencement of the action.—Pearsall v. Rosebrook, 85 N.Y.S. 526, 42 Misc. 10.

(3) Under earlier statutes an infant could not maintain a partition suit either separately or jointly with adult cotenants.—Postley v. Kain, 4 Sandf.Ch. 542—47 C.J. p 347 note 4.

22. Ala.—Dickinson v. Jordan, 98 So. 886, 210 Ala. 602.
47 C.J. p 347 note 7.

Sale for partition
Ky.—Murdock v. Loeser, 87 S.W. 808, 27 Ky.L. 1057.

23. Ill.—Miller v. Lanning, 71 N.E. 1115, 211 Ill. 620, 622.
47 C.J. p 347 note 9.

24. N.J.—Brown v. Garton, 98 A. 845, 86 N.J.Eq. 289.
47 C.J. p 347 note 10.

25. Ill.—Ames v. Ames, 36 N.E. 110, 148 Ill. 321.

26. Ga.—Waters v. Bridges, 191 S.E. 297, 55 Ga.App. 763.
31 C.J. p 1114 note 63.

27. Fla.—Toomer v. Jacksonville Fourth Nat. Bank, 67 So. 225, 68 Fla. 555.
Tenn.—Benton v. Pope, 5 Humphr. 392.

28. Ga.—Hurst v. Goodwin, 40 S.E. 764, 114 Ga. 585, 88 Am.S.R. 43.
Ill.—Stewart v. Howe, 17 Ill. 71.

No recovery for language not slanderous per se
N.Y.—Soderberg v. Proctor, 30 N.Y.S.2d 113, 262 App.Div. 971.

29. Mo.—Munden v. Harris, 134 S.W. 1076, 153 Mo.App. 652.

30. Cal.—Aubel v. Sosso, 236 P. 319, 72 Cal.App. 57.
Ga.—Waters v. Bridges, 191 S.E. 297, 55 Ga.App. 763—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369.
Mich.—Gumienny v. Hess, 280 N.W. 809, 285 Mich. 411.
Mont.—Burns v. Eminger, 276 P. 437, 84 Mont. 397.
Tex.—Fall v. Weber, Civ.App., 47 S.W.2d 365.
Wis.—Callies v. Reliance Laundry Co., 206 N.W. 198, 188 Wis. 376, 42 A.L.R. 712.
31 C.J. p 1114 note 67.

Against state
N.Y.—Louden v. State, 41 N.Y.S.2d 455.
Contributory negligence of infant see the C.J.S. title Negligence §§ 144–149, also 45 C.J. p 998 note 85–p 1011 note 18.

31. Del.—Sund v. Wilmington & P. Traction Co., 114 A. 281, 1 W.W. Harr. 328.

32. Conn.—Ruthkowski v. Connecticut Light & Power Co., 123 A. 25, 100 Conn. 49.
Del.—Sund v. Wilmington & P. Traction Co., 114 P. 281, 1 W.W.Harr. 328.
Ga.—Western & A. R. Co. v. Young, 7 S.E. 912, 81 Ga. 397, 12 Am.S.R. 320—Waters v. Bridges, 191 S.E. 297, 55 Ga.App. 763—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369.
Ky.—Chesapeake & O. Ry. Co. v. Honaker, 226 S.W. 394, 190 Ky. 125—Reliance Textile & Dye Works v. Mitchell, 71 S.W. 425, 24 Ky.L. 1286.
Mo.—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326.
Tenn.—Wolfe v. Vaughn, 152 S.W.2d 631, 177 Tenn. 678.
Tex.—Texas & P. Ry. Co. v. Malone, 38 S.W. 538, 15 Tex.Civ.App. 56.
Wis.—Callies v. Reliance Laundry Co., 206 N.W. 198, 188 Wis. 376, 42 A.L.R. 712.
31 C.J. p 1115 note 74.

Damages awarded under the head of "temporary injury" will be considered as given for physical pain and suffering only, where the charge submitted the amount of damages sustained by reason of "physical pain" and the evidence was confined to such pain.—Texas & P. Ry. Co. v. Malone, 38 S.W. 538, 15 Tex.Civ. App. 56.

33. Conn.—Ruthkowski v. Connecti-

er to earn money after arriving at majority,[34] although he has never earned anything and no one can tell with certainty what his earning capacity will be.[35]

Since the parent is entitled to the services and earnings of the child as long as the latter is legally under his custody or control, as discussed in the C.J.S. title Parent and Child §§ 28–39, also 46 C.J. p 1281 note 92–p 1294 note 94, ordinarily an infant suing for personal injuries cannot recover, as an element of his damages, for the impairment of his earning capacity during infancy,[36] or for loss of time or services,[37] when he is under the control of his parents.[38] Such a recovery, however, may be had by the infant where it is permitted by statute,[39] where the infant has been emancipated,[40] or where the parent waives or relinquishes his claim for damages that might accrue to him, in favor of the infant.[41] For the same reason, an infant is not enti-

cut Light & Power Co., 123 A. 25, 100 Conn. 49.
Del.—Sund v. Wilmington & P. Traction Co., 114 A. 281, 1 W.W.Harr. 328.
Ga.—Western & A. R. Co. v. Young, 7 S.E. 912, 81 Ga. 397, 12 Am.S.R. 320.
Kan.—Murphy v. Ludowici Gas & Oil Co., 150 P. 581, 96 Kan. 321.
Ky.—Reliance Textile & Dye Works v. Mitchell, 71 S.W. 425, 24 Ky.L. 1286.
Mo.—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326.

34. Ga.—Western & A. R. Co. v. Young, 7 S.E. 912, 81 Ga. 397, 12 Am.S.R. 320.
Ky.—City of Pineville v. Lawson, 9 S.W.2d 517, 225 Ky. 542—Bong v. Webster, 290 S.W. 662, 217 Ky. 781—Chesapeake & O. Ry. Co. v. Honaker, 226 S.W. 394, 190 Ky. 125.
Mich.—Gumienny v. Hess, 280 N.W. 809, 285 Mich. 411—Sadlowski v. Meeron, 215 N.W. 422, 240 Mich. 306, opinion adhered to 220 N.W. 680, 243 Mich. 602.
Mo.—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326—Schmits v. St. Louis, I. M. & S. R. Co., 24 S.W. 472, 119 Mo. 256, 23 L.R.A. 250—Rosenkranz v. Lindell Ry. Co., 18 S.W. 890, 108 Mo. 9, 32 Am.S.R. 588.
N.Y.—Traver v. Eighth Ave. R. Co., 42 N.Y. 497, 4 Abb.App.Dec. 422, 3 Keyes 497, 3 Transcr. 203, 6 Abb. Pr.,N.S., 46.
Okl.—City of Miami v. Finley, 240 P. 317, 112 Okl. 97.
Pa.—McGinley v. Philadelphia & R. Ry. Co., 101 A. 825, 257 Pa. 519.
Tenn.—Wolfe v. Vaughn, 152 S.W.2d 631, 177 Tenn. 678.
Tex.—Southern Traction Co. v. Owens, Civ.App., 198 S.W. 150, error refused.
Vt.—Rafus v. Daley, 154 A. 695, 103 Vt. 426.
Wis.—Callies v. Reliance Laundry Co., 206 N.W. 198, 188 Wis. 376, 42 A.L.R. 712.
31 C.J. p 1115 note 76.

35. Mo.—Rosenkranz v. Lindell Ry. Co., 18 S.W. 890, 108 Mo. 9, 32 Am. S.R. 588.
Okl.—City of Miami v. Finley, 240 P. 317, 112 Okl. 97.

36. Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 155, 43 Ariz. 57, quoting **Corpus Juris.**
Ill.—Orr v. Wahlfeld Mfg. Co., 179 Ill.App. 235.
Ky.—Louisville & N. R. Co. v. Bryant, 252 S.W. 145, 200 Ky. 177.
Mich.—Harris v. Crawley, 126 N.W. 421, 161 Mich. 383.
Mo.—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 599, 347 Mo. 326, quoting **Corpus Juris.**
Neb.—Chicago, B. & Q. R. Co. v. Krayenbuhl, 91 N.W. 880, 65 Neb. 889, 59 L.R.A. 920.
N.C.—Hurt v. Western Carolina Power Co., 140 S.E. 730, 194 N.C. 696—Gillis v. Transit Corporation of Norfolk, 137 S.E. 153, 193 N.C. 346—Shipp v. United Stage Lines, 135 S.E. 339, 341, 192 N.C. 475, citing **Corpus Juris**—Hayes v. Southern Ry. Co., 53 S.E. 847, 141 N. C. 195.
Tenn.—Wolfe v. Vaughn, 152 S.W. 2d 631, 634, 177 Tenn. 678, quoting **Corpus Juris.**
Tex.—Tyrrell Hardware Co. v. Orgeron, Civ.App., 289 S.W. 1040—Southern Traction Co. v. Owens, Civ.App., 198 S.W. 150.
W.Va.—Cook v. Virginian Ry. Co., 125 S.E. 106, 97 W.Va. 420.
31 C.J. p 1115 note 69.

Where parents sue solely as minor's representatives without asking anything in their own behalf, no amount can be awarded for medical expenses or other community expenditures caused by injury to son. —Miller, for Use of Miller, v. Trascher, La.App., 145 So. 27.
Parent's right of action see the C. J.S. title Parent and Child § 41, also 46 C.J. p 1294 note 97–p 1302 note 2.

37. Ala.—Doullut v. Hoffman, 86 So. 73, 204 Ala. 33.
Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 155, 43 Ariz. 57.
Minn.—Dentinger v. Uleberg, 213 N. W. 377, 171 Minn. 81.
N.C.—Gillis v. Transit Corporation of Norfolk, 137 S.E. 153, 193 N.C. 346 —Shipp v. United Stage Lines, 135 S.E. 339, 192 N.C. 475.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.
Tenn.—Wolfe v. Vaughn, 152 S.W. 2d 631, 634, 177 Tenn. 678.

Services in home
An injured school girl cannot recover for herself the value to her parents of the services in the home which she was prevented from rendering because of her injuries.—Public Utilities Co. v. Whitehead, 134 N.E. 894, 78 Ind.App. 85.

38. Ariz.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.
Ill.—Meece v. Holland Furnace Co., 269 Ill.App. 164.
Tenn.—Wolfe v. Vaughn, 152 S.W.2d 631, 634, 177 Tenn. 678.
31 C.J. p 1115 note 72.

39. Me.—Close v. Portland Terminal Co., 145 A. 388, 128 Me. 6.

Under Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59, an unemancipated minor may maintain an action in his own name, by his next friend, to recover the loss of earnings and medical expenses resulting from a personal injury.—Close v. Portland Terminal Co., supra.

40. Mich.—Harris v. Crawley, 126 N.W. 421, 161 Mich. 383.
Minn.—Dentinger v. Uleberg, 213 N. W. 377, 171 Minn. 81.
Okl.—Harriss-Irby Cotton Co. v. Duncan, 157 P. 746, 57 Okl. 761.
Tex.—Schaff v. Sanders, Com.App., 269 S.W. 1034, affirming, Civ.App., 257 S.W. 670, and rehearing denied, Com.App., 271 S.W. xiv.
W.Va.—Cook v. Virginian Ry. Co., 125 S.E. 106, 97 W.Va. 420.

Statements by minor plaintiff tending to show his emancipation, in an action for injuries to a minor, whose father is not a party to the proceeding, where no issue as to emancipation of plaintiff is made by the pleadings, do not authorize the allowance of damages for his impaired earning capacity prior to attaining his majority, since a judgment for plaintiff for such damages in that action will not be binding against his father in an action for such impaired earning capacity.—Louisville & N. R. Co. v. Bryant, 252 S.W. 145, 200 Ky. 177.

41. Ky.—City of Pineville v. Lawson, 9 S.W.2d 517, 225 Ky. 542—Bong v. Webster, 290 S.W. 662, 217 Ky. 781.
Tex.—Schaff v. Sanders, Com.App., 269 S.W. 1034, affirming, Civ.App.,

tled to recover for medical, surgical, hospital, or nursing expenses incurred in curing or relieving his injuries,[42] unless he alone is responsible therefor by reason of his emancipation[43] or the incompetency or death of his parents;[44] unless he has paid such expenses or incurred responsibility therefor;[45] unless recovery therefor is permitted by statute;[46] or unless the parent waives or relinquishes the right to recover such expenses, in the infant's favor.[47]

Prenatal injury. At common law, and in the absence of a statute to the contrary, an infant has no right of action for injuries sustained by him while in ventre sa mere.[48] Under a statutory provision, however, that a child conceived but not yet born is to be deemed an existing person as far as may be necessary for its interests in the event of its subsequent birth, a child may maintain a suit for injuries sustained by it before its birth through the negligence of another.[49]

Against infant. An infant, being liable for his

257 S.W. 670, and rehearing denied, Com.App., 271 S.W. xiv.

A minor is entitled to recover for loss of earning capacity before, as well as after, becoming of age, where the suit is brought by the father as next friend, and father as guardian petitions to become a party plaintiff, since the father vests his right of action for services in the minor.—City of Pineville v. Lawson, 9 S.W.2d 517, 225 Ky. 542.

42. Ala.—Doullut v. Hoffman, 86 So. 73, 204 Ala. 33.
Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.
Cal.—Sullivan v. Thompson, 87 P.2d 62, 30 Cal.App.2d 675—McManus v. Arnold Taxi Corporation, 255 P. 755, 82 Cal.App. 215.
Del.—Hobbs v. Lokey, 183 A. 631, 7 W.W.Harr. 408.
Ga.—Sheffield v. Lovering, 180 S.E. 523, 51 Ga.App. 353—Rogers v. McKinley, 172 S.E. 662, 48 Ga.App. 262.
Ill.—Meece v. Holland Furnace Co., 269 Ill.App. 164.
Minn.—Dentinger v. Uleberg, 213 N.W. 377, 171 Minn. 81.
Mo.—Butler v. Metropolitan St. R. Co., 93 S.W. 877, 117 Mo.App. 354.
N.Y.—Ferguson v. Ruppert, 3 N.Y.S.2d 9, 166 Misc. 530.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.
Tenn.—Wolfe v. Vaughn, 152 S.W.2d 631, 177 Tenn. 678.
Tex.—Tyrrell Hardware Co. v. Orgeron, Civ.App., 289 S.W. 1040.
W.Va.—McCallam v. Hope Natural Gas Co., 117 S.E. 148, 93 W.Va. 426.
Wis.—Osborne v. Montgomery, 234 N.W. 372, 203 Wis. 223—Grimes v. Snell, 183 N.W. 895, 174 Wis. 557.

Medical expenses paid by parent or another
Wis.—Kliegel v. Aitken, 69 N.W. 67, 94 Wis. 432, 59 Am.S.R. 901, 35 L.R.A. 249—Peppercorn v. Black River Falls, 61 N.W. 78, 89 Wis. 38, 46 Am.S.R. 818.

43. Wis.—Tande v. Vernon County, 276 N.W. 359, 226 Wis. 602—Knutson v. Fenelon, 227 N.W. 857, 200 Wis. 261.

Expenses after infant reaches majority
N.J.—Sharkey v. Herman Bros., 127 A. 525, 3 N.J.Misc. 126, affirmed Sharkey v. Heymann Bros., 130 A. 920, 102 N.J.Law 224.

44. Tenn.—Wolfe v. Vaughn, 152 S.W.2d 631, 177 Tenn. 678.
W.Va.—Grim v. Moore, 3 S.E.2d 448, 121 W.Va. 299.
Wis.—Knutson v. Fenelon, 227 N.W. 857, 200 Wis. 261.

45. Cal.—Sullivan v. Thompson, 87 P.2d 62, 30 Cal.App.2d 675—Galwey v. Pacific Auto Stages, 273 P. 866, 96 Cal.App. 169—Aubel v. Sosso, 236 P. 319, 72 Cal.App. 57.
Del.—Hobbs v. Lokey, 183 A. 631, 7 W.W.Harr. 408.
Ind.—Central Indiana R. Co. v. Clark, 112 N.E. 892, 63 Ind.App. 49.
N.C.—Hawkins v. Mauney, 190 S.E. 715, 211 N.C. 467.
Wis.—Knutson v. Fenelon, 227 N.W. 857, 200 Wis. 261.

46. Me.—Close v. Portland Terminal Co., 145 A. 388, 128 Me. 6.

Under Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59, recovery for medical expenses is allowed.—Close v. Portland Terminal Co., supra.

Statute precluding action by parent
Under a statutory provision that no parent may sue a county on account of injuries to a minor child, the fact that father had made written assignment of all claims which he might have to his son does not entitle the minor son to recover medical expenses necessitated by injuries sustained through negligence of county, since father had no right of action against county.—Tande v. Vernon County, 276 N.W. 359, 226 Wis. 602.

In New York, under Lien L. § 189, in a personal injury action by an infant, the amount, for which a lien by hospital for hospitalization of infant has been filed in accordance with statute, may be recovered.—Ferguson v. Ruppert, 3 N.Y.S.2d 9, 166 Misc. 530.

47. Ariz.—Pearson & Dickerson Contractors v. Harrington, 137 P.2d 381.
Conn.—Carangelo v. Nutmeg Farm, 162 A. 4, 115 Conn. 457, 82 A.L.R. 1320.
Ill.—White v. Seitz, 258 Ill.App. 318.

A parent suing as the infant's next friend waives or relinquishes in the infant's favor the right to recover such expenses.
Conn.—Carangelo v. Nutmeg Farm, 162 A. 4, 115 Conn. 457, 82 A.L.R. 1320.
Ill.—McHugh v. Hirsch Clothing Co., 31 N.E.2d 326, 308 Ill.App. 272.

48. Ala.—Stanford v. St. Louis-San Francisco Ry. Co., 108 So. 566, 214 Ala. 611.
Cal.—Scott v. McPheeters, 92 P.2d 678, 33 Cal.App.2d 629, hearing denied 93 P.2d 562, 33 Cal.App.2d 629.
Ill.—Smith v. Luckhardt, 19 N.E.2d 446, 299 Ill. 100.
Mich.—Newman v. City of Detroit, 274 N.W. 710, 281 Mich. 60.
Mo.—Buel v. United Rys. Co. of St. Louis, 154 S.W. 71, 72, 248 Mo. 126, 45 L.R.A.,N.S., 625, Ann.Cas.1914C 513.
N.J.—Stemmer v. Kline, 26 A.2d 489, 128 N.J.Law 455, concurring and dissenting opinions 26 A.2d 634, 128 N.J.Law 455, reversing 17 A.2d 58, 19 N.J.Misc. 15—Ryan v. Public Service Coordinated Transport, 14 A.2d 52, 18 N.J.Misc. 429.
N.Y.—In re Roberts' Estate, 286 N.Y.S. 476, 158 Misc. 698.
Ohio.—Krantz v. Cleveland, Akron, Canton Bus Co., 32 Ohio N.P.,N.S., 445.
Pa.—Berlin v. J. C. Penney Co., 16 A.2d 28, 339 Pa. 547.
Contra Kline v. Zuckerman, 4 Pa. Dist. & Co. 227.
R.I.—Gorman v. Budlong, 49 A. 704, 23 R.I. 169.
Tex.—Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 124 Tex. 347, 97 A.L.R. 1513.
31 C.J. p 1115 note 77.

49. Cal.—Scott v. McPheeters, 92 P.2d 678, 33 Cal.App.2d 629, hearing denied 93 P.2d 562, 33 Cal.App.2d 629.

Malpractice suit against physician for injuries sustained by child before its birth by the alleged negligent use of metal clamps and forceps incident to the delivery of the child.—Scott v. McPheeters, supra.

torts, as stated supra § 87, may be sued therefor.[50]

§ 105. Protection of Infant's Interest by Court

It is the right and duty of the court to protect the rights and interests of an infant party, plaintiff or defendant, to a litigation, whether or not the proper relief is asked in the pleadings or the claim or defense is properly pleaded.

It is the policy of the law to protect the interests of minor children incapable of looking after their own affairs;[51] and, since, as stated heretofore, an infant becomes a ward of the court, particularly of a court of equity, on the institution of an action or proceeding affecting his person, as discussed supra § 7, or property, as discussed supra § 57, it is the right and duty of the court, even though it has appointed a representative for the infant,[52] to protect the rights and interests of an infant party to litigation[53] on its own motion,[54] whether he is a plaintiff[55] or defendant,[56] whether or not the proper relief is asked in the pleadings,[57] and whether or not the claim or defense is properly pleaded.[58]

50. Ala.—Oliver v. McClellan, 21 Ala. 675—Pritchett v. Fife, 62 So. 1001, 8 Ala.App. 462.

51. Cal.—In re Guardianship of Carlon's Estate, 110 P.2d 488, 43 Cal.App.2d 204.
Mich.—Zoski v. Gaines, 260 N.W. 99, 271 Mich. 1.
N.Y.—Pieri v. Nebbia, 34 N.Y.S.2d 317, 178 Misc. 388.

52. Ill.—Schorow v. Schorow, 20 N.E.2d 143, 299 Ill.App. 618.
Appointment of next friend or guardian ad litem see infra § 110.

53. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
Ala.—Higdon v. Higdon, 11 So.2d 140, 243 Ala. 571.
Ark.—Morgan v. Stocks, 122 S.W.2d 953, 197 Ark. 368—Fidelity & Deposit Co. of Maryland v. Meyer, 121 S.W.2d 873, 197 Ark. 42—Ingram v. Raiford, 298 S.W. 507, 174 Ark. 1127.
Colo.—Rausch v. Cozian, 282 P. 251, 86 Colo. 389.
Ga.—Clemmons v. State, 16 S.E.2d 883, 885, 66 Ga.App. 16, citing **Corpus Juris.**
Ill.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535—Waechter v. Industrial Commission, 11 N.E.2d 378, 367 Ill. 256—Swiney v. Womack, 175 N.E. 419, 343 Ill. 278—Millage v. Noble, 166 N.E. 50, 334 Ill. 315—Tymony v. Tymony, 163 N.E. 393, 331 Ill. 420—Anderson v. Anderson, 49 N.E.2d 841, 320 Ill.App. 75—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265—Desiron v. Peloza, 32 N.E.2d 316, 306 Ill.App. 582—Zozaski v. Mather Stock Car Co., 38 N.E.2d 825, 312 Ill.App. 585—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209—Ellison v. Ward, 13 N.E.2d 649, 294 Ill.App. 197—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill.App. 397.
Ind.—Norris v. Mingle, 29 N.E.2d 400, 217 Ind. 516—Colvert v. Colvert, 180 N.E. 192, 95 Ind.App. 325.
Ky.—Ray v. Spencer, 162 S.W.2d 789, 290 Ky. 756—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522—Cornett v. Muncy, 15 S.W.2d 251, 228 Ky. 390—Farrow v. Caudill, 250 S.W. 989, 199 Ky. 290.
Mo.—Gray v. Clement, 246 S.W. 940, 296 Mo. 497.
N.Y.—Louden v. State, 41 N.Y.S.2d 455, 181 Misc. 139—Melnick v. Lazzio, 293 N.Y.S. 261, 161 Misc. 791—In re Kempf's Estate, 289 N.Y.S. 74, 159 Misc. 298, reversed on other grounds In re Kempf's Will, 297 N.Y.S. 307, 252 App.Div. 28, affirmed 16 N.E.2d 123, 278 N.Y. 613—DeGristina v. Swift & Co., 285 N.Y.S. 34, 158 Misc. 91—In re Ferguson's Guardianship, 41 N.Y.S.2d 862, affirmed 46 N.Y.S.2d 222, 266 App. Div. 1016—Leonard v. Home Owners Loan Corporation, 39 N.Y.S.2d 127.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561—Schulte v. Herndon, 84 P.2d 607, 184 Okl. 77—Tucker v. Leonard, 291 P. 124, 144 Okl. 264—Tucker v. Leonard, 291 P. 135, 144 Okl. 258—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.
R.I.—Roullard v. McSoley, 172 A. 326, 54 R.I. 232.
S.C.—McDavid v. McDavid, 197 S.E. 204, 187 S.C. 127, 116 A.L.R. 1412—McCoy v. Provident Life Ins. Co., 153 S.E. 468, 156 S.C. 496.
Tenn.—Wilson v. Mullen, 11 Tenn. App. 319, 336, quoting **Corpus Juris.**
Tex.—Williams v. Patterson, Com. App., 288 S.W. 132, reversing, Civ. App., 276 S.W. 750—Dial v. Martin, Civ.App., 37 S.W.2d 166, 175, quoting **Corpus Juris.**
Va.—Newman v. Light, 148 S.E. 818, 152 Va. 760.
Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.
W.Va.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 113 W.Va. 286.
31 C.J. p 1115 note 84.
Duty to protect property rights of infant see supra § 57.

54. Fla.—Mote v. Morton, 41 So. 607, 52 Fla. 548.
Ill.—Tymony v. Tymony, 163 N.E. 393, 331 Ill. 420—Mason v. Truitt, 100 N.E. 202, 257 Ill. 18—Johnson v. Turner, 49 N.E.2d 297, 319 Ill. App. 265—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill. App. 209—Schrader v. Schrader, 280 Ill.App. 561.
Neb.—Everson v. Hurn, 131 N.W. 1130, 89 Neb. 716.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561.
Tenn.—Wilson v. Mullen, 11 Tenn. App. 319.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
Noticing objections
The court is bound to notice legitimate and substantial objections whether or not raised by the infant's representatives.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151.

55. Fla.—Mote v. Morton, 41 So. 607, 52 Fla. 548.
N.Y.—Ambrosius v. Ambrosius, 152 N.Y.S. 562, 167 App.Div. 244.
Pa.—Dehart v. Kerlin, 4 Pa.Co. 396.
Tenn.—Wilson v. Mullen, 11 Tenn. App. 319.

56. N.J.—Bunting v. Brown, 99 A. 840, 87 N.J.Eq. 20.
Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352.
Tenn.—Wilson v. Mullen, 11 Tenn. App. 319.

57. Tenn.—Wilson v. Mullen, 11 Tenn.App. 319.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
31 C.J. p 1115 note 88.
Rights of infant disclosed by evidence are protected without regard to pleadings.—Magevney v. Karsch, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.

58. Fla.—Parken v. Safford, 37 So. 567, 48 Fla. 290.
Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 287, 287 Ill. App. 397—Doubet v. Doubet, 196 Ill.App. 289.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 166, 89 A.L.R. 571.
"In all procedural matters the courts are uniformly more liberal

In order to protect fully the infant's interest the court should exercise a general supervision over the conduct of the next friend or guardian ad litem,[59] advise such representative as to what steps to take or what pleadings to file,[60] and see that the infant's rights are in no way sacrificed[61] or prejudiced or abandoned,[62] that all proper defenses are made for him,[63] and that he is given a fair and impartial hearing,[64] before judgment is rendered against him.[65]

Limitation. The duty and power of the court to protect the interest of an infant litigant are limited to cases wherein the adult parties to the litigation have no rights which are prejudiced thereby,[66] and will not allow infancy to be used as a means for the perpetration of fraud.[67] The court has no power to deny to the adult party the relief to which he shows himself entitled under the law merely because the interest of an infant might be promoted by such refusal.[68]

Compromise and settlement of litigation. The court, such as a court of equity, may authorize the compromise or settlement of a litigation affecting the rights of an infant party thereto, where the evidence shows that a compromise is proper and for the best interests of the infant,[69] and any proposed settlement is subject to the approval of the court.[70] The court, however, should not permit the opposing party to furnish or suggest an attorney to carry on the proceeding for the effectuation of a settlement agreement.[71]

§ 106. Parties in General

a. Infant as real party
b. Necessary and proper parties and joinder
c. Designation or description of parties
d. Substitution of parties

a. Infant as Real Party

An infant is the real party to a suit prosecuted or defended on his behalf by a next friend or guardian ad litem.

Although a suit is prosecuted or defended on behalf of an infant by a next friend or a guardian

in dealing with the rights of children than with sui juris adults."—Smith v. Swope, 145 S.W.2d 827, 829, 284 Ky. 625.

59. Ala.—Midgley v. Ralls, 176 So. 799, 234 Ala. 685.
Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535.
Mo.—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660.
N.Y.—Downey v. Fogarty, 23 N.Y.S.2d 585, 175 Misc. 411.
Pa.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166.
Wis.—In re Jaeger's Will, 259 N.W. 852, 218 Wis. 1, 99 A.L.R. 738.
31 C.J. p 1116 note 90.

The court should examine the facts and circumstances carefully, in permitting an action for an infant by a next friend.—Kidd v. Kidd, 124 S.W.2d 66, 276 Ky. 271.

If guardian ad litem fails properly to protect interest of his ward, the court may compel him to do so.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315.

Special guardian

(1) The duties of a special guardian appointed by the court are very similar to those of an attorney, but court is solely responsible for appointment of special guardian, and person for whom he acts has no voice in his employment and therefore the law supervises more strictly the performance of special guardian's duties and takes greater precaution against possibility of negligence on his part than in case of a private attorney.—Downey v. Fogarty, 23 N.Y.S.2d 585, 175 Misc. 411.

(2) The surrogate's court will not advise a special guardian as to the performance of his duties in matters of procedure.—In re Balfe's Will, 20 N.Y.S.2d 474, 174 Misc. 279, denying motion 274 N.Y.S. 284, 152 Misc. 739, modified on other grounds 280 N.Y.S. 128, 245 App.Div. 22, and affirmed Application of De Mott, 27 N.Y.S.2d 472, 261 App.Div. 996, appeal denied In re Balfe's Estate, 28 N.Y.S.2d 153, 262 App.Div. 746.

60. N.Y.—In re Chittenden, Tuck. Surr. 251.
Okl.—American Inv. Co. v. Brewer, 181 P. 294, 74 Okl. 271.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166.

61. Ark.—Morgan v. Stocks, 122 S.W.2d 953, 197 Ark. 368.
Wis.—In re Jaeger's Will, 259 N.W. 852, 218 Wis. 1, 99 A.L.R. 738.
31 C.J. p 1116 note 92.

Court has broad discretion to see that equity is done in minor's action.—Pereira v. Toscano, 258 P. 429, 84 Cal.App. 526.

62. Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535—Ellison v. Ward, 13 N.E.2d 649, 294 Ill.App. 197.
31 C.J. p 1116 note 93.

Court cannot permit infants' rights to be prejudiced by waiver, omission, neglect, or design of guardian or other person, as far as it is within the power of the court to prevent it.—Union Chevrolet Co. v. Arrington, 138 So. 593, 162 Miss. 816.

63. Okl.—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.
31 C.J. p 1116 note 94.
Answer or defense for infants see infra § 116.

64. Ala.—Midgley v. Ralls, 176 So. 799, 234 Ala. 685.

65. Ky.—Shaefer v. Gates, 2 B.Mon. 453, 38 Am.D. 164.

66. Tex.—Morris v. Morris, 99 S.W. 872, 45 Tex.Civ.App. 60.

67. Ky.—Farrow v. Caudill, 250 S.W. 989, 199 Ky. 290.

The court especially will protect the innocent party, when to do otherwise involves an exception to the fundamental rule not to decree a forfeiture except on imperative grounds.—Farrow v. Caudill, supra.

68. Tex.—Morris v. Morris, 99 S.W. 872, 45 Tex.Civ.App. 60.
31 C.J. p 1116 note 99.

69. Ill.—Wolf v. Uhlemann, 156 N.E. 334, 325 Ill. 165—Matthews v. Doner, 127 N.E. 137, 292 Ill. 592.
N.C.—Reynolds v. Reynolds, 182 S.E. 341, 208 N.C. 578.
31 C.J. p 1116 note 96.
Compromise or settlement by or for infant generally see supra § 80.

70. N.Y.—In re Winkhous, 284 N.Y.S. 52, 157 Misc. 560.

Surrogate's court

Any proposed settlement in favor of infant child of deceased seaman in death action under federal statute would be wholly subject to approval of surrogate's court.—In re Winkhous, supra.

71. N.Y.—De Gristina v. Swift & Co., 285 N.Y.S. 34, 158 Misc. 91.

ad litem, the latter ordinarily cannot be considered a party to the cause,[72] but the infant is the real party,[73] whether the proceeding be one at law or one in equity;[74] and the infant's status as a party is not affected by his coming of age after the commencement of the suit.[75] However, a next friend may be regarded as a party for some purposes,[76] and is regarded as a party within the meaning of certain statutes relating to the conduct of suits.[77]

b. Necessary and Proper Parties and Joinder

An infant, and other persons, having an interest in the subject matter of a suit affecting the infant's estate or person are proper and necessary parties thereto, and generally should be joined as plaintiffs or defendants.

Persons who have an interest in, or claim on, the property or right in controversy are necessary parties,[78] and it is the duty of the court to direct that all persons be made parties to the litigation whose presence is necessary to give the court jurisdiction to grant the infant proper and adequate relief.[79] Persons who have no interest in the litigation are not necessary[80] or proper[81] parties.

Joining infants as parties. Whenever a suit is brought affecting the interests of infants, they are proper and necessary parties, and may or should be joined as such,[82] and a judgment or decree cannot affect an infant unless he was made a party to the suit in which it was rendered,[83] or unless his interest is properly represented in the suit by a party thereto, as considered in the C.J.S. title Judgments § 776, also 34 C.J. p 1000 notes 27, 28. On the other hand, they are not proper or necessary parties where their interests are not affected.[84] An infant cannot be made a party plaintiff to an action for the purpose only of defeating his rights.[85] Where infants and adults are joined as parties in the same action, the fact of infancy can be of no avail to the adults and they cannot claim that any more shall be proved against them than if all the parties were adults.[86]

In equity. It has been held that an infant party to a bill in equity, ordinarily should be made defendant rather than complainant;[87] but that, while the joining of an infant as plaintiff instead of as defendant may constitute error,[88] it is not such a jurisdictional defect as to render the decree void as against bona fide purchasers under it.[89] It has also

72. N.C.—Rabil v. Farris, 196 S.E. 321, 213 N.C. 414.
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.
Tex.—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465.
Va.—Kirby v. Gilliam, 28 S.E.2d 40, 182 Va. 111.
31 C.J. p 1116 note 10.

73. Ala.—Irwin v. Alabama Fuel & Iron Co., 110 So. 566, 215 Ala. 328.
N.C.—Rabil v. Farris, 196 S.E. 321, 213 N.C. 414.
N.Y.—Torrey v. State, 23 N.Y.S.2d 370, 175 Misc. 259.
Pa.—Haines v. Fitzgerald, 165 A. 52, 108 Pa.Super. 290.
Tex.—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, 1057, citing **Corpus Juris**, and affirmed 111 S.W.2d 688, 130 Tex. 465.
Va.—Kirby v. Gilliam, 28 S.E.2d 40, 182 Va. 111.
31 C.J. p 1116 note 11.

74. Vt.—Slafter v. Savage, 95 A. 790, 89 Vt. 352.

75. Pa.—Shoff v. Shoff, 46 Pa.Dist. & Co. 314, 48 Lanc.Rev. 177, 56 York Leg.Rec. 103.
Tex.—Deering v. Hurt, 2 S.W. 42.
31 C.J. p 1157 note 37.

76. Ala.—Irwin v. Alabama Fuel & Iron Co., 110 So. 566, 215 Ala. 328.
Nominal plaintiff
Ky.—Smith v. Swope, 145 S.W.2d 827, 284 Ky. 625.

77. Ala.—Swope v. Swope, 55 So. 418, 173 Ala. 157, Ann.Cas.1914A 537.
31 C.J. p 1116 note 14.

78. Ga.—Campbell v. Atlanta Coach Co., 200 S.E. 203, 58 Ga.App. 824, transferred, see 196 S.E. 769, 186 Ga. 77.
Okl.—American Inv. Co. v. Brewer, 181 P. 294, 74 Okl. 271.

79. Ky.—Andrews v. Hurt, 14 Ky.L. 765.
Okl.—American Inv. Co. v. Brewer, 181 P. 294, 74 Okl. 271.

80. N.Y.—Finn v. Post, 112 N.Y.S. 1046, 61 Misc. 136.
31 C.J. p 1117 note 17.

81. Ark.—Barker v. Fuestal, 147 S.W. 45, 103 Ark. 312.

82. Ala.—Hays v. McCarty, 195 So. 241, 239 Ala. 400—Amann v. Burke, 186 So. 769, 237 Ala. 380.
Cal.—Mabry v. Scott, 124 P.2d 659, 51 Cal.App.2d 245, certiorari denied Title Ins. & Trust Co. v. Mabry, 63 S.Ct. 75, 317 U.S. 670, 87 L.Ed. 538.
Ky.—Hickman County Board of Drainage Com'rs v. Union Stock Land Bank, 83 S.W.2d 511, 259 Ky. 823.
Mo.—In re Cordes' Estate, App., 116 S.W.2d 207.
Pa.—Slack v. Crozier, 31 Pa.Dist. & Co. 209, 26 North.Co. 150.
31 C.J. p 1117 note 21.
Minor and parent
Where a minor is injured and suit is brought by the father in his own right and as next friend of the minor, there is a proper joinder of plaintiffs.—Slack v. Crozier, supra.
Where infant joins in making of contract with an adult they may jointly sue for its enforcement.—American Film Co. v. Reilly, C.C.A. Cal., 278 F. 147.

83. Ky.—Hickman County Board of Drainage Com'rs v. Union Stock Land Bank, 83 S.W.2d 511, 259 Ky. 823.
N.Y.—Hartford Accident & Indemnity Co. v. Proctor, 201 N.Y.S. 420, 206 App.Div. 510.
31 C.J. p 1117 note 22.

84. Ind.—Driscoll v. Penrod, 95 N.E. 313, 176 Ind. 19.
N.Y.—Gropper v. Gropper, 190 N.Y.S. 604, 198 App.Div. 528.

85. Ky.—Foster v. Ewing, 7 Ky.Op. 503.

86. Ill.—Cox v. Reed, 27 Ill. 434.

87. Tenn.—Davidson v. Bowden, 5 Sneed 129.
31 C.J. p 1117 note 26.
It is better practice in proceedings affecting land of infants to make the infants defendants and have a guardian ad litem appointed.—Highfill v. Konnerman, 43 S.W.2d 657, 241 Ky. 282—Clark v. Satterfield's Adm'r, 26 S.W.2d 516, 233 Ky. 600.

88. Tenn.—Davidson v. Bowden, 5 Sneed 129.

89. Tenn.—McGavock v. Bell, 2 Coldw. 512.

been held that the rule requiring the joining of an infant as defendant and not as plaintiff need not be applied strictly except when the infant has a substantial interest in the litigation,[90] that a proceeding which divests a minor of an estate in lands is not necessarily against his interest so that he must in every possible contingency be made defendant,[91] and that on a suggestion at any stage of the cause that an infant party is on the wrong side of the record, the court may order an inquiry, and if the fact is found as suggested the proceedings will be amended by placing the infant on the opposite side of the suit.[92] On the other hand, it has been held that where the suit relates to an infant's estate or person he need not be made a party defendant as he immediately becomes a ward of the court.[93]

In partition proceeding. Inasmuch as all the cotenants are indispensable parties to a proceeding for partition, as stated in the C.J.S. title Partition § 73, also 47 C.J. p 365 note 22-p 366 note 27, if infant cotenants do not join as plaintiffs, as they may do,[94] they must be made defendants by representation or otherwise.[95]

c. Designation or Description of Parties

The prosecution or defense of an action or suit in behalf of an infant should be in the name of the infant by his guardian ad litem or next friend.

An action or suit, whether at law or in equity,[96] respecting an infant's property or person must be prosecuted[97] or defended[98] in his own name by his guardian ad litem or next friend, and not in the name of the guardian ad litem or next friend.[99] If the infant is not named in the complaint or bill he is not a party,[1] although an answer is filed for him by a guardian ad litem.[2] Mere technical errors, however, in the designation or description of the parties will not invalidate the judgment or decree,[3] such as, for instance, the misnomer of the infant;[4] such errors may be corrected by amendment.[5] Where a parent sues in behalf of his infant child without designating himself as his next friend, the court will assume that he sustains that relationship and that the suit is brought by him as the child's next friend.[6]

d. Substitution of Parties

General rules regarding the substitution of parties apply.

90. N.Y.—Bowen v. Idley, 1 Edw. 148.
31 C.J. p 1117 note 29.

91. Ill.—Burger v. Potter, 32 Ill. 66.

92. N.Y.—Le Fort v. Delafield, 3 Edw. 32—Bowen v. Idley, 1 Edw. 160.

93. Ala.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441—Rivers v. Durr, 46 Ala. 418.

Suit for distribution of partition proceeds
In suit by minors by next friend, for distribution of proceeds of partition sale of land which had been held in trust, such minors need not be made parties defendant.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441.
Infant as ward of court generally see supra § 7.

94. Neb.—Nitz v. Widman, 184 N.W. 172, 106 Neb. 736.
47 C.J. p 368 note 84.

Authority to join infant as plaintiff
Where a power of attorney for the settlement of certain estates did not authorize the bringing of suit, the holder of the power had no authority, by reason of it, to join minors as parties plaintiff in a partition suit.—Scaife v. Jones, 99 So. 890, 156 La. 5.

95. Ala.—Dickinson v. Jordan, 98 So. 886, 210 Ala. 602.
Ky.—Blue v. Waters, 71 S.W. 889, 114 Ky. 859.
47 C.J. p 383 note 87.

96. Ala.—Bowie v. Minter, 2 Ala. 406.

97. Ala.—Southern Ry. Co. v. Penny, 114 So. 15, 22 Ala.App. 199.
Ga.—Huley v. Huley, 114 S.E. 184, 154 Ga. 321—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369.
Ind.—Wilson v. Galey, 2 N.E. 736, 103 Ind. 257.
Md.—Hamill v. Hamill, 159 A. 247, 250, 162 Md. 159, citing **Corpus Juris.**
Minn.—Johnson v. Colp, 300 N.W. 791, 211 Minn. 245—Borowski v. Sargent, 246 N.W. 540, 188 Minn. 102—Lund v. Springsteel, 246 N.W. 116, 187 Minn. 577.
N.J.—Ratz v. Hillside Bus Owners' Ass'n, 135 A. 884, 103 N.J.Law 502—MacDonald v. Public Service Co-Ordinated Transport, 158 A. 407, 10 N.J.Misc. 177.
Tenn.—Newburger v. Newburger, 14 Tenn.App. 229.
Va.—Kirby v. Gilliam, 28 S.E.2d 40, 182 Va. 111—Garland v. Norfolk Nat. Bank of Commerce and Trusts, 158 S.E. 888, 156 Va. 653.
W.Va.—Ebbert v. Westfall, 17 S.E.2d 787, 789, 123 W.Va. 690, citing **Corpus Juris.**
31 C.J. p 1117 note 34.

Statutory provision that infants not having guardians must sue by next friend authorizes suits by minors in their own names by next friend, and not by person suing "for and on behalf of such minor."—Upshaw v. Eubank, 151 So. 837, 227 Ala. 653.

98. Ga.—Huley v. Huley, 114 S.E. 184, 154 Ga. 321.
31 C.J. p 1118 note 35.

99. Minn.—Borowski v. Sargent, 246 N.W. 540, 188 Minn. 102.
Va.—Kirby v. Gilliam, 28 S.E.2d 40, 43, 182 Va. 111, citing **Corpus Juris.**
W.Va.—Ebbert v. Westfall, 17 S.E.2d 787, 123 W.Va. 690.
31 C.J. p 1118 note 36.

Objection to action in name of guardian ad litem may be raised by demurrer.—Sandeen v. Tschider, N. D., 205 F. 252, 123 C.C.A. 456.

1. Ky.—Dixon v. Donaldson, 6 J.J. Marsh. 575.

2. Ky.—Dixon v. Donaldson, supra.

3. Miss.—Ætna Indemn. Co. v. State, 57 So. 980, 101 Miss. 703, 39 L.R.A.,N.S., 961.
Pa.—Shoff v. Shoff, 46 Pa.Dist. & Co. 314, 48 Lanc.Rev. 177, 56 York Leg.Rec. 103.
31 C.J. p 1118 note 39.

4. W.Va.—Tomblin v. Peck, 80 S.E. 450, 73 W.Va. 336.

5. Ga.—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369.
31 C.J. p 1118 note 41.

6. Iowa.—In re Brackey, 147 N.W. 188, 166 Iowa 109.
Tex.—Thompson v. Thompson, Civ. App., 202 S.W. 175.

Governed by the general rules regarding the substitution of parties, proper parties may be substituted in actions by or against infants.[7] Where the person suing on behalf of the infant is not duly qualified to act, it is proper to allow an amendment substituting another person who is qualified to act.[8] If the infant sues alone the name of a next friend may be inserted;[9] a next friend may be substituted for a guardian ad litem;[10] or the name of a next friend may be stricken out and another substituted,[11] and such a substitution, when allowed, relates back to the commencement of the suit.[12]

§ 107. Representation by Guardian ad Litem or Next Friend

A guardian ad litem is a special guardian appointed by the court to prosecute or defend, in behalf of an infant, a suit to which he is a party. A next friend is one who, without being regularly appointed guardian, acts for the benefit of an infant.

A guardian ad litem is a special guardian, appointed by the court to prosecute or defend, in behalf of an infant, a suit to which he is a party.[13] A next friend[14] or prochein ami[15] is one who, without being regularly appointed guardian, acts for the benefit of an infant; one admitted to the court to prosecute for an infant.[16] Such persons are considered as agents or officers of the court,[17] their office being to represent the interest of the infant in the litigation.[18] While technically speaking a next friend or prochein ami represents an infant plain-

7. Ala.—Savage v. Smith, 31 So. 374, 132 Ala. 64.
31 C.J. p 1118 note 46.

Conditional substitution erroneous
In action by infant against executor of natural father on an agreement by father for infant's support, where infant's mother, by whom action was brought, did not testify, court erred in ordering substitution of parties in behalf of infant only on condition that mother should not testify, since competency of mother's testimony was to be determined when she offered herself as a witness.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408, 116 A.L.R. 1319.

Substitution of guardian for next friend, and vice versa see Guardian and Ward § 176.

Substitution of parties:
In civil actions generally see the C.J.S. title Parties §§ 85–89, also 47 C.J. p 157 note 56–p 166 note 6.
In equity see Equity § 159.

8. Ala.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441.
31 C.J. p 1118 note 47.

9. N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221—Young v. Young, 3 N.H. 345.

10. Pa.—Dehart v. Kerlin, 4 Pa.Co. 396.

11. N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221—Woodman v. Rowe, 59 N.H. 453.

12. N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221—Woodman v. Rowe, 59 N.H. 453.

13. U.S.—Till v. Hartford Accident & Indemnity Co., C.C.A.Okl., 124 F.2d 405, 408, citing **Corpus Juris.**
Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
Or.—Benson v. Birch, 10 P.2d 1050, 1051, 139 Or. 459, citing **Corpus Juris.**
31 C.J. p 1118 notes 52, 53.

Similar definitions
(1) A guardian ad litem is "A guardian appointed to represent the ward in legal proceedings to which he is a party defendant."—King v. Emmons, 277 N.W. 851, 854, 283 Mich. 116, 115 A.L.R. 564.

(2) Other definitions.—Gary State Bank v. Gary State Bank, 2 N.E.2d 814, 102 Ind.App. 342.

14. U.S.—Till v. Hartford Accident & Indemnity Co., C.C.A.Okl., 124 F.2d 405, 408, citing **Corpus Juris.**
Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
31 C.J. p 1118 note 54.

15. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
31 C.J. p 1118 note 55.

16. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
31 C.J. p 1118 note 56–57.

"The sole purpose in having a next friend is to supply the want of capacity in the minor, to afford someone responsible for the costs."—Bertinelli v. Galoni, 200 A. 58, 59, 331 Pa. 73, 118 A.L.R. 398.

17. Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
Ga.—Sanders v. Hinton, 156 S.E. 812, 171 Ga. 702.
Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 668, 150 Kan. 738, quoting **Corpus Juris.**
Ky.—Louisville & N. R. Co. v. Hooker, 98 S.W.2d 922, 925, 266 Ky. 257, citing **Corpus Juris**—Kash v. Kash's Guardian, 85 S.W.2d 866, 867, 260 Ky. 377, citing **Corpus Juris.**
Mo.—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris**—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 795, 232 Mo.App. 209, citing **Corpus Juris.**
R.I.—Stanton v. Sullivan, 4 A.2d 269, 62 R.I. 154.
31 C.J. p 1118 notes 58, 59.

In limited sense
A guardian ad litem is an officer of the court in only a limited sense; he is not called on to weigh the merits of the proceeding and pass on the rights of the respective litigants.—In re Schrier's Will, 283 N.Y.S. 233, 157 Misc. 310.

Representatives
"In a special sense they are representatives of the court appointing them to protect unrepresented minors and the interests of those unborn."—In re Hallstead's Estate, 12 A.2d 912, 338 Pa. 257.

18. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Kan.—Fotopoulous v. Gas Service Co., 96 P.2d 666, 668, 150 Kan. 738, quoting **Corpus Juris.**
Ky.—Louisville & N. R. Co. v. Hooker, 98 S.W.2d 922, 925, 266 Ky. 257, citing **Corpus Juris**—Kash v. Kash's Guardian, 85 S.W.2d 866, 867, 260 Ky. 377, citing **Corpus Juris.**
Mo.—Crawford v. Amusement Syndi-

tiff, and a guardian ad litem represents an infant defendant,[19] there is little, if any, difference between their functions or powers.[20] A next friend is in the nature of a guardian ad litem,[21] or an attorney,[22] by whom the suit is brought or defended in behalf of another.

Curator ad hoc is one appointed for a particular purpose, that is, a special curator,[23] as where the interests of parent or curator conflict with those of the pupil, or where it is necessary to effect service of process on a nonresident.[24]

A special curator is a curator ad hoc.[25]

Curator ad litem is one appointed to represent the pupil in litigation.[26]

§ 108. —— Necessity for Representation

a. In general
b. Effect of lack of representation
c. Raising objection
d. Waiver or loss of right to object

a. In General

A guardian ad litem should be appointed to represent an infant party to the suit whose interests may be adversely affected thereby.

Although, as considered supra § 103, an infant is capable of suing or being sued, his incapacity requires that he be protected, as considered supra § 105, and, in the absence of a statute dispensing with the necessity of such representation,[27] to that end it is generally necessary that an infant litigant should be properly represented by some one who may adequately enforce or protect his rights,[28] throughout

cate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris**—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 795, 232 Mo.App. 209, citing **Corpus Juris.**
Or.—Benson v. Birch, 10 P.2d 1050, 1051, 139 Or. 459, citing **Corpus Juris.**
31 C.J. p 1118 note 60.
"The purpose of appointing such an officer is to keep the judge judicial, and to put the burden of investigation and claim on someone else." —In re Steel's Estate, 32 Pa.Dist. & Co. 55, 57.

19. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris**—Ellison v. Ward, 13 N.E.2d 649, 651, 294 Ill.App. 197, quoting **Corpus Juris.**
Mo.—Campbell v. Campbell, 165 S.W.2d 851, 857, 350 Mo. 169, quoting **Corpus Juris**—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
N.J.—Weinstein v. Chelsea Securities & Investment Co., 145 A. 231, 104 N.J.Eq. 258—In re March's Estate, 6 A.2d 478, 17 N.J.Misc. 157.
Tex.—Greathouse v. Fort Worth & Denver City Ry. Co., Com.App., 65 S.W.2d 762, 765, citing **Corpus Juris**, reversing Fort Worth & Denver City Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 38 S.W.2d 292—Blackman v. Blackman, Civ.App., 128 S.W.2d 433, 442, citing **Corpus Juris.**
31 C.J. p 1119 note 61.

20. Ga.—Sanders v. Hinton, 156 S.E. 812, 171 Ga. 702.
Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris**—Ellison v. Ward, 13 N.E.2d 649, 651, 294 Ill.App. 197, quoting **Corpus Juris.**
Mo.—Campbell v. Campbell, 165 S.W.2d 851, 857, 350 Mo. 169, quoting **Corpus Juris**—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
N.J.—La Bell v. Suasdorf, 184 A. 750, 116 N.J.Law 368.
31 C.J. p 1119 notes 62–63.
There is little distinction between a next friend and a guardian ad litem.—Till v. Hartford Accident & Indemnity Co., C.C.A.Okl., 124 F.2d 405.

21. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill.App. 582, quoting **Corpus Juris.**
Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581, 584, quoting **Corpus Juris.**
Pa.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.
31 C.J. p 1119 note 64.

22. Pa.—Bertinelli v. Galoni, supra.
31 C.J. p 1119 note 65.

23. La.—Derepas v. Shallus, 15 La. 371, 373—State v. Parish Ct. Judge, 15 La. 81, 83.

24. La.—Derepas v. Shallus, 15 La. 371, 374.

25. La.—Sallier v. Rosteet, 32 So. 383, 108 La. 378, 380.

26. N.Y.—Monroe v. Douglas, 4 Sandf.Ch. 126, 200.
17 C.J. p 403 note 17.
In Louisiana "in 1830 the legislature abolished the curators ad bona and ad litem, and in all cases placed the estates of minors under tutors and undertutors until the minors should attain majority or be emancipated. The curator ad hoc was then the only person under our system who could be appointed to represent a minor not represented by an undertutor."—Welch v. Baxter, 13 So. 629, 630, 45 La.Ann. 1062.

27. **Compromise with parent**
(1) Under some statutes, a minor's father is authorized to petition for an order of the superior court approving compromise of the minor's disputed claim for damages against a third person, but appointment of a guardian, appearance in court of the father or of the minor or taking of testimony relating to the extent of the minor's injuries is not required, and an attack on the order of approval based on such grounds is a collateral attack.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878.

(2) In action for injuries sustained by minor where settlement approved by the superior court was pleaded as a bar, trial court properly rejected offers of proof which would have shown nothing more than a possible error or irregularity in the approval proceeding, where minor did not seek to set aside the order of settlement on any grounds on which a direct attack could be made.—Rico v. Nasser Bros. Realty Co., supra.

28. Cal.—Field v. Hughes, 20 P.2d 990, 131 Cal.App. 144.
Del.—Home Owners' Loan Corporation v. Stein, 176 A. 663, 6 W.W. Harr. 411.
Fla.—Wilkie v. Roberts, 109 So. 225, 91 Fla. 1064.
Ga.—Huley v. Huley, 114 S.E. 184, 154 Ga. 321.
Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535—Waechter v. Industrial Commission, 11 N.E.2d 378, 367 Ill. 256—Hasterlik v. Hasterlik, 146 N.E. 498, 316 Ill. 72, transferred, see 234 Ill.App. 572.
Iowa.—Parkins v. Alexander, 74 N.W. 769, 105 Iowa 74.

Ky.—Highfill v. Konnerman, 43 S.W. 2d 657, 241 Ky. 283—Hounshell v. Hounshell, 3 S.W.2d 620, 228 Ky. 289.
La.—McVay v. New Orleans Public Service, App., 148 So. 67.
Mich.—Cohen v. Home Life Ins. Co., 263 N.W. 857, 273 Mich. 469.
Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.
Mo.—Woods v. Woods, App., 170 S. W.2d 430.
N.H.—Roberts v. Hillsborough Mills, 161 A. 29, 85 N.H. 517.
N.J.—Scott v. Schisler, 153 A. 395, 107 N.J.Law 397.
N.Y.—In re Beban's Estate, 237 N.Y. S. 701, 135 Misc. 25—Grego v. Demario, 231 N.Y.S. 180, 133 Misc. 53, reversed on other grounds 234 N.Y.S. 805, 226 App.Div. 838—Horan v. Greig, 12 N.Y.S.2d 67.
Or.—Kessler v. Kerr, 43 P.2d 616, 150 Or. 447—Benson v. Birch, 10 P. 2d 1050, 1051, 139 Or. 459, citing **Corpus Juris.**
Pa.—Hamilton v. Moore, 6 A.2d 787, 335 Pa. 433—In re Komara's Estate, 166 A. 577, 311 Pa. 135—Camera & Radio Shop v. Zalewske, 157 A. 376, 102 Pa.Super. 562—In re Mitchell's Estate, 20 Pa.Dist. & Co. 101, 48 York Leg.Rec. 13—In re Stewart's Estate, 9 Som.Leg.J. 148, 52 York Leg.Rec. 53.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
Tenn.—Freeman v. Citizens' Nat. Bank, 70 S.W.2d 25, 167 Tenn. 399.
Tex.—Williams v. Patterson, Com. App., 288 S.W. 132, reversing, Civ. App., 276 S.W. 750—De Proy v. Progakis, Com.App., 269 S.W. 78, reversing, Civ.App., 259 S.W. 620—Block v. Burch, Civ.App., 77 S.W. 2d 572, error dismissed—Dr. Pepper Bottling Co. v. Rainboldt, Civ. App., 40 S.W.2d 827, error dismissed—Dial v. Martin, Civ.App., 37 S.W.2d 166, 175, quoting **Corpus Juris,** and reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
Va.—Belcher v. Tredway, 118 S.E. 79, 136 Va. 181.
W.Va.—Johnson v. Hawkins, 157 S.E. 412, 110 W.Va. 199.
Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.
31 C.J. p 1119 note 69—40 C.J. p 1293 note 63 [a].

Representation by general guardian see Guardian and Ward § 175.
Representation in:
- Adoption proceedings see Adoption of Children § 36.
- Agreement for compensation under Workmen's Compensation Acts see the C.J.S. title Workmen's Compensation Acts § 403, also 71 C.J. p 936 note 42.
- Bastardy proceedings see Bastards § 97.
- Condemnation proceeding see Eminent Domain § 226 b.
- Declaratory judgment actions see Actions § 18 d (14) (d).
- Divorce suits by or against infant wife see Divorce §§ 89, 90.
- Federal courts under federal practice see Federal Courts § 123 b.
- Proceedings for accounting by guardian see Guardian and Ward § 154 a.
- Proceedings for appointment of trustee see the C.J.S. title Trusts § 218, also 65 C.J. p 600 note 41.
- Proceedings to obtain judicial approval of guardian's investments see Guardian and Ward § 84 b (1).
- Proceedings to secure compensation under Workmen's Compensation Act see the C.J.S. title Workmen's Compensation Acts § 429, also 71 C.J. p 972 notes 9–21.
- Proceedings to sell realty under order of court see supra § 64.
- Statutory death action see Death §§ 59, 61.
- Will probate proceedings see the C.J.S. title Wills § 362, also 68 C.J. p 953 note 78 and 31 C.J. p 1120 note 76 [a].

Appearance

(1) Jurisdiction of defendant, while an infant, may be acquired only through the appearance by a guardian ad litem.—Pacillo v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586.

(2) Minor must appear by guardian ad litem.—Caskey v. Peterson, 263 N.W. 658, 220 Wis. 690.

Persons of full age

(1) It is proper not to appoint guardians ad litem to represent persons of full legal age.
Ark.—Federal Land Bank of St. Louis v. Cottrell, 126 S.W.2d 279, 197 Ark. 783.
Mo.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451.

(2) Accordingly, where a female becomes of full legal age at eighteen, the appointment of a guardian ad litem for a female over eighteen but under twenty-one is unnecessary.—Audsley v. Hale, supra.

(3) Where, however, a female does not become of full legal age until she is twenty-one, a failure to appoint a guardian ad litem for a female defendant twenty years old is erroneous.—Olsen v. East Side Packing Co., 3 S.W.2d 281, 221 Mo.App. 290.

Purpose of statutes

(1) The purpose of statutes providing for the appointment of guardians ad litem is to protect infants.
Cal.—Doyle v. Loyd, 114 P.2d 398, 45 Cal.App.2d 493.
Nev.—Baker v. Baker, 87 P.2d 800, 59 Nev. 163, modified 96 P.2d 200, 59 Nev. 163.

(2) Purpose of statute requiring guardians and curators to represent wards in all legal proceedings, to sue for, demand, and receive all their dues, give discharges therefor, and compound them on terms authorized by probate court, is to subject minors' affairs to supervision of probate court.—Fenn v. Hart Dairy Co., 83 S.W.2d 120, 231 Mo.App. 1005.

Tutor

(1) A tutor duly appointed should represent the infant.—Crayton v. Waters, 83 So. 540, 146 La. 238—Gilbert v. Mazerat, 46 So. 47, 121 La. 35.

(2) Where the tutor goes to another state and acquires a domicile there, he forfeits the tutorship, and a curator ad hoc should be appointed to represent the minors.—Matthews v. Olla State Bank, 114 So. 98, 164 La. 463.

Unborn persons

(1) Statutes authorizing courts to appoint guardians to represent unborn persons held valid.
Ill.—Gunnell v. Palmer, 18 N.E.2d 202, 370 Ill. 206, 120 A.L.R. 871.
N.Y.—Fisher v. Fisher, 237 N.Y.S. 162, 227 App.Div. 160, reversed on other grounds 170 N.E. 912, 253 N.Y. 260, 69 A.L.R. 918.

(2) The statute authorizing the appointment in cause in equity of competent disinterested person as trustee to protect the interests of persons not in being, where it appears that such persons might in the future claim an interest in the property involved in the suit, was designed in part to assist in safeguarding interests of unborn contingent remaindermen whose rights are represented by parties properly before the court. Under such statute, the interests of unborn persons may be brought within jurisdiction of the court, where they are not otherwise represented and final determination of conflicting claims may be made. Such a statute was applicable to suit seeking to extinguish interests of unborn persons as well as to suit for protection or recovery of some interest of unborn persons.—Gunnell v. Palmer, 18 N.E.2d 202, 370 Ill. 206, 120 A.L.R. 871.

(3) The appointment of guardians ad litem for minors and unborn persons at the audit of the account of an executor, administrator, or trustee is discretionary with the auditing judge.—In re Hall's Estate, 36 Pa.Dist. & Co. 582—In re Steel's Estate, 32 Pa.Dist. & Co. 55.

(4) Where judgment decreeing dissolution of trust sooner than was contemplated by testator and distributing assets was remanded by supreme court for judgment in accordance with complaint, appointment of guardian ad litem for unborn infants who might have some contingent interest in assets of trust

the whole litigation,[29] although there are adults joined as litigants with the infant.[30] Ordinarily a guardian ad litem must be appointed to represent an infant whose interests may be adversely affected by the proceeding.[31] An infant may not need to be represented where he is not a substantial party to the action or proceeding and his interests are not involved[32] or where the court is, by force of statute, charged with the duty of protecting his interests.[33] Where the disabilities of an infant have been removed, it has been held that he can sue,[34] or be sued,[35] without the appointment of a guardian ad litem.

Infant femes covert. In the absence of a statute to the contrary, where an infant feme covert

involved might be necessary in event trustee should desire to amend complaint so as to seek a closing or modification or change in the trust.—Wachovia Bank & Trust Co. v. Laws, 7 S.E.2d 470, 217 N.C. 171.

(5) Unborn children held not to be represented.—Lane v. Taylor, 152 S.W.2d 271, 287 Ky. 116.

29. Ala.—Smith v. Lambert, 72 So. 118, 196 Ala. 269.
Ill.—Union Bank of Chicago v. Wormser, 256 Ill.App. 291.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, 175, quoting **Corpus Juris**, and reversed on other grounds, Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

30. Tex.—Dial v. Martin, supra, quoting **Corpus Juris**.
31 C.J. p 1119 note 71.

31. U.S.—Guerra v. American Colonial Bank of Porto Rico, C.C.A. Puerto Rico, 21 F.2d 56, certiorari denied American Colonial Bank of Porto Rico v. Guerra, 48 S.Ct. 140, 275 U.S. 567, 72 L.Ed. 430.
N.J.—Rothenberg v. Franklin Washington Trust Co., 19 A.2d 640, 129 N.J.Eq. 361, modifying 13 A.2d 667, 127 N.J.Eq. 406.
Pa.—In re Komara's Estate, 166 A. 577, 311 Pa. 135—In re Stover's Estate, 18 Pa.Dist. & Co. 599.
Tenn.—Hyder v. Hyder, 66 S.W.2d 235, 16 Tenn.App. 64.
31 C.J. p 1129 note 63—24 C.J. p 581 note 39.

Annulment of marriage

(1) Where defendant in a suit to annul a marriage is an infant, a guardian ad litem should be appointed.—Fodor v. Kunie, 112 A. 598, 92 N.J.Eq. 301—38 C.J. p 1353 note 9.

(2) Special guardian will be appointed for infant whose legitimacy was questioned in husband's annulment action.—Cesareo v. Cesareo, 234 N.Y.S. 44, 134 Misc. 88.

(3) Under the civil codes, where minors are emancipated by marriage, however, it is not necessary to appoint a guardian ad litem for infant defendants in suits to annul marriages.—Delpit v. Young, 25 So. 547, 51 La.Ann. 923.
38 C.J. p 1353 note 10.

Appointment held proper

Cal.—Loock v. Pioneer Title Insurance & Trust Co., 40 P.2d 526, 4 Cal.2d 245.

Insolvency and dissolution of partnership

(1) In insolvency proceedings against a partnership, when the petitioning creditors neither seek nor obtain an adjudication by the insolvent court against the infant partner or against his individual estate, the appointment of a guardian ad litem for him is not required.—Conary v. Sawyer, 43 A. 27, 92 Me. 463, 69 Am.S.R. 525.

(2) On a suit to dissolve a partnership and for an accounting, the court cannot require the infant defendant to pay money to the receiver where no guardian has been appointed for him.—Gross v. Gross, 112 N.Y.S. 790, 128 App.Div. 429.

Partition proceedings

(1) A court may not in its discretion dispense with requirement that a minor sue by next friend when it is expressly and plainly imposed by statute in a particular proceeding, particularly when the estate and interests of minors is seriously concerned as in partition of their real property.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.

(2) Fact that guardians and curators of estates of minors are authorized to represent their wards in partition proceedings does not affect the trial court's power to appoint a guardian for a minor in a partition proceeding when he has no such guardian or curator.—Woods v. Woods, Mo.App., 170 S.W.2d 430.

Proceeds of sale

In proceedings by administrators for sale of property in which surplus was claimed by devisee's trustee in bankruptcy, and also by his widow and children, their interests, after verdict in their favor, being no longer identical, should be determined in adverse proceeding, which might be done in same action by appointment of guardian ad litem for minor children.—Irvin v. Harris, 127 S.E. 529, 189 N.C. 465.

32. Conn.—Wilson v. D'Atro, 145 A. 161, 109 Conn. 563.
Ill.—Illinois Valley Bank v. Newman, 184 N.E. 636, 351 Ill. 380.
Nev.—Johnson v. Johnson, 27 P.2d 532, 55 Nev. 109.
N.J.—In re Schlemm's Estate, 23 A. 2d 364, 130 N.J.Eq. 295.
31 C.J. p 1120 note 72.

Cancellation of citizenship

Where cancellation of citizenship is sought on ground of fraud, any derivative rights arising from the certificate of naturalization, such as right of a minor child, must rise or fall solely on basis of parent from whom they stem, and there are no rights to be protected independently by guardian ad litem. Consequently, it was not error to refuse to appoint guardian ad litem to protect interests of a three year old son born in Germany after defendant had obtained certificate of naturalization.—U. S. ex rel. Harrington v. Schlotfeldt, C.C.A.Ill., 136 F.2d 935.

33. Miss.—Jack v. Thompson, 41 Miss. 49.
31 C.J. p 1120 note 73.

Custody suits

Children need not always be represented by a guardian ad litem in suit regarding their custody.—Boone v. Boone, 132 F.2d 14, 76 U.S.App.D.C. 399, certiorari denied 63 S.Ct. 1319, 319 U.S. 762, 87 L.Ed. 1713.

Courts are vested with great discretion to protect interests of minors without legally qualified representatives.—McVay v. New Orleans Public Service, La.App., 148 So. 67.

Ward of court

The mere filing of a bill against an infant is sufficient to make him a ward of the court, and a guardian ad litem is not indispensable in a jurisdictional sense. Consequently a statute not requiring the appointment of a guardian ad litem under certain circumstances in particular proceedings is not invalid.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770, 51 A.L.R. 731.

34. Ark.—Missouri Pac. Transp. Co. v. Norwood, 90 S.W.2d 480, 192 Ark. 170.

35. Ark.—Merriman v. Sarlo, 37 S. W. 879, 63 Ark. 151.

Separate maintenance

Where a husband, although of sufficient age to contract a marriage, is a minor, the wife cannot, without the appointment of a guardian ad litem for the husband, sue for separate maintenance.—Huley v. Huley, 114 S.E. 184, 154 Ga. 321.
Parties to action for separate maintenance generally see Husband and Wife § 617.

sues as sole plaintiff, she must be represented by a guardian ad litem or next friend.[36] Where the adult husband is joined with her as a coplaintiff, it is not necessary;[37] but in some jurisdictions it is held that, even though her husband is coplaintiff, the action must be brought by guardian ad litem.[38] Where an infant feme covert is sued, the appointment of a guardian ad litem is ordinarily necessary.[39]

In probate proceedings. A guardian ad litem need not be appointed in a probate court, if the statutes instituting and regulating the practice in such courts do not require such appointment.[40] However, such appointment may be proper and required by the court where the interests of the infant demand it.[41] In some jurisdictions, it is held that probate proceedings are not civil actions or proceedings within the statutory provisions requiring the appointment of guardians ad litem in civil actions or proceedings;[42] but in other jurisdictions the contrary is held.[43] Under some statutes the probate court must appoint a special guardian to represent an infant, where the infant does not appear by general guardian, and where he does so appear, the court must appoint a special guardian, if for any reason the interest of the infant requires it.[44]

Nonresident infants. The rule requiring that infant litigants be represented is ordinarily applicable to nonresident infants.[45] A guardian ad litem may be appointed for nonresident infant plaintiffs[46] or defendants.[47] Under some statutes it is the duty of the court to appoint a guardian for a nonresident infant defendant, whether or not plaintiff applies for such appointment;[48] and it is error to render a judgment or decree against an absent infant defendant without such appointment having been made.[49] Where, however, under the statutes there is no difference in the procedure against a nonresident infant and a nonresident adult, a guardian ad litem need not be appointed for a nonresident infant defendant who is proceeded against by warning order.[50]

Unknown heirs. Where the names and the number of infant heirs are unknown, it is not practicable to appoint guardians ad litem for them, but they must be proceeded against as unknown heirs.[51]

b. Effect of Lack of Representation

The fact that an infant party is not represented by a guardian ad litem or next friend, as a general rule, renders the proceedings erroneous, but the judgment entered therein is not void.

While in some jurisdictions it has been held that a judgment against a minor not represented is void,[52] subject to collateral attack,[53] without resort to an appeal or action of nullity,[54] the weight of

36. Ala.—Hays v. Bowdoin, 49 So. 122, 159 Ala. 600.
31 C.J. p 1120 note 90.

37. Ind.—Welch v. Bunce, 83 Ind. 382.
31 C.J. p 1121 note 91.

38. S.C.—Hiers v. Atlantic Coast Line R Co., 55 S.E. 457, 75 S.C. 311, 9 Ann.Cas. 1114.

39. Ga.—Nicholson v. Wilborn, 13 Ga. 467.
31 C.J. p 1121 note 93.

40. Mich.—Thaw v. Detroit Trust Co., 11 N.W.2d 305, 307 Mich. 6.
31 C.J. p 1120 note 76.

Distribution
Since there is no mandatory statute requiring the appointment of a guardian ad litem for minor absentee beneficiaries in proceedings for a decree for distribution, such an appointment is permissive and not mandatory.—Hibbard v. Ætna Casualty & Surety Co., 16 N.E.2d 241, 301 Mass. 442.

41. Mass.—Peters v. Peters, 8 Cush. 529.
Pa.—Gill's Estate, 20 Pa.Dist. 302.

42. Cal.—Carpenter v. San Joaquin County Super. Ct., 19 P. 174, 75 Cal. 596.
31 C.J. p 1120 note 78.

43. Ill.—Simpson v. Simpson, 112 N.E. 276, 273 Ill. 90.
31 C.J. p 1120 note 79.

44. N.Y.—In re Jaffe's Will, 300 N.Y.S. 1045, 165 Misc. 407.
31 C.J. p 1120 note 80.

In Georgia
The statute, Code 1933, § 49-111, authorizing appointment of guardian ad litem in probate proceeding for minor who "shall have no guardian" does not make appointment of guardian essential, or indicate that proceeding which appointed guardian ad litem would be irregular or void if existing guardian be not made a party.—Griffin v. Suber, 12 S.E.2d 621, 191 Ga. 269.

45. La.—Petrie v. Wofford, 3 La. Ann. 562.
31 C.J. p 1120 note 82.

46. Utah.—Schuyler v. Southern Pac. Co., 109 P. 458, 37 Utah 581.

47. Utah.—Schuyler v. Southern Pac. Co., supra.
31 C.J. p 1120 note 84.

48. Ky.—Covington & Lexington R. Co. v. Bowler, 9 Bush 468.

49. Ky.—Cravens v. Dyer, 1 Litt. 153.

50. Ky.—Bowles v. Bowles, 300 S.W. 880, 222 Ky. 325—Gentry v. Gentry, 290 S.W. 665, 217 Ky. 806—Bethel College v. Gladdish, 263 S.W. 659, 204 Ky. 32—Massingale v. Parker, 230 S.W. 932, 191 Ky. 515.
31 C.J. p 1120 note 88.

51. Ark.—Kountz v. Davis, 34 Ark. 590.

Partition of land of full-blood Indians is binding against unknown minor heirs without appointment of guardian ad litem unless set aside under statutes.—Haymes v. McDermott, 256 P. 908, 125 Okl. 147.

52. La.—Scaife v. Jones, 99 So. 890, 156 La. 5—Broussard v. Rosenblum, 5 La.App. 245.
Va.—Kanter v. Holland, 152 S.E. 328, 154 Va. 120.
31 C.J. p 1121 note 95.

Plaintiff is charged with burden of ascertaining whether defendant is an infant or an adult, and a personal judgment rendered against infant for whom no guardian ad litem was appointed is void.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.

53. La.—Sanders v. Schilling, 49 So. 689, 123 La. 1009.
Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321—Kanter v. Holland, 152 S.E. 328, 154 Va. 120.

54. La.—Sanders v. Schilling, 49 So. 689, 123 La. 1009.

authority is to the effect that, where the court has otherwise jurisdiction, a judgment or decree rendered against an infant without the appointment of a guardian ad litem, while it may be erroneous,[55] and subject to be reversed[56] or set aside[57] or to be ground for a new trial,[58] at most is only voidable,[59] but not absolutely void;[60] and it may not be even necessarily erroneous and subject to reversal;[61] the

55. Ala.—Johnson v. Pugh, 193 So. 317, 239 Ala. 12—Jones v. Henderson, 153 So. 214, 228 Ala. 273—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.
Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
Cal.—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
Ill.—People v. Scott, 157 N.E. 247, 326 Ill. 327—Collins v. Hastings, 283 Ill.App. 304, 306, quoting **Corpus Juris** at length.
Ky.—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.
Mo.—State ex rel. and to Use of Marlowe v. Nolan, 146 S.W.2d 598, 347 Mo. 124.
N.J.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, 192 A. 233, 121 N.J. Eq. 613—Weinstein v. Chelsea Securities & Investment Co., 145 A. 231, 104 N.J.Eq. 258—Camden Commercial College v. Piper, 137 A. 555, 5 N.J.Misc. 535.
N.Y.—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586.
Pa.—In re Elkins' Estate, 18 Pa.Dist. & Co. 578.
Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.
31 C.J. p 1121 note 98.

56. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.
Ill.—Rapp v. Goerlitz, 40 N.E.2d 766, second case, 314 Ill.App. 189—Ridenour v. Johns, 258 Ill.App. 48.
Ky.—Smith v. Smith, 72 S.W.2d 425, 255 Ky. 191—Hounshell v. Hounshell, 3 S.W.2d 620, 223 Ky. 289.
N.J.—Camden Commercial College v. Piper, 137 A. 555, 5 N.J.Misc. 535.
31 C.J. p 1122 note 99.

57. Ala.—Bell v. Bannister, 101 So. 653, 212 Ala. 31.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Ga.—Brown v. Anderson, 197 S.E. 761, 186 Ga. 220, followed in 197 S.E. 833, 186 Ga. 222.
Ill.—Rapp v. Goerlitz, 40 N.E.2d 766, first case, 314 Ill.App. 191—Collins v. Hastings, 283 Ill.App. 304, 306, quoting **Corpus Juris.**
Kan.—Fidelity State Bank v. Kirk, 32 P.2d 239, 139 Kan. 491.
Mich.—De Guzman v. Shepherd, 196 S.W. 522, 255 Mich. 606.
Mo.—Hente v. Michie, 151 S.W.2d 107, 236 Mo.App. 322.
N.J.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613.
Pa.—Hamilton v. Moore, 6 A.2d 787, 335 Pa. 433. See Ward v. Bostick, 29 Del.Co. 231.
Wis.—In re Brandstedter's Estate, 224 N.W. 735, 198 Wis. 457.
31 C.J. p 1122 note 1.

58. Ill.—Bellchambers v. Ebeling, 13 N.E.2d 804, 808, 294 Ill.App. 247, quoting Corpus Juris.
Pa.—Guilian v. Grover, 9 Pa.Dist. & Co. 62, 18 Del.Co. 8.
31 C.J. p 1122 note 2.

Where infants who were apparently adults appeared in the case, employed counsel, and made their defense without making any request for the appointment of a guardian ad litem, and their minority was not in any way disclosed to the court, it was held that the failure to appoint a guardian ad litem was not, under the circumstances, a ground for a new trial.—Smith v. Wagner, 30 P.2d 1020, 137 Cal.App. 556—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191—31 C.J. p 1122 note 2 [a].

59. Ala.—Johnson v. Pugh, 193 So. 317, 239 Ala. 12.
Cal.—Field v. Hughes, 20 P.2d 990, 991, 131 Cal.App. 144, citing **Corpus Juris**—Field v. Hughes, 16 P. 2d 160, 161, citing **Corpus Juris.**
Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535—Bellchambers v. Ebeling, 13 N.E.2d 804, 808, 294 Ill.App. 247, quoting **Corpus Juris**—Collins v. Hastings, 283 Ill.App. 304, 306, quoting **Corpus Juris**—Martin v. Starr, 255 Ill. App. 189.
Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.
Mo.—Olsen v. East Side Packing Co., 3 S.W.2d 281, 221 Mo.App. 290.
N.Y.—Belcher v. Haskell, 292 N.Y.S. 387, 249 App.Div. 251—Grieshaber v. Knoepfel, 198 N.Y.S. 302, 119 Misc. 827.
Pa.—Hamilton v. Moore, 6 A.2d 787, 335 Pa. 433—Young v. Findley, 31 Pa.Dist. & Co. 630, 5 Sch.Reg. 176.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
Tex.—Levy v. Roper, Civ.App., 230 S.W. 514, modified on other grounds 256 S.W. 251, 113 Tex. 356.
31 C.J. p 1122 note 3.

60. Ala.—Jones v. Henderson, 153 So. 214, 228 Ala. 273—Bell v. Bannister, 101 So. 653, 212 Ala. 31.
Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
Cal.—Brown v. Roland, 104 P.2d 138, 40 Cal.App.2d Supp. 825—Cikuth v. Loero, 57 P.2d 1009, 14 Cal.App.2d 82—Hughes v. Quackenbush, 37 P. 2d 99, 1 Cal.App.2d 349—Field v. Hughes, App., 16 P.2d 160—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191.
Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.
Fla.—Polk v. Chase Nat. Co., 162 So. 521, 523, 120 Fla. 243, citing **Corpus Juris**—McDaniel v. McElvy, 108 So. 820, 835, 91 Fla. 770, 51 A.L.R. 731, citing **Corpus Juris.**
Iowa.—Equitable Life Ins. Co. v. Cook, 295 N.W. 428, 229 Iowa 911.
Ky.—White v. White, 172 S.W.2d 72, 294 Ky. 563—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.
Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229, 232, citing **Corpus Juris.**
Mont.—State v. District Court, Sixteenth Judicial District, 81 P.2d 422, 425, 106 Mont. 578, citing **Corpus Juris.**
N.J.—In re March's Estate, 6 A.2d 478, 17 N.J.Misc. 157—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.
N.Y.—Malicky v. Rosenberg, 273 N. Y.S. 818, 152 Misc. 197—Smith v. R. B. I. Bldg. Corporation, 215 N. Y.S. 1, 126 Misc. 826.
Okl.—Young v. Egger, 141 P.2d 1007—Johnston v. Guy, 25 P.2d 625, 165 Okl. 156—Slemp v. City of Tulsa, 281 P. 280, 282, 139 Okl. 76, quoting **Corpus Juris,** and appeal dismissed and certiorari denied 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1127.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
Tex.—Safeway Stores of Texas v. Rutherford, 111 S.W.2d 688, 130 Tex. 465, affirming, Civ.App., 101 S.W.2d 1055—Austin v. First State Bank & Trust Co., Civ.App., 275 S.W. 156.
Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738—In re Thompson's Will, 248 N.W. 167, 212 Wis. 172.
31 C.J. p 1122 note 4—24 C.J. p 582 notes 41, 43.

61. Idaho.—Trolinger v. Cluff, 57 P. 2d 332, 334, 56 Idaho 570, quoting **Corpus Juris** at length.
Pa.—Hamilton v. Moore, 6 A.2d 787, 335 Pa. 433.
31 C.J. p 1122 note 5.

Decree in favor of infant

Where it clearly appears that a decree is in favor of infant defend-

error may be amended or cured.[62] It remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings,[63] and is not subject to collateral attack;[64] and this rule applies to decrees in equity as well as judgments at law.[65] Where the court has not obtained jurisdiction of the infant by service of process and no guardian ad litem has been appointed for him then the judgment is void.[66] Adult parties cannot invoke the infancy of another party not represented by guardian ad litem to set aside the decree as to themselves.[67]

Action by infant. It is not an absolute prerequisite to jurisdiction of an action by an infant that he should sue by guardian ad litem or next friend,[68] and the suit or action is not void on that ground alone;[69] it merely affects the regularity of the proceedings,[70] and the defect is amendable;[71] the judgment or decree is not void.[72]

ant, the failure to appoint a guardian ad litem for him is not reversible error.—Langston v. Bassette, 51 S.E. 218, 104 Va. 47.

Discretion

Summary motion to vacate judgment against infant for whom guardian ad litem has not been appointed is addressed to discretion of court in exercise of which considerations of justice and equity govern, "judicial discretion" meaning sound discretion, guided by law, and not by whim or humor. This discretionary authority should be liberally exercised to protect infant's interests, and unless it is evident that infant did not suffer substantial injury because of failure to designate guardian, relief should be awarded. —La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.

62. Ga.—Sams v. Covington Buggy Co., 73 S.E. 18, 10 Ga.App. 191.
Vt.—Sears v. Duling, 61 A. 518, 77 Vt. 496.

Order after decree, appointing a guardian ad litem, however, has been held to be a nullity, the court stating that the appointment served no purpose and that it could not be entered nunc pro tunc.—Curtis v. Curtis, 229 N.W. 622, 250 Mich. 105.

63. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 523, 120 Fla. 243, citing **Corpus Juris**—McDaniel v. McElvy, 108 So. 820, 835, 91 Fla. 770, 51 A.L.R. 731, citing **Corpus Juris.**
Iowa.—Equitable Life Ins. Co. v. Cook, 295 N.W. 428, 229 Iowa 911.
31 C.J. p 1122 note 7.

Injunction against enforcement of judgment against infant without guardian ad litem is a proper remedy.—Olsen v. East Side Packing Co., 3 S.W.2d 281, 221 Mo.App. 290.

64. U.S.—Colt v. Colt, Conn., 4 S.Ct. 553, 111 U.S. 566, 28 L.Ed. 520.
Fla.—Polk v. Chase Nat. Co., 162 So. 521, 523, 120 Fla. 243, citing **Corpus Juris**—McDaniel v. McElvy, 108 So. 820, 835, 91 Fla. 770, 51 A.L.R. 731, citing **Corpus Juris.**
Mont.—State v. District Court, Sixteenth Judicial District, 61 P.2d 422, 425, 106 Mont. 578, citing **Corpus Juris.**
N.J.—La Bell v. Quasdorf, 184 A. 750, 752, 116 N.J.Law 368, citing **Corpus Juris**—Weinstein v. Chelsea Securities & Investment Co., 145 A. 231, 104 N.J.Eq. 258.
N.Y.—Grieshaber v. Knoepfel, 198 N.Y.S. 302, 119 Misc. 827.
Okl.—Johnston v. Guy, 25 P.2d 625, 165 Okl. 156—Slemp v. City of Tulsa, 281 P. 280, 139 Okl. 76, appeal dismissed and certiorari denied 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1127.
31 C.J. p 1122 note 8.

Consent decree

Under North Carolina law, a judgment against an infant personally served with process although no guardian is appointed is not subject to collateral attack; but a consent judgment against an infant does not bind the infant and can be impeached in trial of an action in which it is set up as a defense, although such a judgment is valid when the court investigates and approves the settlement.—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.

65. Ala.—Conway v. Clark, 58 So. 441, 177 Ala. 99.

66. U.S.—Hatch v. Ferguson, C.C.A. Wash. 68 F. 43, 15 C.C.A. 201, 33 L.R.A. 759.
N.Y.—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—Melnick v. Laszio, 293 N.Y.S. 261, 161 Misc. 791—Marty v. Roberts, 261 N.Y.S. 144, 146 Misc. 332.
N.C.—Gay v. Grant, 8 S.E. 99, 106, 101 N.C. 206.

Where curator ad hoc was appointed to represent tutor who had forfeited tutorship by emigrating to another jurisdiction, judgment obtained against minors was an absolute nullity, as curator ad hoc was without authority to represent them. —Matthews v. Olla State Bank, 114 So. 98, 164 La. 463.

67. N.Y.—De Groat v. Tompkins Bus Corporation, 254 N.Y.S. 878, 142 Misc. 528.
31 C.J. p 1123 note 13.

68. Cal.—Cikuth v. Leoro, 57 P.2d 1009, 14 Cal.App.2d 32—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal. App.2d 349—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191.
Idaho.—Trolinger v. Cluff, 57 P.2d 332, 334, 56 Idaho 570, quoting **Corpus Juris.**
Mo.—Woods v. Woods, App., 170 S.W.2d 430.
N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.
31 C.J. p 1123 note 14.

Delay in the appointment of a guardian ad litem for a minor neither deprives the court of jurisdiction nor constitutes reversible error, where there is no showing of prejudice resulting therefrom.—Johnston v. Calvin, Iowa, 5 N.W.2d 840.

69. Tex.—Gross v. Griffin, Civ.App., 221 S.W. 764.

70. U.S.—Erie R. Co. v. Fritsch, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Erie R. Co. v. Landau, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708.
N.Y.—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—De Grost v. Tompkins Bus Corporation, 254 N.Y.S. 878, 142 Misc. 528—Feigenbaum v. Narragansett Stables Co., 215 N.Y.S. 328, 127 Misc. 114, affirmed 219 N.Y.S. 811, 219 App.Div. 729, affirmed 157 N.E. 886, 245 N.Y. 628.
31 C.J. p 1123 note 16.

71. N.Y.—Inakay v. Sun Laundry Corporation, 42 N.Y.S.2d 344, 180 Misc. 550—Louden v. State, 41 N.Y.S.2d 455—De Groat v. Tompkins Bus Corporation, 254 N.Y.S. 878, 142 Misc. 528.
Wyo.—Urback v. Urback, 73 P.2d 953, 52 Wyo. 207, 113 A.L.R. 889.
31 C.J. p 1123 note 17.

72. U.S.—Erie R. Co. v. Fritsch, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Erie R. Co. v. Landau, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708.
Cal.—Foley v. California Horseshoe Co., 47 P. 42, 115 Cal. 184, 56 Am. S.R. 87.
Ga.—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784.
Tex.—Breckenridge Ice & Cold Storage Co. v. Hutchens, Civ.App., 260 S.W. 684.

Ratification. If the judgment is considered merely voidable but not void, it may be affirmed by the infant,[73] and it will be considered as affirmed by him if he takes any action in reference thereto after he becomes of age, which is consistent only with assuming its validity.[74]

c. Raising Objection

Objection to the incapacity of an infant plaintiff should be taken by a plea in abatement, or by answer or demurrer, if infancy appears on the face of the pleading. The fact that an infant party is not represented is no ground for a dismissal.

Plaintiff, if of lawful age, is not required to allege it; but if defendant relies on plaintiff's incapacity to sue because of infancy he must plead it.[75] The objection of the incapacity of an infant plaintiff should be taken by a plea in abatement, as considered in Abatement and Revival § 92 d; but it has also been held that it may be taken by answer, or, if the infancy appears on the face of the writ, by demurrer.[76] Infancy of plaintiff is not a sufficient plea in bar.[77]

Dismissal or nonsuit. In some cases it is held that the fact that an infant plaintiff[78] or defendant[79] is not represented by next friend or guardian ad litem is no ground for a dismissal, nor is it ground to authorize the direction of a judgment in favor of the infant defendant;[80] but the defect is amendable by permitting the introduction of a representative;[81] nor is the fact that an infant plaintiff is not represented by guardian or next friend a ground for nonsuit.[82] In other cases it is held that it is proper to dismiss the action or suit because the infant plaintiff[83] or defendant[84] is not duly represented; also that it is proper to nonsuit an infant plaintiff not duly represented.[85]

d. Waiver or Loss of Right to Object

Although an infant cannot waive the objection that a representative has not been appointed for him, it has been held that he cannot raise the objection, where his interests have been properly protected, after verdict or judgment. If the other party does not object to an infant plaintiff's incapacity, the objection is waived.

Generally, it may be said that an infant cannot, during his infancy, waive the objection that his rights as litigant have not been protected in the manner prescribed by law;[86] hence an infant defendant who was not represented by a guardian ad litem may raise the objection after verdict to prevent the entry of judgment,[87] and it has been held that he may even do so after judgment.[88] However, since, as considered supra subdivision b of this section, the defect of want of a guardian ad litem for an infant defendant is a mere irregularity not affecting the jurisdiction of the court, it has been held that, where an infant defendant has had his interest in the litigation properly protected, he cannot after verdict[89] or judgment[90] raise the objection

73. Cal.—Childs v. Lanterman, 37 P. 382, 103 Cal. 381, 42 Am.S.R. 121.

No ratification

Partition proceeding which was invalid because minors were represented therein as next friend by another minor was not ratified by subsequent partition in pais of the land set aside to the minors, nor were minors estopped from asserting invalidity.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.

Right of disaffirmance

If guardian was not appointed under statute for minor defendant, minor has right of disaffirmance after attaining majority until barred by laches.—Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen, 65 P.2d 352, 8 Cal.2d 364—Gouanillou v. Industrial Accident Commission, 193 P. 937, 184 Cal. 418—Field v. Hughes, 20 P.2d 990, 131 Cal.App. 144—Neilson v. Walker, 286 P. 1091, 105 Cal.App. 23.

74. Cal.—Childs v. Lanterman, 37 P. 382, 103 Cal. 387, 42 Am.S.R. 121.

75. La.—House v. Croft, 8 Mart.,N. S., 704.

76. Mo.—Jones v. Steele, 36 Mo. 324.
31 C.J. p 1123 notes 26, 27.

Irregularity of appointment of next friend may be raised by demurrer or answer.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

77. Ala.—Howland v. Wallace, 2 So. 96, 81 Ala. 238.

78. Cal.—Doyle v. Loyd, 114 P.2d 398, 45 Cal.App.2d 493.
31 C.J. p 1123 note 31–32.

79. N.J.—Fodor v. Kunie, 112 A. 598, 92 N.J.Eq. 301.
31 C.J. p 1123 note 33.

80. Ind.—Daugherty v. Reveal, 102 N.E. 381, 54 Ind.App. 71.

81. N.J.—Moore v. Moore, 70 A. 684, 74 N.J.Eq. 733.
N.C.—Hicks v. Beam, 17 S.E. 490, 112 N.C. 642, 34 Am.S.R. 521.

82. N.C.—Carroll v. Montgomery, 38 S.E. 874, 128 N.C. 278.
31 C.J. p 1123 note 37.

83. N.Y.—Dunn v. Fidelity & Casualty Co. of New York, 30 N.Y.S.2d 639, 177 Misc. 865.
31 C.J. p 1123 note 39.

84. Me.—Marston v. Humphrey, 24 Me. 513.
31 C.J. p 1123 note 40.

85. S.C.—McDaniel v. Nicholson, 9 S.C.L. 344.

86. N.Y.—Pacilio v. Scarpati, 300 N. Y.S. 473, 165 Misc. 586.
31 C.J. p 1124 note 43.

Mere filing of answer and participation by infant in legal proceedings or trial in his own behalf or through attorney employed by him would not operate as estoppel or legal waiver of the statutory requirements. Accordingly, a statement in infant's answer that it was filed through his guardian would not create estoppel or otherwise bind infant where guardian did not employ attorney who represented infant and prepared answer, and statement was made without knowledge of guardian or infant.—Brown v. Anderson, 197 S.E. 761, 186 Ga. 220, followed in 197 S. E.2d 833, 186 Ga. 222.

87. Pa.—Guilian v. Grover, 9 Pa. Dist. & Co. 62, 18 Del.Co. 8—Blouse v. Geesey, 35 Pa.Co. 181.

88. Ky.—Reynolds v. Steel, 185 S. W. 820, 170 Ky. 153.

89. Ind.—Watson v. Wrightsman, 59 N.E. 1064, 26 Ind.App. 437.
Iowa.—Johnston v. Calvin, 5 N.W. 2d 840, 845, quoting **Corpus Juris.**

90. Vt.—Adams v. Cook, 100 A. 42, 91 Vt. 281.
31 C.J. p 1124 note 48.

so as to defeat the entry of judgment or the judgment itself; and this rule has been applied where the infant was represented by his parent as natural guardian,[91] by attorney,[92] and by guardian of his own selection.[93] Also an infant defendant may after attaining majority lose his right to object to the want or lack of a guardian ad litem, as where he acquiesces in the judgment for a number of years thereafter.[94]

If defendant does not in a proper manner raise the objection to plaintiff's capacity to sue, it is considered as waived.[95] He waives the objection that plaintiff is an infant suing without representative by pleading to the merits,[96] or by not objecting by demurrer or answer.[97] He cannot after plea or answer move on this ground to set aside the proceedings[98] or to arrest judgment.[99]

Codefendants. If one defendant does not in a proper manner raise the objection that a guardian ad litem has not been appointed for his codefendant, he cannot subsequently complain that one was not appointed, even though the failure so to appoint a guardian may deprive him of a statutory right that recourse must first be had against the property of the codefendant.[1]

§ 109. —— Authority to Represent

a. Who may represent
b. By guardian ad litem or next friend
c. Authority to act or appointment

a. Who May Represent

The authority to represent an infant party in a legal action or proceeding is frequently regulated by statute.

Who may represent an infant in legal suits and proceedings is frequently a matter of statutory regulation.[2] Under some statutes a guardian ad litem is appointed for the county by the governor, and he is required to represent and defend the interests of minors in all courts of law and equity.[3] His appearance in court in pursuance of that duty, and his denial of the allegations of the bill against the minors, brings him before the court as the representative of their interests as effectually as though he had been affirmatively appointed by the court.[4] Under such a statute, there is no occasion to appoint a guardian ad litem, except where the interests of the minors are conflicting among themselves, if the general guardian ad litem appears and represents them.[5] The father of a minor child, in Louisiana, being clothed during marriage with the functions of the tutor, is the proper party to bring suit in behalf of the minor.[6] This authority of the father may be taken away from him only by the authority of justice, and after he has been pronounced incapable and unworthy of his trust.[7]

The authority of a general guardian to represent his ward in legal suits and proceedings is discussed in Guardian and Ward § 175.

What law governs. The question as to who shall represent the infant litigant is governed by the law

91. Vt.—Adams v. Cook, supra.
31 C.J. p 1124 note 49.

92. Ind.—Watson v. Wrightsman, 59 N.E. 1064, 26 Ind.App. 437.
Iowa.—Johnston v. Calvin, 5 N.W.2d 840, 845, quoting **Corpus Juris.**

93. Ky.—Woods v. Thompson, 4 Ky. Op. 207.

94. N.Y.—Howard v. Dusenbury, 44 How.Pr. 423.
31 C.J. p 1124 note 52.
Relief against judgment generally see infra § 123.

95. N.Y.—Perkins v. Stimmel, 21 N. E. 729, 114 N.Y. 359, 11 Am.S.R. 659.
31 C.J. p 1124 note 54.

96. Ark.—Davie v. Padgett, 176 S. W. 333, 117 Ark. 544.
31 C.J. p 1124 note 56.

97. N.Y.—Perkins v. Stimmel, 21 N. E. 729, 114 N.Y. 359, 11 Am.S.R. 659.
31 C.J. p 1124 note 57.

98. Ind.—Smith v. Allen, 16 Ind. 316.
31 C.J. p 1124 note 58.

99. Mo.—Jones v. Steele, 36 Mo. 324.

1. Cal.—Holland v. Kodimer, 77 P. 2d 843, 11 Cal.2d 40.

2. Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878.
31 C.J. p 1124 note 64.

3. Ala.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.

4. **Saves decree from invalidity**
Appearance and representation of minors by guardian ad litem for county appointed by governor saves decree from invalidity for failure of due service on minors.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.

5. Ala.—Jones v. Henderson, supra.

6. La.—Grantham v. Smith, 132 So. 805, 18 La.App. 519, rehearing denied 134 So. 263, reversed on other grounds, Lorance v. Smith, 138 So. 871, 173 La. 883, which reverses Grantham v. Smith, 132 So. 810, 18 La.App. 519—Solomon v. Faggard (second case), 127 So. 8, 13 La.App. 433.
31 C.J. p 1124 note 64 [a].

7. **Abandonment by husband**
Exception to capacity of mother to bring suit on behalf of unemancipated minor was held properly overruled, notwithstanding absence of allegation as to mother's qualifications in original petition, where mother thereafter obtained appointment as natural tutrix on showing of abandonment by her husband and filed a supplemental petition as natural tutrix.—Payton v. Ideal Savings & Homestead Ass'n, La.App., 160 So. 648.

Court had no power to authorize mother to institute suit to recover for personal injuries to child by ex parte order without showing husband was either incapable or unworthy of administering estate of minor.—Grantham v. Smith, 132 So. 805, 18 La.App. 519, rehearing denied 134 So. 263, reversed on other grounds Lorance v. Smith, 138 So. 871, 173 La. 883, which reverses Grantham v. Smith, 132 So. 810, 18 La.App. 519.

of the forum, and not by the law of the infant's domicile.[8]

b. By Guardian ad Litem or Next Friend

Subject to statutory variations, an infant plaintiff is properly represented by a next friend, and an infant defendant by a guardian ad litem.

In the absence of a statute to the contrary, an infant plaintiff may properly be represented by a next friend,[9] rather than by a guardian ad litem.[10] The subject, however, may and often is a matter of statutory regulation,[11] and accordingly it may be optional to bring the action by guardian ad litem[12] or next friend,[13] or it may be required to be brought by guardian ad litem[14] or by next friend.[15] The bringing of a suit or action by guardian ad litem instead of by next friend or vice versa, while erroneous,[16] is only a mere irregularity which is not jurisdictional and does not render the judgment void.[17]

While in some of the jurisdictions that adhere to the strict distinction as to the functions of a guardian ad litem and a next friend it has been held that a cross complaint must be by next friend and not by guardian ad litem,[18] in other jurisdictions, having regard for the infant's interest, it is held that the guardian ad litem has authority to plead whatever might defeat the action, and in a proper case, he may file a cross complaint.[19] Indeed, it has been held that it is his duty to prosecute a cross complaint if necessary to protect the infant's interests.[20]

Infant defendants. Where an infant defendant is not represented by his general guardian, he should be represented by a guardian ad litem appointed for that purpose,[21] and not by next friend.[22] It has

8. Minn.—Brunette v. Minneapolis, St. P. & R. Co., 137 N.W. 172, 118 Minn. 444.

9. Ala.—Johnson v. Pugh, 193 So. 317, 239 Ala. 12—Trucks v. Sessions, 66 So. 79, 189 Ala. 149.
Conn.—Tulin v. Tulin, 200 A. 819, 124 Conn. 518.
Fla.—Flewwellin v. Jeter, 189 So. 651, 138 Fla. 540.
Ga.—Pardue Medicine Co. v. Pardue, 22 S.E.2d 143, 194 Ga. 516—Sanders v. Hinton, 156 S.E. 812, 171 Ga. 702—Kite v. Brooks, 181 S.E. 107, 51 Ga.App. 531.
Me.—Ayer v. Androscoggin & K. Ry. Co., 163 A. 270, 131 Me. 381.
Miss.—Tate v. Bush, 62 Miss. 145.
N.J.—In re Braunstein's Will, 171 A. 788, 115 N.J.Eq. 556.
Okl.—First State Bank of Vinita v. Fay, 159 P. 505, 60 Okl. 132.
Tenn.—Freeman v. Freeman, 9 Heisk. 301.
Tex.—Loewenstein v. Watts, Civ. App., 119 S.W.2d 176, affirmed 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910—Wesner v. Woodson, Civ.App., 111 S.W.2d 354, error refused—Fall v. Weber, Civ.App., 47 S.W.2d 365, error refused—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
31 C.J. p 1125 note 71.

At common law, where an infant plaintiff was not represented by his general guardian, he was required to sue by guardian ad litem; but by the statute of Westminster he was authorized to sue by next friend, and this remedy was held to be cumulative, leaving it optional for the suit to be brought by guardian or next friend.—Cavender v. Smith, 5 Iowa 157—31 C.J. p 1124 note 68, p 1125 notes 69, 70.

Federal Employers' Liability Act
Action by minor, by his next friend, is maintainable under Federal Employers' Liability Act.—Close v. Portland Terminal Co., 145 A. 386, 128 Me. 6.

Nonresident infant
Infant who resided in a sister state resided in a "foreign country" within the statute authorizing action of an infant, who resides in a foreign country and who has a guardian, curator, or committee residing therein, to bring suit by such guardian, curator, or committee or by next friend.—Dr. Pepper Bottling Co. of Kentucky v. Hazelip, 144 S.W. 2d 798, 284 Ky. 333.

Partition proceedings
In suit by minors by next friend, for distribution of proceeds of partition sale of land which had been held in trust, such minors need not be made parties defendant and need not have guardian ad litem appointed to represent them.—McWhorter v. Cox, 195 So. 435, 239 Ala. 441.

Surplusage
In suit by minor it was unnecessary to join minor's next friend as guardian, and hence words "and guardian" would be treated as surplusage and stricken.—Artille v. Davidson, 170 So. 707, 126 Fla. 219, affirmed State ex rel. Davidson v. Parks, 175 So. 792, 129 Fla. 64, following State ex rel. H. E. Wolfe Const. Co. v. Parks, 175 So. 786, 129 Fla. 50.

10. Ind.—Spencer v. Robbins, 5 N.E. 726, 106 Ind. 580.
31 C.J. p 1125 note 72.

11. N.Y.—Clark v. Clark, 14 Abb. Pr. 299, 21 How.Pr. 479—Lyle v. Lyle, 13 How.Pr. 104.
31 C.J. p 1125 note 73.

12. Okl.—Hill v. Reed, 103 P. 855, 23 Okl. 616.
Tex.—Long v. Behan, 48 S.W. 555, 19 Tex.Civ.App. 325.

13. Okl.—Hill v. Reed, 103 P. 855, 23 Okl. 616.
Pa.—Ferencz v. Greek Catholic Union, 54 Pa.Super. 642.
31 C.J. p 1125 note 75.

14. N.Y.—Frehe v. Schildwachter, 45 N.E.2d 427, 289 N.Y. 250, affirming 33 N.Y.S.2d 171, 263 App.Div. 879—Brand v. Union Ry. Co. of New York City, 17 N.Y.S.2d 504, 173 Misc. 224.
Pa.—Potter v. Potter, 43 Pa.Dist. & Co. 413.
31 C.J. p 1125 note 76.

15. Ind.—Spencer v. Robbins, 5 N.E. 726, 106 Ind. 580.

16. N.Y.—Wilkiming v. Schmale, 1 Hilt. 263.
Pa.—Potter v. Potter, 43 Pa.Dist. & Co. 413.

17. Tex.—Wygal v. Myers, 13 S.W. 567, 76 Tex. 598.
31 C.J. p 1125 notes 79, 80.

Leave to amend will be given where a decree has not been entered. —Potter v. Potter, 43 Pa.Dist. & Co. 413.

18. Ind.—Gibbs v. Potter, 77 N.E. 942, 166 Ind. 471, 9 Ann.Cas. 481.
31 C.J. p 1125 note 81.

19. Wis.—Tyson v. Tyson, 68 N.W. 1015, 94 Wis. 225.
31 C.J. p 1125 notes 82, 83.

20. Neb.—Schade v. Connor, 120 N. W. 1012, 84 Neb. 51.

21. U.S.—O'Hara v. McConnell, Pa., 93 U.S. 150, 23 L.Ed. 840.
Ill.—Cost v. Rose, 17 Ill. 276.
S.C.—Sligh v. Sligh, 3 S.C.L. 176.
Tex.—Montgomery v. Carlton, 56 Tex. 361.
31 C.J. p 1125 note 86.

22. Pa.—Manning v. Baylinson, 68 Pa.Super. 512.
31 C.J. p 1126 note 87.

been held that judgment may be had on a cross bill against an infant plaintiff represented by a next friend[23] or general guardian[24] without the appointment of a guardian ad litem. On the other hand, although an infant sued by next friend, it has been held that he is entitled to a guardian ad litem to conduct his defense against a cross bill.[25]

c. Authority to Act or Appointment

(1) Consent or wish of infant
(2) Necessity of formal appointment

(1) Consent or Wish of Infant

As a general rule, the consent of an infant is not necessary to the appointment of a guardian ad litem or for a next friend to act for him.

It has been held that the consent of an infant is not necessary to the appointment of a guardian ad litem for him.[26] While some cases hold that a suit should not be maintained without the authority of the infant,[27] and that a next friend should not be allowed to compel him to prosecute an action contrary to his wishes where the infant has arrived at the age of discretion,[28] it has also been held that it is not necessary for the next friend to be authorized by the infant,[29] and that the suit may be brought without the infant's knowledge[30] and even against his wishes.[31] However, the next friend acts at his peril.[32] On proper application the court may direct an inquiry or reference to determine whether or not the suit is for the benefit of the infant, and it may stay all the proceedings in the meantime.[33]

(2) Necessity of Formal Appointment
(a) Infant plaintiffs
(b) Infant defendants

(a) Infant Plaintiffs

It is generally held that no formal order of appointment of a next friend is necessary.

On general principles, there must be an authority somewhere to allow or prohibit a suit to be brought in the name of an infant, by any person assuming to act for him.[34] Hence, in theory of law, it is only by permission of the court that the suit is permitted to be brought in the name of the infant by the person who assumes to act for him.[35] Theoretically, such person is appointed by the court,[36] and there are some cases that seem to hold that a formal appointment is necessary; and in some jurisdictions, by force of statute, a next friend must be duly appointed.[37] It is generally held, however, that no formal order is necessary,[38] the admission of the next friend by the court being implied,[39] it being necessary only that the court should recognize the representative capacity of the person acting as next friend.[40] A recital or allegation in the pleadings that plaintiff sues by next friend is sufficient without a formal order.[41] Even though the court

23. Mo.—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581.

24. Judgment quieting title
Defendant, in suit by infant by legal guardian to recover realty, may secure judgment quieting title without necessity of appointing guardian.—Steil v. Leverett, 272 P. 412, 133 Okl. 300.

25. Ala.—Pritchett v. Dixon, 133 So. 283, 222 Ala. 597.

26. N.M.—In re Dye, 120 P. 306, 16 N.M. 297.
31 C.J. p 1126 note 89.
Application for appointment by infant who has reached age of discretion see infra § 110.

Formal consent is unnecessary.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

27. Ind.—Underwood v. Deckard, 70 N.E. 383, 34 Ind.App. 198.

28. Ky.—Kash v. Kash's Guardian, 85 S.W.2d 866, 260 Ky. 377—Anderson v. Anderson, 11 Bush 327.

29. Conn.—McCarrick v. Kealy, 40 A. 603, 70 Conn. 642.
31 C.J. p 1126 note 93.

30. N.Y.—Fulton v. Rosevelt, 1 Paige 178, 19 Am.D. 409.
31 C.J. p 1126 note 94.

31. Ill.—Chudleigh v. Chicago, R. I. & P. R. Co., 51 Ill.App. 491.
31 C.J. p 1126 note 95.

32. N.Y.—Fulton v. Rosevelt, 1 Paige 178, 19 Am.D. 409.

33. Mass.—Guild v. Cranston, 8 Cush. 506.
31 C.J. p 1126 notes 97, 98.

34. Tex.—Stephens v. Hewett, 54 S. W. 301, 22 Tex.Civ.App. 303.
31 C.J. p 1126 note 1.

35. Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.
31 C.J. p 1126 note 2.

36. Mass.—Butler v. Winchester Home, 104 N.E. 451, 216 Mass. 567.
31 C.J. p 1126 note 3.

At common law, the next friend was appointed by the court.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.

37. Mich.—Moebius v. McCracken, 246 N.W. 163, 261 Mich. 409.
31 C.J. p 1126 note 4, p 1127 note 5.

38. Cal.—In re Smith's Estate, 254 P. 567, 200 Cal. 654.
Ga.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.
Mich.—Moebius v. McCracken, 246 N. W. 163, 261 Mich. 409.
Ohio.—Tuttle v. Furi, 22 Ohio Cir. Ct.,N.S., 388, 43 Ohio Cir.Ct. 626.
Pa.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398—Haines v. Fitzgerald, 165 A. 52, 108 Pa. Super. 290.
31 C.J. p 1127 note 6.

Father
Even if father was not duly appointed as next friend, infant plaintiff could not have judgment set aside where what father did was necessary and proper to be done by next friend.—Oates v. Texas Co., 166 S.E. 317, 203 N.C. 474.

39. Ill.—Packewie v. East St. Louis & Suburban R. Co., 197 Ill.App. 1.
31 C.J. p 1127 note 7.
"The court, in allowing the case to proceed, is presumed to have approved the appearance of the person acting as next friend."—Mize v. Harber, 8 S.E.2d 1, 6, 189 Ga. 737.

40. U.S.—Gillespie v. Collier, Okl., 224 F. 298, 139 C.C.A. 534.
31 C.J. p 1127 note 8.

41. Mass.—Butler v. Winchester Home, 104 N.E. 451, 216 Mass. 567.
31 C.J. p 1127 note 9.

itself fails in its duty to appoint the next friend, its approval or ratification of the judgment will cure the omission.[42]

Affidavit of right to sue. In some jurisdictions a person suing as the next friend of an infant is required to file an affidavit showing his right to sue in that capacity.[43] The failure to file the affidavit is not a jurisdictional defect.[44] It may be filed nunc pro tunc.[45] While the requirement may be waived by defendant,[46] and it will be considered waived if an answer is filed without objecting,[47] a motion to dismiss should be sustained if the affidavit is not made, but, if the affidavit is made while the motion is pending, it is sufficient.[48] It has been held that the defect can be reached only by special demurrer and that the objection is waived by a general demurrer.[49]

Record. Where no formal order of appointment of a next friend needs to be entered, it is not necessary that the record should show that the appointment was made.[50]

Raising objection. The incapacity of a next friend suing in behalf of an infant should be duly objected to in order to be available.[51] It is not ground for reversing a judgment in favor of an infant plaintiff that the next friend was not duly appointed.[52] If defendant appears and pleads, it is then too late to question the authority of the next friend.[53] After verdict the objection is considered waived.[54] Where the allegations of the complaint showing the due appointment are admitted because not properly put in issue, the due appointment is a matter concluded and adjudicated by a judgment in favor of plaintiff.[55] An issue as to such appointment is not raised by a general denial.[56] It may be raised by answer[57] or demurrer,[58] but the demurrer or answer must be by special pleading.[59] The objection cannot be raised by an instruction in the nature of a demurrer to the plaintiff's evidence.[60] It has been held that the better and more convenient practice is to take a preliminary objection by motion before interposing an answer to the merits.[61] A reply in an action by an infant suing by next friend, in which infancy is alleged in answer to defendant's plea of limitations, is not subject to demurrer in failing to allege that the next friend is sui juris.[62]

(b) Infant Defendants

A guardian ad litem for an infant defendant must be appointed by the court, and no one has authority to appear and answer for the infant without such appointment.

No one has authority to appear and answer for an infant defendant without having been first appointed by the court for that purpose,[63] and a decree rendered on the answer or defense of a person who has assumed to act as guardian ad litem for the infant without any such appointment is erroneous,[64] and does not conclude the infant.[65] While it has

42. U.S.—Gillespie v. Collier, Okl., 224 F. 298, 139 C.C.A. 534.

43. Ky.—Spicer v. Holbrook, 66 S.W. 180, 23 Ky.L. 1812.
31 C.J. p 1127 note 14.

44. Ky.—Henning v. Barringer, 10 S.W. 136, 10 Ky.L. 674.

45. N.Y.—Bogert v. Bogert, 45 Barb. 121.

46. Ky.—Campbell v. Dreher, 110 S. W. 353, 33 Ky.L. 444—Staton v. Bryant, 5 Ky.L. 336, 12 Ky.Op. 336.

47. Ky.—Elkhorn Coal Corp. v. Guttadora, 228 S.W. 420, 190 Ky. 770—Staton v. Bryant, 5 Ky.L. 426, 12 Ky.Op. 336.

48. Ky.—Campbell v. Dreher, 110 S. W. 353, 33 Ky.L. 444.

49. Ky.—Maiden v. Stewart, 174 S. W. 5, 163 Ky. 551.

50. Mass.—Butler v. Winchester Home, 104 N.E. 451, 216 Mass. 567.
31 C.J. p 1127 note 12.

51. U.S.—State of Mississippi, for Use of Smith, C.C.A.Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi, for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.
31 C.J. p 1127 note 23.

52. Mo.—Harviston v. St. Louis United R. Co., 119 S.W. 481, 139 Mo.App. 41.

53. U.S.—Brabham v. State of Mississippi, for Use of Smith, C.C.A. Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi, for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.
31 C.J. p 1127 note 25.

54. Ind.—Wortman v. Ash, 4 Ind. 74.

55. Wis.—Hughes v. Chicago, St. P., M. & O. R. Co., 106 N.W. 526, 126 Wis. 525.

56. Mo.—Cohn v. Metropolitan St. R. Co., 81 S.W. 846, 182 Mo. 577.
31 C.J. p 1127 note 28.

57. Mo.—Cohn v. Metropolitan St. R. Co., supra.

58. Mo.—Cohn v. Metropolitan St. R. Co., supra.

59. Mo.—Dudley v. Wabash R. Co., 142 S.W. 338, 238 Mo. 184.
31 C.J. p 1127 note 31.

60. Mo.—Wegenschiede v. St. Louis Transit Co., 94 S.W. 774, 118 Mo. App. 295.

61. Minn.—Schuek v. Hagar, 24 Minn. 339.
31 C.J. p 1127 note 33.

62. R.I.—Bliven v. Wheeler, 50 A. 644, 23 R.I. 379.

63. Ill.—Cost v. Rose, 17 Ill. 276.
31 C.J. p 1127 note 35.
No legal right of parentage or of natural guardianship will enable one to act for an infant without an appointment as guardian.
Ky.—Herr v. Humphrey, 126 S.W.2d 809, 277 Ky. 421, 121 A.L.R. 954.
Mont.—Maloney v. Schnadelmier, 212 P. 493, 65 Mont. 531.

64. Mont.—Maloney v. Schnadelmier, supra.
31 C.J. p 1128 note 36.

65. Mass.—Johnson v. Waterhouse, 26 N.E. 234, 152 Mass. 585, 23 Am. S.R. 858, 11 L.R.A. 440.
Opening decree
Where A appeared as special guardian for infant heirs of B, but there was no order of court appointing him, and it did not appear from the record how many of the heirs were infants, it was held that the cause must be reopened.—Madi-

been held that no formal order need be made for the appointment of a guardian ad litem,[66] that the want or lack of the entry of such order is no ground for reversing the decree or judgment,[67] and that any action on the part of the court whereby the person assuming to act as guardian ad litem is recognized as such is equivalent to an appointment,[68] an order of the court appointing a guardian ad litem is usually required.[69] It is presumed that the appointment was regularly and properly made and that the necessary proofs were before the court to justify its action in making the order.[70] Where the guardian ad litem answers for the infant defendant, and is recognized as such, his authority cannot be questioned in a collateral proceeding.[71]

No letters of guardianship are ordinarily issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him.[72]

Record. In some jurisdictions, it is required that the record should affirmatively show that a guardian ad litem was appointed to appear and answer for infant parties; otherwise the judgment or decree will be reversed on error or appeal;[73] but the failure of the record to show the appointment does not render the judgment void.[74] Where the record is silent on the subject, the appointment will not be presumed;[75] nor will it be presumed that the infant defendant attained his majority before the time of trial.[76] It cannot be presumed that a guardian ad litem was appointed for an infant defendant in the absence of proof that the records were lost or destroyed.[77] The recital in a decree or judgment of the appointment and appearance of a guardian ad litem imports verity,[78] and, ordinarily, it is sufficient to establish his authority.[79]

§ 110. —— Appointment, Eligibility, and Qualification

a. Authority and duty of court
b. Conditions precedent to appointment
c. Time for appointment
d. Who may apply
e. Who may be appointed
f. Proceedings
g. Effect of appointment

a. Authority and Duty of Court

A court has the authority and duty to appoint guardians ad litem or next friends to protect the interests of infant parties in proceedings before it.

For the purpose of protecting the rights of infant litigants, under either its inherent power[80] or the power conferred on it by statute,[81] the court may, and should, protect their interests by the appointment of special guardians or guardians ad litem or next friends.[82] The jurisdiction of particular courts to appoint guardians ad litem may be, and is usually, regulated by statute,[83] but as a general rule a guardian ad litem for an infant party should be appointed by the court in which the ac-

son v. Wallace, 2 J.J.Marsh., Ky., 581.
31 C.J. p 1128 note 37.

66. Hawaii.—Lukua v. Manaia, 21 Hawaii 160.
31 C.J. p 1128 note 38.

67. U.S.—Simmons v. Baynard, C.C. S.C., 30 F. 532.
Ill.—Crane v. Stafford, 75 N.E. 424, 217 Ill. 21—Tuttle v. Garrett, 74 Ill. 444.

68. Fla.—Shepherd v. State, 119 So. 866, 96 Fla. 873.
31 C.J. p 1128 note 40.

69. Mich.—Stevenson v. Kurtz, 57 N.W. 580, 98 Mich. 493.
31 C.J. p 1128 note 41.

70. Cal.—Welsh v. Koch, 88 P. 604, 4 Cal.App. 571.
31 C.J. p 1128 note 42.

71. N.C.—Harris v. Bennett, 76 S.E. 217, 160 N.C. 339.

72. Cal.—Foley v. Northern California Power Co., 130 P. 1183, 165 Cal. 103—In re Hathaway, 43 P. 754, 111 Cal. 270.

73. Va.—Kanter v. Holland, 152 S.E. 328, 154 Va. 120.
31 C.J. p 1128 note 52.

74. Tex.—Davis v. Wells, 37 Tex. 606.

75. Va.—Kanter v. Holland, 152 S.E. 328, 154 Va. 120—Catron v. Bostic, 96 S.E. 845, 123 Va. 355.

76. Iowa.—Cavender v. Smith, 5 Iowa 157.

77. W.Va.—McDonald v. McDonald, 3 W.Va. 676.

78. Mo.—Arn v. Arn, 173 S.W. 1062, 264 Mo. 19.
31 C.J. p 1128 note 57.

79. Ark.—Benjamin v. Birmingham, 8 S.W. 183, 50 Ark. 433.

80. Cal.—Mabry v. Scott, 124 P.2d 659, 51 Cal.App.2d 245, certiorari denied Title Ins. & Trust Co. v. Mabry, 63 S.Ct. 75, 317 U.S. 670, 87 L.Ed. 538.
31 C.J. p 1129 note 61.

81. Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.
31 C.J. p 1129 note 62.

82. Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535—Rapp v. Goerlitz, 40 N.E.2d 766, first case, 314 Ill.App. 191—Schorow v. Schorow, 20 N.E.2d 143, 299 Ill.App. 618.
Mo.—Crawford v. Amusement Syndicate Co., 87 S.W.2d 581.
N.J.—Towner v. Mansfield Tp. Board of Education, 128 A. 602, 3 N.J. Misc. 448.
N.C.—Irvin v. Harris, 127 S.E. 529, 189 N.C. 465.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292—Smith v. Mann, Civ. App., 296 S.W. 613.
31 C.J. p 1129 note 63.
Necessity for representation see supra § 108.

Appellate court

Where no one appeared in the appellate court as guardian ad litem for minor party whose interests were involved, court was required to have a guardian ad litem appointed in order that proper action might be taken for protection of the minor's rights.—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209.

83. Pa.—In re Harber, 41 Pa.Dist. & Co. 590.
31 C.J. p 1129 note 64.

tion is brought and is pending.[84] The power to appoint guardians ad litem for infant defendants may be discretionary with the court,[85] and under ordinary circumstances the exercise of that discretion is not subject to revision.[86] Under some statutes the appointment of a guardian ad litem can be made by the clerk of the court[87] or his deputy.[88]

b. Conditions Precedent to Appointment

In order to authorize the appointment of a guardian ad litem there must be a litigation of which the court has jurisdiction, and in which the infant is a party; and, as a general rule, the infant should have been served with process. A prior appointment of a guardian ad litem should be revoked before another is appointed.

In order to authorize the appointment of a guardian ad litem there must be a litigation of which the court has jurisdiction.[89] If the infant is not a party to the suit the appointment is a nullity.[90]

Former appointments. A guardian ad litem may be appointed without removing the general guardian.[91] The appointment of another guardian ad litem without reversing or setting aside a former appointment has been held to be void.[92] Where, however, the tutor and the minor are absentees at the time of trial, the appointment of a curator ad hoc is proper,[93] and the presence of the undertutor in the parish does not prevent such appointment.[94]

Service of process on infant. Before the appointment of a guardian ad litem for an infant defendant the general rule is that there should have been such service of process on the infant as is necessary to bring him within the jurisdiction of the court;[95] and a premature appointment in such cases usually is held to constitute error.[96] Some cases hold that this error is a jurisdictional defect rendering the appointment absolutely void,[97] but others

84. Mich.—King v. Emmons, 277 N.W. 851, 283 Mich. 116, 115 A.L.R. 564.
Pa.—In re Harber, 41 Pa.Dist. & Co. 590.
31 C.J. p 1129 note 65.

Cure of irregularity
Where guardian ad litem prosecuted claim for infant in court of claims but had been appointed by supreme court instead of by court of claims as strict conformance with civil practice act required, court of claims was authorized to appoint the guardian ad litem nunc pro tunc as of date appointed by supreme court or of filing of claim.—Mackney v. State, 29 N.Y.S.2d 1004, 177 Misc. 94.

That court only
A guardian ad litem can be appointed only by the court before which the proceeding necessitating the appointment is pending.—In re Elkins' Estate, 18 Pa.Dist. & Co. 578.

85. Cal.—In re Snowball, 104 P. 446, 156 Cal. 235.
31 C.J. p 1130 note 66.

Two guardians
In trespass to try title, where there was nothing to show which of two guardians was legal guardian of minor, trial court properly exercised discretion in appointing guardian ad litem of its own choice to represent minor's interest.—Brown v. Stumpff, Tex.Civ.App., 123 S.W.2d 806.

86. Tex.—Smith v. Taylor, 34 Tex. 589.

87. Mo.—Mabe v. Gillie Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.
31 C.J. p 1129 note 64 [e].

88. **During court's vacation**
Ky.—Monroes' Guardian ad Litem v. Monroe, 285 S.W. 250, 215 Ky. 449.

89. Iowa.—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 48.
31 C.J. p 1130 note 68.

90. Wis.—In re McNaughton, 118 N.W. 997, 120 N.W. 288, 138 Wis. 179.
31 C.J. p 1130 note 69.

91. Wash.—Ponti v. Hoffman, 151 P. 249, 87 Wash. 137.

92. Pa.—In re Strickler's Estate, 14 A.2d 341, 140 Pa.Super. 372.
31 C.J. p 1130 note 71.

93. La.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745.

94. La.—Saenger Amusement Co. v. Masur, supra.

95. Ala.—Hamilton v. Tolley, 96 So. 584, 209 Ala. 533.
Kan.—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262.
Ky.—Herr v. Humphrey, 126 S.W.2d 809, 277 Ky. 421, 121 A.L.R. 954—Rachford v. Rachford, 7 S.W.2d 234, 224 Ky. 831—Cain v. Hall, 278 S.W. 152, 211 Ky. 817.
N.Y.—Lella v. Holman, 3 N.Y.S.2d 352, 166 Misc. 796—In re Morris' Estate, 267 N.Y.S. 644, 149 Misc. 483.
Ohio.—Carroll v. Employers' Liability Assur. Corporation, Limited, of London, England, 190 N.E. 590, 47 Ohio App. 146.
Okl.—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.
S.C.—Lanham v. Bomar, 124 S.E. 635, 128 S.C. 483.
Tenn.—Smartt v. Smartt, 1 Tenn. App. 68.
Tex.—Ginn v. Southwest Bitulithic Co., Civ.App., 149 S.W.2d 201, error dismissed, judgment correct.
31 C.J. p 1130 note 76.

Appearance
(1) A guardian ad litem appointed before service of summons on the infants has no right to enter their appearance by filing an answer.—Gannon v. Moore, 104 S.W. 139, 83 Ark. 196.

(2) The answer of a guardian ad litem will not operate as an appearance for the infant, when the guardian was appointed before service by publication on the infant had been perfected.—Standard Oil Co. v. Mehrtens, 118 So. 216, 96 Fla. 455—Laflin, v. Gato, 42 So. 387, 52 Fla. 529.

Cross action
Guardian ad litem or next friend has no right to appear in answer to cross action, in which minor becomes defendant but is not served with process.—Wright v. Jones, Tex.Com. App., 52 S.W.2d 247, reversing, Civ. App., 33 S.W.2d 292.

Nonresident infant
(1) The appointment of a guardian ad litem, for nonresident infant defendants is a nullity, where made before service of process upon them was complete.—Donovan v. Flynn, 220 N.Y.S. 44, 219 App.Div. 471.

(2) Other cases see 31 C.J. p 1130 note 76 [d].

96. Ala.—Hall v. Hall, 121 So. 718, 219 Ala. 199.
Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
N.Y.—Chilson v. Battey, 22 N.Y.S.2d 556, 260 App.Div. 838.
Tex.—Morris v. Drescher, Civ.App., 123 S.W.2d 958, error refused.
31 C.J. p 1130 note 77.

97. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
31 C.J. p 1131 note 78.

Waiver
An infant cannot waive the issuance and service of summons, nor can any person, not even his guardian, do so for him.—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.

hold that the appointment in such cases is voidable only and not void,[98] and hence that it may be cured,[99] as by the service of summons on the infant thereafter and the filing of an answer by the guardian ad litem.[1] If the infant is already in court or voluntarily appears, failure to serve process on him before the appointment of a guardian ad litem will not render the appointment invalid;[2] if the guardian ad litem is appointed before the infant has been properly summoned, the irregularity may be corrected by a subsequent order confirming the appointment after the infant has been summoned.[3]

In a number of cases a distinction is drawn between purely personal actions and actions in rem, or quasi in rem.[4] In the former class of cases it has been held that jurisdiction can be acquired only by service of process,[5] while in the latter class it has been held that service of process is not essential to jurisdiction[6] and that the appointment of a guardian ad litem brings the minor into court;[7] and, although such proceedings may be erroneous,[8] the judgment or decree is not void.[9]

c. Time for Appointment

In the absence of a mandatory statute providing when a person must be appointed to represent an infant party, it usually is held necessary and sufficient if the appointment is made at such time as to protect the interests of the infant.

The application for the appointment of the person to represent the infant should be made at such a time as will permit of an appointment in time to protect the interests of the infant.[10] The question as to at what particular step in the proceeding an application for the appointment of a guardian ad litem or next friend may be entertained so that the appointment will effect a binding decree or judgment on the infant is determined by how far the proceedings have gone so as to affect adversely the interest of the infant litigant,[11] and in the absence

98. Tex.—Morris v. Drescher, Civ. App., 123 S.W.2d 958, error refused.
31 C.J. p 1131 note 79.

Admissibility as evidence

Fact that guardian ad litem for minors was appointed before minors were served with petition and process did not make proceeding inadmissible in evidence where guardian ad litem, after minors were served, acted in their interest.—Steele v. Graves, 127 S.E. 465, 160 Ga. 120.

Attainment of majority

Judgment against defendant, was not error as entered against minor who had no guardian ad litem appointed before service of summons, where defendant was served when still a minor, but court's former unimpeached findings showed that defendant became of age before trial, verdict, and judgment.—Carroll v. Employers' Liability Assur. Corporation, Limited, of London, England, 190 N.E. 590, 47 Ohio App. 146.

Court general guardian

The chancery court is the general guardian of all infants within its jurisdiction, and, by virtue of its general powers, has ample authority to protect the rights of minors when parties to pending actions. If the infant was not brought into court by service before the appointment of a guardian was made, the chancellor had the power to make the appointment without service, and the judgment or decree cannot be collaterally attacked as void.—Jones v. Henderson, 153 So. 214, 228 Ala. 273—Hubbard v. Vredenburgh Sawmill Co., 145 So. 320, 226 Ala. 54—Warren v. Southall, 141 So. 632, 224 Ala. 653—Hamilton v. Tolley, 96 So. 584, 209 Ala. 533.

In absence of fraud

Court of equity, in absence of limiting statute, may appoint guardian ad litem for resident minor defendant in cases affecting realty of minor situated within territorial jurisdiction of court without service of summons on minor, and such appointment is at most merely erroneous and not void unless it appears from record that there was actual or constructive fraud prejudicial to minor as result of appointment.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

99. N.C.—Cates v. Pickett, 1 S.E. 763, 97 N.C. 21.
31 C.J. p 1131 note 80.

1. U.S.—Mason v. Royal Indemnity Co., D.C.Ga., 35 F.Supp. 477, affirmed, C.C.A., 123 F.2d 335.
31 C.J. p 1131 note 81.

2. Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
N.Y.—In re Seabra's Will, 38 Hun 218.
31 C.J. p 1131 note 82.

Compliance with statute

Appointment of mother as guardian of minor over fourteen years of age after service on and nomination by minor, and as guardian ad litem of minors under that age by register without service, where mother appeared and answered bill to mortgage wards' property, was held to be a compliance with rule and statute.—Warren v. Southall, 141 So. 632, 224 Ala. 653.

Cross bill

The appointment of guardian ad litem for infant complainant, on filing of cross bill, without summons to minor, was proper.—Cogburn v. Callier, 104 So. 330, 213 Ala. 46.

3. Ky.—Caulder v. Chenault, 159 S.W. 578, 154 Ky. 777.

4. U.S.—New York L. Ins. Co. v. Bangs, Minn., 103 U.S. 435, 26 L.Ed. 580.
N.Y.—Sloane v. Martin, 40 N.E. 217, 145 N.Y. 524, 45 Am.S.R. 630, 28 L.R.A. 347, affirming 28 N.Y.S. 332, 77 Hun 249.

5. U.S.—New York L. Ins. Co. v. Bangs, Minn., 103 U.S. 435, 26 L.Ed. 580.
N.Y.—Sloane v. Martin, 40 N.E. 217, 145 N.Y. 524, 45 Am.S.R. 630, 28 L.R.A. 347, affirming 28 N.Y.S. 332, 77 Hun 249.

6. N.Y.—Sloane v. Martin, supra—Gotendorf v. Goldschmidt, 83 N.Y. 110.

7. U.S.—Manson v. Duncanson, App. D.C., 17 S.Ct. 647, 166 U.S. 533, 41 L.Ed. 1105.
31 C.J. p 1131 note 87.

8. N.Y.—Sloane v. Martin, 40 N.E. 217, 145 N.Y. 524, 45 Am.S.R. 630, 28 L.R.A. 347, affirming 28 N.Y.S. 332, 77 Hun 249.

9. U.S.—Manson v. Duncanson, App. D.C., 17 S.Ct. 647, 166 U.S. 533, 41 L.Ed. 1105.
31 C.J. p 1131 note 89.

10. Ark.—Blanton v. Davis, 154 S.W. 947, 107 Ark. 1.
Tenn.—Kelley v. Kelley, 15 Lea 194.

11. N.Y.—Anderson v. Anderson, 105 N.Y.S. 359, 164 App.Div. 812—Starr v. MacNamara, 182 N.Y.S. 746, 111 Misc. 242.

From minor's standpoint

In determining whether substantial rights of minor were protected, court was required to consider case from minor's standpoint and determine whether failure of appointment

of statute providing otherwise the subject is largely within the discretion of the court.[12]

Infant plaintiff. Since, as discussed supra § 108, the want of a guardian ad litem or next friend generally is regarded as a mere irregularity and not jurisdictional, it is not a jurisdictional requirement that there should be a next friend or guardian ad litem for an infant at the time of suing out process.[13] Hence, where during the progress of the trial it appears that plaintiff is an infant, the court may then appoint a next friend or guardian ad litem for him and allow the pleadings to be amended accordingly,[14] and where defendant pleads that plaintiff, an infant, did not commence his action by next friend, the court may allow a responsible person to appear as next friend and qualify, even over the objection of defendant.[15] It has been held that an appointment after trial and judgment in favor of the infant plaintiff, on a hearing of a motion for a new trial, is a mere irregularity which does not vitiate the proceedings,[16] but under a statute requiring such appointment to be made before issue of process it has been held that the appointment should not be made nunc pro tunc after a judgment has been rendered adversely to the infant.[17] The appointment of a next friend for an infant plaintiff at the term to which the writ is returnable does not entitle defendant to a continuance.[18]

Infant defendant. Process having been served on an infant defendant, it has been held that, even in the absence of a statute controlling the matter, the first proceeding after the return of process served on an infant defendant is properly the appointment of a guardian ad litem,[19] or at least that such guardian should be appointed before any steps are taken as to which the infant is entitled to be heard.[20] In the absence of a mandatory statute to the contrary,[21] it is generally held that the failure to appoint a guardian ad litem for an infant defendant before any steps in the proceedings are taken is a mere irregularity[22] which may be cured,[23] and will not constitute error, if no binding decree is entered until the infant is properly represented.[24] Thus it has been held that a guardian ad litem may

of guardian required reversal.—Bellchambers v. Ebeling, 13 N.E.2d 804, 294 Ill.App. 247.

12. Kan.—Earl v. Cotton, 96 P. 348, 78 Kan. 405.
Minn.—Patterson v. Melchior, 119 N. W. 402, 106 Minn. 437.

13. Mo.—Woods v. Woods, App., 170 S.W.2d 430.
N.Y.—Feigenbaum v. Narragansett Stables Co., 215 N.Y.S. 328, 127 Misc. 114, affirmed 219 N.Y.S. 811, 219 App.Div. 729, affirmed 157 N.E. 886, 245 N.Y. 628.
31 C.J. p 1132 notes 94, 96.

14. Cal.—Doyle v. Loyd, 114 P.2d 398, 45 Cal.App.2d 493.
Miss.—Sam v. Allen, 120 So. 568, 152 Miss. 572.
Mo.—State ex rel. Missouri Pac. R. Co. v. Cox, 267 S.W. 382, 306 Mo. 27.
N.Y.—Asaro v. Lilienfeld, 36 N.Y.S. 2d 802.
Wyo.—Urbach v. Urbach, 73 P.2d 953, 956, 52 Wyo. 207, 113 A.L.R. 889, citing **Corpus Juris.**
31 C.J. p 1132 note 97.

After verdict

Court, even after verdict, may appoint next friend on disclosure that infant is party.—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185.

15. Ind.—Greenman v. Cohee, 61 Ind. 201.
Wash.—Kongsbach v. Casey, 120 P. 103, 66 Wash. 643.

16. Idaho.—Trask v. Boise King Placers Co., 142 P. 1073, 26 Idaho 290.
N.Y.—Mackney v. State, 29 N.Y.S.2d 1004, 177 Misc. 94.

17. N.Y.—Anderson v. Anderson, 105 N.Y.S. 359, 164 App.Div. 812.

18. Ind.—Harvey v. Coffin, 5 Blackf. 566.

19. Mo.—Graden v. Patrick, App., 162 S.W.2d 287.
N.Y.—Harvey v. Large, 51 Barb. 222.
Infant cannot appear until a guardian is appointed.—Maloney v. Schandelmier, 212 P. 493, 65 Mont. 531.

20. Ill.—Cost v. Rose, 17 Ill. 276—Crocker v. Smith, 10 Ill.App. 376.
31 C.J. p 1132 note 8.

Before plea

To be regular, the appointment of a guardian ad litem must be made before plea.—Rapp v. Goerlitz, 40 N. E.2d 766, first case, 314 Ill.App. 191—31 C.J. p 1132 note 8 [a].

Day of trial

The statute respecting appointment of guardians ad litem does not contemplate appointment of such guardian for minor respondents in partition proceedings on day of trial and his acceptance of service of summons and copies of pleadings and filing of answer on same day.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379.

21. **Particular statutes**

(1) Under some statutes it has been held that after the service and return of the summons against an infant defendant no other proceeding can be taken in the action until the appointment of a guardian ad litem.—Winterroth v. Cox, 133 N. Y.S. 445, 75 Misc. 467—31 C.J. p 1133 note 9.

(2) Under such a statute, the appointment cannot be made after the case has been called for trial.—Cowan v. Ganung, 110 N.Y.S. 470, 58 Misc. 141.

(3) Also, under such a statute after verdict adverse to an infant defendant, before judgment, a guardian ad litem cannot be appointed for the purpose of entering judgment, but the verdict must be set aside and leave given to apply for the appointment of a guardian ad litem in the regular way.—Starr v. MacNamara, 182 N.Y.S. 746, 111 Misc. 242.

22. Mo.—Graden v. Patrick, App., 162 S.W.2d 287, 289, citing **Corpus Juris.**
Tenn.—Kelley v. Kelley, 15 Lea 194.

23. Mo.—Graden v. Patrick, App., 162 S.W.2d 287, 289, citing **Corpus Juris.**
31 C.J. p 1133 note 15.

24. Iowa.—Johnston v. Calvin, 5 N. W.2d 840.
Mo.—Graden v. Patrick, App., 162 S. W.2d 287, 289, citing **Corpus Juris.**
Tex.—Williams v. Patterson, Com. App., 288 S.W. 132, reversing, Civ. App., 276 S.W. 750.
31 C.J. p 1133 note 16.

Appeal from judgment of alderman

A guardian of a minor defendant can be appointed by the court after a case has been appealed from the judgment of the alderman in favor of the plaintiff to the court of common pleas.—Beauer v. Engle, 45 Pa. Dist. & Co. 411, 48 Lanc.Rev. 51.

Vacation of judgment

Where plaintiff filed a motion to

be appointed during trial,[25] after introduction of the evidence but before the decision of the case.[26]

The time prescribed, either by statute or by the rules of practice, in which an infant may apply to have a guardian ad litem appointed for him, must elapse before the court can appoint one on its motion,[27] or on the application of another.[28] It has been held, however, that, where the infant at no time objects to the guardian appointed for him, the failure to allow such time is a mere irregularity.[29]

After becoming of age, as discussed infra § 113, the infant being entitled to control and management of the litigation, a guardian ad litem need not be appointed, although he was an infant at the commencement of the suit or action;[30] in fact he should not be appointed,[31] and it is error to appoint him.[32]

d. Who May Apply

An infant who has reached the age of discretion may apply for the appointment of a guardian ad litem to represent him, and, if the infant is under that age, or fails so to apply, the application may be made by the other party to the action, or by a relative or friend.

Where an infant has arrived at such an age that he is presumed to possess sufficient discretion to select a suitable person to represent him, which age is usually fixed at fourteen years, a guardian ad litem may be appointed on his application;[33] and under some statutes it is required that a guardian ad litem, appointed for an infant plaintiff over a certain age, must be so appointed on the application of the infant only, in which case an appointment made on the application of anyone else is not a legal appointment.[34] Where the infant is under the age referred to above, or where he fails to apply, the application may be made on his behalf by any other party to the action or by a relative or friend of the infant.[35] In case an infant is made a party defendant to an action, plaintiff has a right to apply to the court for the appointment of a guardian ad litem for such infant,[36] and indeed it has been held to be not only the right but the duty of plaintiff to do so.[37]

e. Who May Be Appointed

(1) In general
(2) Relationship to infant
(3) Persons having adverse interest

(1) In General

Competent and suitable persons should be selected to represent an infant party.

Competent and suitable persons should be selected as guardians ad litem.[38] The person appointed

vacate the judgment to avoid delay incident to defendant's writ of error, sued out on the ground that defendant was an unrepresented minor, it was not essential to appoint a guardian ad litem before granting the motion to vacate.—Lee v. Fowler, 161 N.E. 910, 268 Mass. 440.

25. N.Y.—Bartley v. Pitcher, 227 N.Y.S. 46, 131 Misc. 597.
31 C.J. p 1133 note 17.

Discovery of minority during trial

Appointment of guardian ad litem on discovering defendant's minority after trial commenced was not error.
Ind.—Mayfield v. Rumford, 166 N.E. 773, 89 Ind.App. 632.
Iowa.—Brien v. Davidson, 281 N.W. 150, 225 Iowa 595, rehearing denied 282 N.W. 480, 225 Iowa 595.
31 C.J. p 1133 note 17 [a].

Duty of court

The court should appoint a guardian ad litem as soon as the fact of defendant's infancy is called to its attention.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.

26. Kan.—Earl v. Cotton, 96 P. 348, 78 Kan. 405.
Presumptions on appeal see infra § 126 f.

27. Mo.—Kuhrts v. Eisenstein, 100 S.W. 574, 123 Mo.App. 288.
Pa.—Reilly's Estate, 36 Pa.Co. 122.

28. N.Y.—Ward v. Ward, 242 N.Y.S. 171, 136 Misc. 234.
31 C.J. p 1130 note 74.

29. Ohio.—Thomas v. Monroe, 65 P. 2d 1008, 179 Okl. 416.

30. Kan.—Patton v. Furthmier, 16 Kan. 29.
N.Y.—In re Rousos, 119 N.Y.S. 34.
Vt.—Wilder v. Eldridge, 17 Vt. 226.

31. Kan.—Patton v. Furthmier, 16 Kan. 29.

32. N.Y.—In re Rousos, 119 N.Y.S. 34.

33. Mont.—Maloney v. Schandelmier, 212 P. 493, 65 Mont. 531.
31 C.J. p 1133 note 25.

34. Or.—Everart v. Fischer, 145 P. 33, 147 P. 189, 75 Or. 316.

35. Del.—Flannigan v. Wilmington & N. Electric R. Co., 45 A. 346, 18 Del. 415.
Mich.—Peck v. Adsit, 57 N.W. 804, 98 Mich. 639.
31 C.J. p 1133 note 29.

Father's responsibility

Responsibility of having tutor appointed to represent minor devisee at time devisor's succession was opened was on minor's father and not on minor's uncle who was codevisee.—Succession of Grivaud, 187 So. 284, 192 La. 181.

Mother of minors, to whom will, bequeathing portion of estate to bank in trust for payment of net income to her for life, directed conveyance of remainder on her death, was obligated, as their natural guardian, to see that their rights were protected by appointment of guardian ad litem, if advisable, but no such duty rested on bank.—Ringwalt v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 967, 3 Cal.2d 680.

36. Mo.—Coulson v. Coulson, 79 S.W. 473, 180 Mo. 709.
31 C.J. p 1133 note 30, p 1134 note 33.

No conflict in interest

A guardian ad litem for infant defendants may properly be appointed on petition of their mother, who is plaintiff, where the complaint shows that there is no conflict in interest between herself and the infants.—Ex parte Pearson, 60 S.E. 706, 79 S.C. 302.

37. Mo.—Coulson v. Coulson, 79 S.W. 473, 180 Mo. 709.
31 C.J. p 1134 note 32.

38. Mich.—Rabidon v. Muskegon Cir. Judge, 68 N.W. 147, 110 Mich. 297.
31 C.J. p 1134 note 34.

Attorney trying case

The appointment as guardian ad litem for a minor defendant, of a member of the firm which had the case for other defendants, and who

should be an adult,[39] and a real, not a fictitious, person.[40] One who could have acted as next friend for an infant can employ and indemnify another to allow the use of his name as such.[41]

The objection to the qualification of a guardian ad litem cannot be made after he has discharged his duties and has ceased to act in that capacity.[42] It has also been held that the qualification of a person to act as next friend cannot be challenged by a general demurrer.[43]

Court officer. In a proper case a court officer may be appointed to act as guardian ad litem.[44] Where an infant is not able to obtain a responsible guardian or where no one will consent to act for him and in other proper cases the court may appoint one of its own officers.[45]

Financial ability of appointee. While in some cases it has been held that it is not required that the next friend of an infant plaintiff be absolutely responsible financially,[46] a next friend or guardian ad litem for an infant plaintiff, being ordinarily liable for costs, as discussed infra § 127, should be a person of substance.[47]

General or testamentary guardian. Ordinarily the general or testamentary guardian of the infant will be appointed,[48] but it is not necessary that he should be appointed; and if for any reason it appears that such guardian is not the best person to represent the infant the court may in its discretion appoint someone else.[49]

Married woman. Where the disability of coverture has not been removed, a married woman should not be appointed next friend or guardian ad litem,[50] without being joined by her husband.[51] Where, however, the disability of a married woman to act in a fiduciary capacity has been removed by statute, a married woman may act as next friend.[52]

Nomination by adverse party. Although a guard-

was fully cognizant of everything which had transpired in the case, was held to be proper.—Brien v. Davidson, 281 N.W. 150, 225 Iowa 595, rehearing denied 282 N.W. 480, 225 Iowa 595.

Representative of adverse interests

Order directing attorney to act as guardian ad litem, notwithstanding attorney had told court his convictions were such that he could represent only interests of those opposed to infants, was erroneous, and did not give attorney right to file brief for infants on appeal.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.

Ordinary

Under a statute providing that an ordinary cannot, during his term of office, be executor, administrator, or guardian or other agent of a fiduciary nature required to account to his court, and under a statute authorizing action by the ordinary of the county to recover money due a minor under insurance policies, the ordinary is not prohibited from acting as a guardian of a minor residing in the county of which he is ordinary.—Foster v. Wood, 137 S.E. 847, 36 Ga.App. 734.

39. N.Y.—Wolford v. Oakley, Sheld. 261, 43 How.Pr. 118.

"The law being that a minor, on account of his incompetency of minority, may not sue except by the aid and assistance of a competent next friend, that next friend must not be under the same disability, but must be an adult."—Prudential Ins. Co. v. Gleason, 187 So. 229, 232, 185 Miss. 243.

Collateral attack

A decree in partition proceeding wherein petition revealed that minors were represented as next friend by another minor was subject to collateral attack.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.

Partial removal of disability

A partition proceeding wherein minors were represented as next friend by another minor was void as to all parties, notwithstanding minor's disability had purportedly been specially removed for purpose of empowering her to act with reference to her own property.—Prudential Ins. Co. v. Gleason, supra.

40. N.Y.—Bullard v. Spoor, 2 Cow. 430.
N.C.—In re Roediger's Will, 184 S.E. 74, 209 N.C. 470.

41. Tenn.—Evans v. Mason, 1 Lea 26.

42. Puerto Rico.—Graham v. Crosas, 19 Puerto Rico 184.

43. Tex.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated as moot University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605.

44. W.Va.—Ferrell v. Deverick, 100 S.E. 850, 85 W.Va. 1.
31 C.J. p 1135 note 69.

45. U.S.—Brown v. The Henry Pratt, D.C.N.Y., 4 F.Cas.No.2,010.
31 C.J. p 1135 note 70.

46. Mich.—Rabidon v. Muskegon Cir. Judge, 68 N.W. 147, 110 Mich. 297.
31 C.J. p 1135 note 53.

47. N.Y.—Matter of Mang, 50 N.Y. Super. 96, 5 N.Y.Civ.Proc. 162.
31 C.J. p 1135 note 55.

48. Ga.—Scott v. Winningham, 4 S.E. 390, 79 Ga. 492.
31 C.J. p 1135 note 57.

Legal capacity

In proceeding on application of administrators with wills annexed to resign and for final accounting, to which contest was filed by guardian of persons and next friend of minor beneficiaries of wills, person who had been designated by will of mother as guardian of persons of infant daughters had legal capacity to represent minors as next friend in proceeding.—Loewenstein v. Watts, Civ.App., 119 S.W.2d 176, affirmed 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910.

49. W.Va.—Stewart v. Parr, 82 S.E. 259, 74 W.Va. 327.
31 C.J. p 1135 note 59.

50. Ala.—Savage v. Smith, 31 So. 374, 132 Ala. 64, 90 Am.S.R. 932.

Amendment

Refusing to permit father to file amended petition asking to be allowed to sue as next friend for son instead of his wife was improper.—Louisville & N. R. Co. v. Hooker, 98 S.W.2d 922, 266 Ky. 257.

Waiver

Under a statute providing that no person shall sue as next friend unless he reside in the state and be free from disability, the right to object to a married woman's acting as next friend is one which may be waived.—Louisville & N. R. Co. v. Hooker, 98 S.W.2d 922, 266 Ky. 257.

51. Tex.—Carroll v. Embry, Civ. App., 229 S.W. 575.
31 C.J. p 1135 note 62.

52. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.
Tex.—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465.

ian ad litem may be appointed on the application of plaintiff, the court should not permit the adverse party or his attorney to select the person to be appointed.[53] It does not follow, however, that such appointment is fraudulent,[54] or that it will render a judgment void[55] or voidable,[56] in the absence of collusion or deception on the court.[57]

Nonresidents. Although the court should permit the substitution of a resident next friend in place of a nonresident,[58] in the absence of any statutory prohibition a nonresident may act or be appointed as next friend[59] or guardian ad litem.[60] In some jurisdictions, however, by force of statute, a nonresident is not permitted to sue as next friend.[61]

Selection by, and consulting with, infant. It is not necessary that the next friend should be selected by the infant;[62] but it has been held that an infant above the age of fourteen years has the right to select his own next friend.[63] Where the infant is above the age of fourteen years, although it has been held that it is not necessary to consult him with regard to the appointment of a guardian ad litem,[64] it is proper to do so;[65] and, where it is shown that the guardian nominated by such an infant is qualified to act, it has been held to be error to refuse to appoint him,[66] although it has also been held that the matter rests in the sound discretion of the court.[67]

Trustees of juvenile institutions. Where the trustees of juvenile institutions have all the powers of a parent over a minor committed to their charge, the board can act as next friend.[68]

Wishes of natural guardian. The wishes of the natural guardian of the infant, who is shown to have no adverse interest, as to who should be appointed guardian ad litem should not be ignored,[69] but the appointment of the person nominated by him is not compulsory.[70]

(2) Relationship to Infant

It is customary to appoint as guardian ad litem or next friend some near relative of the infant who is qualified to act, but it is not essential that this practice be followed.

The usual practice is to appoint as guardian ad litem or next friend the nearest relative of the infant who is not concerned in point of interest in the matter in question and is otherwise qualified to act.[71] In application of this rule the father,[72] or mother,[73] or stepfather,[74] or grandfather,[75] or grandmother,[76] or uncle[77] of the infant may, when

53. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
31 C.J. p 1134 note 47.

54. Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449, reversing, App., 102 N.E. 54—McKern v. Beck, 126 N.E. 641, 73 Ind.App. 92.

55. Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449, reversing, App., 102 N.E. 54—McKern v. Beck, 126 N.E. 641, 73 Ind.App. 92.

56. Ind.—McKern v. Beck, supra.

57. Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449, reversing, App., 102 N.E. 54—McKern v. Beck, 126 N.E. 641, 73 Ind.App. 92.

58. Tenn.—Vezolles v. Tennessee Cent. Ry. Co., 136 S.W.2d 502, 175 Tenn. 554.

59. Mo.—Aley v. Missouri Pac. R. Co., 111 S.W. 102, 211 Mo. 460.

60. Idaho.—Pine v. Callahan, 71 P. 473, 8 Idaho 684.
Wash.—Shannon v. Consolidated Tiger & Poorman Min. Co., 64 P. 169, 24 Wash. 119.

61. Ky.—Dr. Pepper Bottling Co. of Kentucky v. Haselip, 144 S.W.2d 798, 284 Ky. 333—Stevenson v. Stevenson, 7 Ky.L. 674, 13 Ky.Op. 1012.

62. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.
31 C.J. p 1134 note 42.

63. Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

64. Ark.—Beddinger v. Smith, 13 S. W. 734.
Ky.—Banta v. Calhoen, 2 A.K.Marsh. 166.
N.Y.—Brick's Estate, 15 Abb.Pr. 12.

65. Ala.—Roach v. Hix, 57 Ala. 576—Stammers v. McNaughton, 57 Ala. 277—Walker v. Hallett, 1 Ala. 379.

66. N.Y.—In re Dumbra's Estate, 4 N.Y.S.2d 778, 254 App.Div. 776.

67. Ala.—Walker v. Hallett, 1 Ala. 379.

68. Me.—Harding v. Skolfield, 134 A. 567, 125 Me. 438.

69. N.Y.—Polk v. Hawkins, 34 N.Y.S.2d 417, 264 App.Div. 58—Walter v. Bernheimer, 233 N.Y.S. 90, 225 App.Div. 343.

70. **Circumstances warranting other appointment**
Where justice, who was dissatisfied with petition by parents of infants for appointment of parents' nominee for guardian ad litem, personally communicated directly with the nominee, informing nominee of reason why order for his appointment was not signed, and invited nominee to see the justice the following day, but neither the nominee nor any other person interested appeared or communicated with the justice during period of seventeen days, the justice was warranted in not naming the nominee as guardian ad litem, but in naming a lawyer of high standing.—Polk v. Hawkins, 34 N.Y.S.2d 417, 264 App.Div. 58.

71. U.S.—Jarvis v. Crozier, C.C.W. Va., 98 F. 753.
31 C.J. p 1135 note 73.

72. U.S.—Brabham v. State of Mississippi, for Use of Smith, C.C.A. Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi, for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.
Tex.—Fall v. Weber, Civ.App., 47 S. W.2d 365, error refused.
31 C.J. p 1135 note 74.

73. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.
31 C.J. p 1135 note 75.

74. Tex.—International & G. N. R. Co. v. Kuehn, 8 S.W. 484, 70 Tex. 582.

75. N.J.—Anonymous, 10 N.J.L.J. 142.

76. **Parents alive**
A grandmother could maintain a personal injury action in infant's behalf, as next friend, even though the infant's parents were alive and were supporting the infant in their home.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.

77. N.Y.—O'Reilly v. King, 25 N.Y. Super. 587, 28 How.Pr. 408.

not otherwise disqualified, represent him. The mother, however, may become disqualified by reason of her coverture where her husband refuses to join her.[78] It is not necessary to the validity of the appointment that this practice should be adhered to,[79] or even that the person appointed should be a relative of the infant, although the appointment of a stranger where the parents of the infant are living is a circumstance to awaken attention.[80] Following the rule that there should be no conflicting interests between the infant and the person representing him, if the relative has an interest in the subject matter of the suit or action which is adverse to that of the infant he should not be appointed.[81]

(3) Persons Having Adverse Interest

A person whose interests are adverse to those of the infant should not be appointed to represent him in the proceedings.

There should be no conflicting interests between the infant and the person representing him,[82] and hence a person whose interest in a suit is adverse to an infant should not be appointed guardian ad litem,[83] or permitted to act as the next friend of the infant.[84] In order to disqualify, however, the adverse interest must be clear and substantial.[85] The attorney of an adverse party should not be appointed guardian ad litem of infants,[86] and even a person connected in business with the attorney of the adverse party should not be appointed.[87] Where there are two or more infant parties whose interests conflict they should be represented by different guardians,[88] but where no adverse interest exists between several minor defendants the same guardian ad litem may represent all of them.[89] While the holding of an adverse interest to the infant may constitute the appointment erroneous,[90] it has been held that the error is not jurisdictional,[91] and that the judgment or decree is not subject on that ground alone to be avoided, in the absence of fraud or collusion;[92] but it has also been held that the appointment is void on that ground.[93]

78. Tex.—Carroll v. Embry, Civ. App., 229 S.W. 575.

79. Ga.—Hargrove v. Youmans, 183 S.E. 564, 181 Ga. 614.
31 C.J. p 1135 note 80.

Any person
At common law, any person could serve as next friend of an infant.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.

Father need not be named as next friend.—Kite v. Brooks, 181 S.E. 107, 51 Ga.App. 531.

Husband is not only person qualified to act as next friend of married woman under twenty-one in matters affecting her separate estate.—In re Hay's Guardianship, 17 P.2d 943, 37 N.M. 55.

No particular person is required to act as next friend.—Mize v. Harber, 8 S.E.2d 1, 189 Ga. 737.

80. U.S.—U. S. Bank v. Ritchie, D. C., 8 Pet. 128, 8 L.Ed. 890.
31 C.J. p 1135 note 81.

81. Miss.—Standard Oil Co. v. Magee, 85 So. 186.
31 C.J. p 1136 note 84.

Father having identical interest is not disqualified.—Wilson v. Fisher, Tex.Civ.App., 105 S.W.2d 304, error refused, certiorari denied 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

82. U.S.—U. S. v. 15,883.55 Acres of Land in Spartanburg County, S. C., D.C.S.C., 45 F.Supp. 558.
31 C.J. p 1134 note 37, p 1136 note 85.

Interests held not adverse
La.—Tickfaw Homegrowers' Ass'n v. Gallodoro, 132 So. 767, 15 La.App. 686.
N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.

Guardian of insane person
Appointment of one guardian ad litem for both insane person and minor whose interests were antagonistic was error.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315.

83. U.S.—U. S. v. 15,883.55 Acres of Land in Spartanburg County, S. C., D.C.S.C., 45 F.Supp. 558.
Ala.—Dickinson v. Jordan, 98 So. 886, 210 Ala. 602.
Ill.—In re Ahlrich's Estate, 235 Ill. App. 63.
N.C.—Graham v. Floyd, 197 S.E. 873, 214 N.C. 77.
R.I.—Stanton v. Sullivan, 4 A.2d 269, 62 R.I. 154.
31 C.J. p 1136 note 86.

84. U.S.—Marlin v. Texas Co., D.C. Tex., 26 F.Supp. 611, reversed on other grounds, C.C.A., Texas Co. v. Marlin, 109 F.2d 305.
Ala.—Midgley v. Ralls, 176 So. 799, 234 Ala. 685.
Ky.—Kidd v. Kidd, 124 S.W.2d 66, 276 Ky. 271.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 267, 138 Tex. 1, citing **Corpus Juris**, and reversing, Civ.App., 130 S.W.2d 1048—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, 765, citing **Corpus Juris**, and reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.
31 C.J. p 1136 note 87.

Dual capacity
A parent of a minor may prosecute an action in the dual capacity of next friend and of plaintiff in his own right.—Wilson v. Fisher, Tex. Civ.App., 105 S.W.2d 304, error refused, certiorari denied 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

85. Tex.—Saladiner v. Polanco, Civ. App., 160 S.W.2d 531, error refused.
31 C.J. p 1136 note 88.

86. R.I.—Stanton v. Sullivan, 4 A.2d 269, 62 R.I. 154.
31 C.J. p 1136 notes 89, 90.

87. N.Y.—Parish v. Parish, 78 N.Y. S. 1089, 77 App.Div. 267, reversed on other grounds 67 N.E. 298, 175 N.Y. 181—Lake v. Kessel, 72 N.Y.S. 311, 64 App.Div. 540.
31 C.J. p 1136 note 91.

88. Ala.—Estes v. Bridgforth, 21 So. 512, 114 Ala. 221.
N.Y.—In re Gould, 48 N.Y.S. 872.

89. Ala.—Hamilton v. Tolley, 96 So. 584, 209 Ala. 533.

Allegation of coöwnership is insufficient averment of opposite interests requiring appointment of tutor ad hoc for each absentee minor in partition proceedings.—Jacob v. Rochel, 113 So. 786, 164 La. 114.

90. Wash.—Coleman v. Crawford, 248 P. 386, 388, 140 Wash. 117, quoting **Corpus Juris.**
31 C.J. p 1136 note 94.

91. N.Y.—Parrish v. Parrish, 67 N. E. 298, 175 N.Y. 181.
Wash.—Coleman v. Crawford, 248 P. 386, 388, 140 Wash. 117, quoting **Corpus Juris.**

92. Wash.—Coleman v. Crawford, supra, quoting **Corpus Juris.**
31 C.J. p 1136 note 96.

93. Puerto Rico.—Alverez v. Registrar of Property, 16 Puerto Rico 572.

Decree not binding on minor
A partition decree was not binding on minor owner who was made a party thereto, where grandmother

f. Proceedings

(1) In general
(2) Application or motion, and notice thereof
(3) Affidavits
(4) Consent of guardian ad litem or next friend
(5) Order of appointment and notice of appointment
(6) Bond
(7) Oath

(1) In General

Mere irregularities in the proceedings for the appointment of a representative for an infant party do not render the appointment, or the judgment or decree obtained in the proceedings, void.

The provisions of the constitutions,[94] the statutes,[95] and of the rules of practice[96] respecting the appointment must be observed. In some cases a strict compliance with such provisions has been required;[97] but in other cases a substantial compliance has been held to be sufficient.[98] Mere irregularities which do not affect substantial rights do not affect the jurisdiction;[99] they may be corrected and cured before verdict and judgment,[1] and at most they merely render the appointment voidable;[2] and they do not vitiate the appointment[3] or the judgment or decree obtained in the action.[4] The right to object may be lost by laches.[5] Any defects in the proceedings may be cured by the ratification of the proceedings by the infant after attaining majority.[6]

It is not necessary for an infant defendant to appear or be brought into court before a guardian ad litem can be appointed;[7] his presence in court is necessary only for the purpose of ascertaining his infancy.[8]

Before the appointment of a guardian ad litem the court should be satisfied of the infancy of defendant,[9] but where there is sufficient evidence that an order appointing a guardian ad litem was actually made the presumption is that it was made on sufficient proof.[10]

The appointment should be made only after due inquiry as to the fitness of the person to be appointed,[11] and the court should always select such person as will be most likely to protect the rights of the infant.[12]

(2) Application or Motion, and Notice Thereof

It appears to be the better practice to appoint a representative for an infant party only on formal petition therefor, but in the absence of a statute or court rule to

representing minor as next friend had a conflict of interest with minor, and minor's attorney contended that minor owned no interest in land, notwithstanding minor was given interest in other lands partitioned at the same time.—Clarkson v. Ruiz, Tex.Civ.App., 108 S.W.2d 281, error dismissed.

94. La.—Gates v. Gaither, 15 So. 50, 46 La.Ann. 286.

95. Okl.—Sealey v. Smith, 197 P. 490, 81 Okl. 97.
31 C.J. p 1136 note 99.

96. N.Y.—Torrey v. State, 23 N.Y.S. 2d 370, 175 Misc. 259.
31 C.J. p 1136 note 1.

97. Okl.—Sealey v. Smith, 197 P. 490, 81 Okl. 97.
31 C.J. p 1136 note 2.

98. Mich.—Peck v. Adsit, 57 N.W. 804, 98 Mich. 639.

99. Tex.—Peters v. Allen, Civ.App., 296 S.W. 929.
31 C.J. p 1128 note 44.

1. Ariz.—Arizona Eastern R. Co. v. Carillo, 149 P. 313, 17 Ariz. 115.

2. Ala.—Bondurant v. Sibley, 37 Ala. 565.

3. Mo.—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185.
N.Y.—Torrey v. State, 23 N.Y.S.2d 370, 175 Misc. 259.
31 C.J. p 1136 note 4.

4. Mo.—Sullinger v. West, 211 S.W. 65.
N.C.—Ward v. Lowndes, 2 S.E. 591, 96 N.C. 367.
31 C.J. p 1127 note 11, p 1128 notes 47, 48.

5. Mo.—Vaile v. Sprague, 78 S.W. 609, 179 Mo. 393.
31 C.J. p 1128 note 46.

6. Cal.—Johnston v. Southern Pac. Co., 89 P. 348, 150 Cal. 535, 11 Ann.Cas. 841.

7. Ky.—Banta v. Calhoon, 2 A.K. Marsh. 166—Ray v. McIlroy, 1 A. K.Marsh. 612.

8. Ky.—Ray v. McIlroy, supra.

9. Ala.—Rhett v. Mastin, 43 Ala. 86 —Walker v. Hallett, 1 Ala. 379.

10. Mich.—Stevenson v. Kurtz, 57 N.W. 580, 98 Mich. 493.
Tenn.—Martin v. Porter, 4 Heisk. 407.

11. N.C.—In re Roediger's Will, 184 S.E. 74, 209 N.C. 470.
31 C.J. p 1134 note 35.

Burden of proof

Petitioner seeking to nominate guardian ad litem for infant must show to court's satisfaction that nominee is qualified.—Walter v. Bernheimer, 233 N.Y.S. 90, 225 App. Div. 343.

12. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
31 C.J. p 1134 note 36.

Appointment held not abuse of discretion

Kan.—Galloway v. Wesley, 73 P.2d 1073, 146 Kan. 937.

Member of bar

"It was the duty of the court to select . . . a person of sufficient capacity to understand the rights of the child, and to manage his interests in the subject of the litigation. It was eminently proper, therefore, that the court should choose from the gentlemen of the bar. Indeed, in the appointment of guardians ad litem it is the duty of the court to select men learned in the law and capable of taking care of the interests of their wards."—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 454, 80 Ind.App. 282.

Wise discretion

Fact that some one must be appointed next friend in suit by infants does not eliminate duty vested in court to use wise discretion in making appointment.—Cheney v. Cheney, 82 S.W.2d 1024, reversed on other grounds Cheney v. Coffey, 113 S.W.2d 162, 131 Tex. 212, rehearing denied 114 S.W.2d 533, 131 Tex. 212.

the contrary a formal application is not necessary. Some statutes provide for the giving of notice of such an application.

While an application for the appointment is not necessary,[13] and the appointment may be made on mere suggestion or application ore tenus in open court,[14] or on motion[15] of the court itself without petition from any person[16] or without issuing a commission,[17] it is better and the more usual practice to make the appointment only on formal petition in writing,[18] stating the name of the person proposed,[19] his pecuniary responsibility,[20] his consent to be appointed,[21] and the facts giving the court authority to make the appointment.[22] If the infant has arrived at years of discretion, it is the better practice that he should sign the petition[23] and that it be verified by him;[24] however, his verification is not absolutely necessary.[25] While a petition not alleging sufficient facts to give the court jurisdiction to make the appointment is erroneous, so that the infant may not be bound by the judgment in the action,[26] the insufficiency of the petition may be cured by a reference to the complaint in the case setting forth facts sufficient to justify the appointment.[27] Erroneous statements, which are not prejudicial, may be considered as immaterial;[28] and mere irregularities may be cured by amendment,[29] even after judgment has been rendered in the action.[30] The lack of a petition for the appointment of next friend, as required by statute, is merely an irregularity where substantial rights are not affected thereby.[31]

Notice of application. It is sometimes required that notice on the application for the appointment should be given to the infant where he has arrived at an age of discretion.[32] Also sometimes it is required that notice be served on the infant's next of kin,[33] or on his general or testamentary guardian if he has one, or, if he has none, on the person with whom the infant resides.[34] In special cases notice of the application may be dispensed with.[35] If the infant is already in court, the failure to give him notice is not reversible error.[36]

(3) Affidavits

In some jurisdictions the filing of an affidavit showing the necessity and propriety of the appointment is required.

In some jurisdictions it is necessary that there should be presented to the court an affidavit of the fact of infancy,[37] that there is no general guard-

13. N.Y.—Matter of Ludlow, 5 Redf. Surr. 391.
31 C.J. p 1137 note 16.

14. Cal.—Emerio v. Alvarado, 2 P. 418, 64 Cal. 529.
31 C.J. p 1137 note 17.

15. U.S.—Barclay v. Govers, C.C. D.C., 2 F.Cas.No.973, 1 Cranch C.C. 147.
31 C.J. p 1137 note 18.

16. Cal.—In re Snowball, 104 P. 446, 156 Cal. 235.
31 C.J. p 1137 note 19.

17. U.S.—Reinhart v. Orme, C.C.D. C., 20 F.Cas.No.11,682, 1 Cranch C. C. 244.
31 C.J. p 1137 note 21.

18. Ariz.—Arizona Eastern R. Co. v. Carillo, 149 P. 313, 17 Ariz. 115.
31 C.J. p 1137 note 22.

19. U.S.—Rhinelander v. Sanford, C. C., 20 F.Cas.No.11,739, 3 Day, Conn., 279.
31 C.J. p 1137 note 23.

20. N.Y.—McDonald v. Brass Goods Mfg. Co., 2 Abb.N.Cas. 434.

21. U.S.—Rhinelander v. Sanford, C. C., 20 F.Cas.No.11,739, 3 Day, Conn., 279.

22. N.Y.—Smith v. Reid, 81 N.E. 1082, 184 N.Y. 568, affirming 11 N. Y.S. 739, 19 N.Y.Civ.Proc. 363.
31 C.J. p 1137 note 27.

23. S.C.—Carrigan v. Drake, 15 S.E. 339, 36 S.C. 354.
31 C.J. p 1137 note 28.

24. N.Y.—Rogers v. McLean, 11 Abb.Dec. 440, reversing 31 Barb. 304, and affirmed 34 N.Y. 536, 31 How.Pr. 279.
31 C.J. p 1137 note 29.

25. N.Y.—Van Wyck v. Hardy, 4 Abb.Dec. 496, 39 How.Pr. 392, affirming 11 Abb.Pr. 473, 20 How.Pr. 222.
31 C.J. p 1137 note 30.

26. N.Y.—Van Williams v. Elias, 94 N.Y.S. 611, 106 App.Div. 288.

27. Ariz.—Arizona Eastern R. Co. v. Carillo, 149 P. 313, 17 Ariz. 115.

28. Mo.—Eisenman v. Griffith, 167 S. W. 1142, 181 Mo.App. 183.
31 C.J. p 1137 note 34.

29. N.Y.—Rogers v. McLean, 34 N. Y. 536, 31 How.Pr. 279, affirming 11 Abb.Pr. 440, reversing 31 Barb. 304—Baumeister v. Demuth, 82 N. Y.S. 831, 84 App.Div. 394, reversing 81 N.Y.S. 143, 40 Misc. 22, and affirmed 71 N.E. 1128, 178 N.Y. 630.

30. N.Y.—Baumeister v. Demuth, 82 N.Y.S. 831, 84 App.Div. 394, affirmed 71 N.E. 1128, 178 N.Y. 630.
31 C.J. p 1137 note 36.

31. Mo.—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185.

32. Pa.—Yost v. Yost, 17 Pa.Dist. & Co. 11.
31 C.J. p 1137 note 11.

If infant is under fourteen years of age, service of notice of the application on the infant is merely permissive.—Railroad Federal Savings & Loan Ass'n v. Wolchyk, 296 N.Y. S. 843, 251 App.Div. 568.

33. Pa.—Yost v. Yost, 17 Pa.Dist. & Co. 11—Ressler v. Ressler, 35 Berks Co.L.J. 176.
31 C.J. p 1137 note 12.

34. N.Y.—In re Lopilato's Guardianship, 42 N.Y.S.2d 813, 180 Misc. 699—Lella v. Holman, 3 N.Y.S.2d 352, 166 Misc. 796.
31 C.J. p 1137 note 13.

Irregularity

Failure to give such notice is merely an irregularity where it does not affect substantial rights.—Baker v. Mardis, 1 S.W.2d 223, 221 Mo.App. 1185.

35. N.Y.—Railroad Federal Savings & Loan Ass'n v. Wolchyk, 296 N.Y. S. 843, 251 App.Div. 568.
31 C.J. p 1137 note 14.

36. Ind.—Gillispie v. Darroch, 107 N.E. 475, 57 Ind.App. 482.

37. Ala.—Rhett v. Mastin, 43 Ala. 86—Carter v. Ingerham, 43 Ala. 78.
31 C.J. p 1136 note 37.

Verified pleadings

In suit to cancel deed, allegations in verified intervening petition as to age of grantee's children were sufficient to justify appointment of guardian ad litem.—Thomas v. King, 281 S.W. 816, 213 Ky. 720.

ian,[38] that all the persons on whom by statute a summons for an infant defendant might be served are plaintiffs,[39] or as to the fitness or qualifications of the person to be appointed.[40] A failure to file a proper affidavit, however, is not reversible error, unless it also appears that the interest of the infant has been sacrificed in the procedure,[41] and the judgment obtained in the action is not subject to collateral attack.[42]

(4) Consent of Guardian ad Litem or Next Friend

The consent of the person appointed to act as representative for an infant party is necessary to a valid appointment.

It is necessary to a complete and valid appointment that the person so appointed should accept the appointment and consent to act in such capacity.[43] Although in some jurisdictions it is not necessary that the acceptance be in writing,[44] in other jurisdictions it is required that the consent shall be in writing,[45] and that there shall be an acknowledgment of the written consent.[46] In some cases it has been held that, in the absence of proof of such assent, the decree will be declared void for want of jurisdiction.[47] Other cases have held that, while the absence of the consent may be reversible error,[48] the defect is a mere irregularity,[49] not jurisdictional,[50] which may be cured by the court.[51] Thus the defect is cured where the guardian ad litem appears and performs his duties as such.[52] While perhaps an acceptance in writing may be waived by the guardian ad litem, if he in fact accepts and performs the duties of his office the waiver must be specifically shown.[53]

(5) Order of Appointment and Notice of Appointment

The order of appointment, where such an order is necessary, should disclose the court's authority to make it and designate the appointee and the infant for whom he is to act. Notice of the appointment should be given the infant and the appointee.

Where an order of appointment is necessary, as discussed supra § 109 c (2), it should recite sufficient facts to show the authority to make it[54] and should designate the person who is appointed.[55] The order should designate for what defendants the guardian is to act,[56] and this must usually be done by naming the infants in the order.[57] Sometimes the order must contain special directions respecting the service on the infant,[58] and, if the statute requires a bond from the guardian, the order must direct that it be given.[59] An order appointing a

38. Ky.—Donaldson v. Stone, 11 S.W. 462, 11 Ky.L. 27.
31 C.J. p 1138 note 38.

39. Ky.—Walch v. Davis, 32 S.W. 281, 17 Ky.L. 634.
31 C.J. p 1138 note 39.

By whom made

(1) Under some statutes a guardian for the purpose of defending an action can be appointed on the affidavit of plaintiff or his attorney, but the affidavit for the appointment of a guardian ad litem for service of process must be made by one or more of the plaintiffs, and cannot be made by the attorney, unless all the plaintiffs are absent from the county.—Kitchens v. Edwards, 269 S.W. 1022, 207 Ky. 664—31 C.J. p 1138 note 38 [b].

(2) An affidavit by plaintiff's attorney which does not state facts authorizing him to make it is fatally defective.—Gentry v. Gentry, 290 S.W. 665, 217 Ky. 806.

40. N.Y.—Baumeister v. Demuth, 82 N.Y.S. 831, 84 App.Div. 394, reversing 81 N.Y.S. 148, 40 Misc. 22, and affirmed 71 N.E. 1128, 178 N.Y. 630.
31 C.J. p 1138 note 40.

41. Ky.—Bond v. Dean, 4 S.W.2d 721, 223 Ky. 713.
31 C.J. p 1138 note 38 [a].

42. Ala.—Hamilton v. Tolley, 96 So. 584, 209 Ala. 538.
Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394.

43. W.Va.—Alexander v. Davis, 26 S.E. 291, 42 W.Va. 465.
31 C.J. p 1138 note 41.

An appearance for infants by guardian ad litem amounted to acceptance by guardian of his appointment as such.—Old Colony Trust Co. v. Wolfman, 42 N.E.2d 574, 311 Mass. 614.

44. La.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745—Morris v. Mabry, 97 So. 20, 153 La. 1004.

45. Mo.—Reineman v. Larkin, 121 S.W. 307, 222 Mo. 156.
31 C.J. p 1138 note 42.

46. N.Y.—Cole v. McGravey, 6 N.Y. Civ.Proc. 305.
31 C.J. p 1138 note 43.

Acknowledgment before notary

Under a statute requiring the consent to be acknowledged before, or proved to, the court making the appointment, an acknowledgment of consent executed before a notary public is sufficient.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

47. Ala.—Frierson v. Travis, 39 Ala. 150.
31 C.J. p 1138 note 44.

48. Mo.—Creech v. Creech, 16 Mo. App. 586.

49. Ga.—Deyton v. Bell, 8 S.E. 620, 81 Ga. 370.
31 C.J. p 1139 note 46.

50. Mo.—Arn v. Arn, 173 S.W. 1062, 264 Mo. 19.

51. Ga.—Deyton v. Bell, 8 S.E. 620, 81 Ga. 370.
31 C.J. p 1139 note 48.

52. Mo.—Arn v. Arn, 173 S.W. 1062, 264 Mo. 19.
31 C.J. p 1139 note 49.

53. Mo.—Reineman v. Larkin, 121 S.W. 307, 222 Mo. 156.

54. Miss.—Erwin v. Carson, 54 Miss. 282.
N.Y.—Albrecht v. Canfield, 36 N.Y.S. 940, 92 Hun 240.
31 C.J. p 1139 note 54.

55. Ill.—Hess v. Voss, 52 Ill. 472.
S.C.—Barrett v. Moise, 39 S.E. 755, 61 S.C. 569.
31 C.J. p 1139 note 55.

56. Ky.—Bond v. Dean, 4 S.W.2d 721, 223 Ky. 713.
31 C.J. p 1139 note 56.

57. Ill.—Sullivan v. Sullivan, 42 Ill. 315.
31 C.J. p 1139 note 57.

58. N.Y.—Uhl v. Loughran, 4 N.Y.S. 827, 16 N.Y.Civ.Proc. 386, affirming 2 N.Y.S. 190, 14 N.Y.Civ.Proc. 344.
31 C.J. p 1139 note 58.

59. N.Y.—Walter v. De Graaf, 19 Abb.N.Cas. 406—Kennedy v. Arthur, 18 N.Y.Civ.Proc. 390.

guardian ad litem has been considered not to be appealable,[60] but such an order may be rescinded by the court where another person has been previously appointed and has filed an answer.[61]

A clerical misprision in the order, appointing an "attorney" instead of a guardian ad litem, is not fatal where the error is corrected by the court.[62] It has also been held that possible ambiguities in the order may be cured by the guardian's report and the order of court ordering it to be filed.[63]

Notice of appointment. It is usually required that notice of the appointment be given to the infant[64] and to the appointee,[65] or that a summons or subpoena shall be served on the appointee.[66]

(6) Bond

In the absence of a statute so requiring, the representative for a minor need not file a bond, and, even where a statute requires bond, the failure to file such bond ordinarily is not jurisdictional.

In some jurisdictions, in the absence of statute requiring it, a guardian ad litem need not file a bond;[67] but, by force of statute, the giving of a bond conditioned for the faithful discharge of the duties of the guardian ad litem,[68] or as a prerequisite to his exercising any form or control over the money recovered by the infant,[69] may be necessary. It has been held that the omission of the guardian ad litem to file his bond is a mere irregularity[70] which is curable,[71] and does not affect the jurisdiction of the court[72] or the validity of a sale under its judgment;[73] the bond may be filed nunc pro tunc[74] even after judgment.[75] Under a statute providing that a guardian ad litem for an infant plaintiff shall not receive any money or property of such minor until he has filed a bond as security therefor in such form, and with such surety, as the court may prescribe and approve, the court has no discretion to dispense with the giving of bond,[76] and a payment made by a debtor to such a guardian who has not given bond is without effect.[77]

Where an infant sues by next friend it is not usually considered necessary that the next friend should give a bond for the security of the infant,[78] but under some statutes a next friend must give bond before he can receive any of the funds belonging to the infant.[79] Under some statutes, whether a bond should be required from a next friend is a matter within the discretion of the court,[80] and, on the court's failing to demand the bond, the next friend may prosecute the action without giving bond;[81] the appointment is not invalidated by the failure to require the bond,[82] nor does it affect his right to receive payment of the judgment debt.[83]

60. Cal.—Hathaway's Estate, 43 P. 754, 111 Cal. 270.

A defendant cannot appeal from the court's selection of a next friend for the infant plaintiff.—Carroll v. Montgomery, 38 S.E. 874, 128 N.C. 278.

61. Ala.—Walker v. Mobile Bank, 6 Ala. 452.

62. Ky.—Monroes' Guardian ad Litem v. Monroe, 285 S.W. 250, 215 Ky. 440.

63. Ky.—Bond v. Dean, 4 S.W.2d 721, 223 Ky. 713.

64. U.S.—Nelson v. Moon, C.C.Ohio, 17 F.Cas.No.10,111, 3 McLean 319.
31 C.J. p 1139 note 62.

65. Va.—Strayer v. Long, 3 S.E. 372, 83 Va. 715.
31 C.J. p 1139 note 63.

66. Fla.—McDermott v. Thompson, 10 So. 584, 29 Fla. 299.
31 C.J. p 1139 note 64.

67. Cal.—Foley v. Northern California Power Co., 130 P. 1183, 165 Cal. 103.
Neb.—In re Robertson, 125 N.W. 1093, 86 Neb. 490.
31 C.J. p 1139 note 65.

Law applicable to general guardians requiring bond is inapplicable to guardian ad litem.—Benson v. Birch, 10 P.2d 1050, 139 Or. 459.

68. N.Y.—Minai v. New York R. Co., 167 N.Y.S. 308.
31 C.J. p 1139 notes 66, 67.

69. N.Y.—Lewin v. Brown Drive It Yourself Corporation, 280 N.Y.S. 912, 155 Misc. 225.
31 C.J. p 1139 note 68.

70. Or.—Benson v. Birch, 10 P.2d 1050, 139 Or. 459.
31 C.J. p 1140 note 69.

71. N.Y.—Croghan v. Livingston, 17 N.Y. 218, affirming 25 Barb. 336—Noethinger v. Jeffries, 177 N.Y.S. 577, 108 Misc. 372.

72. N.Y.—Noethinger v. Jeffries, supra.
31 C.J. p 1140 note 71.

73. N.Y.—Croghan v. Livingston, 17 N.Y. 218, affirming 25 Barb. 336.
31 C.J. p 1140 note 72.

74. N.Y.—Noethinger v. Jeffries, 177 N.Y.S. 577, 108 Misc. 372.
31 C.J. p 1140 note 73.

75. N.Y.—Croghan v. Livingston, 17 N.Y. 218.

76. Ariz.—Pacheco v. Delgardo, 52 P.2d 479, 46 Ariz. 401, 103 A.L.R. 494.

77. **Repudiation of compromise**
Where payment of compromise settlement was not made to infant in person but to guardian ad litem who had not given bond and who was therefore not authorized to receive it, guardian's release was nugatory, and court was justified in treating compromise as repudiated by debtor and in ordering original action reinstated.—Pacheco v. Delgardo, supra.

78. Ill.—Paskewie v. East St. Louis & S. R. Co. 117 N.E. 1035, 281 Ill. 385, L.R.A.1918C 52.
31 C.J. p 1140 note 75.

79. **Suit on bond**
Petition against next friend's widow, his surety, and surety's daughter for judgment of bond and to subject properties conveyed by next friend and surety to widow and daughter to payment of judgment, stated cause of action, where it alleged that conveyances were made without consideration for purpose, known to grantees, of avoiding payment to plaintiff.—Robertson v. Cox, 189 S.E. 844, 183 Ga. 744.

80. Mo.—Aley v. Missouri Pac. R. Co., 111 S.W. 102, 211 Mo. 460—Stephens v. Curtner, 222 S.W. 497, 205 Mo.App. 255.

81. Mo.—Aley v. Missouri Pac. R. Co., 111 S.W. 102, 211 Mo. 460.

82. Mo.—Henderson v. Kansas City, 76 S.W. 1045, 177 Mo. 477—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 232 Mo. App. 209.

83. Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, supra.

(7) Oath

In the absence of a statute requiring it, a guardian ad litem need not subscribe to any oath.

In some jurisdictions, in the absence of statute requiring it, it is not necessary for the guardian ad litem to subscribe any oath;[84] but, where a statute so requires, guardians ad litem should qualify by oath faithfully to perform their duties.[85]

g. Effect of Appointment

An order appointing a representative for an infant party is presumptively correct, and, for the purpose of the appointment, is conclusive evidence of infancy.

The appointment of a guardian ad litem[86] is conclusive evidence of infancy, for the purpose of the appointment, but for that purpose alone;[87] it does not otherwise affect the question of infancy, which may be subsequently raised by the proper plea.[88] Presumptions will be indulged in favor of an order appointing a representative for a minor party,[89] and it has been held that the appointment and qualification of such a representative cannot be attacked collaterally.[90]

§ 111. —— Powers, Duties, and Liabilities

a. In general
b. Protection of infant's interest
c. Compromise or settlement
d. Consent, waiver, or admissions
e. Employment of attorney
f. Purchase of infant's property

a. In General

The rights and powers of a guardian ad litem or next friend are limited to the performance of the duties imposed on him by law.

The rights and powers of a guardian ad litem or a next friend are strictly limited to the performance of the precise duties imposed on him by law.[91] Ordinarily, his authority is recognized only for certain specific purposes,[92] and it is restricted to matters connected with the litigation at hand;[93] he has no authority to act in any other matters[94] and he cannot otherwise bind the infant or his estate;[95] and it has been held that he cannot bind the infant by anything that he may do,[96] except with the consent of the court.[97] He is always subject to the supervision and control of the court.[98] The general

84. La.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745—Morris v. Mabry, 97 So. 20, 153 La. 1004.
31 C.J. p 1140 note 82.

85. La.—Crayton v. Waters, 83 So. 540, 146 La. 238.
31 C.J. p 1140 note 84.

86. Ill.—Peak v. Pricer, 21 Ill. 164.

87. N.Y.—Scott v. Prudential Outfitting Co., 155 N.Y.S. 497, 92 Misc. 195.
31 C.J. p 1140 note 86.

88. Ill.—Peak v. Pricer, 21 Ill. 164.

89. Cal.—O'Callaghan v. Bode, 34 P. 269, 84 Cal. 489.
4 C.J. p 754 note 64.

90. La.—Wells v. White-Grandin Lumber Co., 129 So. 171, 13 La. App. 696.

91. Cal.—Walters v. Superior Court in and for Los Angeles County, 18 P.2d 343, 129 Cal.App. 19.
N.Y.—Schwartz v. Kutsher, 29 N.Y.S.2d 168, 176 Misc. 815.
Tenn.—Roberts v. Vaughn, 219 S.W. 1034, 142 Tenn. 361, 9 A.L.R. 1528.
"A guardian ad litem is an officer of the court, and his powers and duties are strictly limited by law. He can only act in accordance with the instructions of the court and within the law under which appointed."—Honadle v. Stafford, 193 N.E. 172, 173, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

92. Tex.—Wright v. Jones, Com. App., 52 S.W.2d 247, reversing, Civ. App., 33 S.W.2d 292.
31 C.J. p 1140 note 90.

93. Ky.—Ambrose v. Graziani, 247 S. W. 953, 197 Ky. 679.
N.J.—Dorsa v. Public Service Co-Ordinated Transport, 152 A. 863, 9 N. J.Misc. 23.
N.Y.—Hartford Accident & Indemnity Co. v. Procter, 201 N.Y.S. 420, 206 App.Div. 510.
Pa.—In re Elkins' Estate, 18 Pa.Dist. & Co. 578.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292.
31 C.J. p 1141 note 91.
"A next friend is a fiduciary only in the sense that he may institute and prosecute a suit in behalf of a minor if, and to the extent that, he is recognized by the court as a proper person to act in such capacity."—Mitchell v. Thompson, Tex.Civ. App., 286 S.W. 642, 646, reversed on other grounds, Com.App., 292 S.W. 862.

Control of trial

Guardian ad litem for minors interested may be heard on claim against decedent's estate, but cannot control trial.—In re Patterson's Estate, 214 N.W. 344, 193 Wis. 392.

94. Ky.—Shaw v. Shaw, 192 S.W. 524, 174 Ky. 398.
Mo.—Gray v. Clement, 227 S.W. 111, 286 Mo. 100.

95. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
31 C.J. p 1141 note 93.

Unauthorized payments

(1) Unauthorized payments made to guardian ad litem or unauthorized agreements entered into with him do not bind the infant.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App. Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N. Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

(2) Next friend of infant need not tender back payment made to him as general guardian as condition precedent to recovery in circuit court. —Dudex v. Sterling Brick Co., 212 N. W. 92, 237 Mich. 470.
Right to receive payment and enter satisfaction of judgment see infra § 124.

96. Ill.—Rhoads v. Rhoads, 43 Ill. 239.

Contracts

A guardian ad litem is not authorized to contract on behalf of his ward.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

97. Ark.—Biggs v. St. Louis, I. M. & S. R. Co., 120 S.W. 970, 91 Ark. 122.

98. Pa.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.
R.I.—Stanton v. Sullivan, 4 A.2d 269, 62 R.I. 154—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
31 C.J. p 1141 note 96.
Protection of infant's interest by court see supra § 105.

rules of agency are not applicable to his conduct, and persons dealing with him are bound at their peril to ascertain the extent of his authority.[99] However, as he fully represents the rights and interests of the infant in the particular litigation,[1] and his rights and powers generally extend to all matters affecting the interest of the ward in the case,[2] in the absence of fraud or gross misconduct the acts of a guardian ad litem or next friend duly authorized to act and acting within the limits of his authority are binding on the infant.[3] It has even been held that, in such case, the infant is bound by the knowledge of his representative.[4] The motives of the guardian ad litem are immaterial if the acts themselves are lawful and proper.[5] A guardian ad litem should not act in the capacity of commissioner to make a report on which the decree is based; but the decree is not void on that account.[6]

Compared with guardian. A guardian ad litem or next friend ordinarily does not have the powers of a trustee or guardian,[7] and is not entitled to the custody of the person or property of the infant.[8] In some jurisdictions, by force of statute, he is endowed with powers similar to those of the general guardian for the purposes of the litigation at hand.

Appearance. The mere appointment of a guardian ad litem and his appearance for an infant does not of itself make the infant a party to the suit, if in fact there was no suit to which he was a party and to which the appointment was applicable.[9] Ordinarily, however, where a guardian ad litem for an infant party to an action has been duly appointed, appears, and defends, the infant is properly in court for all purposes,[10] as though he were an adult;[11] he is subject to the same rules of procedure;[12] and he is bound by the decree or judgment.[13]

Disposition of funds. It has been held that a next friend should not pay over the funds of the infant in his hands to the general guardian until he has been authorized by the court to do so.[14]

Election for infant. Neither a guardian ad litem[15] nor a next friend[16] may make an election for an infant without the consent of the court; but it may be done with such consent.[17]

Power to prosecute. A next friend may bring a suit without first obtaining leave of the court;[18] but it has been held that as the power of a next friend commences with the suit he may maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless defendant has waived the necessity of a demand.[19] A next friend may select the tribunal in which a suit brought on behalf of an infant shall be prosecuted.[20]

Submission to arbitration. A guardian ad litem or next friend cannot submit the rights of the infant to arbitration so as to bind the infant.[21]

99. N.Y.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

1. Ky.—Shaw v. Shaw, 192 S.W. 524, 174 Ky. 398—Bell v. Bell, 180 S.W. 803, 167 Ky. 430.
Miss.—Burrus v. Burrus, 56 Miss. 92.

2. Ohio.—McDowell v. Nims, 9 Ohio Dec., Reprint, 624, 15 Cinc.L.Bul. 359.
Tenn.—Roberts v. Vaughn, 219 S.W. 1034, 142 Tenn. 361, 9 A.L.R. 1528.
31 C.J. p 1141 note 98.

Authorizing mother to assist
After settlement of minor's claim for personal injuries had been agreed on between father and defendant, father could authorize mother to attend to necessary details which followed.—Ayer v. Androscoggin & K. Ry. Co., 163 A. 270, 131 Me. 381.

3. Wash.—Burke v. Northern Pac. R. Co., 149 P. 335, 86 Wash. 37, Ann.Cas.1917B 919.
31 C.J. p 1141 note 99.

4. Wash.—Burke v. Northern Pac. R. Co., supra.

5. N.Y.—Shea v. Bergen, 110 N.Y.S. 572, 59 Misc. 294, affirmed 110 N.Y.S. 1145, 126 App.Div. 934.

6. Va.—American Bonding Co. v. American Surety Co., 103 S.E. 599, 127 Va. 209.

7. Pa.—Turner v. Patridge, 3 Penr. & W. 172.

8. Ohio.—Marsh v. Marsh, 5 Ohio Dec., Reprint, 290, 4 Am.L.Rec. 257.
S.C.—Mitchell v. Connolly, 17 S.C.L. 203.

9. Tenn.—Frazier v. Pankey, 1 Swan 75.

10. Wis.—In re West's Estate, 284 N.W. 565, 231 Wis. 377.
31 C.J. p 1142 note 36.

General appearance
Where, on petition by trustee of inter vivos trust for accounting in chancery, infant beneficiary was served in the manner directed by the court, and a guardian ad litem was appointed, and there was no special appearance filed by consent of court, there was a "general appearance".—In re Rothenberg's Trust, 19 A.2d 639, 129 N.J.Eq. 377.

11. Ark.—Estes v. Lucky, 201 S.W. 815, 133 Ark. 97.

12. Ark.—Estes v. Lucky, supra.

13. Ky.—Cochran v. Tripplett, 9 Ky. Op. 280.
W.Va.—Hansford v. Tate, 56 S.E. 372, 61 W.Va. 207.

14. Mich.—Dudex v. Sterling Brick Co., 212 N.W. 92, 237 Mich. 470.

15. Iowa.—In re Burkholder's Adoption, 233 N.W. 702, 703, 211 Iowa 1222, citing **Corpus Juris.**
N.Y.—Chipman v. Montgomery, 63 N. Y. 221.

16. Tenn.—Hodges v. Hale, 97 S.W. 2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris**—Haggard v. Benson, 3 Tenn.Ch. 268.

17. Ala.—Andrews v. Hall, 15 Ala. 85.
N.Y.—Train v. Davis, 98 N.Y.S. 816, 49 Misc. 162.
31 C.J. p 1142 note 34.

18. Ala.—Barwick v. Rackley, 45 Ala. 215—Bethea v. McCall, 23 Ala. 449.

19. Mass.—Miles v. Boyden, 3 Pick. 213.

20. U.S.—In re Moore, Mo., 28 S.Ct. 585, 209 U.S. 490, 52 L.Ed. 904, 14 Ann.Cas. 1164.

21. N.C.—Millsaps v. Estes, 50 S.E. 227, 137 N.C. 535, 107 Am.S.R. 496, 70 L.R.A. 170.
31 C.J. p 1143 note 52.

b. Protection of Infant's Interest

It is the duty of a guardian ad litem or next friend to protect the infant's interest in the litigation.

It is the duty of a guardian ad litem or next friend fully to protect the infant's interest in all matters relating to the litigation,[22] and to act for him in all matters relating to the suit as he might act for himself if he were able to do so.[23] His duty requires him to acquaint himself with all the rights of the infant in order to protect them,[24] and to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit.[25] He should be as careful as the court from which he receives his appointment not to do anything, or allow anything to be done, to the prejudice of his ward's interests.[26] If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect[27] as well as made to respond to the infant for the damage sustained.[28] The misconduct of a guardian ad litem or next friend in protecting the infant's interests does not affect the jurisdiction of the court in rendering the judgment in the suit or action;[29] the judgment is not rendered thereby void;[30] it is merely a matter

22. Ark.—Sager v. American Inv. Co., 280 S.W. 654, 170 Ark. 568.
Ga.—Speck v. Speck, 156 S.E. 706, 707, 42 Ga.App. 517, citing **Corpus Juris.**
Ill.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315—Tymony v. Tymony, 163 N.E. 393, 331 Ill. 420—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209—Schrader v. Schrader, 280 Ill.App. 561.
Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.
Mo.—Campbell v. Campbell, 165 S.W. 2d 851, 350 Mo. 169—Crawford v. Amusement Syndicate Co., 37 S.W. 2d 581.
N.Y.—In re Wechsler's Estate, 273 N.Y.S. 968, 152 Misc. 564.
N.C.—Graham v. Floyd, 197 S.E. 873, 214 N.C. 77.
Pa.—In re Mark's Estate, 38 Pa.Dist. & Co. 489—Shouey v. Shouey, 16 Pa.Dist. & Co. 693, 17 West.Co. 259.
S.C.—Simpson v. Doggett, 156 S.E. 771, 773, 159 S.C. 294, quoting **Corpus Juris.**
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com.App., 130 S.W.2d 1048—Greathouse v. Fort Worth & D. C. Ry. Co., Com. App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418.
31 C.J. p 1141 note 12.
Duty to answer and defend see infra § 116.

Construction of will

When the interests of a minor are involved in the construction of a will, it is proper for guardian ad litem to contend for any reasonable construction favorable to ward, and, where there are two possible constructions, the guardian must contend for the one most favorable to ward.—Kennard v. Wiggins, 160 S.W. 2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S.Ct. 47, 317 U. S. 652, 87 L.Ed. 524.

Every honorable means

As long as his wards possess any potential rights, it is the duty of the special guardian to protect and advance those rights by every honorable means and expedient which is known and available to him.—In re Schrier's Will, 283 N.Y.S. 233, 157 Misc. 310.

Position of trust and confidence

The position of guardian ad litem is one of trust and confidence toward the ward as well as toward the court.—Cowie v. Strohmeyer, 136 N. W. 956, 150 Wis. 401, reheard 137 N. W. 778, 150 Wis. 401.

Reasonable litigant

"The guardian's duty is to be a reasonable litigant, asserting only what is arguable. Only if the judge thinks that he is clearly taking the wrong position should there be interference, and then the remedy is to appoint someone else."—In re Steel's Estate, 32 Pa.Dist. & Co. 55, 57.

Withdrawal on failure

If guardian ad litem fails properly to protect interests of ward, he should withdraw and another be appointed.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315.

23. Mo.—Kennard v. Wiggins, 160 S.W.2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S. Ct. 47, 317 U.S. 652, 87 L.Ed. 524—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660.
N.H.—Clarke v. Gilmanton, 12 N.H. 515.
S.C.—Cagle v. Schaefer, 104 S.E. 321, 115 S.C. 35.

Duty not perfunctory

Duty of guardian ad litem is not perfunctory or to be lightly regarded in ward's interest.—Peters v. Allen, Tex.Civ.App., 296 S.W. 929.

Filing of answer

The mere filing by a guardian ad litem of an answer submitting ward's interest to protection of court and taking no steps on behalf of ward is not compliance with guardian's duty of looking after ward's interest.—U. S. v. 15,883.55 Acres of Land in Spartanburg County, S. C., D.C.S.C., 45 F.Supp. 558.

24. Ill.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315—Tymony v. Tymony, 163 N.E. 393, 331 Ill. 420.
Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352.
31 C.J. p 1141 note 14.

25. Ill.—Tymony v. Tymony, 163 N. E. 393, 331 Ill. 420.
Okl.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352.
Okl.—Tucker v. Leonard, 291 P. 124, 144 Okl. 264—Tucker v. Leonard, 291 P. 135, 144 Okl. 258.
31 C.J. p 1141 note 15.

Every question available

A guardian ad litem must see to it that every question available in the defense of his ward is urged and acted on by the court.—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.

26. Wis.—Cowie v. Strohmeyer, 136 N.W. 956, 150 Wis. 401, reheard 137 N.W. 778, 150 Wis. 401.

27. Ala.—Andrews v. Hall, 15 Ala. 85.
S.C.—McIver v. Thompson, 108 S.E. 411, 117 S.C. 175—Cagle v. Schaefer, 104 S.E. 321, 115 S.C. 35.

28. Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.
31 C.J. p 1141 note 18.

Actions

(1) Ward may sue guardian ad litem for damages sustained by guardian's consent to judgment if allegations of petition are in fact untrue, regardless of whether or not judgment might have been set aside on motion.—Speck v. Speck, 156 S.E. 706, 42 Ga.App. 517.

(2) A guardian ad litem so sued cannot defend on ground that ward's interests were represented in case by executor, and the guardian is not relieved from the consequences of his default, even though the executor may also be liable to the infant.—Speck v. Speck, supra.

29. Cal.—Welsh v. Koch, 88 P. 604, 4 Cal.App. 571.

30. Ind.—Colvert v. Colvert, 180 N.

of error,[31] for which a judgment may be set aside.[32]

Duty to appeal. A guardian ad litem has been held to have discharged his full duty when he has represented his ward's interests in the litigation before the court of first instance, and due fidelity to his duties does not require him to appeal to the court of last resort.[33]

c. Compromise or Settlement

As a general rule, a guardian ad litem or next friend cannot, without the consent of the court, compromise or settle the infant's claim.

A guardian ad litem or next friend has no authority to enter into a compromise or settlement.[34] Although it has been held that a compromise without the order or sanction of the court is void,[35] ordinarily a compromise not prejudicial to the infant is not necessarily absolutely void,[36] and may be ratified by the infant after he reaches his majority.[37] Under some statutes, however, the person suing on behalf of the infant has authority to compromise or settle the suit or cause of action.[38]

A guardian ad litem or next friend has no authority to collect the proceeds of the infant's claim.[39] Under some statutes a guardian ad litem cannot receive payment in settlement of the cause of action except on giving proper security approved by the court, and payment to a guardian ad litem who has not given such security is not a satisfaction of the claim.[40]

By leave of court. Ordinarily a guardian ad litem or next friend may, with the consent of the court, agree to a settlement or compromise beneficial to the infant,[41] and the court has power to au-

E. 192, 95 Ind.App. 325, citing **Corpus Juris.**

31 C.J. p 1141 note 20.

Collateral attack

Failure of next friend properly to prosecute suit cannot avoid decree on collateral attack.—Irwin v. Alabama Fuel & Iron Co., 110 So. 566, 215 Ala. 328.

31. Cal.—Welsh v. Koch, 88 P. 604, 4 Cal.App. 571.

32. Ga.—Nelson v. Estill, 9 S.E.2d 73, 77, 190 Ga. 235, citing **Corpus Juris.**

31 C.J. p 1141 note 22.

33. Pa.—In re McGlinn's Estate, 35 Pa.Dist. & Co. 75, 55 Montg. 52.

34. U.S.—Horzepa v. Dauski, D.C.N.Y., 40 F.Supp. 476.

Ark.—Johnson v. Baum, 250 S.W. 354, 158 Ark. 441.

Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 839, 128 Fla. 353, 111 A.L.R. 682, citing **Corpus Juris.**

Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446—Ambrose v. Graziani, 247 S.W. 953, 197 Ky. 679.

N.J.—Rubin v. L. H. Trowbridge Sign Co., 122 A. 768, 99 N.J.Law 216.

N.Y.—In re Uran, 238 N.Y.S. 596, 227 App.Div. 496.

R.I.—Abbott v. Rhode Island Hospital Trust Co., 140 A. 356, 49 R.I. 87.

Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.

31 C.J. p 1142 notes 41, 42.

Consent judgment see infra § 122.

35. Ark.—Rankin v. Schofield, 98 S.W. 674, 81 Ark. 440.

36. Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 893, 128 Fla. 353, 111 A.L.R. 682, citing **Corpus Juris.**

31 C.J. p 1142 note 44.

37. N.Y.—Central Hanover Bank & Trust Co. v. Brown, 30 N.Y.S.2d 85.

38. Md.—Clark v. Southern Can Co., 81 A. 271, 116 Md. 85, 36 L.R.A., N.S., 980.

39. Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

N.Y.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.

Right to collect proceeds of judgment in infant's favor see infra § 124.

40. N.Y.—Joyce v. Washington Storage Warehouse & Van Co., 163 N.Y.S. 519, 176 App.Div. 538—Heiter v. Joline, 119 N.Y.S. 819, 135 App.Div. 13.

41. Mass.—Wallace v. Boston Elevated Ry. Co., 80 N.E. 461, 194 Mass. 328.

Mich.—Hightower v. Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509—Dudex v. Sterling Brick Co., 212 N.W. 92, 94, 237 Mich. 470, citing **Corpus Juris.**

Neb.—In re Shierman's Estate, 261 N.W. 155, 159, 129 Neb. 230, citing **Corpus Juris.**

N.J.—Rubin v. L. H. Trowbridge Sign Co., 122 A. 768, 99 N.J.Law 216.

N.Y.—In re Balfe's Will, 20 N.Y.S.2d 474, 174 Misc. 279, denying motion 274 N.Y. 284, 152 Misc. 739, modified on other grounds 280 N.Y.S. 128, 258 App.Div. 22, and affirmed Application of De Mott, 27 N.Y.S.2d 472, 261 App.Div. 996, appeal denied In re Balfe's Estate, 28 N.Y.S.2d 153, 262 App.Div. 746—In re Beresford's Estate, 262 N.Y.S. 78, 146 Misc. 140.

Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.

R.I.—Young v. Geoffroy, 152 A. 793, 51 R.I. 162.

31 C.J. p 1142 note 48.

Compliance with order

Defendant who seeks to compromise an infant's claim must comply strictly with order of court permitting guardian ad litem to enter into the compromise.—Snider v. Renner, 279 N.Y.S. 384, 155 Misc. 352.

Infant's desire

Settlements may be made by the guardian ad litem, without regard to the infant's desire, if approved by the court.—Golshen v. Samor Realty Co., 4 N.Y.S.2d 107, 167 Misc. 477.

Parent prosecuting action in dual capacity of next friend for minor and of plaintiff in his own right may, with the court's approval, make a compromise agreement if, in making agreement, his interest is not preferred to detriment of minor.—Wilson v. Fisher, Tex.Civ.App., 105 S.W.2d 304, error refused, certiorari denied 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

Payment

(1) Where court authorized settlement on payment to infant plaintiff's guardian ad litem and authorized guardian to retain a certain sum for services of attorney and hold balance as general guardian, and guardian ad litem, before appointment as general guardian, executed general release, payment of amount of settlement by defendant to plaintiff's attorney who converted the money to his own use did not discharge defendant from liability, although at-

thorize it.[42] It has been held that a compromise entered without the order or sanction of the court, and considered void, cannot be validated by the subsequent approval thereof by the court.[43]

d. Consent, Waiver, or Admissions

A guardian ad litem or next friend cannot concede, waive, or admit away any substantial rights of the infant.

The guardian ad litem or next friend can make no concessions.[44] He cannot waive,[45] or admit away any substantial rights of the infant,[46] or, likewise, relinquish any substantial rights of the in-

torney delivered such release to defendant.—Honadle v. Stafford, 193 N. E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App. Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

(2) Court was without power, after litigation had terminated, to direct payment to guardian ad litem of money received in settlement of infant's action for injuries and deposited with city chamberlain by court order.—Lewin v. Brown Drive It Yourself Corporation, 280 N.Y.S. 912, 155 Misc. 225.

Procedure

(1) A compromise may become effective only when it is approved by the court after independent consideration and a finding that the proposed agreement is clearly for the advantage of the minor.

Ark.—Kuykendall v. Zachary, 16 S. W.2d 590, 179 Ark. 478.

R.I.—Abbott v. Rhode Island Hospital Trust Co., 140 A. 356, 49 R.I. 87.

(2) The proposed settlement will not be approved if the court is not satisfied that it is reasonable.—Horan v. Greig, 12 N.Y.S.2d 67.

(3) Affidavits of a physician as to the condition of the injured infant may be required.—Maguire v. New York Rapid Transit Corporation, 253 N.Y.S. 855, 141 Misc. 807—Lentine v. Jacobs, 243 N.Y.S. 114, 137 Misc. 403.

(4) If dissatisfied with the proposed settlement, the court may appoint a special guardian to make examination into the facts regarding reasonableness of proposed settlement, and may authorize the guardian to appoint physicians to examine the infant the fees of special guardian and physicians to be paid by defendant.—Horan v. Greig, supra.

(5) On application by guardian ad litem to compromise infant's action, it must be disclosed what settlement is proposed for such action and amount attorney expects to receive from action, so that compensation of attorneys may be fixed in the infant's action, based on amount so to be received.—Ferguson v. Ruppert, 3 N. Y.S.2d 9, 166 Misc. 530.

(6) For court to approve terms of settlement, counsel representing minor plaintiff need not personally investigate case or present evidence to court.—Ayer v. Androscoggin & K. Ry. Co., 163 A. 270, 131 Me. 381.

(7) Neither minor nor next friend need be present when court considers approving settlement of action in which minor is plaintiff; nor need evidence be formally introduced unless court requires it.—Ayer v. Androscoggin & K. Ry. Co., supra.

(8) Procedure to be observed stated.—Lentine v. Jacobs, supra.

Relief against stipulation

An infant will not be relieved from a stipulation of settlement by his guardian ad litem, if the status quo ante cannot be restored; but, where there has been no change of status, a refusal to exercise discretion in favor of infant plaintiff to relieve him from a stipulation of settlement made by his guardian ad litem was improper.—Bruder v. Schwartz, 24 N.Y. S.2d 443, 260 App.Div. 1048.

42. R.I.—Young v. Geoffroy, 152 A. 793, 51 R.I. 162.

31 C.J. p 1142 note 49.

Compromise approved as beneficial to the infant.—Rhode Island Hospital Trust Co. v. Davis, R.I., 33 A.2d 197.

Considerable discretion is permitted court in inquiring into reasonableness and propriety of settlement of infant's cause of action.—Maguire v. New York Rapid Transit Corporation, 253 N.Y.S. 855, 141 Misc. 807.

No suit brought

The district court has jurisdiction to approve a settlement, although no suit has actually been begun on the claim.—Ernst v. Daily, 278 N.W. 516, 202 Minn. 358.

43. Ark.—Rankin v. Schofield, 98 S. W. 674, 81 Ark. 440.

44. Ark.—Jeffery v. Patton, 31 S.W. 2d 738, 182 Ark. 449—Johnson v. Baum, 250 S.W. 354, 158 Ark. 441.

Iowa.—Stephens v. Wood, 195 N.W. 239, 196 Iowa 1394.

Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418—Wright v. Jones, Com. App., 52 S.W.2d 247, reversing, Civ. App., 33 S.W.2d 292.

31 C.J. p 1143 note 54.

Consent judgment see infra § 122.

45. Colo.—Rausch v. Cosian, 282 P. 251, 86 Colo. 389.

Fla.—Miles v. Miles, 158 So. 520, 117 Fla. 884—Knights of Pythias v. Henry, 99 So. 557, 87 Fla. 209.

Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.

Kan.—Suter Bros. v. Hebert, 299 P. 627, 630, 133 Kan. 262, citing **Corpus Juris.**

La.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745.

Mo.—Campbell v. Campbell, 165 S. W.2d 851, 350 Mo. 169—Kennard v. Wiggins, 160 S.W.2d 706, 712, 349 Mo. 283, citing **Corpus Juris,** and certiorari denied Wiggins v. Kennard, 63 S.Ct. 47, 317 U.S. 652, 87 L.Ed. 524—Spotts v. Spotts, 55 S. W.2d 977, 331 Mo. 917, 87 A.L.R. 660.

N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.

Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**

Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418—Wright v. Jones, Com. App., 52 S.W.2d 247, 252, citing **Corpus Juris,** reversing, Civ.App., 33 S.W.2d 292—Watson v. Glenn, Civ.App., 82 S.W.2d 704, 705, citing **Corpus Juris**—Long v. Galveston Electric Co., Civ.App., 59 S.W.2d 228, 229, citing **Corpus Juris.**

31 C.J. p 1143 note 55.

Waiver of process see infra § 115.

46. Ark.—Jeffery v. Patton, 31 S.W. 2d 738, 182 Ark. 449.

Ga.—Deck v. Shields, 25 S.E.2d 514, 195 Ga. 697.

Ill.—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209.

Mo.—Kennard v. Wiggins, 160 S.W. 2d 706, 712, 349 Mo. 283, citing **Corpus Juris,** and certiorari denied Wiggins v. Kennard, 63 S.Ct. 47, 317 U.S. 652, 87 L.Ed. 524.

N.J.—Caruso v. Caruso, 141 A. 16, 102 N.J.Eq. 393, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.

Pa.—In re Mark's Estate, 38 Pa.Dist. & Co. 489.

R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.

Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**

Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418—Wright v. Jones, Com. App., 52 S.W.2d 247, reversing Civ.

fant,[47] or consent to anything which may be prejudicial to him,[48] even by neglect or omission;[49] and any admission or waiver is ineffectual and not binding on the infant,[50] although it is contained in a pleading.[51]

On the other hand, a guardian ad litem or next friend may make a valid consent or waiver as to matters which merely facilitate a trial and cannot prejudicially affect the rights of an infant.[52] Also, with permission of the court, he may waive a mere irregularity, either expressly or by conduct.[53]

e. Employment of Attorney

A guardian ad litem or next friend may employ an attorney to conduct the suit, but he cannot, without the court's permission, contract as to the attorney's fees.

Although a next friend or guardian ad litem may employ an attorney to conduct the suit,[54] he cannot make a contract for the payment of a specified compensation which will bind the infant or his es-

App., 33 S.W.2d 292—Watson v. Glenn, Civ.App., 32 S.W.2d 704.
31 C.J.p 1143 note 56.

Omission of name

Guardian ad litem of minor could not admit, in answer in proceeding to construe will, that omission of her name from will was intentional.—Woodworth v. Baker, 135 A. 606, 48 R.I. 99.

47. Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

Contingent interest

In proceeding to terminate a testamentary trust where parents of named infants and unborn issue assigned to a legatee all their interest in trust property, guardian ad litem of minor children in the absence of valid consideration was without authority to relinquish minors' contingent interest in trust property to the immediate beneficiary of the trust estate.—Deal v. Wachovia Bank & Trust Co., 11 S.E.2d 464, 218 N.C. 483.

48. R.I.—Woodworth v. Baker, 135 A. 606, 607, 48 R.I. 99, citing **Corpus Juris.**
Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**
Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, reversing, Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418—Wright v. Jones, Com. App., 52 S.W.2d 247, reversing, Civ. App., 33 S.W.2d 292.
31 C.J. p 1143 note 57.

Jurisdiction or proof

(1) Questions of jurisdiction or proof by competent evidence of material issues or of procedure in accordance with established rules cannot, as against infant defendants, be waived.
Fla.—Knights of Pythias v. Henry, 99 So. 557, 87 Fla. 209.
N.J.—Anderson v. Anderson, 32 A. 2d 83, 133 N.J.Eq. 311.

(2) Accordingly, in suit for partition of real estate, in which a curator was appointed for an absent minor defendant, and default was entered, evidence of ownership, consisting of statement of counsel for plaintiff as to what official records indicated as to ownership, although not objected to, does not support judgment against minors, as objection thereto could not be waived by curator.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745.

(3) Also, in case of a minor, represented by curator appointed by court, all objections which should have been are considered as having been made.—Succession of Walsh, 131 So. 214, 15 La.App. 332.

49. Kan.—Suter Bros. v. Hebert, 299 P. 627, 630, 133 Kan. 262, citing **Corpus Juris.**
Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**
31 C.J. p 1143 note 58.

Failure to file exceptions

Guardian ad litem must represent infant throughout suit, and, on failure to file exceptions to sheriff's return of sale made before expiration of six months from entry of decree of foreclosure, cannot preclude infant defendant from having error reviewed any time after confirmation and within twelve months after attaining full age.—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

50. Okl.—Cudjo v. Harris, supra.
Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**
31 C.J. p 1143 note 59.

51. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226, 233, citing **Corpus Juris.**
N.J.—Anderson v. Anderson, 32 A.2d 83, 133 N.J.Eq. 311—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613—Caruso v. Caruso, 139 A. 812, 101 N.J.Eq. 350, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.
R.I.—Woodworth v. Baker, 135 A. 606, 48 R.I. 99.
Tenn.—Hodges v. Hale, 97 S.W.2d 454, 458, 20 Tenn.App. 233, citing **Corpus Juris.**
Tex.—Watson v. Glenn, Civ.App., 32 S.W.2d 704.
31 C.J. p 1143 note 60.

52. Ark.—Morgan v. Stocks, 122 S. W.2d 953, 197 Ark. 368—Burks v. Cantley, 86 S.W.2d 34, 191 Ark. 347.
N.J.—Anderson v. Anderson, 32 A. 2d 83, 133 N.J.Eq. 311—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661—Caruso v. Caruso, 139 A. 812, 101 N.J.Eq. 350, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.
Tenn.—Northwestern Mutual Life Ins. Co. v. Newsom, 2 Tenn.App. 70, 73, citing **Corpus Juris.**
31 C.J. p 1143 note 61.

53. Wis.—In re Koch, 134 N.W. 663, 148 Wis. 548.

54. Ala.—Smoot v. Ryan, 65 So. 828, 187 Ala. 396.
Colo.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408, 116 A.L.R. 1319.
Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
Ill.—Goldberg v. Perlmutter, 31 N.E.2d 333, 308 Ill.App. 84—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 812, 300 Ill. App. 582, quoting **Corpus Juris**—Zasove v. Minneapolis, St. P. & S. S. M. Ry. Co., 218 Ill.App. 534.
N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.
Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.
31 C.J. p 1143 note 65.

Control of court

The employment of counsel and the fees to be paid counsel for services rendered to minors are within the control of the court.—Hepp v. Petrie, 200 N.W. 857, 185 Wis. 350.

Evidence held insufficient to show the employment of an attorney or an agreement that the estate of the infants should pay him for his services.—In re Price, 215 P. 710, 61 Cal. App. 592.

Sufficiency of employment

Attorney representing minor plaintiff need not be directly employed or paid by plaintiff or next friend, and, in the absence of fraud, any arrangement with regard to employment of counsel for minor plaintiff, acceded to by next friend, is sufficient.—Ayer v. Androscoggin & K. Ry. Co., 168 A. 270, 131 Me. 381.

tate,[55] unless the agreement meets with the approval of the court;[56] but the compensation of the attorney will be fixed by the court without regard to any such contract.[57] There are cases holding that the next friend may employ counsel to represent him and agree on the compensation to be paid, subject, however, to the limitation that the fee agreed on shall be reasonable,[58] which is a question for the court.[59]

Order of court. The court may direct that counsel be employed when the interest of the infant requires it.[60] It is the better practice to apply to the court for an order authorizing the employment and fixing the compensation,[61] for, if the guardian ad litem acts without such order, he takes on himself the burden of showing the court that the employment was necessary.[62]

f. Purchase of Infant's Property

A guardian ad litem or next friend cannot, as a general rule, purchase the infant's property for himself.

A guardian ad litem or next friend cannot acquire the infant's property for himself pending litigation with respect to it,[63] or, it has been held, purchase the infant's property or property in which the infant is interested at a sale ordered in the action or proceedings in which he represents the infant.[64] Although it has been held that courts are without power to make effectual a sale of the infant's property to the next friend,[65] it has also been held that a guardian ad litem may so purchase, with the consent of the court, if the purchase is in good faith and for a valuable consideration.[66] In any event, it is generally held that such a purchase is not, in the absence of statute providing otherwise,[67] absolutely void,[68] but is merely voidable.[69] Being considered voidable, it may become valid or ratified by acquiescence.[70]

§ 112. —— Compensation and Allowances

a. In general

b. How allowance made

55. Cal.—Leonard v. Alexander, 122 P.2d 984, 50 Cal.App.2d 385.
Colo.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408, 116 A.L.R. 1319.
Mo.—Campbell v. Campbell, 165 S.W. 2d 851, 350 Mo. 169.
N.J.—Peraino v. De Mayo, 177 A. 692, 13 N.J.Misc. 233.
Tenn.—City of Nashville v. Williams, 82 S.W.2d 541, 169 Tenn. 38.
31 C.J. p 1144 note 66.

Gratuitous services

The rule that services rendered to another with his consent and acquiescence without an understanding that they are gratuitous imply a promise to pay does not apply to the employment of attorneys by the mother of minors to represent them in a suit in which a guardian ad litem has been appointed, and the evidence without conflict shows that, as far as the estate of the minors was concerned, the understanding was that the services were to be rendered gratuitously.—In re Price, 215 P. 710, 61 Cal.App. 592.

56. U.S.—Ryan v. Philadelphia & Reading Coal & Iron Co., C.C.N.Y., 189 F. 253.
Tenn.—Yourie v. Nelson, 1 Tenn.Ch. 614.

57. Cal.—Leonard v. Alexander, 122 P.2d 984, 50 Cal.App.2d 385.
Pa.—In re Mikasinovich, 168 A. 506, 110 Pa.Super. 252.
31 C.J. p 1144 note 68.

Allowance held reasonable

Ill.—Zasove v. Minneapolis, St. P. & S. S. M. Ry. Co., 218 Ill.App. 534.

58. Ky.—Elk Valley Coal Min. Co. v. Willis, 149 S.W. 894, 149 Ky. 449—Sanders v. Woodbury, 142 S.W. 207, 146 Ky. 153.

Reasonable sum

An agreement by the next friend to pay the attorney a reasonable sum as his fee is valid and enforceable. —Goldberg v. Perlmutter, 31 N.E.2d 333, 308 Ill.App. 84.

Necessaries

Services of attorneys in suit instituted on behalf of minors by next friend were "necessaries" for which the minor or next friend could make a binding agreement to pay reasonable compensation.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582—Burns v. Illinois Central R. Co., 190 Ill. App. 191.

59. Ky.—Sanders v. Woodbury, 142 S.W. 207, 146 Ky. 153.

60. Md.—Tatem v. Wright, 114 A. 836, 139 Md. 20.
N.J.—Colgate v. Colgate, 23 N.J.Eq. 372.

61. Ill.—Smith v. Smith, 69 Ill. 308.
Wis.—Richardson v. Tyson, 86 N.W. 250, 110 Wis. 572, 84 Am.S.R. 937.

62. Ill.—Smith v. Smith, 69 Ill. 308.
Wis.—Richardson v. Tyson, 86 N.W. 250, 110 Wis. 572, 84 Am.S.R. 937.

63. Ohio.—Massie v. Matthews, 12 Ohio 351.

64. Tex.—Mitchell v. Thompson, Com.App., 292 S.W. 862, 863, citing **Corpus Juris**, reversing, Civ.App. 286 S.W. 642, and rehearing denied, Com.App., 297 S.W. xix.
31 C.J. p 1144 note 73.
Who may purchase at sales under order of court generally see supra § 66.

Liability for value

An infant's guardian ad litem, purchasing ward's deceased mother's land at sale to pay debts of her estate, against which he asserted claim, and having title conveyed to his wife, may be charged with full value of land after conveyance thereof to innocent purchasers, without regard to question of fraud.—Graham v. Floyd, 197 S.E. 873, 214 N.C. 77.

65. Tex.—Mitchell v. Thompson, 292 S.W. 862, reversing, Civ.App., 286 S.W. 642, and rehearing denied, Com.App., 297 S.W. xix.

66. N.Y.—Jackson v. Woolsey, 11 Johns. 446.
31 C.J. p 1144 note 77.

67. N.Y.—Dugan v. Sharkey, 85 N. Y.S. 778, 89 App.Div. 161.
31 C.J. p 1144 note 78.

Grantee

In some jurisdictions, by force of statute, the purchase is void and a subsequent grantee acquires no title. —McLaughlin v. Morris, 234 S.W. 259, 150 Ark. 347.

68. Miss.—Memphis Stone & Gravel Co. v. Archer, 82 So. 315, 120 Miss. 453.
31 C.J. p 1144 note 79.

69. Miss.—Smith v. Strickland, 103 So. 782, 139 Miss. 1.
31 C.J. p 1144 note 80.

Notice

Grantees of father, purchasing minor children's property at judicial sale, in suit by him as next friend, were charged with notice and were not innocent purchasers.—Mitchell v. Thompson, Com.App., 292 S.W. 862, reversing, Civ.App., 286 S.W. 642, and rehearing denied, Com.App., 297 S.W. xix.

70. Ky.—Mitchell v. Berry, 1 Metc. 602.

c. Amount of allowance
d. By whom allowance payable

a. In General

A guardian ad litem is entitled to reasonable compensation for his services, and to reimbursement for his necessary expenses. A next friend is entitled to reimbursement for necessary expenses, and in some jurisdictions he is entitled to compensation for his services.

The allowance of compensation or disbursements ordinarily is a matter within the discretion of the court.[71] The guardian ad litem is entitled to reasonable compensation for his services,[72] rendered in the trial court as well as on appeal,[73] and to a reimbursement for reasonable and necessary expenses,[74] such as counsel fees.[75]

A next friend is entitled to be reimbursed for all his expenditures,[76] even though he is unsuccessful, if he has acted in good faith and with reasonable caution.[77] Although it has been held that a next friend is not entitled to any compensation for personal services,[78] it has also been held that he should be allowed compensation for personal services performed within the powers granted him by law,[79] and he has been allowed such compensation even in the absence of a statute governing the actions of a next friend or fixing his compensation.[80]

The fact that the litigation has been unsuccessful to the infant does not per se forfeit the right to compensation where there has been good faith and reasonable caution,[81] but it is otherwise where there was no probable cause for the litigation.[82] A guardian ad litem[83] or next friend[84] who also represents interests adverse to the infant is not entitled to compensation, and if he has received any compensation it may be recovered.[85]

b. How Allowance Made

There must be a compliance with any statutory procedure prescribed for the allowance of compensation and allowances. In some jurisdictions such allowances may be taxed in the bill of costs.

Where a statute provides the manner for making the allowances, there must be a compliance therewith.[86] Ordinarily it is a matter within the judicial discretion of the court.[87] Generally it is made by the court making the appointment,[88] or by the

71. Wis.—In re McNaughton, 118 N.W. 997, 138 Wis. 179, motion denied 120 N.W. 288, 138 Wis. 179.

Power

The power to appoint a guardian ad litem necessarily implies the additional power to compensate him for the services rendered by him on behalf of the minor.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

72. Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.
N.Y.—City Bank Farmers Trust Co. v. Meyn, 34 N.Y.S.2d 373, 263 App. Div. 671.
Tex.—Texas Employers' Ins. Ass'n v. Storey, Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1144 note 86.

73. Hawaii.—Focke v. Gay, 27 Hawaii 132.
31 C.J. p 1144 note 87.

74. Hawaii.—Focke v. Gay, supra.
N.Y.—Leopold v. Myers, 2 Hilt. 580, 10 Abb.Pr. 40.

75. Wis.—Richardson v. Tyson, 86 N.W. 250, 110 Wis. 572, 84 Am.S.R. 937.
31 C.J. p 1144 note 89.

Guardian acting as attorney

"Where the services as guardian ad litem and as an attorney are rendered by the same person, a separate allowance should be made for each service; the amount allowed for services as guardian ad litem being taxable as costs and the amount allowed for services as counsel fees assessable against the estate of the incompetent."—Franz v. Buder, C.C.A.Mo., 38 F.2d 605, 607.

However, it has been held that the orphans' court normally appoints lawyers as guardians ad litem in order to avoid double expense, and it is not proper practice for a guardian ad litem who is an attorney to engage other counsel to act for him.—In re Wanamaker's Trust, 38 Pa.Dist. & Co. 347, affirmed 17 A.2d 380, 340 Pa. 419.

76. N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
31 C.J. p 1145 note 90.

Approval of account

"Before the next friend may charge the infant with reasonable and necessary expenditures for attorneys' fees and the like, his account should be examined and approved by the circuit court."—Dudex v. Sterling Brick Co., 212 N.W. 92, 94, 237 Mich. 470.

77. N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235.
W.Va.—Brown v. Erwin, 108 S.E. 605, 89 W.Va. 113.

78. Ga.—Daniel v. Powell, 29 Ga. 730.

79. Tenn.—Roberts v. Vaughn, 219 S.W. 1034, 142 Tenn. 361, 9 A.L.R. 1528.

80. Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.

81. Ill.—Carlberg v. State Sav. Bank & Trust Co. of Moline, 143 N.E. 441, 321 Ill. 181.
31 C.J. p 1145 note 94.

82. Mass.—Libby v. Todd, 80 N.E. 584, 194 Mass. 507.

83. N.Y.—Heuel v. Stein, 150 N.Y.S. 540, 165 App.Div. 14.

84. **Proceedings held necessary** and not to have been brought to establish next friend's adverse interest so as to preclude him from compensation for his services.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.

85. N.Y.—Heuel v. Stein, 150 N.Y.S. 540, 165 App.Div. 14.

86. Idaho.—Fraser v. Davis, 156 P. 913, 29 Idaho 70, modified and rehearing denied 158 P. 233, 29 Idaho 70.
31 C.J. p 1145 notes 98, 99.

87. Ill.—Wright v. Upson, 135 N.E. 209, 303 Ill. 120.
Wis.—In re McNaughton's Will, 118 N.W. 997, 138 Wis. 179, rehearing denied 120 N.W. 288, 138 Wis. 179.

88. Ky.—Lacey v. Lacey, 186 S.W. 501, 170 Ky. 625.
31 C.J. p 1145 note 2.
"As the court has the power to appoint a guardian ad litem and impose duties upon him for the benefit of a minor, it is but an incident to that power that it may allow him suitable compensation to be paid as the equity of the case shall require."—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 454, 80 Ind.App. 282.

court wherein the services are rendered,[89] or by the court in which the action is brought,[90] before the case is finally disposed of,[91] although in some jurisdictions the appellate court may fix the compensation in such sum as is deemed just and right.[92] While moneys recovered for an infant are in the custody of the court, it will order the allowance to be reimbursed; but after payment to the general guardian such allowance can be reimbursed only by an ordinary action or proceeding against the moneys in the hands of the guardian.[93] It cannot be recovered in a subsequent action to which plaintiff in the original action is not a party, but, if the fee has not been allowed in the original action, such action should be opened after due notice to plaintiff and then the guardian may move for his reasonable compensation.[94] The allowance is not required to be taxed in the manner of taxing costs,[95] but it may be, and is sometimes, taxed in the bill of costs.[96] An allowance of solicitor's fees cannot be included as part of such costs to be paid by the opposing party.[97] The allowance may be in solido for several infant defendants.[98]

The court may make an allowance of a fee to a guardian ad litem of its own volition and without awaiting a request therefor,[99] or the allowance may be made on motion or on the filing of an account,[1] or an application in the form of a petition is a proper manner of presenting the subject to the court.[2] Although an allowance of a fee to a guardian ad litem without any proofs being offered to support the charge has been held to be error,[3] it has also been held that it is the privilege of the court to hear evidence of what would be a reasonable fee, but that it is not incumbent on the court to do so.[4] Under some statutes no order allowing compensation shall be made except on an affidavit by the guardian ad litem, or, if the guardian is not an attorney, then on his affidavit and an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case and, to the best of his ability, has made himself acquainted with the rights of the ward and that such guardian has taken all steps necessary for the protection of such rights to the best of his knowledge and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.[5]

Under a statute providing that a particular court has power to open, vacate, modify, or set aside a decree or order of the court for fraud, newly discovered evidence, clerical error, or other sufficient cause, a decree approving an allowance for a guard-

89. Mo.—Walton v. Yore, 58 Mo. App. 562.

90. Tex.—Simmons v. Arnim, 220 S. W. 66, 110 Tex. 309.
31 C.J. p 1145 note 4.

91. Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.
31 C.J. p 1145 note 5.

92. **Look to record**
The supreme court would look to the entire record, including finding of register and of trial judge, to determine allowance to be made to guardian ad litem representing minor in proceeding resulting in construction of will favorable to vesting of entire estate in minor, and would apply supreme court's own judgment to determine what would be just between the parties.—Frazer v. First Nat. Bank, 178 So. 441, 235 Ala. 252, 126 A.L.R. 1.

93. N.Y.—Leopold v. Myers, 2 Hilt. 580, 10 Abb.Pr. 40.

94. Ky.—Pope v. Lyttle, 163 S.W. 1121, 157 Ky. 659.
31 C.J. p 1145 note 9.

95. Wis.—In re McNaughton's Will, 118 N.W. 997, 138 Wis. 179, rehearing denied 120 N.W. 288, 138 Wis. 179.

Failure to set out reason
Failure of judgment allowing guardian ad litem's fee against ward to set out reason for not taxing fee as costs did not render judgment void and the party attacking the judgment must show that the failure to tax fee as costs was without sufficient reason.—Kunze v. Krueger, Tex.Civ.App., 30 S.W.2d 385, error refused.

96. U.S.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.
Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.
Ill.—Allis-Chalmers Mfg. Co. v. Hays, 171 N.E. 178, 339 Ill. 230.
Kan.—Galloway v. Wesley, 73 P.2d 1073, 146 Kan. 937.
Neb.—Ben B. Wood Realty Co. v. Wood, 273 N.W. 493, 132 Neb. 817.
Tex.—Flenniken v. Foot, Civ.App., 270 S.W. 903—Fulwiler Electric Co. v. Spann, Civ.App., 252 S.W. 892.
31 C.J. p 1145 note 11.

By whom incurred
Fee of guardian ad litem in cases in which his service is required is item of costs "incurred" by plaintiff by bringing suit within statute making each party liable for costs incurred by him.—Hays v. Spangenberg, Tex.Civ.App., 94 S.W.2d 899.

97. Ill.—Hutchinson v. Hutchinson, 38 N.E. 926, 152 Ill. 347, affirming 50 Ill.App. 87.
31 C.J. p 1145 note 12.

98. Mo.—Walton v. Yore, 58 Mo. App. 562.

99. Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.

1. Ind.—Whinery v. Hammond Trust & Savings Bank, supra.

2. Ind.—Whinery v. Hammond Trust & Savings Bank, supra.

3. Ill.—Judson v. First Trust & Sav. Bank of Springfield, 238 Ill. App. 531.

Attorney's fees
Notwithstanding consent by the guardian ad litem to the proposed allowance, proof should be made of the reasonable value of the attorney's services, on proper notice to the guardian ad litem.—Amato v. State, 9 N.Y.S.2d 934, 170 Misc. 136.

4. **Familiarity with services**
Allowing fee without hearing expert testimony was proper, where court was familiar with services rendered.—Texas Employers' Ins. Ass'n v. Storey, Tex.Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.

5. N.Y.—City Bank Farmers Trust Co. v. Meyn, 34 N.Y.S.2d 373, 263 App.Div. 671.

ian ad litem will be vacated where it was procured by fraud,[6] but such an order cannot be set aside because of a mistake of law.[7]

Services in appellate court. The question as to what court has power to make the allowances for services rendered on appeal is largely governed by statute.[8] Under some statutes the allowance is made by the lower court and not by the court of appeals,[9] or it is held that it is permissive for the lower court to make the allowance.[10] Under other statutes the allowance may be made by the appellate court for services rendered therein,[11] but not for services rendered in the lower court.[12]

Appointment of another guardian ad litem. While, where there is a controversy with regard to the allowance to be made to the guardian ad litem, another guardian ad litem should be appointed to represent the interests of the infant,[13] the failure to appoint such other guardian, following the general rule discussed supra § 108 b, is not jurisdictional and does not render the judgment void, but merely voidable.[14]

c. Amount of Allowance

The amount of compensation allowed must be reasonable.

Where the statute provides the amount of the allowances that may be made there must be a compliance with its provisions.[15] Ordinarily the allowance should be reasonable,[16] and is to be fixed by the court exercising its judicial discretion.[17] In fixing the amount the court should consider the character of the litigation,[18] the amount involved therein,[19] the labor or services performed,[20] the results achieved,[21] and the character of the com-

6. N.Y.—In re Jaffe's Will, 300 N.Y.S. 1045, 165 Misc. 407.

7. N.Y.—In re Conolly's Estate, 42 N.Y.S.2d 301, 266 App.Div. 333, appeal denied 43 N.Y.S.2d 507, 266 App.Div. 910.

8. N.Y.—Matter of Bull, 6 N.Y.S. 565, 1 Conn.Surr. 395.
31 C.J. p 1145 note 14.

9. Ky.—Williams v. Williams, 72 S.W. 271, 24 Ky.L. 1753.
31 C.J. p 1145 note 15.

10. Ky.—Staggenborg v. Bailey, 80 S.W. 1109, 118 Ky. 801, 26 Ky.L. 188.

11. Wis.—In re Mathews' Will, 223 N.W. 434, 198 Wis. 128.
31 C.J. p 1146 note 17.

In Pennsylvania a guardian and trustee ad litem is not entitled to an allowance by the orphans' court out of principal of the estate for costs and counsel fees of an appeal to be taken to the supreme court from a decree of the orphans' court resolving questions raised by him against interests he represents.—In re McGlinn's Estate, 35 Pa.Dist. & Co. 75, 55 Montg.Co. 52.

12. Wis.—In re Allis, 157 N.W. 548, 163 Wis. 452, mandate amended 158 N.W. 330, 163 Wis. 452.

13. Tenn.—Loftis v. Butler, Ch. App., 58 S.W. 886.

14. Tex.—Simmons v. Arnim, 220 S.W. 66, 110 Tex. 309.

15. Ala.—First Nat. Bank v. Watters, 79 So. 242, 201 Ala. 670.

16. N.Y.—In re Schaefer's Estate, 44 N.Y.S.2d 301.
N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Cheshire, 189 S.E. 189, 211 N.C. 103.
31 C.J. p 1146 note 25.

Allowances held reasonable
U.S.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.
Ky.—Combs v. Shields' Ex'r, 109 S.W.2d 601, 270 Ky. 232—Shawler v. Carter, 298 S.W. 714, 221 Ky. 248.
Neb.—Ben B. Wood Realty Co. v. Wood, 273 N.W. 493, 132 Neb. 817.
N.Y.—In re Jaffe's Will, 300 N.Y.S. 1045, 165 Misc. 407.
Tex.—Kunze v. Krueger, Civ.App., 30 S.W.2d 385, error refused.
31 C.J. p 1146 note 25 [b].

Allowances held excessive
Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.
Ky.—Cornett v. Muncy, 15 S.W.2d 251, 228 Ky. 390.
N.Y.—In re Ewald's Estate, 42 N.Y.S.2d 39, 266 App.Div. 799—Bond v. Bond, 17 N.Y.S.2d 515, 258 App.Div. 978.
Pa.—In re Hallstead's Estate, 12 A.2d 912, 338 Pa. 257—In re Wanamaker's Trust, 38 Pa.Dist. & Co. 347, affirmed 17 A.2d 880, 340 Pa. 419.
31 C.J. p 1146 note 25 [c].

Contract
Offer by guardian ad litem to accept a certain sum for services in suit, neither accepted nor rejected by executor, was an incompleted contract.—Ex parte Johnson, 164 S.E. 847, 166 S.C. 294.

17. U.S.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.
Ill.—Carlberg v. State Sav. Bank & Trust Co. of Moline, 143 N.E. 441, 312 Ill. 181.
Ind.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.
S.C.—Ex parte Johnson, 164 S.E. 847, 166 S.C. 294.
Tex.—Kunze v. Krueger, Civ.App., 30 S.W.2d 385, error refused—Texas Employers' Ins. Ass'n v. Storey, Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1146 notes 26, 27.

18. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Cheshire, 189 S.E. 189, 211 N.C. 103.
Tex.—Texas Employers' Ins. Ass'n v. Storey, Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1146 note 28.

19. Ill.—Carlberg v. State Sav. Bank & Trust Co. of Moline, 143 N.E. 441, 312 Ill. 181.
Tex.—Texas Employers' Ins. Ass'n v. Storey, Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1146 note 29.

20. Ill.—Carlberg v. State Sav. Bank & Trust Co. of Moline, 143 N.E. 441, 312 Ill. 181—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.
Ky.—Combs v. Shields' Ex'r, 109 S.W.2d 601, 270 Ky. 232—Shawler v. Carter, 298 S.W. 714, 221 Ky. 248.
N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Cheshire, 189 S.E. 189, 211 N.C. 103.
Tex.—Kunze v. Krueger, Civ.App., 30 S.W.2d 385, error refused—Texas Employers' Ins. Ass'n v. Storey, Civ.App., 7 S.W.2d 913, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1146 note 30.

The services for which costs may be taxed include his services in looking after the interests of his wards in the litigation to the same extent that an individual sui juris would ordinarily look after his own affairs.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.

21. Ala.—Frazer v. First Nat. Bank, 178 So. 441, 235 Ala. 252, 126 A.L.R. 1.
Ky.—Combs v. Shields' Ex'r, 109 S.W.2d 601, 270 Ky. 232.
Tex.—Kunze v. Krueger, Civ.App., 30 S.W.2d 385, error refused—Texas Employers' Ins. Ass'n v. Storey,

pensation, whether contingent or fixed.[22] It has also been held that the standard for determining the amount to be allowed usually is the customary fee for similar services where the fee is the subject of contract between a solicitor and a client.[23] The compensation which may be given a guardian ad litem is not limited to the allowance by way of taxed costs;[24] but where extra compensation is to be made it must be out of the estate of the infant,[25] for where compensation is to be made to a guardian ad litem out of the general fund, and not from the estate of the infant, the compensation is limited to the taxed costs of the suit as authorized by statute.[26]

d. By Whom Allowance Payable

The allowance should, as a general rule, be made out of the property or fund of the infant, although in a proper case the allowance may be made out of the property or fund in controversy.

The question as to who should pay the allowance is often a matter within the discretion of the court.[27] It is generally held that the allowance should be made out of the property or fund of the infant;[28] and this may be done, although the infant is the successful litigant, within the discretion of the court.[29] In some cases it may be charged against the property in controversy,[30] at least where the services of the guardian ad litem have been necessary in its preservation,[31] notwithstanding the infant is found to have no interest in

Civ.App., 7 S.W.2d 918, affirmed, Com.App., 17 S.W.2d 458.
31 C.J. p 1146 note 31.

In particular case

Where a statute provides that costs which may be occasioned by contest as to particular shares or interests shall be charged against the particular shares or interests involved and paid as determined by the result of the trial of such particular issue, the compensation of the guardian ad litem for services rendered with respect to such particular issue must be confined to the services rendered by him in the particular case, uninfluenced by the effect of the results obtained on the property of the minor not involved in the partition proceedings.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

22. Tex.—Kunze v. Krueger, Civ. App., 30 S.W.2d 385, error refused —Japhet v. Pullen, Civ.App., 15 S. W. 1188.

23. Tex.—Carlberg v. State Sav. Bank & Trust Co. of Moline, 143 N.E. 441, 312 Ill. 181.

24. N.Y.—New York Life Ins. & Trust Co. v. Sands, 56 N.Y.S. 741, 26 Misc. 252—McCue v. Hara, 5 Redf.Surr. 336.
31 C.J. p 1146 note 33.

25. N.Y.—Union Ins. Co. v. Van Rensselaer, 4 Paige 85.

26. Wis.—In re McNaughton's Will, 118 N.W. 997, 138 Wis. 179, motion denied 120 N.W. 288, 138 Wis. 179.
31 C.J. p 1146 note 35.

27. Kan.—Galloway v. Wesley, 73 P.2d 1073, 146 Kan. 937.
Neb.—Ben B. Wood Realty Co. v. Wood, 273 N.W. 493, 132 Neb. 817.
31 C.J. p 1146 note 36.

28. La.—Stewart v. Metairie Cemetery Ass'n, 111 So. 616, 163 La. 108.
N.J.—Peraino v. De Mayo, 177 A. 692, 13 N.J.Misc. 233.
Tex.—Wilson v. Fisher, Civ.App., 105 S.W.2d 304, error refused, certiorari denied 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.
31 C.J. p 1146 note 37.

Payment from income

The counsel fee awarded to a guardian ad litem for minors should be paid out of the income due such minors rather than out of income generally.—In re Rosenthal's Estate, 41 Pa.Dist. & Co. 292.

Several minors

Compensation of guardian ad litem may be ordered paid in equal portions from the funds of each of the minors represented by him.—Ex parte Johnson, 164 S.E. 847, 166 S.C. 294.

29. Tex.—Simmons v. Arnim, 220 S. W. 66, 110 Tex. 309.
31 C.J. p 1147 note 38.

30. Wis.—In re Mathews' Will, 223 N.W. 434, 198 Wis. 128.
31 C.J. p 1147 note 40.

Trust property

Where a trustee filed a complaint for the sale of trust property, compensation of the guardian ad litem of the infant defendants who resisted the sale should be paid out of the trust estate.—Whinery v. Hammond Trust & Savings Bank, 140 N.E. 451, 80 Ind.App. 282.

In New York

(1) Under Civ.Pract.Act § 207, if a guardian ad litem shall have been appointed for an infant defendant who is not entitled to any money or property under the terms of the final judgment, such guardian may, nevertheless, receive such compensation as the court shall deem reasonable, which shall be paid by any party to the action or proceeding or out of the proceeds of any property which is the subject matter of the action, as the court shall direct. This discretion vested in the court is a judicial discretion, and there must be circumstances shown which justify the manner of its exercise.—Livingston v. Ward, 161 N.E. 468, 248 N.Y. 193, amending remittitur 159 N.E. 875, 247 N.Y. 97, which reversed 216 N.Y.S. 37, 216 App.Div. 675 and amending remittitur Livingston v. Livingston, 161 N.E. 165, 247 N.Y. 517, which reversed 216 N.Y.S. 58, 216 App.Div. 698.

(2) Where plaintiff and defendants ask the court to determine what parties have title to, or interest in, real property which is the subject matter of the action, and where infant defendants are necessary parties, the services rendered by the guardians appointed for the infants are beneficial to adverse parties, even though such infants are found to have no interest in the property, and the court has power to allow compensation to the guardians payable by the adverse parties or out of the proceeds of the property.—Livingston v. Ward, supra.

(3) Guardian ad litem for infant defendants adjudged not entitled to property was held entitled to compensation for his services.—Bartos v. Bartos, 244 N.Y.S. 713, 138 Misc. 117.

(4) An allowance to the guardian ad litem of infant defendants payable out of the estate was held proper.—Rezzemini v. Brooks, 140 N.E. 237, 236 N.Y. 184, modifying 197 N.Y. S. 872, 204 App.Div. 157, which reversed 194 N.Y.S. 748, 118 Misc. 791.

(5) Guardian ad litem of infants having contingent interests in realty sold in proceeding by life tenant was entitled to allowance for services and disbursements out of proceeds.—In re Roosevelt's Estate, 228 N.Y.S. 323, 131 Misc. 800.

31. Ill.—Union Bank of Chicago v Wormser, 256 Ill.App. 291.

the property.[32] It is not as a rule payable by the successful adverse party;[33] and, where there is no fund belonging to the minor, it has been held to be the duty of an attorney, acting as guardian ad litem, to render his services without compensation.[34] Under some statutes, however, the adverse party plaintiff, although successful, may be liable for such compensation,[35] at least where the infant defendant is unable to pay.[36] Under some statutes, plaintiff[37] or the person who procured the appointment of the guardian ad litem,[38] is liable. An adult co-defendant is not liable for the compensation of an infant defendant's guardian ad litem.[39]

A guardian ad litem may be entitled to a lien for his services on the property which he has protected.[40]

§ 113. —— Termination of Authority

The authority of a guardian ad litem may terminate or expire by his death or removal, or by the infant's arriving at majority, or by the end of the suit.

The authority of a guardian ad litem or next friend of an infant to represent him in the conduct of the cause expires with the minority of the infant;[41] and the infant may, on becoming of age, discontinue the action,[42] although if he elects to proceed in the cause after he is of age the next friend is discharged from his liability, and the infant will be liable in the same manner as though the suit had been commenced by an adult.[43]

Where there are two conflicting appointments in separate actions brought for the same cause of action, the prior appointment will not be vacated except on terms affording proper protection to the attorney who represented the first appointee.[44]

Death. As discussed in Abatement and Revival §§ 120, 168, the death of the next friend or guardian ad litem does not abate the action, and the action continues by or against his successor in office, the court having power to appoint another person to represent the infant.[45]

End of suit. The authority of a guardian ad litem or next friend continues until the termination of the cause,[46] at which time his authority terminates.[47] His authority, however, does not necessarily terminate with the rendition of judgment in the trial court;[48] it is not ended or suspended by the withdrawal of the summons and the commencement of a new action,[49] or by a change of adverse parties connected with the subject matter of the suit,[50] or by an appeal to a higher court;[51] nor

32. S.C.—Beckwith v. McAllister, 172 S.E. 311, 171 S.C. 344.
Tenn.—Sims v. Bank of Commerce & Trust Co., 14 Tenn.App. 672.
33. Tenn.—Patton v. Dixon, 58 S.W. 299, 105 Tenn. 97.
31 C.J. p 1147 note 41.
34. Tenn.—Massengill v. Fox, 7 Tenn.App. 157.
35. Kan.—Galloway v. Wesley, 73 P.2d 1073, 146 Kan. 937.
Neb.—Ben B. Wood Realty Co. v. Wood, 273 N.W. 493, 132 Neb. 817.
36. Tex.—Ashe v. Young, 3 S.W. 454, 68 Tex. 123.
37. Ark.—Williams v. Ewing, 31 Ark. 229.
31 C.J. p 1147 note 43.
38. Tex.—Rogers v. Rogers, Com.App., 240 S.W. 1104.
31 C.J. p 1147 note 44.
39. N.Y.—Richardson v. Van Voorhis, 3 N.Y.S. 396.
40. Wis.—Tyson v. Richardson, 79 N.W. 439, 103 Wis. 397.
31 C.J. p 1147 note 46.

Remainder

Only bodily heir of life tenant vested with fee simple had vested fee simple title in remainder, and a limitation that remainder be shared with other children that might be born to life tenant was condition subsequent as regards court's power to tax guardian ad litem's fee and to create a lien therefor against the property.—Kunze v. Krueger, Tex.Civ.App., 30 S.W.2d 385, error refused.

41. U.S.—Mason v. Royal Indemnity Co., D.C.Ga., 35 F.Supp. 477, affirmed, C.C.A., 123 F.2d 335.
Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 795, 232 Mo.App. 209, citing **Corpus Juris.**
31 C.J. p 1157 note 35.

Dropping guardian's name

After plaintiff reached his majority, the name of his guardian ad litem in the trial of the action should have been dropped, but a failure so to drop the name of the guardian does not affect the merits of the case.—Cahn v. Schmitz, 108 P.2d 1006, 56 Ariz. 469.

42. N.Y.—McCarthy v. Anable, 7 N.Y.S.2d 887, 169 Misc. 595.
31 C.J. p 1156 note 26.
43. N.Y.—McCarthy v. Anable, supra.
44. U.S.—De Benedetto v. Alpha Portland Cement Co., D.C.N.Y., 199 F. 540.
45. Md.—Richards v. Swan, 7 Gill 366.
Mo.—Raming v. Metropolitan St. R. Co., 50 S.W. 791.
31 C.J. p 1148 note 79.
46. Ky.—Luck v. Schabell, 216 S.W. 1066, 186 Ky. 335—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589.
47. Cal.—Morris v. Standard Oil Co., 219 P. 998, 192 Cal. 343, 30 A.L.R. 1103.
Ill.—Wojtas v. Rachel, 267 Ill.App. 148.
Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 795, 232 Mo.App. 209, citing **Corpus Juris.**
N.Y.—Nicolosi v. Olshansky, 1 N.Y.S.2d 943, 166 Misc. 55.
Pa.—In re Strickler's Estate, 14 A.2d 341, 343, 140 Pa.Super. 372, citing **Corpus Juris**—In re Elkins' Estate, 18 Pa.Dist. & Co. 578.
31 C.J. p 1147 note 53.
48. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589—Staggenborg v. Bailey, 80 S.W. 1109, 118 Ky. 301, 26 Ky.L. 188.

Foreclosure sale

A guardian ad litem is appointed "for the suit," and sale proceedings, although subsequent and ancillary to the foreclosure decree, are a part of the suit because they are necessary to complete the remedy sought in the action.—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

49. S.C.—Griffith v. Cromley, 36 S.E. 738, 58 S.C. 448.
50. Cal.—Skinner v. Knickrehm, 102 P. 947, 10 Cal.App. 596.
51. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589.
Minn.—Covell v. Porter, 84 N.W. 107, 81 Minn. 302.

is it necessary that there should be a new guardian ad litem every time a pleading is amended.[52]

Removal. The court has power to remove, or revoke the authority of, a guardian ad litem,[53] or next friend,[54] at its discretion,[55] and it is its duty to do so[56] where it is necessary in order to protect the interests of the infant,[57] or where his interests are adverse to those of the infant,[58] or where such action is necessary to prevent the infant's being prejudiced by his acts or omissions,[59] where he has been improperly appointed,[60] where he fails in his duty,[61] is guilty of misconduct,[62] or is incompetent.[63] A written authority of an infant appointing his next friend to file a caveat to a will is revocable.[64]

As a general rule, the financial irresponsibility of the appointee may be ground for his removal or the revocation of his authority.[65] It has been held that an irresponsible guardian ad litem should not be allowed to continue to act merely on giving security for costs.[66]

§ 114. Appearance and Representation by Attorney

a. In general

b. Authority

c. Compensation

a. In General

An infant cannot appear or plead by attorney. However, this rule does not deprive the infant of the professional aid of an attorney, when the infant is properly represented by next friend or guardian ad litem.

An infant cannot appear or plead by attorney;[67] he must do so by his general guardian, as discussed in Guardian and Ward § 175, or by a guardian ad litem or next friend, as discussed supra § 111. However, this rule relates merely to the appearance on the record and does not deprive the infant of the professional aid of an attorney,[68] and hence, when the infant is properly represented by next friend or guardian ad litem, the conduct of the prosecution[69] or defense[70] may be carried on by an attorney, and the effect of the appearance of the attorney is on the same footing as the appearance of any other litigant.[71]

The defect of an appearance by attorney instead of next friend or guardian ad litem is amendable.[72] The judgment rendered in the action is not, on this

W.Va.—Fisher v. Bell, 63 S.E. 620, 65 W.Va. 10.

52. Cal.—Carpenter v. San Joaquin County Super. Ct., 19 P. 174, 75 Cal. 596.

53. Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W. 2d 792, 795, 232 Mo.App. 209, citing **Corpus Juris.**
31 C.J. p 1147 note 59.

54. Tex.—Texas Indemnity Ins. Co. v. Hubbard, Civ.App., 138 S.W.2d 626, error dismissed, judgment correct.
31 C.J. p 1147 note 60.

55. Ark.—Nashville Lumber Co. v. Barefield, 124 S.W. 758, 93 Ark. 353, 20 Ann.Cas. 968.
Tex.—Texas Indemnity Ins. Co. v. Hubbard, Civ.App., 138 S.W.2d 626, error dismissed, judgment correct.
Review of order see infra § 126 f.

56. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589.

57. Tex.—Peters v. Allen, Civ.App., 296 S.W. 929.
31 C.J. p 1148 note 63.

58. Tex.—Texas Indemnity Ins. Co. v. Hubbard, Civ.App., 138 S.W.2d 626, error dismissed, judgment correct.
31 C.J. p 1148 note 64.

59. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589—Robinson v. Talbot, 78 S.W. 1108, 25 Ky.L. 1914.

60. N.Y.—Matter of Water Comrs., 4 Edw. 545.

61. Tex.—Peters v. Allen, Civ.App., 296 S.W. 929.
31 C.J. p 1148 note 68.
Petition dismissed
Petition by mother as next friend that another guardian ad litem be appointed was properly dismissed where the guardian appointed was acting ably and conscientiously.—Patterson v. Old Dominion Trust Co., 140 S.E. 810, 149 Va. 597, modified on other grounds 141 S.E. 759, 149 Va. 597.

62. **Partisanship**
A special guardian is not removable for asserting strong partisanship in behalf of his ward.—In re Schrier's Will, 283 N.Y.S. 233, 157 Misc. 310.

63. Ind.—Budd v. Rutherford, 30 N. E. 1111, 4 Ind.App. 386.
31 C.J. p 1148 note 70.

64. Md.—Reichard v. Izer, 52 A. 592, 95 Md. 451.

65. Ind.—Budd v. Rutherford, 30 N. E. 1111, 4 Ind.App. 386.
31 C.J. p 1148 note 75.

66. N.Y.—Backerman v. Coccola, 178 N.Y.S. 423, 189 App.Div. 235.
31 C.J. p 1148 note 76.

67. Del.—King v. Cordrey, 177 A. 303, 307, 6 W.W.Harr. 418, citing **Corpus Juris.**
Ill.—Skaggs v. Industrial Commission, 21 N.E.2d 731, 371 Ill. 535.
Minn.—In re Fiske's Estate, 291 N. W. 289, 207 Minn. 44.
Miss.—Parker v. Smith, 117 So. 249, 150 Miss. 849.
N.J.—Laute v. Gearhart, 165 A. 115, 11 N.J.Misc. 117, affirmed 170 A. 646, 112 N.J.Law 382.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—Melnick v. Laszio, 293 N.Y.S. 261, 161 Misc. 791—In re Friend's Estate, 298 N.Y.S. 923.
Pa.—Camera & Radio Shop v. Zalewske, 157 A. 376, 102 Pa.Super. 562.
Tex.—Russell v. Texas & P. R. Co., 5 S.W. 686, 68 Tex. 646—Wright v. Jones, Com.App., 52 S.W.2d 292, reversing, Civ.App., 33 S.W.2d 292—De Proy v. Progakis, Com.App., 269 S.W. 78, reversing, Civ.App., 259 S.W. 620.
Wis.—Caskey v. Peterson, 263 N.W. 658, 220 Wis. 690.
31 C.J. p 1148 note 81.

68. N.Y.—People v. New York C. Pl., 11 Wend. 164.
Power of guardian ad litem or next friend to employ attorney see supra § 111.

69. Colo.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408.
N.Y.—People v. New York C. Pl., 11 Wend. 164.

70. Ind.—Alexander v. Frary, 9 Ind. 481—Doe v. Scoggin, 2 Ind. 208—Doe v. Brown, 8 Blackf. 443.

71. Tex.—Hart v. Hunter, 114 S.W. 882, 52 Tex.Civ.App. 75.

72. **An attorney engaged by the next friend** of an infant is the attorney for the infant, who is the real party in interest.

ground alone, void,[73] but merely erroneous and voidable.[74] When the judgment is in favor of the infant, the fact that he appeared by attorney does not even render the judgment voidable or erroneous.[75] If the infant has not been properly served and guardian ad litem has not been appointed, the unauthorized appearance of an attorney for him confers no jurisdiction over him.[76]

Probate proceedings. In some jurisdictions, in probate proceedings, infants may be represented by an attorney appointed by the court,[77] in the discretion of the court.[78]

Qualifications. The attorney must not have interest adverse to the infant.[79]

Withdrawal of attorney. An attorney for an infant may withdraw in a proper case.[80]

b. Authority

The authority and powers of the attorney are limited to those possessed by the guardian ad litem or next friend. An infant ordinarily is bound by the acts of his counsel while acting within the limits of his authority.

The authority and powers of the attorney are limited to those possessed by the guardian ad litem or next friend.[81] An infant client ordinarily is bound by the acts of his counsel who is duly authorized to act and while acting within the limits of his authority.[82]

The attorney cannot waive[83] or admit away[84] any substantial rights of the infant, or consent to anything which may be prejudicial to the infant.[85] However, he may make a valid consent or waiver as to matters which merely facilitate the litigation and cannot prejudicially affect the rights of the infant.[86]

Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
N.J.—Smith v. Minor, 1 N.J.Law 416.
Vt.—Sears v. Duling, 61 A. 518, 77 Vt. 496.
31 C.J. p 1149 note 89.

73. Del.—King v. Cordrey, 177 A. 303, 307, 6 W.W.Harr. 418, citing **Corpus Juris.**
31 C.J. p 1149 note 90.

74. Del.—King v. Cordrey, 177 A. 303, 307, 6 W.W.Harr. 418, citing **Corpus Juris.**
31 C.J. p 1149 note 91.

75. Mo.—Padgett v. Smith, 103 S.W. 942, 205 Mo. 122.
31 C.J. p 1149 note 92.

76. N.Y.—Hope v. Shevill, 122 N.Y.S. 127, 137 App.Div. 86, affirmed 97 N.E. 1106, 204 N.Y. 563.

77. Idaho.—Schwarz v. Taeger, 258 P. 1085, 44 Idaho 633.
31 C.J. p 1149 note 94.

78. Mont.—State v. Second Judicial Dist. Ct., 87 P. 615, 34 Mont. 306.

79. U.S.—Glover v. Bradley, S.C., 233 F. 721, 147 C.C.A. 487, Ann.Cas. 1917A 921.
31 C.J. p 1149 note 97.

80. N.Y.—Lichtenstein v. Reilly, 16 N.Y.S.2d 1006.

Motion to withdraw denied

Where action for injuries received by an infant plaintiff was about to be reached for trial, a motion by plaintiffs' attorneys for leave to withdraw from action and to fix attorneys' liens thereon was denied, although motion was unopposed, especially where there were no other attorneys ready and willing to take over the case, and attorneys seeking to withdraw had been substituted for a former attorney upon their own consent.—Lichtenstein v. Reilly, supra.

81. Minn.—Eidam v. Finnegan, 50 N.W. 933, 48 Minn. 53, 16 L.R.A. 507.
N.Y.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case)—Greenburg v. New York Cent. & H. R. R. Co., 104 N.E. 931, 210 N.Y. 505.
31 C.J. p 1149 note 7.

Authority to bring suit

Where father of minor executed power appointing attorney to commence prosecution and enforce or to defend action touching an automobile accident which occurred to the minor, the power authorized the attorney to bring suit of the minor by her father and next friend for injury sustained in the accident.—Merchants Mut. Casualty Co. v. Kiley, N.H., 30 A.2d 681.

General agent

Where an attorney is appointed by next friend of infant, attorney becomes general agent of infant and responsible to him for faithful discharge of duties required of him as officer of the court under oath.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.

Powers of attorney of record

An infant's attorney is empowered as an officer of the court, in the interests of the infant, to exercise all the powers and duties of an attorney of record.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.

82. Cal.—Morris v. Standard Oil Co., 219 P. 998, 192 Cal. 343, 30 A.L.R. 1104.
Ill.—Miller v. Chicago & N. W. Ry. Co., 23 N.E.2d 70, 301 Ill.App. 386.
N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.
31 C.J. p 1149 note 8.

Acts in good faith

An infant ordinarily is bound by acts done in good faith by his counsel in the course of a suit, to the same extent as a person of full age.
U.S.—Thompson v. Maxell Land-Grant & R. Co., N.M., 18 S.Ct. 121, 168 U.S. 451, 42 L.Ed. 539.
Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585—Colvert v. Colvert, 180 N.E. 192, 95 Ind.App. 325.

Remission of judgment

Where an attorney representing a guardian ad litem, in order to avoid a new trial, made a remission of more than half of a judgment secured in a personal injury action brought by the ward, such remission was binding, and it was not necessary to obtain the approbation of the court.—Morris v. Standard Oil Co., 219 P. 998, 192 Cal. 343, 30 A.L.R. 1104.

Stipulation of fact

Ordinarily an infant is bound by a stipulation of fact entered by his attorney with court's consent.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 113 W.Va. 286.

83. Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1150 note 10.

84. Ark.—Webster v. Horton, 67 S.W.2d 200, 188 Ark. 610.

85. Ark.—Webster v. Horton, supra.
31 C.J. p 1150 note 12.

86. N.J.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.
31 C.J. p 1150 note 13.

Compromise or settlement. An attorney has no authority to enter into a compromise or settlement[87] without a prior order of the court.[88]

c. Compensation

An attorney is entitled to a reasonable fee for services beneficial to the infant.

Where the attorney has rendered service which has been beneficial to the infant, he is entitled to a reasonable fee[89] to be allowed from the infant's estate,[90] or from the funds recovered for the infant[91] in view of all the circumstances.[92] There is authority to the effect that the amount of compensation to be allowed should be governed more by what the infant's estate can pay than by the actual value of the services.[93]

The attorney is entitled to be reimbursed for proper expenditures, and it has been held that, for that purpose, he has a lien on the funds recovered.[94]

§ 115. Process

a. Form and requisites
b. Necessity and sufficiency of service
c. Acceptance or acknowledgment of service
d. Waiver
e. Return
f. Record of service
g. Conclusiveness of service
h. Attainment of majority pending action

a. Form and Requisites

The form and requisites of the process are generally governed by the rules applicable to process in other civil actions. Irregularities in form will not vitiate the process.

The form and requisites of the process are generally governed by the rules applicable to process in other civil actions.[95] The notice must be addressed to the infant,[96] even though personal service is not required on him but on his parent or guardian,[97]

87. Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
N.Y.—Honadle v. Stafford, 193 N.E. 172, 265 N.Y. 354, reversing 272 N.Y.S. 444, 241 App.Div. 395, affirming 269 N.Y.S. 27, 150 Misc. 412, motion denied 279 N.Y.S. 36, 243 App.Div. 854 (first case), and 279 N.Y.S. 36, 243 App.Div. 857 (second case).

88. Fla.—Garner v. I. E. Schilling Co., 174 So. 837, 128 Fla. 353, 111 A.L.R. 682.
Confirmation
A compromise benefiting an infant will be confirmed by the court.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.

89. Colo.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408.
Ill.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.
N.Y.—Amato v. State, 9 N.Y.S. 934, 170 Misc. 136.
Pa.—In re Mikasinovich, 168 A. 506, 110 Pa.Super. 252.
Tenn.—City of Nashville v. Williams, 82 S.W.2d 541, 169 Tenn. 38.
31 C.J. p 1149 note 99.
Attorney's services as necessaries see supra § 78.
Power of next friend or guardian ad litem to contract for specified compensation see supra § 111.
Proceedings
(1) Supreme court is without jurisdiction of petition seeking to fix compensation for counsel representing a minor who sued by next friend, since amount of compensation is to be determined on reference as to what would be reasonable remuneration for counsel in a proceeding wherein infant is made defendant and a guardian ad litem appointed to represent him.—City of Nashville v. Williams, 82 S.W.2d 541, 169 Tenn. 38.
(2) The fees of the attorney for infant plaintiffs are properly fixed by reference in the action in which the services are rendered. All the parties interested should have notice of the reference to fix the fees, but although they have no notice thereof the order confirming the master's report fixing the fees is not void but only voidable, being made in a case where the court had jurisdiction of the subject matter and of the parties, and disclosing no infirmity on its face.—Connor v. Ashley, 35 S.E. 546, 57 S.C. 305.
(3) In determining the amount of fees to be paid counsel for a minor, the relationship of counsel and infant is antagonistic.—City of Nashville v. Williams, supra.
(4) Proper notice should be given to guardian ad litem on application of attorney for allowance of fees.—Amato v. State, 9 N.Y.S.2d 934, 170 Misc. 136.

90. Ark.—Greenlee v. Rowland, 107 S.W. 193, 85 Ark. 101—Owens v. Gunther, 86 S.W. 851, 75 Ark. 37, 5 Ann.Cas. 130.

91. U.S.—U. S. v. Equitable Trust Co. of New York, N.Y., 51 S.Ct. 539, 283 U.S. 738, 75 L.Ed. 1379, modifying, C.C.A., Barnett v. Equitable Trust Co. of New York, 34 F.2d 916, certiorari granted U. S. v. Equitable Trust Co. of New York, 50 S.Ct. 160, 280 U.S. 550, 74 L.Ed. 609.
N.C.—In re Stone, 97 S.E. 216, 176 N. C. 336.
Pa.—In re Mikasinovich, 168 A. 506, 110 Pa.Super. 252.
Fee of minor's former attorney
Whether the fee of a minor plaintiff's former attorney could be deducted from sum which defendant would be required to pay under a judgment for minor in a personal injury action was within district court's discretion.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.

92. Wash.—Plummer v. Northern Pac. R. Co., 167 P. 73, 98 Wash. 67, 7 A.L.R. 104.
Matters to be shown
The time actually consumed in performing such services must be shown in addition to estimates concerning the value of the services.—City Nat. Bank & Trust Co. of Chicago v. Sewell, 21 N.E.2d 810, 300 Ill.App. 582.
Allowance held adequate
Pa.—In re Dunmore's Estate, 14 Pa. Dist. & Co. 630.
Allowance held excessive
N.Y.—Grannemann v. Grannemann, 88 N.Y.S. 405, 95 App.Div. 37, affirmed 77 N.E. 1187, 184 N.Y. 586.

93. N.C.—In re Stone, 97 S.E. 216, 176 N.C. 336.

94. W.Va.—Brown v. Erwin, 108 S. E. 605, 89 W.Va. 113.

95. U.S.—Thomson v. Butler, C.C.A. Mo., 136 F.2d 644.
Iowa.—Cummings v. Landes, 117 N. W. 22, 140 Iowa 80.
31 C.J. p 1150 note 15.

96. Iowa.—Sleeper v. Killion, 147 N. W. 314, 166 Iowa 205.
N.Y.—In re Friend's Estate, 298 N. Y.S. 923.

97. Iowa.—Sleeper v. Killion, 147 N. W. 314, 166 Iowa 205.

showing his age,[98] and directing him to appear by guardian.[99]

Irregularities in form will not vitiate the process.[1] Where the summons was regularly served on infants and on their guardian, a failure to name them in the summons as defendants is amendable and on collateral attack will be considered as amended, and the decree based on such service is not void.[2] Where an infant, properly served with process, is sued in his wrong name and he fails duly to object, he is bound by the decree.[3]

Infant plaintiff. It has been held that, where an infant is plaintiff, the form of the writ may be the same as in other cases.[4]

b. Necessity and Sufficiency of Service

(1) In general
(2) On infant
(3) On parent, guardian, etc.
(4) On guardian ad litem

(1) In General

Process must be issued against an infant in order to give the court jurisdiction of his person. Statutes governing the method of acquiring such jurisdiction must be complied with.

To give the court jurisdiction over the person of the infant, process must be issued against him.[5] It is within the power of the legislature to prescribe the method by which jurisdiction over an infant can be acquired.[6] There is a lack of uniformity in the statutes and practice of the different jurisdictions respecting the person or persons on whom process should be served in a suit against an infant.[7] The matter being largely governed by statute,[8] its requirements must be complied with.[9] While generally strict compliance is required,[10] in which case it is sufficient,[11] in some cases a substantial compliance has been considered sufficient.[12]

(2) On Infant
(a) In general
(b) Mode and sufficiency of service
(c) Effect of failure to serve

(a) In General

As a general rule, when an infant is made a party to an action, he must be served with process, unless he is already before the court in some proper manner.

While there is authority that there need not be service of process on an infant, the appointment of a guardian ad litem and his answer for the infant standing in the place of such service,[13] as a general rule, when an infant is made a party to an action, he must be served with process,[14] unless he is al-

98. Ohio.—Keys v. McDonald, 1 Handy 287, 12 Ohio Dec., Reprint, 146.

99. N.Y.—Kellett v. Rathbun, 4 Paige 102.

1. Ky.—Auxier v. Auxier, 206 S.W. 789, 182 Ky. 588.
31 C.J. p 1150 note 20.

2. Ark.—Burgett v. Williford, 19 S. W. 750, 56 Ark. 187, 35 Am.S.R. 96.

3. Ill.—Bear v. Fletcher, 96 N.E. 997, 252 Ill. 206.

4. Ind.—Bouche v. Ryan, 3 Blackf. 472.
31 C.J. p 1150 note 23.

5. Ky.—Wales v. Williams, 287 S.W. 705, 216 Ky. 260.
La.—Spears v. Spears, 136 So. 614, 178 La. 294.
Miss.—Parker v. Smith, 117 So. 249, 150 Miss. 849.
31 C.J. p 1150 note 24.
Infants under guardianship see Guardian and Ward § 177.

6. Fla.—Price v. Winter, 15 Fla. 66.
N.Y.—Taylor v. Emmet, 122 N.Y.S. 66, 137 App.Div. 202.

7. U.S.—Woolridge v. McKenna, C. C.Tenn., 8 F. 650.

8. U.S.—Thomson v. Butler, C.C.A. Mo., 136 F.2d 644.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586.
31 C.J. p 1150 note 27.

9. Ala.—Bank of Luverne v. Turk, 133 So. 52, 222 Ala. 549.
Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Lella v. Holman, 3 N.Y.S.2d 352, 166 Misc. 796.
Ohio.—Templeman v. Hester, 29 N.E. 2d 216, 65 Ohio App. 62—Feigi v. Lopartkovich, 176 N.E. 670, 38 Ohio App. 338.
31 C.J. p 1150 note 28.
Service held sufficient
Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377.

10. N.Y.—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App.Div. 440.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.
31 C.J. p 1150 note 29.

11. Miss.—Culley v. Rhodes, 87 So. 136, 124 Miss. 640.

12. Ark.—Holt v. Manuel, 54 S.W.2d 66, 186 Ark. 435—Purcell v. Gann, 168 S.W. 1102, 113 Ark. 332.
31 C.J. p 1150 note 31.
Service held sufficient
Ark.—Purcell v. Gann, 168 S.W. 1102, 113 Ark. 332.
Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.
Ohio.—Matthews v. Vandervoort, 18 Ohio App. 174.

13. W.Va.—Ferrell v. Ferrell, 44 S. E. 187, 53 W.Va. 515.

14. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.
Ark.—Moore v. Wilson, 20 S.W.2d 310, 180 Ark. 41.
Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665—Suter Bros. v. Hebert, 26 P.2d 591, 138 Kan. 317—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262.
Miss.—Parker v. Smith, 117 So. 249, 150 Miss. 849.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440—Lella v. Holman, 3 N.Y. S.2d 352, 166 Misc. 796—Melnick v. Laszio, 293 N.Y.S. 261, 161 Misc. 791—McGrath v. Roefs, 196 N.Y.S. 891, 119 Misc. 641—In re Friend's Estate, 298 N.Y.S. 923.
Ohio.—Feigi v. Lopartkovich, 176 N. E. 670, 38 Ohio App. 338.
Tenn.—Smartt v. Smartt, 1 Tenn. App. 68.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 38 S.W.2d 292—De Proy v. Proga-

ready before the court in some proper manner.[15] Since the service of process on an infant is a condition precedent to the appointment of guardian ad litem, as discussed supra § 110, as a general rule a failure to serve the infant is not cured by the appointment of a guardian ad litem who appears or answers for him.[16]

(b) Mode and Sufficiency of Service

An infant usually is served with process in the same manner as an adult. Personal service ordinarily is required. However, where an infant cannot be actually or personally served, he may be served by substituted service, or service by publication as authorized by statute.

An infant usually is to be served with process in the same manner as an adult,[17] especially where he has arrived at an age of discretion.[18]

Personal service ordinarily is required when the infant is within the jurisdiction,[19] although there are other codefendants on whom proper service has been made.[20] It is sometimes required that infants shall be served in the presence of the legal guardian, or of the person who has the present care and custody of them.[21]

Service other than personal. The legislature may provide or authorize constructive instead of actual service,[22] and such constructive service pursuant to the statute will bind the infant.[23] Ordinarily, where an infant defendant cannot be actually or personally served, he may be served in the same manner as an adult defendant,[24] as by substituted service[25] or service by publication;[26] and statutory provisions

kis, Com.App., 269 S.W. 78, reversing, Civ.App., 259 S.W. 620.
31 C.J. p 1151 note 36.
Service as prerequisite to appointment of guardian ad litem see supra § 110.

15. Ill.—Suiter v. McWard, 159 N.E. 799, 328 Ill. 462—First Trust Joint Stock Land Bank of Chicago v. Cutler, 12 N.E.2d 705, 293 Ill.App. 354.
Ky.—Grooms v. Grooms, 7 S.W.2d 863, 225 Ky. 228.
Okl.—Johnson v. Thornburgh, 254 P. 53, 124 Okl. 123, certiorari granted 48 S.Ct. 28, 275 U.S. 513, 72 L.Ed. 400, certiorari dismissed 48 S.Ct. 322, 276 U.S. 601, 72 L.Ed. 725.
31 C.J. p 1151 note 37.

Cross action

(1) Where suit is instituted by minors through next friend seeking title or possession, defendants may obtain affirmative relief with respect to property without citing minors to answer cross action.—Baumgardner v. Russell Realty Co., Tex.Civ.App., 33 S.W.2d 561, error dismissed.

(2) Other cases as to necessity of process see 31 C.J. p 1151 note 37 [b].

Notice of substitution of party plaintiff

In a foreclosure action by a trust company against minors, wherein receiver of trust company was substituted as plaintiff, minors were not entitled to be served with additional notice showing substitution.—Watson v. Glenn, Tex.Civ.App., 82 S.W.2d 704.

16. Ala.—Bank of Luverne v. Turk, 133 So. 52, 222 Ala. 549.
Ark.—Moore v. Wilson, 20 S.W.2d 310, 180 Ark. 41.
Ky.—Rachford v. Rachford, 7 S.W. 2d 234, 224 Ky. 831.
N.Y.—Lella v. Holman, 3 N.Y.S.2d 352, 166 Misc. 796.
31 C.J. p 1151 note 40.

17. Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665.
Ky.—Moseley v. Mayton, 245 S.W. 872, 196 Ky. 827.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.
31 C.J. p 1152 note 51.

Who may urge defects

Defects in service of notice on nonresident infant defendants is not matter of which complainants can complain, where infants were before court and represented by properly appointed guardian ad litem, and even where no guardian ad litem is appointed none but infants can complain.—Cogburn v. Callier, 104 So. 330, 213 Ala. 46.

18. Pa.—Erskine v. Adams, 9 Pa. Dist. 444, 24 Pa.Co. 382.

19. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
Kan.—Missouri State Life Ins. Co. v. Butts, 293 P. 499, 131 Kan. 775.
Ky.—White v. White, 172 S.W.2d 72, 294 Ky. 563—Moseley v. Mayton, 245 S.W. 872, 196 Ky. 827.
N.J.—Laute v. Gearhart, 165 A. 115, 11 N.J.Misc. 117, affirmed 170 A. 646, 112 N.J.Law 382.
Pa.—Minerd v. Minerd, 3 Fay.L.J. 180.
31 C.J. p 1152 note 53.

A mere reading of the summons to the infant is insufficient.—Parker v. Smith, 117 So. 249, 150 Miss. 849.

Where infant very young

Where an infant defendant in partition was only two years old, service on the mother, in the presence of the infant, of two duly certified copies of the notice, one for the infant and the other for the mother as his natural guardian, was sufficient.—Havens v. Drake, 23 P. 621, 43 Kan. 484.

Personal service outside jurisdiction

A nonresident minor motorist, on whom personal service was made in Canada by duly qualified officer, was properly served with process under provision in vehicle code relating to service of process on nonresident motorist.—Silver Swan Liquor Corporation v. Adams, 110 P.2d 1097, 43 Cal.App.2d Supp. 851.

20. N.C.—Hughes v. Pritchard, 69 S.E. 3, 153 N.C. 135, 138 Am.S.R. 649.

21. Fla.—McDermott v. Thompson, 10 So. 584, 29 Fla. 299.
N.Y.—Kellett v. Rathbun, 4 Paige 102.

Competent person

N.J.—Laute v. Gearhart, 165 A. 115, 11 N.J.Misc. 117, affirmed 170 A. 646, 112 N.J.Law 382.

22. Ky.—Kidd v. Kidd, 124 S.W.2d 66, 276 Ky. 271—Bryant v. Wade, 3 Ky.Op. 213.
31 C.J. p 1152 note 56.

23. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243—Goodrich v. Thompson, 118 So. 60, 96 Fla. 327—Quigley v. Cremin, 113 So. 892, 94 Fla. 104, modifying 109 So. 312.
N.Y.—Smith v. Reid, 31 N.E. 1082, 134 N.Y. 568—Taylor v. Emmet, 122 N.Y.S. 66, 137 App.Div. 202.

24. Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665.
N.Y.—Merritt's Will, 5 Dem.Surr. 544.
Pa.—Yerkes v. Stetson, 13 Pa.Dist. 696, 30 Pa.Co. 429.

25. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243—Goodrich v. Thompson, 118 So. 60, 96 Fla. 327—Quigley v. Cremin, 113 So. 892, 94 Fla. 104, modifying 109 So. 312.
Wis.—Caskey v. Peterson, 263 N.W. 658, 220 Wis. 690.
31 C.J. p 1153 note 59.

26. Fla.—Peacock v. City of Miami, 109 So. 458, 92 Fla. 360.

relating to service on defendants, other than by personal service, generally apply to infant defendants.[27]

As a prerequisite to service by publication, a sufficient[28] affidavit must be made showing the existence of facts authorizing recourse to that substitute for personal service.[29] Also there must be an order for such publication,[30] and publication must conform to the requirements of the law in such cases.[31]

While service by publication on nonresident infants may give jurisdiction to determine the title to infants' lands situated within the state, there is authority that with regard to lands situated in another state the court must obtain jurisdiction by personal service, and it cannot obtain jurisdiction by publication.[32]

(c) Effect of Failure to Serve

A judgment rendered against an infant who has not been served with process is not binding on him, but is erroneous and voidable on direct attack.

A judgment rendered against an infant who has not been served with process is not binding on him,[33] but is erroneous and voidable on direct attack.[34] There is authority that a judgment or decree rendered against or affecting the interests of an infant who has not been served with process is void,[35] especially where the infant was not represented by a guardian ad litem properly appointed;[36] but there is also authority to the effect that such lack of service does not render the judgment void, if the infant was represented in the proceeding by a guardian ad litem.[37] There is also authority that, although there is an absence of process, the appointment of, and appearance and defense by, a guardian ad litem is sufficient to protect the judgment as against a collateral attack.[38]

Curative statute. The legislature may, and sometimes does, declare valid judgments against infant defendants, not personally served.[39] Such statute cures a judgment against an infant not personally served but who was represented in the action by a guardian ad litem,[40] but it has no application where there has been no service on the infant or anyone representing him,[41] even though there are adult codefendants on whom proper service has been made.[42]

(3) On Parent, Guardian, Etc.

Service of process usually is required to be made on the parent, guardian, or person having custody of the infant, or with whom he resides, or in whose service he is employed.

It usually is required that, when an action is brought against an infant, process shall be served on the parent,[43] and, likewise, process shall be

Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665.
Tenn.—Smartt v. Smartt, 1 Tenn. App. 68.
31 C.J. p 1153 note 60.

27. Ky.—Bowles v. Bowles, 300 S. W. 880, 222 Ky. 325.
N.Y.—Lella v. Holman, 3 N.Y.S.2d 352, 166 Misc. 796.
Wis.—Caskey v. Peterson, 263 N.W. 658, 220 Wis. 690.
31 C.J. p 1153 note 61.
Nonresident minor motorist
The statutory designation of director of motor vehicles as attorney on whom process may be served in action against nonresident motorist is binding on minor nonresident motorist using highways of state, notwithstanding the general rule that delegation of power attempted by minor himself is void.—Silver Swan Liquor Corporation v. Adams, 110 P.2d 1097, 43 Cal.App.2d Supp. 851.

28. Kan.—Claypoole v. Houston, 12 Kan. 324.

29. Ind.—People v. Stanley, 6 Ind. 410.
N.Y.—Syracuse Sav. Bank v. Burton, 6 N.Y.Civ.Proc. 216.
31 C.J. p 1153 note 64.

30. Ala.—Woods v. Montevallo Coal & Transp. Co., 18 So. 108, 107 Ala. 364.
N.Y.—Moulton v. Moulton, 47 Hun 606, 13 N.Y.Civ.Proc. 420.
31 C.J. p 1153 note 65.

31. Ill.—McDermaid v. Russell, 41 Ill. 489.
N.Y.—Syracuse Sav. Bank v. Burton, 6 N.Y.Civ.Proc. 216.
31 C.J. p 1153 note 66.

32. Kan.—Terry v. Miller, 164 P. 151, 100 Kan. 324.
31 C.J. p 1153 note 69.

33. N.Y.—Smith v. Reid, 31 N.E. 1082, 134 N.Y. 568, affirming 11 N.Y.S. 739, 19 N.Y.Civ.Proc. 363.
31 C.J. p 1152 note 41.

34. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.
Tex.—Ginn v. Southwest Bitulithic Co., Civ.App., 149 S.W.2d 201, error dismissed, judgment correct—Pennebaker v. Thrash, Civ.App., 84 S.W.2d 1081, error dismissed—Perdue v. Miller, Civ.App., 64 S. W.2d 1002, error refused.
31 C.J. p 1152 note 42.

35. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
N.Y.—Melnick v. Lazzo, 293 N.Y.S. 261, 161 Misc. 791.
31 C.J. p 1152 note 43.

36. Ky.—Hulsewede v. Churchman, 63 S.W. 1, 111 Ky. 51, 23 Ky.L. 487.
N.C.—Gay v. Grant, 8 S.E. 99, 106, 101 N.C. 206.

37. Ala.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.
31 C.J. p 1152 note 45.

38. Ky.—Ratliff v. Childers, 198 S. W. 718, 178 Ky. 102.

39. N.C.—Smith v. Gray, 21 S.E. 200, 116 N.C. 311.
31 C.J. p 1152 notes 48–50.

40. N.C.—Harris v. Bennett, 76 S.E. 217, 160 N.C. 339.
31 C.J. p 1152 note 48.

41. N.C.—Hughes v. Pritchard, 69 S. E. 3, 153 N.C. 135, 138 Am.S.R. 649.
31 C.J. p 1152 note 49.

42. N.C.—Hughes v. Pritchard, supra.

43. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
Kan.—Suter Bros. v. Hebert, 26 P.2d 591, 138 Kan. 317—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262.
Ky.—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311—Cain v. Hall, 278 S.W. 152, 211 Ky. 817.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 328—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—Melnick

served on the guardian,[44] or person having custody of the infant[45] or with whom he resides[46] or in whose service he is employed,[47] if such person be resident within the state.[48] Ordinarily, however, the requirement of such service is limited to cases where the infant is under the age of fourteen years.[49] Where such a requirement exists, service on the infant personally is not alone sufficient,[50] unless none of the other persons against whom process is required to be served is in existence or can be found,[51] and there is authority that a judgment rendered without service on such persons is void.[52] However, there is also authority that, where personal service has been had on the infant and a guardian ad litem has been appointed who has answered for him, the failure to serve the father, mother, or guardian, cannot invalidate the judgment.[53] Service of process on such person usually is in addition to service on the infant;[54] however, in some jurisdictions personal service on infants un-

v. Lassio, 293 N.Y.S. 261, 161 Misc. 791—McGrath v. Roefs, 196 N.Y.S. 891, 119 Misc. 641.
Tex.—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526.
31 C.J. p 1153 note 70.

Service on mother

Where the father is dead and there is no guardian, service is required to be made on the mother of the infant. —White v. White, 172 S.W.2d 72, 294 Ky. 563—Townsend v. Tipton, 160 S. W.2d 161, 289 Ky. 766—Cain v. Hall, 278 S.W. 152, 211 Ky. 817—Moseley v. Mayton, 245 S.W. 872, 196 Ky. 827 —31 C.J. p 1153 note 70 [a] (2), (3).

Adverse interest of parent

(1) Where the father is the plaintiff, and the infant has no guardian, service on the mother is required.—Lowe v. Taylor, 21 S.W.2d 284, 231 Ky. 273.

(2) Infant defendants were not properly before court by virtue of service on mother as statutory guardian, where she was plaintiff in action and occupying adverse position.—Rachford v. Rachford, 7 S.W. 2d 234, 224 Ky. 831.

(3) A summons for a minor defendant cannot be left with a parent who, although not a nominal complainant, is a party interested and benefited by the decree granting relief prayed in the bill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267—Manternach v. Studt, 82 N.E. 829, 230 Ill. 356.

(4) A decree in such a case has been held void for want of jurisdiction.—Sharp v. Sharp, supra.

(5) Other cases see 31 C.J. p 1153 note 70 [e].

Appointment nunc pro tunc of guardian ad litem for infant defendant did not cure jurisdictional defect existing by reason of failure to serve parent.—Ward v. Ward, 242 N. Y.S. 171, 136 Misc. 234.

Service beyond territorial jurisdiction

Service of summons beyond territorial jurisdiction of court on father of infant, a nonresident defendant, would not give court jurisdiction of infant.—Herr v. Humphrey, 126 S.W. 2d 809, 277 Ky. 421, 121 A.L.R. 954.

Service held insufficient

Service of summons on the father of a minor defendant for whom a guardian ad litem had been appointed to make defense was insufficient to give trial court jurisdiction over minor, where minor was not living with father and had not lived with him for several years.—Baker v. Boyd, 119 S.W.2d 524, 196 Ark. 563.

44. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625.
Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
Ga.—Spooner v. Spooner, 172 S.E. 5, 178 Ga. 105.
Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665—Suter Bros. v. Hebert, 26 P.2d 591, 138 Kan. 317—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262—Missouri State Life Ins. Co. v. Butts, 293 P. 499, 131 Kan. 775.
Miss.—Parker v. Smith, 117 So. 249, 150 Miss. 849.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—Melnick v. Lassio, 293 N.Y.S. 261, 161 Misc. 791—McGrath v. Roefs, 196 N.Y. S. 891, 119 Misc. 641.
31 C.J. p 1153 note 71.
Necessity of service on guardian of infant under general guardianship see Guardian and Ward § 177.

45. Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
Kan.—Suter Bros. v. Hebert, 26 P.2d 591, 138 Kan. 317—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440—McGrath v. Roefs, 196 N.Y.S. 891, 119 Misc. 641.
31 C.J. p 1154 note 72.

46. U.S.—Hatch v. Ferguson, C.C. Wash., 57 F. 966, affirmed 68 F. 43, 15 C.C.A. 201, 33 L.R.A. 759.
Kan.—Suter Bros. v. Hebert, 26 P. 2d 591, 138 Kan. 317—Suter Bros. v. Hebert, 299 P. 627, 133 Kan. 262.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440.

47. N.Y.—Leahy v. Hardy, 232 N.Y. S. 543, 225 App.Div. 323—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440.

48. N.C.—Ward v. Lowndes, 2 S.E. 591, 96 N.C. 367.
31 C.J. p 1154 note 74.

49. Ky.—White v. White, 172 S.W. 2d 72, 294 Ky. 563—Townsend v. Tipton, 160 S.W.2d 161, 289 Ky. 766 —Cain v. Hall, 278 S.W. 152, 211 Ky. 817.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.
31 C.J. p 1154 note 75.

50. Kan.—Hurd v. Baty, 88 P.2d 1031, 149 Kan. 665.
Ky.—Kitchens v. Edwards, 269 S.W. 1022, 207 Ky. 664.
N.Y.—Leahy v. Hardy, 232 N.Y.S. 543, 225 App.Div. 323—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586—Ward v. Ward, 242 N.Y.S. 171, 136 Misc. 234—McGrath v. Roefs, 196 N.Y.S. 891, 119 Misc. 641.
31 C.J. p 1154 note 76.

51. Okl.—Bolling v. Gibson, 128 P. 1093, 36 Okl. 678—Bolling v. Campbell, 128 P. 1091, 36 Okl. 671.
31 C.J. p 1154 note 77.

In Kentucky, where the persons enumerated in the statute cannot be served, it is proper to appoint a guardian ad litem on whom the service of process is made.—Brown v Allen, 194 S.W. 801, 175 Ky. 570—31 C.J. p 1154 note 77 [a].

52. Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
Ky.—Townsend v. Tipton, 160 S.W 2d 161, 289 Ky. 766, 142 A.L.R. 306 —Lowe v. Taylor, 21 S.W.2d 284, 231 Ky. 273.
N.Y.—Issem v. Slater, 27 N.Y.S.2d 871, 262 App.Div. 59, reargument denied 29 N.Y.S.2d 505, 262 App. Div. 834, appeal dismissed 37 N.E. 2d 144, 286 N.Y. 703—Jacobson v. Krekell, 228 N.Y.S. 371, 223 App. Div. 440—Melnick v. Lassio, 293 N.Y.S. 261, 161 Misc. 791.
31 C.J. p 1154 note 78.

53. N.C.—Roseman v. Roseman, 37 S.E. 518, 127 N.C. 494.

54. Okl.—Taylor v. Scott, 200 P. 427, 83 Okl. 30.
31 C.J. p 1154 note 80.

der fourteen years of age is or may be dispensed with, service on the parent, guardian, or person having custody of the infant being in such case sufficient.[55]

The object of the service on the parent or guardian being simply notice, where there are several infant defendants, it is not necessary to serve the parent or guardian with a copy of the summons for each of the infants, but one copy served on him is sufficient;[56] and there is authority that, where the parent is plaintiff, he need not be served;[57] and where the parent, guardian, etc., is a codefendant it is not necessary that he should be served with a copy of the summons in addition to that served on him as a defendant in his own right.[58] However, there is also authority that it is necessary to serve on the parent or guardian a copy of the summons for the infant in addition to that served on him as defendant.[59]

(4) On Guardian ad Litem

The guardian ad litem should be served with the summons and complaint, and with notice of all proceedings in the case.

The guardian ad litem should be served with the summons and complaint,[60] and with notice of all proceedings in the case in which notice to parties is required.[61]

c. Acceptance or Acknowledgment of Service

An infant cannot accept or acknowledge service so as to bind himself; nor can any other person do so for him.

An infant cannot accept or acknowledge service so as to bind himself,[62] nor can any other person accept or acknowledge service for the infant,[63] although such person may accept service for himself in an action against the infant.[64]

d. Waiver

An infant cannot waive personal service of process; nor can any other person do so for him.

Where personal service of process on an infant is required he cannot waive such service,[65] as by voluntary appearance;[66] nor can any other person do so for him.[67] A guardian ad litem may waive

55. Ky.—Palmer v. Husbands, 119 S. W. 762, 134 Ky. 152.
31 C.J. p 1154 note 81.

56. Ark.—Leach v. Maxwell, 286 S. W. 1029, 171 Ark. 1188.
31 C.J. p 1154 note 82.

57. Cal.—Brown v. Lawson, 51 Cal. 615.
S.C.—Kennedy v. Williams, 38 S.E. 8, 59 S.C. 378.

58. Ark.—Leach v. Maxwell, 286 S. W. 1029, 171 Ark. 1188.
Ky.—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311—McComas v. Hull, 145 S.W.2d 841, 284 Ky. 654—Cain v. Hall, 278 S.W. 152, 211 Ky. 817.
Miss.—Baldwyn v. Thompson, 95 So. 835, 132 Miss. 125, overruling suggestion of error Baldwin v. Thompson, 95 So. 327.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 773, 184 Okl. 273, citing **Corpus Juris.**
31 C.J. p 1155 note 84.

59. Ala.—Hodges v. Wise, 16 Ala. 509.
Kan.—Suter Bros. v. Hebert, 26 P.2d 591, 138 Kan. 317.
Wis.—Helms v. Chadbourne, 45 Wis. 60.

60. Ky.—Walker v. Perkins, 76 S.W. 2d 251, 256 Ky. 442.
Pa.—Minerd v. Minerd, 3 Fay.L.J. 180.
31 C.J. p 1155 note 86.

61. Ill.—Crane v. Stafford, 75 N.E. 424, 217 Ill. 21.
31 C.J. p 1155 note 87.

62. U.S.—Thomson v. Butler, C.C.A. Mo., 136 F.2d 644.
Ark.—Moore v. Wilson, 20 S.W.2d 310, 180 Ark. 41.
Ky.—Herr v. Humphrey, 126 S.W.2d 809, 810, 277 Ky. 421, 121 A.L.R. 954, citing **Corpus Juris.**
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292.
31 C.J. p 1155 note 88.
On attaining majority see infra subdivision h of this section.

63. U.S.—Thomson v. Butler, C.C.A. Mo., 136 F.2d 644.
Mo.—Kansas City, St. J. & C. B. R. Co. v. Campbell, 62 Mo. 585.
31 C.J. p 1155 note 89.

An attorney is unauthorized to acknowledge service for infant defendant.—Laute v. Gearhart, 165 A. 115, 11 N.J.Misc. 117, affirmed 170 A. 646, 112 N.J.Law 382.

Tutor ad hoc

An attorney appointed as a tutor ad hoc for minor defendants has been held authorized to accept service of petition for partition.—Powell v. Larance, 155 So. 13, 179 La. 751.

In partition proceeding, in which guardian ad litem was appointed for infant defendant, on petition of father with whom she resided, without notice to infant, and in which service on infant was accepted for her by her father, the court did not have jurisdiction over infant and could not compel successful bidder to accept property.—Lanham v. Bomar, 124 S. E. 635, 123 S.C. 483.

64. S.C.—Barrett v. Moise, 39 S.E. 755, 61 S.C. 569.
31 C.J. p 1155 note 90.

65. Ark.—Moore v. Wilson, 20 S.W. 2d 310, 180 Ark. 41.
Fla.—Wise v. Wise, 184 So. 91, 134 Fla. 553.
Ky.—Herr v. Humphrey, 126 S.W.2d 809, 810, 277 Ky. 421, 121 A.L.R. 954, citing **Corpus Juris.**
Ohio.—Templeman v. Hester, 29 N.E. 2d 216, 65 Ohio App. 62—Feigi v. Lopartkovich, 176 N.E. 670, 38 Ohio App. 338.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292—Johnson v. Moss, Civ. App., 108 S.W.2d 1110, error dismissed.
31 C.J. p 1155 note 92.
On attaining majority see infra subdivision h of this section.

66. Fla.—Wise v. Wise, 184 So. 91, 134 Fla. 553.
N.Y.—Melnick v. Lazzio, 293 N.Y.S. 261, 161 Misc. 791—McGrath v. Roefs, 196 N.Y.S. 891, 119 Misc. 641.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292.
31 C.J. p 1155 note 93.

67. Fla.—Miles v. Miles, 158 So. 520, 117 Fla. 884.
Ohio.—Templeman v. Hester, 29 N.E. 2d 216, 65 Ohio App. 62—Feigi v. Lopartkovich, 176 N.E. 670, 38 Ohio App. 338.
Tex.—Wright v. Jones, Com.App., 52 S.W.2d 247, reversing, Civ.App., 33 S.W.2d 292.
31 C.J. p 1155 note 94.
Waiver by general guardian see Guardian and Ward § 178.

service on himself.[68]

An irregularity in the service of summons, which is not prejudicial, is waived when the infant defendant appears and answers, even though he appears and answers by guardian ad litem.[69]

e. Return

The return should show that the process has been duly executed.

The return should show that the process has been duly executed.[70] Thus it should show proper service on the infant.[71] If it is necessary to serve any person other than the infant, such service must also be shown,[72] and the return should show that the person served was the proper person under the statute;[73] and if service is not made on such person the return should show that there is no such person in the county,[74] or to be found, or, it has been held, that the infant is of age when the service on him alone is sufficient.[75]

Amendment. The return may be amended so as to show that proper service was actually made.[76]

False return. Where the court has otherwise jurisdiction in the absence of fraud or collusion on the part of the adult plaintiff or his attorney, the falsity of the return does not invalidate the judgment.[77]

Conclusiveness. A sheriff's return showing that infants were served is conclusive in the absence of fraud or mistake.[78]

f. Record of Service

The record should show affirmatively that process was duly served on the infant. A recital of service in the record is presumed to be true.

The record should show affirmatively that process was duly served on the infant,[79] and a recital of service in the record is presumed to be true;[80] but an infant defendant is at liberty to show that the service was not in fact made.[81] The failure of the record to show due service, it has been held, does not per se render the judgment or decree void.[82] If the record shows service on the infant, but does not show with whom he was residing, it may be presumed for the purpose of sustaining the jurisdiction that he was residing with his father.[83]

g. Conclusiveness of Service

If the court rendering the judgment is a court of general jurisdiction, as against a collateral attack, it will be presumed, unless expressly contrary to the record, that proper process was issued and served.

In accordance with the general rule stated in the C.J.S. title Judgments § 425, also 34 C.J. p 542 note 98, if the court rendering the judgment is a court of general jurisdiction, as against a collateral attack, it will be presumed, unless expressly contrary to what is shown by the record, that proper process was issued and served,[84] especially where the infant was represented by guardian ad litem.[85] Where the record shows that a guardian ad litem was ap-

In Louisiana

(1) There is authority that a curator ad hoc to represent absent minor defendants may waive citation.—Powell v. Larance, 155 So. 13, 179 La. 751—Brown v. Furlong, 117 So. 583, 166 La. 537.

(2) However, there is also authority that a curator ad hoc cannot waive citation.—Spears v. Spears, 136 So. 614, 173 La. 294—Haley v. Woods, 113 So. 144, 163 La. 911—Jacobs v. Kansas City, S. & G. R. Co., 64 So. 150, 134 La. 389—Walker v. Waller, 2 La.App. 781.

68. Ala.—Whitaker v. Patton, 1 Port. 9.

69. N.Y.—Thistle v. Thistle, 66 How. Pr. 472, 5 N.Y.Civ.Proc. 43.
N.C.—Turner v. Douglass, 72 N.C. 127.

70. Miss.—Culley v. Rhodes, 87 So. 136, 124 Miss. 640.
31 C.J. p 1155 note 98 [a].

71. Or.—Cobb v. Klosterman, 114 P. 96, 58 Or. 211.
31 C.J. p 1155 note 99.

72. Okl.—Bolling v. Campbell, 128 P. 1091, 36 Okl. 671, followed in Bolling v. Gibson, 128 P. 1093, 36 Okl. 678.
31 C.J. p 1155 note 2.

73. Iowa.—Allen v. Saylor, 14 Iowa 435.
Ky.—Jenkins v. Crofton, 9 S.W. 406, 10 Ky.L. 456.
31 C.J. p 1155 note 3.

74. Miss.—Erwin v. Carson, 54 Miss. 282.
Pa.—Girard L. Ins. Annuity & Trust Co. v. Farmers' & Mechanics' Nat. Bank, 57 Pa. 388.
31 C.J. p 1155 note 4.

75. Ohio.—Keys v. McDonald, 1 Handy 287, 12 Ohio Dec. (Reprint) 146.

76. Ky.—Moseley v. Mayton, 245 S. W. 872, 196 Ky. 827.
31 C.J. p 1155 note 7.

Where sheriff dead

Where a sheriff's return showed that summons issued for a minor defendant under fourteen years of age, whose father was dead, was served, not on her mother, but on the mother of other infant defendants, and the deputy sheriff who served the process was dead, it has been held that the defect could not be remedied by showing by affidavits that summons was in fact served on the mother of such infant.—Moseley v. Mayton, supra.

77. Ind.—Miedreich v. Lauenstein, 86 N.E. 963, 87 N.E. 1029, 172 Ind. 140.

78. Ky.—White v. White, 172 S.W. 2d 72, 294 Ky. 563.

79. Ala.—Bank of Luverne v. Turk, 133 So. 52, 222 Ala. 549.
Ark.—Ross v. Stroud, 291 S.W. 996, 173 Ark. 66.
31 C.J. p 1156 note 9.

80. N.Y.—Smith v. Reid, 31 N.E. 1082, 134 N.Y. 568, affirming 11 N.Y.S. 739, 19 N.Y.Civ.Proc. 363.
N.C.—Sledge v. Elliott, 21 S.E. 797, 116 N.C. 712.

81. Mo.—Little v. Browning, 230 S. W. 92, 287 Mo. 278.
N.Y.—Smith v. Reid, 31 N.E. 1082, 134 N.Y. 568, affirming 11 N.Y.S. 739, 19 N.Y.Civ.Proc. 363.

82. Ga.—Taliaferro v. Calhoun, 73 S. E. 675, 137 Ga. 417.

83. Cal.—Brown v. Lawson, 51 Cal. 615.
31 C.J. p 1156 note 13.

84. Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
La.—Mariana v. Eureka Homestead Soc., 158 So. 642, 181 La. 125.
31 C.J. p 1156 note 15.

85. Ill.—Horn v. Horn, 84 N.E. 904, 234 Ill. 268.
31 C.J. p 1156 note 16.

pointed and that he accepted the appointment and filed an answer, a recital in the decree that the cause was heard on an answer is conclusive as to the service of legal notice on the infant.[86] Where the record itself shows failure duly to serve the infant, the judgment may be collaterally attacked.[87] A recital in the decree to the effect that the infant defendant was served in the manner provided by law, with nothing in the record contradictory thereof, will control on appeal.[88]

h. Attainment of Majority pending Action

Service on an infant in such a manner as not to confer jurisdiction of him as an infant will not compel his appearance after arriving at majority. However, it is competent for him to acknowledge or waive process where he attains majority during the pendency of the action.

It has been held that service on an infant not conferring jurisdiction of him as such will not compel his appearance after arriving at majority.[89] However, it is competent for him to acknowledge or waive process where he attains majority during the pendency of the action.[90]

Under a statute providing that a judgment in ejectment is conclusive on the party against whom it is recovered, not under disability at the time of its recovery, it has been held that where a judgment in ejectment rendered in favor of an infant is reversed on appeal after he comes of age, but there is nothing in the record showing his appearance as an adult, the judgment is not conclusive against him.[91]

§ 116. Pleading

a. In general

b. Allegations concerning particular matters

c. Verification of pleadings

d. Issues, proof, and variance

a. In General

(1) Of, or on behalf of, infant plaintiff

(2) Of, or on behalf of, infant defendant

(3) Of party adverse to infant

(1) Of, or on Behalf of, Infant Plaintiff

In a bill or complaint by, or on behalf of, an infant it is necessary to state a cause of action; and even though the suit is brought by a next friend, indebtedness or liability to the infant, rather than the next friend, should be averred. An amendment available to any party as a matter of right should not be denied an infant plaintiff.

A cause of action must be stated in a bill or complaint by a minor.[92] Where the suit is brought by next friend the declaration should allege the indebtedness or liability of defendant to the infant and not to the next friend as such.[93] In a suit by an infant to recover back money obtained from him, it is not necessary to make any other than the general allegations of damage to plaintiff.[94] It is error to disallow to an infant plaintiff an amendment which is available to any party as a matter of right.[95] Protection by court of interests of infant party regardless of pleadings see supra § 105.

(2) Of, or on Behalf of, Infant Defendant

(a) Necessity of answer or defense

86. Ark.—Beddinger v. Smith, 13 S. W. 734.

87. U.S.—New York L. Ins. Co. v. Bangs, Minn., 103 U.S. 435, 26 L. Ed. 580.
31 C.J. p 1156 note 18.

88. Ark.—Price v. Hartsell, 205 S. W. 829, 135 Ark. 440.

89. Ga.—Wheeler v. Martin, 88 S.E. 951, 145 Ga. 164—Welch v. Agar, 11 S.E. 149, 84 Ga. 583, 20 Am.S.R. 380.
N.Y.—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586.

Legal service or voluntary appearance necessary

Where action was pending when defendant, who was a minor when action was commenced, became an adult, relief could not be granted to plaintiff unless and until trial court obtained jurisdiction over defendant's person by legal service of summons on defendant, or by defendant's voluntarily submitting to trial court's jurisdiction by entering his appearance.—Templeman v. Hester, 29 N.E. 2d 216, 65 Ohio App. 62.

90. La.—Eureka Homestead Soc. v. Sladovich, 108 So. 477, 161 La. 265.
N.Y.—Pacilio v. Scarpati, 300 N.Y.S. 473, 165 Misc. 586.
Ohio.—Templeman v. Hester, 29 N.E. 2d 216, 65 Ohio App. 62—Hobert v. Francis, 178 N.E. 715, 40 Ohio App. 491.
31 C.J. p 1157 note 47.

91. Tenn.—Boro v. Harris, 13 Lea 36.

92. **Bill against two defendants**

A bill by a minor buyer of automobile against seller of automobile and third person to whom seller sold automobile which buyer traded in, for damages resulting from seller's alleged fraudulent statement that automobile was in first-class running condition, and for rescission and cancellation of contract of sale, and for return of automobile traded in, was properly dismissed as to third person, in absence of allegation that third person had acted fraudulently, or had knowledge of alleged fraud practiced on minor, or that third person was other than innocent purchaser.—Russell v. Donaldson, 195 So. 198, 142 Fla. 394.

Cause of action against employer stated

A complaint alleging that plaintiff, a minor, was emancipated in that he was entirely free, received his own pay, paid his own bills, and supported himself without any contribution from his father, and alleging that plaintiff's employer wrongfully turned over deductions from his wages to third party who had demised certain farm lands to father, stated cause of action against employer.—Zozaski v. Mather Stock Car Co., 26 N.E.2d 663, 304 Ill.App. 459.

93. W.Va.—Shirley v. Bonham, 5 W. Va. 501.
31 C.J. p 1158 note 64.

94. Mass.—Kellogg v. Kimball, 122 Mass. 168.

95. Ga.—Kanes v. Merchants' & Mechanics' Banking & Loan Co., 168 S.E. 560, 176 Ga. 684.

(b) Duty and authority to answer or defend

(c) Form and sufficiency of answer or demurrer

(a) Necessity of Answer or Defense

Ordinarily, it is considered irregular and erroneous to hear a case and render judgment against an infant defendant without the prior filing in his behalf of a proper answer interposing whatever defense he may have; and where a judgment is so rendered, it may be opened or set aside in a proper proceeding for that purpose; but the defect is not jurisdictional and does not render the judgment absolutely void.

Where there is an infant defendant, the case is not at issue,[96] and cannot properly and regularly be heard,[97] until an answer or plea has been interposed on his behalf; but there are cases in which an answer on behalf of an infant has been held to be not necessary, as in a partition case,[98] where the infant properly unites as plaintiff in an action or proceeding to partition his real estate,[99] or in some jurisdictions, by force of statute, where the guardian ad litem is unable to make any defense and reports his inability so to do.[1]

It is irregular and erroneous to render a judgment or decree against an infant defendant without a proper answer, interposing whatever defense he may have, having been previously filed in his behalf;[2] and where a judgment or decree is so rendered, it may be opened or set aside in a proper proceeding for that purpose.[3] However, if the infant is properly before the court the defect is not jurisdictional;[4] it does not render the judgment absolutely void,[5] but it is voidable only,[6] and, being a mere irregularity, the judgment will not be vacated or set aside unless there is a sufficient showing that there is a defense to the action.[7] The judgment or decree will not be disturbed by reason of the fact that the guardian ad litem did not make an active defense, so long as the facts on which the defense rested were fairly before the court.[8] Judicial protection of interests of infant party regardless of pleadings is considered supra § 105.

Defense to cross complaint. The necessity of a material and substantial defense for an infant applies to the defense of a cross complaint in an action by the infant.[9]

(b) Duty and Authority to Answer or Defend

A guardian ad litem not only may file an answer for the ward, but it is his duty to do so and to make such defense as is necessary to protect the rights and interests of the ward. If an infant defendant comes of age during the pendency of the action, he is thenceforth entitled to manage his own defense.

It is the duty of a guardian ad litem to make proper defense for his ward;[10] and the court may[11] and should[12] compel him so to do. While a guardian ad litem is not required to make a defense not founded in fact[13] or law,[14] and he is not warranted in interposing useless or vexatious defenses,[15] it is his duty to make such defense as the exercise of care may dictate[16] and as may be necessary to protect the rights and interests of the ward,[17] and to make the defense in the interest of his infant ward as vigorous as the nature of the case will admit.[18]

The control of the defense by the guardian ad

96. Ill.—Illinois Valley Bank v. Newman, 184 N.E. 636, 351 Ill. 380.
31 C.J. p 1158 note 68.

97. Ala.—Howell v. Randle, 54 So. 563, 171 Ala. 451.
31 C.J. p 1159 note 9.

98. N.Y.—Bogert v. Bogert, 45 Barb. 121.
31 C.J. p 1158 note 70 [a].

99. Ky.—Shelby v. Harrison, 84 Ky. 144.
31 C.J. p 1158 note 71.

1. Ky.—Ramsey v. Keith, 76 S.W. 142, 25 Ky.L. 582.
31 C.J. p 1158 note 72.

2. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143—Baker v. Boyd, 119 S.W.2d 524, 196 Ark. 563.
31 C.J. p 1159 note 10.

3. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
31 C.J. p 1160 note 11.

4. Ill.—Goudy v. Hall, 36 Ill. 313, 87 Am.D. 217.
Kan.—Swartwood v. Sage, 75 P. 508, 68 Kan. 817.

5. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
31 C.J. p 1160 note 13.

6. Ark.—Arkansas Trust Co. v. Sims, supra.
Ky.—Harrod v. Harrod, 180 S.W. 797, 167 Ky. 308.

7. Iowa.—Reints v. Engle, 107 N. W. 947, 130 Iowa 726.

8. Iowa.—Harris v. Bigley, 111 N. W. 432, 136 Iowa 307.
31 C.J. p 1160 note 16.

9. Ky.—Whalen v. Hopper, 154 S. W. 40, 152 Ky. 727.
31 C.J. p 1158 note 73.

10. Mo.—Kennard v. Wiggins, 160 S.W.2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S. Ct. 47, 317 U.S. 652, 87 L.Ed. 524—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660.
31 C.J. p 1158 note 78.
Duties of guardian ad litem generally see supra § 111.

11. Ind.—Richards v. Richards, 17 Ind. 636.
31 C.J. p 1158 note 79.

12. Ky.—Henly v. Gore, 4 Dana 133.
31 C.J. p 1158 note 80.

13. Ark.—Price v. Hartsell, 205 S. W. 829, 135 Ark. 440.

14. Ill.—Tymony v. Tymony, 163 N. E. 393, 331 Ill. 420.
31 C.J. p 1159 note 1.

15. Ill.—Tymony v. Tymony, supra—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209.

16. Ill.—Millage v. Noble, 166 N.E. 50, 334 Ill. 315—Tymony v. Tymony, 163 N.E. 393, 331 Ill. 420.

17. Ill.—Tymony v. Tymony, supra—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209.

18. Ill.—Tymony v. Tymony, 163 N. E. 393, 331 Ill. 420.
31 C.J. p 1159 note 24.

litem is not complete,[19] and the court should not, in the decree appointing him, authorize him to file whatever pleadings he may deem proper.[20] It is the duty of a guardian ad litem to file an answer to protect the minor's interest;[21] and it has been held to be the duty of the complainant to see that a guardian ad litem interposes an answer for his ward.[22] Where a guardian ad litem has been appointed the answer of an infant defendant may only be interposed by him.[23] While a guardian ad litem does not perform his duty by perfunctorily filing a formal answer for his ward and then abandoning the case,[24] he may do so by filing a general denial and orally advising the court of the facts as disclosed by his investigation, without offering contesting proof where none is available to him.[25]

Time to plead. A rule of court limiting the time within which dilatory pleas may be filed, when applied to action against an infant defending by guardian ad litem, should be so construed or extended as at least to allow the guardian to file such a plea within the time limited after his appointment.[26] Where a guardian ad litem was appointed for an infant defendant but had neither knowledge nor notice of the appointment until after final judgment had been recovered and entered in the case, and on learning of his appointment he promptly applied for leave to answer, such leave should be granted unless plaintiff consents to strike out the infant's name as a party to the action.[27]

Where infant defendant comes of age during the pendency of the action, he is entitled personally to manage his own defense.[28] He may disregard the answer set up for him by his guardian ad litem, and file an entirely new answer for himself,[29] or have the former answer amended;[30] but after decree or judgment he cannot file a defendant's pleading.[31]

(c) Form and Sufficiency of Answer or Demurrer

The answer of a guardian ad litem in behalf of an infant defendant may and should be so framed as to let in every defense to which the infant is entitled and to deny, or request proof of, every material allegation of the complaint which is prejudicial to the infant.

Infants answering by guardian ad litem may deny generally the allegations of the complaint or petition,[32] or they may answer specially,[33] or they may even adopt an answer already on file.[34] It has been said to be irregular practice for a guardian ad litem to join in an answer with other defendants;[35] but it has been held that where infant defendant has no special or separate defense, no separate answer is necessary, and joinder in the general answer of defendants is sufficient.[36] The answer must be that of the infant himself, and not the personal answer of the guardian ad litem.[37] It should set up every defense to which the infant is entitled,[38] and it should deny every material allegation of the complaint prejudicial to the infant,[39] or at least call

19. R.I.—Stanton v. Sullivan, 4 A. 2d 269, 62 R.I. 154—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
Powers of guardian ad litem generally see supra § 111.

20. R.I.—Stanton v. Sullivan, 4 A. 2d 269, 62 R.I. 154.
Protection of infant's interest by court see supra § 105.

21. N.C.—Deal v. Wachovia Bank & Trust Co., 11 S.E.2d 464, 218 N.C. 483.

22. Ala.—Roach v. Hix, 57 Ala. 576.

23. Del.—Bancroft v. Bancroft, 85 A. 561, 27 Del. 9.
31 C.J. p 1158 note 82.

24. Ill.—McCarthy v. Cain, 134 N.E. 62, 301 Ill. 534.
31 C.J. p 1159 note 95.

25. Iowa.—Stephens v. Wood, 195 N. W. 239, 196 Iowa 1394.

26. Vt.—Fall River Foundry Co. v. Doty, 42 Vt. 412.

27. N.Y.—Farmers' Loan & Trust Co. v. Erie R. Co., 9 Abb.N.Cas. 264.

28. N.Y.—In re Rouse, 119 N.Y.S. 34—Dow v. Dow, 21 N.Y.S. 487, 66 Hun 631, affirming 18 N.Y.S. 222, 63 Hun 622.
31 C.J. p 1157 note 39.

29. Ky.—Shields v. Bryant, 2 A.K. Marsh. 342.
N.M.—Thompson v. Maxwell Land Grant & Ry. Co., 6 P. 193, 3 N.M. 269.

30. U.S.—Erie R. Co. v. Fritsch, C. C.A.N.J., 72 F.2d 766, 767, citing Corpus Juris.
Va.—Winston v. Campbell, 4 Hen. & M. 477, 14 Va. 477.

31. Md.—Tessier v. Wyse, 3 Bland 28.

32. Okl.—Sims v. Hedges, 123 P. 155, 32 Okl. 683.
31 C.J. p 1159 note 84.

33. N.Y.—Farmers' Loan & Trust Co. v. Reid, 3 Edw. 414.
Answer held to allege facts warranting relief
Ala.—First Nat. Bank v. Robertson, 127 So. 221, 220 Ala. 654.

34. N.C.—White v. Morris, 12 S.E. 80, 107 N.C. 92.

35. Mich.—Wood v. Truax, 39 Mich. 628.

36. Cal.—Western Lumber Co. v. Phillips, 29 P. 328, 94 Cal. 54.

37. Miss.—Bull v. Dagenhard, 55 Miss. 602.
31 C.J. p 1159 note 89.

Signature
(1) The signature to an answer consisting of the name of the guardian ad litem, followed by the words "guardian ad litem," was, when considered with the contents of the answer, held not to be the signature of a person in his individual, rather than his representative, capacity.—Sinnett v. Goff, 109 S.E. 820, 89 W. Va. 629.

(2) Where a guardian ad litem did not sign his answer, but it was verified and filed and treated as properly drawn, this was a mere irregularity not affecting the title of a purchaser in the proceedings.—Rieman v. Von Kapff, 25 A. 387, 76 Md. 417.

38. Okl.—Iowa Land & Trust Co. v. Dawson, 134 P. 39, 37 Okl. 593.
31 C.J. p 1159 note 97.

39. Ala.—Howell v. Randle, 54 So. 563, 171 Ala. 451.
31 C.J. p 1159 note 96.
This requirement is statutory in some states.—Morgan v. Stocks, 122 S.W.2d 953, 197 Ark. 868.
Admission or agreement to demands
(1) Where plaintiff claimed rights as against interests of minor defendant, guardian ad litem for the minor

for strict proof.[40] Indeed, it has been stated to be the duty of the guardian to deny all allegations of the complaint and require strict proof thereof.[41] The answer of an infant by his guardian cannot be excepted to for insufficiency.[42]

Formal answer. In some cases it has been the practice to file a mere formal answer disclaiming all knowledge or information with respect to the matters alleged in the complaint, and requiring strict proof thereof and invoking the protection of the court.[43] This formal answer submits the infant to the care and protection of the court,[44] stands as a denial so as to put the complainant on proof of all the material allegations of his bill,[45] and is sufficient to let in any defense to which the infant appears entitled by the evidence.[46] Such an answer, however, has in some cases been disapproved.[47]

Demurrer. The common law gave an infant the right to resort to his parol demurrer,[48] which was not properly a demurrer at all, but rather a stay or suspension of proceedings in the action during the nonage of the infant.[49] In one state, the common law rule has in effect been preserved by statute,[50] but in most states is now obsolete.[51] Obviously, where the petition is good as against a demurrer, the defense of an infant should be made by answer and not by demurrer.[52]

(3) Of Party Adverse to Infant

In an action against an infant, the bill, petition, or complaint must, of course, state a cause of action; and in an action by an infant, it is incumbent on defendant to plead such claims or defenses as he wishes to assert.

In an action by an infant to rescind the purchase of an automobile, no recovery can be had by defendant for deterioration of the automobile,[53] or for the reasonable value of its use,[54] while it was in plaintiff's possession, where he has not pleaded such claim. So, too, a claim by defendant that the return of the automobile did not restore him to his original position is a purely defensive matter and is properly raised only in the answer.[55] In an action by a minor to recover a down payment made on the purchase price of real estate on the ground that he has repudiated the purchase, an affidavit of defense is sufficient to prevent summary judgment where it avers that the minor has no interest in the contract, the purchase having been made by another person acting for plaintiff's parents, and the money involved, although in an account carried in the name of the minor, having been deposited in the account by the parents to prevent its being attached on a judgment owing to a third person.[56]

Action for personal injuries. In an action against a child to recover damages for personal injuries, a petition alleging that the child is incapable of negligence because of his tender years does not state a cause of action.[57] Where the institution or maintenance of a suit by an infant to recover damages for personal injuries amounts to a repudiation and disaffirmance of a contract of settlement, a plea in such suit which merely sets up the contract of settlement in accord and satisfaction of plaintiff's claim, and does not allege that the infant has not dissipated and squandered the consideration of the contract and is able to restore, and has not restored, it, is insufficient.[58]

On the foreclosure of a mortgage against infant

wrongfully agreed by answer to the demands of plaintiff.—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 209.

(2) However, filing of answer by guardian ad litem, admitting truth of certain allegations in answer and cross petition of another defendant, does not render judgment void, although it does constitute an irregularity.—Thomas v. Monroe, 65 P.2d 1008, 179 Okl. 416.

(3) Admissions by guardian ad litem generally see supra § 111.

40. Fla.—Mote v. Morton, 41 So. 607, 52 Fla. 548.
31 C.J. p 1159 note 98.

41. Ark.—Sager v. American Inv. Co., 280 S.W. 654, 170 Ark. 568.

42. N.Y.—Leggett v. Sellon, 3 Paige 84.

43. Ohio.—Wood v. Butler, 23 Ohio St. 520.
31 C.J. p 1159 note 2.

Custom

The rights of an infant respondent are customarily submitted to protection of court by suitable answer filed by guardian, which puts opposing party on his proof and allows guardian to avail himself of every defense of law and fact open to infant.—Stanton v. Sullivan, 4 A. 2d 269, 62 R.I. 154.

44. Miss.—Price v. Crone, 44 Miss. 571.
Mo.—Beach v. Lynn, 252 S.W. 437, 299 Mo. 127.

45. Miss.—Gregory v. Orr, 61 Miss. 307.
31 C.J. p 1159 note 4.

46. S.C.—Boozer v. Teaque, 3 S.E. 551, 27 S.C. 348.
31 C.J. p 1159 note 5.

47. Me.—Tucker v. Bean, 65 Me. 352.
31 C.J. p 1159 note 6.

48. Ill.—Enos v. Cappa, 15 Ill. 277.
31 C.J. p 1178 note 74.

49. Black L.D.

50. Md.—Tise v. Shaw, 11 A. 363, 582, 68 Md. 1.

51. Cal.—Joyce v. McAvoy, 31 Cal. 273, 89 Am.D. 172.
31 C.J. p 1158 note 75.

52. Kan.—Crawford v. Firmin, 59 P.2d 27, 144 Kan. 270.

53. Wis.—Schoenung v. Gallet, 238 N.W. 852, 206 Wis. 52, 78 A.L.R. 387.

54. Or.—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.
Wis.—Schoenung v. Gallet, 238 N.W. 852, 206 Wis. 52, 78 A.L.R. 387.

55. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

56. Pa.—Eckstein v. Ignasiak, 24 Erie Co. 1.

57. Ga.—Davis v. Gavalas, 139 S.E. 577, 37 Ga.App. 242.

58. Ga.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.

defendants the complaint must allege the requisite facts to show what are the interests of the infants in the premises.[59]

After attainment of majority. The fact that an infant defendant attains majority during the pendency of the suit does not render a supplemental bill necessary unless his interest in the suit is changed by that event.[60] Where a late infant cannot recover what he has paid or parted with, where the transaction was fair and reasonable and the other party has acted bona fide, without deducting the benefits derived by the infant from the consideration received by him, as considered supra § 75, it is not necessary for defendant to plead in his answer the provident character of the transaction, or that there was no fraud.[61]

b. Allegations Concerning Particular Matters

(1) Lack of jurisdiction
(2) Infancy and representation of infant
(3) Disaffirmance or ratification of transaction
(4) Necessaries

(1) Lack of Jurisdiction

Statutes prescribing the mode and time of raising objections to the jurisdiction of the court apply to infants.

Infants must raise objections to the jurisdiction of the court in the mode and time prescribed by statute the same as adults.[62]

(2) Infancy and Representation of Infant

Infancy and matters in avoidance of an allegation or plea of infancy are to be pleaded, infancy as a defense being waived when not pleaded. Also, the proper representation of an infant party is to be pleaded; but defective allegations in this regard may not be fatal, and objections thereto are waived when not presented by special demurrer.

The petition or complaint in an action by an infant should allege his infancy,[63] his representation by guardian ad litem or next friend,[64] and, where an appointment is necessary, the due appointment of the person acting in that capacity,[65] or where, under statute, some other fact, such as the lack of a legal guardian, is necessary, the existence of such fact.[66] Although the age of the infant need not be set out,[67] it is proper for the complaint or declaration to allege the age of the infant in order to prove the right to sue in such manner.[68] It has been held that if defendant would deny the infancy of plaintiff suing by guardian he must plead in abatement;[69] but it has also been held that where the complaint alleges that plaintiff is an infant, an answer attempting to set up the affirmative defense of a release is insufficient unless it contains an allegation that plaintiff is not an infant.[70]

Where a statutory proceeding to relieve a minor of the disabilities of nonage is relied on to authorize a suit against the minor, it should be specifically pleaded by setting out the proceeding in the bill, or by attaching a copy thereof as an exhibit, so that the court on examination of the bill may determine the right of complainant to proceed without the appointment of a guardian ad litem to represent the minor.[71] Averments as to such matters based on information and belief are not permissible.[72] The

59. N.Y.—Aldrich v. Lapham, 6 How.Pr. 129, Code Rep.,N.S., 408.

60. N.Y.—Campbell v. Bowne, 5 Paige 34.

61. Minn.—Berglund v. American Multigraph Sales Co., 160 N.W. 191, 135 Minn. 67.

62. Tenn.—Boyd v. Martin, 9 Heisk. 382.
63. Mo.—Taylor v. Missouri Pac. R. Co., App., 257 S.W. 511.
31 C.J. p 1160 note 18.

Allegation that plaintiff was not "sui juris," may, when considered with the context, be so qualified as not to be an allegation that plaintiff had not attained majority.—Brown v. Federal Land Bank of Columbia, 168 S.E. 775, 176 Ga. 670.

64. **Rule of court, authorized by, and having the effect of, a statute, respecting the entitling of the suit and allegations as to the representative, should be followed.**—Garmella v. Woodlawn Farm Dairy Co., 44 Lack.Jur., Pa., 31, 56 York Leg.Rec. 212.

Allegations held sufficient

Ala.—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 208 Ala. 457.

Del.—Spooner v. Delaware, L. & W. R. Co., 1 N.Y.St. 558, affirmed 21 N. E. 696, 115 N.Y. 22.

65. Mo.—Rogers v. Marsh, 73 Mo. 64.
31 C.J. p 1160 note 21.

Qualification

In action by mother on behalf of her minor daughter, where petition failed to allege that mother qualified as tutrix, an exception of want of capacity was properly maintained. —Coignard v. F. W. Woolworth & Co., La.App., 175 So. 123.

66. Tex.—Spears Dairy v. Davis, Civ.App., 124 S.W.2d 159.

67. Iowa.—Stewart v. Chadwick, 8 Iowa 463.
31 C.J. p 1160 note 22.

68. Cal.—Todd v. Orcutt, 183 P. 963, 42 Cal.App. 687.

Marital status

Petition in personal injury suit by minor, suing by next friend, was not demurrable for failure to allege that minor was unmarried female, where petition showed that minor was female aged thirteen and was in school.—Sheffield v. Lovering, 180 S. E. 523, 51 Ga.App. 353.

69. Del.—Graham v. Cain, 2 Del. 97.

70. N.Y.—Pollack v. Court Taxi Service, 237 N.Y.S. 229, 227 App. Div. 805.

Allegation construed

In infant's personal injury action, wherein infant disaffirms a contract of settlement with defendant by instituting or maintaining the suit; an allegation in the plea or answer that settlement was made when infant was a "small child" was equivalent to an allegation that plaintiff at the time was an infant.—Tharpe v. Cudahy Packing Co., 4 S.E.2d 49, 60 Ga.App. 449.

71. Ala.—Garth v. Ewing, 117 So. 665, 218 Ala. 143.

72. Ala.—Garth v. Ewing, supra.

answer of an infant by a guardian ad litem should at least recite the appointment of the guardian ad litem,[73] and disclose for whom the appointment was made.[74]

Defective or improper allegations concerning representation of a minor in an action prosecuted for him by another person are not necessarily fatal, as the defects therein may be cured by verdict,[75] part thereof may be treated as surplusage, and the remainder may show proper representation,[76] or defendant may not be denied the right to offer any evidence he has in defense or be surprised by any evidence offered under plaintiff's pleading.[77] The fact of adequate representation is more important than the characterization thereof in a pleading.[78] An objection that a pleading of a minor shows on its face that the person representing him is not the kind of representative required by statute may be raised by demurrer,[79] and when not raised in apt time it is waived.[80] The failure of the representative to allege his right, under the statutes, to represent the minor on account of the latter having no legal guardian may[81] and must[82] be taken advantage of by special demurrer, and is waived by a general demurrer.[83] So, also, where it appears from the substance of the suit that it is brought by a minor through another person as next friend, failure to employ the regular and technical form of pleading to manifest this fact does not render the petition subject to general demurrer.[84]

Infancy as defense. Infancy is a special,[85] personal,[86] and affirmative[87] defense which ordinarily must be pleaded,[88] and which is waived if not pleaded.[89] In a state, however, where the practice does not permit a reply or replication, minority, as a defense to an averment of set-off and avoidance contained in the answer, is open to plaintiff without being pleaded.[90]

Infancy is not a dilatory plea.[91] Defendant has a right to plead that he was an infant at the time of signing the note sued on;[92] and this right is not lost because the person possessing it is sued together with other persons liable;[93] but a joint plea of the infancy of one defendant in an action on a joint and several bond is bad on demurrer.[94] An allegation that at the time of the transaction defendant was an infant is sufficient without alleging that the transaction was voidable.[95] In a suit on a note or check where the plea of infancy is set up it is not necessary to negative that it was given for necessaries, or that the infant was practicing a profession or trade,[96] nor is it necessary to allege disaffirmance or lack of ratification, as considered in-

73. Ga.—Nicholson v. Wilborn, 13 Ga. 467.
31 C.J. p 1159 note 90.

74. Cal.—Newman v. Maldonado, 30 P. 833, 3 Cal.Unrep.Cas. 540.

75. Tex.—Gulf, C. & S. F. R. Co. v. Reagan, Civ.App., 34 S.W. 796.
31 C.J. p 1160 note 19 [c].

76. Mo.—State ex rel. Missouri Pac. R. Co. v. Cox, 267 S.W. 382, 306 Mo. 27—Taylor v. Missouri Pac. R. Co., App., 257 S.W. 511.

77. Tex.—Spears Dairy v. Davis, Civ.App., 124 S.W.2d 159.

78. Miss.—Hill v. Ouzts, 200 So. 254, 190 Miss. 341.

79. Ark.—Cannon v. Price, 150 S.W. 2d 755, 202 Ark. 464.
S.D.—Olsen v. Steele, 215 N.W. 531, 51 S.D. 505.

80. Ark.—Cannon v. Price, 150 S.W. 2d 755, 202 Ark. 464.

81. Ga.—Foster v. Wood, 137 S.E. 847, 36 Ga.App. 734.

82. Ky.—Bartley v. Bigford, 268 S. W. 820, 207 Ky. 48.

83. Ky.—Bartley v. Bigford, supra.

84. Ga.—Spencer v. Peace, 156 S.E. 729, first case, 42 Ga.App. 516, followed in 156 S.E. 729 (second case), 42 Ga.App. 517—Vale Royal Mfg. Co. v. Bradley, 70 S.E. 36, 8 Ga.App. 483.

85. Ala.—Maness v. Woodall, 148 So. 744, 227 Ala. 38.

86. Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
S.C.—McCoy v. Provident Life Ins. Co., 153 S.E. 468, 156 S.C. 496.

87. Mass.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.
31 C.J. p 1161 note 40.

88. Ala.—Maness v. Woodall, 148 So. 744, 227 Ala. 38—Sanders v. Williams, 50 So. 893, 163 Ala. 451.
Tenn.—Homer v. Duncan, 7 Tenn. App. 674.
31 C.J. p 1161 note 40.

Time to plead

(1) It is proper to refuse to permit a plea of infancy to be interposed after the close of the evidence. —Forrestell v. Wood, Md., 23 A. 133.

(2) Where an infant has signed a mortgage, the proper time to plead infancy to avoid it is in the action of foreclosure, and he can have no relief in an independent action after foreclosure on the sole ground of infancy when he executed the mortgage.—Hunter v. Bearn, 3 Ky.L. 327.

Pleading in cross complaint under one cover with answer

Defense of minority was sufficiently pleaded, although set forth only in cross complaint, where answer and cross complaint were filed under one cover.—Maddox v. Hamp Williams Hardware Co., 26 S.W.2d 85, 181 Ark. 403.

89. Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.
S.C.—McCoy v. Provident Life Ins. Co., 153 S.E. 468, 156 S.C. 496.
31 C.J. p 1161 note 41.

Estoppel

Defendant, proceeding to trial with able counsel's assistance and submitting cause to court and jury on merits, is estopped to set up defense of infancy.—Steelman v. Gilbert, 186 A. 47, 14 N.J.Misc. 490.

90. La.—Nichols v. Tall Timber Lumber Co. of Louisiana, App., 145 So. 691.

91. Ill.—Greer v. Wheeler, 2 Ill. 554.

92. N.J.—Camden Commercial College v. Piper, 137 A. 555, 5 N.J. Misc. 535.

93. Nev.—W. M. Barnett Bank v. Chiatovich, 232 P. 206, 48 Nev. 319.

94. N.J.—Bordentown Tp. v. Wallace, 11 A. 267, 50 N.J.Law 13.

95. Ky.—Stern v. Freeman, 4 Metc. 309.

96. Ga.—Medders v. Baxley Banking Co., 88 S.E. 407, 17 Ga.App. 730.

fra, subdivision b (3) of this section, or to plead a tender of the consideration received.[97]

Matter in avoidance of a plea of infancy must be pleaded in the replication in an action at law.[98] Estoppel to assert the defense of infancy must be specifically pleaded.[99]

Concealment or misrepresentation of age. In an action by an infant, defendant may plead that the infant fraudulently represented his age and thereby induced the contract in question;[1] but such a plea is insufficient where it does not allege that the infant intended that defendant act on the misrepresentation[2] and that defendant did so act.[3] Where plaintiff alleges that defendant concealed his infancy at the time of the transaction on which the action is based, a denial by defendant that he concealed his infancy is not a good plea, but if he notified plaintiff of his infancy he should plead such notice affirmatively.[4]

(3) Disaffirmance or Ratification of Transaction

Disaffirmance or ratification may be pleaded; but ratification need not be alleged in the initial pleading based on the contract or transaction, as distinguished from the pleading opposing a claim or plea of infancy; and there is some divergence of authority as to whether disaffirmance must be specially pleaded.

The avoidance of a transaction by an infant may,[5] and, according to some authorities, must,[6] be specially pleaded to avail a party affected thereby. However, it has been held that, when a minor conveys land, and, after attaining majority, brings an action of ejectment to recover it, it is not necessary to set out in the petition a disaffirmance of the conveyance.[7] Also, in an action on a note and for the price of goods sold and delivered, it is sufficient for defendant to plead infancy and that the goods sold and for which the note was given were not necessaries without alleging his disaffirmance or lack of ratification of the contract.[8] A pleaded defense that plaintiff never disaffirmed his contracts or acts is sham and insufficient in law where it is admitted that, shortly after plaintiff attained majority, he disaffirmed by notice in writing and defendant received such notice.[9]

In an action to enforce rights under a transaction entered into while an infant, it is not necessary that plaintiff should expressly allege ratification.[10] A transaction which has been ratified may be declared on without noticing the ratification.[11] Where infancy is pleaded by defendant the facts constituting ratification are in avoidance of the plea and ordinarily must be introduced into the pleadings, in actions at law, by a replication;[12] but where a code provision dispenses with a reply except where a counterclaim or set-off is pleaded in the answer, plaintiff may prove a ratification without alleging it in a reply or an amended petition.[13] In an action by a late infant to recover back a consideration paid by him, defendant may plead ratifica-

97. N.Y.—Leaman v. Schell, 39 N.Y.S.2d 417, 265 App.Div. 1041, appeal withdrawn 41 N.Y.S.2d 205, 266 App.Div. 662.

98. Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.

99. Mont.—Downey v. Northern Pac. Ry. Co., supra.

1. N.Y.—Chasser v. Hutton, 248 N.Y.S. 136, 139 Misc. 623.

2. Ala.—Drennen Motor Car Co. v. Smith, 160 So. 761, 235 Ala. 275.

3. Ala.—Drennen Motor Car Co. v. Smith, supra.

4. Ky.—Adam Roth Grocery Co. v. Hopkins, 29 S.W. 293, 16 Ky.L. 678.

5. **Complaint for rescission held to state cause of action**
Or.—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.

Equity of bill
(1) Bill of infant to set aside settlement of claim for wrongful death for administrator's fraud presented ground for equitable relief.—Irwin v. Alabama Fuel & Iron Co., 110 So. 566, 215 Ala. 328.

(2) Minor's suit to cancel deed was not without equity because she alleged in her original bill that she did not receive any purchase money and after the reception of evidence to the contrary amended her bill and tendered purchase price received.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

Consistent allegations
Complaint does not assert inconsistent grounds of recovery where it is based on both rescission of the contract according to its terms and disaffirmance on the ground of infancy.—Rayburn v. Hopkins, 197 S.W. 1180, 130 Ark. 501—31 C.J. p 1157 note 63 [a].

6. Ala.—Sanders v. Williams, 50 So. 893, 168 Ala. 451.
31 C.J. p 1160 note 25.

Compromise settlement
In minor's suit by next friend, minor could not recover for personal injuries where minor's mother, who had been appointed guardian of minor's property and had compromised the matter as a doubtful claim, was not a party and the pleadings did not request the setting aside of the compromise settlement.—Campbell v. Atlanta Coach Co., 200 S.E. 293, 58 Ga.App. 824, transferred, see 196 S.E. 769, 186 Ga. 77.

In suit to cancel deed plaintiff must allege the disaffirmance of the transaction before bringing the suit.—O'Donohue v. Smith, 114 N.Y.S. 536, 130 App.Div. 214.

7. Mo.—Craig v. Van Bebber, 13 S.W. 906, 100 Mo. 584, 18 Am.S.R. 560.

8. N.Y.—Morgan v. Smith, 224 N.Y.S. 400, 130 Misc. 412.

9. N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J.Misc. 455.

10. Ind.—Nolte v. Libbert, 34 Ind. 163.
31 C.J. p 1160 note 31.

11. Ala.—American Freehold Land Mortg. Co. v. Dykes, 18 So. 292, 111 Ala. 178, 56 Am.S.R. 38—West v. Penny, 16 Ala. 186.

12. Ala.—American Freehold Land Mortg. Co. v. Dykes, 18 So. 292, 11 Ala. 178, 56 Am.S.R. 38.
31 C.J. p 1161 note 33.

13. Ky.—Stern v. Freeman, 4 Metc. 309.
31 C.J. p 1161 note 34.

tion as an affirmative defense;[14] but allegations in the complaint in a mortgage foreclosure suit that defendant, after arriving at majority, made substantial payments of principal and interest are of no avail to the mortgagee where the complaint is formulated on the theory that the note and mortgage were binding on defendant while he was a minor and not on the theory of ratification.[15]

New promise after majority. Where defendant pleads infancy plaintiff may by his replication set up a new promise by defendant after reaching majority.[16]

(4) Necessaries

The proper pleading, in an action against an infant to recover for necessaries, is to allege in the declaration or complaint merely what is sufficient at common law in a declaration for debt for board and lodging or goods furnished, and, after defendant has set up infancy as a defense, to allege in the reply or replication that the articles furnished were necessaries.

At common law, in an action to recover against an infant for necessaries, the declaration is required to contain only counts as in an action for debt for board and lodging or goods furnished,[17] and it is not necessary to allege that there were no persons on whom the law placed the responsibility for the necessaries.[18] No additional requirements are imposed by code provisions[19] and a complaint is sufficient if it contains allegations which would have rendered a declaration sufficient at common law.[20] However, where a declaration on a note shows that the maker was an infant, but does not allege that the note was given for necessaries, the suit may be dismissed on demurrer.[21]

If defendant sets up infancy as a defense plaintiff in his replication must allege that the articles furnished were necessaries.[22] In one state, in order to raise the question whether or not a contract is one for necessaries, a minor defendant must do so by an affidavit of defense.[23]

c. Verification of Pleadings

Ordinarily, and in the absence of a statutory provision to the contrary, the necessity, or lack of necessity, of verification of a pleading is the same where the pleading is that of an infant represented by next friend or guardian ad litem as where it is that of another person; but the verification is made by the next friend or guardian ad litem and not by the infant.

A petition or complaint in an action by an infant may be verified by his next friend or guardian ad litem.[24] Generally speaking, an infant suing by next friend or guardian ad litem does not[25] and may not[26] verify the petition or complaint. It has been held, however, that, if an infant plaintiff is old enough to understand the obligation of an oath, he should be required to verify the petition in accordance with the statutory provisions, but that the rule is otherwise if the infant is of tender years.[27]

Where a decree recites that the cause came on to be heard on the answer of the guardian ad litem for an infant defendant, it will be presumed that the answer was sworn to, although there is no evidence of the fact on record.[28] A merely formal answer of a guardian ad litem submitting the rights of the infant to the protection of the court need not be under oath.[29]

Answer under oath as evidence. An infant's answer on oath, by his guardian, is not evidence either in his favor[30] or against him.[31]

Execution of instruments. Although defendant is a minor and answers by a guardian ad litem, the execution of written instruments averred in the petition is admitted unless denied under oath;[32] but the verified general denial of the guardian ad litem puts in issue the execution of a written instrument.[33]

14. N.Y.—Hook v. Harmon Nat. Real Estate Corporation, 297 N.Y.S. 79, 162 Misc. 751, affirmed 295 N.Y.S. 249, 250 App.Div. 689, 251 App.Div. 722.

15. Ill.—First Trust Joint Stock Land Bank of Chicago v. Cutler, 12 N.E.2d 705, 293 Ill.App. 354.

16. Ala.—Fant v. Cathcart, 8 Ala. 725.
31 C.J. p 1160 note 28.

17. N.Y.—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.
31 C.J. p 1161 note 35.

18. N.Y.—In re Taylor, supra.
31 C.J. p 1161 note 36.

19. Mo.—Gibbs v. Poplar Bluff Light & Power Co., 125 S.W. 840, 142 Mo.App. 19.
N.Y.—Goodman v. Alexander, 59 N.E. 145, 165 N.Y. 289, 55 L.R.A. 781, 31 N.Y.Civ.Proc. 342, reversing 50 N.Y.S. 884, 28 App.Div. 227.

20. N.Y.—In re Taylor, 275 N.Y.S. 934, 153 Misc. 673.

21. Ga.—Latham v. Kolb, 76 Ga. 291.

22. Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 536, 72 Mont. 166, citing **Corpus Juris.**
31 C.J. p 1161 note 37.

23. Pa.—Torbin v. Eber, 39 Lack. Jur. 20.

24. Wis.—Phillips v. Postage Transit Co., 118 N.W. 539, 137 Wis. 189.
31 C.J. p 1161 note 51.

25. N.Y.—Goishen v. Samor Realty Co., 4 N.Y.S.2d 107, 167 Misc. 477.
Inapplicability to infant of general statute requiring party to verify pleading see the C.J.S. title Pleading § 355, also 49 C.J. p 593 note 63.

26. Ohio.—Menke v. Motor Car Co., 21 Ohio N.P.,N.S., 534.

27. Ky.—Goins v. Herndon, 5 Ky.Op. 70.

28. Va.—Durrett v. Davis, 24 Gratt. 302, 65 Va. 302.

29. Miss.—Johnson v. McCabe, 42 Miss. 255.
31 C.J. p 1162 note 54.

30. N.Y.—Bulkley v. Van Wyck, 5 Paige 536.

31. Md.—Harris v. Harris, 6 Gill & J. 111.
31 C.J. p 1162 note 57.

32. Kan.—McLean v. Webster, 26 P. 10, 45 Kan. 644.

33. Okl.—Sims v. Hedges, 123 P. 155, 32 Okl. 683.

d. Issues, Proof, and Variance

Although they are applied as against the adverse party, the ordinary rules as to issues and proof are sometimes relaxed or not applied as against an infant party.

In actions by or against infants or their representatives, the courts sometimes apply general rules dealing with issues and proof, such as the rules that the issues are confined to such matters as are sufficiently raised by the pleadings,[34] that a general denial in the answer puts in issue every allegation of the complaint or petition,[35] but ordinarily does not put in issue facts not alleged,[36] and that evidence, otherwise competent, is admissible[37] or inadmissible[38] according as it does or does not relate to matters within the issues raised by the pleadings; and it is true that the courts will apply general rules as against an adult party opposed to an infant, as by requiring proof of a new promise after majority alleged by him in the replication,[39] excluding evidence of a matter not pleaded by him,[40] and giving effect to an admission arising from his failure to deny an allegation in the pleading of the infant or late infant.[41] However, general rules are frequently relaxed or not applied as against an infant party. In an action against an infant all the facts entitling plaintiff to judgment must be sustained by proof,[42] whatever the answer may be,[43] whether it denies[44] or fails to traverse[45] the allegations of the petition or complaint, and even though there is a guardian;[46] and the necessity of establishing the case as against an infant party cannot be obviated by making him a plaintiff.[47] An infant defendant, in a suit to enforce a vendor's lien, has been allowed to show a waiver of the lien without specially pleading it.[48]

Necessity of answer in behalf of infant defendant to put case at issue is discussed supra subdivision a (2) (a) of this section. Verified denial of execution of written instrument, or lack of such denial, as putting in issue or admitting execution is discussed supra subdivision c of this section. Proof of ratification without allegation thereof is discussed supra subdivision b (3) of this section.

Infancy and representation of infant party. Where suit is brought by next friend, it is proper to prove the infancy of the real plaintiff and hence his right to sue in this manner.[49] Infancy as a ground of relief must be proved,[50] unless it is admitted by the adverse party;[51] but it has been held that, although in an action prosecuted by next friend the answer denies the infancy of plaintiff, he need not prove that he is an infant where his right of action does not depend on that fact.[52] Where a suit is brought by guardian or next friend, a plea

34. Ill.—Bliss v. Perryman, 2 Ill. 484.

35. Okl.—Sims v. Hedges, 123 P. 155, 32 Okl. 683.
31 C.J. p 1162 note 67.

36. Ala.—Sanders v. Williams, 50 So. 893, 163 Ala. 451.
31 C.J. p 1162 note 68.

Counterclaim
In infant's action to recover money paid on purchase price of automobile, counterclaim for damage resulting to defendant from plaintiff's misrepresentation of age was not available under general issue to common counts.—Drennen Motor Car Co. v. Smith, 169 So. 761, 235 Ala. 275.

37. N.J.—Brinkmann v. Dorsey Motors, 1 A.2d 473, 121 N.J.Law 115, affirmed 5 A.2d 686, 22 N.J.Law 378.
31 C.J. p 1162 note 64.

In absence of special exception to the pleading or objection to the testimony, an infant's allegation that he had paid certain sum on purchase price of cash register would warrant proof that part of payment was made by trading in old cash register, in lieu of money, for a specified agreed amount.—Lockhart v. National Cash Register Co., Tex.Civ.App., 66 S.W.2d 796.

Written notice of disaffirmance of a deed executed by a minor may be given in evidence under a pleading which alleges disaffirmance either in general terms or by setting out such notice specially.—George v. Brooks, 94 Ind. 274.

38. Mass.—Kelly v. Halox, 152 N.E. 236, 256 Mass. 5.
31 C.J. p 1162 note 63.

39. Ala.—Fant v. Cathcart, 8 Ala. 725—Dockery v. Day, 7 Port. 518.

40. Mont.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.

41. N.C.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 429.

42. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
N.J.—Anderson v. Anderson, 32 A.2d 83, 133 N.J.Eq. 211.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, 175, quoting **Corpus Juris**, and reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
31 C.J. p 1163 note 87.

Law requires introduction of evidence either for or against minors whose rights are to be considered.—Kroot v. Liberty Bank of Chicago, 30 N.E.2d 92, 307 Ill.App. 309.

43. Ill.—Tymony v. Tymony, 163 N. E. 393, 331 Ill. 420.

44. Ark.—Baker v. Boyd, 119 S.W.2d 524, 196 Ark. 563.

45. Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 669.
31 C.J. p 1163 note 89.

46. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.

47. Ill.—Leonard v. Chicago Title & Trust Co., supra.
Tex.—Dial v. Martin, Civ.App., 37 S. W.2d 166, 175, quoting **Corpus Juris**, and reversed on other grounds Martin v. Dial, Com.App., 57 S.W. 2d 75, 89 A.L.R. 571.
31 C.J. p 1163 note 88.

48. Fla.—Lucas v. Wade, 31 So. 231, 43 Fla. 419.

49. Cal.—Todd v. Orcutt, 183 P. 963, 42 Cal.App. 687.
Iowa.—Byers v. Des Moines Valley R. Co., 21 Iowa 54.

50. Ky.—Harlan County Bd. of Education v. Hensley, 144 S.W. 63, 147 Ky. 441, 42 L.R.A.,N.S., 643.
31 C.J. p 1163 note 95.

51. Md.—Boyd v. Boyd, 6 Gill & J. 25.

52. Minn.—Meyerberg v. Eldred, 35 N.W. 371, 37 Minn. 503.

of the general issue[53] or of accord and satisfaction[54] admits plaintiff's infancy, and hence it need not be proved. Also, the truth of a plea of infancy is admitted by a replication setting up a new promise by defendant after reaching majority, and hence need not be proved.[55]

In an action by an infant it is not necessary to make proof of the appointment of a guardian ad litem,[56] unless defendant makes the objection that no such appointment has been made.[57] There is no fatal variance between an allegation in the petition that plaintiff's next friend was appointed by the court and the fact that he was appointed by the clerk of court in vacation.[58] Also, a variance in the name of an infant defendant as stated in the complaint and in the petition for the appointment of a guardian ad litem will be disregarded when it is not pretended that neither is the true name.[59]

In some cases, it has been held that evidence of infancy may be given under the general issue;[60] but it has also been held that it may not be proved under a plea of nil debit,[61] although it may be proved under a plea of non assumpsit.[62] The necessity of pleading defense of infancy is discussed supra subdivision b (2) of this section.

Where there are several issues, one of which is on the plea of infancy, and that is found for defendant, it disposes of the whole case, and entitles defendant to a judgment; and the jury need not pass on the other issues.[63]

§ 117. Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency
d. Preservation of evidence in record

a. Presumptions and Burden of Proof

Ordinarily, presumptions are indulged in favor of, but not against, infants. However, infancy as a ground of relief is not presumed; and the party, whether plaintiff or defendant, who relies on infancy at the time of a contractual transaction to defeat such transaction has the burden of proving it, while the adverse party has the burden of proving ratification or other matter rendering the contract binding notwithstanding the infancy.

Ordinarily, no presumption against an infant can be permitted,[64] but, on the contrary, every presumption is indulged in his favor.[65] However, infancy

53. Ind.—Linnville v. Earlywine, 4 Blackf. 469.
31 C.J. p 116 note 93.

54. Ala.—Hubbert v. Collier, 6 Ala. 269.

55. Ala.—Fant v. Cathcart, 8 Ala. 725.
31 C.J. p 1160 note 29.

56. N.Y.—Strong v. Jenkins, 15 N.Y. S. 120, 21 N.Y.Civ.Proc. 9.

Superfluous allegation

Where an allegation as to prosecution of the suit by next friend may be treated as surplusage, the petition otherwise showing adequate representation, proof of appointment as next friend is unnecessary.—State ex rel. Missouri Pac. R. Co. v. Cox, 267 S.W. 382, 306 Mo. 27.

57. N.Y.—Strong v. Jenkins, 15 N.Y. S. 120, 21 N.Y.Civ.Proc. 9.

58. Mo.—Adams v. St. Louis-San Francisco Ry. Co., App., 251 S.W. 124.

59. N.Y.—Varian v. Stevens, 9 N.Y. Super. 635.

60. Me.—Cutts v. Gordon, 13 Me. 474, 29 Am.D. 520.
31 C.J. p 1162 note 69.

61. U.S.—Young v. Bell, D.C., 30 F. Cas.No.18,152, 1 Cranch C.C. 342.
31 C.J. p 1162 note 70—8 C.J. p 932 note 75.

62. U.S.—Young v. Bell, supra.

63. Ohio.—Rohrer v. Morningstar, 18 Ohio 579.

64. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561—Tanner v. Schultz, 223 P. 174, 97 Okl. 132.
Tex.—Dial v. Martin, 37 S.W.2d 166, 175, quoting **Corpus Juris**, and reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
31 C.J. p 1163 note 85.

Execution of power of attorney

Where voluntary partition was made of land at a time when claimants thereto were minors, a presumption cannot be entertained that claimants executed powers of attorney or other authority to represent them which they were incapable in law of executing.—Hinnant v. Rodriguez, Tex.Civ.App., 255 S.W. 1000, affirmed, Com.App., 267 S.W. 471.

Consideration

(1) Contract of infant does not import consideration so as to cast burden on him of proving want of consideration or dispense with proof of adequate consideration to support it against him or his representative.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J.Eq. 203.

(2) Since prima facie an infant is not liable on a note given during infancy, no presumption of legality of consideration as to such a note attaches.—Swoboda v. Nowak, 255 S.W. 1079, 213 Mo.App. 452.

Knowledge at time of reaching lawful age

One suing to repudiate a contract entered into during his minority will not be presumed to have known of defects in the contract at the time of reaching his lawful age.—Miller v. McAden, Tex.Civ.App., 253 S.W. 901.

Intention to ratify will not be inferred from an act which may be otherwise explained.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.

Consent to transfer of property by inheritance

One's consent on his becoming of age to transfer of property to him by inheritance while a minor is not so readily presumed as would be an act in ratification of contract by minor, since in case of contract minor would have full and complete knowledge of transaction.—Banking Commission of Wisconsin v. Hamilton, 281 N.W. 693, 229 Wis. 89.

65. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561—Tanner v. Schultz, 223 P. 174, 97 Okl. 132—In re Hildebrand, 197 P. 445, 81 Okl. 197.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, 175, quoting **Corpus**

as a ground of relief is never presumed;[66] and, when nothing appears to the contrary, persons entering into an agreement are presumed to be adults, and competent to contract.[67]

In an action by or against an infant, the rules applicable in civil actions generally govern the burden of proof.[68] Whether asking for affirmative relief[69] or interposing an affirmative defense,[70] the party who relies on infancy, at the time of the act or transaction in question,[71] for the purpose of attacking and defeating such act or transaction,[72] has the burden of proving infancy at that time. On the other hand, the party who asserts that a contract is binding has the burden of proving matters in avoidance of the infancy asserted, by the adverse party,[73] such as fraudulent concealment or misrepresentation of age,[74] ratification after reaching majority,[75] or engaging in trade.[76] It is sufficient for plaintiff to show a new promise or ratification since the making of the contract without showing that defendant was of age at the time, and it then devolves on defendant to prove that he was an infant when he made the alleged ratification if he claims that such was the fact.[77] Where it is alleged that a defendant at the time of the transaction in question was in business holding himself out as of full age, and concealed from plaintiff the fact of his infancy, and defendant alleges that plaintiff knew of his infancy, which plaintiff denies, the burden of proof is on defendant to show such knowledge on the part of plaintiff.[78]

As to necessaries. A person seeking to recover for necessaries furnished an infant has the burden of proving that the things furnished were necessaries[79] suitable to the infant's station and circum-

Juris, and reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

Acceptance of beneficial settlement

Where a voluntary settlement is made for the benefit of minors, an acceptance is presumed. See Penn Mut. Life Ins. Co. v. Forbes, 200 Ill. App. 441.

66. Ky.—Harlan County Bd. of Education v. Hensley, 144 S.W. 63, 147 Ky. 441, 42 L.R.A.,N.S., 643.
31 C.J. p 1163 note 95.

67. Okl.—McKeever v. Carter, 157 P. 56, 53 Okl. 360.
31 C.J. p 1163 note 98.

68. N.Y.—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S. 995, 240 App.Div. 1028.
R.I.—Misch v. Montgomery, 200 A. 999, 61 R.I. 345, reheard 3 A.2d 816, 62 R.I. 142.
31 C.J. p 1162 note 76 [a], [b].

Excuse for not restoring cash received

Where a minor mortgaged an automobile for two hundred dollars, receiving one hundred dollars in cash and a check for one hundred dollars, and the evidence in his suit to recover value of the car after attaining his majority and repudiating the transaction showed that he had parted with the check in payment of a garage bill, the burden was on him to show facts excusing him from restoration of the cash received.—Whitman v. Allen, 121 A. 160, 123 Me. 1, 36 A.L.R. 776.

Termination of infant's title

Where infants' original title to securities was admitted, alleged bona fide purchaser of securities had burden of establishing that such title was terminated and became vested in some one other than the infants.—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738.

Creation of agency

Where infants signed names, at request of their father and natural guardian without any explanation as to nature of transaction, on documents regarding benefits of deposit agreement in respect of infants' bonds, alleged bona fide purchaser of bonds had burden of establishing creation of supposed agency in father by infants.—Application of Goodchild, supra.

69. Okl.—Camp v. Whitney, 12 P.2d 500, 158 Okl. 32—Brown v. Miller, 215 P. 748, 89 Okl. 287.

70. R.I.—Wike v. Edwards, 160 A. 782.

71. Ky.—Pinnacle Motor Co. v. Daugherty, 21 S.W.2d 1001, 231 Ky. 626.

72. Okl.—Caton v. Brubaker, 236 P. 420, 108 Okl. 268.
31 C.J. p 1163 note 99, p 1164 note 1.

73. Iowa.—Harrison v. Burnes, 51 N. W. 165, 84 Iowa 446.
31 C.J. p 1164 note 7.

74. Iowa.—Harrison v. Burnes, supra.
Ky.—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.
La.—Smith v. Hempen, 8 La.App. 120.

75. La.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.
N.J.—Hermenau v. Zazzarino, 155 A. 459, 108 N.J.Eq. 451.
N.Y.—Washington St. Garage v. Maloy, 248 N.Y.S. 467, 230 App.Div. 266—Saxe v. Neil, 224 N.Y.S. 660, 221 App.Div. 492—Hook v. Harmon Nat. Real Estate Corporation, 297 N.Y.S. 79, 162 Misc. 751, affirmed 295 N.Y.S. 249, 250 App.Div. 889, 251 App.Div. 722—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.
31 C.J. p 1066 note 93.

76. Iowa.—Harrison v. Burnes, 51 N. W. 165, 84 Iowa 446.
La.—Holliday v. Marionneaux, 9 Rob. 504.

Statutory conditions

Where, under statute, in order to hold an infant on a contract not made for necessaries, it must appear not only that he was practicing a profession or trade, or was engaged in a business, but also that he had the permission of his parent or guardian or of the law to do so, and that the contract was connected with that profession, trade, or business, the burden of proving the existence of all these conditions rests on the party asserting the validity of the contract.—James v. Sasser, 60 S.E. 329, 3 Ga.App. 568.

77. N.Y.—Bigelow v. Grannis, 4 Hill 206—Bay v. Gunn, 1 Den. 108.

78. Ky.—Adam Roth Grocery Co. v. Hopkins, 29 S.W. 293, 16 Ky.L. 678.

79. Miss.—Williams v. Pool, 110 So. 224, 114 Miss. 459.
Mo.—De Woody v. Goss, App., 86 S. W.2d 194.
N.Y.—Stetson v. Russell, 225 N.Y.S. 139, 130 Misc. 713.
31 C.J. p 1081 note 88.

Instruction or education

(1) Lessor seeking to recover on contract leasing rooms to minor college student had burden of proving that college education was necessary.—Moskow v. Marshall, 171 N.E. 477, 271 Mass. 302.

(2) In action to recover tuition fees paid by plaintiff when a minor for course of electrical instruction, defendant had burden to prove such

stances;[80] that they were furnished under circumstances creating an obligation on the part of the infant to pay therefor;[81] and the reasonable value thereof.[82] In the absence of proof to the contrary, the presumption is that repairs on an infant's automobile are not necessaries.[83] While in some jurisdictions it has been held that, where the defense is that the infant was already supplied with necessaries, the burden of proof is on defendant to establish that fact,[84] in other jurisdictions it has been held that the person seeking recovery has the burden to prove that the necessaries, or the money therefor, were not already supplied.[85] The law presumes that a minor is supplied by his parents with necessaries, as long as the minor continues to live with them;[86] and plaintiff has the burden of proving the inability or refusal of the father to furnish the necessaries in question.[87] When the infant has been furnished with money sufficient to supply him with necessaries, the presumption is that he has been fully supplied from that fund, and the burden is on the person claiming for necessaries furnished on credit to rebut that presumption.[88]

In an action by a minor to recover damages for personal injuries, including medical expense incurred, he has the burden of proving special facts rendering him liable for such expense notwithstanding his minority.[89]

b. Admissibility

General rules of evidence govern the admissibility of evidence in an action by or against an infant or a person claiming to have been an infant at the time of the transaction involved in the suit.

The rules applicable in civil actions generally govern the admissibility of evidence in an action by or against an infant.[90] In accordance with such rules, particular evidence may be held admissible,[91] while other evidence may be held inadmissible.[92] An infant is not bound by the admissions of an adult codefendant;[93] and the answer of complainant to the cross bill of adult defendants, stating the consideration of a note sued on, cannot be taken as proof against infant defendants.[94] The admissibility of admissions of an infant is discussed in Evidence § 313, and of guardian ad litem or next friend in Evidence § 319. The question of whether an infant is bound by his admissions is considered supra § 22.

School census reports are admissible on the issue of whether or not a person was an infant at the time he executed a deed;[95] and, where there is reasonable doubt concerning his age, evidence of his acts, conduct, and appearance is admissible.[96] Also, when the defense of infancy rests on the uncorroborated testimony of defendant, his physical appearance, in connection with all the other circumstances of the case, may be considered by the jury in determining whether or not his testimony is de-

nstruction was a necessary.—Crandall v. Coyne Electrical School, 256 Ill.App. 322.

80. Miss.—Williams v. Pool, 110 So. 224, 144 Miss. 459.

81. Mo.—De Woody v. Goss, App., 86 S.W.2d 194.
31 C.J. p 1081 note 88.

Lack of other way of obtaining necessaries

Plaintiff has burden of proving that defendant had no way of obtaining the thing claimed to be a necessary except by his own contract.—Moskow v. Marshall, 171 N. E. 477, 271 Mass. 302—L. P. Hollander Co. v. Porter, 166 N.E. 724, 267 Mass. 378.

82. Mo.—O'Donniley v. Kinley, 286 S.W. 140, 220 Mo.App. 284.

83. N.Y.—Egnaczyk v. Rowland, 267 N.Y.S. 14, 148 Misc. 889.

84. Tex.—Parsons v. Keys, 43 Tex. 557.

85. Miss.—Brent v. Williams, 30 So. 713, 79 Miss. 355.
31 C.J. p 1081 note 90.

86. Mo.—Perrin v. Wilson, 10 Mo. 451.
S.C.—Jones v. Colvin, 26 S.C.L. 14.

87. N.Y.—Stetson v. Russell, 225 N. Y.S. 139, 130 Misc. 713.

88. Ga.—Nicholson v. Wilborn, 13 Ga. 467.

89. Tex.—Bering Mfg. Co. v. Peterson, 67 S.W. 133, 26 Tex.Civ.App. 194.

90. N.Y.—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S. 995, 240 App.Div. 1028.
31 C.J. p 1162 note 77.

91. N.Y.—Sneze v. National Acc. Soc., 231 N.Y.S. 589, 133 Misc. 406.
Tex.—Newberry v. Johnson, Civ.App., 274 S.W. 667.
31 C.J. p 1162 note 77 [c].

Wages or value of time lost

(1) In an action by a minor for damages for personal injuries, evidence of wages received by plaintiff prior to injury is admissible only as tending to establish probable loss in earning capacity after plaintiff should attain her majority.—Willis v. Schertz, 175 N.W. 321, 188 Iowa 712.

(2) However, there was evidence of the minor's emancipation, testimony of time lost by him and the value thereof was properly admitted.—Central of Georgia Ry. Co. v. McNab, 43 So. 222, 150 Ala. 332.

Depriving infant of testimony otherwise available to him

The judiciary should not permit an assumed authority on part of mother or lawyer, or misadvertence of either, to deprive an infant of testimony otherwise available to him in the prosecution of litigation in his behalf.—Lee v. Leibold, 79 P.2d 1049, 102 Colo. 408, 116 A.L.R. 1319.

92. Ark.—Bailey v. Runyan, 27 S. W.2d 1020, 181 Ark. 755.
Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.
Iowa.—Perry Auto Co. v. Mainland, 294 N.W. 281, 229 Iowa 187.
Mich.—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551.
Or.—Blomquist v. Jennings, 250 P. 1101, 119 Or. 691.
Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Meakin, Civ.App., 146 S.W. 1057.
31 C.J. p 1162 note 77 [a], [b], [d].

93. W.Va.—Holderby v. Hagan, 50 S.E. 437, 57 W.Va. 341, 4 Ann.Cas. 401.

94. Ind.—Campbell v. Campbell, 1 Ind. 220.

95. Ky.—Adkins v. Bently, 197 S.W. 1086, 177 Ky. 616.

96. Ark.—Moore v. Smith, 155 S.W. 2d 572, 202 Ark. 1197.

serving of credit.[97] Evidence to prove the age of a person generally is discussed in Evidence §§ 169, 227b, 493, 609. The intelligence of a person who disaffirmed a deed executed during infancy may be considered in determining whether or not disaffirmance was within a reasonable time after attainment of majority.[98]

On question of ratification. Ratification may be shown by circumstantial evidence;[99] and evidence explanatory of what occurred after the infant reached majority has been held admissible on the issue of ratification,[1] as has other evidence;[2] but a transcript of the late infant's testimony before a referee in bankruptcy is inadmissible where it does not meet the statutory requirements of a valid ratification and does not appear to have any probative value on the question of ratification.[3]

A deposition cannot be read against an infant where it does not appear that the guardian ad litem was served with notice.[4] It would seem that a motion may be entertained for the purpose of obtaining an order for the examination of infants under a statute relating to the taking of testimony by deposition before an action is begun and for the appointment of a special guardian for the infant so as to bind him with such notice as will permit the reading of the depositions in any actions that may be brought in which the infant may be interested.[5] In some jurisdictions, by force of statute, where the only defendant against whom a deposition is to be read is under the disability of infancy alone, the deposition must be taken on interrogatories except in certain stated proceedings;[6] and, under the statutes of other states a deposition cannot be read in a suit for the lease or sale of the land of an infant, unless taken in the presence of the guardian ad litem or on interrogatories agreed on by him,[7] but such provision does not apply to suits against infants generally.[8] If a deposition is taken in a case to which an infant is a party, before it is at issue, and it does not appear to have been taken de bene esse and there is reason to believe that there was collusion between the guardian ad litem or next friend of the infant and the adverse party, the deposition will be rejected.[9] It is no valid objection to proceedings against an infant that depositions were taken before the same person as commissioner who was the guardian ad litem of the infant.[10]

c. Weight and Sufficiency

Clear or strict proof is required to establish infancy or a matter in avoidance thereof; doubtful evidence is insufficient.

In an action by a minor to recover for personal injuries, he has the burden of proving his case by a fair preponderance of the evidence.[11] On the other hand, strict proof is required against infants.[12] Clear, certain, and unequivocal evidence is required to prove estoppel[13] or a partnership[14] on the part of a minor. Also, an intention to ratify must be clearly and unequivocally shown;[15] and, if there is a doubt respecting ratification, the person against

97. N.Y.—Waterman v. Waterman, 85 N.Y.S. 377, 42 Misc. 195, 14 N.Y.Ann.Cas. 276—Gabarski v. Simkin, 73 N.Y.S. 199, 36 Misc. 195.

98. Ga.—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245.

99. W.Va.—Hobbs v. Hinton Foundry, Machine & Plumbing Co., 82 S.E. 267, 74 W.Va. 443, Ann.Cas. 1917D 410.
31 C.J. p 1066 note 98.

1. N.C.—Owens v. Phelps, 95 N.C. 286.

2. Mass.—McDonald v. Sargent, 51 N.E. 17, 171 Mass. 492.
31 C.J. p 1066 note 96 [a].

Retention or offer to restore proceeds of contract

Retention, after maturity, of proceeds of contract, made during infancy, is admissible as evidence of ratification, and offer to restore such proceeds is admissible as tending to negative ratification.—Bryan v. First Nat. Bank, 114 So. 576, 217 Ala. 50.

3. Me.—Sawyer Boot & Shoe Co. v. Braveman, 155 A. 290, 126 Me. 70.

4. W.Va.—Queen v. Caldwell, 164 S.E. 35, 113 W.Va. 215.
31 C.J. p 1164 note 10.

5. N.Y.—In re New York Central R. Co., 44 N.Y.S.2d 104, reversing 41 N.Y.S.2d 614.

6. Ky.—Womble v. Price's Guardian, 66 S.W. 370, 112 Ky. 533, 23 Ky.L. 1939, petition denied 67 S.W. 9.
31 C.J. p 1164 note 15.

7. Va.—Moore v. Triplett, 22 S.E. 69.
W.Va.—Hurst v. Coe, 3 S.E. 564, 39 W.Va. 158.

8. Va.—Moore v. Triplett, 22 S.E. 69.

9. Tenn.—Gaugh v. Henderson, 2 Head 628.
31 C.J. p 1164 note 13.

10. Va.—Durrett v. Davis, 24 Gratt. 302, 65 Va. 302.

11. R.I.—Misch v. Montgomery, 200 A. 999, 61 R.I. 345, reheard 3 A.2d 816, 62 R.I. 142.

12. Ill.—Rhoads v. Rhoads, 43 Ill. 239.
31 C.J. p 1162 note 87 [a].

13. Mo.—Gerkey v. Hampe, App., 274 S.W. 510.

14. Mo.—Gerkey v. Hampe, supra.

15. La.—International Accountants Soc. v. Santana, 117 So. 768, 166 La. 671, 59 A.L.R. 276, affirming 7 La.App. 594.

Strong evidence

Before a court of equity will imply an adoption of a void contract, involving a mineral grant to a minor's land, the evidence should be very strong, and the position of the ward in denying adoption after attaining majority revoltingly unjust and inconsistent with his conduct toward the other parties to the contract.—Cosden Oil & Gas Co. v. Hendrickson, 221 P. 86, 96 Okl. 206.

Inconclusive evidence

Communications from vaudeville performer to theatrical manager, shortly after performer attained majority, remitting commissions on wages earned during minority, are not conclusive on issue of ratification of contract for performer's services.—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.

whom the ratification is claimed must have the benefit of the doubt.[16]

In regard to the sufficiency of evidence required to establish or show infancy, it has been held that it should be established by clear evidence,[17] by clear and satisfactory evidence,[18] or by a preponderance of the evidence.[19] Also, it has been held that strict proof of nonage is required of a person who, when near majority, publicly transacted business as though of full age and held himself out as such.[20] Doubtful evidence is insufficient;[21] but, in the absence of evidence to the contrary, defendant's answer stating that plaintiff is a minor and exhibits showing the signature of plaintiff as a minor are sufficient proof of minority;[22] and the positive testimony of witnesses as to the minority of a party is not overcome by his misrepresentation of his age.[23]

The evidence in a particular case may be sufficient or insufficient according as it meets, or fails to meet, the requirements of the pertinent rule.[24]

16. La.—Kothe v. Von Behren, App., 5 So.2d 571.

17. U.S.—Moore v. Sawyer, C.C.Okl., 167 F. 826.
Okl.—Bell v. Bearman, 133 P. 188, 37 Okl. 645.

18. Va.—McCauley v. Grim, 79 S.E. 1041, 115 Va. 610.

19. Okl.—Tyrell v. Shaffer, 174 P. 1074, 70 Okl. 228, certiorari granted 39 S.Ct. 19, 248 U.S. 556, 63 L.Ed. 420, affirmed 39 S.Ct. 258, 249 U.S. 582, 63 L.Ed. 787.

20. La.—Davis v. Coan, 14 La. 257. 31 C.J. p 1164 note 6 [a].

21. Ky.—Walker v. Walker, 69 S.W. 2d 716, 253 Ky. 378.

22. Ill.—Lewellyn v. Hawkins, 253 Ill.App. 368.

23. Ark.—Foreman v. Dickinson, 6 S.W.2d 829, 177 Ark. 121.

24. Evidence held sufficient
(1) To justify for support judgment for plaintiff.
Ga.—Stephens v. Wilson, 197 S.E. 350, 58 Ga.App. 24.
Okl.—Johnson v. Estill, 223 P. 121, 97 Okl. 125.

(2) To show infancy.—Collins v. Peters Real Estate Improvement Corporation, 252 Ill.App. 348—31 C.J. p 1164 note 4 [a] (1).

(3) To show infancy at time of execution of deed.
Ark.—Tays v. Johnson, 292 S.W. 122, 173 Ark. 223.
Ky.—Hart v. Davidson, 120 S.W.2d 214, 274 Ky. 663—Mitchell v. Swartz, 270 S.W. 22, 207 Ky. 780.
Tex.—Teat v. Jones, 89 S.W.2d 987, 126 Tex. 480, affirming Jones v. Teat, Civ.App., 57 S.W.2d 617.

(4) To sustain finding of majority at time of execution of deed.—Moore v. Smith, 155 S.W.2d 572, 202 Ark. 1197—31 C.J. p 1164 note 4 [a] (2), (3), (5).

(5) To support implied finding, in connection with general finding, that plaintiff was over eighteen years of age at time she executed deed.—Smart v. Billings, 35 P.2d 923, 169 Okl. 26.

(6) To show that purchaser knew of infancy of mortgagee.—Faircloth v. Johnson, 127 S.E. 346, 189 N.C. 428.

(7) To support finding that defendant's agent knew of infancy of person to whom he sold automobile.—Snodderly v. Brotherton, 21 P. 2d 1036, 173 Wash. 86.

(8) To warrant finding that infant represented that he was of age.—Eckrich v. Hogan Bros., 263 N.W. 308, 220 Iowa 755.

(9) To show that plaintiffs knew that they could not enter into a legal contract and that they endeavored to and did deceive defendants as to their age, except for which defendants would not have made the contract.—Young v. Daniel, 255 S.W. 854, 201 Ky. 65.

(10) To sustain finding that infant did not misrepresent his age.—Pinnacle Motor Co. v. Daugherty, 21 S.W.2d 1001, 231 Ky. 626—Marceiliac v. Stevens, 267 S.W. 229, 206 Ky. 383—31 C.J. p 1162 note 78 [a] (3).

(11) To show that contract to purchase trousseau was made by daughter and not by her father.—Moskovitz v. Kerman Stores Co., 259 Ill. App. 480.

(12) To justify setting aside assignment on ground that eighteen-year-old girl had been misled, placed under influence of liquor, and induced to execute assignment when not in a condition to exercise reasonable judgment.—Waldrep v. Merkle, D.C.Okl., 38 F.Supp. 165.

(13) To justify or sustain judgment allowing plaintiff to recover sum paid under contract and disaffirming, or terminating all liability under contract on ground that plaintiff was under twenty-one years of age at time of entering into contract.
Ill.—Bryniarski v. Peoples Finance Co., 5 N.E.2d 621, 287 Ill.App. 634.
Iowa.—Roeper v. Danese, 221 N.W. 506, 206 Iowa 964.

(14) To sustain or justify verdict or finding denying disaffirmance.
Ark.—Bailey v. Runyan, 27 S.W.2d 1020, 181 Ark. 755.
Wash.—Stone v. Knutzen, 265 P. 161, 147 Wash. 54.

(15) To show disaffirmance or rescission by infant.
Cal.—Spencer v. Collins, 104 P. 320, 156 Cal. 298, 20 Ann.Cas. 49.
Ill.—General Motors Acceptance Corporation v. Vaughn, 193 N.E. 483, 358 Ill. 541.

(16) To sustain finding that late infant did not intend to disaffirm deed.—Holden v. Murphy, Tex.Civ. App., 62 S.W.2d 189, error refused.

(17) To sustain a verdict that the contract was repudiated within a reasonable time.—Miller v. McAden, Tex.Civ.App., 253 S.W. 901.

(18) To sustain verdict refusing cancellation for failure to disaffirm within reasonable time after majority.—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245.

(19) To show ratification.—Smith v. Mooney, 85 A. 619, 76 N.H. 521—31 C.J. p 1066 note 93 [a].

(20) To sustain finding that minor had returned the entire consideration received by him.—La Baron v. Berryessa Cattle Co., 248 P. 779, 78 Cal. App. 536—31 C.J. p 1162 note 78 [a] (10).

(21) To justify trial judge in believing that it was not within plaintiff's power to make restitution.—Shellabarger v. Jacobs, 45 N.E.2d 184, 316 Ill.App. 191.

(22) To show that plaintiffs who were minors when partition was made received their allotted shares in personalty after majority.—De Rodriguez v. Hinnant, Tex.Com.App., 267 S.W. 471, affirming Hinnant v. Rodriguez, Civ.App., 255 S.W. 1000.

(23) To warrant chancellor in concluding that contest of will giving bulk of property in trust for infant great-grandchildren was in good faith, and that compromise whereby such property was to be divided equally between the great-grandchildren and the testator's children was for the best interests of the infants.—Metzner v. Newman, 194 N.W. 1008, 224 Mich. 324, 33 A.L.R. 98.

(24) To establish market value of automobile involved at the time it was delivered by infant to another person.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.

(25) To show other matters see 31 C.J. p 1162 note 78 [a] (1), (2), (4)–(8), p 1164 note 4 [a] (4).

d. Preservation of Evidence in Record

Different rules obtain in different states as to the necessity of preserving in the record all the evidence necessary to establish a decree against an infant. Unless imposed by statute, no duty rests on a guardian ad litem in respect of preserving the evidence in the record.

In some jurisdictions it has been held that all the evidence necessary to establish a decree against an infant should be preserved in the record;[25] but, in other jurisdictions, it has been held that a decree against an infant will not be reversed simply because the evidence is not in the record.[26] In the absence of statute requiring it, the guardian ad litem is not in duty bound to preserve the evidence in the record.[27]

§ 118. Dismissal and Nonsuit

The dismissal of a suit by or against an infant may be allowed or denied in accordance with ordinary rules as qualified by considerations applicable when the interests of a minor are involved.

Subject to the limitation that a minor's rights cannot be prejudiced by neglect or dereliction of his next friend, a chancery rule respecting dismissal of a cause is as applicable to minors as to adults.[28] A suit or action brought on behalf of an infant by next friend may be dismissed by the court where it appears that the suit or action is not for the infant's interests,[29] or is against the wishes of the infant and his natural guardian and is not authorized by him or a court.[30] Also, where, in an action by a late infant against several defendants, it appears that the transaction in suit involved directly only plaintiff and one defendant, it is proper to dismiss such defendant's cross action, as well as plaintiff's action, against the other defendants.[31] However, a dismissal with prejudice against commencement of another action is beyond the jurisdiction of the court and void where it is made without a trial on, and determination of, the merits and is based on a settlement negotiated by the next friend and not approved by another court having jurisdiction of the estate of the infant,[32] even though the court finds it to be for the best interest of the minor that the case be settled rather than tried.[33] A minor suing

Evidence held insufficient

(1) To show infancy.—Leaman v. Schell, 39 N.Y.S.2d 417, 265 App.Div. 1041, appeal withdrawn 41 N.Y.S.2d 205, 266 App.Div. 662—31 C.J. p 1164 note 4 [b].

(2) To support finding that defendant did not appear to be twenty-one years of age when he borrowed money from plaintiff to buy land.—Kinnebrew v. McAfee, Tex.Civ.App., 272 S.W. 242.

(3) To show fraudulent misrepresentation of age.

Ill.—Shellabarger v. Jacobs, 45 N.E. 2d 184, 316 Ill.App. 191—Hauser v. Marmon Chicago Co., 208 Ill. App. 171.

Ky.—Hart v. Davidson, 120 S.W.2d 214, 274 Ky. 663.

(4) To sustain jury's finding that defendant disaffirmed within a reasonable time after majority a note executed during his minority.—Kinnebrew v. McAfee, Tex.Civ.App., 272 S.W. 242.

(5) To show why disaffirmance was not made before answering or within reasonable time after majority.—Robinson v. Roquemore, Tex. Civ.App., 2 S.W.2d 873.

(6) To show ratification after reaching majority.

Ky.—Elkhorn Coal Corporation v. Tackett, 88 S.W.2d 943, 261 Ky. 795.

N.J.—Hermenau v. Zamarino, 155 A. 459, 108 N.J.Eq. 451.

N.Y.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266—Farnum v. O'Neill, 252 N.Y.S. 900, 141 Misc. 555.

Tex.—Walker v. Stokes Bros. & Co., Civ.App., 262 S.W. 158.

31 C.J. p 1066 note 93 [b].

(7) To prove ratification by female minor after her marriage.—Kothe v. Von Behren, La.App., 5 So. 2d 571.

(8) To show that articles furnished infant were necessaries.

Ariz.—Worman Motor Co. v. Hill, 94 P.2d 865, 54 Ariz. 227, 124 A.L.R. 1363.

Miss.—Foster-McLaurin Furniture Co. v. Duvall, 106 So. 825, 141 Miss. 556.

Mo.—De Woody v. Goss, App., 86 S. W.2d 194.

(9) To establish a partnership between father and minor son or to raise estoppel against son.—Gerkey v. Hampe, Mo.App., 274 S.W. 510.

(10) To warrant determination that agency on behalf of infants existed so as to render applicable doctrine of estoppel.—Application of Goodchild, 290 N.Y.S. 683, 160 Misc. 738.

(11) To sustain finding that minor was hit in eye by missile fired from slingshot of playmate.—Misch v. Montgomery, 200 A. 999, 61 R.I. 345, reheard 3 A.2d 816, 62 R.I. 142.

(12) To show other matters see 31 C.J. p 1162 note 78 [b] (1)–(4), (6).

25. Ill.—Rhoads v. Rhoads, 43 Ill. 239.
31 C.J. p 1164 note 17.

26. Ind.—Bennett v. Welch, 15 Ind. 332.
31 C.J. p 1164 note 18.

27. Ark.—Price v. Hartzell, 205 S. W. 829, 135 Ark. 440.

28. Ala.—Alexander v. Alexander, 150 So. 142, 227 Ala. 322.

29. Ohio.—Hanna v. Titus, 39 N.E. 2d 556, 68 Ohio App. 127.
31 C.J. p 1126 note 99.

Statute so providing is codification of the common-law rule.—Hanna v. Titus, supra.

Before answer, defendant may move to dismiss on ground that the action is not for the benefit of the infant; the court may hear evidence on the issue raised; and, if evidence supports the motion, court may dismiss the petition.—Hanna v. Titus, supra.

After judgment and appeal, action by next friends may be dismissed if prosecution to final judgment is not for minors' benefit.—Jones v. Jones, 265 P. 66, 125 Kan. 403.

30. Ky.—Kash v. Kash's Guardian, 85 S.W.2d 866, 260 Ky. 377.

Affidavits in support of the motion to dismiss may be considered on the hearing of the motion.—Kash v. Kash's Guardian, supra.

31. Ky.—National Savings & Building Ass'n v. Hutchinson, 144 S.W. 2d 1029, 284 Ky. 408.

32. Okl.—Tucker v. Leonard, 291 P. 124, 144 Okl. 264—Tucker v. Leonard, 291 P. 135, 144 Okl. 258.

33. Okl.—Tucker v. Leonard, 291 P. 124, 144 Okl. 264—Tucker v. Leonard, 291 P. 135, 144 Okl. 258.

on a contract cannot properly be nonsuited on the ground that, until he reaches his majority and elects to ratify, no action can be maintained on the contract.[34]

While it is said that a next friend may dismiss the suit because he is himself liable for costs, it is also stated that it may well be questioned whether or not he can do so to the prejudice of the infant,[35] and it has been held that the infant cannot be estopped from subsequently suing on the same cause of action.[36] Neglect or dereliction of the next friend in allowing a dismissal of the suit ought not to be permitted to prejudice the rights or remedies of the minor; but application of this rule is not called for where there is no prejudice to such rights; and it is proper for the court to grant a motion of the next friend to dismiss where it is apparent from the history of prior litigation concerning the subject-matter and the lack of new proof that further litigation would be fruitless.[37] It may be proper, in view of the previous steps taken after the commencement of the action, to deny a motion for dismissal made by a guardian appointed for the express purpose of bringing suit, as where he has previously defeated a declaratory judgment proceeding on the ground of the pendency of the suit, a companion case has been adversely decided, and he has brought suit as next friend in another court on the same cause of action.[38]

Action against infant. Where an infant defendant has been personally served with process, the fact that another person has not also been served as required by statute furnishes no reason for dismissal of the action.[39] It is error to dismiss a suit against infant defendants after the filing of an answer and without a hearing on evidence where it appears from the answer that the infants claim their interests are identical or allied with those of plaintiffs, and consequently the dismissal is in fact a finding against the minors and their interests.[40] A suit must be continued where there are infant defendants interested therein notwithstanding infant plaintiffs are without interest.[41]

§ 119. Trial and New Trial

a. In general
b. Instructions and questions of law or fact
c. Reference
d. Verdict and findings

a. In General

Subject to specific statutory variation, and to such variation as is called for by the status of an infant litigant, ordinary rules govern the trial, and the grant or refusal of a new trial, in an action by or against an infant.

Notwithstanding the minority of one of the parties a lawsuit is a contest in which neither side is under any legal obligation to give to the other any information or assistance, save such as is exacted under the processes provided by law.[42] In case an infant appears by guardian and makes an issue, it may be noticed for trial at once like other issues.[43] An infant party cannot waive trial by jury.[44]

New trial. Under some statutes an infant defendant is entitled to a new trial for erroneous proceedings against him where the condition of defendant does not appear in the record nor the error in the proceedings.[45] When it appears in evidence that defendant, sued as an adult, is an infant, if the court renders judgment against defendant without requiring plaintiff to proceed against defendant as an infant, it should grant relief on a motion for a new trial.[46] While, under statute, the right of an infant to a new trial for certain specified reasons may be asserted either by petition in the trial court or by appeal, he may not adopt both means of procuring a rehearing for the same error.[47] It has been held that a new trial should be granted where a guardian ad litem was not appointed in time to represent an infant defendant at the trial;[48] but the contrary conclusion has been reached where defendant was ably represented by counsel and his substantial rights were not prejudiced by the irregularity.[49]

34. R.I.—Vaughn v. Carr, 95 A. 569, 38 R.I. 307.

35. Ala.—Isaacs v. Boyd, 5 Port. 388.

36. Ill.—Chicago, Rock Island & Pacific R. Co. v. Kennedy, 70 Ill. 350.

37. Ala.—Alexander v. Alexander, 150 So. 142, 227 Ala. 322.

38. Miss.—Mitchell v. Film Transit Co., 13 So.2d 154.

39. N.Y.—Ward v. Ward, 242 N.Y.S. 171, 136 Misc. 234.

40. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.

41. S.C.—Beckwith v. McAlister, 162 S.E. 623, 165 S.C. 1.

42. La.—Broussard v. Rosenblum, 5 La.App. 245.

43. Ky.—Childers v. Bales, 124 S. W. 295.
31 C.J. p 1165 note 20.

44. Ill.—Liserowitz v. West Chicago St. R. Co., 80 Ill.App. 248.
31 C.J. p 1165 note 21.

45. Ky.—Jamison v. Petit, 6 Bush 669.

46. Ky.—Shrout v. Burgess, 5 Ky.L. 691.

47. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.

48. R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.

Necessity of good defense

Where a judgment was rendered against a minor without a defense having been made by a guardian in an action for rescission of a contract on ground of fraud, the minor was not entitled to have a new trial unless he showed that he had a good defense to the action.—Beardsley v. Clark, 294 N.W. 887, 229 Iowa 601.

49. Cal.—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191.

A new trial may be granted the unsuccessful adverse party on the ground of newly discovered evidence of the majority of the successful party at the time of execution of the deed in question.[50]

Rehearing in equity. The matter of granting a rehearing in equity is, as in the case of adults, within the discretion of the court.[51]

Bill of review. An infant may bring a bill of review to set aside a decree of foreclosure to which he was a party, although he does not have a right to possession.[52]

b. Instructions and Questions of Law or Fact

The questions of fact which, when the evidence warrants the submission thereof to the jury, are to be determined by the jury under proper instructions by the court include infancy and ratification or disaffirmance of an infant's deed or contract. What are necessaries is a mixed question of law and fact.

In accordance with the rules pertaining to questions of law or fact in civil trials generally, it is the province of the court to determine all questions of law,[53] but questions of fact ordinarily are to be determined by the jury[54] under proper instructions from the court.[55] If the evidence on a question of fact is sufficient to be submitted to the jury, and is conflicting or is of such a character that different inferences might reasonably be drawn therefrom, the question should be submitted to the jury.[56] Where, however, there is no evidence on an issue of fact, or the evidence thereon is undisputed or conclusive, or so slight that a finding in favor of the party asserting the existence or nonexistence of the fact would not be sustained, the question should

Iowa.—Johnston v. Calvin, 5 N.W.2d 840.

50. S.C.—Prudential Ins. Co. of America v. Reynolds, 177 S.E. 889, 174 S.C. 547.

51. Miss.—Hebron v. Kelly, 23 So. 641, 77 Miss. 48, reheard 25 So. 877, 77 Miss. 48.
31 C.J. p 1165 note 26.

52. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L. Ed. 1551.

53. Mo.—Heinsle v. Metropolitan St. R. Co., 81 S.W. 848, 182 Mo. 528.
31 C.J. p 1165 note 29.

54. N.J.—Mandell v. Passaic Nat. Bank & Trust Co., 14 A.2d 523, 18 N.J.Misc. 455.
Pa.—Pentimall v. Bankers' Automobile Finance Corporation, 92 Pa. Super. 110.
31 C.J. p 1165 note 30 [a].

Whether minor son was emancipated by father, is for jury or judge sitting without jury.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.

Whether plaintiff misrepresented his age is for jury.—Pinnacle Motor Co. v. Daugherty, 21 S.W.2d 1001, 231 Ky. 626.

Estoppel by conduct

In action to foreclose a chattel mortgage, defended on the ground that defendant was a minor at the time the notes and mortgage were executed, and that he promptly disaffirmed the contracts on coming of age, the question of whether defendant was estopped from setting up his minority as a defense, by his conduct in obtaining loan, leading mortgagee to believe that he was of full age, was for the jury.—First State Bank v. Edwards, Tex.Civ.App., 245 S.W. 478.

Sufficient capacity of child to charge him with contributory negligence see the C.J.S. title Negligence § 260, also 45 C.J. p 1311 note 68-p 1314 note 75.

55. Ga.—McGarrity v. Cook, 114 S. E. 213, 154 Ga. 311.

Instructions upheld as proper
Ga.—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245.
Ill.—Illinois Cent. R. Co. v. Jernigan, 101 Ill.App. 1, affirmed 65 N. E. 88, 198 Ill. 297.
R.I.—Correy v. Michaelovitch, 128 A. 673, 46 R.I. 387, 39 A.L.R. 374.

Erroneous instructions are properly refused
Mo.—Swoboda v. Nowak, 255 S.W. 1079, 213 Mo.App. 452.
31 C.J. p 1164 note 19 [a].

Instruction held erroneous
Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.

Instruction held not erroneous
N.C.—General Motors Acceptance Corporation v. Edwards, 197 S.E. 613, 213 N.C. 736, 116 A.L.R. 1217.

Confusing or misleading instructions are properly refused
Ga.—Siegelstein v. Fenner & Beane, 17 S.E.2d 907, 66 Ga.App. 345.

Charge held not misleading or confusing
N.H.—Charbonneau v. MacRury, 153 A. 457, 84 N.H. 501, 73 A.L.R. 1266.

Absence of request

As regards married minor's contention that home purchased by him was not a necessary, instruction, defining term necessary, was not erroneous as excluding idea that minor might rent or lease such home, and as disregarding question whether he was able to pay therefor, or bought it for speculative purpose, where submission of issue as to his inability to pay, or purchase for speculative purpose, was not requested.—Newberry v. Johnson, Tex.Civ.App., 274 S.W. 667.

56. Ala.—Taylor v. White, 56 So. 2 1 Ala.App. 593.

Evidence held sufficient

(1) To be submitted to jury generally.—Bay v. Gunn, 1 Den. (N.Y.) 108.

(2) To present jury question whether plaintiff had good reason to believe defendant capable of contracting.—Titonka First Nat. Bank v. Casey, 138 N.W. 897, 158 Iowa 349.

(3) To require charge as to effect of minority on release, although infancy was not pleaded as defense.—McCoy v. Provident Life Ins. Co., 153 S.E. 468, 156 S.C. 496.

(4) To go to jury on question of ratification.
Ala.—Bryan v. First Nat. Bank, 114 So. 576, 217 Ala. 50.
N.C.—Long v. Town of Rockingham, 121 S.E. 461, 187 N.C. 199.

Refusal to charge against recovery held proper

(1) Where minor plaintiff's evidence reasonably supported recovery, overruling demurrer thereto and refusing requested instruction directing verdict against him were not error.—First Nat. Bank v. Jones, 238 P. 488, 111 Okl. 116.

(2) In an infant's action, after disaffirmance of contract of purchase, court properly refused to instruct that plaintiff could not recover under count for money received by defendant for plaintiff's use, where the evidence showed that plaintiff had himself paid fifty dollars in cash, and that only part of the amount claimed under such count was paid by his father.—Carpenter v. Grew, 141 N.E. 859, 247 Mass. 133.

not be submitted to the jury, but it becomes one of law for the court, which it may dispose of by nonsuit, dismissal, direction of verdict, or otherwise;[57] and in such case the court may direct a nonsuit notwithstanding the fact that plaintiff is an infant[58] or was an infant at the time of the transaction in question.[59] Generally, and subject to the foregoing qualification of a proper evidential basis, where a question of infancy vel non arises directly, it must be determined as a question of fact[60] by the jury[61] or the trial judge sitting without a jury;[62] and, subject to the same qualification, it is a question of fact for the jury whether the deed, contract, etc., of an infant has been ratified[63] or avoided.[64] So, also, where the question of what is a reasonable time for disaffirmance after reaching majority is one of fact, as it ordinarily is, as discussed supra § 75, it is a question for the jury.[65]

The question as to what are necessaries is a mixed one of law and fact.[66] Whether articles are of those classes for which an infant shall be bound to pay is a matter of law for the court;[67] if they fall under those general descriptions, then whether they were actually necessary and suitable to the condition and state of the infant is a question of fact for the jury.[68] The question whether the education furnished to an infant is to be considered a necessary, under the circumstances of the particular case,

57. Wis.—Larson v. Knapp, Stout & Co., 73 N.W. 992, 98 Wis. 178.

Absence of evidence of emancipation

(1) Permitting jury's consideration of minor plaintiff's loss or diminution of earning capacity was erroneous where there was no evidence of emancipation.

Mo.—Ellington v. Chicago, R. I. & P. Ry. Co., App., 45 S.W.2d 105.

Tex.—Tyrrell Hardware Co. v. Orgeron, Civ.App., 289 S.W. 1040.

(2) Instructions as to damages for permanent injuries to, and loss of, earnings by minor plaintiff were erroneous, in absence of evidence that he had been emancipated.—S. A. Gerrard Co. v. Couch, 29 P.2d 151, 43 Ariz. 57.

Evidence held insufficient to raise jury question

(1) As to whether minor was hit in eye by missile from playmate's slingshot.—Misch v. Montgomery, 3 A.2d 816, 62 R.I. 142, rehearing 200 A. 999, 61 R.I. 345.

(2) As to minor's representing himself to be eighteen years old when purchasing car.—Turben v. Wilson, 271 P. 842, 133 Okl. 158.

(3) As to disaffirmance of contract during infancy or after reaching majority.—Washington St. Garage v. Maloy, 243 N.Y.S. 467, 230 App.Div. 266.

Instructions dispensed with by undisputed evidence

In ejectment, where it was undisputed and uncontradicted that grantee in deed under which plaintiff claimed was minor at time of its execution, it was not error to omit to charge as to necessity of delivery and acceptance of deeds or as to effect of nondelivery thereof.—Harrison v. Hester, 129 S.E. 528, 160 Ga. 865.

Direction of verdict

(1) In minor's action, plaintiff's motion for directed verdict was properly granted, where there was no evidence before the jury which contradicted plaintiff's claim, the facts as alleged being practically admitted.—Kelly v. Halox, 152 N.E. 236, 256 Mass. 5.

(2) A directed verdict against a party claiming disaffirmance after majority of a deed executed during minority may be proper under the evidence.—Floyd v. Rimes, 149 S.E. 907, 169 Ga. 78.

(3) Directed verdict for defendant was proper on account annexed for merchandise, plea being infancy, where infancy and absence of ratification were undisputed.—Sawyer Boot & Shoe Co. v. Braveman, 136 A. 290, 126 Me. 70.

(4) Court may peremptorily instruct in favor of infant in absence of evidence that articles furnished were actually needed by him.—Foster-McLaurin Furniture Co. v. Duvall, 106 So. 825, 141 Miss. 556.

(5) Since, however, the issue arising from a traverse of an allegation of appointment of next friend relates merely to capacity to sue, defendant, in absence of proof supporting such allegation, is not entitled to directed verdict, but only to a dismissal.—State ex rel. Missouri Pac. R. Co. v. Cox, 267 S.W. 382, 306 Mo. 27.

58. Wis.—Larson v. Knapp, Stout & Co., 73 N.W. 992, 98 Wis. 178.

59. **Absence of proof of payment**

In assumpsit by married woman for return of moneys paid by her during coverture and during infancy, under contract for purchase of land, where there was no proof of any amount paid by her under the contract, judgment of nonsuit was proper.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

60. Mass.—Stykowski v. Kaplan, 177 N.E. 909, 277 Mass. 138.

61. Mich.—Schweitzer v. Bird, 170 N.W. 57, 204 Mich. 333.
31 C.J. p 1165 note 34.

62. N.J.—Brinkmann v. Dorsey Motors, 1 A.2d 473, 121 N.J.Law 115, affirmed 5 A.2d 686, 122 N.J.Law 378.

63. U.S.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, C. C.A.Conn., 287 F. 328, modifying, D.C., 270 F. 219.

Neb.—Brownell v. Adams, 236 N.W. 750, 121 Neb. 304.

Okl.—Shipman v. Conrad, 223 P. 183, 97 Okl. 216.

Tex.—Miller v. McAden, Civ.App., 253 S.W. 901.

31 C.J. p 1066 note 91, p 1165 note 35.

Ratification is question of fact or of mixed law and fact

Minn.—Gislason v. Henry L. Doherty & Co., 260 N.W. 883, 194 Minn. 476.

64. Ala.—Slaughter v. Cunningham, 24 Ala. 260, 60 Am.D. 463.

Tex.—Johnson v. Johnson, 85 S.W. 1023, 38 Tex.Civ.App. 385.

65. Tex.—Kinnebrew v. McAfee, Civ.App., 272 S.W. 242.

If not over seven years, reasonable time after majority for disaffirming deed by infant is for jury.—Holbrook v. Bank of Cumming, 147 S.E. 526, 168 Ga. 245—Holbrook v. Montgomery, 141 S.E. 408, 165 Ga. 514.

66. Tex.—Johnson v. Newberry, Com.App., 267 S.W. 476, reversing Newberry v. Johnson, Civ.App., 248 S.W. 456.
31 C.J. p 1080 note 81.

67. Miss.—Decell v. Lewenthal, 57 Miss. 331, 34 Am.R. 449.
31 C.J. p 1080 note 82.

68. Me.—Nielson v. International Text Book Co., 75 A. 330, 106 Me. 104, 20 Ann.Cas. 591.
31 C.J. p 1081 note 83.

What particular kind of lodging is necessary for minor is inquiry of fact for jury in given case.—Johnson v. Newberry, Tex.Com.App., 267 S.W. 476, reversing Newberry v. Johnson, Civ.App., 248 S.W. 456.

ordinarily is a question of fact.[69] The quantity,[70] quality,[71] and value[72] of what was furnished are of course questions for the jury.

c. Reference

In deciding matters relating to a reference in a suit to which an infant is a party, due consideration is given to the status of the infant litigant and the duty to protect his interest.

An infant is not capable of consenting to a reference in an action to which he is a party,[73] and the guardian ad litem of an infant defendant should not consent to a general reference to a master to take an account against an infant until he has ascertained that the rights of the infant may be protected on such reference.[74] Ex parte proofs before a master in a foreclosure suit are not permissible where there are infant defendants;[75] and, where testimony is taken before a master or commissioner in chancery without notice to the guardian ad litem of infant defendants, it is not admissible as against the infants[76] notwithstanding the guardian may make no objection on the hearing.[77] Since it is the practice of courts to protect the interest of infant litigants, as discussed supra § 105, the court may, where the guardian ad litem of an infant defendant has not excepted to the master's report, allow the infant to do so at any time before or at the hearing.[78] It is proper, after a hearing before the master, for the next friend of a minor first to obtain consent and leave of court before filing a petition asking that the cause be remanded for further proof.[79] The report of a special guardian for the purpose of acquainting the court with the infant's interest and the manner in which to protect the infant is not open to the filing of exception to the findings or recommendations contained in it.[80]

d. Verdict and Findings

An appropriate verdict may be rendered, or findings of fact made, in an action by or against an infant. Under statute, findings of fact may be waived.

A statutory provision that findings of fact may be waived by the several parties to an issue of fact applies to infants as well as to adults.[81] In an action against several defendants, one of whom is an infant, the jury may find for the infant and against the other defendants;[82] but, under an issue formed to try the question of property between a claimant and a plaintiff in execution, the jury cannot render a verdict against claimant on the ground of infancy; the proper course in such case being to move for an issue to try the question of infancy, or for the appointment of a guardian.[83]

§ 120. Judgment

The court should not render a judgment or decree affecting the interests of a minor as a matter of course, but only after consideration of the merits and a real and vigorous defense of the minor's interests. The judgment or decree should be responsive and warranted by the pleadings and the evidence. The general rules govern its construction.

In general a court should not enter judgment or decree for or against a minor as a matter of course, but only after a consideration of the merits of the case,[84] and after a real and vigorous defense of his interests has been made.[85] The failure of a regular guardian or guardian ad litem to make defense or file a report prior to judgment, as required by statute, will render the judgment erroneous but not void.[86]

The judgment or decree should be responsive and warranted by the pleadings,[87] supported by compe-

69. Conn.—International Text Book Co. v. Doran, 68 A. 255, 80 Conn. 307.
Me.—Nielson v. International Text Book Co., 75 A. 330, 106 Me. 104, 20 Ann.Cas. 591.
70. Ind.—Henderson v. Fox, 5 Ind. 489.
71. Ind.—Henderson v. Fox, supra.
72. Ind.—Henderson v. Fox, supra.
N.C.—Cole v. Wagner, 150 S.E. 339, 197 N.C. 692.
73. Mo.—Gamache v. Prevost, 71 Mo. 84—Garesche v. Gambs, 3 Mo. App. 572.
74. N.Y.—Jenkins v. Freyer, 4 Paige 47.
75. N.J.—Co-Investors Building & Loan Ass'n v. Billet, 175 A. 90.
76. W.Va.—Henry v. Musgrave, 158 S.E. 783, 110 W.Va. 467.
31 C.J. p 1165 note 41.
77. Ill.—Boyer v. Boyer, 89 Ill. 447—Turner v. Jenkins, 79 Ill. 228.
78. S.C.—McFaddin v. Lumpkin, 100 S.E. 168, 112 S.C. 431.
79. Tenn.—Flanigan v. Landmon, 8 Tenn.App. 361.
80. N.Y.—Matter of Gill, 155 N.Y.S. 1019, 92 Misc. 661.
81. Cal.—Western Lumber Co. v. Phillips, 29 P. 328, 94 Cal. 54.
82. Me.—Cutts v. Gordon, 13 Me. 474, 29 Am.D. 520.
N.Y.—Hartness v. Thompson, 5 Johns. 160.
83. Ala.—Mundine v. Perry, 2 Stew. & P. 130.
84. Mich.—Palassolo v. Verdier, 208 N.W. 677, 234 Mich. 547.
Duty of court to protect interests of infant see supra § 105.
85. Ark.—Baker v. Boyd, 119 S.W.2d 524, 196 Ark. 563—Moore v. Wilson, 20 S.W.2d 310, 180 Ark. 41.
Effect of want or insufficiency of answer or defense see supra § 116.
Defense held sufficient
Ark.—Leach v. Maxwell, 286 S.W. 1029, 171 Ark. 1188.
86. Iowa.—Beardsley v. Clark, 294 N.W. 887, 229 Iowa 601.
Ky.—Cain v. Hall, 278 S.W. 152, 211 Ky. 817—Reynolds v. Steel, 185 S. W. 820, 170 Ky. 153.
Omission to state representative capacity
Ky.—Robinson v. Clark, 34 S.W. 1083, 17 Ky.L. 1401.
87. Mo.—Campbell v. Campbell, 165 S.W.2d 851, 350 Mo. 169.
31 C.J. p 1166 note 52.
Pleadings held to support relief granted
Tex.—Miller v. McAden, Civ.App., 253 S.W. 991.

tent evidence,[88] and not inconsistent.[89]

In a statutory suit to try title in which one of the parties is a minor the court may not only adjudge the infant to be the owner of an undivided interest in the property, but may divest him of his title thereto by an order under which specified parties are directed to take the land and pay the ascertained value thereof to the owners, including the minor.[90]

Where a minor's father is made a party to a suit by a minor to rescind a conveyance and the court finds that the father was the real owner of the property conveyed, judgment may be entered against the father ordering him to execute a conveyance of the property involved to the grantees.[91]

Construction. The rules governing the construction of judgments and decrees generally, considered in Equity §§ 612–615, and the C.J.S. title Judgments §§ 436–443, also 34 C.J. p 501 note 4–p 507 note 76, apply.[92]

§ 121. —— Rendition, Form, and Entry

The general rules governing the form, rendition, and entry of judgment control, except as modified by statute, or varied by the conditions arising from the peculiar rights of infants.

The general rules governing the form, rendition, and entry of judgments, considered in the C.J.S. title Judgments §§ 62–86, also 33 C.J. p 1188 note 87–p 1214 note 90, §§ 100–121, also 34 C.J. p 44 note 57–p 82 note 15, and decrees, considered in Equity §§ 587–598, apply to judgments and decrees for or against infants.[93] Thus the rules and principles controlling the time for the rendition and entry of the judgment or decree should be followed.[94]

Where a statute prohibits a minor from alienating his immovable property a judgment cannot be given in general terms against an emancipated minor, but should direct that execution be levied only on the movables and not on immovables.[95]

A judgment entered on the record in an action commenced by a minor without the advice and assistance of a next friend in which the court by an entry made on the back of the writ ordered the minor's father to maintain the action as next friend is not voidable because of the failure of the clerk to minute such order on the docket or of counsel to file a formal amendment of the writ in accordance therewith.[96]

It is error to give a joint decree in favor of several complainants for the aggregate of all their debts against defendant where one of the complainants is an infant.[97] A minor is entitled to a judgment against all persons liable, although he is entitled to only one satisfaction.[98]

In whose name judgment entered. Where an infant party is successful the judgment should be in favor of the infant and not in favor of the next friend or guardian ad litem,[99] and where he is unsuccessful the judgment should be against the infant and not against the guardian ad litem.[1] On the other hand, it has been held that in an action against a minor's tutor based on a liability of the minor judgment should properly go against the defendant as tutor.[2]

§ 122. —— Validity and Conclusiveness

a. In general
b. Judgment by default
c. Consent judgment
d. Confession of judgment
e. Decree for conveyance of land

88. Ill.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151.

89. **Judgment held inconsistent**
Ark.—Maddox v. Hamp Williams Hardware Co., 26 S.W.2d 85, 181 Ark. 403.

90. Mo.—Talbert v. Grist, 201 S.W. 906, 198 Mo.App. 492.

91. Minn.—Johanson v. Lunda, 195 N.W. 917, 157 Minn. 260.
Recovery on disaffirmance of contract of purchase see supra § 47.

92. **Judgments and decrees construed**
Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Ohio.—Harvey v. Sampson, App., 50 N.E.2d 423.

93. **Judgment pursuant to agreement**
Mass.—Wallace v. Boston Elevated Ry. Co., 80 N.E. 461, 194 Mass. 328.

94. Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
Clerk's unauthorized early entry immaterial
Mass.—Wallace v. Boston Elevated Ry. Co., 80 N.E. 461, 194 Mass. 328.
Proper time
Ark.—Morgan v. Stocks, 122 S.W.2d 953, 197 Ark. 368.
Fla.—Grimsley v. Rosenberg, 114 So. 553, 94 Fla. 673.
31 C.J. p 1166 note 51 [b].

95. La.—Broussard v. Mallet, 8 Mart.,N.S., 269.

96. N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.

97. Va.—Armstrong v. Walkup, 9 Gratt. 372, 50 Va. 372.

98. Ark.—Merchants & Planters Bank & Trust Co. v. Deaton, 141 S.W.2d 543, 200 Ark. 828.

99. Tex.—Standard Motor Co. v. Stillians, Civ.App., 1 S.W.2d 332, error dismissed.
31 C.J. p 1166 note 54.
Where majority attained before judgment
Where infant attained majority pending disposition of suit, judgment could be entered in his name notwithstanding he sued by next friend.—Texas Employers' Ins. Ass'n v. Crooks, Tex.Civ.App., 56 S.W.2d 476.

1. Iowa.—Tucker v. McClure, 17 Iowa 583.

2. La.—Citizens' Bank of Waynesboro, Ga., v. Hibernia Bank & Trust Co., 140 So. 705, 19 La.App. 461.

a. In General

In general an adjudication for or against an infant is at most voidable because of matters arising out of his infancy, and, except as to the time allowed to attack it, binds him as to matters directly in issue to the same extent as though he had been an adult. It cannot be attacked collaterally unless it is absolutely void, and a presumption exists in favor of its validity.

As a general rule, subject to the exceptions considered infra subdivisions a–e of this section and, in many jurisdictions, to the extended period of time in which an infant is allowed to attack the judgment, considered infra § 123 b, an infant before the court and properly represented is bound by the adjudication to the same extent as though he were an adult, as considered in the C.J.S. title Judgments § 766, also 31 C.J. p 1166 note 58–p 1167 note 59, and 34 C.J. p 990 note 44[b]. It follows that infancy cannot be pleaded to an action on a judgment,[3] and that the judgment is not absolutely void by the mere reason of infancy; at most it is only voidable.[4] However, an infant is not bound by the judgment of a court which did not have jurisdiction of the subject matter,[5] or of his person, considered generally in the C.J.S. title Judgments § 766, also 31 C.J. p 1167 note 65, as where he was not a party before the court,[6] or was not served with process, considered supra § 115 b (2), or in some jurisdictions where process was not served on his parent, guardian, or other specified person, considered supra § 115 b (3). Also the rule as to the conclusiveness of a judgment in an action in which the minor was represented by a next friend is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend.[7]

By the judgment a minor is concluded as to issues raised directly by the pleadings,[8] but he is not concluded as to issues only incidentally involved.[9]

The fact that a judgment is void as against an infant does not render it void as to his adult codefendants,[10] and the action of the court in setting aside a judgment for a minor will not affect a judgment entered in the same proceeding in favor of the minor's parents where the rights of action are different although arising out of the same state of facts.[11]

One who conducts a suit as guardian or next friend for an infant is not a party thereto so as to be bound by the judgment in another action brought in his own right on a cause arising out of the same facts.[12]

The fact that the person in whose favor a judgment has been obtained is an infant does not prevent the dormancy statute from running against it.[13]

Collateral attack. In general an infant has no more right to attack collaterally a judgment or decree against him than has an adult.[14] Its conclusiveness depends on whether it is void or merely voidable.[15] In conformity with the rule applicable to judgments generally, considered in the C.J.S. title Judgments § 401, also 34 C.J. p 511 note 46–p 514 note 57, unless it is wholly void it cannot be attacked collaterally.[16] If void it has no effect as an estoppel,[17] and is subject to collateral attack,[18] pro-

2. Ind.—Cohee v. Baer, 32 N.E. 920, 134 Ind. 375, 39 Am.S.R. 270.
31 C.J. p 1167 note 60.

4. Mo.—Reineman v. Larkin, 121 S.W. 307, 222 Mo. 156.
Wash.—Kongsbach v. Casey, 120 P. 108, 66 Wash. 643.

5. Mo.—Boone v. Oetting, 114 S.W. 2d 981, 342 Mo. 269.

No estoppel from payment to guardian

Where claim to realty was made under a void partition sale wherein land was sold to life tenant and proceeds of sale distributed among remaindermen, the minor child of a deceased remainderman, who was represented by guardian ad litem in partition suit and whose share therein had been paid to guardian, was not estopped to assert interest in land, in absence of showing that child had knowledge that payment was for her interest in land, even if payment by guardian to child was presumed.—Boone v. Oetting, supra.

6. Ala.—Amann v. Burke, 186 So. 769, 237 Ala. 380.
Ark.—Moudy v. Bradley, 140 S.W.2d 113, 200 Ark. 630.

7. Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.
Fraud or collusion as constituting ground for setting judgment aside see infra § 123 d.

8. Ala.—Matthews v. Lovelady, 100 So. 855, 211 Ala. 495.
Tenn.—Hodges v. Hale, 97 S.W.2d 454, 20 Tenn.App. 233.

9. Tenn.—Hodges v. Hale, supra.

10. Ky.—Carney v. Yocum, 195 S.W. 482, 176 Ky. 173.
N.Y.—Belcher v. Haskell, 292 N.Y.S. 387, 249 App.Div. 251.
Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.
Tex.—Austin v. First State Bank & Trust Co., Civ.App., 275 S.W. 156.

11. Pa.—Rebic v. Gulf Refining Co., 186 A. 236, 122 Pa.Super. 149.

12. N.C.—Rabil v. Farris, 196 S.E. 321, 213 N.C. 414.

13. Ga.—Williams v. Merritt, 34 S.E. 212, 109 Ga. 213.

14. Cal.—Stevens v. Kelley, 134 P. 2d 56, 57 Cal.App.2d 318.
Iowa.—Reinsurance Life Co. of America v. Houser, 227 N.W. 116, 208 Iowa 1226.
31 C.J. p 1167 note 64.

15. Okl.—Conner v. Bartlett, 238 P. 411, 111 Okl. 8, certiorari denied 46 S.Ct. 101, 269 U.S. 573, 70 L.Ed. 419, and error dismissed 47 S.Ct. 447, 273 U.S. 661, 71 L.Ed. 827.

16. Ohio.—Kinsinger v. Cummins, 182 N.E. 524, 42 Ohio App. 468.

17. Okl.—Conner v. Bartlett, 238 P. 411, 111 Okl. 8, certiorari denied 46 S.Ct. 101, 269 U.S. 573, 70 L.Ed. 419, and error dismissed 47 S.Ct. 447, 273 U.S. 661, 71 L.Ed. 827.

18. Ark.—Dalton v. Bradley Lumber Co., 205 S.W. 695, 135 Ark. 392.
Ill.—Sharp v. Sharp, 164 N.E. 685, 338 Ill. 267.
Tex.—Newton v. Easterwood, Civ.App., 154 S.W. 646.

vided its invalidity is apparent on the face of the record.[19] If, however, it is merely voidable, regardless of how irregular or erroneous it may be, it is conclusive until reversed or set aside in some appropriate proceeding[20] and cannot be attacked collaterally.[21] Thus, if the court had jurisdiction of the subject matter and of the person, the proceedings are not void even though they were irregular,[22] or the court erred in the application of the law to the case,[23] and regardless of how erroneous it may be in other respects the judgment or decree will be sustained against collateral attack;[24] but where the court does not have jurisdiction,[25] as where it does not have jurisdiction of the subject matter,[26] the judgment or decree may be attacked collaterally. A judgment in an action by an infant by his next friend, in the absence of a charge of misconduct against the next friend, is not subject to collateral attack.[27]

A default[28] or consent[29] judgment or decree, whether held improper and erroneous as such in proceedings to which minors are parties,[30] or valid and binding,[31] cannot be attacked collaterally on grounds based on its consent or default nature; but where such a judgment or decree is void and that fact is apparent from the records it is subject to collateral attack.[32]

Where, in a proceeding for the sale of a decedent's land to pay debts, a defendant, although not a minor, is brought before the court by a guardian ad litem, such defendant cannot, after appearing before the commissioners and failing to object to the appointment of the guardian ad litem, attack

Jurisdiction proper subject of inquiry

Court in which decree against minor defendants of court of another jurisdiction is attacked as void may inquire whether court had jurisdiction of such defendants.—Salinas v. Jones, D.C.Tex., 60 F.2d 1049.

19. Ark.—Kuykendall v. Zachary, 16 S.W.2d 590, 179 Ark. 478.
Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.
Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
La.—Matthews v. Olla State Bank, 114 So. 98, 164 La. 463.
N.C.—Butler v. Winston, 27 S.E.2d 124, 223 N.C. 421.

How invalidity determined

Whether judgment is void on its face must be determined from consideration of judgment roll alone.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.

20. Ark.—James v. Wade, 141 S.W. 2d 13, 200 Ark. 786.
Ga.—Hargrove v. Youmans, 183 S.E. 564, 181 Ga. 614.
Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649.
Iowa.—Reinsurance Life Co. of America v. Houser, 227 N.W. 116, 208 Iowa 1226.
Okl.—Conner v. Bartlett, 238 P. 411, 111 Okl. 3, certiorari denied 46 S. Ct. 101, 269 U.S. 573, 70 L.Ed. 419, and error dismissed 47 S.Ct. 447, 273 U.S. 661, 71 L.Ed. 827.
W.Va.—Musick v. Musick, 138 S.E. 458, 104 W.Va. 27.
31 C.J. p 1167 note 63.

Statute extending time for redemption by infants inapplicable

If infant owners are properly before the court and represented by guardian ad litem in suit to foreclose tax certificate, they are bound by judgment, since statute relating to right of infant to redeem within one year after expiration of disability has no application.—Hill v. Street, 1 S.E.2d 850, 215 N.C. 312.

Judgments held conclusive on infant

Ala.—Matthews v. Lovelady, 100 So. 855, 211 Ala. 495.
Miss.—Phelps v. Port Gibson Oil Works, 181 So. 135, 182 Miss. 735.
N.Y.—In re Sciscente's Estate, 2 N.Y.S.2d 230, 166 Misc. 162—In re Lachenmeyer's Estate, 258 N.Y.S. 641, 144 Misc. 678.
Tex.—Fowler v. Roden, 105 S.W.2d 187, 129 Tex. 599, affirming, Civ. App., 76 S.W.2d 858—Austin v. First State Bank & Trust Co., Civ. App., 275 S.W. 156.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.

21. U.S.—Colt v. Colt, Conn., 4 S. Ct. 553, 111 U.S. 566, 28 L.Ed. 520.
Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649.
Ind.—Cohee v. Baer, 32 N.E. 920, 134 Ind. 375, 39 Am.S.R. 270.
Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412—Cain v. Hall, 278 S. W. 152, 211 Ky. 817.
N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.
N.C.—Smith v. Gray, 21 S.E. 200, 116 N.C. 311.
Ohio.—Kinsinger v. Cummins, 182 N. E. 524, 42 Ohio App. 468.

22. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 242.
Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649.
Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
N.C.—England v. Garner, 90 N.C. 197.
Effect of lack of representation by guardian or next friend see supra § 108 b.

After appearance and trial de novo on appeal

U.S.—Palmer v. Palmer, D.C.Conn., 31 F.Supp. 861.

23. Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649.

24. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.
Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649—Allman v. Taylor, 101 Ill. 185.
Mich.—Dudex v. Sterling Brick Co., 212 N.W. 92, 237 Mich. 470.

25. Ark.—Dalton v. Bradley Lumber Co., 205 S.W. 695, 135 Ark. 392.
Mich.—Dudex v. Sterling Brick Co., 212 N.W. 92, 237 Mich. 470.

26. Mass.—Welch v. King, 181 N.E. 846, 279 Mass. 445.

27. Tex.—Benavides v. Garcia, Civ. App., 283 S.W. 611, affirmed, Com. App., 290 S.W. 739.

28. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
N.J.—Springgarden Building & Loan Ass'n of Nutley v. Fusaro, 1 A.2d 320, 124 N.J.Eq. 205.

29. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
Consent judgment as merely voidable see infra subdivision c of this section.

30. Ky.—Brooks v. Stuart, 37 S.W. 2d 56, 238 Ky. 235.
N.C.—Rawls v. Mayo, 79 S.E. 298, 163 N.C. 177.

31. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409.

32. N.C.—Butler v. Winston, 27 S. E.2d 124, 223 N.C. 421—Wyatt v. Berry, 170 S.E. 131, 205 N.C. 118.

the proceedings collaterally by proof that he was not a minor when his answer was taken.[33]

Presumption of validity. The presumption in favor of the validity of a judgment of a court of competent jurisdiction, considered in the C.J.S. title Judgments §§ 425–427, also 34 C.J. p 537 note 72–p 554 note 52, exists in the case of judgments against infants equally as with judgments against adults,[34] where the parties are properly within the jurisdiction of the court.[35] Thus it will be presumed in aid of a judgment against an infant that the court had jurisdiction over the person of the infant,[36] as well as the subject matter, when the validity of the judgment is questioned collaterally,[37] and that the court[38] or the guardian ad litem[39] protected his interests. However, the presumption may be overcome by proof.[40] It has been held, although there is also authority to the contrary,[41] that jurisdiction of a minor defendant will not be presumed because the judgment shows the appointment of a guardian ad litem.[42]

b. Judgment by Default

As a general rule a default judgment or decree against an infant is erroneous, but although there is some authority which holds it void the preponderant view is that it is merely voidable and not void.

Although in some jurisdictions a default judgment against a minor within the jurisdiction of the court and properly represented is not invalid,[43] and may properly be entered,[44] as a general rule, in some jurisdictions under statutes so providing, a judgment should not be rendered against an infant by default and without proof of the facts relied on for relief.[45] Such a judgment is erroneous,[46] and on appropriate proceedings may be vacated or set aside;[47] but although there is some authority to the effect that such a judgment is void[48] the preponderance of authority supports the view that it is merely voidable,[49] and not absolutely void.[50] However, in some jurisdictions the time and manner of entry of judgment by default against an infant are regulated by statute, in which case the statute must be complied with in order to render the judgment binding on the infant.[51]

The fact that a defendant proceeded against as an adult was an infant some months prior to the institution of the suit involved will not prevent the court from deeming him sui juris and, on his fail-

33. D.C.—Duncanson v. Manson, 3 App.D.C. 260.

34. Ill.—Rosenberger v. Lincoln Nat. Life Ins. Co., 282 Ill.App. 52.
Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
La.—Mariana v. Eureka Homestead Soc., 158 So. 642, 181 La. 125.

35. N.C.—White v. Morris, 12 S.E. 80, 107 N.C. 92.
31 C.J. p 1168 note 71.

36. Ill.—Rosenberger v. Lincoln Nat. Life Ins. Co., 282 Ill.App. 52.

37. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

38. Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449, reversing, App., 102 N.E. 54.

39. Ohio.—Kinsinger v. Cummins, 182 N.E. 524, 42 Ohio App. 468.

40. La.—Mariana v. Eureka Homestead Soc., 158 So. 642, 181 La. 125—Spears v. Spears, 136 So. 614, 173 La. 294.

41. Ill.—Rosenberger v. Lincoln Nat. Life Ins. Co., 282 Ill.App. 52.

42. Tex.—De Proy v. Progakis, Com. App., 269 S.W. 78, reversing, Civ. App., 259 S.W. 620.

43. La.—Morris v. Mabry, 97 So. 20, 153 La. 1104.

44. Pa.—Kepler v. Union Joint Stock Land Bank of Detroit, 26 Pa. Dist. & Co. 521.

45. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 699.
Effect of:
Lack of representation of minor see supra § 108 b.
Want or insufficiency of answer or defense see supra § 116.
Averments traversed by law
Ky.—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

46. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 669.
31 C.J. p 1168 note 73.
Proper practice
(1) On default of infant defendant in mortgage foreclosure suit, complainant should enter order to take proofs rather than take decree pro confesso.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613.
(2) Whole case against infant defendant must be proved, and nothing can be taken as admitted against him by his default.—Weining v. Selitto, supra.
Ex parte proof
Prior to the 1934 amendment of Chancery Rules, rule 186a, subsequently rule 196, which apparently permits such proof when there are infant defendants, the acceptance by the master in a foreclosure suit against infant defendants of ex parte affidavits as proof was erroneous.—Springgarden Building & Loan Ass'n of Nutley v. Fusaro, 1 A.2d 320, 124 N.J.Eq. 205—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613.

47. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 669.
Neglect of his counsel does not bar infant.—Maloney v. Schandelmier, 212 P. 493, 65 Mont. 531.

48. Pa.—Brown v. Downing, 20 A. 871, 137 Pa. 569.
31 C.J. p 1168 note 74.

49. Minn.—Eisenmenger v. Murphy, 43 N.W. 784, 42 Minn. 84, 18 Am. S.R. 493.
31 C.J. p 1168 note 73.

50. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
N.J.—Springgarden Building & Loan Ass'n of Nutley v. Fusaro, 1 A.2d 320, 124 N.J.Eq. 205.
31 C.J. p 1168 note 75.

51. N.Y.—Kingden v. Craig, 147 M. Y.S. 571, 162 App.Div. 508.
31 C.J. p 1168 notes 76, 77.

ure to appear, entering judgment against him on that basis.[52]

c. Consent Judgment

In general, in the absence of fraud or collusion, a consent decree or judgment may bind an infant party, provided the court has investigated the facts and determined its fairness to the infant.

As a general rule, in the absence of fraud or collusion,[53] an infant may be bound by a consent judgment or decree in an action or suit to which he is a party,[54] at least where the judgment or decree is based on an adjudication of the court, after investigation of the facts, that it is fit and proper,[55] and, in some jurisdictions, even though it was pronounced without any inquiry and determination as to whether or not it was for the infant's benefit.[56] However, before entering a consent decree the court should inquire whether or not the terms of it are for the interest of the infant;[57] and in the majority of jurisdictions an infant is not bound by a judgment or decree rendered by consent without evidence,[58]

52. W.Va.—Andrews v. Floyd, 170 S.E. 897, 114 W.Va. 96.

53. U.S.—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.

54. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409—Watson v. U. S., D.C.N.C., 34 F.Supp. 777—Derrisaw v. Schaffer, D.C.Okl., 8 F.Supp. 876.
Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.
Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.
Mich.—Metzner v. Newman, 194 N.W. 1008, 224 Mich. 324, 33 A.L.R. 98.
Mo.—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W.2d 559.
31 C.J. p 1168 note 85.
Authority of guardian ad litem or next friend to consent generally see supra § 111 d.

Authority of court

Probate judge had general authority to approve settlement between heirs involving property rights of minor.—In re Marxhausen's Estate, 225 N.W. 632, 247 Mich. 192.

55. Kan.—Perry v. Umberger, 65 P.2d 280, 145 Kan. 367.
Mich.—Metzner v. Newman, 194 N.W. 1008, 224 Mich. 324, 33 A.L.R. 98.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—Hernandez v. San Antonio Public Service Co., Civ.App., 297 S.W. 264.
31 C.J. p 1169 note 86.

Decree favored

Adjustment of differences, between members of family over settlement of estate in which infant legatees are interested, will be looked on favorably when proposed compromise is submitted to chancery court and finding is made that settlement and compromise are for best interests of the infants.—Metzner v. Newman, 194 N.W. 1008, 224 Mich. 324, 33 A.L.R. 98.

56. Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.

Inquiry procedural

Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

57. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409.
Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Mich.—Hightower v. Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509—In re Marxhausen's Estate, 225 N.W. 632, 247 Mich. 192.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
31 C.J. p 1169 note 88.

Court not bound by representative's consent

The answer of guardian ad litem of minor admitting allegations of complaint and consenting that decree be entered as prayed does not require entry of consent decree, since court is not bound by admission of guardian ad litem, even though decree would be binding on infant.—Schramm v. U. S. Nat. Bank of Portland, 52 P.2d 181, 151 Or. 693.

Inquiry by court customary

Ordinarily, court will not enter consent decree where infants are concerned without inquiry as to whether or not decree is for their benefit.—Schramm v. U. S. Nat. Bank of Portland, supra.

Inquiry not dispensed with because of counsel

(1) A full investigation of all the conditions and circumstances should be made, even though the infant is represented by counsel.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.

(2) Where settlement of infant's suit by next friend is proposed, court has duty to protect infant's interest by judicially ascertaining facts, through real hearing and consideration of them, even though infant is represented by his own counsel who, in good faith and to the best of his ability, is safeguarding the infant's interests.—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W.2d 559.

Inquiry as to agreement unnecessary where evidence considered

Where judgment foreclosing minor's interest was rendered on evidence, it was held that there was no necessity that attorneys' agreement for judgment be passed on by court.—Stillwell v. Standard Savings & Loan Ass'n, Tex.Civ.App., 30 S.W.2d 690, error dismissed.

Extent of investigation required

(1) The court must be sufficiently advised to enable it to arrive at a reasonable conclusion in the premises. This does not require the court to exhaust the minutest details which might arise in the course of a contested lawsuit, but it does require a fair hearing.—Perry v. Umberger, 65 P.2d 280, 145 Kan. 367.

(2) The court should not rely solely on statement of infant's parents or next friend or on statement of infant's counsel, but should hear such testimony or ascertain such facts as will fully convince court that judgment pursuant to such settlement will fully protect infant's rights and interest.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.

(3) Statute requiring as condition of approval of settlement that the court find the effect on the estate of the minor is just and reasonable does not require that testimony be taken in a proceeding for settlement where the court is already acquainted with the material facts, as the finding necessary is one of substance, not of form, and is to be based on acquaintance with the situation rather than on whether or not witnesses are sworn.—In re Marxhausen's Estate, 225 N.W. 632, 247 Mich. 192.

58. N.C.—Keller v. Caldwell Furniture Co., 154 S.E. 674, 199 N.C. 413.
31 C.J. p 1168 note 79.

Effect of recital in judgment

Fact that judgment recited that evidence was heard was immaterial in view of express terms of judgment showing that it was based on stipulation and agreement which the circuit court was without jurisdiction to approve.—Campbell v. Campbell, 165 S.W.2d 851, 350 Mo. 169.

Record held to show evidence taken

Tex.—Griggs v. Brewster, Civ.App.,

or investigation and determination by the court of its fairness to the minor,[59] especially where it is prejudicial to him.[60] Such a judgment is not necessarily absolutely void,[61] although it may be erroneous.[62] Thus a court may set aside a consent judgment following a compromise of a minor's claim where there has been no real examination of the facts to determine whether or not the settlement is for the best interests of the minor,[63] even though fraud was not in fact committed,[64] and should do so where it appears that the consent decree was entered conformably to, and solely in reliance on, the stipulation.[65] If, however, the compromise was considered and sanctioned by the court[66] and was rendered on testimony in addition to the admission or confession of the guardian ad litem,[67] the judgment will not afterward be set aside where there was no fraud in its procurement; but, where the judgment was obtained through fraud, the rights of the infant parties are not bound thereby,[68] and the judgment may be set aside at the instance of the minor;[69] and the failure of the minor's representative to appeal from a consent judgment obtained through fraud, collusion, or neglect will not bind him so as to prevent a subsequently appointed representative from taking steps to have the judgment vacated.[70]

It will be presumed in the absence of any showing to the contrary that the court has performed its duty to inquire into the facts and determine whether or not the decree is for the best interests of the infant,[71] although it is not necessary that there be a reference to a master and a report by him,[72] but, if the judgment affirmatively shows that no investigation and determination of the fairness of the agreement to the infant were made, it is void;[73] and it has been held that a consent decree which waives or surrenders substantial rights of the minor is not binding because it denotes a surrender of the rights of the infant without investigation by the court.[74]

If the judgment by consent is beneficial to the infant's interests, it will not be set aside.[75]

A judgment which shows that it was not agreed to, but instead that the cause was submitted to the court by agreement of the parties, is binding on an infant party.[76]

Adverse interests in control of minor's cause. A

16 S.W.2d 839, denying rehearing, Civ.App., 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

59. Ark.—Kuykendall v. Zachary, 16 S.W.2d 590, 179 Ark. 478.
N.C.—Wyatt v. Berry, 170 S.E. 131, 205 N.C. 118.
31 C.J. p 1168 note 81.

Where infant not served with process

In action for possession of realty, where infant was not made party, judgment against infant was held void, although infant's guardian ad litem filed answer, where infant's interests were not presented to court in good faith and passed on by court. —Wyatt v. Berry, 170 S.E. 131, 205 N.C. 118.

Adverse party cannot preclude infant's rights

Defendant who before consenting to judgment in action for injuries knew that minor's rights were not properly laid before the court, and participated in attempt to adjudicate minor's rights could not preclude minor from seeking to set aside such judgment in so far as it failed to compensate minor for his injuries.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com.App., 130 S.W.2d 1048.

60. Ga.—Carroll v. Atlantic Steel Co., 106 S.E. 908, 151 Ga. 378, 15 A.L.R. 660.
31 C.J. p 1168 note 80.

61. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
Ky.—Brooks v. Stuart, 37 S.W.2d 56, 238 Ky. 235.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed.
31 C.J. p 1168 note 82.
Collateral attack see supra subdivision a of this section.
Effect of want or insufficiency of answer or defense see supra § 116.

62. N.C.—Rawls v. Mayo, 79 S.E. 298, 163 N.C. 177.
Tex.—Hollis v. Dashiell, 52 Tex. 187.

63. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind. App. 585.
Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.

64. Tenn.—Kates v. Anderson, Dulin, Varnell Co., supra.

65. Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

66. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind. App. 585.
Kan.—Perry v. Umberger, 65 P.2d 280, 145 Kan. 367.

67. Tex.—Williams v. Tooke, Civ. App., 116 S.W.2d 1114, error dismissed.

68. Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.

Facts constituting fraud

Where the same attorney acted for minor remaindermen and for life tenant, who permitted property to be sold for taxes in order to cut off remaindermen's interest, judgment quieting purchaser's title was fraudulent as to remaindermen, and did not divest their title.—Newport v. Hatton, supra.

69. Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.

70. Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S. W.2d 762, reversing, Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.

71. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L. Ed. 409—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.
Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.
Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.
31 C.J. p 1169 note 89.

72. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind. App. 585.

73. Ark.—Kuykendall v. Zachary, 16 S.W.2d 590, 179 Ark. 478.

74. Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

75. Va.—Morriss v. Virginia Ins. Co., 8 S.E. 383, 85 Va. 588.
31 C.J. p 1169 note 87.
Injustice or improvidence as ground for setting aside judgment or decree to which infant is party see infra § 123 d.

76. Ky.—Brooks v. Stuart, 37 S.W. 2d 56, 238 Ky. 235.

consent judgment taken by consent of a next friend whose interests were antagonistic to those of the infant is void.[77] Also an agreed judgment will not be sustained on direct attack where the infant had no counsel in fact and the same attorneys represented both sides which were adverse.[78]

Unauthorized agreement. A consent judgment agreed to by an attorney who had no authority from the next friend to compromise the rights of the minor is void.[79] A consent judgment agreed to by an attorney in a suit filed through the medium of a next friend for a person over twenty-one years of age, which suit was not authorized by plaintiff, is void.[80]

Judgment outside the issues. A consent judgment purporting to adjudicate matters not within the issues of the cause in which it is entered is not binding on an infant party thereto.[81]

d. Confession of Judgment

In general a judgment or decree cannot be entered pro confesso against an infant.

A bill cannot be taken as confessed or judgment by confession entered against an infant,[82] and the error of entering a judgment as confessed against an infant is not cured by a reservation to him of the right to show cause against the judgment after he becomes of age.[83] However, a judgment confessed on a bond after an infant's majority pursuant to a warrant executed shortly before the infant's majority cannot be repudiated for the first time after a lapse of ten years.[84]

e. Decree for Conveyance of Land

The authorities are not in accord as to the validity of a decree to compel a minor to convey realty.

In some jurisdictions it has been held that, in a proper case, a decree may be entered against an infant compelling him to make a conveyance.[85] In other jurisdictions it has been held that such a decree cannot be entered so as to compel him to do so during infancy;[86] and under some statutes a court cannot remove the disabilities of minors under a specified age so as to enable them to convey an interest in land, and a judgment or decree so doing is void.[87]

§ 123. —— Relief against Judgment

a. In general
b. Time for application
c. Infant's day in court
d. Grounds
e. Defenses and conditions precedent
f. Relief as against bona fide purchasers
g. Proceedings
h. Relief awarded

a. In General

In general an infant may obtain relief during or after his minority against an erroneous judgment, but unless it is void he has no absolute right to have it avoided, a request therefor being addressed to the sound discretion of the court and granted only when it is for the best interests of the infant so to do.

In general a judgment in a proceeding to which a minor is a party which is voidable on grounds arising out of his minority may be avoided by him on attaining his majority.[88] However, an infant ordinarily has no absolute right to avoid a judgment or decree against him[89] unless it is void.[90] It is not within the power of the infant to avoid the judgment by a mere election because of incapacity arising from his infancy.[91] A proceeding to avoid such a judgment or decree,[92] including a default

77. N.C.—Butler v. Winston, 27 S.E.2d 124, 223 N.C. 421.

78. Mo.—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W.2d 559.

79. Tex.—Kreis v. Kreis, Civ.App., 36 S.W.2d 821, error dismissed.

80. Tex.—Kreis v. Kreis, supra.

81. Ind.—Burrell v. Jean, 146 N.E. 754, 196 Ind. 187.

82. Pa.—Vacuum Oil Co. v. Pitarra, 32 Luz.L.Reg. 224.
31 C.J. p 1169 note 92.
Warrant of attorney to confess judgment see supra § 23.

83. Miss.—Hargrove v. Martin, 14 Miss. 61.

84. Del.—King v. Cordrey, 177 A. 303, 6 W.W.Harr. 418.

85. Ky.—Meriwether v. Hite's Heirs, 2 A.K.Marsh. 181.
31 C.J. p 1169 note 94.
Actual delivery of deed immaterial Whether or not deeds of release were actually delivered in accordance with order in partition suit was immaterial, in view of statute giving a decree of chancery for release of realty the same effect on the title as though the release had been executed in conformance with the decree, and notwithstanding such disability as infancy.—Satchwell v. Warner, 14 A.2d 527, 127 N.J.Eq. 544, affirmed 19 A.2d 830, 129 N.J.Eq. 384.

86. Mass.—Whitney v. Stearns, 11 Metc. 319.
31 C.J. p 1169 note 95.

87. Ark.—Dalton v. Bradley Lumber Co., 205 S.W. 695, 135 Ark. 392.

88. Cal.—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App.2d 349.

89. Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 668, 150 Kan. 738, citing **Corpus Juris.**
N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368—In re March's Estate, 6 A.2d 478, 17 N.J. Misc. 157.
31 C.J. p 1169 note 96.

90. N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368—In re March's Estate, 6 A.2d 478, 17 N.J. Misc. 157.

91. N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.

92. N.J.—La Bell v. Quasdorf, supra—Steelman v. Gilbert, 186 A. 47, 14 N.J.Misc. 490.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.

judgment or decree,[93] is addressed to the sound discretion of the court, which discretionary authority is legal and not arbitrary in character;[94] and while it should be liberally exercised to protect the infant's interests,[95] the court will not set aside the judgment or decree unless for the best interest of the minor,[96] and relief will not be granted if his rights were fully safeguarded and he suffered no substantial injury.[97] The correction of a decree involving minors and adults in a case in which all were properly served with process, is not void because rendered without service of notice of the filing of the petition for correction on the minors where the court investigated and made a finding that the correction was proper and not prejudicial to the minors.[98] In the absence of fraud or collusion, a decree rendered in an infant's favor on a bill by next friend, whether involving real or personal estate, cannot be reopened by the infant.[99]

The right to maintain an action to review a judgment against infant defendants after their arrival at majority exists only in those who were infants at the time of the rendition of the judgment, and interested in it, and does not belong to such as thereafter became interested in the subject matter of the suit by reason of the death of one of the parties to it.[1]

A judgment creditor has the duty to have canceled and erased from the records the inscription of a judgment against a minor which should never have been rendered.[2]

A decree against minors which is erroneous because of matters arising out of their minority will not be reformed at the request of adult plaintiffs.[3] However, a voidable judgment against a minor is of such precarious value to plaintiff that it may be vacated on his motion under a statute authorizing the court to vacate a final judgment on motion of the prevailing party if execution has not been satisfied in whole or in part.[4]

b. Time for Application

In many jurisdictions the statutes so provide, and it is held in conformity therewith, that an infant has a specified fixed time after majority in which to attack a judgment or decree in a proceeding to which he is a party, which right may be exercised at any time within the period fixed, but not thereafter. The right to attack a judgment or decree may be lost by laches.

It has been held independent of statute that a judgment irregularly obtained against an infant may be set aside after he has become of age,[5] and at one time, as considered infra subdivision c of this section, it was the practice for a decree in equity against an infant to be entered nisi and to contain a provision giving him a day in court after he became of age to show cause against it before it became absolute. Now, however, by force of statutes enacted in the various jurisdictions an infant generally has a fixed time after arrival at majority in which to show cause against or seek to vacate or set aside a judgment or decree rendered in a proceeding to which he is a party;[6] and a general statute prescribing the time within which proceed-

93. Wis.—Grauman, Marx & Cline Co. v. Krienitz, 126 N.W. 50, 142 Wis. 556.

94. N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.

95. N.J.—La Bell v. Quasdorf, supra.

Strict rules not applicable

Minors are considered wards of the court and as to them the strict rules applicable to persons, sui juris, who invoke and obtain judicial action and then seek vacation thereof is not so rigid.—Noble v. Noble, 300 N.W. 885, 299 Mich. 565.

96. Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.

97. N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368—Steelman v. Gilbert, 186 A. 47, 14 N.J.Misc. 496.

Relief held properly refused

Ill.—Chicago Title & Trust Co. v. Kearney, 282 Ill.App. 279.
N.J.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.
Pa.—Skibinzewski v. Newhouse, 12 Pa.Dist. & Co. 419.
S.C.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50.

98. Ark.—Goode v. King, 76 S.W.2d 300, 189 Ark. 1093.

99. Miss.—Johns v. Harper, 61 Miss. 142.

1. Ky.—Back v. Combs, 29 S.W. 352, 96 Ky. 522, 16 Ky.L. 613.

2. La.—Swift & Co. v. Villemeur, 131 So. 855, 15 La.App. 503.

3. Ark.—Baker v. Boyd, 119 S.W.2d 524, 196 Ark. 563.

4. Mass.—Lee v. Fowler, 161 N.E. 910, 263 Mass. 440.

5. S.C.—Haigler v. Way, 31 S.C.L. 324.
31 C.J. p 1171 note 21.

6. Ark.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 283 Ky. 522.
Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.
Okl.—Mosier v. Aspinwall, 1 P.2d 633, 151 Okl. 97—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.
31 C.J. p 1171 notes 22, 23.

Time allowed

(1) Twelve months after infant attains majority.
Ark.—Moudy v. Bradley, 140 S.W.2d 113, 200 Ark. 630—Ready v. Ozan Inv. Co., 79 S.W.2d 433, 190 Ark. 506.
Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.
Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.

(2) Two years after reaching majority.—Stillwell v. Standard Savings & Loan Ass'n, Tex.Civ.App., 80 S.W. 2d 690, error dismissed.

(3) Four years after attaining majority.—Swift & Co. v. Villemeur, 131 So. 855, 15 La.App. 503.

(4) Period for an appeal from the decree after majority.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151.

(5) Period allowed for writ of er-

ings to set aside judgments or decrees of a court shall be instituted does not bar an infant from maintaining such a suit where another statute provides that infants shall have the same time after their disability has been removed to bring an action as is prescribed for other persons.[7] Also, where there is no statute specifically prescribing the time within which a suit to annul a decree must be brought, it has been held that the court by analogy will limit the time therefor to the time prescribed by the statutes for bills of review, appeals, and similar proceedings.[8] Under such statutes the court has power to grant relief at or after the term at which the judgment or decree complained of was entered;[9] and independent of statute the court may grant relief during the term at which the judgment or decree was rendered.[10] The infant, by appropriate proceedings, may attack the judgment or decree at any time within the period fixed by statute,[11] and it is unnecessary that such right be reserved in the judgment or order.[12] He is not bound to move at the earliest possible opportunity to set aside the judgment or decree,[13] and need not do so during infancy;[14] nor is he required to wait until after he comes of age before seeking relief, but may apply for that purpose as soon as he sees fit.[15] However, proceedings attacking a judgment or decree not void on its face must be commenced within the statutory time provided therefor or the right to do so will be lost;[16] and where the decree is valid on its face and has become absolute by the running of time, the court is without authority to vacate or

ror after majority.—Mitchell v. Mitchell, 159 N.E. 274, 328 Ill. 136—Haines v. Hewitt, 21 N.E. 930, 129 Ill. 347.

(6) After maturity within time limited for appeal, or as extended under statute.—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J.Eq. 661.

Proceedings in which statutory relief applicable

Ark.—Moudy v. Bradley, 140 S.W.2d 113, 200 Ark. 630.

Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

31 C.J. p 1171 note 23 [d], [e].

7. Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.

Where title to cause of action was in minors themselves, representation by another in any fiduciary capacity would not cause statute to run against them.—Nelson v. Estill, supra.

8. Miss.—Adams v. Belt, 100 So. 191, 136 Miss. 511.

Time allowed

A suit to annul a decree against minor defendants must be brought not later than two years after the minors have obtained their majority, unless they are without knowledge of the rendition of the decree, or of such facts as would reasonably put them on inquiry and lead to a discovery thereof.—Adams v. Belt, supra.

9. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.

Okl.—Mosier v. Aspinwall, 1 P.2d 633, 151 Okl. 97—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

Motion to set aside

Ill.—Simpson v. Anderson, 137 N.E. 88, 305 Ill. 172.

10. Iowa.—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207.

11. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

12. Ala.—Kennedy v. Kennedy, 2 Ala. 571.

Ark.—Rankin v. Schofield, 98 S.W. 674, 81 Ark. 440.

Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.

Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

13. N.Y.—McMurray v. McMurray, 60 Barb. 117, 9 Abb.Pr.,N.S., 315, 41 How.Pr. 41, affirmed 66 N.Y. 175.

14. Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.

Proceeding held timely

A motion to set aside judgments as void, because obtained against an infant for whom no guardian had been appointed, made when enforcement was sought shortly after the infant attained her majority, was held timely.—De Guzman v. Shepherd, supra.

15. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

31 C.J. p 1174 note 74.

Original bill during minority

Infant may during minority maintain original bill for relief, on ground of fraud or error appearing on face of proceedings.—Sharp v. Sharp, supra.

16. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

Ark.—Ready v. Ozan Inv. Co., 79 S.W.2d 433, 190 Ark. 506.

Cal.—Cikuth v. Loero, 57 P.2d 1009, 14 Cal.App.2d 32.

31 C.J. p 1174 note 76.

Time allowed

Six months after rendition.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

Right barred in same manner as adult's

If suit to set aside judgment against infant is not brought within statutory time, the infant's action is barred in the same manner as the action of an adult.—Ready v. Ozan Inv. Co., 79 S.W.2d 433, 190 Ark. 506.

Proceeding held timely

Ill.—McReynolds v. Miller, 22 N.E. 2d 951, 372 Ill. 151.

Iowa.—Reno v. Avery, 212 N.W. 564, 203 Iowa 645.

N.J.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613.

Proceeding held not timely

Tex.—First Texas Joint Stock Land Bank of Houston v. Webb, Civ. App., 82 S.W.2d 159, error dismissed.

Supervening disability not tacked

An infant remainderman who was party to decree of October 2, 1893, foreclosing mortgage on remainder and who reached his majority on August 16, 1903, was barred by lapse of time from directly or collaterally attacking decree in proceeding instituted on March 17, 1938, notwithstanding that remainderman was adjudged of unsound mind on May 23, 1901, and was not adjudicated of sound mind until within two years of March 17, 1938, and that life estate did not end until August 8, 1934. —McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

set it aside.[17] This limitation does not apply where the judgment is absolutely void, as in such case lapse of time does not give it validity;[18] and in some jurisdictions statutes limiting the time within which an infant may bring suit to set aside a judgment to a specified time after he reaches majority do not apply where the fact of his minority does not appear in the record of the original action.[19] Also, although it is held in some jurisdictions that a statutory limitation on the time within which an infant may attack a judgment or decree applies even though fraud was practiced in obtaining it,[20] in others it is held that a judgment or decree may be vacated or set aside at any time where it affirmatively appears that it was obtained through actual or constructive fraud.[21] However, where the fraud involved was a concealed fraud it has been held that an independent action for relief on the ground that the judgment was fraudulently obtained may be brought within the period allowed by statute after the discovery of the fraud to enjoin the enforcement of adverse rights fraudulently obtained and is not limited to the time allowed by statute to reverse, vacate, or modify a judgment in the court in which it was rendered.[22]

Right restricted as under former equity practice. Statutes giving a minor the right to attack a judgment or decree within a fixed time after majority have been held designed to afford an infant such equitable relief as he would have been entitled to under the former equity practice,[23] and not to extend or amplify the right to relief beyond those cases in which, under the old practice, such right was reserved in the decree.[24] Hence, since under the former practice it was proper to reserve in the decree a right to show cause against it after majority only in the case of infant defendants, as considered infra subdivision c of this section, they have, in some jurisdictions, been held not applicable to a judgment or decree in an action in which the complaining infant was the actor.[25]

Laches. A party may lose his right to attack a judgment rendered during his minority by laches,[26] as where he fails to assert his right for several years after reaching majority,[27] especially where the rights of innocent third persons have intervened.[28] Also, where a minor becomes of age during the pendency of proceedings to which he is a party, his failure to disaffirm promptly after attaining his majority constitutes laches which will bar him from questioning the judgment subsequently rendered on grounds arising out of his minority.[29] Laches and unreasonable delay in challenging a default judgment rendered against defendant in

17. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243.

18. Ky.—Arnold v. Lawson, 142 S. W. 684, 146 Ky. 365.

19. Ark.—Wade v. Saffell, 9 S.W.2d 803, 177 Ark. 1186.

20. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S. Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Wash.—Wilson v. Hubbard, 82 P. 154, 39 Wash. 671.

21. Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

22. Okl.—Harjo v. Johnston, 104 P. 2d 985, 187 Okl. 561.

Principle has no application to things that were openly done or which appear of record.—Adams v. Belt, 100 So. 191, 136 Miss. 511.

23. Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.

Okl.—Mosier v. Aspinwall, 1 P.2d 633, 151 Okl. 97—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

24. Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.

31 C.J. p 1172 note 24½.

Cases involving affirmative and non-affirmative action

It has been held that although there are early cases decided in other jurisdictions in which a distinction was made between cases in which the infant was directed to make or join in a conveyance and cases in which the title was divested by the decree itself without affirmative act on the part of the infant that the common-law rule is unsettled and the statute should be given universal application and construed to permit infants to show cause within twelve months after arriving at full age in all cases of judgments against them. —Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352.

Ejectment

Where a judgment in ejectment in which a minor was defendant did not divest him of any interest in the land, but only adjudicated that he did not have any title therein, he could not show cause against such a judgment.—Paragould Trust Co. v. Perrin, 145 S.W. 886, 103 Ark. 67.

25. Ark.—Woodall v. Moore, 17 S.W. 262, 55 Ark. 22.

31 C.J. p 1172 note 24.

26. Wis.—In re Brandstedter's Estate, 224 N.W. 735, 198 Wis. 457.

31 C.J. p 1174 note 83.

Period of immunity to laches

An infant cannot be charged with laches during his minority, but that immunity does not continue throughout his majority.—In re Brandstedter's Estate, supra.

27. Wis.—In re Brandstedter's Estate, supra.

31 C.J. p 1174 note 84.

Right to question decree held lost

Ark.—Cannon v. Price, 150 S.W.2d 755, 202 Ark. 464.

Wis.—In re Brandstedter's Estate, 224 N.W. 735, 198 Wis. 457.

Right held not barred

Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561.

28. Ark.—Cannon v. Price, 150 S.W. 2d 755, 202 Ark. 464.

N.C.—Arthur v. Broadway, 37 S.E. 503, 127 N.C. 407.

29. Cal.—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App.2d 349.

Majority attained after trial

Minor defendant who, raising no question regarding minority, participated in trial without guardian, was held not entitled to vacation of adverse judgment where minor attained majority after trial and before judgment, and her attorneys, after she

a proceeding commenced after he attained his majority will cause the court to refuse to strike it on the ground that he has a meritorious defense in that he was a minor at the time the liability was entered into.[30]

c. Infant's Day in Court

Prior to the enactment of statutes enabling an infant to attack a judgment or decree within a fixed period after his arrival at majority, it was the practice in equity that a decree against an infant defendant should be entered nisi and a reservation made therein giving him the right to show cause against it after he became of age before it became absolute, but such a reservation was not made in favor of an infant plaintiff.

It has been the practice in equity that a decree against an infant shall first be entered nisi and shall contain a provision giving him a day in court after he became of age to show cause against it before it becomes absolute;[31] and when the decree contains such a provision the infant is entitled, as a matter of course, at any time before the decree is made absolute to put in a new answer and have the cause heard again.[32] In many jurisdictions, however, the necessity for such a reservation has been obviated by statutes giving the infant time to show cause after majority, considered supra subdivision b of this section.

Necessity of reservation of day in decree. In general, where an infant defendant is entitled to his day in court, after majority, to show cause, the right must be expressly reserved to him in the decree, or the decree will be erroneous,[33] and may be impeached by appropriate proceedings for that purpose;[34] but the decree will not be considered absolutely void, and therefore it is not subject to collateral attack.[35] Under some statutes an infant is entitled to his day in court, whether the right is expressly reserved to him or not; and in such cases, therefore, the failure to reserve the right is not even error.[36] The clause reserving to an infant defendant the right to show cause against a decree after majority should not, of course, be inserted in a decree, in cases where the infant is not entitled to that right under any circumstances.[37]

Infant complainants. As a general rule, infant complainants are bound by the judgment or decree entered in the cause, and, in the absence of statute authorizing them to attack it after arrival at majority, considered supra subdivision b of this section, are not entitled to a day after coming of age to show cause against it.[38]

d. Grounds

The judgment or decree rendered during minority may be vacated on the grounds which are open to an adult, and also for irregularities in the proceedings arising out of minority. To obtain relief substantial harm must have been caused to the minor's rights, but a showing of injustice has been held sufficient to entitle him to relief.

It has been stated that the grounds on which one may avoid a judgment or decree rendered during his minority are the same as those of an adult,[39] and only those.[40] Such statement, of course, must be considered as qualified by the differences in the time in which the grounds for relief may be available because of the extended period during which an infant may seek relief, as considered supra subdivision b of this section; and perhaps it should be limited, as far as it indicates a restriction of the grounds to those available to adults, to grounds go-

attained majority and before decision of cause, presented additional points and authorities to court, which did not include any item relating to defendant's minority.—Carver v. Donin, 33 P.2d 841, 139 Cal.App. 395.

Minor not harmed

Minor who was defendant in personal injury action and who became of age before trial, but made no attempt to disaffirm until judgment was rendered against him, was not harmed by having case proceed against him without appointment of guardian ad litem.—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App. 2d 349.

30. Md.—Weisman v. Davits, 199 A. 476, 174 Md. 447.

31. Me.—McClellan v. McClellan, 65 Me. 500.
31 C.J. p 1170 note 10.

32. Iowa.—Ralston v. Lahee, 8 Iowa 17, 74 Am.D. 291.
31 C.J. p 1170 note 11.

33. Va.—Tennent's Heirs v. Pattons, 6 Leigh 196, 33 Va. 196.
31 C.J. p 1170 note 13.

34. Va.—Lee v. Braxton, 5 Call 459, 9 Va. 459.
31 C.J. p 1171 note 14.

35. Cal.—Joyce v. McAvoy, 31 Cal. 273, 89 Am.D. 172.
31 C.J. p 1171 note 15.

36. Va.—Morriss v. Virginia Ins. Co., 8 S.E. 383, 85 Va. 588.
31 C.J. p 1171 note 16.

37. Miss.—Doe v. Bradley, 14 Miss. 485.
31 C.J. p 1171 note 17.

38. Tenn.—Simpson v. Alexander, 6 Coldw. 619.
31 C.J. p 1171 note 19.

Distinction between cases involving real and personal property disapproved

Cases in which a distinction between decrees affecting real estate and decrees affecting only personalty was drawn, the infant complainant being held entitled to a day to show cause against decrees of the former but not of the latter class, have been criticized and disapproved.—Cannon v. Hemphill, 7 Tex. 184.

39. N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.
31 C.J. p 1172 note 28.

40. Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.
N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.

ing to the merits of the cause of action, for certain irregularities in the proceedings in which the judgment or decree was rendered, which arise out of the party's infancy and are nonexistent where persons sui juris are involved, have at varying times been held sufficient grounds on which to obtain relief, as, for example, the want, or improper representation, of the minor,[41] or that his interests were not properly protected,[42] as that the action, where judgment was rendered against the infant, was not defended,[43] or that a consent judgment or decree was entered without previous judicial sanction or proper investigation.[44] However, a judgment or decree cannot be avoided merely on the ground of infancy,[45] and, although it has been held that a minor is entitled to have a default judgment opened on a petition alleging that he was a minor,[46] it has also been held in such case that the judgment will not be stricken off where no irregularity appears on the face of the record.[47] The judgment or decree may be impeached or set aside for fraud,[48] collusion,[49] or neglect;[50] and there is authority which indicates that these are the only grounds available where the infant is properly represented in the proceeding.[51] However, it has also been held that the judgment or decree may be avoided for surprise,[52] mistake,[53] error[54] apparent on the face

41. Ark.—Union Sawmill Co. v. Langley, 66 S.W.2d 300, 188 Ark. 316.
Effect of lack of:
Representation by guardian or next friend see supra § 108 b.
Service on infant see supra § 115.
Insufficient representation
Court, believing that minor plaintiff's guardian, agreeing on settlement, was prevented from consulting attorney or told that defendant would settle with guardian only, may set aside agreed judgment.—Union Sawmill Co. v. Langley, supra.

42. S.C.—Simpson v. Doggett, 156 S. E. 771, 159 S.C. 294.

43. La.—Swift & Co. v. Villemeur, 131 So. 855, 15 La.App. 503.

44. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.
N.C.—In re Reynolds' Guardianship, 173 S.E. 789, 206 N.C. 276.
Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Civ.App., 130 S.W.2d 1048.
Legal fraud
Action of minor's guardian in taking a default judgment against him without investigation or inquiry amounts to a legal fraud on the rights of the minor.—Seay v. Hawkins, C.C.A.Okl., 17 F.2d 710.

45. Kan.—Fotopoulos v. Gas Service Co., 96 P.2d 666, 150 Kan. 738—Kistler v. Fitspatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.
Mo.—Robison v. Floesch Const. R. Co., 236 S.W. 332, 291 Mo. 34.

46. Pa.—Young v. Findley, 31 Pa. Dist. & Co. 630, 5 Sch.Reg. 176.

47. Pa.—Young v. Findley, supra.

48. Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.
Ill.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Ind.—Miller v. Ketchum, 179 N.E. 559, 94 Ind.App. 426.
Mo.—Kennard v. Wiggins, 160 S.W. 2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S.Ct. 47, 317 U.S. 652, 87 L.Ed. 524.
N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561.
Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W. 2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.
Wash.—Coleman v. Crawford, 248 P. 386, 140 Wash. 117.
31 C.J. p 1172 note 32.
Matters constituting fraud
Ala.—Irwin v. Alabama Fuel & Iron Co., 110 So. 566, 215 Ala. 328.
Ark.—Union Sawmill Co. v. Langley, 66 S.W.2d 300, 188 Ark. 316.
Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.
Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Iowa.—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207.
Matters held not to indicate fraud
Ala.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.
Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.

49. N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.
Wash.—Coleman v. Crawford, 248 P. 386, 140 Wash. 117.

50. Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S. W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.

51. Tex.—Baumgardner v. Russell Realty Co., Civ.App., 33 S.W.2d 561, error dismissed.

52. W.Va.—Poling v. Poling, 55 S. E. 993, 61 W.Va. 78—Lafferty v. Lafferty, 26 S.E. 262, 42 W.Va. 783.

53. Ind.—Seward v. Clark, 67 Ind. 289.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.

54. Ill.—McReynolds v. Miller, 22 N.E.2d 951, 372 Ill. 151.
Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.
N.H.—Merchants Mut. Casualty Co. v. Kiley, 30 A.2d 681.
Okl.—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.
Va.—Gimbert v. Norfolk Southern R. Co., 148 S.E. 680, 152 Va. 684.
31 C.J. p 1172 note 35.
Foreclosure of void mortgage
Judgment foreclosing mortgage of minor's realty made by guardian without county court's authority, and proceedings thereunder, may be set aside in a proper proceeding brought by infant.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.
Error in infant's name insufficient ground
Where judgment expressly excepted minor defendant's interest in land against foreclosure of vendor's and trust deed liens, although minor's name was incorrectly given in judgment and undisputed evidence showed person named in judgment was same person as minor who was cited and for whom guardian ad litem was appointed, judgment would not be set aside on ground that minor was being deprived of property under false name by being improperly cit-

of the proceedings,[55] unavoidable casualty or misfortune preventing the party from prosecuting or defending,[56] want of jurisdiction in the court[57] or of the person,[58] or other grounds which will vacate a judgment affecting an adult.[59]

In general the error for which a judgment or decree may be avoided must be such that, if appealed, it would cause a reversal,[60] or show that other facts have been discovered which show the decree to be wrong.[61] The nature of the proceeding by which relief is sought may determine whether the error relied on must be one of law or of fact. If relief is sought by writ of error coram nobis,[62] or by motion in the nature of a writ of error coram nobis,[63] conformably to the rules applicable to judgments generally, considered in the C.J.S. title Judgments § 312, also 34 C.J. p 393 note 1–p 398 note 49, the error, in order to constitute a ground for relief, must be an error of fact and not of law; and the facts relied on must be facts which do not appear on the record, were unknown to the court, and, if known, would have precluded the rendition of the judgment.[64] On the other hand, a proceeding to vacate or set aside the judgment or decree by bill of review cannot be sustained because of error of fact;[65] and it has been held, on motion to vacate or other procedure instituted under statutes giving infants the right to show cause after majority against a judgment or decree for errors therein, that errors of law constitute grounds for relief,[66] but errors of fact do not.[67] It has been held, however, that, where the infants were properly represented and their rights fully litigated and considered, the mere fact that the court erred in its decision will not enable the infants to reopen the question after the time to review the decision has passed;[68] and also that mere error in the judgment rendered will not authorize the court to set aside the judgment at a succeeding term of court on the petition of the minor's guardian.[69] A mistake of law by one of the parties is no ground for vacating a consent decree.[70]

On collateral attack the only fraud which constitutes ground for relief is fraud which shows a lack of jurisdiction.[71]

A judgment or decree will not be set aside on merely technical grounds,[72] as, for example, for mere irregularity of form.[73]

Injustice or improvidence. The fact that applicant was an infant when the judgment was rendered and that the judgment itself is shown to be unjust is sufficient to entitle applicant to relief.[74]

ed and erroneously named in judgment, since judgment fully protected minor's interest in lands.—Patridge v. Peschke, Tex.Civ.App., 111 S.W.2d 1147.

55. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

56. Okl.—Thomas v. Monroe, 65 P. 2d 1008, 179 Okl. 416.

Negligence of attorney

Failure of probate attorney to look after interests of minor defendant in partition action as he had promised to do was held not to constitute such unavoidable casualty as would require vacating of judgment rendered in action.—Thomas v. Monroe, supra.

57. Wash.—Coleman v. Crawford, 248 P. 386, 140 Wash. 117.

58. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

59. N.M.—Caudill v. Caudill, 44 P. 2d 724, 39 N.M. 248.

60. Iowa.—Webster v. Page, 6 N.W. 716, 54 Iowa 461.
31 C.J. p 1172 note 38.

61. Tex.—Johnson v. Johnson, 85 S. W. 1023, 38 Tex.Civ.App. 385.

62. Tenn.—McLemore v. Durivage, 22 S.W. 207, 92 Tenn. 482.

63. Ill.—Martin v. Starr, 255 Ill. App. 189.

64. Ill.—Martin v. Starr, supra.

65. N.M.—Caudill v. Caudill, 44 P. 2d 724, 39 N.M. 248.

66. Iowa.—In re Kempthorne, 175 N.W. 857, 188 Iowa 70.
Okl.—Cudjo v. Harris, 248 P. 343, 119 Okl. 69.

67. Iowa.—In re Kempthorne's Estate, 175 N.W. 857, 188 Iowa 70.

68. N.Y.—In re Evans' Estate, 1 N. Y.S.2d 99, 165 Misc. 752, affirmed In re Evans' Will, 17 N.Y.S.2d 1006, 258 App.Div. 1037, appeal granted 18 N.Y.S.2d 1002, 259 App.Div. 705, affirmed 29 N.E.2d 392, 284 N.Y. 571.

69. Okl.—Thomas v. Monroe, 65 P. 2d 1008, 179 Okl. 416.

Protection against injustice

Protection is afforded infant defendant from injustice resulting from erroneous judgment by right to institute proceedings after he reaches his majority.—Thomas v. Monroe, supra.

70. U.S.—Derrisaw v. Schaffer, D.C. Okl., 8 F.Supp. 876.

71. Tex.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Fraud of guardian ad litem

Where there were no factual allegations with respect to guardian ad litem which would show lack of jurisdiction, no relief as to any other fraud which might have been committed by guardian could be granted in collateral proceeding, instituted by infant remainderman after reaching majority, attacking mortgage foreclosure decree.—McCampbell v. Warrich Corporation, supra.

72. W.Va.—Tomblin v. Peck, 80 S. E. 450, 73 W.Va. 336.

73. Ala.—Casey v. Sacks, 134 So. 851, 223 Ala. 147.

Appointment of guardian ad litem without service does not warrant vacation of chancery court's decree on bill in nature of bill of review. —Casey v. Sacks, supra.

74. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 283 Ky. 532—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.
31 C.J. p 1172 note 40.

Relief held proper

Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

Pa.—Rebic v. Gulf Refining Co., 186 A. 236, 122 Pa.Super. 149.

Injustice and improvidence not shown

Tex.—Griggs v. Brewster, Civ.App., 16 S.W.2d 839, denying rehearing

A judgment entered on agreement of the parties may be set aside because it is improvident as to an infant party,[75] as where a confessed judgment in favor of a minor, made by the court without a proper investigation of the facts, did not adequately compensate him for the injuries sustained,[76] and a judgment adverse to an infant may be set aside because his interests were not properly cared for;[77] but mere inadequacy of relief due to a failure of the court to realize the extent of the injuries suffered after a proper investigation of the facts will not warrant the vacation of a consent judgment.[78] However, the reasonableness of the amount for which a default judgment against an infant defendant was rendered should not be considered in the determination of whether or not it should be set aside for failure to appoint a guardian ad litem.[79]

Necessity of prejudice. While a judgment against an infant may be set aside for irregularity,[80] it is generally held that the error must be such as affects the substantial rights of the infant,[81] especially where the rights of innocent third persons have intervened.[82] Hence, the infant must show a valid defense to the action in which the judgment or decree was rendered.[83]

Newly discovered evidence. A decree against infants will not be set aside for newly discovered evidence, merely because the guardian ad litem failed to produce in evidence facts which were then patent, although, if the guardian colluded with plaintiff to suppress facts, or was so grossly negligent that his failure to produce the evidence amounted to a fraud, the relief will be granted.[84]

Grounds existing at rendition of decree. The right of an infant to show cause against a decree which affects his interests is limited to cause existing at the time of the rendition of the decree, and not such as arose afterward.[85]

e. Defenses and Conditions Precedent

An infant may be estopped, or may waive the right, to attack a judgment or decree affecting his interests, as by a prior unsuccessful attack thereon. The necessity for the error relied on depends under varying circumstances on the procedure by which relief is sought. Ordinarily it is not necessary to tender or return the consideration received or paid under the judgment or decree attacked.

An infant may become estopped to attack a judgment against him or affecting his interests,[86] and, where defects or defenses are waived by a failure to prosecute timely and appropriate review proceedings, the judgment cannot thereafter be attacked on such grounds in equitable proceedings.[87]

Where, on an infant's showing cause against a decree against him, an additional fact appears, which if it had been originally shown would have authorized the decree, it will not be disturbed, although without that fact being proved the decree ought not to have been entered.[88]

Where an attempt by an infant, after his arrival at majority, to set aside a decree, is founded in fraud, the relief asked will not be granted.[89] In order for an infant to have a judgment set aside for fraud of the adverse party it has been held that

15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

75. Tex.—Day v. Johnson, 72 S.W. 426, 32 Tex.Civ.App. 107.

76. Mich.—Palazzolo v. Verdier, 208 N.W. 677, 234 Mich. 547.
Tenn.—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Civ.App., 130 S.W.2d 1046.
Judgment insufficient to cover expenses of treating injury
Mich.—Palazzolo v. Verdier, 208 N.W. 677, 234 Mich. 547.

77. Ill.—Lloyd v. Kirkwood, 112 Ill. 329.
Tex.—Stephens v. Hewett, 54 S.W. 801, 22 Tex.Civ.App. 303.

78. Kan.—Perry v. Umberger, 65 P. 2d 280, 145 Kan. 367.

79. N.Y.—Malicky v. Rosenberg, 273 N.Y.S. 818, 152 Misc. 197.

80. N.C.—England v. Garner, 90 N. C. 197.
31 C.J. p 1172 note 46.

81. Cal.—Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen, 65 P.2d 352, 8 Cal.2d 364.
N.C.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62.
31 C.J. p 1173 note 47.
Representation of conflicting interests
Showing that judgment was improperly influenced by guardians ad litem representing conflicting interests is necessary that it be set aside in equitable proceeding therefor.—Griggs v. Brewster, Civ.App., 16 S.W. 2d 839, denying rehearing 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.
Vacation of judgment held improper
N.C.—Mitchell v. Mitchell, 190 S.E. 487, 211 N.C. 308.

82. N.C.—Harris v. Bennett, 76 S. E. 217, 160 N.C. 339.
31 C.J. p 1173 note 48.

83. Cal.—Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen, 65 P.2d 352, 8 Cal.2d 364.
Iowa.—Beardsley v. Clark, 294 N.W. 887, 229 Iowa 601.
31 C.J. p 1173 note 49.

84. Iowa.—Harris v. Bigley, 111 N. W. 432, 136 Iowa 307.

85. Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.
31 C.J. p 1172 note 31.

86. Ga.—Sharp v. Findley, 71 Ga. 654.
Mo.—Fischer v. Siekmann, 28 S.W. 435, 125 Mo. 165.
Denial of relief held proper
N.Y.—Malicky v. Rosenberg, 273 N. Y.S. 818, 152 Misc. 197.

87. Tex.—Griggs v. Brewster, Civ. App., 16 S.W.2d 839, denying rehearing, Civ.App., 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

88. Va.—Pierce v. Trigg, 10 Leigh 406, 37 Va. 406.

89. Mich.—Lowes v. Lowes, 86 N. W. 820, 127 Mich. 307.

he must show that he or his representative exercised due diligence at the former trial to relieve himself of the effects of such fraud.[90]

Mere acquiescence by an infant while under disability in a default judgment is insufficient to justify the denial of his motion to set it aside.[91]

The failure of an infant who attained his majority a short time before final determination of the case in the appellate court to appear therein will not affect his right later to contest issues incidentally involved in the proceeding.[92]

Prior unsuccessful attack. Where an unsuccessful effort to attack a judgment against an infant has been made by a suit by his guardian during his minority,[93] or by a petition to vacate the judgment filed by the minor after attaining his majority,[94] he is thereafter precluded from attacking it; and, where an infant against whom judgment had been rendered after coming of age joined with the other defendants in a motion for a new trial and appealed from an order denying such motion, which was affirmed, it was held that by joining in the motion and appeal he submitted himself to the jurisdiction of the court and could not thereafter move to set aside the judgment on the ground of his infancy.[95] An unsuccessful action by a party seeking relief against a judgment under a statute authorizing relief from a judgment taken through mistake, inadvertence, surprise, or excusable neglect does not bar the right of an infant defendant who was made a party to the statutory proceeding to have the judgment reviewed for error within the statutory time allowed therefor, where error of law committed on the trial is not cause for relief under the statutory proceeding.[96]

Appearance of error in record. Under statutes authorizing an infant to show cause against a judgment within a fixed time after arrival at majority it has been held not necessary, if his condition of infancy appears in the record, for the error to appear therein in order for the court to vacate the judgment.[97] Under some statutes in order for a judgment to be vacated or modified after term because the infant was not properly represented in the case, the condition of infancy must not appear in the record, nor the error in the proceedings.[98]

Tender or return of funds or property received under judgment. It has been held that parties who accept and, after reaching majority, retain benefits received under a judgment rendered during their minority cannot, while still retaining such benefits, repudiate the judgment.[99] On the other hand it has been held that a minor is not required to tender or pay back any consideration received by, or paid to, him in satisfaction of the judgment or decree as a prerequisite to maintaining a proceeding to have it vacated or set aside,[1] unless it is shown that he has actually received and still possesses it,[2] or that it was spent for necessaries.[3] A return will not be required where the money was paid to the guardian ad litem or next friend and not to the minor and there is no showing that the latter had the consideration at the time he instituted proceedings to vacate the judgment.[4] Also, if no money was paid to, or received by, the guardian, it is unnecessary that a payment of the fee of the original attorney for the minor out of the amount due on the judgment in the minor's favor be refunded as a prerequisite to the reopening of the judgment on petition by the minor's next friend.[5] Where some of the persons interested in a partition proceeding were represented by guardians, but it was not shown that the money received by them or by their guardians was received with knowledge of the fact that any portion of it was the proceeds of the property of partition, the proceedings and decree for partition did not prevent the infants from electing, on attaining their majority, to follow the property itself.[6]

90. Ind.—Atha v. Glenn, 174 N.E. 826, 92 Ind.App. 449.

91. Wis.—Grauman, Marx & Kline Co. v. Krienitz, 126 N.W. 50, 142 Wis. 556.
31 C.J. p 1174 note 86.

92. Tenn.—Hodges v. Hale, 97 S.W. 2d 454, 20 Tenn.App. 233.

93. Ky.—Bohannon v. Tarbin, 76 S. W. 46, 25 Ky.L. 515.

94. Okl.—Welch v. Commercial Nat. Bank of Muskogee, 217 P. 476, 90 Okl. 221.

95. Cal.—Childs v. Lanterman, 37 P. 382, 103 Cal. 337, 42 Am.S.R. 121.

96. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 433, 216 Ind. 192.

97. Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

98. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.

99. Mo.—Virgin v. Kennedy, 32 S. W.2d 91, 326 Mo. 400.

1. S.C.—Simpson v. Doggett, 156 S.E. 771, 159 S.C. 294.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com.App., 130 S.W.2d 1048—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

2. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com. App., 130 S.W.2d 1048—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

3. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com. App., 130 S.W.2d 1048.

4. Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

5. Pa.—Rebic v. Gulf Refining Co., 186 A. 236, 122 Pa.Super. 149.

6. N.Y.—Moore v. Appleby, 36 Hun

The acceptance of funds under a consent judgment will not estop minors from suing to have the judgment set aside where such funds constitute only a portion of the funds to which they were actually entitled;[7] and, where a vacation of only a part of the judgment is sought, the failure to return or tender money received under the portion of the judgment not attacked will not preclude the granting of relief.[8] Ordinarily an averment of a willingness to repay and a request for an accounting is a sufficient tender of the amount received.[9]

f. Relief as against Bona Fide Purchasers

In general the rights of bona fide purchasers under a judgment or decree rendered in proceedings to which an infant was a party are not affected by its vacation; but the rights of those who are not bona fide purchasers are not protected.

A decree or judgment of a court of competent jurisdiction in a proceeding to which an infant is a party is so far binding that it will not be set aside so as to affect the rights of bona fide purchasers under it,[10] even though the judgment or decree was procured through fraud,[11] or was erroneous and if appropriate review proceedings had been taken would have been reversed;[12] but they are not protected against errors which show that the court was without jurisdiction to render the decree.[13] The rights of one who is not a bona fide purchaser will not be protected,[14] and this includes a party litigant in the original proceeding who purchased through or under the judgment and immediate and remote vendees of such party litigant.[15] It has also been held that there can be no such thing as innocent purchasers in cases where statutes permitting an infant after attaining majority to show cause against a judgment or decree rendered against him during infancy, considered infra subdivision b of this section, apply, as in such cases the statute is notice to the world.[16] However, where such statutes expressly so provide, the rights of bona fide purchasers are protected;[17] and thereunder a purchaser who was a stranger to the record until the time of the sale is considered a bona fide purchaser whose rights are not affected by the vacation of the judgment or decree,[18] but a party to the suit, or an attorney in the case, or the plaintiff procuring the judgment, or an assignee of such plaintiff are not bona fide purchasers whose rights are protected.[19]

g. Proceedings

(1) In general
(2) Requisites and sufficiency of proceedings

(1) In General

A void judgment or decree is subject to either direct or collateral attack, but if it is merely voidable it can only be attacked directly. The particular procedure to be followed varies somewhat in the different jurisdictions, but in general consists of some form of procedure in the cause itself, such as an appeal, motion in the cause or bill of review, or an original or independent suit or action.

An absolutely void judgment or decree rendered in a proceeding to which a minor is a party may be attacked directly by such party,[20] or, as appears supra § 122 a, it is subject to collateral attack. If the judgment or decree is merely voidable or erroneous and not absolutely void it can only be attacked directly,[21] and, as appears supra § 122 a, it

368, affirmed 15 N.E. 377, 108 N.Y. 237.

7. Ga.—Nelson v. Estill, 9 S.E.2d 73, 190 Ga. 235.

8. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Com. App., 130 S.W.2d 1048.

9. Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.

10. Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449.
Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.
Okl.—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561.
31 C.J. p 1170 note 3.

11. Ind.—Gwinn v. Williams, 80 Ind. 374.

12. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267—Allman v. Taylor, 101 Ill. 185.
Ind.—Young v. Wiley, 107 N.E. 278, 183 Ind. 449.
N.C.—England v. Garner, 90 N.C. 197.

13. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

14. Okl.—Harjo v. Johnston, 104 P. 2d 985, 187 Okl. 561.
31 C.J. p 1170 note 5.

15. Okl.—Harjo v. Johnston, supra.

16. Ark.—Blanton v. Rose, 68 S.W. 674, 70 Ark. 415.

17. Ohio.—Stewart v. Kellough, 135 N.E. 608, 104 Ohio St. 347.
31 C.J. p 1170 note 8.

18. Ky.—Crume v. Sherman, 215 S. W. 196, 185 Ky. 376—Webb v. Webb's Guardian, 198 S.W. 736, 178 Ky. 152—Hays v. Beaver Creek Coal & Coke Co., 198 S.W. 743, 178 Ky. 149.

19. Ky.—Crume v. Sherman, 215 S. W. 196, 185 Ky. 376—Webb v. Webb's Guardian, 198 S.W. 736, 178 Ky. 152.
31 C.J. p 1170 note 9.

20. La.—Matthews v. Olla State Bank, 114 So. 98, 164 La. 463.

21. Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.
Direct attack on judgment defined and distinguished from collateral attack see the C.J.S. title Judgments §§ 408–411, also 34 C.J. p 520 note 34–p 525 note 91.

Party to decree
An infant who is a party to a decree can only assail it directly.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Errors which should be corrected by direct proceedings
Relief from a judgment erroneously rendered against an infant because unrepresented should be sought by direct proceedings to correct the error.

is not subject to collateral attack. On direct attack the particular method to be employed depends on the procedures authorized in the jurisdiction and their availability in the particular case, as affected by the time as of which relief is sought, considered supra subdivision b of this section, and the grounds on which it is based, considered supra subdivision d of this section. It has been variously held that relief may be obtained through appeal or writ of error, considered infra § 126, motion for a new trial, considered supra § 119, motion for a rehearing, considered supra § 119, motion made during the term at which the judgment or decree was rendered to set it aside,[22] or other motion,[23] amended pleading in the pending action,[24] petition to open a final decree and order to show cause issued thereon,[25] by bill of review,[26] bill in the nature of a bill of review,[27] or a statutory action to review for error.[28] However, as a general rule it is not necessary to proceed in this manner,[29] but the infant may maintain an original or independent suit or action to impeach or avoid the judgment or decree,[30] and it is

Ill.—Millard v. Marmon, 7 N.E. 468, 116 Ill. 649.
N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 22.

22. Ark.—Union Sawmill Co. v. Langley, 66 S.W.2d 300, 188 Ark. 316—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.

23. N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221. 31 C.J. p 1173 note 67.

Appropriate motions

(1) Motion and rule to show cause why the judgment should not be set aside.—Haigler v. Way, 31 S.C.L. 324.

(2) Correction of error because infant was unrepresented may be conveniently and expeditiously accomplished on a motion to bring the action forward on the docket and to vacate or modify the judgment.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.

(3) Summary motion to vacate the judgment is the modern method of attacking a judgment against an infant for whom a next friend or guardian ad litem had not been designated, on the assumption that he was an adult.—La Bell v. Quasdorf, 184 A. 750, 116 N.J.Law 368.

24. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.

25. N.J.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613—Morris v. Glaser, 151 A. 766, 770, 106 N.J.Eq. 585, affirmed 160 A. 578, 110 N.J. Eq. 661.

Substitute for bill of review

"Procedure by petition to open a final decree and order to show cause issued thereon is the modern procedure recognized in this state as a substitute for the procedure by bill of review or by bill in the nature of bill of review, and although our practice still recognizes such bills, the practice of procedure by petition and order to show cause has been recognized in this state for more than a century."—Morris v. Glaser, supra.

Leave of court

For relief against failure to protect the rights of an infant the petition can be filed without leave of the court.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613.

26. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
N.J.—Weining v. Selitto, 187 A. 368, 121 N.J.Eq. 60, affirmed 192 A. 233, 121 N.J.Eq. 613—Morris v. Glaser, 151 A. 766, 106 N.J.Eq. 585, affirmed, 160 A. 578, 110 N.J.Eq. 661. 31 C.J. p 1173 note 68.
Bill of review:
Generally see Equity §§ 635–655.
As:
Direct or collateral attack see Equity § 635 a.
Original or dependent suit see Equity § 635 a.

Nature of bill

The bill of review is an equitable proceeding.—Griggs v. Brewster, Civ. App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

Leave of court is not necessary.
Va.—Lee v. Braxton, 5 Call 459, 9 Va. 459.
W.Va.—Lafferty v. Lafferty, 26 S.E. 262, 42 W.Va. 783.

Right of possession unnecessary

An infant remainderman who was a party to a foreclosure proceeding on his remainder interest need not have a right of possession in order to bring a bill of review to set aside the decree.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Consent judgment

Where agreed judgment in minor's action is against interests of minor and facts making it so are not disclosed to court approving agreement for judgment, minor may, as between parties to judgment, have it set aside by bill of review.—Greathouse v. Fort Worth & D. C. Ry. Co., Tex. Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418.

27. Ohio.—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.
31 C.J. p 1173 note 68 [b].

28. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192.

Nature of proceeding

An action to review a judgment for error is in the nature of a petition for rehearing, and is not independent of, but is incidental to, the main action; it is a method by which the court which tried the case may have the opportunity to correct its own error.—Attica Building & Loan Ass'n of Attica v. Colvert, supra.

29. Ohio.—Carey v. Kemper, 11 N. E. 130, 45 Ohio St. 93.
31 C.J. p 1173 note 69.

30. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.
Ohio.—Bennett v. Fleming, 137 N.E. 900, 105 Ohio St. 352—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.
31 C.J. p 1173 note 70.

Proper practice

Under statutes authorizing infant within twelve months after attaining majority to proceed to set aside a judgment, proper practice is to make application to vacate judgment by an independent action.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.

By curator or next friend

Minors had right to petition court in name of their curator and their mother as next friend to vacate erroneous default judgment for cross complainant, claiming title to mortgaged land as purchaser at tax sale in suit by curator and mortgage trustee to foreclose mortgage securing note for money loaned by curator on minors' behalf, and cross complainant's demurrer to petition was improperly sustained, where judgment expressly recited that curator and minors failed to answer or demur to cross complaint.—Arkansas Trust Co. v. Sims, 133 S.W. 2d 854, 198 Ark. 1143.

unnecessary first to obtain the consent of the court to the filing of such a bill,[31] or to apply for a rehearing or to file a bill of review.[32]

Under some statutes the proceeding to vacate or modify the decree, even though it partakes of the nature of an independent action and is designated by a case number different from that of the original action, must be regarded as a continuation of the original action,[33] and thus is not subject to the restrictions that ordinarily obtain in an action where the parties seek to obtain equitable relief from a judgment brought as an original and independent action in the strict sense.[34]

The procedure prescribed by statute for obtaining relief from an improper judgment against an infant should be followed,[35] but strict conformity with the prescribed and technical rules of procedure will not be required where a trial on the merits is substantially realized and afforded by the method adopted.[36] Under some statutes the proper procedure after term is by petition to vacate[37] where the condition of the infant does not appear in the record, or the error in the proceedings.[38] In some jurisdictions it has been held that an infant party who was represented by attorney of record must institute a separate action in order to obtain relief.[39] In other jurisdictions if the decree is not void on the face of the record it can be attacked only by appeal, considered infra § 126, or by a bill of review or a bill in the nature of a bill of review;[40] and in still other jurisdictions it has been held that a direct action to annul the judgment, and not an appeal, is the proper remedy where the record does not disclose the evidence necessary to establish the grounds on which the judgment is attacked.[41] It is no objection to an original bill to impeach or avoid a judgment or decree that the minority of the complainant does not appear on the face of the proceedings attacked.[42] If a judgment against an infant was procured by fraud and collusion a suit in equity to set it aside is a proper remedy;[43] and a direct attack for fraud, collusion, or neglect may be made on a consent judgment in favor of a minor which was approved by the court.[44]

A writ of error coram nobis, considered generally in the C.J.S. title Judgments §§ 311–313, also 34 C.J. p 390 note 54–p 402 note 56, where not superseded by other statutory procedures, is an appropriate remedy in a proper case by which to attack a judgment against an infant,[45] as is also an application in the nature of a writ of error coram nobis.[46]

If the judgment is void it may be annulled in a direct action after the time for appeal or other procedure in the cause has elapsed,[47] as by an action to cancel the judgment,[48] or, as appears supra § 122 a, it may be attacked collaterally, in which case a motion to quash the execution is an appropriate meth-

31. Ill.—Grimes v. Grimes, 82 N.E. 847, 143 Ill. 550.

32. Ill.—Grimes v. Grimes, supra.
Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.

33. Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

34. Okl.—Fowler v. Humphrey Inv. Co., supra.

35. Ark.—Ingram v. Raiford, 298 S. W. 507, 174 Ark. 1127.
Ky.—Buttermore v. Hensley, 103 S. W.2d 68, 267 Ky. 669.

Where decree not absolutely void
Minor's attack on probate decree determining distribution of decedent's estate may be made under statutory conditions only where the constitutional requirements of due process for the proceedings involved were satisfied so that the decree was at most not void for lack of notice, but only ex parte as to the minor. —Palmer v. Palmer, D.C.Conn., 31 F.Supp. 361.

36. Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 669.

37. Ky.—Buttermore v. Hensley, supra.

Procedure held sufficient
Motion to set aside default judgment against infants would be treated as petition for vacation of erroneous judgment prescribed by statute, where motion set out grounds relied on for vacation of judgment, and judgment creditors entered their appearance, answered such criticism of judgment, and resisted granting of the motion.—Buttermore v. Hensley, supra.

38. Ky.—Berryhill v. Holland, 99 S. W. 902, 124 Ky. 615, 30 Ky.L. 831.

39. Ark.—Ingram v. Raiford, 298 S. W. 507, 174 Ark. 1127.

A consent decree against infants cannot be set aside on petition or motion at a subsequent term, the only remedy being by an original bill in the nature of a bill of review.—Jones v. McKenna, 4 Lea, Tenn., 630.

40. Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243.

41. La.—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745.

42. Ill.—Grimes v. Grimes, 82 N.E. 847, 143 Ill. 550.

43. Mo.—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 666—Davidson v. I. M. Davidson Real Estate & Investment Co., 125 S.W. 1143, 226 Mo. 1, 136 Am.S.R. 615.

44. Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S. W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.

45. Tenn.—McLemore v. Durivage, 22 S.W. 207, 92 Tenn. 482.
31 C.J. p 1174 note 72.

Ancient procedure
At the common law the recovery of a judgment against an infant for whom a next friend or guardian ad litem had not been designated, on the assumption that he was an adult, was regarded as an error of fact not apparent of record, remediable by the ancient writ of error coram nobis or coram vobis, depending on whether the cause was in the king's bench or the common pleas.—La Bell v. Quasdorf, 184 A. 750, 116 N. J.Law 368.

46. Tex.—Wallis v. Stuart, 50 S.W. 567, 92 Tex. 568.

47. La.—Matthews v. Olla State Bank, 114 So. 98, 164 La. 463.

48. Tex.—Garza v. Kenedy, Com. App., 299 S.W. 231, reversing, Civ. App., 291 S.W. 615, and rehearing denied, Com.App., 299 S.W. xx.

od by which to proceed.[49]

Where a minor mortgaged lands, and a scire facias was sued out on the mortgage, and the premises sold for less than the sum due and a judgment was rendered for the balance, on a bill by the minor to enjoin this judgment, alleging his minority and want of notice of the proceedings at law, it was held that his only remedy was at law through a writ of error.[50]

(2) Requisites and Sufficiency of Proceedings

The rules governing the requisites and sufficiency of the various procedures by which judgments generally are avoided or impeached ordinarily apply, as, for example, that the proceeding be instituted in the court where the judgment or decree attacked was rendered, that it be on notice, with the necessary parties and sufficient pleadings, and that the petitioner has the burden of proof.

The rules governing the various procedures by which it is proper to avoid or impeach judgments or decrees generally, considered in the C.J.S. titles Equity §§ 622–682 and Judgments §§ 228–435, also 34 C.J. p 207 note 5–p 501 note 2, p 511 note 46–p 567 note 71, apply, except as varied by specific statutory provisions, to proceedings to avoid or impeach judgments or decrees rendered in proceedings to which infants were parties.[51] As a general rule such proceedings should be commenced in the court in which the judgment or decree was rendered;[52] but in some jurisdictions an independent suit to set aside the judgment of an inferior court for fraud extrinsic to the issues may be instituted in a court of record without first seeking relief in the inferior court.[53] They must be on notice to the other parties to the decree,[54] and those holding adversely under the judgment,[55] under some statutes it being required that a summons issue and be served as in the commencement of an action.[56]

Parties. The proceeding to impeach or avoid the judgment or decree should be instituted by the infant through his representative, if commenced before reaching his majority, or by the infant himself after that date.[57] The other parties to the judgment or decree attacked,[58] persons claiming under the decree,[59] and all those against whom some form of relief is sought[60] should in general be made parties to the proceeding; but it is not necessary to join a party to the original proceeding who has no further interest in the litigation and against whom no relief is sought.[61]

Pleadings. Under the controlling statutes and rules applicable in various jurisdictions there is required a formal petition, application, or complaint[62]

49. Va.—Kanter v. Holland, 152 S. E. 328, 154 Va. 120.

50. Ohio.—Clark v. Bond, Wright 282.

51. **Different rule of procedure not followed**
While it is the duty of courts to protect the interest of minors represented by a guardian ad litem, still no rule of procedure different from that enjoyed by other litigants should be made.—Griggs v. Brewster, Tex.Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

52. Ohio.—Carey v. Kemper, 11 N.E. 130, 45 Ohio St. 93.
31 C.J. p 1173 note 57.

Where error not apparent on record
If the error does not appear on the face of the record it can be availed of only by a proceeding to set aside the judgment in the court in which such judgment was rendered.—Wallis v. Stuart, 50 S.W. 567, 92 Tex. 568.

53. Kan.—Leslie v. Proctor & Gamble Mfg. Co., 169 P. 193, 102 Kan. 159, L.R.A.1918D 571.
31 C.J. p 1173 note 57 [a].

54. Mo.—Ruby v. Strother, 11 Mo. 417.

55. Kan.—Weeks v. Berschauer, 36 P.2d 81, 140 Kan. 244.

Adverse party
An adverse party includes a person who purchases the property of the minor at execution sale under the judgment.—Weeks v. Berschauer, supra.

56. Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

57. N.Y.—Belcher v. Haskell, 292 N.Y.S. 387, 249 App.Div. 251.

Nominal ownership of instrument by curator immaterial
The fact that the instrument involved in the proceeding attacked is in the name of the curator of the minors does not prevent the minors from obtaining relief in a proceeding instituted by them where said instrument actually belonged to them. —Arkansas Trust Co. v. Sims, 133 S. W.2d 854, 198 Ark. 1143.

Joinder of parent
The fact that the mother of the minors, as their next friend, is joined in the action does not prejudice the defendants.—Arkansas Trust Co. v. Sims, supra.

58. Kan.—Kistler v. Fitzpatrick Mortgage Co., 71 P.2d 882, 146 Kan. 467.

59. Miss.—McLemore v. Chicago, St. L. & N. O. R. Co., 58 Miss. 514.

60. **Recorder**
In suit to erase inscription of judgment from mortgage records, recorder of mortgages was necessary party defendant.—Swift & Co. v. Villemeur, 131 So. 855, 15 La.App. 503.

61. Wash.—Morrison v. Morrison, 65 P. 779, 25 Wash. 466.

Where vacation of only part of judgment sought
A minor, who by judgment against railroad was allowed to recover only for loss of his mother but who had not recovered for minor's injuries was not precluded from setting such judgment aside on ground that the judgment was indivisible and failure to make all parties to judgment parties to action to set aside was fatal where only concern of minor in suit to set aside was to avoid the binding force of the judgment in so far as it precluded minor's recovery for injuries and minor did not seek to relitigate his statutory right of recovery for wrongful death of his mother.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Civ.App., 130 S.W.2d 1048.

62. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 822.
31 C.J. p 1173 note 51.
Pleadings in proceeding to obtain equitable relief against judgment generally see the C.J.S. title Judgments §§ 388–392, also 34 C.J. p 488 note 13–p 494 note 81.

Matter in support of notice of application
Failure to set aside judgment on

duly verified,[63] setting forth the judgment or decree,[64] except where the application is made by amended pleading in the pending action, as in such case the judgment is already a part of the record,[65] and setting forth the grounds to vacate,[66] and the defense to the action if the party applying was defendant.[67] Under some statutes it is unnecessary for the infant in order to have the judgment modified or set aside to aver or show diligence in the preparation of his defense to the action,[68] or the discovery of testimony;[69] nor in such case is it necessary to allege any of the special grounds for which new trials are granted to adults.[70] If the judgment or decree is attacked for fraud, whether directly in an independent proceeding[71] or collaterally,[72] the facts relied on as constituting the fraud must be specifically alleged.

Evidence and burden of proof. The burden is on the infant to establish the ground on which he seeks to vacate or set aside the judgment,[73] and he must show that injustice has been done him.[74] If the infant was the plaintiff in the proceeding he must

verdict for plaintiff in negligence case because of defendant's infancy was held not reversible error, where nothing was presented to trial judge in support of defendant's notice of application to vacate judgment on such ground, defendant's testimony that he was under age being no part of record.—Steelman v. Gilbert, 186 A. 47, 14 N.J.Misc. 490.

62. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.
Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

Failure to verify

Failure to verify petition for the vacation of an erroneous judgment rendered against an infant may be taken advantage of by a rule to verify the petition, but it is not ground for demurrer.—Berryhill v. Holland, 99 S.W. 902, 124 Ky. 615, 30 Ky.L. 831.

64. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.
Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

65. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.

66. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.
Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

Averments held sufficient

(1) In suit to set aside construction of will.—Kennard v. Wiggins, 160 S.W.2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S. Ct. 47, 317 U.S. 652, 87 L.Ed. 524.

(2) Allegations of fact in count to set aside judgment rendered in suit brought by infant's father as next friend, for personal injuries, held sufficiently to show fraud and inadequacy, even though formal statement to that effect was not made.—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W. 2d 559.

Statement of grounds held insufficient

(1) Allegation that there were a number of witnesses who had knowledge of transactions involved, who were available to testify but who were not called as witnesses, was not sufficient.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.

(2) Complaint, in action for release from judgment, not showing guardian for infant defendant was fraudulently appointed or neglected duties held demurrable.—Colvert v. Colvert, 178 N.E. 692, 95 Ind.App. 325, rehearing overruled 180 N.E. 192, 95 Ind.App. 325.

67. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.
Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522.
Okl.—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221.

Failure to allege defense

Failure of defendant petitioning after arrival at majority for vacation of judgment rendered against him during his majority without any defense being made or proof offered to set forth any defense to the action does not render the petition insufficient where the law provides that all allegations of a petition against an infant must be proved, even though not traversed.—Berryhill v. Holland, 99 S.W. 902, 124 Ky. 615, 30 Ky.L. 831.

68. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.

69. Ky.—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446.

70. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522—Metzger Bros. v. Watson's Guardian, 65 S.W.2d 460, 251 Ky. 446—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.
31 C.J. p 1173 note 56.

71. Ill.—Stuns v. Stunz, 23 N.E. 410, 131 Ill. 309.

72. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Allegations held insufficient

In suit by remainderman, after reaching his majority, collaterally attacking mortgage foreclosure decree, general allegations of fraud, conspiracy, and collusion among mortgagee's assignee, purchaser of life estates, and guardian ad litem, with respect to foreclosure proceedings and failure to apply earnings of property to liquidation of mortgage, were insufficient to show fraud of guardian ad litem.—McCampbell v. Warrich Corporation, supra.

73. Ga.—Wheeler v. Martin, 88 S.E. 951, 145 Ga. 164.
Ky.—Walker v. Perkins, 76 S.W.2d 251, 256 Ky. 442.
Tex.—Griggs v. Brewster, Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114, and affirmed 62 S. W.2d 980, 122 Tex. 588.

Evidence held sufficient

Mo.—Kennard v. Wiggins, 160 S.W. 2d 706, 349 Mo. 283, certiorari denied Wiggins v. Kennard, 63 S.Ct. 47, 317 U.S. 652, 87 L.Ed. 524—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W.2d 559—Gurley v. St. Louis Transit Co. of St. Louis, App., 259 S.W. 895.
N.Y.—Issem v. Slater, 27 N.Y.S.2d 871, 262 App.Div. 59, reargument denied 29 N.Y.S.2d 505, 262 App. Div. 834, appeal dismissed 37 N.E. 2d 144, 286 N.Y. 703.

Evidence held insufficient

N.C.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62.

74. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Ky.—Park v. Bolinger, 8 S.W. 914, 10 Ky.L. 303.
Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

Necessity for court to investigate

Where defendant's allegations that

show that he had a meritorious cause of action on which the judgment debtor was liable;[75] but if the infant was a defendant in the proceeding he must show that he had a good defense to the cause of action and that he was prevented from making it.[76] A motion to set aside a judgment on account of defendant's minority must be sustained by proof that he had not arrived at full age at the date of the rendition of the judgment.[77] A defendant in a proceeding by an infant to vacate the judgment against him is not limited to a demurrer or plea of release of error, but may by answer controvert the allegations of the petition where it brings in question matters of fact considered by the court at the time the judgment was rendered;[78] but, where an infant after reaching majority seeks to open a judgment for an error not appearing on the face of the record, the judgment sought to be opened cannot be made the basis of a plea of res judicata.[79]

Evidence aliunde the record may be resorted to in a proceeding to vacate an apparently valid judgment commenced within the time allowed by law.[80]

Issues. Issues of fact are for the jury.[81]

h. Relief Awarded

Where relief against the judgment is granted the court should restore the parties to their former positions as nearly as possible and should require an accounting of property and money received under the judgment vacated. An infant who fails to obtain relief will not be allowed costs.

Where the infant succeeds in showing that the judgment should not have been rendered the court should place him and the other parties in statu quo as nearly as this can be done;[82] and, although as appears supra subdivision e of this section it is not always required that the infant tender or return the property or money received in satisfaction of the judgment or decree sought to be vacated as a prerequisite to the institution of the proceedings therefor, it is generally held that where the judgment or decree is vacated provision must be made for an accounting for such property or money on final determination of the cause of action.[83] On petition by a defendant after attaining his majority to vacate a judgment entered pro confesso without any hearing of evidence during his minority the court should not adjudge the judgment void but should set it aside and allow defendant a reasonable time in which to file an answer.[84]

Costs. Where a judgment against an infant plaintiff is revoked because of his infancy costs will not be allowed him.[85]

§ 124. —— Payment and Satisfaction of Judgment in Infant's Favor

As a general rule, in the absence of statutory authorization, the guardian ad litem or next friend of an infant, or the infant himself, is not authorized to receive payment of a judgment in favor of the infant and give satisfaction therefor, but only the infant's regularly qualified guardian or the court can do so.

It is generally held, sometimes under statutes providing to that effect, that a guardian ad litem or next friend of an infant in whose favor a judgment has been rendered is not authorized to receive the

he was not negligent and that injured infant was are undisputed, court should have investigated matter and made findings of fact before setting aside consent judgment.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62.

Where unfairness not shown

Court did not abuse discretion in refusing to vacate judgment on settlement by next friend for minor's injuries, no unfairness being shown. —Hernandez v. San Antonio Public Service Co., Tex.Civ.App., 297 S.W. 264.

75. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind. App. 585.
Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

Evidence held sufficient in suit to set aside judgment rendered in personal injury action.—Gilliland v. Bondurant, 59 S.W.2d 679, 332 Mo. 881, affirming, App., 51 S.W.2d 559.

76. Tex.—Griggs v. Brewster, Civ. App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114, and affirmed 62 S.W.2d 980, 122 Tex. 588.

77. Mo.—Stupp v. Holmes, 48 Mo. 89.

78. Ky.—Park v. Bolinger, 8 S.W. 914, 9 S.W. 295, 10 Ky.L. 303.

79. Ky.—Bunnell v. Bunnell, 64 S. W. 420, 111 Ky. 566, 65 S.W. 607, 23 Ky.L. 800, 1101.

80. Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1, reversing, Civ.App., 130 S.W.2d 1048.

81. Tex.—Greathouse v. Fort Worth & D. C. Ry. Co., Com.App., 65 S. W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418.

Issues held for jury

In suit to set aside improvident agreed judgment for minor in action brought by next friend, whether defendant made false representations to next friend inducing her to make settlement was held for jury.—Greathouse v. Fort Worth & D. C. Ry. Co., supra.

82. Iowa.—Ralston v. Lahee, 8 Iowa 17, 74 Am.D. 291.
Ky.—Pope v. Lemaster, 5 Litt. 76.
W.Va.—Poling v. Poling, 55 S.E. 993, 61 W.Va. 78.

83. N.C.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62.

Necessity to account for property paid in satisfaction of judgment

Infant should be required to account for moneys collected and used in payment of hospital and doctors' bills if her motion to set aside consent judgment is granted.—Patrick v. Bryan, supra.

Return of consideration

In setting aside decree rendered in partition action brought by Indian minor, court would not permit minor to retain proceeds of the partition sale.—Harjo v. Johnston, 164 P.2d 985, 187 Okl. 561.

84. Ky.—Berryhill v. Holland, 99 S. W. 902, 124 Ky. 615, 30 Ky.L. 831.

85. N.Y.—Maynard v. Downer, 13 Wend. 575.

amount,[86] or to receipt for, discharge, or enter satisfaction of the judgment,[87] even though he is the parent of the infant and as such the natural guardian of his person;[88] nor can the infant himself receive the money and give a valid satisfaction of judgment therefor;[89] but only a regularly qualified guardian of the infant can do so.[90] However, there are cases wherein it is held that under certain circumstances a next friend may receive payment and satisfy the judgment, if there is no general guardian,[91] and under the statutes in some jurisdictions the judgment may be paid to, or collected by, the next friend;[92] and where the giving of a bond by next friend is a matter left to the discretion of the court or officer making the appointment, considered supra § 110, the fact that no bond is given because none is required will not affect the right of the next friend to receive the payment of the judgment debt.[93] The right of a next friend or guardian ad litem to receive payment and satisfy the judgment is limited under some statutes to cases where the amount does not exceed a specified amount;[94] and in some jurisdictions such right is limited by the rule that where there is a lawfully constituted general guardian no one but him or some person deriving authority from him can legally receive and receipt for the money due the ward.[95] The payment of the judgment to any person not authorized to receive it will not operate as a satisfaction thereof,[96] and it will not be binding on the infant,[97] who will continue to be entitled to execution on the judgment;[98] and regardless of whether or not a next

86. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
Cal.—Parra v. Cleaver, 55 P.2d 599, 600, 12 Cal.App.2d 386, quoting **Corpus Juris.**
Ky.—Ambrose v. Graziani, 247 S.W. 953, 197 Ky. 679.
N.J.—Dorsa v. Public Service Co-ordinated Transport, 152 A. 863, 9 N.J.Misc. 23.
31 C.J. p 1174 note 89.
Power of:
Attorney to receive payment or satisfy judgment see Attorney and Client § 99.
Guardian ad litem to receive payment in settlement of cause of action see supra § 111.

Power of court to order
Under statute giving courts of record power to direct that money paid into court and deposited with county treasurer or city chamberlain be paid out for owners' best interests, city court of New York City could not direct that balance of judgment for infant plaintiff in hands of city chamberlain be paid to infant's guardian ad litem, who had been appointed in Italy to prosecute action, until he was appointed guardian of infant's property, since only supreme and surrogate's courts have jurisdiction, under statute, to distribute infants' estates.—Nicolosi v. Olshansky, 1 N.Y.S.2d 943, 166 Misc. 55.

87. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
Cal.—Parra v. Cleaver, 55 P.2d 599, 600, 12 Cal.App.2d 386, quoting **Corpus Juris.**
31 C.J. p 1175 note 90.

88. N.J.—Dorsa v. Public Service Co-ordinated Transport, 152 A. 863, 9 N.J.Misc. 23.

89. Cal.—Parra v. Cleaver, 55 P.2d 599, 12 Cal.App.2d 386.

Provision in decree for payment to minor immaterial
The fact that the decree in a creditor's suit in which a receiver was appointed provided that the amount found due a minor should be paid to him is no ground for reversing the decree, as the satisfaction of the decree is to be taken by the receiver or master and it is his duty to see that he receives a valid and binding release or satisfaction of the decree.—Wojtas v. Rachel, 267 Ill.App. 148.

90. U.S.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.
Cal.—Parra v. Cleaver, 55 P.2d 599, 600, 12 Cal.App.2d 386, quoting **Corpus Juris.**
Ill.—Wojtas v. Rachel, 267 Ill.App. 148—Paskewie v. East St. Louis & Suburban Ry. Co., 106 Ill.App. 131.
31 C.J. p 1175 note 92.

Provision in judgment for protection of infant
The interests of an infant on the judicial sale of property in which he has an interest are properly protected by a provision of the judgment that the share of the infant shall not be paid by the purchaser, but shall remain a lien on the property sold until said infant becomes of age, or until his guardian executes the bond required by statute.—Bowles v. Allman, 141 S.W.2d 557, 283 Ky. 383.

91. Pa.—Gutekunst v. Huber, 31 Pa.Dist. & Co. 53, 44 Dauph.Co. 291.
31 C.J. p 1175 note 97.

Assignment to joint tort feasor
Where a minor has recovered a judgment against joint tort-feasors by a next friend, the next friend, on receiving payment of the judgment from one of the defendants, may validly assign the judgment to that defendant in order that he may proceed to claim contribution from the other.—Gutekunst v. Huber, supra.

92. Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.
Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, 102 S.W.2d 792, 232 Mo.App. 209.
31 C.J. p 1175 note 1.

Father
Father who sued as next friend for infant's personal injuries had authority to receive payment of, and satisfy, judgment recovered by him in infant's name.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

93. Mo.—Stephens v. Curtner, 222 S.W. 497, 205 Mo.App. 555.

94. Cal.—Parra v. Cleaver, 55 P.2d 599, 12 Cal.App.2d 386.
31 C.J. p 1175 note 99 [a].

95. Md.—Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619.
Pa.—Stroyd v. Pittsburg Tract. Co., 15 Pa.Super. 245.

96. Cal.—Parra v. Cleaver, 55 P.2d 599, 600, 12 Cal.App.2d 386, quoting **Corpus Juris.**
31 C.J. p 1175 note 94.

97. Cal.—Parra v. Cleaver, supra, quoting **Corpus Juris.**
31 C.J. p 1175 note 95.

No estoppel
Fact that money due under judgment for personal injuries was delivered to minor's mother who expended it for the general benefit of the family with the minor's knowledge did not estop minor to set aside warrant of satisfaction of judgment executed by her next friend, even though the minor was gainfully employed before sustaining her injuries and paid part of her wages to her family for her maintenance.—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289.

98. Cal.—Parra v. Cleaver, 55 P.2d 599, 600, 12 Cal.App.2d 386, quoting **Corpus Juris.**
Ga.—Betts v. Hancock, 107 S.E. 277, 27 Ga.App. 62.

friend ordinarily is authorized to receive payment of the judgment and acknowledge satisfaction thereof he is without such authority where the appointment, as well as the judgment, was fraudulently obtained.[99]

An infant, on becoming of age, is competent to sign a satisfaction of the judgment.[1]

Payment into court. Where there is no one authorized to receive the amount of a judgment in favor of an infant, it is proper to direct that the money, when collected, shall be paid into court,[2] subject to the order of the legally constituted guardian when such a one shall appear,[3] or to remain in court until the infant arrives at majority,[4] or, under some statutes, subject to be withdrawn by any proper person by giving the required bond and securing an order from the court, entered of record, authorizing him to do so.[5]

Power of court to confirm settlement and irregular satisfaction. The trial court which rendered the judgment has power in the exercise of its discretion to confirm a settlement of the judgment made during the pendency of an appeal for an amount smaller than the judgment and, even though the guardian ad litem had no legal right to accept payment of the judgment, to approve such payment, where it was properly expended, and render valid and binding a release and satisfaction of judgment executed therefor.[6]

Necessity to give security. Under statutes providing that a guardian ad litem or next friend may not receive payment for a judgment due to the infant until he has given security duly approved by the court, if such person does not give the required security he cannot proceed to collect the judgment, and the payment does not constitute satisfaction.[7] A judgment for an infant should not authorize its payment to the guardian ad litem or next friend without requiring him to give the bond.[8] A guardian ad litem who without order of court deposits such recovery in a savings bank is not relieved from liability.[9]

Satisfaction prior to payment. It is improper to satisfy the judgment before payment is made.[10]

§ 125. Execution and Enforcement of Judgment

General rules, in the absence of specific statutes, control executions on, and other enforcement of, judgments recovered by or against infants.

The general rules as to the issuance of execution are applicable, in so far as may be, to the issuance of executions to enforce judgments recovered by or against infants.

In favor of infant. Where an infant sues by next friend, and recovers judgment, which is affirmed by the supreme court, but the opinion and judgment of affirmance ignore the next friend, treating the judgment as for plaintiff in person, execution properly issues in the name of the infant.[11] The issuance of execution in favor of an infant sometimes is suspended until there is some person authorized to receive the money.[12] Statutes providing that a next friend who has prosecuted a personal action on behalf of an infant will not be allowed to receive the proceeds of the judgment until he has executed a bond therein provided for do not prevent an authorized levying officer from proceeding with the collection of the execution issued on such a judgment.[13]

Against infant. Except as otherwise provided by statute,[14] the general rule is that, where a judgment

99. Mo.—Gurley v. St. Louis Transit Co. of St. Louis, App., 259 S.W. 895.

1. Cal.—City Properties Co. v. Fitzmaurice, 183 P. 267, 42 Cal.App. 16.

2. Ill.—Paskewie v. East St. Louis & Surburban Ry. Co., 206 Ill.App. 131.

Tex.—Harllee v. State, Civ.App., 18 S.W.2d 1091.

31 C.J. p 1175 note 4.

General rule

The general rule is that a judgment for the sole benefit of minors should be paid into registry of court, especially where minors are represented in suit by next friend.—Wilson v. Fisher, Tex.Civ.App., 105 S.W. 2d 304, error refused, certiorari denied 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

3. Tex.—Harllee v. State, Civ.App., 18 S.W.2d 1091.

31 C.J. p 1175 note 5.

4. Tex.—Harllee v. State, supra.

31 C.J. p 1175 note 6.

5. Tex.—Harllee v. State, supra.

6. Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.

Statute prohibiting minor's contracting or delegating power immaterial

Statute containing inhibitions against a minor who contracts or delegates power would not affect validity of release of judgment entered into in behalf of minor plaintiff by next friend and guardian ad litem.—Lambert v. Hill, supra.

7. N.Y.—Wileman v. Metropolitan St. R. Co., 80 N.Y.S. 233, 80 App. Div. 53.

8. Tex.—Parriss v. Jewell, 122 S.W. 399, 57 Tex.Civ.App. 199.

9. N.Y.—Matter of Harris, 137 N.Y. S. 234, 77 Misc. 590.

10. Pa.—Rebic v. Gulf Refining Co., 186 A. 236, 122 Pa.Super. 149.

11. Ala.—Thomason v. Gray, 4 So. 394, 84 Ala. 559.

12. N.Y.—Wileman v. Metropolitan St. R. Co., 80 N.Y.S. 233, 80 App. Div. 53.

31 C.J. p 1175 note 16.

13. Ga.—Oxford Knitting Mills v. Sutton, 56 S.E. 298, 127 Ga. 162.

14. **In North Carolina** under acts of 1784 and 1789, an execution against the land of an infant ought to appear on its face to have issued after a stay of twelve months and on motion, or the sheriff is not bound

has been rendered against an infant, execution may issue against his property the same as in the case of a judgment against an adult,[15] if there is no guardianship pending.[16] In some jurisdictions the manner of execution of judgments against infants is regulated by statute.[17]

Restraining execution of judgment. The execution of a judgment against an infant may, in a proper case, be restrained by injunction.[18] It has been held that where the infant has a right to vacate or modify the judgment the levy of an execution under the judgment will not be restrained without first taking steps to vacate or modify it.[19] The bill or complaint seeking the injunction should allege all the facts necessary to warrant its grant.[20]

§ 126. Appeal and Error

a. In general
b. Presentation and reservation in lower court of grounds for review
c. Parties
d. Requisites and proceedings for transfer of cause
e. Record
f. Review
g. Determination and disposition of cause

a. In General

Matters relating to appeal and error in actions by or against infants are, in the absence of statute, controlled by general rules.

An infant has the right to appeal from a judgment against him, where the judgment if against an adult would be appealable.[21] An infant may appeal from a decree of foreclosure in a proceeding to which he was a party although he does not have a right to possession.[22]

Nature and form of remedy. Where no guardian ad litem has been appointed for the infant, he cannot, it has been held, proceed by bill of exceptions[23] but the proper procedure is by writ of error.[24] In other jurisdictions, where the record on its face shows that appellant was an infant or if the question has been submitted to, and decided by, the lower court, an erroneous judgment may be corrected on appeal.[25] Under express provisions of the statutes in some jurisdictions if injustice is done to an infant and the injustice does not appear on the face of the record, he may have the judgment modified or set aside in the trial court;[26] but if the error occurs on the face of the record the remedy of the infant is by appeal,[27] in which case his relief is the same as his relief by action where the error is not shown by the record.[28] Under a statute permitting the obtaining by an infant of a new trial after judgment, either by petition in the trial court or by appeal, the infant cannot adopt both means of procuring a new trial for the same error.[29]

Duty to appeal. It is the duty of the guardian ad litem in a proper case to appeal from a decision adverse to his ward[30] or to enter an appearance on an appeal from a decree affecting his interests,[31] and the court may direct him to defend an appeal from a decree favorable to the minor;[32] further

to levy it.—Newbern Bank v. Stanly, 13 N.C. 476.

15. N.Y.—Stevenson v. Guardian Life Ins. Co. of America, 25 N.Y.S.2d 483, 175 Misc. 823.
31 C.J. p 1176 note 20.
Body executions against infants see Executions § 419.

16. Tex.—Simmons v. Arnim, Civ. App., 172 S.W. 184, affirmed 220 S.W. 66, 110 Tex. 309.

17. Tex.—Simmons v. Arnim, 220 S.W. 66, 110 Tex. 309, affirming, Civ.App., 172 S.W. 184.
31 C.J. p 1176 note 22.

18. N.J.—Vansyckle v. Rorback, 6 N.J.Eq. 234.

19. Ind.T.—Cook v. Keith, 82 S.W. 918, 5 Ind.T. 595.

20. Tex.—Janks v. Herrick Hardware Co., Civ.App., 197 S.W. 896.
31 C.J. p 1176 note 26.

21. Conn.—Williams v. Cleaveland, 56 A. 350, 76 Conn. 426.
31 C.J. p 1176 note 28.

Complainant or defendant
Right to review adverse decree is available to minor affected, whether complainant or defendant.—Commercial Bank & Trust Co. v. Dendy, 115 So. 591, 149 Miss. 512.

22. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

23. Mass.—Valier v. Hart, 11 Mass. 309.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.

24. Me.—Easton v. Eaton, 90 A. 977, 112 Me. 106, 52 L.R.A.,N.S., 799.
Mass.—Johnson v. Waterhouse, 26 N.E. 234, 152 Mass. 585, 11 L.R.A. 440.
R.I.—Keenan v. Flanagan, 147 A. 617, 50 R.I. 321.
31 C.J. p 1176 note 28 [a].

25. Ark.—Sauve v. Ingram, 143 S.W.2d 541, 200 Ark. 1181.

26. Ky.—Berryhill v. Holland, 99 S.W. 902, 124 Ky. 615, 30 Ky.L. 831.
31 C.J. p 1176 note 31.
Proceedings by infant to vacate judgment see supra § 123.

27. Ky.—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.
31 C.J. p 1176 note 29.

28. Ky.—Bartlett v. Louisville Trust Co., supra.

29. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453—Wilhelm v. Hendrick, 197 S.W. 836, 177 Ky. 296.

30. Hawaii.—Focke v. Gay, 27 Hawaii 132.

31. Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.

32. Ill.—Union Bank of Chicago v. Wormser, 256 Ill.App. 291.

he should be given leave to employ counsel to assist him where necessary.[33]

Waiver or release of error. Where a writ of error is brought to reverse a judgment recovered on a note against an infant who appeared by attorney, a promise made by him after he comes of age to pay the note is neither a release or waiver of the error nor a bar to a writ of error.[34] The question whether a minor has waived his right to disaffirm a judgment by permitting it to be rendered against him without notifying the trial court of his minority is one of fact to be determined by the record.[35]

Certiorari. To the extent and within the limits discussed in the title in this work of that name, certiorari is a proper remedy to be pursued by an infant.[36]

Successive proceedings. Minor appellants giving notice of an appeal cannot prosecute a writ of error after expiration of the time for filing a transcript on appeal.[37]

b. Presentation and Reservation in Lower Court of Grounds for Review

As against adult parties, and to some extent as against infant parties, only matters presented and reserved in the lower court will be reviewed; however, the rule is much relaxed in favor of infant parties for the protection of their rights.

As against adult parties the appellate court will enforce the rule that only grounds of exception presented and reserved in the lower court will be considered.[38] Hence a theory of the defense abandoned in the trial court is not before the reviewing court on appeal from a judgment for minors.[39] However, the rule that it is the duty of the courts to protect the interests of an infant litigant, as discussed supra § 105, applies to appellate courts.[40] Hence it has been laid down that on appeal an infant will be given the benefit of every defense of which he could have availed himself or which might have been interposed for him in the trial court,[41] although there is no appeal on his part.[42] It has, however, been held that, where the infant is properly represented, he is bound by the action of the court with respect to mere errors of law, not involving jurisdiction, as though he had been an adult;[43] and there are some cases where, the infant being properly represented in the lower court, the appellate court has refused to consider objections not raised in the lower court.[44] The review-

33. Hawaii.—Focke v. Gay, 27 Hawaii 132.

34. Mass.—Goodridge v. Ross, 6 Metc. 487.

35. Cal.—Field v. Hughes, 20 P.2d 990, 131 Cal.App. 144.

36. Mass.—Stone v. Boston, 2 Metc. 220.
31 C.J. p 1176 note 32.

37. Tex.—Griggs v. Brewster, Civ. App., 15 S.W.2d 1114, rehearing denied 16 S.W.2d 839, affirmed 62 S.W.2d 980, 122 Tex. 588.
Proceeding after abandonment of first proceeding generally see Appeal and Error § 34 c.

38. Cal.—Pascoe v. Payne, 12 P.2d 1091, 124 Cal.App. 528.
Ill.—Leonard v. Chicago Title & Trust Co., 18 N.E.2d 706, 298 Ill. App. 187.
31 C.J. p 1178 note 85.

39. Mo.—Campbell v. Terminal R. Ass'n of St. Louis, 126 S.W.2d 915, 235 Mo.App. 56.

40. S.C.—Hodge v. De Laine, 135 S.E. 357, 137 S.C. 337.
Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.
31 C.J. p 1178 note 79.

41. Ala.—Pritchett v. Dixon, 133 So. 283, 222 Ala. 597.
Hawaii.—Lapahoehoe Sugar Co. v. Lalakea, 28 Hawaii 310.
Ill.—Leonard v. Chicago Title & Trust Co., 5 N.E.2d 282, 287 Ill. App. 397.
Miss.—Williams v. Bailey, 165 So. 439, 174 Miss. 760.
Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.
31 C.J. p 1178 note 80.

An infant cannot waive his rights by mere failure to object on trial.—Bartlett v. Louisville Trust Co., 277 S.W. 250, 212 Ky. 13.

Erroneous overcharge
Even though appellants claim error as to only part of overcharge in payments on mortgage, where rights of infant are concerned entire erroneous overcharge will be corrected.—Hodge v. De Laine, 135 S.E. 357, 137 S.C. 337.

Failure to appoint guardian ad litem
(1) In action against minor, where court had failed to appoint guardian ad litem until court heard minor's motion for new trial, which was denied, court's error in so failing to appoint could be availed of by minor for first time on appeal.—Bellchambers v. Ebeling, 13 N.E.2d 804, 294 Ill.App. 247.

(2) Question of validity of judgment against minor for whom no guardian ad litem is appointed may be raised on error or appeal.—Martin v. Starr, 255 Ill.App. 189.

42. Okl.—Warrior v. Stith, 50 P.2d 179, 174 Okl. 150.
Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.
31 C.J. p 1178 note 81.

43. U.S.—Kingsbury v. Buckner, Ill., 10 S.Ct. 638, 134 U.S. 650, 33 L.Ed. 1047.
Mont.—Byrnes v. Butte Brewing Co., 119 P. 788, 44 Mont. 328, Ann.Cas. 1913B 440.

Where his general guardian appeared and resisted a petition praying for the entry nunc pro tunc of the record of a commitment of the infant as a juvenile delinquent, neither the guardian nor the infant could be heard to say on appeal that his rights were not fully protected.—Freestone v. State, 176 N.E. 877, 98 Ind.App. 523.

44. Me.—Richard v. Neault, 135 A. 524, 126 Me. 17.
S.C.—Murchison Nat. Bank v. Reynolds, 121 S.E. 673, 127 S.C. 528.
31 C.J. p 1178 note 83.

In the absence of fraud or collusion on the part of the infants' guardian ad litem the appellate court will not pass upon objections which could have been made and the merits of a case in which final judgment has been rendered.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50.

Suit for minor's benefit
Error in instructions is unavailable in the absence of exceptions or requests for additional instructions although adversely affecting a minor's interests in an administrator's statutory action for the death of the minor's parent since the infant is

ing court may follow the trial court's treatment of the nature of a motion, from the denial of which an appeal has been taken.[45]

c. Parties

Ordinarily an infant must appeal by a representative, either the guardian ad litem or the next friend who appeared for him in the trial court or a representative appointed for the purposes of the appeal; but after attaining his majority the infant may prosecute the appeal in his own behalf.

Although it has been stated categorically that an infant may not individually prosecute or maintain an appeal,[46] it has also been held that an appeal taken by an infant himself is an act voidable by him,[47] and on motion of his guardian ad litem, appointed after such appeal, the court may dismiss the appeal.[48]

The rule that a motion for a new trial is indivisible cannot be invoked to defeat the review of an appeal on a meritorious petition in error filed by an infant defendant, whose guardian has inadvertently joined her in a motion for a new trial and petition in error with a nominal defendant who has no rights involved in the controversy.[49] Where an appeal in the interests of the infants brings before the court the entire matter in controversy with regard to a conveyance for their support, which is alleged to be fraudulent, it is immaterial whether the grantee prosecutes the appeal or whether the committee of the grantor, standing in the place of the grantor, has any interest.[50]

Appeal by guardian ad litem or next friend. A guardian ad litem or next friend does not necessarily become functus officio by the rendition of a judgment or decree,[51] and, as discussed in Appeal and Error § 194 a, he may be the proper person to take an appeal on behalf of the infant. When an appeal is taken by a guardian ad litem his powers and duties continue until the final termination of the cause,[52] unless he is removed by the court[53] or the guardianship is terminated by the arrival of the infant at majority, a matter discussed infra notes 63–65. The fact that an appeal is improperly taken in the name of the guardian ad litem instead of in the name of the infant by his guardian ad litem does not require its dismissal,[54] nor does the fact that an appeal is taken in the minor's name instead of in that of his guardian deprive the appellate court of jurisdiction.[55] Where there is a presumption of law that there are no unknown heirs, a guardian ad litem appointed to represent unknown heirs cannot prosecute an appeal.[56] It has been held that an appellate court could strike a brief filed by an infant's guardian ad litem who stated that his convictions were such that he could represent only the interests of those opposed to his ward.[57]

Appointment of representative. Proceedings in review of a judgment are a continuation of the original case,[58] and hence the guardian ad litem or next friend who appeared for the infant in the original case is entitled to appear for him in the appellate court,[59] and it is not necessary or proper to appoint a new guardian ad litem or next friend on the appeal where the one who originally represented the infant appears;[60] but, where infant par-

not a party to the suit.—Richard v. Neault, 135 A. 524, 126 Me. 17.

45. Motion to set aside verdict
Where invalidity of proceeding against infant, because of lack of appointment of guardian ad litem under statutes, was presented by infant, through his attorney, in motion designated as amendment to motion for new trial, affidavit of infant's guardian, stating the facts, was made part of motion, and trial court treated motion as one to set aside verdict and judgment against infant, reviewing court would so treat motion.—Brown v. Anderson, 197 S.E. 761, 186 Ga. 220, followed in 197 S.E. 833, 186 Ga. 222.

46. Ky.—McComas v. Hull, 118 S.W. 2d 540, 274 Ky. 192.

47. N.H.—Robbins v. Cutler, 26 N. H. 173.

48. N.H.—Robbins v. Cutler, supra.

49. Neb.—Godfrey v. Smith, 103 N. W. 450, 73 Neb. 756, 10 Ann.Cas. 1138.

50. Va.—Bruce v. Dean, 140 S.E. 277, 149 Va. 39.

51. N.Y.—Matter of Stewart, 48 N. Y.S. 999, 23 App.Div. 17.
W.Va.—Fisher v. Bell, 63 S.E. 620, 65 W.Va. 10.

52. Ky.—Staggenborg v. Bailey, 80 S.W. 1109, 26 Ky.L. 188.
31 C.J. p 1176 note 39.
Right to appeal as affected by termination of representative capacity generally see Appeal and Error § 182.

53. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589—Staggenborg v. Bailey, 80 S.W. 1109, 26 Ky.L. 188.

54. Va.—Bruce v. Dean, 140 S.E. 277, 149 Va. 39.

55. Iowa.—Johnston v. Calvin, 5 N. W.2d 840.

56. Tenn.—Scruggs v. Baugh, 3 Tenn.App. 256.

57. Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.

58. Ind.—Evansville & R. R. Co. v. Maddux, 33 N.E. 345, 134 Ind. 571, rehearing denied 34 N.E. 511, 134 Ind. 571.

59. Ind.—Evansville & R. R. Co. v. Maddux, supra.
Ky.—Easy Payment Property Co. v. Vonderheide, 93 S.W. 911, 29 Ky.L. 540.

60. Ind.—Evansville & R. R. Co. v. Maddux, 33 N.E. 345, 134 Ind. 571, rehearing denied 34 N.E. 511, 134 Ind. 571.
Mass.—Sherwin v. Smith, 135 N.E. 17, 282 Mass. 306.
Minn.—Covell v. Porter, 84 N.W. 107, 81 Minn. 302.

Infants represented by guardian
On appeal to supreme judicial court from probate court decree construing will, appointment of guardian ad litem for interested minors represented by guardian was held unnecessary.—Sherwin v. Smith, 135 N.E. 17, 282 Mass. 306.

ties are not properly represented, a person may be appointed by the appellate court to represent them.[61] It is not necessary that the next friend by whom a writ of error is prosecuted should be the same person who acted as next friend in the trial court.[62]

Effect of arrival at majority. Since the infant's arrival at majority terminates the guardianship, as considered supra § 113, the infant, and not the guardian ad litem or next friend, is the proper party to take and prosecute the appeal.[63] Where there are several infant defendants represented by a guardian ad litem and one of the infants arrives at majority, he may move to dismiss the appeal as to him, but the right of the guardian ad litem to take the appeal for him is not affected, nor is his right to maintain the appeal for the other infant defendants.[64] The action of an infant in bringing an appeal without representation may be considered ratified by resisting a motion to dismiss the appeal after attaining majority.[65]

Waiver of objections. It has been held that, if an infant sues out a writ of error in his own name and there is joinder in error, his disability is waived.[66]

d. Requisites and Proceedings for Transfer of Cause

Statutory requirements as to the proceedings for the transfer of a cause involving an infant's rights, such as the payment or security for costs and as to the time of the taking of an appeal and notice thereof, must be complied with.

Statutory requisites as to the taking of an appeal must be complied with.[67]

Payment or security for costs. Under statutory permission, on the filing of a sufficient affidavit by his next friend an infant may appeal in forma pauperis;[68] but an affidavit which shows the inability of the infant to pay costs, but does not show that the next friend is unable to pay costs or give security therefor, is insufficient.[69] An appeal taken by or on behalf of an infant whose guardian ad litem has become insolvent and has failed to pay the costs adjudged will not be stayed because of nonpayment of such costs.[70]

Time for appeal. In the absence of statute, an infant has no further time than an adult within which to take the necessary steps for the correction of errors in a proceeding or judgment against him.[71] Under the statutes of some jurisdictions an infant against whom or affecting whose interests a judgment has been rendered is allowed a certain time after reaching majority within which he may appeal or sue out a writ of error;[72] but such a

61. Ariz.—In re Harris' Estate, 296 P. 267, 38 Ariz. 1.
31 C.J. p 1177 note 50.
Duties of guardian ad litem generally see supra § 111.

Replacing guardian opposed to infants' interests
Record on appeal which shows that guardian ad litem was opposed to infants' interests discloses a defect which the appellate court must remedy on proper proceedings brought for that purpose.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.

62. Ill.—Ames v. Ames, 36 N.E. 110, 148 Ill. 321.
Tex.—Carlton v. Miller, 21 S.W. 697, 2 Tex.Civ.App. 619.

Any person who will give the bond required by law may sue out a writ of error for an infant as his next friend.—Ridgely v. Bennett, 13 Lea (Tenn.) 206.

63. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589—Staggenborg v. Bailey, 80 S.W. 1109, 26 Ky.L. 188.

Right to select own attorney
A defendant who gave notice to court that he had attained twenty-one years was entitled to appear on his appeal by attorneys of his own selection, and attorneys who filed notice of appearance for such defendant could appear in his behalf on argument of appeal and could then state the position which defendant desired to take on the appeal.—Ream v. Ream, 24 N.E.2d 96, 281 N.Y. 395, granting motion 11 N.Y.S.2d 848, 256 App.Div. 1067, leave to appeal denied 13 N.Y.S.2d 108.

64. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589.
Right of appeal or writ of error by guardian ad litem or next friend after infant's majority see Appeal and Error § 194 a.

65. Iowa.—Titonka First Nat. Bank v. Casey, 138 N.W. 897, 158 Iowa 349.

66. Ill.—McClay v. Norris, 9 Ill. 370.

67. **Motion to set aside judgment**
An infant's appeal in an action to sell realty from a judgment void as to her may be dismissed in the absence of a motion to set the judgment aside.—Wales v. Williams, 287 S.W. 705, 216 Ky. 260.

Motion for new trial and bill of exceptions
In the absence of a bill of exceptions and a motion for new trial in a suit involving the construction of a will, a review on a writ of error by an infant defendant within three years after becoming of age is limited to the record proper.—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660.
Service of bill of exceptions on guardian ad litem or next friend see Appeal and Error § 879.

68. Ga.—Harmon v. Gaddy, 19 S.E. 2d 302, 193 Ga. 574.

69. Tex.—Lewis v. Texas & P. R. Co., 105 S.W. 334, 47 Tex.Civ.App. 425.

70. N.Y.—Wice v. Commercial F Ins. Co., 7 Daly 258, 2 Abb.N.Cas 325.

71. Cal.—Welsh v. Koch, 88 P. 604 4 Cal.App. 571.

72. Ill.—Segal v. Chicago City Ry. Co., 155 N.E. 757, 325 Ill. 43, reversing 216 Ill.App. 11.
Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192.
Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453—Wales v. Williams, 287 S.W. 705, 216 Ky. 260.
Mo.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451.
Okl.—Pfister v. Johnson, 49 P.2d 174, 173 Okl. 541, 102 A.L.R. 31—Tinker v. Scharnhorst, 263 P. 645, 129 Okl. 118.
31 C.J. p 1177 note 69.

Female infants
The Missouri statute providing

statute does not prevent the infant from taking an appeal, or suing out a writ of error by next friend or guardian during his minority.[73] It has been held that if an appeal is properly taken during infancy the infant loses his right to have the judgment opened after attaining majority.[74] In some jurisdictions the time within which a guardian ad litem or next friend may appeal is limited by statute, after which time his right to do so terminates.[75]

Notice of appeal. An infant against whom an appeal is prosecuted ordinarily is entitled to notice of appeal or summons in error,[76] within the time prescribed by the statute,[77] and service on the guardian or next friend is not sufficient to confer appellate jurisdiction over the infant.[78] This is especially true when the appeal is taken after the infant becomes of age.[79] It has been held that the attorney of record in the lower court may accept service of case-made, and that in such case the objection that summons in error was not properly served is without merit;[80] but a statute permitting service of notice on the attorney of record in the lower court does not apply where the record fails to show the authority of the attorney so served to act for the infant appellee or his guardian.[81] Under some statutes, where an infant is named as appellee and is served with notice of appeal, it is not necessary to name his guardian ad litem as appellee or to give him notice of appeal.[82] Where an appeal is taken on behalf of an infant, defendant in error is entitled to notice of appeal, and failure to give such notice within the time prescribed by statute is ground for dismissing the appeal.[83]

e. Record

General rules control as to the scope and contents of the record and the matters which must be shown thereby, such as the service of process, the appointment of a guardian ad litem, and the reception of evidence.

The failure of the record to show that minor defendants were served with process is a fundamental error requiring reversal,[84] which the minor may set up at any stage of the proceedings on appeal or writ of error,[85] and which the court will even notice on appeal ex mero motu;[86] but an adult plaintiff, claiming for the first time on a motion for rehearing on appeal that the record does not show service of process on an infant defendant, has the burden of showing affirmatively by the record that error has been committed.[87] An appellant cannot complain that the record fails to show the appointment of guardians ad litem for infant appellees when that fact is recited in the decree and the abstract shows their appearance.[88] On an appeal on the judgment roll by an adult defendant, proceedings relative to the appointment of a guardian ad litem for the infant plaintiff, not being embodied in any record, could not be considered.[89] The rules of practice in equitable actions regarding the neces-

that a person within the age of twenty-one years has three years after the removal of the disability to sue out a writ of error applies to females within that age in spite of another statute declaring that females of eighteen years of age shall be considered of full age.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451.

Showing as to age

Where petition for writ of error and verified exhibits including a certified copy of birth certificate disclosed that plaintiff in error became of age within three years prior to filing of writ of error, in absence of any denial, supreme court would consider the statements true and assume that writ of error was sued out within three years after removal of disability.—Campbell v. Campbell, Mo., 165 S.W.2d 851.

73. Ill.—Segal v. Chicago City Ry. Co., 155 N.E. 757, 325 Ill. 43, reversing 216 Ill.App. 11.
31 C.J. p 1177 note 70.

74. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453—Webb v. Webb, 195 S.W. 96, 176 Ky. 96.
Neb.—Foerster v. Helming, 181 N.W. 521, 105 Neb. 531.

75. Ky.—Parks v. Barnes, 191 S.W. 447, 173 Ky. 589.

76. Ky.—Townsend v. Tipton, 160 S.W.2d 161, 289 Ky. 766, 142 A.L.R. 306.
Mo.—Brann v. Pool, 272 S.W. 691, 308 Mo. 309.
Okl.—Scott v. Brown, 7 P. 113, 40 Okl. 184.

77. Okl.—Welch v. Welch, 152 P. 828, 49 Okl. 337.

78. Okl.—Groves Nat. Bank v. Baker, 148 P. 714, 47 Okl. 368—Scott v. Brown, 137 P. 113, 40 Okl. 184.

79. N.Y.—Donovan v. Donovan, 272 N.Y.S. 157, 241 App.Div. 906, dismissing appeal 263 N.Y.S. 336, 147 Misc. 134.

80. Okl.—Rentie v. Rentie, 172 P. 1083, 70 Okl. 103.

81. Mo.—Brann v. Pool, 272 S.W. 691, 308 Mo. 309.

82. Ind.—Prebster v. Henderson, 113 N.E. 241, 114 N.E. 691, 186 Ind. 21.

83. Okl.—Peaden v. Brown, 151 P. 1166, 49 Okl. 317.

84. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.
Ark.—Ross v. Stroud, 291 S.W. 996, 173 Ark. 66.
Tex.—De Proy v. Progakis, Com. App., 269 S.W. 78, reversing, Civ. App., 259 S.W. 620—Morris v. Drescher, Civ.App., 123 S.W.2d 958, error refused.

Necessary parties

In action to recover on special pavement assessment certificates issued by city purporting to be a lien on property involved where assessment lien and contract lien were asserted and judgment seemed to foreclose both, record failed to show that infant defendants were not necessary parties so as to render harmless failure to serve process on some of them.—Ginn v. Southwest Bitulithic Co., Tex.Civ.App., 149 S.W.2d 201, error dismissed, judgment correct.

85. Tex.—Morris v. Drescher, Civ. App., 123 S.W.2d 958, error refused.

86. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.

87. Tex.—Morris v. Drescher, Civ. App., 123 S.W.2d 958, error refused.

88. Ill.—Davison v. Heinrich, 172 N.E. 770, 340 Ill. 349.
Conclusiveness of abstract generally see Appeal and Error § 1148.

89. Cal.—Neilson v. Walker, 286 P. 1091, 105 Cal.App. 23.

sity and manner of making evidence heard orally before the court a part of the record for purposes of review apply alike to infants and adults.[90]

f. Review

The scope and extent of review are in general controlled by the rules applicable in other proceedings, as, for example, with reference to the persons entitled to allege error, the presumptions which will be indulged, the review of matters of discretion and of questions of fact, and as to errors which are regarded as prejudicial.

Since an infant is bound by the judgment or decree rendered in the action, infancy alone is no ground for reversal;[91] and the rules applicable in other cases as to the scope of the review, discussed in Appeal and Error §§ 1453–1834, and as to the determination of the cause on appeal, discussed in Appeal and Error §§ 1835–2003, generally control.

Moot questions. The question presented by an appeal from an order denying a motion to vacate the appointment of a guardian ad litem, having become an academic one by the resignation of the guardian, will not be considered by the court.[92]

Parties entitled to allege error. The omission of the next friend of an infant plaintiff to give bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by defendant on appeal, since he is not injured or prejudiced and it does not concern him.[93] An adult plaintiff, after active participation in the trial below, is estopped to assert for the first time on a motion for a rehearing on appeal that the deceased defendant's minor daughter had not been served with a citation where the error is not apparent on the face of the record.[94] Where the general guardian of the minor appeared and resisted a petition, the petitioner could not complain on appeal of the failure to appoint a guardian ad litem.[95]

Presumptions. The appellate court will presume that the lower court duly protected the interest of the infant.[96] Where the decree appealed from recites the appointment of a guardian ad litem it will be presumed that the appointment was regularly made[97] and that the court found that the guardian ad litem had been appointed in due time;[98] but where the record does not show the appointment of a guardian ad litem for an infant defendant no presumption exists that such an appointment has been made,[99] and there is no presumption that a minor defendant against whom a judgment has been rendered was served with process.[1]

Discretion of court. The general rule, stated in Appeal and Error § 1583, that the appellate court will not review or revise the trial court's actions or rulings with reference to matters resting in the latter's judicial discretion in the absence of a showing of an abuse of that discretion has been applied in cases involving infants.[2] Similarly the rule that the complaining party has the burden of showing that the trial court abused its discretion, discussed in Appeal and Error § 1584, has been applied to cases on appeal in which infants were parties.[3] An order of removal of a guardian ad litem or next

Scope of review in appeal on judgment roll generally see Appeal and Error § 1466.

90. Ky.—Chenault v. State Bank & Trust Co., 128 S.W.2d 715, 278 Ky. 453.

Oral evidence as part of record on appeal in equity actions see Appeal and Error § 704.

91. Ky.—Mason v. Chambers, 4 J.J. Marsh. 401.

31 C.J. p 1177 note 75.

92. N.Y.—Chase Nat. Bank of City of New York v. Von Kageneck, 23 N.Y.S.2d 450, 260 App.Div. 941—Chase Nat. Bank of City of New York v. Von Kageneck, 23 N.Y.S.2d 449, 260 App.Div. 942.

Academic or moot questions not considered on appeal see Appeal and Error § 1455.

93. Fla.—Neal v. Spooner, 20 Fla. 38.

94. Tex.—Morris v. Drescher, Civ. App., 123 S.W.2d 958, error refused.

95. Ind.—Freestone v. State, 176 N. E. 877, 98 Ind.App. 523.

96. Cal.—Neilson v. Walker, 286 P. 1091, 105 Cal.App. 23.

S.C.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50—Barfield v. Barnes, 93 S.E. 425, 108 S.C. 1.

31 C.J. p 1117 note 21 [d].

Legal necessity

Where mortgagors' minor heirs were represented by guardian ad litem, while defense to foreclosure suit was made for them by an attorney ad litem and heirs sui juris did not defend, it must be presumed on appeal that defense made for such minors was because of legal necessity.—Jacobs v. Knox, 166 S.W. 2d 7, 204 Ark. 969.

97. Ill.—Davison v. Heinrich, 172 N. E. 770, 340 Ill. 349.

98. Ark.—Dudley v. Dudley, 189 S. W. 838, 126 Ark. 182.

99. Va.—Broyhill v. Dawson, 191 S. E. 779, 168 Va. 321.

1. Tex.—Morris v. Drescher, Civ. App., 123 S.W.2d 958, error refused.

2. Vacating judgment on ground of defendant's infancy

N.J.—Steelman v. Gilbert, 186 A. 47, 14 N.J.Misc. 490.

Substitution of infant's original next friend by another

Tex.—Texas Indemnity Ins. Co. v. Hubbard, Civ.App., 138 S.W.2d 626, error dismissed, judgment correct.

Fixing fee of guardian ad litem

Tex.—Kunze v. Krueger, Civ.App., 30 S.W.2d 385, error refused.

Requiring bond for costs

Failure of the trial court to require next friend of nonresident infant, who brought action for the infant, to execute bond for costs would not require reversal, where the infant was the successful litigant, in view of the fact that the statute is not mandatory.—Dr. Pepper Bottling Co. of Kentucky v. Hazelip, 144 S.W.2d 798, 284 Ky. 333.

3. Vacating judgment

On appeal from decision to vacate judgment on ground it erroneously deprived infants of their rights, appellants had burden to show that trial court abused its discretion in refusing to vacate judgment.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50.

friend has been held not reviewable.[4] The amount of allowances by the lower court for fees of a guardian ad litem is reviewable by the appellate court.[5]

Questions of fact, verdicts, and findings. Since an appellate court, exercising strictly the functions of a court of review, generally is limited to the correction of errors of law, as discussed in Appeal and Error § 1642, a defendant who pleaded infancy at the trial below cannot assign his infancy as error when the triers of fact have found against his plea.[6] The reviewing court cannot take the allegations of a motion to set aside a judgment because of minority as true where the former unimpeached findings of the lower court show that the minor was of age on the date of the entry of judgment.[7]

Harmless error. Some courts have held that, where the interests of a minor litigant have been protected, failure to appoint a guardian is not ground for reversal;[8] but other courts have considered such failure to be reversible error.[9] The taking of evidence respecting matters affecting an infant's property rights without proper notice to his guardian ad litem has also been held to be prejudicial error.[10] A consent order entered by the attorneys and guardian ad litem for infant defendants will not be disturbed on appeal in the absence of a showing that the infants' interests were prejudiced thereby.[11] The failure by an infant's next friend to observe technical formalities in bringing a suit on his behalf does not constitute material error.[12] The rule stated in Appeal and Error § 1898, that the improper naming of the person bringing the action is not prejudicial error, has been applied to the case of an infant plaintiff.[13]

g. Determination and Disposition of Cause

General rules determine as to the disposition of the cause and as to further proceedings on remand.

Where an infant brings a writ of error to reverse a judgment rendered against him, the court only vacates the judgment, but does not set aside the proceedings altogether.[14] Where a complain-

4. Cal.—In re Hathaway's Estate, 43 P. 754, 111 Cal. 270.
Del.—Flint v. Flint, 82 A. 538, 26 Del. 155.
Wash.—State v. King County Super. Ct., 134 P. 172, 74 Wash. 559.

5. N.C.—Hood ex rel. North Carolina Bank & Trust Co. v. Cheshire, 189 S.E. 189, 211 N.C. 103.

6. N.Y.—Ingersoll v. Wilson, 3 Johns. 437.

7. Ohio.—Carroll v. Employers' Liability Assur. Corporation, Limited, of London, England, 190 N.E. 590, 47 Ohio App. 146.

8. Neb.—Kuhlman v. Schacht, 265 N.W. 549, 130 Neb. 511.

No concern of opposite party

Where decree fully protects minor litigants, it is no concern of opposite party whether guardian ad litem was appointed.—Davison v. Heinrich, 172 N.E. 770, 340 Ill. 349.

Where an infant was defended by an attorney who filed a written motion for a new trial without specifying the failure to appoint a guardian ad litem, such failure cannot constitute a ground for reversal of the judgment against him.—Martin v. Starr, 255 Ill.App. 189.

Delay in appointment

(1) A judgment for defendant in action by motorist for damage to automobile resulting from collision, wherein defendant filed a counterclaim, would not be reversed on ground that motorist was a minor, where attention of court was first called to minority of motorist when motion for new trial was made, and thereafter motorist's mother was appointed guardian ad litem to act for him, and record indicated that proceedings would have been no different had guardian ad litem been appointed before trial.—Zielinski v. Pleason, 20 N.E.2d 620, 299 Ill.App. 594.

(2) Delay in the appointment of a guardian ad litem for a minor neither deprives the court of jurisdiction nor constitutes reversible error, where there is no showing of prejudice resulting therefrom.—Johnston v. Calvin, Iowa, 5 N.W.2d 840.

Prosecution of suit by infants in their own names

By virtue of specific statutory enactment a judgment for infants will not be disturbed, where they prosecuted suit by attorney in their own names, and not by guardian or curator, and where curator had removed from state.—Chapman v. Bimel-Ashcroft Mfg. Co., Mo., 263 S.W. 993.

Appointment or nonappointment of guardian ad litem or next friend to sue for an infant as not constituting reversible error, see Appeal and Error § 1898.

9. Ala.—Garner v. Empire Land Co., 117 So. 64, 217 Ala. 528.

Error not alleged

Where record disclosed judgment against minor without appointment of guardian ad litem as required by statute, reviewing court was required to reverse such judgment with new trial, notwithstanding failure to allege such error in grounds of appeal.—Weller v. Speet, 267 N.W. 758, 275 Mich. 655.

Judgment on appeal

(1) Judgment against infant cannot be had in court on appeal.
Okl.—Bailey v. Brown, 25 P.2d 1088, 166 Okl. 5.
Tex.—Pleasant v. Mims, Civ.App., 55 S.W.2d 171.

(2) A minor, for whom his father recovered a judgment for personal injuries, cannot be bound by a judgment on appeal, where his general guardians were appointed after the order appealed from was entered, were not parties to the proceeding, and were not represented at the hearing on appeal, and the record does not show that they have been substituted for the plaintiff as representatives of the minor.—Jensen v. Chicago, M. & St. P. Ry. Co., 199 N.W. 579, 160 Minn. 122.

10. W.Va.—Queen v. Caldwell, 164 S.E. 35, 112 W.Va. 215—Henry v. Musgrave, 158 S.E. 783, 110 W.Va. 467.

11. S.C.—Murchison Nat. Bank v. Reynolds, 121 S.E. 673, 127 S.C. 528.

12. **Filing authority to sue**

On appeal by infant, in action by his next friend against the infant's father wherein final judgment would require father to pay costs, next friend's failure to file authority to solicitor to bring suit as required by statute was immaterial.—Yost v. Yost, 190 A. 753, 172 Md. 128.

Technical or formal errors generally see Appeal and Error § 1679.

13. Kan.—Garcia v. Slater-Breitag Yeamans Motor Co., 278 P. 23, 128 Kan. 365.

14. Vt.—Barber v. Graves, 13 Vt. 290.

ant's bill and a cross bill by an infant defendant were both dismissed, and on appeal by complainant the decree is reversed, the appellate court has no power to reinstate the cross bill or grant any relief on it; but in order that the infant may have an opportunity to assert his rights the cause will be remanded in order that another cross bill may be filed on behalf of the infant if it be deemed advisable.[15] A judgment against minors and adults as joint trespassers may be reversed as to the minors only, since no contribution could be compelled if one were obliged to pay the judgment.[16] Where in an action on notes against several defendants, one of them by a separate answer alleged infancy and the issue thus raised was submitted to the jury as a separate issue and the jury found for such defendant on such issue and also found for all the defendants on the general issue, it was held that the judgment in favor of infant defendant must stand, although as to other defendants the judgment was reversed.[17] Where a case is remanded to the chancery court with directions to appoint a guardian ad litem for the decedent's minor heirs, not made parties to a creditors' suit against the administrator, new pleadings may be filed in their behalf.[18] Where a judgment in favor of a minor is erroneous in directing a payment of a portion of the damages awarded to his attorneys, it will be modified by the appellate court to direct that such portion be deposited in the registry of the court subject to disbursement on a proper showing by the interested attorneys.[19]

§ 127. Costs

a. In general
b. In favor of or against infant
c. Against next friend or guardian ad litem

a. In General

The matter of costs usually is governed by the general rules relating thereto.

The matter of the right to, and liability for, costs generally is governed by the rules applicable in other civil actions.[20] While under some provisions of law a next friend may be required to give bond as security for costs, as discussed in Costs § 127 b, the requirements laid down by the statute must be fulfilled in order to compel him to do so.[21]

b. In Favor of or against Infant

Costs in favor of an infant when his success in the action is due to his plea of infancy are in general discretionary and apparently not favored; the authorities differ sharply as to the liability of an infant for costs when he is the unsuccessful party.

In favor of infant. Where on the trial of an action to recover for goods sold a verdict is directed in behalf of one of defendants on the ground of infancy, he is not entitled to costs as a matter of course, but their allowance depends on a special application to the court by which they may be withheld or allowed according to its sound discretion.[22] Where an infant defendant, joined with others, secures a nolle prosequi as to himself on account of infancy, he is not entitled to costs.[23] Where a defendant in an action on a joint liability who was not served voluntarily answers, pleading infancy, plaintiff may obtain leave to discontinue as to him without costs and such defendant cannot be allowed any costs in the action other than the costs of making his motion to compel plaintiff to receive his answer.[24] Where a judgment recovered against an infant on a note is reversed on writ of error because of the infancy of defendant below, the court will not give plaintiff in error costs unless it appears that plaintiff in the court below knew that he was an infant.[25] Where infant appellees are not

15. Ala.—Parks v. Parks, 66 Ala. 326.
16. Conn.—Wilford v. Grant, Kirby 114.
17. Conn.—Arnold v. Lane, 40 A. 921, 71 Conn. 61.
18. Tenn.—Hyder v. Hyder, 66 S.W. 2d 235, 16 Tenn.App. 64.
19. Tex.—Houston Oxygen Co. v. Davis, Civ.App., 145 S.W.2d 300, reversed on other grounds 161 S.W. 2d 474, 139 Tex. 1, 140 A.L.R. 868.
20. Mo.—Graden v. Patrick, App., 162 S.W.2d 287.
N.Y.—Stevenson v. Guardian Life Ins. Co. of America, 25 N.Y.S.2d 483, 175 Misc. 823.
31 C.J. p 1178 note 92.
Right of infant to sue or defend in forma pauperis see Costs § 148.
Taxation of guardian's compensation and allowances as costs see supra § 112.

Attorney's fees as costs

(1) The fee for representing a minor defendant is allowed as compensation for services rendered the minor, but it is authorized to be taxed as a part of the cost of suit, and is deemed "costs" incurred by successful plaintiff within the meaning of the statute when the minor has no property or estate out of which the fee can be collected.—Bruni v. Vidaurri, Tex., 166 S.W.2d 81, affirming in part and reversing in part Viduarri v. Bruni, Civ.App., 154 S.W.2d 498.

(2) The costs allowed attorney for representing minor defendants, some of whom were served personally and some by publication, and all costs incident to issuance and publication of citations by publication before order consolidating suit with several other suits should be taxed against plaintiffs, in absence of proof sufficient for otherwise adjudging those items of cost.—Bruni v. Vidaurri, supra.

21. Ky.—Dr. Pepper Bottling Co. of Kentucky v. Hazelip, 144 S.W.2d 798, 284 Ky. 333.
22. N.Y.—Yamato Trading Co. v. Hoexter, 44 Hun 491.
23. N.Y.—Ex parte Nelson, 1 Cow. 417.
24. N.Y.—Wellington v. Claason, 9 Abb.Pr. 175, 18 How.Pr. 10.
25. Mass.—Knapp v. Crosby, 1 Mass. 479.

represented by a guardian or next friend, the costs of the appeal should be taxed against the appellants, although the cause has been reversed.[26] Where an infant is appointed administrator and continues to act after becoming of age until the commencement of a suit, when he objects to the validity of his appointment on the ground of infancy, it has been held that he is not entitled to costs of a cross bill filed by him for the purpose of substituting in his place in the suit the administrator appointed on the revocation of the first appointment.[27]

Against infant. According to some authorities an infant plaintiff suing by guardian ad litem or next friend is liable for costs in case he is unsuccessful,[28] but this is denied by other authorities.[29] An infant defendant is not liable for costs in an action to which he is a necessary party because of his being the heir of the person against whom, if alive, the action should be brought,[30] but in other cases an infant defendant may be liable for costs.[31] The trust fund of a successful infant plaintiff, represented in the action by a next friend, may be charged with costs when its preservation or recovery results from such action.[32]

c. Against Next Friend or Guardian ad Litem

Although there is contrary authority, the next friend or guardian ad litem of an infant plaintiff generally is held liable for costs and the representative of an infant defendant is not, while an infant litigant's election to proceed with the action on becoming of age usually relieves his representative of liability for costs.

Although some authorities have held that the next friend is not liable for costs,[33] unless he has mismanaged the conduct of the suit or action or acted in bad faith,[34] or unless the court, in the exercise of a discretionary power conferred by statute, so directs,[35] the next friend or guardian ad litem of an unsuccessful infant plaintiff is as a general rule primarily liable for costs,[36] especially where the in-

26. Md.—Annapolis, W. & B. R. Co. v. State, 65 A. 434, 104 Md. 659.
N.C.—Ex parte Cooper, 48 S.E. 581, 136 N.C. 130.

27. N.Y.—Carow v. Mowatt, 2 Edw. 57.

28. Iowa.—Albee v. Winterink, 7 N. W. 497, 55 Iowa 184.
31 C.J. p 1179 note 3.

Election by minor after majority to proceed with cause brought by next friend renders minor liable for costs.—Young v. Western & A. R. R., 158 S.E. 464, 465, 43 Ga.App. 257, citing **Corpus Juris.**

29. Neb.—Kleffel v. Bullock, 1 N.W. 250, 8 Neb. 336.
31 C.J. p 1179 note 4.

In New York

(1) Where action is instituted on behalf of infant by guardian ad litem, and action is unsuccessful infant is not liable for costs.—Goishen v. Samor Realty Co., 4 N.Y.S.2d 107, 109, 167 Misc. 477, quoting **Corpus Juris.**

(2) In a case specifically disagreeing with the conclusions reached in Goishen v. Samor Realty Co., supra, it has been held that the statute relieving infant's guardian ad litem from liability for costs, unless specially charged therewith by court order, did not relieve infant of liability therefor, and successful defendant may proceed under general statutes relating to costs for recovery thereof from unsuccessful infant plaintiff, who can avoid liability therefor only by suing as poor person.—Stevenson v. Guardian Life Ins. Co. of America, 25 N.Y.S.2d 483, 175 Misc. 823.

(3) No appeal costs would be allowed against an infant.—Boxer v. Schroeter, 7 N.Y.S.2d 262, 169 Misc. 393.

30. Neb.—Clark v. Clark, 32 N.W. 157, 21 Neb. 402.
31 C.J. p 1179 note 5—51 C.J. p 287 note 32.

31. Mo.—Graden v. Patrick, App., 162 S.W.2d 287.
Tex.—Bruni v. Vidaurri, 166 S.W.2d 81, 140 Tex. 138, affirming in part and reversing in part Viduarri v. Bruni, Civ.App., 154 S.W.2d 498.
31 C.J. p 1179 note 6.

Fee of attorney ad litem

In suit to construe will and for partition, fee of minors' attorney ad litem was taxable against their interest.—Pisek v. Kostroun, Tex.Civ. App., 6 S.W.2d 813, reversed on other grounds Kostroum v. Pisek, Com. App., 15 S.W.2d 220.

32. U.S.—U. S. v. Equitable Trust Co. of New York, N.Y., 51 S.Ct. 639, 283 U.S. 738, 75 L.Ed. 1379, modifying, C.C.A., Barnett v. Equitable Trust Co. of New York, 34 F.2d 916, certiorari granted U. S. v. Equitable Trust Co. of New York, 50 S.Ct. 160, 280 U.S. 550, 74 L.Ed. 609.

33. N.Y.—McCarthy v. Anable, 7 N. Y.S.2d 887, 169 Misc. 595.
31 C.J. p 1179 note 7.

34. N.Y.—Gottfried v. Natanson, 300 N.Y.S. 777, 165 Misc. 447.

Contempt for nonpayment

Since at the time judgment was rendered against a plaintiff in an action by an infant by a guardian ad litem, the statute made the guardian liable for costs only if the court specially directed him to pay them because of mismanagement or bad faith in the action, an order refusing to punish him for contempt for not paying them was proper although at the time of the commencement of the action a statute, later repealed, was in effect making the guardian unconditionally liable for costs.—Huebl v. Scollard, 142 Wis. 589, 126 N.W. 12.

35. U.S.—Horzepa v. Dauski, D.C.N. Y., 40 F.Supp. 476.
N.Y.—McCarthy v. Anable, 7 N.Y.S. 2d 887, 169 Misc. 595—Goishen v. Samor Realty Co., 4 N.Y.S.2d 107, 167 Misc. 477—Gottfried v. Natanson, 300 N.Y.S. 777, 165 Misc. 447.

36. Ga.—Young v. Western & A. R. R., 158 S.E. 464, 43 Ga.App. 257.
Ky.—Dr. Pepper Bottling Co. of Kentucky v. Hazelip, 144 S.W.2d 798, 284 Ky. 333.
Md.—Hoff v. Hoff, 159 A. 591, 162 Md. 248, 82 A.L.R. 528.
Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 55 S.W.2d 639.
31 C.J. p 1179 note 9.

Costs of former suit

Next friend bringing renewal suit in behalf of minor after voluntary dismissal is primarily responsible for costs of former suit.—Powell v. Fidelity & Deposit Co. of Maryland, 173 S.E. 196, 48 Ga.App. 529.

Necessity of bond

The liability of the next friend of an infant, unsuccessfully prosecuting a suit, for costs incurred by prevailing party, does not arise from the fact that he has, pursuant to an order of the court, executed a bond for costs, conditioned to pay all such costs as may be awarded against him, but he is liable to pay costs, whether he has or has not executed a bond.—State v. Oxley, 120 S.E. 383, 95 W.Va. 160.

fant's representative also seeks recovery on an individual cause of action[37] or is the real party in interest;[38] and he is also liable for costs on a reversal of his appeal.[39] However, in a jurisdiction where the imposition of costs on a guardian ad litem is discretionary, it has been held that he is not liable for costs as a party joined as plaintiff where there can be no costs against him in his representative capacity.[40] While the guardian ad litem of an infant defendant ordinarily is not chargeable with costs,[41] and a statute empowering the court so to charge the guardian will not be invoked where there has been no misconduct on the part of the representative, since it is intended for the protection of infants,[42] it has been held that a guardian ad litem who appeals on behalf of an infant defendant is liable for the costs of the appeal where the judgment is affirmed.[43]

If, after attaining majority, the infant elects to proceed with the cause, the next friend is discharged from liability for costs.[44] Some cases have held that this rule applies to costs already incurred and to future costs,[45] but other cases seem to limit the rule to future costs and not to costs already incurred.[46] However, in some jurisdictions by statute, unless the next friend applies to be relieved therefrom, he remains liable for the costs incurred both before and after the infant becomes of age[47]. It has been said that where an infant has become of age the court should not exercise its discretionary right to impose costs against the guardian ad litem.[48] In any event if the proper procedure has not been followed by the successful party costs cannot be imposed either on the quondam infant or his guardian ad litem on a motion to review taxation of costs,[49] although the costs will be disallowed without prejudice to further proceedings by defendant.[50]

Recognizance for costs. The next friend may properly recognize for costs in the suit under a statute requiring a recognizance by some person other than plaintiff.[51]

Reimbursement of next friend. A next friend who has acted in good faith and on probable grounds is entitled to be reimbursed for the costs that he has paid from the property of the infant.[52]

INFANZON. In Spanish feudal law, the noble who exercised no other powers than those lawfully conceded to him.[1]

INFATUATION. Act of infatuating, or state of being infatuated; folly; also, that which infatuates.[2]

It has been used as one of the synonyms of "intoxication."[3]

Double costs

Where action for damages for infant's illness was brought by infant's parents individually and as next friends of infant, and judgment for defendant was reversed on ground that the parents might recover expenses incurred in caring for the infant, costs on appeal as to the parents were required to abide final determination of the cause as to them, but defendant was entitled to double costs against the parents as infant's next friends, as to issue of defendant's liability to the infant.—Stave v. Giant Food Arcade, 17 A.2d 779, 126 N.J.Law 75.

37. N.Y.—Giebner v. Retz, 300 N.Y.S. 1050, 253 App.Div. 752.
Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 55 S.W.2d 639.

38. Tenn.—McIntosh v. Cutshall, 113 S.W.2d 88, 21 Tenn.App. 531.

39. Tenn.—McIntosh v. Cutshall, supra.
W.Va.—Fisher v. Bell, 63 S.E. 620, 65 W.Va. 10.

Costs in both courts

If, on suggestion that the next friend of an infant about to prosecute a lawsuit is financially irresponsible, he executes a cost bond with approved security, and thereafter prevails in the circuit court, but loses on appeal, and the suit is dismissed, the prevailing party on appeal is entitled to a decree or judgment against the next friend for the costs in both courts.—State v. Oxley, 120 S.E. 383, 95 W.Va. 160.

40. N.Y.—McCarthy v. Anable, 7 N.Y.S.2d 887, 169 Misc. 595.

41. Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 55 S.W.2d 639.
31 C.J. p 1180 note 12.

42. N.Y.—Gottfried v. Natanson, 300 N.Y.S. 777, 165 Misc. 447.

43. Ala.—Ward v. Mathews, 25 So. 50, 122 Ala. 188, overruling Brown v. Williams, 6 So. 111, 87 Ala. 353.

Affidavits in forma pauperis

Where, on adverse termination of case against minors by their next friend, they sue out bill of exceptions and bring case to supreme court, next friend is liable for costs although he files affidavit stating that minors were unable to pay costs.—Potts v. Wilson, 123 S.E. 294, 158 Ga. 316.

44. Md.—Wainwright v. Wilkinson, 62 Md. 146.
31 C.J. p 1180 note 15.

45. Md.—Wainwright v. Wilkinson, supra.

46. N.Y.—Schoen v. Schlessinger, 7 Abb.N.Cas. 399, 57 How.Pr. 490.

47. Ohio.—Farmer v. Richmond, 166 N.E. 206, 31 Ohio App. 25.

48. N.Y.—McCarthy v. Anable, 7 N.Y.S.2d 887, 169 Misc. 595.

49. N.Y.—McCarthy v. Anable, supra.

50. N.Y.—McCarthy v. Anable, supra.

51. Vt.—Duffy v. Pinard, 41 Vt. 297.

52. Tenn.—Green v. Harrison, 8 Sneed 131—Grant v. Davis, 8 Tenn. Civ.A. 315.

1. Escriche Diccionario.

2. Webster New Int.D.

3. Ga.—Ring v. Ring, 38 S.E. 330, 331, 112 Ga. 554.

IN FAVORABILIBUS ANNUS INCŒPTUS PRO COMPLETO HABETUR.[4]

IN FAVORABILIBUS, MAGIS ATTENDITUR QUOD PRODEST QUAM QUOD NOCET.[5]

IN FAVOREM VITÆ LIBERTATIS ET INNOCENTIÆ OMNIA PRÆSUMUNTUR.[6]

INFECT. To contaminate with any disease-producing substance, germs, or bacteria.[7]

Infected. The participial adjective meaning having undergone infection.[8]

Carrier's liability for injury to, or loss of, live stock unloaded in infected pens see Carriers § 43 b; and duty of warehouseman with reference to infected goods see the C.J.S. title Warehousemen and Safe Depositaries § 11, also 67 C.J. p 451 notes 83–88.

INFECTION. The word is susceptible of more than one interpretation; it has a definite technical meaning as understood by members of the medical profession and an entirely different meaning to those who are not learned in the medical sciences.[9] The ordinary conception of the word to the layman, as distinguished from the medical understanding of it is that infection is caused by any noxious substance inserted into the flesh, whether the substance be germ or poison, and hence is understood to mean the invasion of bacteria from the air into an opening or abrasion of the surface of the skin or body causing toxic or blood poisoning.[10]

In medical jurisprudence, the communication of disease, as by the entrance of pathogenic germs into an organism in any manner;[11] the communication of disease germs or virus by any means, direct or indirect;[12] the process of infecting;[13] the transmission of disease or disease germs from one person to another, either directly by contact with morbidly affected surfaces, or more remotely through inhalation, absorption of food or liquid tainted with excremental matter, contact with contaminated clothing or bedding, or other agencies;[14] also that which infects, or causes the communicated disease;[15] the subtle or virulent matter proceeding from diseased bodies and imparting the same to others.[16] Depending on the circumstances, it may,[17] or may not,[18] include internal inflammation where pus is formed by the reason of pus germs, as distinguished from external injuries infected by bacteria from the air; and so, specifically, it has been said that an ulcer is an infection,[19] but that eczema is not see 28 C.J.S. p 829 note 93.

"Infection" has been said to be nearly synonymous with, although in some respects it is distinguished from, "contagion" see 16 C.J.S. p 1523 note 50; and to be both distinguishable and not distinguishable from "poison" or "poisoning" see the C.J.S. title Poisons § 1.

4. A maxim meaning "In things favored the year begun is held as completed."—Peloubet Leg.Max.

5. A maxim meaning "In things favoured, what does good is more regarded than what does harm."—Wharton L.Lex.

Similarly rendered

"In things favored, what profits is more regarded than what prejudices."—Black L.D.

6. A maxim meaning "In favor of life, liberty, and innocence, every presumption is made."—Black L.D.

Applied in State v. Bilansky, 3 Minn. 246.

Similarly rendered

"All things are presumed in favour of life, liberty, and innocence, or, as the maxim may also be rendered, the presumption is always in favour of life, liberty, and innocence."—Trayner Leg.Max.

7. Colo.—New York Life Ins. Co. v. Mariano, 76 P.2d 417, 418, 102 Colo. 18.

8. Webster New Int.D.

"Infected or exposed to infection"

"Words which have a definite legal meaning, which applies to persons who have been brought into actual contact with or within the baleful influence of an infectious or contagious disease."—Wong Hoy Woon v. Duncan, 3 B.C. 318, 322.

9. Wash.—Kane v. Order of United Commercial Travelers of America, 100 P.2d 1036, 1040, 3 Wash.2d 355.

10. Mo.—Dickey v. Western Tablet Co., 267 S.W. 431, 433, 218 Mo.App. 253.

Tex.—Order of Ry. Conductors of America v. Gregory, Civ.App., 91 S.W.2d 1139, 1141.

Wash.—Kane v. Order of United Commercial Travelers of America, 100 P.2d 1036, 1040, 3 Wash.2d 355.

More specifically

(1) The application of an animal poisoning.—Regina v. Clarence, 22 Q.B.D. 23, 41.

(2) In construing the instructions in an action for damages arising from the sale of hogs alleged to be infected with hog cholera, the court said: "'Infection' as used in these instructions, means that the hogs must have been affected with the cholera, or that the germs of such disease were in or on them."—Summers v. Huston, 162 P. 474, 475, 62 Okl. 280.

11. U.S.—Todd Dry Docks v. Marshall, C.C.A.Wash., 61 F.2d 671, 672.

12. Colo.—New York Life Ins. Co. v. Mariano, 76 P.2d 417, 418, 102 Colo. 18, quoting Gould D. of Medicine.

13. Colo.—New York Life Ins. Co. v. Mariano, supra.

14. Black L.D.

Phrases construed

(1) "Auto infection," the communication of disease from one part of the body to another by mechanical transmission of virus from a diseased to a healthy part.—Black L.D.

(2) "Bacterial infection" see 7 C.J.S. p 1316 note 98.

15. Webster New Int.D.

16. Neb.—Stryker v. Crane, 50 N.W. 1132, 1133, 33 Neb. 690.

Tex.—Kaster v. Woodson, Civ.App., 123 S.W.2d 981, 983.

17. Tex.—Kaster v. Woodson, supra.

18. Kan.—Continental Casualty Co. v. Colvin, 95 P. 565, 570, 77 Kan. 561.

19. N.Y.—Pinto v. Chelsea Fibre Mills, 186 N.Y.S. 748, 750, 196 App. Div. 221.

"Infection" as employed in policies of accident insurance see the C.J.S. title Insurance § 776, also 1 C.J. p 451 note 19[b]; and as an injury for which compensation may be had under compensation statutes see the C.J.S. title Workmen's Compensation Acts § 256, also 71 C.J. p 760 note 53. For references to other particular applications consult the Descriptive-Word Index.

In international law, "infection," with reference to the contraband of goods, is said to be the liability of a particular owner to a derivative condemnation of his goods, arising as an incident of the owner's position when the seizure is made and the captor's right arises.[20]

INFECTIOUS. Capable of communicating infection; contaminating; that infects, taints, or corrupts.[21] While it is true that lexicographers and scientific persons observe a well-defined difference in the meanings of the words "contagious" and "infectious," the latter term may properly be used to express the property of transmissibility of certain diseases.[22]

Infectious disease. A disease capable of being transmitted or communicated by means of infection.[23] In its technical use, it presupposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various dejections from animals.[24]

It is sometimes used interchangeably, and sometimes compared, with "contagious disease" see 16 C.J.S. p 1523 notes 54–56.

Quarantine regulations and other provisions concerning infectious and contagious diseases see Health §§ 12–20. For references to other particular applications consult the Descriptive-Word Index sub verbo Contagious and Infectious Diseases.

INFEFT. In Scotch law, to give seizin or possession of lands; to invest or enfeoff.[25]

INFEFTMENT. In old Scotch law, investiture or infeudation, including both charter and seizin; and in later law, saisine, or the instrument of possession.[26]

INFENSARE CURIAM. Latin, an expression applied to a court when it suggested to an advocate something which he had omitted through mistake or ignorance.[27]

INFEOFFMENT. See Enfeoffment 30 C.J.S. p 244 note 18 and generally Deeds § 5.

INFER. Derived from the Latin inferre, compounded of "in" from, and "ferre" to carry or bring,[28] and defined as meaning to bring into, to bring forward;[29] to bring a result or conclusion from something back of it, that is, from some evidence or data from which it may be logically deduced.[30]

"Inferred" has been held synonymous with "implied" see 42 C.J.S. p 406 note 39; and has been distinguished from "presumed."[31]

INFERENCE. Although the noun "inference," as commonly understood, may mean the actual fact inferred, strictly it means the process or reasoning in reaching the fact and not the fact itself;[32] and it has been defined generally as the act or process of inferring;[33] a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted;[34] and, in

20. Eng.—The Kronprinsessan Margareta, [1921] 1 A.C. 486, 496.
"Doctrine of infection" see the C.J.S. title War § 34, also 67 C.J. p 415 notes 68, 69.

21. Century D.

"Infectious substances"
The phrase ordinarily means substances that are in their nature infectious and that are generally recognized as contaminating, or as capable of communicating infection.—Farner v. Massachusetts Mut. Acc. Assoc., 67 A. 927, 928, 219 Pa. 71, 123 Am.S.R. 621.

22. Mo.—Council v. St. Louis & S. F. R. Co., 100 S.W. 57, 61, 123 Mo. App. 432.

23. Black L.D.

24. U.S.—Grayson v. Lynch, N.M., 16 S.Ct. 1064, 1068, 163 U.S. 468, 41 L.Ed. 230—Todd Dry Docks v. Marshal, D.C.Wash., 49 F.2d 621, 623.

25. Black L.D.

26. Black L.D.

27. Black L.D.

28. Conn.—Morford v. Peck, 46 Conn. 380, 385.

29. Utah.—Salt Lake County v. Industrial Commission, 120 P.2d 321, 323, 101 Utah 167.

30. Conn.—Morford v. Peck, 46 Conn. 380, 385.

31. Conn.—Morford v. Peck, supra.
Wis.—Bannon v. Insurance Co. of North America, 91 N.W. 666, 669, 116 Wis. 250.

32. U.S.—Montgomery v. Hutchins, C.C.A.Cal., 118 F.2d 661, 665.

33. Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633.

34. Minn.—Corcoran v. Teamsters & Chauffeurs Joint Council No. 32, 297 N.W. 4, 7, 209 Minn. 289.

Process discussed
"The very process of inference involves the process of one fact or a set of facts pushing forward in the mind the probability of the inferred fact. Sometimes the basic fact or facts from which the inference arises strongly urge to any reasonable mind the inferred fact. At other times, the process of inference is more tenuous. And true it is, that where the fact attempted to be inferred is pushed or carried out of the basic facts with no more urgency than some other fact, the inferences are said to be equal and cancel each other. Perhaps the more accurate way to state the proposition is that the mind in its natural functioning does not bring forward

logic, as the derivation of a judgment or conclusion from any given material of knowledge or thought on the assumed ground of a real interdependence of things conformably to law;[35] a thought or idea not represented by the words used but to be deduced therefrom.[36]

In law, the term has been generally defined as meaning a conclusion, a deduction, that which is inferred;[37] a conclusion drawn by reason from premises, or facts, established by proof;[38] a conclusion or a deduction from facts or propositions known to be true or from facts proved;[39] a deduction which the trier may or may not make according to his own conclusions;[40] a permissible deduction from the evidence;[41] something inferred from precedent matter, separated from which it is a mere absurdity

any fact from the underlying facts because, being in a condition of equipoise, no inferable fact is brought forward or pushed out of the underlying facts as a natural conclusion."—Salt Lake County v. Industrial Commission, 120 P.2d 321, 323, 101 Utah 167.

35. Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633.

36. Tenn.—George Cole Motor Co. v. McCanless, 130 S.W.2d 93, 95, 174 Tenn. 625.

37. Va.—Ryan v. Maryland Casualty Co., 3 S.E.2d 416, 418, 173 Va. 57.

38. Kan.—Wollard v. Peterson, 56 P.2d 476, 479, 143 Kan. 566, quoting **Corpus Juris.**
Ky.—Cochran's Adm'rs v. Chesapeake & O. Ry. Co., 22 S.W.2d 452, 453, 232 Ky. 107—Louisville & N. R. Co. v. Mann's Adm'r, 13 S.W.2d 257, 258, 227 Ky. 399.
Mo.—Pape v. Ætna Casualty & Surety Co., App., 150 S.W.2d 569, 572.
N.M.—State v. Jones, 48 P.2d 403, 406, 39 N.M. 395, citing **Corpus Juris.**
Ohio.—Mechanics' & Traders' Ins. Co. v. Himmelstein, 155 N.E. 806, 809, 24 Ohio App. 29.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Sanderson, Civ.App., 174 S.W.2d 646, 649, quoting **Corpus Juris.**
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**
Wyo.—Wright v. Conway, 242 P. 1107, 1110, 34 Wyo. 1.
31 C.J. p 1181 note 17.

Similarly expressed

(1) A conclusion drawn by reason of common sense from premises established by proof.—Mechanics' & Traders' Ins. Co. v. Himmelstein, 155 N.E. 806, 809, 24 Ohio App. 29.

(2) A conclusion drawn by reasoning from proved facts.—Black Star Coal Co. v. Hall, 78 S.W.2d 343, 345, 257 Ky. 481.

(3) A conclusion which, by means of data founded on common experience, natural reason draws from facts which are proved.
Ohio.—Ensel v. New York Lumber Ins. Co., 102 N.E. 955, 88 Ohio St. 269, 282.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Sanderson, Civ.App., 174 S.W.2d 646, 649, quoting **Corpus Juris.**
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**

(4) A deduction drawn from certain facts by reason.—Starkweather v. Conner, 38 P.2d 311, 314, 44 Ariz. 369.

39. Ky.—Cochran's Adm'rs v. Chesapeake & O. Ry. Co., 22 S.W.2d 452, 453, 232 Ky. 107.
Mo.—Pape v. Ætna Casualty & Surety Co., App., 150 S.W.2d 569, 572.
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**
31 C.J. p 1181 notes 20, 21.

Similar definitions

(1) A deduction from proved facts.
Ala.—Continental Casualty Co. v. Paul, 95 So. 814, 815, 209 Ala. 166, 30 Am.L.R. 802.
Ky.—Louisville & N. R. Co. v. Mann's Adm'r, 13 S.W.2d 257, 259, 227 Ky. 399.

(2) A logical deduction from facts and evidence.—State v. Jones, 48 P. 2d 403, 406, 39 N.M. 395, citing **Corpus Juris.**

(3) A logical deduction from circumstances known to exist.—Norfolk Coca-Cola Bottling Works v. Krausse, 178 S.E. 497, 502, 162 Va. 107.

(4) An inference is a logical deduction from facts proved.—Stambaugh v. Hayes, 103 P.2d 640, 645, 44 N.M. 443.

(5) A deduction to be drawn from the facts proved and not a conclusion based upon suspicion alone.—People v. Peloian, 272 P. 304, 305, 95 Cal.App. 96—Lyders v. Wilsey, 271 P. 383, 385, 94 Cal.App. 493.

(6) An inference is a deduction which may properly be made from any facts legally proved.—Allen v. Chicago, R. I. & P. Ry. Co., 54 S.W. 2d 787, 793, 227 Mo.App. 468.

40. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Sanderson, Civ. App., 174 S.W.2d 646, 649, quoting **Corpus Juris.**
Vt.—Cross v. Passumpsic Fibre Leather Co., 98 A. 1010, 1014, 90 Vt. 397.
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**

Similar definitions

(1) "A deduction which the reason of a jury makes from the facts proved."—Juchert v. California Water Service Co., 106 P.2d 886, 890, 16 Cal.2d 500—Sweeney v. Metropolitan Life Ins. Co., 92 P.2d 1043, 1045, 10 Cal.App.2d Supp. 767—31 C.J. p 1181 note 22 [a] (1).

(2) "A deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect."
Cal.—Crooks v. White, 290 P. 497, 500, 107 Cal.App. 304.
Ohio.—Mechanics' & Traders' Ins. Co. v. Himmelstein, 155 N.E. 806, 809, 24 Ohio App. 29.
Or.—Bannell v. Parelius, 111 P.2d 88, 90, 166 Or. 174.
31 C.J. p 1181 note 22 [a] (2).

(3) An inference is a deduction which the reason of the trier of facts may make from proved facts.—Matsuda v. Luond, 126 P.2d 359, 361, 52 Cal.App.2d 443.

(4) A permissible deduction which the reason of the trier of fact makes without an express instruction of law to that effect.
Ky.—Louisville & N. R. Co. v. Mann's Adm'r, 13 S.W.2d 257, 258, 227 Ky. 399.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 569, 328 Mo. 1009, 81 A.L.R. 400.
Mont.—Mellon v. Kelly, 41 P.2d 49, 53, 99 Mont. 10.

(5) "A reasonable deduction and conclusion of facts proven which court or jury is entitled to draw."—Ryder v. Bamberger, 158 P. 752, 756, 172 Cal. 791.

41. S.D.—State v. Godlasky, 195 N. W. 832, 833, 47 S.D. 36.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Sanderson, Civ.App., 174 S.W.2d 646, 649, quoting **Corpus Juris.**
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**
31 C.J. p 1181 note 23.

Similarly expressed

(1) A permissible deduction.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 1062, 11 Cal.2d 64.

(2) A permissible deduction from facts adduced and taken as true.—

of language;[42] a truth or proposition drawn from another which is admitted or supposed to be true;[43] a conclusion in favor of the existence of one fact from others proved;[44] also, in a sense, the thing proved.[45] An inference may be retroactive, that is, from present conditions one may infer a previous fact.[46]

While under particular circumstances, "inference" has been said to be mere conjecture, probability, or surmise,[47] and so has been held equivalent to, or synonymous with, "deduction" see 26 C.J.S. p 165 note 23, and in legal writings and opinions "assumption," "inference," "presumption," and "probability" have been said to be substantially synonymous see Assumption 7 C.J.S. p 137 note 11 and Evidence § 115 note 92, yet as generally used "inference" has been distinguished from, or contrasted with, "conjecture" see 15 C.J.S. p 972 note 24, "guesswork" see 39 C.J.S. p 415 note 11, "presumption" see Criminal Law § 579 and Evidence § 115 notes 89–91, "speculation,"[48] and "supposition."[49]

Inference from circumstantial evidence see Criminal Law § 907 a in criminal prosecutions generally, and Evidence § 1039 in civil actions generally; inferences supporting finding or award in compensation proceedings see the C.J.S. title Workmen's Compensation Acts § 547, also 71 C.J. p 1079 note 59–p 1080 note 79; and weight of inferences from evidence in criminal prosecutions generally see Criminal Law § 902, and in civil actions generally see Evidence § 1044. For references to other particular applications consult the Descriptive-Word Index.

Reasonable inference. A process of reasoning whereby, from facts admitted or established by evidence or from common knowledge or experience, a reasonable conclusion may be drawn that a further fact is established.[50] The term implies the existence of some tangible fact or circumstance on which it is based.[51]

As a basis of verdict on findings see Evidence § 1044.

Other phrases employing the word are set out in the note.[52]

INFERENTIAL. In the law of evidence, operating in the way of inference; argumentative;[53] circumstantial.[54]

INFERIOR. Less important or less valuable;[55] also one who, with relation to another, has less power and is below him; one who is bound to obey another.[56]

Inferior bodies or local lodges, and their relation to the supreme and intermediate bodies see Beneficial Associations §§ 60–64; and inferior court and jurisdiction thereof see Courts §§ 7, 97, 105. For references to other specific applications see Descriptive-Word Index.

Phrases employing the word are set out in the note.[57]

Guthrie v. Gillespie, 6 S.W.2d 886, 890, 319 Mo. 1137.

(3) "A permissible deduction which the jury is entitled to draw from the evidence."—Puget Sound Electric R. Co. v. Benson, Wash., 253 F. 710, 714, 165 C.C.A. 304.

(4) A reasonable deduction and conclusion from proved facts.—Cold Metal Process Co. v. McLouth Steel Corporation, C.C.A.Mich., 126 F.2d 185, 188.

42. N.J.—Chambers v. Hunt, 18 N.J. Law 339, 354.
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**

43. Minn.—Corcoran v. Teamsters & Chauffeurs Joint Council No. 32, 297 N.W. 4, 7, 209 Minn. 289.
Va.—Ryan v. Maryland Casualty Co., 3 S.E.2d 416, 418, 173 Va. 57.

44. Mo.—Smith v. Western Union Tel. Co., 57 Mo.App. 259, 266.
Wash.—Barnes v. J. C. Penney Co., 70 P.2d 311, 316, 190 Wash. 633, quoting **Corpus Juris.**

45. Ohio.—Mechanics' & Traders' Ins. Co. v. Himmelstein, 155 N.E. 806, 809, 24 Ohio App. 29.
Wyo.—Wright v. Conway, 242 P. 1107, 1110, 34 Wyo. 1.

46. Mo.—Allen v. Chicago, R. I. & P. Ry. Co., 54 S.W.2d 787, 793, 227 Mo.App. 468.

47. Ill.—Richardson v. Franklin, 235 Ill.App. 440, 446.

48. N.M.—State v. Jones, 48 P.2d 403, 406, 39 N.M. 395, citing **Corpus Juris.**

49. Ala.—Continental Casualty Co. v. Paul, 95 So. 814, 209 Ala. 166, 30 A.L.R. 802—Miller-Brent Lumber Co. v. Douglas, 52 So. 414, 415, 167 Ala. 286.
Ky.—National Life & Accident Ins. Co. v. Kendall, 59 S.W.2d 1009, 1013, 248 Ky. 768, citing **Corpus Juris**—Cochran's Adm'rs v. Chesapeake & O. Ry. Co., 22 S.W.2d 452, 453, 232 Ky. 107—Louisville & N. R. Co. v. Mann's Adm'r, 13 S.W.2d 257, 258, 227 Ky. 399.
N.M.—Stambaugh v. Hayes, 103 P.2d 640, 645, 44 N.M. 443.

50. N.M.—Stambaugh v. Hayes, supra.

51. Tex.—Houston East & West Texas Ry. Co. v. McHowell, Civ. App., 278 S.W. 258, 261.

52. **Phrases construed**
(1) "Fact inference" see 35 C.J.S. p 386 note 37.

(2) "Inference upon inference" or "piling inferences," within the rule that one presumption or inference may not be based on another.
Ill.—McManimen v. Public Service Co. of Northern Illinois, 47 N.E.2d 385, 317 Ill.App. 649.
Mo.—Marra v. Jones Store Co., App., 170 S.W.2d 441, 450.
See also Evidence § 116 b.

53. Black L.D.
"Inferential fact" see 35 C.J.S. p 386 note 37.

54. Pa.—Commonwealth v. Harman, 4 Pa. 269, 272.

55. Cal.—Moody v. Peirano, 84 P. 783, 7 Cal.Unrep.Cas. 247, 249.

56. Black L.D.

57. **Phrases construed**
(1) "Inferior agents" or "servants," distinguished from managing agents, managers, and others who exercise judgment and discretion in performing their duties.—Foster v. Charles Betcher Lumber Co., 58 N. W. 9, 13, 14, 5 S.D. 57, 49 Am.S.R. 859, 23 L.R.A. 490.

INFERIORITY. The state of being inferior, especially in degree or quality; a lower state or condition.[58]

Construed specifically in statutes regulating food see Food § 15 note 60.

INFEUDACION. A variant form of the Spanish word "Enfeudación" see 30 C.J.S. p 244 note 19.

INFEUDATION. The placing in possession of a freehold estate; also the granting of tithes to laymen.[59]

INFICIARI. Latin, in the civil law, to deny; more specifically, to deny one's liability; hence to refuse to pay a debt or restore a pledge, to deny the allegation of a plaintiff or the charge of an accuser.[60]

INFICIATIO. Latin, in the civil law, denial; the denial of a debt or liability, or of the claim or allegation of a party plaintiff.[61]

IN FICTIONE JURIS SEMPER ÆQUITAS EXISTIT.[62]

IN FICTIONE JURIS SEMPER SUBSISTIT ÆQUITAS.[63]

INFIDEL. As a noun, with reference to any given religion, one who is an unbeliever;[64] one who does not believe in the existence of a God who will reward or punish in this world or that which is to come; one who professes no religion that can bind his conscience to speak the truth.[65] With particular reference to Christianity, one who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized features of the Christian religion;[66] a person who does not believe the Scriptures of the Old and New Testaments.[67]

The term has been compared with "atheist" see 7 C.J.S. p 166 note 12.

Blasphemy by infidel see Blasphemy § 2. Competency of infidel as witness see the C.J.S. titles Constitutional Law § 206 d; Witnesses § 62, also 70 C.J. p 97 note 71 [e]. Charging person with being an infidel as libelous per se see the C.J.S. title Libel and Slander § 31, also 36 C.J. p 1171 note 42.

INFIDELIDAD. In Spanish law, faithlessness or breach of trust in a particular matter such as the custody of documents or prisoners, each of which is punishable by imprisonment, fine, and, in some cases, disqualification for public office.[68]

(2) "Inferior board, council, or tribunal."—Sumpter v. Duffie, 97 S. W. 435, 80 Ark. 369, 372.

(3) "Inferior judicatories."—Dixon v. Sable, 95 S.E. 240, 241, 147 Ga. 623—Carr v. State, 27 S.E. 148, 98 Ga. 89, 91.

(4) "Inferior quality," as negatived by "first-class" see 36 C.J.S. p 824 note 39.

(5) "Inferior tribunals."—Linn County Bank v. Clifton, 172 S.W. 388, 392, 263 Mo. 200.

(6) "Quasi inferior political tribunal," as more apt term than "judicial tribunal," when applied to a meeting of legal voters with authority to levy a road tax.—Beirl v. Columbia County, 144 P. 457, 461, 73 Or. 107.

58. Century D.

59. Black L.D.

60. Black L.D.

61. Black L.D.

62. A maxim meaning "In the fiction of law, there is always equity; that is a legal fiction is always consistent with equity."—Black L.D.

Applied in Woods' Estate, 15 Pa. Dist. 55, 56.

Maxim more specifically discussed

(1) "Wherever it [the maxim] may contribute to the advancement of justice, the fiction is maintained; but is never allowed to work an injury or prejudice to any party. For the attainment of substantial justice, and to prevent the failure of right, the courts frequently apply this maxim."—Low v. Little, 17 Johns., N.Y., 346, 348.

(2) "Fiction is never allowed to work injustice."—Lehl v. Strong Mercantile Co., 259 P. 512, 513, 82 Colo. 343.

(3) "The proper use of legal fiction is to prevent injustice."—Union Refrigerator Transit Co. v. Kentucky, Ky., 26 S.Ct. 36, 39, 199 U.S. 194, 50 L.Ed. 150.

63. A maxim meaning "In a legal fiction equity always exists."—Bouvier L.D.

Applied or explained in Painter v. Painter, 69 A. 323, 324, 220 Pa. 82, 20 L.R.A.,N.S., 117—31 C.J. p 1181 note 37 [a].

64. Webster New Int.D.

65. Black L.D.

66. N.Y.—Gibson v. American Mutual Life Insurance Co., 37 N.Y. 580, 584.

In a comprehensive sense it embraces Jews as well as heathen, that is, all who do not believe the Christian religion.—Omychund v. Barker, 1 Atk. 21, 25, 26 Reprint 15, Willes 538, 125 Reprint 1310, 11 E.R.C. 126.

More specifically

An infidel is "one who does not believe the Bible, or that Jesus Christ was the true Messiah; the 'Christ of God'—can no more be a Protestant, than he can a Roman Catholic, because he lacks the first and chief qualification of either, viz., a belief in Christianity; for while he, with the Protestant, denies the authority of the pope, he differs from both in not believing the Bible, or Jesus Christ and his religion. The infidel and the pagan stand alike; they are both anti-Catholic, and equally anti-Protestant. . . . Jews believe in the Old Testament, and not in the New. Mohammedans receive the whole Bible in a sense, but receive and acknowledge the Alcoran as a higher authority, and accept Mohammed as a greater prophet than Jesus. Neither believes the system of Christianity, as taught in the New Testament. They are both, alike, anti-Catholic and anti-Protestant. . . . A Roman Catholic is a Christian who admits the authority of the pope; a Protestant is a Christian who denies that authority; and no one not a Christian can be either a Catholic or a Protestant, any more than a man can be a Jew who does not believe in Moses or the Pentateuch, or than he could be a Mohammedan who did not believe in Mohammed or the Alcoran."—Hale v. Everett, 53 N.H. 9, 55, 16 Am.R. 32.

67. Mass.—Thurston v. Whitney, 2 Cush. 104, 109.

68. Escriche Diccionario.

INFIDELIS. In old English law, an infidel or heathen; in feudal law, one who violated fealty.[69]

INFIDELITAS. In feudal law, infidelity; faithlessness to one's feudal oath.[70]

INFIDELITY. Unfaithfulness to the marriage vows.[71] Admissibility of evidence of infidelity in prosecution for homicide see Homicide § 264. False charges of infidelity as an indignity authorizing divorce see Divorce § 44, and as justifying desertion see Divorce § 56.

INFIDENCIA. In Spanish law, disloyalty, breach of confidence.[72]

INFIDUCIARE. In old European law, to pledge property.[73]

INFIHT. Saxon, an assault made on a person inhabiting the same dwelling.[74]

INFINITESIMAL. So small as to be treated as not existing at all.[75]

INFINITUM IN JURE REPROBATUR.[76]

INFIRM. Not firm or sound physically;[77] feeble, weak;[78] lacking in bodily or mental strength, feeble or relaxed, as from age or disease.[79]

INFIRMARY. See the C.J.S. titles Hospitals § 1 and Paupers § 74.

INFIRMATIVE. Having the quality of diminishing force, having a tendency to weaken or render infirm, as used in the law of evidence.[80]

INFIRMITY. The state or quality of being infirm physically or otherwise, debility or weakness;[81] an imperfection or weakness, especially a disease;[82] a malady;[83] physical, mental or moral weakness or flaw, enfeebling disease, the state or quality of being infirm physically, mentally or morally, debility, infirmness, as the infirmity of age;[84] physical weakness, debility, frailty, feebleness of body, resulting from some constitutional defect, disease, or, now mostly, old age; also weakness or want of strength, lack of power to do something, inability.[85]

The term is equivalent to, or synonymous with, "disease" see 27 C.J.S. p 143 note 83.

INFLAME. Primarily, to set on fire; to kindle; to inflame, or cause to flame;[86] and derivatively, to augment, to increase; to aggravate in description, or exaggerate; to heat, to excite excessive action in the blood vessels; hence to anger, to exasperate, to irritate, or to provoke;[87] to excite or increase as

69. Black L.D.

70. Black L.D.

71. Century D.

72. Escriche Diccionario.

73. Black L.D.

74. Black L.D.

75. Eng.—Pharmaceutical Soc. v. Armson, [1894] 2 Q.B. 720, 724.

76. A maxim meaning "Infinity is reprehensible in law."—Wharton L. Lex.

Applied to litigation

"That which is endless is reprobated in law."—Black L.D.

77. Webster New Int.D.

78. Tex.—Collins v. State, 5 S.W. 848, 850, 24 Tex.App. 141.

79. Tex.—Armour & Co. v. Tomlin, Civ.App., 42 S.W.2d 634, 636.

Phrases construed

(1) "Aged and infirm persons" within exemption statutes see Exemptions § 22.

(2) "Infirm persons" as possessing testamentary capacity see the C.J.S. title Wills §§ 27–30, also 68 C.J. p 440 note 68–p 444 note 17.

(3) "Sick, poor, and infirm," as used in a statute relating to the care, maintenance, and relief of such persons, the phrase must be construed conjunctively and its application must be restricted to those who are incapable of self-support on account of physical disability or the like.—Lebcher v. Board of Com'rs of Custer County, 23 P. 713, 714, 9 Mont. 315.

80. Black L.D.

Illustrative phrases

(1) "Infirmative consideration," a consideration, supposition, or hypothesis of which the criminative facts of a case admit, and which tends to weaken the inference or presumption of guilt deducible from them.—Black L.D.

(2) "Infirmative fact," a fact set up, proved, or even supposed, in opposition to the criminative facts of a case, the tendency of which is to weaken the force of the inference of guilt deducible from them.—Black L.D.

(3) "Infirmative hypothesis," a term sometimes used in criminal evidence to denote an hypothesis or theory of the case which assumes accused's innocence, and explains the criminative evidence in a manner consistent with that assumption.—Black L.D.

81. Iowa.—Peterson v. Modern Brotherhood of America, 101 N.W. 289, 291, 125 Iowa 562, 67 L.R.A. 631—Meyer v. Fidelity & Casualty Co. of New York, 65 N.W. 328, 330, 96 Iowa 378, 59 Am.S.R. 374.

82. U.S.—Bernays v. U. S. Mutual Acc. Assoc., C.C.Mo., 45 F. 455, 456.

Similarly expressed

Some permanent disease, accident, or something of that kind.—In re Buck, [1896], 2 Ch. 727, 734.

83. U.S.—Bernays v. U. S. Mutual Accident Association, C.C.Mo., 45 F. 455, 456.

Tex.—Collins v. State, 5 S.W. 848, 850, 24 Tex.App. 141.

84. Tex.—Armour & Co. v. Tomlin, Civ.App., 42 S.W.2d 634, 636.

85. Neb.—McClure v. World Ins. Co., 254 N.W. 393, 395, 126 Neb. 676.

Phrases construed

(1) "Bodily infirmity" see 11 C.J.S. p 376 notes 42–52.

(2) "Mental weakness or infirmity," as distinguished from "mental capacity" see 12 C.J.S. p 1117 note 65.

86. Neb.—Clair v. State, 59 N.W. 118, 120, 40 Neb. 534, 28 L.R.A. 367.

Tex.—City of Pampa v. Todd, Civ. App., 39 S.W.2d 636, 639.

87. Neb.—Clair v. State, 59 N.W. 118, 120, 40 Neb. 534, 28 L.R.A. 367.

passion or appetite; to enkindle into violent action or into a violent passion.[88]

INFLAMMABLE. Susceptible of combustion.[89]

Statutes for prevention of, and protection from, fire as proper exercise of the police power see Constitutional Law § 184. For references to other particular applications consult the Descriptive-Word Index sub verbo Inflammables.

INFLAMMATION. A morbid condition usually characterized by swelling, pain, heat, and redness.[90]

INFLAMMATORY. An adjective derived from the verb "inflame,"[91] and meaning tending to excite anger, animosity, tumult, or sedition; tending to inflame, kindle, or irritate.[92]

INFLICT. To lay on or impose as something that must be borne or suffered; to cause to be suffered.[93] While it is an apt word to use in connection with punishment, it does not necessarily imply direct violence.[94]

"Inflicted" has been held equivalent to "imposed" see 42 C.J.S. p 409 note 67.

Phrases employing the word are set out in the note.[95]

INFLICTION. Act of inflicting, or that which is inflicted, as punishment or disgrace.[96] The use of the word does not necessarily imply the doing of an actual wrong.[97]

INFLUENCE.

As a Noun

The act or process, or the power, of producing an effect without apparent force or direct authority;[98] a considerable or ascendant power arising from a station, excellence of character or intellect, wealth, etc.[99] the use of a person's endeavors.[1]

"Due influence." The term is defined, discussed, and distinguished from "undue influence," in 28 C. J.S. p 575 note 17–p 576 note 23.

"Under the influence of liquor" and similar phrases. "Under the influence of intoxicating liquor" is an expression in common, everyday use by the people;[2] it means having drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition;[3] and, therefore, when a person is so affected by intoxicating liquor as not to possess that clearness of intellect and control of himself that he otherwise would have, he is "under the influence of intoxicating liquor," and this is the common, well-known understanding of the expression.[4]

88. Neb.—Clair v. State, supra.
Tex.—City of Pampa v. Todd, Civ. App., 39 S.W.2d 636, 639.

89. Ont.—Rex v. McGregor, 4 Ont. L. 198, 202.

Phrases construed

(1) "Inflammable films."—Victoria Pier Syndicate v. Reeve, 28 T.L.R. 443, 444.

(2) "Inflammable liquid."—Buchanan v. Exchange F. Ins. Co., 61 N.Y. 26, 29—31 C.J. p 1182 note 58 [b].

(3) "Inflammable material."—Longabaugh v. Virginia City & Truckee R. Co., 9 Nev. 271, 292.

90. Century D.

Phrase construed

"Nonmicrobic inflammation of the skin," as descriptive of eczema.—McCall v. Hamilton County Farmers Telephone Ass'n, 280 N.W. 254, 257, 135 Neb. 70.
"Eczema" defined see 28 C.J.S. p 829 note 93.

91. Neb.—Clair v. State, 59 N.W. 118, 120, 40 Neb. 534, 28 L.R.A. 367.
Tex.—City of Pampa v. Todd, Civ. App., 39 S.W.2d 636, 639.

92. Webster New Int.D.

93. Century D.

Derivation

"'Inflict' is derived from 'infligo,' for which, in Facciolati's Lexicon three Italian and three Latin equivalents are given, all meaning 'to strike,' viz. 'dare, ferire and percuotere' in Italian, and 'infero, impingo and percutio' in Latin."—Reg. v. Clarence, 22 Q. B. D. 23, 42.

94. Mass.—Commonwealth v. Macloon, 101 Mass. 1, 23, 100 Am.D. 89.

95. **Phrases construed**

(1) "Inflict any punishment", as used in a penal statute held to contemplate an act of trespass.—State v. Porter, 25 W.Va. 685, 689.

(2) "Inflicting disgrace" and "inflicting great bodily harm" see Assault and Battery §§ 78, 79.

(3) "Inflict punishment" clearly includes imprisonment and involuntary restraint, as well as hanging, beheading, or whipping.—Commonwealth v. Macloon, 101 Mass. 1, 23, 100 Am.D. 89.

(4) "Injury inflicted," construed to include any bodily harm which is caused to be suffered by the act of another.—Commonwealth v. Macloon, supra.

(5) "Intentional injuries inflicted by the insured or any other person" see the C.J.S. title Insurance § 772, also 1 C.J. p 442 note 9–p 443 note 25.

96. Webster New Int.D.

97. Wis.—Kortendick v. Waterford, 125 N.W. 945, 947, 142 Wis. 413.

98. Mo.—State v. Wren, 62 S.W.2d 853, 855, 333 Mo. 575.

Not always apparent

"Influence is a subtle agent. It is often potential when its presence is unsuspected."—Chency v. Unroe, 77 N.E. 1041, 1043, 166 Ind. 550, 117 Am. S.R. 291.

99. Webster New Int.D.

1. Ark.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n., 22 S.W.2d 17, 18, 180 Ark. 484.

2. Minn.—State v. Graham, 222 N. W. 909, 911, 176 Minn. 164.

3. Ala.—Standard Life & Accident Ins. Co. v. Jones, 10 So. 530, 532, 94 Ala. 434.
N.Y.—Shader v. Railway Passengers' Assurance Co., 3 Hun 424, 427.

4. Minn.—State v. Graham, 222 N. W. 909, 911, 176 Minn. 164.

Scope of the term

(1) The expression covers not only all well-known and easily recognised conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive one so indulging of that clearness of intellect and control of himself which he would otherwise possess.—Packard v. O'Neil, 262 P. 881, 884, 45 Idaho 427, 58 A.L.R. 317.

The phrase has been held equivalent to "intoxicated"[5] and "in a state of intoxication,"[6] and has been distinguished from "drunkenness"[7] and "while intoxicated."[8] Other phrases of similar import are set out in the note.[9]

As used to describe the condition of the driver of a motor vehicle see the C.J.S. title Motor Vehicles § 625, also 42 C.J. p 1329 notes 13–19 and p 1331 notes 57–60.

"Undue influence." It has been said that the term, while easily comprehended and understood, is somewhat difficult to define;[10] that it is easier to say what it is not rather than what it is;[11] and that no definition of what the law denominates "undue influence" can be given which will furnish a safe and reliable test for every case, for each case must be decided on its own special facts.[12] All that can be said, in the way of formulating a general rule on this subject, is that whatever destroys free agency and constrains the person whose act is brought in judgment to do what is against his will and what he would not have done if left to himself is "undue influence,"[13] no matter by what means the control is exercised,[14] whether by physical force,

(2) It has been said that the phrase "while under the influence of or affected by intoxicants" interpreted strictly and literally would include being under the influence of liquor to any extent, but that, in ordinary acceptation, it means so far under the influence as to constitute a state of intoxication.—Murdie v. Maryland Casualty Co., D.C.Nev., 52 F.2d 888, 892.

5. Colo.—Stevens v. People, 51 P.2d 1022, 1024, 97 Colo. 559.

6. Neb.—Smith v. State, 247 N.W. 421, 422, 124 Neb. 587.

7. Mass.—Commonwealth v. Lyseth, 146 N.E. 18, 250 Mass. 555—Cutter v. Cooper, 125 N.E. 634, 637, 234 Mass. 307.
N.Y.—Cashion v. Harnett, 255 N.Y.S. 169, 170, 234 App.Div. 332.

8. N.Y.—Cashion v. Harnett, supra.

9. **Similar phrases**
(1) "In any degree under the influence of intoxicating liquor."—Robinson v. Hawkeye Commercial Men's Association, 171 N.W. 118, 120, 186 Iowa 759.

(2) "Under the influence of an intoxicant," construed as equivalent to "in drunken or partly drunken condition."—Daniels v. State, 296 S.W. 20, 23, 155 Tenn. 549.

(3) "Under the influence of any intoxicant or narcotic."
Vt.—Furry's Administrator v. General Accident Ins. Co., 68 A. 655, 656, 80 Vt. 526, 15 L.R.A.,N.S., 206, 130 Am.S.R. 1012, 13 Ann.Cas. 515.
Wis.—Bakalars v. Continental Casualty Co., 122 N.W. 721, 722, 141 Wis. 43, 25 L.R.A.,N.S., 1241, 18 Ann.Cas. 1123.

(4) "Under the influence of any liquor," as equivalent to "drunk" and "intoxicated."—Richardson v. Business Men's Protective Association of Lincoln, Neb., 284 P. 599, 601, 129 Kan. 700.

(5) "Under the influence of liquor" held equivalent to "drunk," "intoxicated," or "in an intoxicated condition."
Ill.—Buck v. Maddock, 47 N.E. 208, 209, 167 Ill. 219.
La.—State v. Dudley, 106 So. 364, 365, 159 La. 872.

10. Tex.—Douglas v. Skidmore, Civ. App., 95 S.W.2d 533, 535, 537, citing **Corpus Juris**—Mayes v. Mayes, Civ.App., 159 S.W. 919, 923.
Similarly expressed
(1) It is impossible to describe or define with any great precision what undue influence really is, what the quality or extent of one mind over another must be to make it undue influence in the eyes of the law.—Watson v. Holmes, 140 N.Y.S. 727, 733, 80 Misc. 48.

(2) It is not easy to define with exactness and precision.—Finney v. Morehouse, 161 N.E. 293, 294, 27 Ohio App. 499.

(3) "The courts will not undertake to define [it] by definite words or rules."—Roche v. Roche, 121 N.E. 621, 627, 286 Ill. 336—31 C.J. p 1183 note 68 [a].

(4) The courts will not undertake to define undue influence by any fixed principle, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded.—Borton v. Borton, 143 So. 468, 225 Ala. 457.

11. S.C.—Pressley v. Kemp, 16 S.C. 334, 344, 42 Am.R. 635.
Held not to constitute undue influence
(1) Honest intercession and persuasion is not "undue influence," but there must be unlawful importunity.—Hawkes v. Mobley, 163 S.E. 494, 498, 174 Ga. 481.

(2) Influence secured through affection is not undue or wrongful.
Ill.—Ropacki v. Ropacki, 173 N.E. 376, 378, 341 Ill. 301—Hoelscher v. Hoelscher, 153 N.E. 662, 665, 322 Ill. 406—Hurd v. Reed, 102 N.E. 1048, 1050, 260 Ill. 154.
Ky.—Chrisman v. Quick, 193 S.W. 13, 14, 174 Ky. 845.

(3) Influence obtained by modest persuasion and argument addressed to the understanding or mere appeals to the affection is not undue influence in a legal sense.—Smith v. Smith, 47 S.W.2d 1036, 1040, 243 Ky. 240.

(4) Solicitation, importunity, and persuasion are not necessarily undue influence, but with a person of great age, feeble physically and mentally, where the relations between the parties are intimate, they may constitute undue influence.—Geddes v. McElroy, 154 N.W. 320, 328, 171 Iowa 633.

(5) "Suggestion and advice, addressed to the understanding and judgment, do not constitute undue influence; nor does solicitation, unless the party be so worn by the importunities that his will gives way. Earnest entreaty, importunity, and persuasion may be employed; but, if the influence is not irresistible, it is not undue, and its existence is immaterial, even though it is yielded to."—Tabb v. Willis, 156 S.E. 556, 563, 155 Va. 836.

(6) The influence which a wife by her virtue, love, and sacrifices gains over her husband's affections does not constitute undue influence, but it must go beyond legitimate argument and persuasion and amount to domination or coercion.—Craycroft v. Crawford, Tex.Civ.App., 275 S.W. 124, 126.

(7) The improper influence which the law denounces as "undue" does not consist in the faithful and loving performance of filial offices, however far they extend beyond legal duty, nor can the affection and good will which comes unsought in return for such kindness be classed as improper or undue.—Hamlett v. McMillin, Mo., 223 S.W. 1069, 1074.

12. N.J.—Haydock v. Haydock, 23 N.J.Eq. 494, 496.
31 C.J. p 1183 notes 68, 71.

13. Neb.—Gidley v. Gidley, 265 N.W. 245, 250, 130 Neb. 419, quoting **Corpus Juris.**
N.J.—Carroll v. House, 22 A. 191, 192, 48 N.J.Eq. 269, 27 Am.S.R. 469.
31 C.J. p 1183 note 72.

14. Neb.—Gidley v. Gidley, 265 N.

duress, fraud, threats, importunity, or any other species of mental, moral, or physical coercion.[15] The means employed, the extent or degree of the influence, and by whom it is exerted, are all immaterial,[16] for the question to be determined is always: "Was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor?"[17] It has been said that, whatever may be the particular form, in all cases of undue influence three factors are implied: (1) A person who can be influenced. (2) The fact of improper influence exerted. (3) Submission to the overmastering effect of such unlawful conduct.[18] The term "undue influence" has been variously de-

W. 245, 250, 130 Neb. 419, quoting **Corpus Juris.**

N.J.—In re Sebring's Will, 93 A. 686, 688, 84 N.J.Eq. 453—Carroll v. House, 22 A. 191, 192, 48 N.J. Eq. 269, 27 Am.S.R. 469.

Ohio.—Finney v. Morehouse, 161 N. E. 293, 294, 27 Ohio App. 499.

Moral turpitude or improper motive not necessary

(1) To constitute undue influence it is not necessarily required that there should exist moral turpitude or even an improper motive; but if one person, even from the best of motives, having obtained a dominant influence over the mind of another, thereby induces him to execute a deed or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the person who procured the result, such an instrument so obtained is not improperly termed fraudulent as the result of "undue influence."—Myatt v. Myatt, 62 S.E. 887, 888, 149 N.C. 137.

(2) Motives of almost every conceivable kind may be offered, and if the mind of the agent, free to adopt or reject the motives, yields its assent, the act is the act of the agent. —Pressley v. Kemp, 16 S.C. 334, 344, 42 Am.R. 635—Means v. Means, 36 S. C.L. 167, 192.

15. Mass.—Neill v. Brackett, 126 N. E. 93, 94, 234 Mass. 367.

Neb.—Gidley v. Gidley, 265 N.W. 245, 250, 130 Neb. 419, quoting **Corpus Juris.**

31 C.J. p 1183 notes 74–82.

Coercion the essential characteristic

(1) "Coercion is at all times the essence of undue influence."—In re Caffrey's Will, 159 N.Y.S. 99, 102, 95 Misc. 466.

(2) "To define coercion is really the crux of the accepted definition of undue influence. . . . 'Coercion' as used . . . in the definition of undue influence, need not be induced by actual or physical force. It may be the result of any wrongful means which produce moral restraint and consequent want of free will. Such means in law constitute the moral coercion of the definition."—Matter of Van Ness, 139 N.Y.S. 485, 492, 78 Misc. 592.

(3) "Undue influence is a kind of mental coercion, which destroys the free agency of one and constrains him to do that, which is against his will, and what he would not have done if left to his own judgment and volition, so that his act becomes the act of the one exerting the influence, rather than his own act—such act being one to his own injury, or to the injury of someone upon whom he would, if left to his own free will, have bestowed a benefit."—Beard v. Beard, 190 S.W. 703, 706, 173 Ky. 131, Ann.Cas.1918C 832.

(4) "Undue influence may be established without showing any physical coercion or constraint. The influence that vitiates may be subtle and be entirely without outward demonstration, but in whatever form it may appear it must, nevertheless, be made to appear from competent evidence that the will of the one accused of practicing undue influence dominated the will of the person whose act is brought in judgment.—Anderson v. Anderson, 134 P. 553, 557, 43 Utah 26.

(5) It does not imply the use of physical coercion or force. Any influence, however exercised, which destroys free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done, is undue, or wrongful.—Dingman v. Romine, 42 S.W. 1087, 1088, 141 Mo. 466. "Coercion" defined see 14 C.J.S. p 1307.

16. Ill.—Smith v. Henline, 51 N.E. 227, 232, 174 Ill. 184.

Mass.—Neill v. Brackett, 126 N.E. 93, 94, 234 Mass. 367.

Minn.—Prescott v. Johnson, 97 N.W. 891, 892, 91 Minn. 273.

Miss.—Powell v. Plant, 23 So. 399, 400.

Neb.—Gidley v. Gidley, 265 N.W. 245, 250, 130 Neb. 419, quoting **Corpus Juris.**

31 C.J. p 1184 note 84.

17. Neb.—Gidley v. Gidley, supra, quoting **Corpus Juris.**

N.J.—In re Tunison, 90 A. 695, 696, 83 N.J.Eq. 277.

31 C.J. p 1184 note 86.

"The leading case upon the question of undue influence . . . is Huguenin v. Baseley, 14 Ves.Jr. 273, 33 Reprint 526, 6 ERC 834."—Munson v. Carter, 27 N.W. 208, 212, 19 Neb. 293.

Test similarly stated

(1) "The influence exercised by one person over another which the law would regard as undue and illegal must be of such a character as to destroy the free agency of the party who disposes of his property; but no matter how slight the influence may be, if the free agency of the party is destroyed, it destroys also the act or acts which come from it—which are the result of it."—Watson v. Holmes, 140 N.Y.S. 727, 733, 80 Misc. 48.

(2) "Influence, to be undue, must be such as, in effect, destroys the free agency of the person acted upon and substitutes the will of another for his own."—Hult v. Home Life Ins. Co. of New York, 240 N.W. 218, 224, 213 Iowa 890.

(3) The test of undue influence is whether the person exercised his or her own free agency and acted voluntarily by the use of his or her own reason and judgment.—Homewood v. Eggers, 295 P. 681, 684, 132 Kan. 256.

18. Mass.—Neill v. Brackett, 126 N. E. 93, 94, 234 Mass. 367.

One or another element emphasized

(1) There can be no fatally undue influence without a person incapable of protecting himself as well as a wrongdoer to be resisted.—Latham v. Udell, 33 Mich. 238, 242.

(2) Influence, in a legal sense, is undue only when it introduces a transaction which injures some one materially, or which is intrinsically unfair or unconscientious.—Gathings v. Howard, 84 So. 240, 246, 132 Miss. 355.

(3) To constitute "undue influence," the mind must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purpose of another.—Peacock v. Du Bois, 105 So. 321, 322, 90 Fla. 162.

(4) One party to the negotiations must occupy a superior position with

fined,[19] as a coercion produced by importunity, or by a silent irresistible power, which the strong will often exercises over the weak and infirm, and which cannot be resisted, so that the motive is tantamount to force or fear;[20] an influence which acts to the injury of the person who is swayed by it, or of those whom he would, if left to himself, have benefited;[21] any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do an act which he would not do, or to forbear from an act which he would do, if left to act freely;[22] a wrongful influence;[23] and so, despite the variety of the definitions, all the cases seem to agree that the dominant feature or controlling element of "undue influence" is that it deprives one of freedom of action, destroys free will, or precludes the exercise of free choice, discretion, or judgment,[24] as indicated by the statements set out in the note.[25]

It has been said that "undue influence" may be caused by duress,[26] that it partakes of the nature of duress;[27] and that it may be equivalent to, or

reference to the other by reason of a real or apparent authority over him arising out of preexisting relations, or assumed at the time because of the weakness of mind, or distress or necessities of the other, by reason of which he knowingly gains an unconscionable advantage. —Emerson-Brantingham Implement Co. v. Anderson, 194 P. 160, 165, 58 Mont. 617.

(5) Undue influence exists wherever through weakness and dependence or implicit reliance by one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment.—Caven v. Agnew, 40 A. 480, 186 Pa. 314, 328—In re Douglass' Estate, 29 A. 715, 716, 162 Pa. 567.

19. U.S.—Sturm v. Stump, D.C.W. Va., 239 F. 749, 754.
Tex.—Powell v. Powell, Civ.App., 170 S.W. 111, 112.

20. Minn.—Stockton v. Thorn, 39 N.W. 143, 39 Minn. 204.
Mo.—Wing v. Havelik, 161 S.W. 732, 735, 253 Mo. 502.
31 C.J. p 1183 note 72 [a] (1).

21. Mo.—Wing v. Havelik, supra.
Pa.—In re Coleman, 40 A. 69, 71, 185 Pa. 437.
31 C.J. p 1183 note 72 [a] (2).

22. Ill.—Powell v. Betchel, 172 N.E. 765, 768, 340 Ill. 330—Prinz v. Schmidt, 166 N.E. 209, 212, 334 Ill. 576.

Similarly expressed

(1) Any improper or wrongful constraint, urging, or persuasion, whereby a person's will is overpowered, and he is induced to dispose of his property otherwise than he would if left to act freely and of his own volition, and whatever disturbs his free act and constrains a person to do with his property what is really against his will and purpose, and which he would not have done if left to himself, is undue influence, whether exercised by physical force, threats, or coaxing.—Watson v. Holmes, 140 N.Y.S. 727, 733, 80 Misc. 48.

(2) Any influence or act brought to bear upon a person entering into a contract or in the performance of a business transaction, taking into consideration the nature of the transaction and all the circumstances of each particular case, which precludes the exercise of free and deliberate judgment.—Mutual Benefit Department of Order of Railway Conductors of America v. Bland, 24 Ohio Cir.Ct., N.S., 169, 174.

(3) Such improper or wrongful constraint, or machination, or such urgency of persuasion as to overpower a person's will, and induce him to do that which he would not have done if left to act according to his own will and desire.—Hult v. Home Life Ins. Co. of New York, 240 N.W. 218, 224, 213 Iowa 890.

23. Ill.—Hoelscher v. Hoelscher, 153 N.E. 662, 665, 322 Ill. 406—Hurd v. Reed, 102 N.E. 1048, 1050, 260 Ill. 154—Sears v. Vaughan, 82 N.E. 881, 887, 230 Ill. 572—Dowie v. Sutton, 81 N.E. 395, 401, 227 Ill. 183, 197, 118 Am.S.R. 266—Burt v. Quisenberry, 24 N.E. 622, 624, 132 Ill. 385.
Ky.—Chrisman v. Quick, 193 S.W. 13, 14, 174 Ky. 845.
31 C.J. p 1183 note 72 [a] (4).

Similarly expressed

A wrongful influence, operating with such force as to deprive the actor of free agency.—Ropacki v. Ropacki, 173 N.E. 376, 378, 341 Ill. 301.

24. Iowa.—Hult v. Home Life Ins. Co. of New York, 240 N.W. 218, 224, 213 Iowa 890.
Ky.—Smith v. Smith, 47 S.W.2d 1036, 1040, 243 Ky. 240.
Ohio.—Raymond v. Hearon, 164 N.E. 644, 646, 30 Ohio App. 184.

25. **Illustrative definitions**

(1) "Undue influence" is evil influence which destroys free agency and brings about results which are not the product of the free will of the person influenced.—Bennett v. Bennett's Ex'r, 51 S.W.2d 241, 243, 244 Ky. 394.

(2) It is influence obtained over the mind of another to such an extent as to destroy free agency, and to constrain him to do against his will what he would otherwise refuse to do.—Huffaker v. Brammer, 235 S.W. 727, 729, 193 Ky. 267.

(3) The exercise of acts or conduct by one person toward another person, by which the latter's mind is subjugated to that of the former.—In re Smith's Estate, 252 P. 325, 328, 200 Cal. 152.

(4) The exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised.
U.S.—Sturm v. Stump, D.C.W.Va., 239 F. 749, 754.
Ind.—Folsom v. Buttolph, 143 N.E. 258, 262, 82 Ind.App. 283.

(5) "That dominion or domination acquired by any person over the mind of another sane person to such extent as to destroy the exercise of the discretion and free will or choice of such other person."—Powell v. Powell, Tex.Civ.App., 170 S.W. 111, 112.

(6) "That which overpowers the will without convincing the judgment."—Wing v. Havelik, 161 S.W. 732, 735, 253 Mo. 502—31 C.J. p 1183 note 72 [a] (6).

(7) Whatever destroys free agency and constrains the person whose act is brought in judgment or under review to do that which is against his will or contrary to his own untrammelled desire.
Mass.—Neill v. Brackett, 126 N.E. 93, 94, 234 Mass. 367.
Mo.—Wing v. Havelik, supra.
31 C.J. p 1183 note 72 [a] (8).

Statutory definitions
U.S.—Snyder v. Rosenbaum, Okl., 30 S.Ct. 73, 75, 215 U.S. 261, 265, 54 L.Ed. 186—31 C.J. p 1183 note 72 [b].

26. Mass.—Neill v. Brackett, 126 N. E. 93, 94, 234 Mass. 367.
31 C.J. p 1186 note 30.
"Duress" defined see Contracts § 168; Deeds § 61.

27. Mass.—McDonald v. MacNeil, 15 N.E.2d 460, 300 Mass. 350.

merely a kind of, "duress,"[28] or "fraud" see Fraud § 1 notes 35–41. "Undue influence," however, has been compared with, or distinguished from, "confidential relation" see 15 C.J.S. p 823 note 98, "control" see 18 C.J.S. p 30 note 55, "due influence" see 28 C.J.S. p 576 notes 21–23, "duress,"[29] "fraud" see Fraud § 1 notes 42–50, "great influence,"[30] and "want of mental capacity."[31]

Effect of undue influence on particular acts, instruments, or transactions see such C.J.S. titles as Contracts §§ 180–188; Deeds §§ 62–64; Elections § 118 e notes 17–32, § 332; Gifts §§ 34, 92; Landlord and Tenant § 225, also 35 C.J. p 1164 notes 77–85; Mortgages § 143, also 41 C.J. p 439 notes 7–14; Release § 30, also 53 C.J. p 1226 note 91–p 1227 note 3; Sales § 54, also 55 C.J. p 176 note 40–p 177 note 56; Trusts § 76, also 65 C.J. p 332 notes 11–32; Vendor and Purchaser § 53, also 66 C.J. p 630 notes 29–35; and Wills § 221, also 68 C.J. p 740 note 78–p 741 note 98, §§ 224–261, also 68 C.J. p 743 note 40–p 796 note 10, § 284, also 68 C.J. p 823 note 2–p 824 note 10. For references to other particular applications, including matters of remedy and procedure, see 31 C.J. p 1182 note 65, and consult the Descriptive-Word Index.

Other phrases employing the word are set out in the note.[32]

As a Verb

To be influential; to exert an influence.[33] In the common acceptation of the term, the verb "influence" means to affect, alter, move, or sway;[34] and, more specifically, to affect, modify, or act upon physically, especially in some gentle, subtle, or gradual way, as the brain influences the mind; to exert or maintain a mental or moral power upon or over; to affect or sway by motives, as the feelings or conduct; also to exert influence upon, particularly to alter or move with respect to character, conduct, or the like; to affect, to persuade, to sway, as to influence a person for good; to affect, that is, to have an effect on the condition or development of; to modify or determine, as temperature influences flora and fauna;[35] to procure from, or to put some external constraint upon;[36] to use one's endeavors, although unable to carry his point.[37]

It has been held synonymous with "affect" see 2 C.J.S. p 918 note 67.1 in Pocket Parts, and "induce" see 42 C.J.S. p 1370 note 44; and has been compared with, or distinguished from, "induce" see 42 C.J.S. p 1370 note 46, and "procure."[38]

28. Fla.—Peacock v. Du Bois, 105 So. 321, 322, 90 Fla. 162.
Vt.—Heath v. Capital Savings Bank & Trust Co., 64 A. 1127, 79 Vt. 301.

29. Distinction stated
(1) "Where the coercion is not sufficient to amount to duress, but a social, moral, or domestic force is exerted on a party which controls the free action of his will and prevents any true consent in the making of a contract or the execution of a deed, equity may relieve against the same on the ground of undue influence even if it would not be invalid at law."—Hartnett v. Hartnett, 60 N. W. 362, 365, 42 Neb. 23.

(2) Undue influence differs from duress in many particulars.
Neb.—Munson v. Carter, 27 N.W. 208, 212, 19 Neb. 293.
N.Y.—Matter of Hermann, 150 N.Y.S. 118, 124, 87 Misc. 476.

30. Fla.—Greeno v. Wilson, 8 So. 723, 725, 27 Fla. 492.

31. Gist of distinction
"Undue influence" and "want of mental capacity" have no necessary relation to each other. While it may be conceded that one who has no mind to be influenced cannot be subjected to undue influence, yet one who has a feeble mind, a defective will, a confused intelligence, and a deficient understanding, may be highly susceptible to influence, due or undue.—Hoff v. Hoff, 189 P. 613, 617, 106 Kan. 542.

Capacity conceded
"Undue influence . . . is . . . a concession of capacity, although weak."—Thompson v. Kyner, 65 Pa. 368, 379.

32. Phrases construed
(1) "Overpowering influence."—Euclid Ave. Trusts Corp. v. Hohs, 23 Ont.L. 377, 385, 2 Ont.W.N. 825, 18 Ont.W.R. 787.

(2) "Parental influence" described as an influence based not on terror and coercion, but on kindness and affection, which may bias the child's mind and so induce him to do that which may be highly imprudent, and which, if the child were properly protected, he would never do.—Worrall's Appeal, 1 A. 380, 385, 110 Pa. 349.

(3) "Prejudice or local influence."—Montgomery County v. Cochran, C.C.Ala., 116 F. 985, 993—Adelbert College v. Toledo, W. & W. R. Co., C.C. Ohio, 47 F. 836, 844—Neale v. Foster, C.C.Ore., 31 F. 53, 55, 12 Sawy. 424.

(4) "Under the influence of," as having the same significance, import, and breadth of meaning as the phrase "affected by."—State v. Hurd, 105 P. 2d 59, 62, 5 Wash.2d 308.

(5) "Under the influence of sudden passion," defined as meaning that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation, that the act must be directly caused by the passion arising out of the provocation, and that whatever the passion is it must be an emotion of the mind rendering it incapable of cool reflection.—Lamb v. State, 169 S.W. 1158, 1163, 75 Tex.Cr. 75.

33. Webster New Int.D.

34. Conn.—State v. Ventola, 191 A. 726, 728, 122 Conn. 635, 110 A.L.R. 578.
Wash.—State v. Hurd, 105 P.2d 59, 61, 5 Wash.2d 308.

35. Wash.—State v. Hurd, supra.

Phrase construed
"Consignments . . . 'influenced' by him."—Blake v. Voight, 11 N.Y. S. 716, 717, 16 Daly 398.

36. Ark.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S.W.2d 17, 18, 180 Ark. 484.

37. Pa.—Respublica v. Ray, 3 Yeates 65, 66.

Similarly expressed
"'Influence' means the use of a party's endeavors."—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, 22 S.W.2d 17, 18, 180 Ark. 484.

38. "Influence" is weaker than "procure"
Ark.—Loewer v. Arkansas Rice Growers' Co-op. Ass'n, supra.
Mo.—Schwabe v. Estes, 218 S.W. 908, 909, 202 Mo.App. 272.

INFLUENZA. An epidemic catarrh caused by the season, weather, and its vicissitudes.[39] The disease is also commonly known as "flu."[40]

INFOLD. To clasp with the arms, to embrace, to wrap up or cover with folds.[41] Not the same as the term "in fold," which has been construed as meaning "in foal."[42]

INFORM. To communicate knowledge of or to; to make known, to advise, to tell;[43] to make acquainted; to acquaint, enlighten, instruct, or notify.[44]

"Inform" has been held synonymous with "advise" see 2 C.J.S. p 893 note 84, and "informed" has been held to be the equivalent of "asked," in particular uses of that word, see 6 C.J.S. p 790 note 67, and, in the sense of having received information, a synonym of "learned."[45]

INFORMACION. In Spanish law, the juridical establishment of a fact.[46] The plural "informaciones," in connection with applications for an office or employment, means proof of the character and qualifications of the applicant.[47]

INFORMAL. Deficient in legal form; inartificially drawn up.[48]

The Spanish word "informal" is stronger than the English word "informal," and in law means irregular, unlawful.[49]

INFORMALITY. An irregularity; not in accordance with the usual method;[50] want of legal form;[51] want of customary legal form;[52] more specifically, a deviation from the well-approved forms of expression and a substitution in lieu thereof of other terms in as plain, intelligible, and explicit language.[53]

Phrases employing the word are set out in the note.[54]

INFORMANT. One who imparts information.[55]

INFORMANTE. In Spanish law, a maker of books of pedigree or genealogy.[56]

IN FORMA PAUPERIS. See Forma 37 C.J.S. p 114 note 58; also Appeal and Error §§ 521–525, and Costs §§ 146–157.

INFORMATION. In general, the act or process of informing; communication or reception of knowl-

39. Wis.—Wirth v. State, 22 N.W. 860, 862, 63 Wis. 51.

40. Iowa.—West v. Iowa Seventh Day Adventist Assoc., Inc., 189 N. W. 765, 767, 194 Iowa 390.

41. Ala.—O'Rear v. Richardson, 81 So. 865, 866, 17 Ala.App. 87.

42. Ala.—O'Rear v. Richardson, supra.

43. S.C.—Daniels v. Berry, 146 S. E. 420, 425, 148 S.C. 446.

44. Webster New Int.D.

Phrases construed

(1) "First inform," a statutory phrase, used with respect to an informer in a criminal case, construed as meaning that the person who is to impart the information must be a person who has imposed on him no official duty to do so.—In re Four Cutting Machines, D.C.N.Y., 9 F.Cas. No.4,987, 3 Ben. 24.

(2) "Inform against," as equivalent to "denounce" see 26 C.J.S. p 712 note 74.

(3) "Informing officer," as including a state's attorney.—Fowler v. Bishop, 1 Root (Conn.) 198.

45. Tex.—Lightfoot v. State, 58 S. W.2d 81, 84, 123 Tex.Cr. 176.

46. Escriche Diccionario.

Phrases construed or defined

(1) "Información 'ad perpetuam' (rei memoriam)" is a proceeding to perpetuate testimony.—Escriche Diccionario.

(2) "Información (or papel) en derecho" is a written argument or brief.—Escriche Diccionario.

(3) "Información de pobreza" is a showing of poverty.—Escriche Diccionario.

(4) "Información de 'commodo et incommodo'" is proof of the consequences of erecting a factory or similar institution.—Escriche Diccionario.

(5) "Información de 'vita et moribus'" is proof of the character and habits of a party; as an accused.—Escriche Diccionario.

(6) "Información sumaria" is a summary investigation without the usual formalities.—Escriche Diccionario.

47. Escriche Diccionario.

48. Black L.D.

Phrases construed

(1) "Informal assignment" by bankrupt see Bankruptcy § 227 note 27.

(2) "Informal composition" in bankruptcy proceedings see Bankruptcy § 653 note 23.

(3) "Informal hearing" before arbitrators see Arbitration and Award § 58.

(4) "Informal issue" see the C.J.S. title Pleading § 512, also 31 C.J. p 1187 note 54, and 33 C.J. p 827 note 86 [f].

(5) "Informal procedure" in bankruptcy see Bankruptcy §§ 31, 276 j note 18.

(6) "Informal verdict."—Barnes v. State, 202 S.W. 949, 950, 83 Tex.Cr. 207.

49. Escriche Diccionario.

50. English L.D.

A near equivalent of "irregularity" B.C.—Callahan v. Coplen, 7 B.C. 422, 428.

51. Black L.D.

52. Mo.—Walkeen Lewis Millinery Co. v. Johnson, 109 S.W. 847, 849, 130 Mo.App. 325.

53. N.C.—State v. Gallimon, 24 N.C. 372, 377.

54. **Phrases construed**

(1) "Any informality."—Hunt v. Curry, 37 Ark. 100, 108.

(2) "Error or informality, or other defect."—Oakland Paving Co. v. Whittell Realty Co., 195 P. 1058, 1060, 185 Cal. 113.

(3) "Informality in any statement or declaration filed."—Burk v. Huber, 2 Watts (Pa.) 306, 312.

(4) "Informality in entering the judgment."—Walkeen Lewis Millinery Co. v. Johnson, 109 S.W. 847, 849, 130 Mo.App. 325.

(5) "Informality or refinement."—State v. Gallimon, 24 N.C. 372, 377.

55. Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

56. Escriche Diccionario.

edge or intelligence; inspiration or animation; instruction;[57] intelligence;[58] also, more specifically, that which is received or obtained through information, training, or discipline; knowledge communicated or received; knowledge of a special event, situation, or the like;[59] knowledge acquired, derived, or inculcated, as by observation, or by reading or study, or in conversation;[60] knowledge communicated by others or obtained by a personal study and investigation; knowledge derived from reading, observation, or instruction;[61] hence advices,[62] news, notice, particular intelligence or report.[63]

"Information" has been held synonymous with "news;"[64] and sometimes it has been used as equivalent to, or synonymous with, and has also been contrasted with, or distinguished from, "knowledge,"[65] and "notice" see the C.J.S. title Notice § 2, also 46 C.J. p 538 notes 23–26.

In law. Besides its frequent use in law, in the sense of communicated knowledge,[66] it is also used to designate the first step, in the nature of a pleading, by which various civil and criminal proceedings are commenced, as discussed in such C.J.S. titles as Admiralty § 119; Attorney General § 8; Criminal Law § 303; Extradition § 14; Indictments and Informations § 11; and Quo Warranto § 1, also 51 C.J. p 310 notes 14–23, and § 37, also 51 C.J. p 343 note 65–p 348 note 68.

In French law, the act or instrument which contains the depositions of witnesses against the accused.[67]

Phrases employing the word are set out in the note.[68]

INFORMATIONS IN CIVIL CASES

Informations in civil cases which are treated under this heading in Corpus Juris, volume 31 C.J. p 1188 note 1 to p 1192 note 85, are discussed in the C.J.S. title Attorney General § 8 e.

57. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Active process

The imparting of information, as when information is proffered as the consideration for a contract, must involve an active process resulting in arousing or suggesting ideas or notions not before existent in the mind of the recipient; otherwise it is not information in the true sense of the term, although it may be a statement of fact.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

58. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

59. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Similarly expressed

Knowledge communicated concerning some particular fact, subject, or event.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

60. Wis.—Metcalf v. Mutual F. Ins. Co., 112 N.W. 22, 24, 132 Wis. 67.

61. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

62. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

63. Ark.—Moore v. Holman Real Estate Co., 196 S.W. 479, 480, 129 Ark. 465.

Credit or mercantile information

Held not to be an article of commerce.—State v. Morgan, 48 N.W. 314, 321, 2 S.D. 32.

64. Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 640, 95 Conn. 702.

65. Wis.—Zdunek v. Thomas, 254 N. W. 382, 383, 215 Wis. 11.

31 C.J. p 1187 note 73 [b].

66. U.S.—U. S. v. Poinier, S.C., 11 S.Ct. 752, 753, 140 U.S. 160, 35 L. Ed. 395.

31 C.J. p 1187 note 82.

Duty to give, or right to obtain information see such C.J.S. titles as Agency § 138 b; Carriers §§ 482, 640 b; Census § 8; Corporations §§ 499–511; Factors § 25; Insurance §§ 492–497, also 26 C.J. p 156 note 91–p 158 note 10, § 584, also 36 C.J. p 1070 notes 49–51, § 594, also 37 C.J. p 447 note 79–p 449 note 5, §§ 645, 646, also 38 C.J. p 1051 note 33–p 1059 note 99; Trusts § 247, also 65 C.J. p 659 note 32–p 651 note 35, § 333 also 65 C.J. p 819 note 81; Witnesses §§ 430–434, also 70 C.J. p 717 note 21–p 725 note 44, § 560, also 70 C. J. p 987 note 62–p 988 note 64; and for references to other particular applications see Descriptive-Word Index sub verbo Information.

67. Black L.D.

68. **Phrases construed**

(1) "Information and belief" see 10 C.J.S. p 238 note 69, and consult the Descriptive-Word Index for reference to specific applications.

(2) "Information and knowledge," as equivalent to "information and belief" see 10 C.J.S. p 238 note 69.

(3) "Information for an intrusion," a method of redress for a trespass committed on the lands of the commonwealth, which was of the nature of an action of trespass quare clausum fregit, and, which accordingly, never could be maintained by the crown, until the king had acquired the possession.—Commonwealth v. Hite, 6 Leigh 588, 594, 33 Va. 588, 594, 29 Am.D. 226.

(4) "Information in the nature of quo warranto" see the C.J.S. title Quo Warranto § 1, also 51 C.J. p 310 notes 14–23.

INFORMATUS NON SUM. Literally "I am not informed." A formal answer made by the defendant's attorney in open court to the effect that he has not been advised of any defense to be made to the action; thereupon judgment by default passes.[69]

INFORME. In Spanish law, the report of a cause which a trial judge is required to make to the audiencia or reviewing court; also, written argument, or brief.[70]

INFORMER. A person who informs or procures an action against another, whom he suspects of the violation of some penal statute;[71] also, from its derivation, one who sues by way of an information.[72] The term may be construed to mean "common informer."[73]

Informers in particular prosecutions or proceedings and their rights arising therefrom see such C. J.S. titles as Customs Duties § 266; Fines § 20; Forfeitures § 10; Intoxicating Liquors § 304, also 33 C.J. p 706 note 90 [a], § 393, also 33 C.J. p 674 note 92–p 675 note 97; Penalties § 21, also 25 C.J. p 1215 notes 29–40; Rewards § 26, also 54 C.J. p 791 note 13–p 793 note 49; and consult the Descriptive-Word Index for references to other specific applications.

INFORTIATUM. The name given by the glossators to the second of the three parts or volumes into which the Pandects were divided.[74]

INFORTUNIUM, HOMICIDE PER. Literally "Homicide by misfortune," as where a man doing a lawful act, without intention of hurt, unfortunately kills another.[75]

INFRA. In law Latin, "infra" is used at the beginning of many phrases, where it is variously translated as meaning "below," "beneath," "during," "under," "underneath;"[76] and more frequently as meaning "within."[77] The use of "infra" for "intra"

69. Black L.D.

70. Escriche Diccionario.

71. Ga.—Western Union Tel. Co. v. Nunnally, 12 S.E. 578, 579, 86 Ga. 503.
31 C.J. p 1192 note 5.

In the revenue laws
The word also, no doubt in some of its applications, includes a person who lodges information with a government officer which leads to a suit brought by the government itself. It is so used in the customs revenue laws.—Pollock v. The Laura, D.C.N.Y., 5 F. 133, 141.

72. U.S.—Pollock v. The Laura, supra.

73. N.J.—Bryant v. Skillman Hardware Co., 69 A. 23, 24, 76 N.J.Law 45.
"Common informer" defined see 15 C. J.S. p 590 notes 60–62.

74. Black L.D.

75. Black L.D.

76. Bouvier L.D.

"Infra aetatem"
Below or under age; within age.—Burrill L.D.

"Infra annos nubiles"
(1) Translated as "Under marriageable years; not yet of marriageable age."—Black L.D.

(2) Applied in George's Case, 6 Coke 22a, 22b, 77 Reprint 286.

"Infra annum"
Under or within a year.—Black L. D.

"Infra dignitatem curiæ"
(1) Translated as "Beneath the dignity of the court."—Burrill L.D.

(2) Applied or explained in Moore v. Lyttle, 4 Johns.Ch., N.Y., 183, 185—31 C.J. p 1192 note 8 [a].

"Infra furorem"
During madness; while in a state of insanity.—Black L.D.

77. Bouvier L.D.

"Infra civitatem"
(1) Translated as "Within the state."—Black L.D.

(2) Applied in London v. Long, 1 Campb. 22, 24.

"Infra corpus comitatus"
(1) Literally "Within the body of a county."—Black L.D.

(2) Applied in Commonwealth v. Macloon, 101 Mass. 1, 12, 100 Am.D. 89—31 C.J. p 1193 note 12 [e].

"Infra hospitium"
(1) "Literally "Within an inn; within the inn."—Burrill L.D.

(2) Applied in Hawley v. Smith, 25 Wend., N.Y., 642, 643.

"Infra jurisdictionem"
(1) Literally "Within the jurisdiction."—Black L.D.

(2) Applied or discussed in Lacaze v. State, Add., Pa., 59, 60.

"Infra ligeantiam regis"
(1) Translated as "Within the king's ligeance."—Black L.D.

(2) Applied or discussed in Commonwealth v. Macloon, 101 Mass. 1, 12, 100 Am.D. 89.

"Infra præsidia"
(1) Translated as "Within the guards or fortified places; in a place of safe custody or protection."—Burrill L.D.

(2) Applied or discussed in The Flad Oyen, 1 C.Rob. 134, 139.

"Infra sex annos"
(1) Literally "Within six years."—Black L.D.

(2) Applied or discussed in Sawkill v. Warman, 10 Mod. 104, 88 Reprint 646.

Other illustrative phrases
(1) "Infra annum luctus"—within the year of mourning.—Black L.D.

(2) "Infra brachia"—within her arms.—Black L.D.

(3) "Infra comitatum vel extra"—within a county or without.—Burrill L.D.

(4) Infra corpus civitatis—within the body of the country.—Black L.D.

(5) "Infra curtem"—within the court.—Burrill L.D.

(6) "Infra gildam"—within a gild, or guild.—Burrill L.D.

(7) "Infra libertates vel extra"—within liberties or without.—Burrill L.D.

(8) "Infra listas"—within the lists.—Burrill L.D.

(9) "Infra metas"—within the bounds or limits.—Black L.D.

(10) "Infra metas et divisas"—within the metes and bounds.—Burrill L.D.

(11) Infra metas forestæ—within the bounds of the forest.—Black L.D.

(12) Infra metas hospitii—within the limits of the household; within the verge.—Black L.D.

(13) "Infra pallacium"—within the palace.—Burrill L.D.

(14) "Infra quatuor maria"—within the four seas; within the kingdom of England; within the jurisdiction.—Black L.D.

seems to have sprung up among the barbarians after the fall of the Roman Empire.[78]

In a book, or other writing, "infra" occurring by itself refers the reader to a subsequent part of the book, like "post," q. v.[79] It is the opposite of "ante" and "supra."[80]

INFRACCION. In Spanish law, the transgression or violation of a law.[81]

INFRACTION. A breach, violation or infringement, as of a law, contract, a right or duty.[82]

In French law, this term is used as a general designation of all punishable actions.[83]

INFRAGANTE. In Spanish law, caught in the act.[84]

IN FRAUDEM VERO QUI, SALVIS VERBIS LEGIS, SENTENTIAM EJUS CIRCUMVENIT.[85]

INFRINGEMENT. A broad term[86] used to signify the wrongful invasion or infraction of another person's rights;[87] specifically, the act of trespassing on the incorporeal rights secured by a patent, copyright, or the like.[88]

Infringement of copyright see Copyright and Literary Property § 90 et seq; of corporate name see Corporations § 173; of ferry franchise see Ferries § 16; of patent see the C.J.S. title Patents § 282 et seq, also 48 C.J. p 292 note 10 et seq; and of trademark see the C.J.S. title Trade-Marks, Trade-Names and Unfair Competition § 64 et seq, also 63 C.J. p 368 note 90 et seq. For other references consult the Descriptive-Word Index sub verbis Infringement and Infringement of Patents.

INFRINGER. One who, or that which, infringes.[89] Specifically with reference to patent rights, one who invades any one of three substantive rights owned by another, the right to make, the right to sell, and the right to use.[90]

INFUGARE. Latin, to put to flight.[91]

INFULA. A coif, or a cassock.[92]

IN FULL. See 37 C.J.S. p 1394 note 11 and 42 C.J.S. p 477 notes 95–98.

INFURCION. In Spanish law, a species of ground rent.[93]

INFUSION. A liquid extract or essence obtained by steeping a vegetable substance.[94]

In medical jurisprudence, the process of steeping in liquor; an operation by which the medicinal qualities of a substance may be extracted by a liquor without boiling; described as a pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract; also the product of this operation.[95]

It has been compared with "decoction."[96]

INGE. Meadow or pasture.[97]

IN GENERALIBUS VERSATUR ERROR.[98]

IN GENERE QUICUNQUE ALIQUID DICIT, SIVE ACTOR SIVE REUS, NECESSE EST UT PROBAT.[99]

(15) "Infra quatuor parietes"—within four walls.—Black L.D.

(16) "Infra quinquaginta annos"—within fifty years.—Shalmer v. Pulteney, 1 Ld.Raym. 276, 277, 91 Reprint 1081.

(17) "Infra regnum"—within the realm.—Black L.D.

(18) "Infra septa"—within the inclosures.—Burrill L.D.

(19) "Infra summonitium Justiciorum"—within the summons of the justices.—Taylor L.Gloss.

(20) "Infra tempus semestre"—within six months.—Burrill L.D.

(21) "Infra triduum"—within three days.—Black L.D.

(22) "Infra virgam"—within the verge.—Burrill L.D.

78. Black L.D.

79. Black L.D. 2d ed.

80. Black L.D.
"Ante" defined see 3 C.J.S. p 1393 notes 53, 54.

81. Escriche Diccionario.

82. Black L.D.

83. Black L.D.

84. Escriche Diccionario.

85. A maxim meaning "He acts fraudulently who, observing the letter of the law, eludes its spirit."—Morgan Leg.Max.

86. U.S.—Lowry v. Hert, D.C.Ky., 273 F. 698, 704.

87. Ont.—Green v. Watson, 2 Ont. 627, 632, 633.

88. U.S.—Lowry v. Hert, D.C.Ky., 273 F. 698, 704.

89. Webster New Int.D.

90. U.S.—Tuttle v. Matthews, C.C. N.Y., 28 F. 98.

91. Black L.D.

92. Black L.D.

93. Escriche Diccionario.

94. Century D.

95. Black L.D.

96. "'Infusion' and 'decoction', though not identical are ejusdem generis in law."—Black L.D., citing Rex v. Phillips, Eng., 3 Campb. 73, 75.

97. Black L.D.

98. A maxim meaning "Error dwells in general expressions."—Black L.D.
Applied in
U.S.—Pitman v. Hooper, C.C.Mass., 19 F.Cas.No.11,186, 3 Sumn. 286, 290.
Mass.—Underwood v. Carney, 1 Cush. 285, 292.

99. A maxim meaning "In general, whoever alleges anything, whether plaintiff or defendant, must prove it."—Bouvier L.D.

INGENIERO. In Spanish law, an engineer.[1]

INGENIOUS. Having an aptitude to contrive; proceeding from, pertaining to, or characterized by, cleverness or ingenuity.[2]

INGENIUM. A word of various meanings: primarily an engine or device; a machine, especially for warlike purposes, or for the navigation of a ship; also a net or hook, hence artifice, fraud, or trick.[3]

INGENUIDAD. In Spanish law, the quality or state of being "ingenuo" or free-born.[4]

INGENUITAS. Latin, freedom, liberty, the state or condition of one who is free; also liberty given to a servant by manumission.[5]

INGENUITY. Quality or power of ready invention; skill or cleverness in devising or combining.[6] The term implies an acuteness of understanding, and comprehends invention;[7] and has been said to be a quality different from the skill of the mechanic.[8]

It has been compared with, and distinguished from "wit."[9]

INGENUUS. Latin, one free-born.[10] In Roman law, a person who, immediately that he was born, was a free person, as opposed to "libertinus," or "libertus," who, having been born a slave, was afterwards manumitted or made free.[11]

IN GOOD FAITH. See 35 C.J.S. p 490 notes 98–7.

INGOTS OF STEEL. The steel bars when taken from the molds of a steel manufactory, the words being applied to the finished product as it is ready for shipping; also called "billets of steel."[12]

INGRATITUDE. In general, lack of gratitude; indisposition to acknowledge or reciprocate favors; a state of unthankfulness for benefits conferred.[13]

In Roman law, ingratitude was accounted a sufficient cause for revoking a gift or recalling the liberty of a freedman. Such is also the law of France, with respect to the first case. The English law, however, has left the matter entirely to the moral sense.[14]

INGREDIENT. A constituent; that which enters into a compound or is a component part of any combination or mixture.[15]

IN GREMIO LEGIS. See Gremium 38 C.J.S. p 1077 note 70.

INGRESS. The going to a place.[16]

INGRESSU. In English law, an ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands; in 1833 it was abolished.[17]

INGRESSUS. In old English law, ingress; entry. The relief paid by an heir to the lord was sometimes so called.[18]

INGROSSATOR. An engrosser.[19]

1. Escriche Diccionario.

Various kinds

"Ingeniero agrónomo"—agricultural engineer; "ingeniero de caminos canales y puertos," road and harbor engineer; "ingeniero de minas"—mining engineer; "ingeniero de montes"—supervisor of mountain regions; "ingeniero industrial"—mechanical or chemical engineer; "ingeniero militar"—military engineer; "ingeniero naval"—naval constructor. —Escriche Diccionario Suplemento.

2. Webster New Int.D.

Illustrative phrase

"Ingenious men and women who make useful inventions" construed in describing the beneficiaries of a charitable bequest.—Scott's Estate, 28 Pa.Dist. 292, 298.

3. Black L.D.

4. Escriche Diccionario.

5. Black L.D.

"Ingenuitas regni"

In old English law, the freemen, yeomanry, or commonalty of the kingdom; applied sometimes also to the barons.—Black L.D.

6. Webster New Int.D.

7. U.S.—Tolfree v. Wetzler, D.C.N. J., 22 F.2d 214, 223.

8. U.S.—Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., C.C.Mich., 59 F. 902, 908.

9. U.S.—Tolfree v. Wetzler, D.C.N. J., 22 F.2d 214, 223.

10. Eng.—Birtwhistle v. Vardill, 2 Cl. & F. 571, 591, 6 Reprint 1270, 5 E.R.C. 750.

11. Black L.D.

12. Ill.—Illinois Steel Co. v. Bauman, 53 N.E. 107, 108, 178 Ill. 351, 69 Am.S.R. 316.

13. Century D.

14. Black L.D.

15. Webster New Int.D.

"Prohibited ingredient"

In the manufacture of oleomargarine, the term refers to something used to give it color and not to the ingredients essential to produce the article itself.—Bennett v. Carr, 96 N.W. 26, 28, 134 Mich. 243.

Regulation of the manufacture and sale of oleomargarine see Food § 18.

16. Eng.—Somerset v. Great Western R. Co., 46 L.T.Rep.,N.S., 883, 884.

Phrases construed

(1) "Ingress and egress," see 28 C.J.S. p 841 notes 81, 82, and for references to particular applications consult the Descriptive-Word Index.

(2) "Ingress, egress and regress," words frequently used in leases to express the right of the lessee to enter, go upon, and return from, the lands in question.—Commonwealth v. Shapiro, 41 Pa.Super. 96, 100.

See specifically the C.J.S. title Landlord and Tenant § 295, also 36 C. J. p 33 note 78–p 35 note 5.

17. Black L.D.

18. Black L.D.

19. Black L.D.

"Ingrossator magni rotuli"

Engrosser of the great roll; afterwards called "clerk of the pipe."—Black L.D.

INGROSSING. The act of making a fair and perfect copy of any document from a rough draft of it, in order that it may be executed or put to its final purpose.[20]

INGUINAL. Of or pertaining to, or in the region of, the inguen, or groin.[21]

INHABIL. In Spanish law, incapacitated.[22]

INHABIT. A word derived from the Latin verb "habito."[23] It has been many times defined by the courts, and has been given different shades of meaning.[24] It has been defined as meaning to live or dwell in;[25] to occupy as a place of settled residence.[26] One of the necessary elements in the signification of the word is locality of existence.[27]

"Inhabit" is said to be usually classed as synonymous with "dwell" see 28 C.J.S. p 599 note 67, and "reside," but not, in strictness, properly so.[28]

Inhabited. Having inhabitants,[29] as in the phrase "inhabited territory," which has been construed in annexation statutes as including particular territory, regarded as a unit, even though a number of the parcels of land therein are uninhabited,[30] but as inapplicable to a tract of land which, regarded as a unit, is wholly without inhabitants.[31]

Other phrases employing the word are set out in the note.[32]

INHABITANCY. See Habitancy 39 C.J.S. p 757 notes 37–42.

INHABITANT.

In General

It has been variously stated that the term "inhabitant" is derived from the Latin words "habeo,"[33] "habitare,"[34] or "habito."[35] Being a word of great variation of meaning,[36] it has many significations,[37] so that no exact definition can be given of the word "inhabitant" as applicable to all cases;[38] and its construction is generally governed by the connection in which it is used,[39] for, by itself, it has no definite

20. Black L.D.

21. Webster New Int.D.

Phrases construed

(1) "Inguinal hernia" see 39 C.J.S. p 896 note 62 (4).

(2) "Right inguinal hernia," held confined to the region of the groin, and hence evidence that while at work, a laborer felt "a severe pain in the right side," without further specifying its location, did not establish that he sustained such hernia, for the pain might have been in the lung, or in the pleura, or in any of the muscles of the right side. —Cavalier v. Chevrolet Motor Co., 178 N.Y.S. 489, 490, 189 App.Div. 412.

22. Escriche Diccionario.

23. N.H.—Brentwood School Dist. No. 2 v. Pollard, 55 N.H. 503, 504.
"Habito" defined see 39 C.J.S. p 758 notes 53–55.

24. Wash.—Platt v. Magagnini, 187 P. 716, 719, 110 Wash. 39.

25. Pa.—West Perry Township Overseers v. Walker Township Overseers, 41 Pa.Co. 429, 431—Noyes Tp. Poor Dist. v. Chapman Tp. Poor Dist., 39 Pa.Co. 489.

26. Iowa.—Hinds v. Hinds, 1 Iowa 36, 41.
Pa.—West Perry Tp. Overseers v. Walker Tp. Overseers, 41 Pa.Co. 429, 431.

27. Wash.—Platt v. Magagnini, 187 P. 716, 719, 110 Wash. 39.

Where one sleeps

In a case of involving the settlement of a man, it was said that "a man properly inhabits where he lies; as in the case where the house is in two leets, he is to be summoned to that in which his bed is."—St. Mary Colechurch Parish, Str. 60, 93 Reprint 385.

28. **Scope of terms compared**

"The word inhabit does not convey the idea of permanent residence. . . . Inhabit conveys the idea of a home, but not necessarily of a full and fixed settlement, such as is conveyed by the term residence."—Brentwood School Dist. No. 2 v. Pollard, 55 N.H. 503, 504.

29. Webster New Int.D.

30. Cal.—People v. Ontario, 84 P. 205, 209, 148 Cal. 625.

31. Cal.—Capuchino Land Co. v. San Bruno, 167 P. 178, 180, 34 Cal.App. 239.

32. **Phrases construed**

(1) "Come to inhabit."—Reg. v. St. Paul, 7 Q. B. 533, 540, 53 E.C.L. 533, 115 Reprint 589.

(2) "Inhabited dwelling house" see the C.J.S. titles Arson § 6 a; Burglary § 17; Larceny § 12, also 36 C.J. p 755 notes 18–33.

(3) "Inhabited house" see 41 C.J. S. p 366 note 83 (28).

(4) "Inhabited house duty," a tax assessed in England on inhabited dwelling houses, according to their annual rental value.—Black L.D.

33. **Lord Coke's derivation**

"He derives the word 'inhabitant' from the word 'habeo,' and says that wherever a man 'has' lands he 'inhabits;' that if the man has lands in different places, he is an inhabitant of all the places."—Davis v. Central R. & Banking Co., 17 Ga. 323, 328.

34. Tex.—Ullman v. State, 1 Tex. App. 220, 222, 28 Am.R. 405.

35. Alaska.—Terrill v. Terrill, 2 Alaska 475, 477.
Ill.—Spragins v. Houghton, 3 Ill. 377, 396.
"Habito" defined see 39 C.J.S. p 758 notes 53–55.

36. Ariz.—Slosser v. Salt River Valley Canal Co., 65 P. 332, 335, 7 Ariz. 376.

37. Ark.—Wilson v. Lawrence, 69 S.W. 570, 572, 70 Ark. 545—Brown v. Rushing, 66 S.W. 442, 446, 70 Ark. 111.

38. Ark.—Wilson v. Lawrence, 69 S. W. 570, 572, 70 Ark. 545.
31 C.J. p 1194 note 53.

39. Ark.—Wilson v. Lawrence, supra.
31 C.J. p 1194 note 56.

Construed in statutes

(1) In statutory enactments, its meaning, as interpreted by the courts, varies as the legislative intent appears, and in harmony with the subject matter, object, and purpose of the statute.—Bechtel v. Bechtel, 112 N.W. 883, 884, 101 Minn. 511, 12 L.R.A.,N.S., 1100.

(2) The word "inhabitants," as used in a statute authorizing the supervisors of any county to protect the game and fish in their respective counties for the use and consumption of the "inhabitants," means the inhabitants of the particular county, rather than the other inhabitants of the state.—State v. Hill, 53 So. 411, 412, 98 Miss. 142, 31 L.R.A.,N.S., 490.

meaning.[40] The term, however, has been conceived to be entirely free from technicality, and declared to have a known and universally accepted meaning, all agreeing in considering inhabitant as directly connected with habitation and abode.[41]

As shown in the following subdivisions, the term, under particular circumstances, may imply, or be used to refer to, citizenship, domicile, or permanent residence; and may sometimes be used with a corporate signification.

In its general sense, however, it has been variously defined as meaning a dweller or a dweller in a place;[42] a dweller or householder in any place;[43] the householder in a vill;[44] one domiciled;[45] one who has an actual residence in a place, or one who resides in a place;[46] one who lives in a place;[47] a resident.[48] In its broadest sense, the term "inhabitant" would include all sexes, ages, and conditions;[49] and in the following notes examples are given of what, under particular circumstances, the term has been held to include[50] and not to include.[51]

Corporation as an inhabitant see Corporations § 8 b; and number of inhabitants as affecting creation and alteration of school districts see the C.J.S. title Schools and School Districts § 33, also 56 C.J. p 210 note 2–p 211 note 14. For references to other particular applications see 31 C.J. p 1194 note 50.

Indicating Permanency

In law, the term "inhabitant" is used technically with varying meaning in respect of permanency of abode,[52] or as implying a permanent abode.[53] It embraces locality of existence[54] or fixed permanent home, and excludes the idea of a temporary residence.[55] All lexicographers distinguish an inhabitant as one who dwells in a place with the inten-

40. Mo.—State v. Snyder, 82 S.W. 12, 23, 182 Mo. 462.

41. Ill.—Spraggins v. Houghton, 3 Ill. 377, 397.

42. Minn.—Bechtel v. Bechtel, 112 N.W. 883, 884, 101 Minn. 511, 12 L.R.A.,N.S., 1100.
Tex.—Ullman v. State, 1 Tex.App. 220, 222, 28 Am.R. 405.
31 C.J. p 1194 notes 61, 62.

43. U.S.—Zambrino v. Galveston, H. & S. A. R. Co., C.C.Tex., 38 F. 449, 453—Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co., C.C.Ill., 34 F. 818, 820.

44. N.Y.—In re Wrigley, 8 Wend. 134, 141.

45. Ind.—Schmoll v. Schenck, 82 N. E. 805, 807, 40 Ind.App. 581.
Mass.—Borland v. Boston, 132 Mass. 89, 98, 42 Am.R. 424.

46. Tenn.—Kuntz v. Davidson County, 6 Lea 65, 66.

47. Conn.—New Haven v. Bridgeport, 37 A. 397, 68 Conn. 588—Hartford Ins. Co. v. Hartford, 3 Conn. 15, 24.

48. Conn.—New Haven v. Bridgeport, 37 A. 397, 68 Conn. 588, 590.
31 C.J. p 1194 note 67.
Statutory definition
"The word 'inhabitant' may be construed to mean a resident in any place."—Ahearn v. Burk, 99 N.E. 1004, 1005, 179 Ind. 179.

49. U.S.—Walnut v. Wade, Ill., 103 U.S. 683, 694, 26 L.Ed. 526.

50. **Held to import or include**
(1) All those who are qualified to act in town meetings.—Baldwin v. North Branford, 32 Conn. 47, 53.

(2) Every person who is in the state, whether for a long or short period.—Bishop v. Vose, 27 Conn. 1, 9.

(3) The free white males above the age of twenty-one years, actual residents of the territory, citizens of the United States, and those who have declared on oath their intention to become such, and shall have taken an oath to support the constitution of the United States.—State v. Boyd, 48 N.W. 739, 750, 31 Neb. 682.

(4) A minor.—Canton v. Simsbury, 6 A. 183, 184, 54 Conn. 86.

(5) An occupant of lands.—Schmoll v. Schenck, 82 N.E. 805, 807, 40 Ind.App. 581.

(6) A resident in any city or town.—Sears v. Boston, 1 Metc., Mass., 250, 251.

(7) Resident trustees, in whom is vested the absolute legal title to choses in action.—Detroit v. Lewis, 66 N.W. 958, 960, 109 Mich. 155, 163, 32 L.R.A. 439.

(8) A settler.—Schmoll v. Schenck, supra.

(9) Tenants in fee simple, tenants for life, tenants for years, and tenants at will.—In re Wrigley, 8 Wend., N.Y., 134, 141—In re Wrigley, 4 Wend., N.Y., 602, 603.

(10) A voter who is qualified.—Schmoll v. Schenck, 82 N.E. 805, 807, 40 Ind.App. 581.

51. **Held not to include**
(1) A minor in a particular case where the meaning of "inhabitant" was limited.—Brown v. Rushing, 66 S.W. 442, 446, 70 Ark. 111.

(2) A teamster permanently employed in the quartermaster's department of the army, coming to the state, and stationed at a military post in a state where he was subject to the orders of the department, is not an "inhabitant" of the state so as to be liable to road duty.—Pundt v. Pendleton, D.C.Ga., 167 F. 997, 1003. See also Army and Navy § 34 a.

52. U.S.—Foster v. Givens, Ky., 67 F. 684, 693, 14 C.C.A. 625.
31 C.J. p 1195 note 84.
From its derivation
The Latin "habitare," the root of this word, imports by its very construction frequency, constancy, permanency, closeness of connection, attachment, both physical and moral; and the word 'in' serves to give additional force to these senses.—Ullman v. State, 1 Tex.App. 220, 222, 28 Am.R. 405.

53. Wyo.—Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne, 54 P.2d 906, 916, 49 Wyo. 333.

54. Alaska.—Terrill v. Terrill, 2 Alaska 475, 477.
Ill.—Spragins v. Houghton, 3 Ill. 377, 397.
Refers to principal situs
One may be designated as an inhabitant of that place, which constitutes the principal seat of his residence, of his business, pursuits, connexions, attachments, and of his political and municipal relations.—Phillips v. Boston, 67 N.E. 250, 251, 183 Mass. 314, 316—31 C.J. p 1195 note 85 [a].

55. Ind.—Schmoll v. Schenck, 82 N. E. 805, 807, 40 Ind.App. 581.
31 C.J. p 1195 note 87.
Permanency essential
(1) "One who has an actual, but merely temporary residence in a place, is not, in any proper sense, an inhabitant of that place. An inhabitant of a township or ward is one who has his domicile there, his fixed habitation and home, from which he has no present intention of removing."—Sharp v. Casper, 36 N.J.Law 367, 368.

tion of making it his home, and not a mere transient or temporary sojourner therein,[56] and in this connection the word has been defined as a dweller or resident in a place, in opposition to a mere sojourner or transient person;[57] one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional or transient lodger or visitor;[58] one who dwells or resides permanently, or who has a fixed and permanent abode, in a place;[59] one who has an actual fixed residence in a place;[60] one who is an established or permanent resident of a particular place;[61] one who lives in a place, and has there a fixed and legal settlement;[62] a permanent resident.[63] An examination of the authorities, however, shows that it frequently has a much broader meaning than this,[64] as indicated above in the first subdivision; and the word "inhabitant" has sometimes been given various meanings not inconsistent with the idea of prolonged absence from a particular locality.[65]

With Reference to Citizenship

While as stated in Citizens § 1 notes 34–40, the word "citizen" is not a convertible term with "inhabitant," although the two may sometimes be used synonymously, "inhabitant" does not necessarily imply citizenship,[66] for to be an inhabitant does not imply the relation of the person to the common-

(2) "In order to be an inhabitant there must be a domicile or home acquired, and it must have the stamp of permanency upon it. . . . In other words, there must be a permanent domicile or home established, whether actually and physically, or by intention, accompanied with some act done in the execution of that intent."—Gallagher v. Gallagher, Tex.Civ.App., 214 S.W. 516, 517.

(3) An inhabitant of a place is one who ordinarily is personally present there; not merely in itinere, but as a resident and dweller therein.—Harding v. Standard Oil Co., C.C.Ill., 182 F. 421, 425—31 C.J. p 1195 note 87 [a].

Definite time

A person having a fixed place of abode within the district for a definite time only is not an inhabitant within a statute providing for the prohibition of the sale of intoxicating liquors in a district on petition of a majority of the adult inhabitants.—Wilson v. Lawrence, 69 S.W. 570, 572, 70 Ark. 545.

56. Pa.—West Perry Tp. Overseers v. Walker Tp. Overseers, 41 Pa.Co. 429, 432—Noyes Tp. Poor District v. Chapman Tp. Poor District, 39 Pa.Co. 489.

57. Ala.—Merrill v. Morrissett, 76 Ala. 433, 437—Long v. Brown, 4 Ala. 622, 630.

58. Minn.—Bechtel v. Bechtel, 112 N.W. 883, 884, 101 Minn. 511, 12 L.R.A.,N.S., 1100.
31 C.J. p 1194 note 73 [a] (2), (3).

Similar definitions

(1) "One who dwells in a place as distinguished from a transient or occasional lodger or visitor."—State v. Snyder, 82 S.W. 12, 23, 182 Mo. 462.

(2) "One who has his domicil, or fixed residence there, in opposition to one who is a mere sojourner or temporarily resident in the place, or country."
Ala.—State v. Primrose, 3 Ala. 546, 547.
Neb.—State v. Boyd, 48 N.W. 739, 752, 31 Neb. 682.

(3) "One who has a fixed residence in a place in opposition to a mere 'sojourner.'"—Schmoll v. Schenck, 82 N.E. 805, 807, 40 Ind. App. 581.

(4) One who has a fixed residence, as distinguished from an occasional lodger or visitor.—Zambrino v. Galveston, H. & S. A. R. Co., C.C.Tex., 38 F. 449, 453—31 C.J. p 1194 note 73.

59. Tex.—Ullman v. State, 1 Tex. App. 220, 222, 28 Am.R. 405.
31 C.J. p 1194 notes 70, 71.

Similar definitions

(1) One who has a fixed residence.—Matter of Colebrook, 55 N.Y.S. 861, 863, 26 Misc. 139.

(2) One who has a fixed residence in a place.—Kennedy v. Ryall, 67 N.Y. 379, 386—Matter of Colebrook, supra.

60. Okl.—Coleman v. Territory, 47 P. 1079, 1081, 5 Okl. 201.
31 C.J. p 1195 note 75.

More specifically

One who has a legal settlement in a town, city or parish.—Zambrino v. Galveston, H. & S. A. R. Co., C.C.Tex., 38 F. 449, 453—Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co., C.C.Ill., 34 F. 818, 820.

61. Ariz.—Slosser v. Salt River Valley Canal Co., 65 P. 332, 335, 7 Ariz. 376.

62. Ill.—Dorsey v. Brigham, 52 N.E. 303, 305, 177 Ill. 250, 69 Am.S.R. 228, 42 L.R.A. 809.
31 C.J. p 1195 note 80.

63. Ill.—Helle v. Deerfield Township, 96 Ill.App. 642, 643.
Pa.—West Perry Tp. Overseers v. Walker Tp. Overseers, 41 Pa.Co. 429, 432.

64. Ariz.—Slosser v. Salt River Valley Canal Co., 65 P. 332, 335, 7 Ariz. 376.

65. Or.—Popejoy v. Boynton, 230 P. 1016, 112 Or. 646.

Absence as affecting

Actual residence, that is, personal presence in a place, is one circumstance to determine the fact of being an inhabitant; but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly on the question whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties.—Sears v. Boston, 1 Metc., Mass., 250, 251.

66. U.S.—Wrisley Co. v. Rouse Soap Co., Wis., 90 F. 5, 6, 32 C.C.A. 496.

Not necessarily "citizen"

(1) A man may be a citizen, without being an inhabitant; as a man may be an inhabitant, without being a citizen.
Del.—Quinby v. Duncan, 4 Del. 383, 384.
Mass.—Opinion of the Justices, 122 Mass. 594, 595, 599.

(2) "A foreigner, permanently resident, is as much an inhabitant, as if he were a citizen, or subject."

wealth, but refers primarily to his abode or residence;[67] and this is not only an obvious distinction, but one which constitutional provisions often make,[68] as in the qualification of voters where both citizenship and residence are required, see Elections §§ 18, 19.

With Reference to Domicile

Consistent with the elements of "domicile" as defined and discussed in Domicile §§ 1-11, the word, "inhabitant," when used as indicative of, or as relating to, domicile, has been said to embrace the fact of residence at a place, with intent to regard it and make it one's home.[69] The act and intent must concur, and the intent may be inferred from declarations and conduct.[70] In this connection the term has been defined as meaning a person coming into a place with an intention to establish his domicile or permanent residence;[71] a person with a fixed domicile or legal residence;[72] one who has his domicile in a place;[73] one who resides actually and permanently in a given place and has his domicile there.[74] While the word "inhabitant" in its general acceptation may be synonymous with "domicile," see infra note 84, "inhabitant" may not only import "domicile," but something more than "domicile."[75]

Collective Significance

The word "inhabitants" is sometimes recognized as having a collective, or a corporate, rather than an individual, significance, with reference to governmental or municipal subdivisions.[76] The use of the words "inhabitants of the town" or "inhabitants of the school district," to signify the town or the school district itself in its capacity as a municipal corporation, or an organized entity, is frequent and its propriety unquestioned.[77]

Other Terms Compared

"Resident." Although it has been said that the terms "inhabitant" and "resident" may be synonymous,[78] it may be doubted that this position is strictly accurate,[79] for the terms are not always

Ala.—State v. Primrose, 3 Ala. 546, 547.

Neb.—State v. Boyd, 48 N.W. 739, 752, 51 N.W. 602, 31 Neb. 682.

(3) "A natural person may be a citizen or subject of one country and an inhabitant of another."—Miller v. Eastern Oregon Gold Min. Co., C.C.Or., 45 F. 345, 348.

67. U.S.—Foster v. Givens, Ky., 67 F. 684, 694, 14 C.C.A. 625.

68. Del.—Quinby v. Duncan, 4 Del. 383, 384.

69. Mo.—State v. Snyder, 82 S.W. 12, 23, 182 Mo. 462.

31 C.J. p 1195 note 89.

Similarly expressed

(1) "The word 'inhabitant' includes the concept of residence with intention of making it the home."—Weisinger v. McGehee, 134 So. 148, 150, 160 Miss. 424, citing **Corpus Juris.**

(2) "A man is properly said to be an inhabitant where he dwelleth and hath his home."—Thayer v. Boston, 124 Mass. 132, 145, 26 Am.D. 650—Otis v. Boston, 12 Cush., Mass., 44, 49.

70. Mass.—Borland v. Boston, 132 Mass. 89, 98, 42 Am.R. 424—Lyman v. Fiske, 17 Pick. 231, 234, 28 Am.D. 293.

71. U.S.—U. S. v. The Penelope, D. C.Pa., 27 F.Cas.No.16,024, 2 Pet. Adm. 438, 450.

72. Minn.—Bechtel v. Bechtel, 112 N.W. 883, 884, 101 Minn. 511, 12 L. R.A.,N.S., 1100.

73. Okl.—Coleman v. Territory, 47 P. 1079, 1081, 5 Okl. 201.

31 C.J. p 1195 note 76.

74. Tex.—Gallagher v. Gallagher, Civ.App., 214 S.W. 516, 517.

75. Me.—Mather v. Cunningham, 74 A. 809, 812, 105 Me. 326, 29 L.R.A., N.S., 761, 18 Ann.Cas. 692.

31 C.J. p 1196 note 4.

76. R.I.—East Greenwich v. Gimmons, 84 A. 1008, 1009, 34 R.I. 526.

So construed in treaty

As used in a treaty it has been held to mean the body politic, the collective political people of the state, having a fixed domicile in the state.—Givanovich's Succession, 24 So. 679, 680, 50 La.Ann. 625.

77. N.H.—Chapin v. Winchester School Dist. No. 2, 35 N.H. 445, 455.

R.I.—East Greenwich v. Gimmons, 84 A. 1008, 1009, 34 R.I. 526.

Term held indefinite

A grant of land for cemetery purposes to the "inhabitants" of a certain school district, where the district, as such, was incapable of receiving the land for such purposes, has been held too indefinite to confer any title on the inhabitants of such district as individuals, the ascertainment of such individuals not being within the reach of reasonable effort or expenditure.—Hunt v. Tolles, 52 A. 1042, 1043, 75 Vt. 48.

78. U.S.—Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co., D.C.Md., 49 F.Supp. 807, 809—Bogue v. Chicago, B. & Q. R. Co., D.C.Iowa, 193 F. 728, 733.

N.Y.—Old Homestead Water Co. v. Treyz, 195 N.Y.S. 723, 725, 202 App. Div. 98—In re Seymour, 177 N.Y.S. 702, 703, 107 Misc. 330—Roosevelt v. Kellogg, 20 Johns. 208, 210.

Or.—Popejoy v. Boynton, 230 P. 1016, 1017, 112 Or. 646.

Tex.—Gallagher v. Gallagher, Civ. App., 214 S.W. 516, 517.

Wis.—Kidd v. Joint School Dist. No. 2, City of Richland Center and Town of Richland, 216 N.W. 499, 501, 194 Wis. 353.

31 C.J. p 1196 note 8.

Similarly expressed

(1) "Inhabitant" is the nearest synonym to "resident" in the English language.

Ind.—McCormick v. Johnson County, 68 Ind. 214, 217.

Mo.—State v. Snyder, 82 S.W. 12, 24, 182 Mo. 462.

(2) They are convertible terms.—Bell v. Pierce, 48 Barb., N.Y., 51, 53.

(3) "It may be that 'inhabitant' is often a more comprehensive term than resident; but taken together as they appear in the clause under consideration, with the modifier, 'usually,' before the word 'resident,' it seems to us that the term 'usually resident' following the word 'inhabitant' in such close immediate connection, was intended to illustrate the meaning of 'inhabitant,' and that whatever shades of distinction may be drawn when the words are used independently of each other, in other statutes, here they are synonymous."—State v. Snyder, 82 S.W. 12, 23, 182 Mo. 462.

79. Ill.—Tazewell County v. Davenport, 40 Ill. 197, 207.

synonymous,[80] since "inhabitant" implies a more fixed and permanent abode than "resident" and frequently imports many privileges which a mere resident cannot claim and many duties to which he is not subject;[81] and in some constitutional and statutory provisions "resident" may have a somewhat broader significance than "inhabitant," designating a class of persons who have no actual domicile within the state.[82]

Other terms. "Inhabitant" is sometimes used synonymously with "citizen," but not necessarily so see Citizens § 1 a notes 35–42. In its general acceptation, it may be equivalent to, or synonymous with, "citizen of a state,"[83] "domicile,"[84] "domiciliary resident,"[85] "legal residence,"[86] "legal voter,"[87] and "persons resident;"[88] and with reference to nations it has been said that "inhabitants," "people," and "subjects" are sometimes used indiscriminately as synonyms.[89] The term "inhabitant" has been contrasted with, or distinguished from, "elector" see Elections § 1 g note 91, "sojourner,"[90] "transient,"[91] "usual resident,"[92] and "voter" see Elections § 1 h note 16.

In Phrases

Phrases employing the word are set out in the note.[93] Other phrases as to which more recent adjudications have not been found see 31 C.J.S. p 1197 notes 33–45.

INHABITED. See Inhabit ante p 388 notes 29–31.

IN HÆREDES NON SOLENT TRANSIRE ACTIONES QUÆ PŒNALES EX MALEFICIO SUNT.[94]

INHALE. To draw in; to inspire.[95]

Inhaling gas as an accident insurance risk see the C.J.S. title Insurance § 777, also 1 C.J. p 454 notes 36–38.

INHERE. To be fixed or attached permanently to something;[96] to exist in, and inseparably from, something else; also to stick fast.[97]

INHERENT. Existing as an element of original quality;[98] naturally pertaining to, and permanently or inseparably existing in, a subject.[99]

N.Y.—Frost v. Brisbin, 19 Wend. 11, 13, 32 Am.D. 423.

80. Mass.—Martin v. Gardiner, 134 N.E. 380, 382, 240 Mass. 350—Harvard College v. Gore, 5 Pick. 370, 373.
31 C.J. p 1196 note 10.

81. U.S.—Barney v. Oelrichs, N.Y., 11 S.Ct. 414, 416, 138 U.S. 529, 533, 34 L.Ed. 1037.
Ind.—Schmoll v. Schenck, 82 N.E. 805, 807, 40 Ind.App. 581.
31 C.J. p 1196 note 11, p 1197 note 12.

82. Mass.—Lee v. Boston, 2 Gray 484, 490.

83. U.S.—Keating v. Pennsylvania Co., D.C.Ohio, 245 F. 155, 160.

84. Iowa.—Brown v. Lambe, 93 N. W. 486, 488, 119 Iowa 404.
Mass.—Opinion of Justices, 5 Metc. 587, 588.
Miss.—Weisinger v. McGehee, 134 So. 148, 150, 160 Miss. 424, citing Corpus Juris.

85. Ala.—Merrill v. Morrissett, 76 Ala. 433, 437.

86. Iowa.—Brown v. Lambe, 93 N. W. 486, 488, 119 Iowa 404.

87. U.S.—Walnut v. Wade, Ill., 103 U.S. 683, 694, 26 L.Ed. 526.
"Legal voter" defined see Elections § 1 h notes 21–29.

88. Unless there is something in the context, or in their connection with other expressions, or in their peculiar use, indicating an intention to give them a larger or different meaning.—Lee v. Boston, 2 Gray, Mass., 484, 490.

89. U.S.—The Pizarro, Ga., 2 Wheat. 227, 246, 4 L.Ed. 226—Loi Hoa v. Nagle, C.C.A.Cal., 13 F.2d 80, 81.

90. U.S.—Willingham v. Swift, C.C. Ga., 165 F. 223, 224—Bicycle Stepladder Co. v. Gordon, C.C.Ill., 57 F. 529, 531.

91. U.S.—Stadtmuller v. Miller, N. Y., 11 F.2d 732, 739.

92. Pa.—Commonwealth v. Weber, 67 Pa.Super. 497, 505, affirmed 103 A. 348, 350, 259 Pa. 592.

93. Phrases construed
(1) "District whereof he is an inhabitant," as equivalent to "district of the residence of."—Ex parte Shaw, N.Y., 12 S.Ct. 935, 937, 145 U. S. 444, 36 L.Ed. 768.

(2) "Inhabitant of this state," held to apply to one who enters the state for a temporary object with an intention to return to his home outside the state but who remains in this state so long and does so great a business and contracts so many debts for and against himself within the state as to subject himself to liability and to process as an "inhabitant of this state," within the meaning of a statute.—Boardman v. Bickford, 2 Aikens, Vt., 245, 248.

(3) "Inhabitants of the town," as equivalent to "people of the town."—Walnut v. Wade, Ill., 103 U.S. 683, 693, 26 L.Ed. 526.

(4) "Inhabitant with domicile" as distinguished from "transient."—Stadtmuller v. Miller, N.Y., 11 F.2d 732, 739.

(5) "Neighboring inhabitants."—Brouwer v. Jones, 23 Barb., N.Y., 153, 164—Barrow v. Richard, 8 Paige, N. Y., 351, 360, 35 Am.D. 713 note.

(6) "Resident and inhabitant of this state," a statutory phrase construed as meaning that defendant had a fixed abode in the state and was a permanent resident thereof, although he was temporarily residing outside the state.—McFarlane v. Cornelius, 73 P. 325, 328, 74 P. 468, 43 Or. 513.

94. A maxim meaning "Penal actions, arising from anything of a criminal nature, do not pass to heirs."—Black L.D.

95. U.S.—Lowenstein v. New York Fidelity and Casualty Co., C.C.Mo., 88 F. 474, 478.

96. Wash.—State v. Lorenzy, 109 P. 1064, 1066, 59 Wash. 308, Ann.Cas. 1912B 153.

97. Ky.—Majestic Theater Co. v. Lutz, 275 S.W. 16, 20, 210 Ky. 92.

98. English L.D.

99. N.J.—Meehan v. Jersey City Excise Comrs., 70 A. 363, 365, 75 N. J.Law 557.
Imports scientific fitness
In passing upon the validity of a statute affecting the procedure in constitutional courts, it was said: "When we are examining a body of systematic law in order to determine whether certain characteristics are substantial or merely accidental, we use language according to the subject matter. In such a connection, the words 'organic,' 'inherent,' 'essential,' and the like, do not import a physical, moral, or mathemati-

"Inherent" has been said to be a word of the same class as, or synonymous with, "essential" see 30 C.J.S. p 1228 note 59, "intrinsic,"[1] and "organic;"[2] and has been compared with, or distinguished from, "inalienable" see 42 C.J.S. p 497 note 20, and "restrainable."[3]

"Inherent power." An authority possessed without its being derived from another; a right, ability, or faculty of doing a thing without receiving that right, ability, or faculty from another.[4]

Inherent powers of particular entities see such C.J.S. titles as Corporations §§ 186 a, 944; Courts §§ 31, 86–88; Municipal Corporations § 117, also 43 C.J. p 191 note 32–p 192 note 51; States § 26, also 59 C.J. p 75 notes 25–36; and United States §§ 4, 5, also 65 C.J. p 1254 note 52–p 1255 note 80.

Other phrases employing the word are set out in the note.[5] Other phrases as to which more recent adjudications have not been found see 31 C.J. p 1197 note 57–p 1198 note 61.

INHERENTLY. The adverb of "inherent."[6]

INHERETRIX. The old term for "heiress."[7]

INHERIT. In its broad and more general sense, it has been defined as meaning to acquire from any source, to have imparted to or conferred upon, to receive by transmission in any way;[8] to come into possession of, to enjoy as a possession, to obtain, to possess, to receive.[9] It is often construed to mean to be possessed of, to have, to receive, to take.[10]

In law, as stated in Descent and Distribution § 1 d notes 69–80, the word has acquired a peculiar and invariable meaning;[11] it is a word of limitation,[12] although sometimes it is used, not as a word of limitation, but loosely in lieu of "take."[13] While in its strict sense as a word of limitation it denotes only the passing of real property by descent,[14] yet it is sometimes applied in a broader or more general sense to taking by will,[15] and is even frequently applied to personal property.[16]

The term has been held equivalent to, or synonymous with, "descend" see 26 C.J.S. p 984 note 28, "receive,"[17] and "take."[18] It has been compared with, or distinguished from, "hold"[19] and "take."[20]

cal necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development, and the nature of legal things."—Flanigan v. Guggenheim Smelting Co., 44 A. 762, 764, 63 N.J. Law 647.

1. N.Y.—Irving Trust Co. v. Gunder, 271 N.Y.S. 795, 816, 152 Misc. 83.

2. N.J.—Flanigan v. Guggenheim Smelting Co., 44 A. 762, 764, 63 N. J.Law 647.

3. N.J.—Meehan v. Jersey City Excise Comrs., 70 A. 363, 365, 75 N.J. Law 557.

4. Cal.—In re Jessup, 22 P. 1028, 1034, 81 Cal. 408, 6 L.R.A. 594.

5. **Phrases construed**

(1) "Inherent and inalienable rights" see 42 C.J.S. p 497 note 21 (3).

(2) "Inherent defenses" in actions for tort see the C.J.S. title Torts § 10, also 62 C.J. p 1099 note 87–p 1102 note 29.

(3) "Inherent jurisdiction."—Kelly v. Conner, 123 S.W. 622, 627, 122 Tenn. 339, 25 L.R.A.,N.S., 201. See also generally Courts §§ 15–119; Equity §§ 7–88; Federal Courts §§ 4–73.

(4) "Inherent vice."—Texas & P. R. Co. v. Prunty, Tex.Civ.App., 233 S.W. 625, 627—Texas Cent. R. Co. v. Hunter, 104 S.W. 1075, 1076, 47 Tex. Civ.App. 190.

Liability for injuries resulting from "inherent defect" or "inherent vice" of cargo see the C.J.S. titles Carriers §§ 54, 79, 98, 254–256, 259; and Shipping § 133, also 58 C.J. p 422 notes 27–30, p 424 notes 69–73.

6. Webster New Int.D.

Phrases construed

(1) "Inherently dangerous" see 25 C.J.S. p 1001 note 21.

(2) "Inherently dangerous undertaking" held not to include the removing of wallpaper by use of a machine which generated steam by means of a gasoline boiler.—Berman v. Greenburg, 50 N.E.2d 773, 775, 314 Mass. 540.

See generally the C.J.S. title Master and Servant §§ 213–215, also 39 C. J. p 338 note 99–p 342 note 18; §§ 448–453, also 39 C.J. p 859 note 76 –p 869 note 78; § 461, also 39 C.J. p 893 note 38–p 894 note 41; § 527, also 39 C.J. p 1102 note 88–p 1106 note 97; § 590, also p 1331 note 70–p 1336 note 48.

7. Black L.D.

8. Okl.—Higby v. Martin, 28 P.2d 1097, 1103, 167 Okl. 10.

Wash.—In re White, 84 P. 831, 832, 42 Wash. 360.

9. Okl.—Higby v. Martin, 28 P.2d 1097, 1103, 167 Okl. 10.

10. Okl.—Higby v. Martin, supra.

31 C.J. p 1198 notes 80–83.

11. Me.—Lyon v. Lyon, 34 A. 180, 183, 88 Me. 395.

12. Tex.—Barmore v. Darragh, Civ. App., 231 S.W. 472, 478.

13. Ky.—Craven v. Louisville Trust Co., 168 S.W.2d 723, 726, 293 Ky. 163—Dohn v. Dohn, 62 S.W. 1033, 1036, 64 S.W. 352, 110 Ky. 884, 23 Ky.L. 356.

14. Ala.—Toomer v. Van Antwerp Realty Corporation, 189 So. 549, 554, 238 Ala. 87, 123 A.L.R. 1063, citing **Corpus Juris.**

"At common law 'inherit' and 'inheritance' related to real property which descended to heirs."—In re Ryan's Estate, 133 P.2d 626, 634, 21 Cal.2d 498.

15. Ala.—Toomer v. Van Antwerp Realty Corporation, 189 So. 549, 554, 238 Ala. 87, 123 A.L.R. 1063, citing **Corpus Juris.**

16. Ala.—Toomer v. Van Antwerp Realty Corporation, supra, citing **Corpus Juris.**

Cal.—In re Ryan's Estate, 133 P.2d 626, 634, 21 Cal.2d 498.

31 C.J. p 1198 note 79.

17. Iowa.—Manchester v. Loomis, 181 N.W. 415, 422, 191 Iowa 554.

18. Iowa.—Manchester v. Loomis, supra.

Ky.—Craven v. Louisville Trust Co., 168 S.W.2d 723, 726, 293 Ky. 163.

19. Ind.—Lehman v. State, 88 N.E. 365, 367, 45 Ind.App. 330.

20. Tex.—Barmore v. Darragh, Civ. App., 231 S.W. 472, 478.

Phrases employing the word are set out in the note.[21]

INHERITABLE. Capable of being inherited; transmissible or descendible from the ancestor to the heir by course of law; heritable.[22]

INHERITANCE. In general, acquisition, ownership, possession, possession or right of possession, permanent possession, also a possession received by gift or without purchase;[23] that which is or is to be inherited;[24] the property which is inherited.[25] It is sometimes used as a synonym of "estate;"[26] and has been distinguished from "income" see 42 C.J.S. p 535 note 39.

As used in law, in its technical sense, as a word of limitation, properly restricted to real property which descends by operation of law, although sometimes more broadly construed as including both real and personal property which passes either by descent or by will, see Descent and Distribution § 1 d notes 81–1.

Phrases employing the word are set out in the note.[27]

INHERITOR. An heir; one who inherits.[28] The word has been used merely in the sense of "taker."[29]

INHIBITER or INHIBITOR. Generally, one who, or that which, inhibits; specifically, in Scotch law, a person who takes out an inhibition, q. v., as against a wife or a debtor.[30]

The term is also used in the iron and steel industry to describe a material used in the metal pickling bath to prevent the acid from impairing the integrity of the metal, although it has been said that a better term would perhaps be "neutralizer."[31]

INHIBITION. In English law, the name of a writ which forbids a judge from further proceeding in a cause depending before him; it is in the nature of a prohibition.[32]

In Scotch law, a species of diligence or process by which a debtor is prohibited from contracting any debt which may become a burden on his heritable property, in competition with the creditor at whose instance the inhibition is taken out; and from granting any deed of alienation, etc., to the prejudice of the creditor. Also a writ in the sovereign's name, passing the signet, which prohibits all and sundry from having transactions with a wife or giving her credit.[33]

In the civil law, a prohibition which the law makes or a judge ordains against an individual.[34]

In ecclesiastical law, a writ issuing from a superior ecclesiastical court, forbidding an inferior judge to proceed further in a cause pending before him; also the command of a bishop or ecclesiastical judge that a clergyman shall cease from taking any duty.[35]

21. Phrases construed

(1) "Be inherited by," construed as equivalent to "be received by" and "go to."

Pa.—Hill v. Giles, 50 A. 758, 759, 201 Pa. 215.

R.I.—Quinn v. Hall, 91 A. 71, 76, 37 R.I. 56, Ann.Cas.1917C 373.

(2) "Inherit as heirs."—Cook v. Councilman, 72 A. 404, 406, 109 Md. 622.

(3) "Inherited lands," with reference to lands inherited by a member of the Creek Nation, held to apply to all allotments selected by or for deceased members of the tribe in the hands of their heirs, whether such deceased members died before or after such allotments were made. —Shulthis v. MacDougal, C.C.Okl., 162 F. 331, 344. See also Indians § 15.

(4) "Inherit equally," as meaning to take by law and not under the will.—Cochran v. Elwell, 19 A. 672, 674, 46 N.J.Eq. 333.

22. Century D.

Illustrative phrases

(1) "Inheritable blood" see Descent and Distribution § 20 note 5.

(2) "Inheritable estate," as the only estate subject to curtesy see Curtesy § 11 a.

23. Okl.—Rigby v. Martin, 28 P.2d 1097, 1103, 167 Okl. 10.

Wash.—In re White, 84 P. 831, 832, 42 Wash. 360.

24. Wis.—Glascott v. Bragg, 87 N. W. 853, 854, 111 Wis. 605, 56 L.R.A. 258.

25. Ill.—Adams v. Akerlund, 48 N. E. 454, 457, 168 Ill. 632.

N.J.—Cummings v. Cummings, 75 A. 210, 211, 76 N.J.Eq. 568.

26. Ind.—Rountree v. Pursell, 39 N. E. 747, 749, 11 Ind.App. 522.

27. Phrases construed

(1) "Estate of inheritance" and "estates of inheritance" see Descent and Distribution §§ 65–67 and Estates §§ 7–11.

(2) "Freehold of inheritance" see Estates § 7 note 57.

(3) "Inheritance act," a name sometimes given to the English statute of 3 & 4 Wm. IV c 106, by which the law of inheritance or descent was considerably modified.—Black L.D.

(4) "Inheritance tax" or "legacy and inheritance taxes" see the C.J.S. titles Internal Revenue, also 33 C.J. p 310 note 44–p 315 note 27; and Taxation § 1111 et seq, also 61 C.J. p 1590 note 1 et seq; and consult the Descriptive-Word Index sub verbo Inheritance and Transfer Taxes.

(5) "Several inheritance," as meaning an inheritance conveyed so as to descend to two persons severally by moieties.—Black L.D., sub verbo Several Inheritance.

(6) "Words of inheritance" as required to convey a fee simple see Deeds § 109.

28. Webster New Int.D.

29. Eng.—Boys v. Bradley, 10 Hare 389, 413, 44 Eng.Ch. 376, 68 Reprint 978.

30. Century D.

31. Ind.—American Chemical Paint Co. v. Reilly Tar & Chemical Corporation, C.C.A.Ind., 110 F.2d 720.

32. Black L.D.

33. Black L.D.

34. Black L.D.

35. Black L.D.

IN HIS ENIM QUÆ SUNT FAVORABILIA ANIMÆ, QUAMVIS SUNT DAMNOSA REBUS FIAT ALQUANDO EXTENTIO STATUTI.[36]

IN HIS QUÆ DE JURE COMMUNI OMNIBUS CONCEDUNTUR, CONSUETUDO ALICUJUS PATRIÆ VEL LOCI NON EST ALLEGANDA.[37]

INHOC. In old records, a nook or corner of a common or fallow field, inclosed and cultivated.[38]

INHONESTUS. In old English law, unseemly; not in due order.[39]

INHUMACION. In Spanish law, interment.[40]

INHUMAN. Destitute of the kindness and tenderness that belongs to a human being.[41]

Inhuman treatment, or "cruel and inhuman treatment" as constituting cruelty which is a ground for divorce see Divorce §§ 24–33. For other references see Descriptive Word Index sub verbo Inhumanity.

IN IIS QUÆ SUNT MERÆ FACULTATIS NUNQUAM PRÆSCRIBITUR.[42]

INIMICAL. Having the disposition or temper of an enemy; unfavorable; unfriendly.[43]

IN INVITUM. See In 42 C.J.S. p 489 notes 3, 4.

INIQUIDAD. In Spanish law, injustice, want of equity.[44]

INIQUISSIMA PAX EST ANTEPONENDA JUSTISSIMO BELLO.[45]

INIQUITY. Absence of, or deviation from, just dealing; want of uprightness; gross injustice; wickedness.[46]

In Scotch practice, a technical expression applied to the decision of an inferior judge who has decided contrary to law. He is said to have committed iniquity.[47]

INIQUUM EST ALIOS PERMITTERE, ALIOS INHIBERE MERCATURAM.[48]

INIQUUM EST ALIQUEM REI SUI ESSE JUDICEM.[49]

INIQUUM EST INGENUIS HOMINIBUS NON ESSE LIBERAM RERUM SUARUM ALIENATIONEM.[50]

INITIAL. Beginning; placed at the beginning;[51] that which begins or stands at the beginning; also, the first letter of a man's name.[52]

Initials as constituting a part of the name see the C.J.S. title Names § 6, also 45 C.J. p 373 note 77–p 375 note 92. For references to other particular applications consult the Descriptive-Word Index.

Phrases employing the word are set out in the note.[53]

INITIALIA TESTIMONII. In Scotch law, preliminaries of testimony; the preliminary examination of a witness, before examining him in chief, answering to the voir dire of the English law, although taking a somewhat wider range.[54]

INITIA MAGISTRATUUM MELIORA FIRMA; FINIS INCLINAT.[55]

36. A maxim meaning "In things that are favorable to the spirit, though injurious to property, an extension of the statute should sometimes be made."—Black L.D.

Applied in Beawfage's Case, 10 Coke 99b, 101b, 77 Reprint 1076.

37. A maxim meaning "In those things which by common rights are conceded to all, the customs of a particular district or place is not to be alleged."—Black L.D.

Applied in Monopolies Case, 11 Coke 84b, 85b, 77 Reprint 1260.

38. Black L.D.

39. Black L.D.

40. Escriche Diccionario.

41. Ind.—Graft v. Graft, 76 Ind. 136, 138.

42. A maxim meaning "Prescription does not run against a mere power or faculty to act."—Trayner Leg. Max.

43. Webster New Int.D.

"Inimical to the public welfare"

A statutory phrase used to characterize monopolistic contracts condemned by an anti-trust statute as criminal conspiracies.—Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co., 43 So. 435, 437, 90 Miss. 551, 556, 8 L.R.A.,N.S., 1053—Yazoo & M. V. R. Co. v. Searles, 37 So. 939, 942, 85 Miss. 520.

44. Escriche Diccionario.

45. A maxim meaning "The most unjust peace is to be preferred to the justest war."—Bouvier L.D.

Applied in Roat v. Stuyvesant, 18 Wend., N.Y., 257, 305.

46. Webster New Int.D.

47. Black L.D.

48. A maxim meaning "It is inequitable to permit some to trade and to prohibit others."—Black L.D.

49. A maxim meaning "It is wrong for a man to be a judge in his own cause."—Black L.D.

50. A maxim meaning "It is unjust that freemen should not have the free disposal of their own property."—Black L.D.

51. Cyclopedic L.D.

52. Black L.D.

53. Phrases construed

(1) "Initial and moving cause" see 14 C.J.S. p 49 note 68.

(2) "Initial carrier" see Carriers § 402, and for other references consult the Descriptive-Word Index.

(3) "Initial cause" as equivalent to "efficient cause," "first cause," and "proximate cause" see 14 C.J.S. p 43 notes 15, 18, p 46 note 97.

(4) "Initial shipment".—Siebert v. Erie R. Co., 163 N.Y.S. 111, 114.

(5) "Initial terminus."—Citizens' St. R. Co. v. Africa, 42 S.W. 485, 878, 100 Tenn. 26, 37.

54. Black L.D.

55. A maxim meaning "Public of-

INITIATE. To commence;[56] to introduce by preliminary instruction or forms, guide primarily, admit formally, induct;[57] to propose for approval, as a schedule of rates.[58] As the participial adjective, commenced, or inchoate; as "curtesy initiate."[59]

"Initiated" has been held to be equivalent to "caused" see 14 C.J.S. p 52 note 88.

INITIATION. Act of initiating, or process of being initiated or introduced; the rites, ceremonies, ordeals or instructions, with which one is made a member of a sect or society.[60]

INITIATIVE. See the C.J.S. title Statutes §§ 115–151, also 59 C.J. p 685 note 51–p 721 note 45; and consult the Descriptive-Word Index sub verbo Initiative and Referendum.

INITIATOR. One who or that which initiates.[61]

IN ITINERE. See In 42 C.J.S. p 489 notes 5–7.

IN JUDGMENT. See In 42 C.J.S. p 483 note 82 (22).

IN JUDICIIS MINORI ÆTATI SUCCURRITUR.[62]

IN JUDICIO NON CREDITUR NISI JURATIS.[63]

INJUNCTION. A rule of conduct merely imposed for the time being upon a litigant by the properly constituted authority.[64] As a remedy or writ see Injunctions post.

fices are more vigorous in the beginning; but weaken toward the close."—Peloubet Leg.Max.

56. Fla.—J. I. Kelly Co. v. St. Paul F. & M. Ins. Co., 47 So. 742, 750, 56 Fla. 456, 16 Ann.Cas. 654.

57. Century D.

Illustrative phrase

"'Initiate' new employees" used to describe a custom among particular employees which consists of laying new employees across a barrel and applying the paddle.—Medlin Milling Co. v. Boutwell, Tex.Civ.App., 122 S.W. 442, 443.

58. U.S.—Idaho Power Co. v. Thompson, D.C., 19 F.2d 547, 579.

59. Black L.D.
See also Curtesy § 1 a note 4.

60. Webster New Int. D.

Phrases construed

(1) "Initiation fee," as meaning a sum paid upon joining an organization for the privileges of membership, and as not including a payment made to purchase some article required as a condition of membership, such as a uniform or shares of stock.—Derby v. U. S., D.C.Mass., 17 F.2d 119, 120.

(2) "Initiation of new employees" by fellow employees in a mill, as an established custom known and acquiesced in by the management.—Medlin Milling Co. v. Boutwell, Tex. Civ.App., 122 S.W. 442.

(3) "Initiation of new members" in a beneficial association see Beneficial Associations § 41 b.

61. Webster New Int.D.

Phrase construed

"Initiator of a bill."—State v. Thurston County Super. Ct., 159 P. 92, 94, 92 Wash. 16.

62. A maxim meaning "In judicial affairs the minor is protected."—Peloubet Leg.Max.

Similarly rendered

"In courts or judicial proceedings, infancy is aided or favored."—Black L.D.

63. A maxim meaning "In a trial, credence is given only to those who are sworn."—Black L.D.

Applied in In re Delaware River Road, 5 Pa.Dist. 694, 698, 18 Pa.Co. 165.

64. N.M.—Warder v. Shufeldt, 62 P. 2d 812, 814, 40 N.M. 442—Canavan v. Canavan, 139 P. 154, 155, 18 N.M. 640, 51 L.R.A.,N.S., 972, Ann.Cas. 1915D 1007.

INJUNCTIONS

This Title includes judicial prohibitions to parties in civil actions, by writ, order, or judgment therein, against doing or refraining from doing particular acts or things, granted as provisional, interlocutory, or final relief; nature and scope of the remedy in general; in what cases and for what purposes it is allowed; grounds of injunction and jurisdiction over and proceedings to obtain injunctions; issuance, requisites, and validity of preliminary or temporary injunctions or restraining orders; service and notice thereof; quashing, vacating, or setting aside such writs, orders, etc., and dissolution or discharge thereof, on giving security or bonds for indemnity or otherwise; final or permanent injunctions; award of damages, etc., incident to relief by injunction; violation of injunctions and punishment thereof; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., injunctions; and liability of persons other than officers for wrongful procuring, issuance, enforcement, etc., of injunctions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. NATURE AND FORM OF REMEDY

§ 1. Definition and Nature in General

An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.

An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.[1] It is an equitable remedy,[2] and has been held the principal and the most important process issued by courts of equity.[3] The function or purpose of an injunction is to restrain action or interference of some kind,[4] to furnish preventive

1. Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732, 736, citing **Corpus Juris.**
Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.
32 C.J. p 19 note 1.
Certiorari and injunction distinguished see Certiorari § 4 c.
Injunction:
And:
Quo warranto against corporations distinguished see infra § 96.
Specific performance compared see infra § 79.
As operating in personam see infra § 168.

Other definitions

(1) An injunction is a judicial process whereby a person is required to do or refrain from doing a particular thing.
Ark.—Gainsburg v. Dodge, 101 S.W. 2d 178, 193 Ark. 473.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
Tex.—Railroad Commission of Texas v. A. E. McDonald Motor Freight Lines, Civ.App., 127 S.W.2d 932.
32 C.J. p 19 note 1 [a] (2).

(2) An injunction is a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction.
La.—McDonogh v. Calloway, 7 Rob. 442, 444.
Tex.—Ex parte Hughes, 129 S.W.2d 270, 273, 133 Tex. 505, citing **Corpus Juris.**

(3) An injunction is merely process by which court enforces equity.—Santa Rita Oil Co. v. State Board of Equalization, 116 P.2d 1012, 112 Mont. 359, 136 A.L.R. 757, vacating Santa Rita Oil & Gas Co. v. Board of Equalization, 54 P.2d 117, 101 Mont. 268.

(4) "Injunction" is writ commonly used by courts of equity as incident to enforcement of its commands and decrees.
S.D.—Putnam v. Pyle, 232 N.W. 20, 57 S.D. 250.
W.Va.—Smith v. City of Parkersburg, 24 S.E.2d 588.

(5) Other definitions.
Neb.—Conrad v. Kaup, 291 N.W. 687, 137 Neb. 900—Behrens v. Smith Baking Co., 266 N.W. 61, 130 Neb. 651.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.
Tex.—Donna Independent School Dist. v. Sanders, Civ.App., 57 S.W.2d 857.
32 C.J. p 19 note 1 [a].

Statutory definitions

(1) An injunction is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims.—Minden Syrup Co. v. Applegate, La.App., 150 So. 421.

(2) Other statutory definitions see 32 C.J. p 19 note 1 [b].

Extraordinary writ, process, or remedy

U.S.—Sun Oil Co. v. Burford, C.C.A. Tex., 130 F.2d 10, vacating 124 F. 2d 467, certiorari granted Burford v. Sun Oil Co., 63 S.Ct. 265, 317 U.S. 621, 87 L.Ed. 503, and 63 S. Ct. 524, 317 U.S. 623, 87 L.Ed. 505, reversed on other grounds 63 S. Ct. 1098, 319 U.S. 315, 87 L.Ed. 1424, rehearing denied 63 S.Ct. 1442, two cases, 320 U.S. 214, 87 L. Ed. 1851—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F. Supp. 83, certiorari granted 60 S. Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S. Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143—Fleming v. Montana Coal & Iron Co., D.C. Mont., 286 F. 453, affirmed, C.C.A., 289 F. 793.
Ala.—Jackson v. Millspaugh, 14 So. 44, 100 Ala. 285.
Fla.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1—Willis v. Hathaway, 117 So. 89, 95 Fla. 608.
Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Ky.—Kentucky Utilities Co. v. Carlisle Ice Co., 131 S.W.2d 499, 279 Ky. 585.
N.Y.—Lyon v. Water Com'rs of City of Binghamton, 240 N.Y.S. 647, 228 App.Div. 585.
Or.—State v. Beaver Portland Cement Co., 124 P.2d 524, 169 Or. 1, rehearing denied State by Wilson v. Beaver Portland Cement Co., 126 P.2d 1094, 169 Or. 1.

Summary, peculiar, and extraordinary

The remedy by injunction is summary, peculiar, and extraordinary.
Alaska.—Anderson v. Smith, 8 Alaska 470.
D.C.—White v. Hesse, 48 F.2d 1018, 60 App.D.C. 106.
Mo.—Prendergast v. Blomberg, App., 141 S.W.2d 156.
Wash.—Goetz v. Russell, 232 P. 300, 132 Wash. 339.

Writ of mandate distinguished

"Writ of mandate" commands an action to be done, whereas "injunction" restrains doing of an act.—Sawyer Stores v. Mitchell, 62 P.2d 342, 103 Mont. 148.

A cease and desist order of the National Labor Relations Board is of the nature of an injunction.—National Labor Relations Board v. Wm. Tehel Bottling Co., C.C.A., 129 F.2d 250.

2. Cal.—Meridian, Limited v. City and County of San Francisco, 90 P. 2d 537, 13 Cal.2d 424, rehearing denied and opinion amended on other grounds 91 P.2d 105, 13 Cal.2d 424.
Mont.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.
Tex.—Hinds v. Minus, Civ.App., 64 S.W.2d 1093.
Utah.—Riggins v. District Court of Salt Lake County, 51 P.2d 645, 89 Utah 183.

3. Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

Strong arm of equity

Injunction is frequently spoken of as the strong arm of equity.
Alaska.—Anderson v. Smith, 8 Alaska 470.
Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

4. U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Securities and Exchange Commission v. Okin, D.C.N.Y., 51 F.Supp. 925.
Cal.—Ellis v. American Federation of Labor, 120 P.2d 79, 48 Cal.App.2d 440.
Ga.—Jones v. Methvin, 17 S.E.2d 172, 193 Ga. 17.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

relief against irreparable mischief or injury,[5] or to preserve the status quo;[6] it is protection for the future and not punishment for past transactions, as discussed infra § 22 c.

As prerogative writ. The writ of injunction is not in itself a prerogative writ, but it is sometimes put to prerogative purposes, for example, when it is sued out in behalf of the sovereign or state in aid of the jurisdiction to enforce trusts and prevent public nuisances or to enjoin the abuse of trust powers.[7]

§ 2. Preliminary Injunction

An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits to preserve the subject in controversy in its then existing condition.

An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits, and its sole object is to preserve the subject in controversy in its then existing condition, and without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party.[8] This is so whether the in-

5. Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

6. Wash.—Blanchard v. Golden Age Brewing Co., supra.

7. Or.—State v. Lord, 43 P. 471, 28 Or. 498, 31 L.R.A. 473.
32 C.J. p 20 note 2.

High prerogative writ

Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.

8. Ala.—Browning v. Wesco Co., 119 So. 660, 218 Ala. 544—Hamilton v. City of Birmingham, 189 So. 776, 779, 28 Ala.App. 534, quoting **Corpus Juris.**

Del.—Consolidated Film Industries v. Johnson, 192 A. 603, 121 Del.Ch. 417.

Ill.—Cleaning & Dyeing Plant Owners Ass'n of Chicago v. Sterling Cleaners & Dyers, 278 Ill.App. 70—Kuhl v. Clark, 261 Ill.App. 491—Lincoln Trust & Savings Bank v. Nelson, 261 Ill.App. 370—Levy v. Rosen, 258 Ill.App. 262.

La.—State v. Great Atlantic & Pacific Tea Co., 183 So. 219, 222, 190 La. 925, quoting **Corpus Juris**—Palama v. Livaudais, 153 So. 691, 179 La. 201—Ruiz v. Alfonso, App., 1 So.2d 330.

Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

N.H.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N.H. 426.

Okl.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.

Pa.—Shenkin v. Schermerhorn, 18 Pa. Dist. & Co. 470—Commonwealth v. Simon, 6 Pa.Dist. & Co. 93, 95, quoting **Corpus Juris.**

R.I.—Havens v. Crandall, 150 A. 76, 51 R.I. 8, citing **Corpus Juris.**

S.C.—Williams v. Jones, 75 S.E. 705, 92 S.C. 342.

Tex.—City of Dallas v. Wright, 36 S.W.2d 973, 120 Tex. 190, 77 A.L.R. 709—Pacific Mid-Continent Corporation v. Tunstill, Civ.App., 159 S.W.2d 908—City of Fort Worth v. Tarlton, Civ.App., 151 S.W.2d 268—Smith v. State, Civ.App., 140 S.W.2d 299—Kimbrough v. State, Civ.App., 139 S.W.2d 165, 168, quoting **Corpus Juris**—Bellows-MacLay Const. Co. v. MacLay, Civ.App., 98 S.W.2d 213—Morgan v. Smart, Civ.App., 88 S.W.2d 769, 770, quoting **Corpus Juris**—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079—Railroad Commission of Texas v. Real, Civ.App., 80 S.W.2d 494, 495, citing **Corpus Juris**—Southland Life Ins. Co. v. Egan, Civ.App., 79 S.W.2d 899, 900, citing **Corpus Juris,** and reversed on other grounds 86 S.W.2d 722, 126 Tex. 160—Dallas Joint Stock Land Bank of Dallas v. Davis, Civ.App., 73 S.W.2d 989—Sinclair Refining Co. v. City of Paris, Civ.App., 68 S.W.2d 230, 235, citing **Corpus Juris**—Thurman v. State, Civ.App., 67 S.W.2d 382—Gordon v. Hawkins, Civ.App., 66 S.W.2d 432, 434, citing **Corpus Juris**—Diamond v. Hodges, Civ.App., 58 S.W.2d 187—Texas Milk Products Co. v. City of Mt. Pleasant, Civ.App., 55 S.W.2d 1101, 1104, quoting **Corpus Juris**—Terrell v. Alpha Petroleum Co., Civ.App., 54 S.W.2d 821—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73—Walter v. Hammonds, Civ.App., 42 S.W.2d 1083, 1084, citing **Corpus Juris**—Midland Building & Loan Ass'n v. Sparks Chapel Colored M. E. Church in America, Civ.App., 35 S.W.2d 774—City of Farmersville v. Texas-Louisiana Power Co., Civ.App., 33 S.W.2d 272, 274, citing **Corpus Juris**—Welsh v. Carter, Civ.App., 30 S.W.2d 354, 355, quoting **Corpus Juris.**

Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 435.

32 C.J. p 20 note 4—62 C.J. p 311 notes 84-92.

Other definitions

(1) An injunction whose permanence must await the final determination of the rights of the parties under the pleadings is an "injunction pendente lite."—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F.2d 202.

(2) Temporary injunction is merely an interlocutory writ to preserve status of parties until court can determine merits of the controversy.—City of Springfield v. North Fork Outlet Drainage Dist., 249 Ill.App. 133.

(3) A "temporary injunction" is an order granted to hold until further orders of court, or until trial of the case on its merits.—Frisby v. Rockins, Tex.Civ.App., 105 S.W.2d 362, error dismissed.

(4) A "temporary injunction" is one granted at commencement of suit before determination of parties' rights to restrain defendant from committing or continuing acts in dispute, and may be made perpetual or discharged.—Railroad Commission of Texas v. A. E. McDonald Motor Freight Lines, Tex.Civ.App., 127 S.W.2d 932.

Merely provisional in nature

Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386—Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190—Klein's Restaurant Corporation v. McLain, 11 N.E.2d 644, 293 Ill.App. 54.

Purpose

(1) The sole purpose of a temporary injunction is to maintain the cause in statu quo until a trial on the merits.

U.S.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F.2d 42—Cywan v. Blair, D.C.Ill., 16 F.2d 279—G. F. Heublein & Bro. v. Bushmill Wine & Products Co., D.C.Pa., 39 F.Supp. 549—Fratelli Branca & Co. v. Pagliaro, D.C.Pa., 36 F.Supp. 344—Best Foods v. Hemphill Packing Co., D.C.Del., 295 F. 425.

Conn.—Olcott v. Pendleton, 22 A.2d 633, 128 Conn. 292.

Del.—Consolidated Film Industries v. Johnson, 192 A. 603, 121 Del.Ch. 417.

Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.

Ill.—Almon v. American Carloading Corporation, 44 N.E.2d 592, 380 Ill. 524, reversing 38 N.E.2d 362, 312 Ill.App. 225—Morris v. Patterson, 37 N.E.2d 918, 311 Ill.App. 657—Rossman v. Chapman, 37 N.E.2d 911, 312 Ill.App. 185—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102—Halsted Calumet River Golf Ass'n v. Riverdale Coal & Dock Co., 32 N.E.2d 375, 308 Ill.App. 670—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 23 N.E.2d 229, 301 Ill.App. 591—Friedman v. Peckler, 255 Ill.App. 199.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

Minn.—Jannetta v. Jannetta, 285 N. W. 619, 205 Minn. 266—Minneapolis Electric Lamp Co. v. Federal Holding Co., 201 N.W. 324, 161 Minn. 198.

Mo.—State, on Inf. of McKittrick, v. American Ins. Co., 173 S.W.2d 51.

Mont.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293—Claussen v. Chapin, 221 P. 1073, 69 Mont. 205.

N.J.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 485, 120 N.J.Eq. 376—Fraxam Amusement Corporation v. Skouras Theatre Corporation, 167 A. 672, 113 N.J.Eq. 509—Paragon Distributing Corporation v. Paragon Laboratories, 129 A. 404, 99 N.J.Eq. 224.

N.Y.—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413—Coffey v. Metro-Goldwyn-Mayer Corporation, 289 N.Y.S. 882, 160 Misc. 186—Bohl v. City of Schenectady, 220 N.Y.S. 349, 128 Misc. 863.

N.C.—Hurwitz v. Carolina Sand & Gravel Co., 126 S.E. 171, 189 N.C. 1.

Okl.—Drummond v. Jeffrey, 65 P.2d 1212, 179 Okl. 409, citing **Corpus Juris.**

Or.—State v. Mart, 295 P. 459, 135 Or. 603.

Pa.—Commonwealth v. Cohen, 28 A. 2d 723, 150 Pa.Super. 487.

S.C.—Queen v. Swink, 131 S.E. 324, 134 S.C. 21.

Tex.—Perry v. Stringfellow, 134 S. W.2d 1031, 134 Tex. 328, reversing, Civ.App., 113 S.W.2d 1012—Nelms v. Electro-Ball Co., Civ.App., 157 S.W.2d 681, error refused—McMurrey Refining Co. v. State, Civ. App., 149 S.W.2d 276, error refused—Kimbrough v. State, Civ.App., 139 S.W.2d 165—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W. 2d 230, error refused—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Ford Rent Co. v. Mayfair Taxicab Co., Civ.App., 99 S.W.2d 1023—Vireca Corporation v. Cole, Civ.App., 93 S.W.2d 567—Kilburn v. Childers, Civ.App., 86 S. W.2d 832—Railroad Commission v. Goodson, Civ.App., 81 S.W.2d 279—Williams v. De Fee, Civ.App., 77 S. W.2d 729—Sinclair Refining Co. v. City of Paris, Civ.App., 68 S.W.2d 230—Hunt v. Hunt, Civ.App., 55 S.W.2d 911—Crowell v. Cammack, Civ.App., 40 S.W.2d 259—Coffee v. Borger State Bank, Civ.App., 38 S. W.2d 187—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused—Texarkana & Ft. S. Ry. Co. v. Miller-Vidor Lumber Co., Civ.App., 288 S.W. 498—Duncan v. Boyd, Civ.App., 288 S. W. 281.

Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523.

W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

(2) Purpose of temporary injunction is to preserve status quo of subject matter of suit against any act which would render final judgment ineffectual.—Moffitt v. Lloyd, Tex. Civ.App., 98 S.W.2d 860—Gordon v. Hoencke, Tex.Civ.App., 253 S.W. 629.

(3) The purpose of an injunction pendente lite is to guard against a change in conditions that will hamper or prevent granting of such relief as may be found proper after trial of the issues.—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987—American Mercury v. Kiely, C.C.A.N.Y., 19 F.2d 295—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A. Iowa, 9 F.2d 246.

(4) An "ad interim restraint" is intended to enable the court fully to deliberate and investigate the case and the injunction maintains a status quo so that the parties are in substantially the same plight when the final decree is entered as they were when the litigation began.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J.Eq. 283—Magna Mfg. Co. v. Ætna Casualty & Surety Co., 18 A.2d 565, 129 N.J.Eq. 142.

(5) The essential function of a "preliminary injunction" is to avert threatened irreparable mischief until an opportunity is afforded for a full and deliberate investigation of case in ordained mode.—Benton v. Kernan, 8 A.2d 719, 126 N.J.Eq. 343, modifying 6 A.2d 195, 125 N.J.Eq. 412—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 5 A.2d 682, 125 N.J.Eq. 250—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J.Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545.

(6) An "interlocutory injunction" is wholly provisional, preliminary, and preparatory, looks to a future and final hearing more deliberate, solemn, and complete than any theretofore had, and does not forestall result of such hearing, or settle what it shall be, although contemplating what it may be.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.

A temporary injunction has served its purpose when, after a trial on the merits, a permanent injunction is issued.—Shahen v. Superior Court of San Bernardino County, 115 P.2d 516, 46 Cal.App.2d 187.

Synonymous terms

(1) Terms "temporary injunction," "preliminary injunction," and "interlocutory injunction" mean the same thing.—Panhandle Const. Co. v. Plain, Tex.Civ.App., 52 S.W.2d 504.

(2) Temporary injunctions, which are also called interlocutory injunctions, preliminary injunctions, and even permanent injunctions as distinguished from perpetual injunctions, operate, unless dissolved by a further order, until final judgment.—Mickle v. Garrett, Tex.Civ.App., 110 S.W.2d 1235.

(3) An "injunction ad interim" is part of equity police and a device to keep parties in order and prevent one from hurting the other while their respective rights are under adjudication.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.

Name immaterial

If a restraint imposed by order of court is "until the further order of the court" it is a "preliminary injunction" regardless of what the order is called by the court issuing it.—Gray v. Bybee, Cal.App., 141 P.2d 32—Lincoln v. Superior Court of Madera County, 124 P.2d 179, 51 Cal. App.2d 61.

Distinguished from perpetual injunction

A clear legal distinction exists between an "order" granting injunctive relief and a "judgment" granting a perpetual injunction, the former being merely interlocutory preserving status quo or protecting rights of litigants pending decision on the merits, and the latter being a final adjudication of rights of parties subject only to right of appeal, pending which full protection to rights of party affected by permanent injunction is secured by right to supersede.—Allen v. Gulf Oil Corporation, Tex. Civ.App., 139 S.W.2d 207, error refused.

junction is prohibitory or mandatory.[9] Distinguishing characteristics of injunctions of this class are that they do not conclude the rights of the parties, and that their issuance is not dependent on a hearing on the merits.[10]

§ 3. Perpetual Injunction

A permanent or perpetual injunction is one granted by the judgment which finally disposes of the injunction suit.

A perpetual or permanent injunction is one granted by the judgment which finally disposes of the injunction suit.[11] It forms a part of the judgment on a hearing on the merits,[12] and it can properly be ordered only on the final judgment.[13] Injunctions of this class are in no sense provisional remedies but are always, and must be, final relief.[14]

In order to grant relief on the merits of the case by perpetual injunction it is not a prerequisite that a temporary injunction should have been applied for and granted, as discussed infra § 213.

§ 4. Preventive or Prohibitive or Prohibitory Injunction

A prohibitive or preventive injunction commands a person to refrain from doing an act and necessarily operates on unperformed acts and prevents a threatened but nonexistent injury.

An injunction may compel a person to do as well as to refrain from doing,[15] and injunctions are mandatory or preventive according as they command defendant to do, or to refrain from doing, a particular thing.[16] A preventive or prohibitive or prohibitory injunction commands a person to refrain from doing an act.[17] Injunctions of this character necessarily operate on unperformed and unexecuted acts and prevent a threatened but nonexistent injury,[18] and they cannot be used to redress a consummated wrong or to undo what has been done.[19] A concrete case is presented whenever a right of the plaintiff is threatened by the defendant, and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity.[20]

9. Tex.—Railroad Commission of Texas v. Real, Civ.App., 80 S.W.2d 494, 495, citing **Corpus Juris**—Texas Milk Products Co. v. City of Mt. Pleasant, Civ.App., 55 S.W.2d 1101, 1104, quoting **Corpus Juris**—Welsh v. Carter, Civ.App., 30 S.W. 2d 354, 355, quoting **Corpus Juris.**
W.Va.—Powhatan Coal & Coke Co. v. Ritz, 56 S.E. 257, 60 W.Va. 395, 9 L.R.A.,N.S., 1225.

10. Ala.—French Piano & Organ Co. v. Forbes, 32 So. 678, 134 Ala. 302, 92 Am.S.R. 31.
Tex.—Texas Milk Products Co. v. City of Mt. Pleasant, Civ.App., 55 S.W.2d 1101, 1104, quoting **Corpus Juris**—City of Farmersville v. Texas-Louisiana Power Co., Civ.App., 33 S.W.2d 272, 274, citing **Corpus Juris.**

11. N.C.—Galloway v. Stone, 182 S. E. 333, 208 N.C. 739.
Tex.—City of Fort Worth v. Tarlton, Civ.App., 151 S.W.2d 268—Smith v. State, Civ.App., 140 S.W.2d 299—Smith v. Coleman, Civ.App., 127 S.W.2d 928.
32 C.J. p 21 note 11.

Nature

An injunctive decree is "executory" and "continuing" as to purpose or object to be attained, and operates until vacated, modified or dissolved, but is "permanent" in sense that it enjoins a party from doing that which he had no legal or equitable right to do.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.

12. Tex.—Mickle v. Garrett, Civ. App., 110 S.W.2d 1235.
32 C.J. p 21 note 12.

13. Tex.—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.
32 C.J. p 21 note 13.

14. N.Y.—Jackson v. Bunnell, 21 N. E. 79, 113 N.Y. 216.

15. La.—Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 So.2d 606, 201 La. 749.

16. Okl.—Dusbabek v. Local Building & Loan Ass'n, 63 P.2d 756, 178 Okl. 592.
Tex.—Cartwright v. Warren, Civ. App., 177 S.W. 197.

Determination of character

(1) Whether an injunction is prohibitory or mandatory in character is not always easy of determination. —Pomin v. Superior Court in and for El Dorado County, 112 P.2d 17, 44 Cal.App.2d 206.

(2) The character of an injunction, as prohibitive or mandatory, is determined not so much by the particular designation given to it by the court directing its issuance as by the nature of its terms and provisions, and the effect on the persons against whom it is issued.
Cal.—Ohaver v. Fenech, 273 P. 555, 206 Cal. 118.
Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619.

(3) The character of an injunction as to whether it is mandatory or preventive is determined by the situation at the time of the filing of the bill therefor.—Carver v. San Pedro, L. A. & S. L. R. Co., C.C.Cal., 151 F. 334.

17. Fla.—Zetrouer v. Zetrouer, 103 So. 625, 89 Fla. 253.
Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.
Wis.—Carpenter Baking Co. v. Bakery Sales Drivers Local Union, No. 344, 296 N.W. 118, 237 Wis. 24.
32 C.J. p 21 note 17.

18. Cal.—Ohaver v. Fenech, 273 P. 555, 206 Cal. 118.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 145, 216 N.C. 401, citing **Corpus Juris.**
Tex.—Anderson v. City of San Antonio, Civ.App., 26 S.W.2d 353, 354, citing **Corpus Juris.**
32 C.J. p 22 note 18.

Preserves status quo

An injunction is purely "prohibitory" which merely has effect of preserving subject of litigation in statu quo.—Pomin v. Superior Court in and for El Dorado County, 112 P. 2d 17, 44 Cal.App.2d 206.

19. N.C.—Jackson v. Jernigan, 5 S. E.2d 143, 216 N.C. 401.

20. Mo.—Schubach v. McDonald, 78 S.W. 1020, 179 Mo. 163, 101 Am.S. R. 452, 65 L.R.A. 136.

§ 5. Mandatory Injunction

a. In general
b. Preliminary mandatory injunctions

a. In General

A mandatory injunction is an extraordinary remedial process which commands the performance of some positive act, and it is well settled that courts of equity have jurisdiction in proper cases to compel the performance of an act as well as to restrain it.

A mandatory injunction is an extraordinary remedial process[21] resorted to usually for the purpose of effectuating full and complete justice,[22] and commands the performance of some positive act.[23] While it has been said that the granting of mandatory injunctions is governed by the same rules as the granting of preventive injunctions,[24] courts are more reluctant to grant a mandatory injunction than a prohibitory one,[25] and generally an injunction will not lie except in prohibitory form.[26] In a very great majority of cases injunction is a merely preventive remedy, and in some cases courts have on this ground refused to issue an injunction mandatory in its nature, or have broadly declared that it is not the object of an injunction to redress a consummated wrong or to undo what has been done.[27]

Nevertheless, since the purpose of mandatory injunctions is not to correct a wrong of the past, in the sense of redress for injury already sustained, but to prevent further injury,[28] except in jurisdictions where the practice is governed by special statutory provisions,[29] a court of equity is not always limited to the restraint of a contemplated or threat-

21. U.S.—Morrison v. Work, 45 S. Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 290 F. 306, 53 App.D.C. 331—Stafford Mills v. White, D.C.Mass., 41 F.2d 58.
Ill.—Lyle v. City of Chicago, 191 N. E. 255, 357 Ill. 41, 93 A.L.R. 1492.
Ind.—Schwartz v. Holycross, 149 N. E. 699, 83 Ind.App. 658.
N.Y.—Lexington & Fortieth Corporation v. Callaghan, 24 N.E.2d 316, 281 N.Y. 526, affirming 11 N.Y.S.2d 554, 256 App.Div. 978, leave to appeal denied 12 N.Y.S.2d 362, 257 App.Div. 806, and motion denied 25 N.E.2d 147, 282 N.Y. 594.
W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

22. W.Va.—State v. Baker, supra.

23. Cal.—Ohaver v. Fenech, 273 P. 555, 206 Cal. 118.
Fla.—Zetrouer v. Zetrouer, 103 So. 625, 89 Fla. 253.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.
Wis.—Carpenter Baking Co. v. Bakery Sales Drivers Local Union, No. 344, 296 N.W. 118, 237 Wis. 24.
32 C.J. p 22 note 21.

Determination of character

(1) For the purpose of determining whether the effect of an injunction is mandatory or prohibitory, the result of the enforcement of the writ on defendant must be considered; and if it compels him affirmatively to surrender a position which he holds, and which, on facts alleged by him, he is entitled to hold, it is mandatory.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619.

(2) Order of court effective to transfer possession of property from defendants to plaintiff, and restrain defendants from interfering with plaintiff's use thereof in fulfillment of alleged contract until further order of court, is a mandatory injunction.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.

(3) An injunction is mandatory if it has effect of compelling performance of a substantive act and necessarily contemplates change in relative position or rights of parties at time the injunction is granted or the decree entered.—Pomin v. Superior Court in and for El Dorado County, 112 P.2d 17, 44 Cal.App.2d 206.

(4) An injunction, requiring person to cease selling, or suffering to be sold, on his premises intoxicating beverages for other than specified purposes, without requiring any affirmative act on his part, is "prohibitory injunction," not "mandatory injunction," as mere passiveness on such person's part will remedy condition complained of.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind. App. 212.

Cease and desist order

The affirmative provisions of a cease and desist order of the National Labor Relations Board are analogous to a mandatory injunction. —National Labor Relations Board v. Wm. Tehel Bottling Co., C.C.A., 129 F.2d 250.

24. Okl.—Thompson v. North, 129 P. 2d 1011, 191 Okl. 356.
Tex.—Houston Funeral Home v. Boe, Civ.App., 78 S.W.2d 1091.

25. Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
Okl.—Dusbabek v. Local Building & Loan Ass'n, 63 P.2d 756, 178 Okl. 592.

26. La.—Prescott v. Prescott, 141 So. 88, 174 La. 653—Broussard v. Cormier, 98 So. 403, 154 La. 877.

Rarely granted

As mandatory injunctions are not favored, they will rarely be granted. —State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152—Higgins v. Lewis, 137 S.W.2d 308, 23 Tenn.App. 648.

27. Ill.—Lyle v. City of Chicago, 191 N.E. 255, 357 Ill. 41, 93 A.L.R. 1492.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 145, 216 N.C. 401, citing **Corpus Juris.**
32 C.J. p 22 note 23.
Right to injunction where injury sustained prior to suit generally see infra § 22 c.

28. Iowa.—Troe v. Larson, 54 N.W. 179, 84 Iowa 649, 35 Am.S.R. 336.

29. Ga.—Braswell v. Palmer, 11 S. E.2d 889, 191 Ga. 262—Georgia Power Co. v. City of Rome, 157 S.E. 283, 172 Ga. 14—Beck v. Kah, 136 S.E. 160, 163 Ga. 365.
32 C.J. p 22 note 24.

Applicable to final decrees

The statute declaring that an injunction may only restrain and may not compel a party to perform an act does not limit inhibition to the granting of an interlocutory injunction, but is applicable to final decrees and to rulings on demurrer.—Campbell v. Deal, 195 S.E. 432, 185 Ga. 474.

Requiring incidental affirmative action

(1) Where main purpose of an injunction is not to require any affirmative action, but to restrain defendant from repeating a trespass, injunction is not mandatory although compliance therewith may require some affirmative action on part of party enjoined.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163—Denson v. Tarver, 197 S.E. 242, 186 Ga. 180—Noland v. Biggers, 156 S.E. 266, 171 Ga. 627—Rosser v. Styron, 155 S.E. 23, 171 Ga. 238—32 C.J. p 22 note 24 [b] (8).

(2) Injunction against continuing trespass by servant on master's premises is not objectionable as mandatory although restraining servant from remaining on premises.—Killian v. Cherokee County, 150 S.E. 158, 169 Ga. 313.

ened action;[30] and it is settled beyond question that equity has jurisdiction in a proper case to compel affirmative performance of an act as well as to restrain it,[31] and that it is its duty to do so,[32] especially where it is the only remedy which will meet the requirements of the case.[33]

A mandatory injunction may be granted although the act causing the injury has been completed before the suit is brought and complainant may by this means be put in statu quo,[34] and where defendant

(3) When main purpose of injunction is to restrain diversion of water from natural channel causing overflow, injunction is not mandatory and contrary to statute, although requiring some affirmative action such as opening of hole in wall to permit water to flow.—Spencer v. Tumlin, 116 S.E. 600, 155 Ga. 341.

(4) Where main purpose of injunction is to restrain repeated trespass, injunction is not mandatory, although compliance with it requires affirmative action by party enjoined, such as removal of fence across roadway to cemetery.—Phinizy v. Gardner, 125 S.E. 195, 159 Ga. 136.

Injunctions held mandatory

(1) The rule against allowance of mandatory injunctions could not be evaded by enjoining a creditor holding a personal judgment based on an indebtedness secured by a deed to realty from adding interest thereon until security was levied on and sold.—Shedden v. National Florence Crittenton Mission, 12 S.E.2d 618, 191 Ga. 428.

(2) Interlocutory injunction, which, if enforced, would dispossess defendant and admit plaintiff into possession of controverted premises, was in legal effect mandatory injunction, and relief afforded thereby not within scope of writ.—Bond v. Harrison, 168 S.E. 604, 176 Ga. 568—Beck v. Kah, 136 S.E. 160, 163 Ga. 365—Burns v. Hale, 133 S.E. 857, 162 Ga. 336.

(3) Other injunctions see 32 C.J. p 22 note 24 [b].

In Idaho

(1) It was held in a case citing Corpus Juris that, since a preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal, it was unnecessary to determine whether a statute providing that an injunction is a writ or order requiring a person to refrain from a particular act and a case construing such statute forbid a mandatory injunction.—Evans v. District Court of Fifth Judicial Dist., 275 P. 99, 100, 47 Idaho 267.

(2) Under the statute, "an injunction is a writ or order requiring a person to refrain from a particular act . . . and not a writ or order requiring a person to do a certain act."—Brinton v. Steele, 112 P. 319, 19 Idaho 71—Wilson v. Boise City, 60 P. 84, 7 Idaho 69, 74.

30. U.S.—Ex parte Lennon, Ohio, 17 S.Ct. 658, 166 U.S. 548, 41 L.Ed. 1110, affirming 64 F. 320, 12 C.C.A. 134.

31. U.S.—Texas & N. O. R. Co. v. Northside Belt Ry. Co., Tex., 48 S.Ct. 361, 276 U.S. 475, 72 L.Ed. 661, affirming, C.C.A., 16 F.2d 782, affirming, D.C., 8 F.2d 153, and certiorari granted 47 S.Ct. 768, 274 U.S. 734, 71 L.Ed. 1335—Delaware & Hudson R. Corporation v. Williams, C.C.A.Ill., 129 F.2d 11—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F.2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685—Clarkson Coal Mining Co. v. United Mine Workers of America, D.C.Ohio, 23 F.2d 208—Simon v. Frankfort Distillery, C.C.A.Ky., 2 F.2d 949—Sims v. Stuart, D.C.N.Y., 291 F. 707.

Colo.—Werner v. Norden, 287 P. 644, 87 Colo. 339—Wimer & Co. v. Downs, Inc., 237 P. 155, 77 Colo. 377.

Fla.—Bowling v. National Convoy & Trucking Co., 135 So. 541, 101 Fla. 634.

Ind.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.

Ky.—W. D. Harris & Co. v. Lewis, 32 S.W.2d 401, 403, 235 Ky. 810, citing **Corpus Juris.**

La.—Broussard v. Cormier, 98 So. 403, 154 La. 877.

Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.

Mass.—Department of Public Utilities v. Trustees of Properties of New York, N. H. & H. R. Co., 24 N.E.2d 647, 304 Mass. 664.

Mo.—State ex rel. Shartel v. Humphreys, 93 S.W.2d 924, 926, 338 Mo. 1091, citing **Corpus Juris.**

Mont.—Grosfield v. Johnson, 39 P.2d 660, 664, 98 Mont. 412, quoting **Corpus Juris.**

N.J.—Rayhertz Amusement Corporation v. Fulton Improvement Co., 200 A. 557, 124 N.J.Eq. 121.

N.C.—First Nat. Bank v. People's Bank, 140 S.E. 705, 194 N.C. 720.

Ohio.—Portmann v. Board of Elections of Stark County, 19 N.E.2d 531, 60 Ohio App. 54.

Pa.—Farmers' Trust Co. of Lancaster v. Miller, 176 A. 815, 116 Pa. Super. 446.

Tenn.—White v. N. C. & St. L. Ry., 1 Tenn.App. 467.

Wash.—Delorme v. International Bartenders' Union, Local 624, 139 P.2d 619.

W.Va.—Kennedy v. Klammar, 139 S. E. 713, 104 W.Va. 198, citing **Corpus Juris.**

32 C.J. p 23 note 26.

Statutory power

The exercise of jurisdiction, expressly conferred by statute, to give equitable relief by compelling affirmative action, is not limited to usual situation in which, apart from statute, mandatory injunction may be issued, as where defendant is guilty of continuing wrong on plaintiff and termination of wrongful conduct involves restoration of conditions existing before it began.—Department of Public Utilities v. Trustees of Properties of New York, N H. & H. R. Co., 24 N.E.2d 647, 304 Mass. 664.

Compelling court to decide

Since a mandatory injunction to compel a judge to act is equivalent to mandamus and the same rules apply, as discussed infra § 9, where a court found that defendant had not been discharged in bankruptcy in the federal court as alleged a mandatory injunction would not lie to compel the court to decide that defendant had been discharged—Hargis v. Howard, 114 S.W.2d 78, 272 Ky. 263—Hargis v. Swope, 114 S.W. 2d 75, 272 Ky. 257.

Procuring interview between prisoner and attorney

Sheriff's arbitrary refusal to permit interview between prisoner and attorney justifies immediate mandatory injunction.—Farrall v. Hood, Tex.Civ.App., 32 S.W.2d 480.

32. U.S.—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 107 C.C. A. 403, affirming, C.C., 174 F. 59, and certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612.

33. Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.

34. U.S.—Sims v. Stuart, D.C.N.Y., 291 F. 707.

Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and

has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things,[35] and thereby prevent the gaining of an advantage by reason of the wrongful act.[36] Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the status quo,[37] or to grant such other relief as may be proper under the particular circumstances of the case.[38] Also a mandatory injunction may issue in the enforcement of a judgment or decree;[39] or as an auxiliary to a prohibitory injunction.[40]

However, even if the right is clear, it does not follow that a mandatory injunction must be granted,[41] and such injunctions will be issued only in cases of extreme[42] necessity,[43] where the right invaded is material and substantial,[44] and where adequate redress at law is not afforded.[45] Mandatory injunctions will never be granted unless extreme or very serious damage at least will ensue from withholding that relief;[46] nor will they be issued in doubtful cases,[47] where they would promote, and

Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.
Mont.—Grosfield v. Johnson, 39 P.2d 660, 664, 98 Mont. 412, quoting **Corpus Juris.**
Tex.—Texas Co. v. Watkins, Civ. App., 82 S.W.2d 1079.
32 C.J. p 23 note 29.

Hasty action to anticipate litigation may be rectified by a mandatory injunction.—Palmetto Fire Ins. Co. v. Conn, D.C.Ohio, 9 F.2d 202, affirmed 47 S.Ct. 88, 272 U.S. 295, 71 L.Ed. 243.

35. U.S.—Texas & N. O. R. Co. v. Northside Belt Ry. Co., Tex., 48 S.Ct. 361, 276 U.S. 475, 72 L.Ed. 661, affirming, C.C.A., 16 F.2d 782, affirming, D.C., 8 F.2d 153, and certiorari granted 47 S.Ct. 768, 274 U. S. 734, 71 L.Ed. 1335—St. Louis Southwestern Ry. Co. v. Board of Directors of Red River Levee Dist. No. 1, C.C.A.Ark., 32 F.2d 124.
Colo.—Werner v. Norden, 287 P. 644, 87 Colo. 339.
Ky.—Wise v. Chandler, 108 S.W.2d 1024, 1036, 270 Ky. 1, quoting **Corpus Juris.**
Okl.—Dusbabek v. Local Building & Loan Ass'n, 63 P.2d 756, 178 Okl. 592.
Pa.—O'Donnell v. Lehigh Nav. Coal Co., 188 A. 348, 324 Pa. 369.
32 C.J. p 24 note 37.

The absence of a preliminary injunction, or a request therefor, has been held not to render the rule inapplicable.
Colo.—Werner v. Norden, 287 P. 644, 87 Colo. 339.
Hawaii.—Anderson v. W. G. Rawley Co., 27 Hawaii 150.

Buildings violating zoning ordinance
Mandatory injunction compelling partial destruction of buildings erected after notice of defendants' violation of zoning ordinance was properly granted, notwithstanding claim that money judgment would sufficiently compensate plaintiffs.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

36. U.S.—St. Louis & S. F. R. Co. v. Cross, C.C.Okl., 171 F. 480.
37. Colo.—Werner v. Norden, 287 P. 644, 87 Colo. 339—Grattan v. Wilson, 259 P. 6, 82 Colo. 239—Thornton v. Schobe, 243 P. 617, 79 Colo. 25.
Okl.—State v. Board of County Com'rs of Creek County, 107 P.2d 542, 552, 188 Okl. 184, citing **Corpus Juris.**
32 C.J. p 24 note 40.
38. Ky.—Wise v. Chandler, 108 S.W. 2d 1024, 1036, 270 Ky. 1, quoting **Corpus Juris.**
32 C.J. p 24 note 40.
39. La.—Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 So.2d 606, 201 La. 749—Town of Leesville v. Kapotsky, 122 So. 59, 168 La. 342.
Tex.—White v. State, Civ.App., 122 S.W.2d 714.

Implied power
Power of court to grant injunction necessary to protect jurisdiction and enforce mandate will be inferred as necessary implication from express jurisdiction.—McCarty v. McCarty, Tex.Civ.App., 40 S.W.2d 165, error dismissed, Com.App., 61 S.W.2d 1115.

40. La.—Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 So.2d 606, 201 La. 749—Town of Leesville v. Kapotsky, 122 So. 59, 168 La. 342.
41. Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
42. Miss.—State ex rel. Rice v. Allen, 177 So. 763, 180 Miss. 659.
Tenn.—Slatten v. Mitchell, 124 S.W. 2d 310, 22 Tenn.App. 547.
43. Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.
Okl.—Thompson v. North, 129 P.2d 1011, 191 Okl. 356.
Pa.—Gordon v. Pettey, 139 A. 914, 291 Pa. 258.
Tex.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Civ.App., 263 S. W. 1103.
44. N.Y.—Van Cortlandt v. New York Cent. R. Co., 263 N.Y.S. 842, 238 App.Div. 132, reversing 250 N. Y.S. 298, 139 Misc. 892, and reversed on other grounds 192 N.E. 401, 265 N.Y. 249—Horton v. Niagara, Lockport & Ontario Power Co., 247 N.Y.S. 741, 231 App.Div. 386.
Existence and nature of right protected generally see infra § 19.
45. Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.
Tenn.—Slatten v. Mitchell, 124 S.W. 2d 310, 22 Tenn.App. 547—White v. N. C. & St. L. Ry., 1 Tenn.App. 467.
Tex.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Civ.App., 263 S. W. 1103.
46. Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.
N.Y.—Howland v. Union Bag & Paper Corporation, 282 N.Y.S. 357, 156 Misc. 507.
Okl.—Thompson v. North, 129 P.2d 1011, 1013, 191 Okl. 356, citing **Corpus Juris.**
Tex.—Johnson v. Cameron, Civ.App., 110 S.W.2d 604—Johnson v. Lancaster, Civ.App., 266 S.W. 565, 569, quoting **Corpus Juris.**
W.Va.—Mercer County Court v. Princeton Power Co., 169 S.E. 450, 113 W.Va. 617, citing **Corpus Juris**—Kennedy v. Klammar, 139 S.E. 713, 104 W.Va. 198.
32 C.J. p 23 note 30.
47. Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.
R.I.—Smart v. Boston Wire Stitcher Co., 148 A. 803, 50 R.I. 409—St. Michael's Ukrainian Greek Catho-

not remedy, a wrong,[48] where they would brush aside fixed rights for the benefit of a wrongdoer,[49] where they would operate inequitably or oppressively,[50] where the injury complained of is capable of compensation in damages,[51] where enforcement will require too great an amount of supervision by the court,[52] or where there has been unreasonable delay by the person seeking the injunction, as discussed infra § 171.

The right to a mandatory injunction to protect an easement is considered in Easements § 107 b (1) (f); as a remedy for violation of building restrictions infra § 87; to remove encroachments infra § 67; to compel corporate action infra § 101; or to recover possession of property infra § 60.

b. Preliminary Mandatory Injunctions

While a court of equity usually has power to award preliminary mandatory injunctions in a proper case, mandatory injunctions should rarely be granted except on final hearing.

In a number of decisions it is either said or held without qualification that a mandatory injunction will not be issued on an interlocutory application; that an injunction, unless issued after the decree, when it becomes a judicial process, can be used only for the purpose of prevention and protection,[53] and not for the purpose of compelling defendant to undo anything which he has previously done.[54] However, while it is generally true that the office of a preliminary injunction is to preserve the status quo until on final hearing the court may grant full relief as discussed supra § 2, and that this can be accomplished by an injunction prohibitory in form, it sometimes happens that the status quo is a condition not of rest but of action and the condition of rest is what will inflict the irreparable injury complained of, in which circumstances courts of equity may issue mandatory writs before the case is heard on its merits, as it may be the only effective remedy,[55] and, according to the weight of authority, a court of equity has power to award preliminary mandatory injunctions in extreme cases where the right is very clear,[56] and especially is this so where

lic Church of Woonsocket v. Bohachewsky, 136 A. 878, 48 R.I. 234. 32 C.J. p 23 note 32.

48. U.S.—Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 290 F. 306, 53 App.D.C. 331—Stafford Mills v. White, D.C.Mass., 41 F.2d 58.

49. Wis.—Bartman v. Wisconsin Michigan Power Co., 254 N.W. 876, 214 Wis. 608.

50. Cal.—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 128 Cal. App. 348.
Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.
32 C.J. p 23 note 33.

51. Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 231.
Kan.—Cave v. Henley, 264 P. 25, 125 Kan. 214.
Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.
Tenn.—Slatten v. Mitchell, 124 S.W. 2d 310, 22 Tenn.App. 547—White v. N. C. & St. L. Ry., 1 Tenn.App. 467.
32 C.J. p 24 note 35.

52. Pa.—McCabe v. Watt, 73 A. 453, 224 Pa. 253, 24 L.R.A.,N.S., 274.
Tenn.—Slatten v. Mitchell, 124 S.W. 2d 310, 22 Tenn.App. 547.

53. Ill.—Utterback v. Estill, 224 Ill. App. 151.
32 C.J. p 24 note 42.

54. U.S.—State of Louisiana ex rel. Saint v. Morgan's Louisiana & T. R. & S. S. Co., D.C.La., 18 F.2d 645.
Md.—Washington Univ. v. Green, 1 Md.Ch. 97.

55. Ill.—Peoples Gas Light & Coke Co. v. Slattery, 5 N.E.2d 285, 287 Ill.App. 379.
Ind.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216.
Miss.—Pitts v. Carothers, 120 So. 830, 152 Miss. 694.
N.J.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 51, 53, 120 N.J.Eq. 307, quoting **Corpus Juris**—McCran v. Public Service Ry. Co., 122 A. 205, 95 N.J. Eq. 22.
Tex.—McMurrey Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079—Houston Funeral Home v. Boe, Civ. App., 78 S.W.2d 1091—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190, 192, 193, citing and quoting **Corpus Juris.**
32 C.J. p 25 note 50.

56. U.S.—Asher v. Ingels, D.C.Cal., 13 F.Supp. 654—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 93.
Fla.—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593—Kellerman v. Chase & Co., 135 So. 127, 101 Fla. 785—Zetrouer v. Zetrouer, 103 So. 625, 89 Fla. 253.
Ind.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216.
N.J.—Adelman v. Universal Fur Dressing Co., 174 A. 528, 116 N.J. Eq. 511.
Pa.—Commonwealth v. Cohen, 28 A. 2d 723, 150 Pa.Super. 487—Popkin v. Credit Reliance Co., 33 Berks Co.L.J. 241.
Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619, 625, citing **Corpus Juris.**
Tex.—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190.
32 C.J. p 24 note 45.

Secretly and suddenly changed status

Court may by preliminary mandatory injunction compel defendant to restore subject matter of suit, where defendant attempted to shelter himself behind suddenly and secretly changed status.

Fla.—Bowling v. National Convoy & Trucking Co., 135 So. 541, 101 Fla. 634.
Pa.—McDevitt v. Phillips, 45 Dauph. Co. 394.

Reinstatement of teacher

Where facts involved in controversy between school township trustee and school teacher with permanent tenure status who sought reinstatement were properly before the court, and made a case for final mandatory injunction, a temporary injunction, similar in effect, could issue to save the teacher from irreparable injury which might be sustained prior to final hearing.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216.

the acts complained of are willful or fraudulent and without any pretense of right.[57]

However, mandatory injunctions should rarely be granted except on final hearing[58] and then only to execute the judgment or decree of the court.[59] To authorize the issuance of a mandatory injunction on an interlocutory application, the situation must be unusual and the granting of relief essential to maintain the status quo;[60] the case must be one of extreme necessity;[61] the invasion of the right must be material and substantial;[62] the right of complainant must be clear and unmistakable on the law and the facts;[63] and there must exist an urgent and paramount necessity for the issuing of the writ in order to prevent extreme or other serious damage which would ensue from withholding it.[64] If the issuance on preliminary application of an injunction mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain on a final hearing, the application should be refused except in very rare cases, and then only where complainant's right to the relief is clear and certain.[65]

57. Tex.—McMurrey Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Popham v. Wright, Civ.App., 229 S.W. 335.

58. Fla.—Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438—Price v. Gordon, 177 So. 276, 129 Fla. 715—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593—Kellerman v. Chase & Co., 135 So. 127, 101 Fla. 785—House v. Nash, 105 So. 266, 90 Fla. 123—Zetrouer v. Zetrouer, 103 So. 625, 89 Fla. 253—Stephens v. Stephens, 100 So. 746, 87 Fla. 466.

Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 23 N.E.2d 229, 301 Ill.App. 591—Peoples Gas Light & Coke Co. v. Slattery, 5 N.E.2d 285, 287 Ill. App. 379.

Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619, 625, citing **Corpus Juris.**

Tex.—White v. State, Civ.App., 122 S.W.2d 714—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190, 193, quoting **Corpus Juris**—Amarillo Mut. Benevolent Ass'n v. Sims, Civ.App., 53 S.W.2d 329, 331, quoting **Corpus Juris**—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.

W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

32 C.J. p 25 note 51.

Ex parte

A mandatory injunction should never issue ex parte, but only after hearing either on rule or on the merits.—Town of Leesville v. Kapotsky, 122 So. 59, 168 La. 342—Broussard v. Cormier, 98 So. 403, 154 La. 877.

59. Fla.—Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593—House v. Nash, 105 So. 266, 90 Fla. 123—Stephens v. Stephens, 100 So. 746, 87 Fla. 466.

32 C.J. p 25 note 52.

60. N.Y.—Kakalios v. Mesevich, 18 N.Y.S.2d 189, 259 App.Div. 112—Jonas v. Blansid Realty Corporation, 39 N.Y.S.2d 89, 179 Misc. 379—Amalgamated Furniture Factories v. Rochester Times-Union, 219 N.Y.S. 705, 128 Misc. 673.

Tex.—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 53 S.W.2d 329.

New status not accorded

Irreparable loss resulting from refusal to accord plaintiff a new status, as distinguished from interference with rights previously enjoyed by plaintiff, does not furnish the basis for interlocutory injunctive relief.—Warner Bros. Pictures v. Gittone, C.C.A.Pa., 110 F.2d 292, reversing, D.C., Gittone v. Warner Bros. Pictures, 30 F.Supp. 823.

61. N.J.—Fraxam Amusement Corporation v. Skouras Theatre Corporation, 167 A. 672, 113 N.J.Eq. 509—Jersey City v. Coppinger, 137 A. 572, 101 N.J.Eq. 185.

Extreme necessity shown

Deprivation of access to landowner's valuable manufacturing plant by closing wagonway over intersecting railroad was held to present extreme necessity, warranting preliminary mandatory injunction to restore way.—Rockaway Rolling Mill Corporation v. Delaware, L. & W. R. Co., 137 A. 650, 101 N.J.Eq. 192, affirmed 143 A. 334, 103 N.J.Eq. 297.

62. N.J.—Savage v. Port Reading R. Co., 67 A. 436, 73 N.J.Eq. 308.

Tex.—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 53 S.W.2d 329.

63. Ala.—Green v. Messer, 10 So. 2d 157, 158, citing **Corpus Juris**—Alabama Power Co. v. City of Guntersville, 183 So. 396, 398, 236 Ala. 503, quoting **Corpus Juris**—City of Decatur v. Meadors, 180 So. 550, 552, 235 Ala. 544, quoting **Corpus Juris.**

Fla.—Stephens v. Stephens, 100 So. 746, 87 Fla. 466.

Ill.—Cleaning & Dyeing Plant Owners Ass'n of Chicago v. Sterling Cleaners & Dyers, 278 Ill.App. 70.

Miss.—Morris v. Trussell, 109 So. 854, 144 Miss. 343.

N.J.—Adelman v. Universal Fur Dressing Co., 174 A. 523, 116 N.J. Eq. 511.

N.Y.—Sherman v. Abeles, 269 N.Y.S. 849, 150 Misc. 497, affirmed 269 N. Y.S. 864, 241 App.Div. 676, reversed on other grounds 193 N.E. 241, 265 N.Y. 383, 95 A.L.R. 1384.

Or.—State v. Mart, 295 P. 459, 135 Or. 603.

Pa.—Philadelphia Record Co. v. Curtis-Martin Newspapers, 157 A. 796, 305 Pa. 372.

Tex.—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 53 S.W.2d 329.

32 C.J. p 25 note 54.

64. Ala.—Green v. Messer, 10 So.2d 157, 158, citing **Corpus Juris**—Alabama Power Co. v. City of Guntersville, 183 So. 396, 398, 236 Ala. 503, quoting **Corpus Juris**—City of Decatur v. Meadors, 180 So. 550, 552, 235 Ala. 544, quoting **Corpus Juris.**

Fla.—Bowling v. National Convoy & Trucking Co., 135 So. 541, 101 Fla. 634.

Idaho.—Evans v. District Court of Fifth Judicial Dist., 275 P. 99, 100, 47 Idaho 267, citing **Corpus Juris.**

N.J.—McCran v. Public Service Ry. Co., 122 A. 205, 95 N.J.Eq. 22.

Or.—State v. Mart, 295 P. 459, 135 Or. 603.

Pa.—Philadelphia Record Co. v. Curtis-Martin Newspapers, 157 A. 796, 305 Pa. 372.

Tex.—White v. State, Civ.App., 122 S. W.2d 714—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 53 S.W.2d 329—Turner v. Sims, Civ.App., 20 S.W.2d 355, error dismissed—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused.

W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

32 C.J. p 26 note 55.

65. U.S.—Sims v. Stuart, D.C.N.Y., 291 F. 707.

Ala.—Green v. Messer, 10 So.2d 157, 158, quoting **Corpus Juris**—Ala-

§ 6. Common and Special Injunctions

An almost obsolete classification of interlocutory injunctions is that which divides them into "common injunctions" and "special injunctions."

As shown infra this section, an old but now almost, if not entirely, obsolete classification of interlocutory injunctions is that which divides them into "common injunctions" and "special injunctions."

Common injunctions issued secondarily and in aid of another equity,[66] the object being to restrain further proceedings in an action at law to enable defendant therein to assert an equity which he could not assert in a court of law.[67] Where plaintiff in the action at law failed to answer or delayed in answering the bill, the injunction issued as of course,[68] but it did not issue until such failure to answer, and then only as a means of compelling appearance and full answer.[69] The effect of the common injunction on a pending suit at law was determined by the progress of that suit at the date of its issuance.[70] Where the common injunction issued before the declaration in the action at law it stayed all further proceedings; but if it issued afterward it merely stayed the execution.[71] A common injunction usually was dissolved as a matter of course on the coming in of an answer denying the merits, and without any inquiry into the truth of the allegations, unless some special reason was alleged for continuing it.[72] Under the practice in those states in which both legal and equitable causes are tried in the same courts and in the same forms of action, it would seem that the necessity for a common injunction can never arise,[73] and in fact common injunctions no longer issue in most jurisdictions,[74] such result following as of course from statutes requiring notice to the opposing party before the issuance of an injunction;[75] and the terms "preliminary" and "special" injunctions are in some cases employed interchangeably.[76]

A special injunction was founded, not on the equity existing in the controversy at law between the parties, but on something collateral to it, as, for instance, the necessity of protecting the property in dispute pending the litigation, and was granted only on special application,[77] on good cause shown by affidavit,[78] and on special grounds arising out of the circumstances of the case,[79] and operated according to the terms of the order granting it.[80] Usually it was granted only on notice.[81] The practice in dissolving special injunctions differed from that in the dissolution of common injunctions.[82] In the case of special injunctions the bill might be read as an affidavit to contradict the answer where there was any conflict and the injury to plaintiff would be irreparable if the relief were not granted; but the injunction would not in general be dissolved on motion, but would be continued to the hearing to enable the parties to support by proofs their respective allegations.[83] To dissolve a special injunction before hearing the cause on proof, it devolved on defendant to show that plaintiff had no cause fit to be heard;[84] and if from the answer it appeared that

bama Power Co. v. City of Guntersville, 183 So. 396, 398, 236 Ala. 503, quoting **Corpus Juris**—City of Decatur v. Meadors, 180 So. 550, 552, 235 Ala. 544, quoting **Corpus Juris.**

Ill.—Cleaning & Dyeing Plant Owners Ass'n of Chicago v. Sterling Cleaners & Dyers, 278 Ill.App. 70.

Tex.—Cleere v. Wise, Civ.App., 153 S.W.2d 311—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190, 193, quoting **Corpus Juris**—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73, 74, quoting **Corpus Juris**—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ. App., 8 S.W.2d 730, error refused.

32 C.J. p 26 note 56.

Injunction properly granted

Tex.—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190.

66. N.C.—Jarman v. Saunders, 64 N. C. 367—Heilig v. Stokes, 63 N.C. 612.

67. N.C.—Jarman v. Saunders, 64 N. C. 367—Heilig v. Stokes, 63 N.C. 612.

Tenn.—Patterson v. Gordon, 3 Tenn. Ch. 18.

68. Tenn.—Chadwell v. Jordan, 2 Tenn.Ch. 635.

32 C.J. p 27 note 63.

69. Del.—Marvel v. Ortlip, 3 Del.Ch. 9.

70. Tenn.—Chadwell v. Jordan, 2 Tenn.Ch. 635.

71. Tenn.—Hendrick v. Dallum, 1 Overt. 427.

32 C.J. p 27 note 66.

72. N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Cobb v. Clegg, 49 S.E. 80, 137 N.C. 153.

32 C.J. p 27 note 67.

73. N.C.—Jarman v. Saunders, 64 N. C. 367.

74. Tenn.—Chadwell v. Jordan, 2 Tenn.Ch. 635.

32 C.J. p 27 note 69.

75. U.S.—Perry v. Parker, C.C.Mass., 19 F.Cas.No.11,010, 1 Woodb. & M. 280.

76. Pa.—Passenger R. Co. v. Easton, 7 Pa.Co. 569.

77. Pa.—Mountain Side Rod and Gun Club v. Skirchak, 32 Lus.Leg.Reg. 376.

32 C.J. p 27 note 72.

78. Tenn.—Chadwell v. Jordan, 2 Tenn.Ch. 635.

79. S.C.—Aldrich v. Kirkland, 40 S. C.L. 334.

80. Pa.—Mountain Side Rod and Gun Club v. Skirchak, 32 Lus.Leg.Reg. 376.

Tenn.—Chadwell v. Jordan, 2 Tenn. Ch. 635.

81. U.S.—Lawrence v. Bowman, C. C.Cal., 14 F.Cas.No.8,134, McAll. 419.

82. N.C.—Capehart v. Mhoon, 45 N. C. 30.

83. N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

32 C.J. p 27 note 78.

84. N.C.—Solomon v. Wilmington Sewerage Co., 45 S.E. 536, 133 N.C. 144—Purnell v. Daniels, 43 N.C. 9.

there was any question on the matter that should be further inquired into the injunction was continued until the hearing.[85]

§ 7. Cross Injunctions

Where one person obtains an injunction restraining another from interfering with certain property or disposing of it, and the person thus enjoined appears to be equally entitled to possession of the property, he may obtain a like injunction against the other party.

Where one person obtains an injunction restraining another from interference with, or disposition of, certain property, and the person thus enjoined appears to be equally entitled to the possession of this property, he may, on application, obtain a like injunction against the other party without any proof of insolvency or other special cause for depriving him of control.[86]

§ 8. Restraining Order

A restraining order is an order granted to maintain the subject of controversy in statu quo until the hearing of an application for a temporary injunction, and, while the term has been held synonymous with "injunction," it has also been distinguished therefrom.

A restraining order is an order granted to maintain the subject of controversy in statu quo until the hearing of an application for a temporary injunction.[87] Its purpose is merely to suspend proceedings until there may be an opportunity to inquire whether any injunction should be granted,[88] and it is not intended to operate as an injunction pendente lite,[89] and should not in effect determine the issues involved before the parties can have their day in court[90] or give an advantage to either party by proceedings in the acquisition or alteration of the property the right to which is disputed while the hands of the other party are tied.[91] A restraining order, like a temporary injunction, is provisional in its nature and does not conclude a right, but is simply incidental to the main issue to be tried.[92] The unauthorized issuance of a restraining order will not prevent the issuance of a temporary injunction on a full hearing.[93]

In some jurisdictions restraining orders are not recognized,[94] and, where the right to grant injunctional relief is strictly statutory, a defendant is not entitled to a restraining order against plaintiff, where the statute makes no provision therefor.[95]

"Injunction" distinguished. Although the term, "restraining order," is sometimes used as a synonym of "injunction,"[96] and a restraining order has been

85. N.C.—Solomon v. Wilmington Sewerage Co., 45 S.E. 536, 133 N.C. 144.
32 C.J. p 27 note 80.

86. N.Y.—McCracken v. Ware, 5 N.Y.Super. 688, 1 Code Rep.,N.S., 215.
32 C.J. p 27 note 81.
Counterinjunction see infra § 27.

87. Ga.—Grissel v. Grissel, 3 S.E. 2d 649, 188 Ga. 418.
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
La.—Snowden v. Red River and Bayou Des Glaises Levee and Drainage Dist., 134 So. 389, 172 La. 447, followed in 134 So. 394, 172 La. 463, and certiorari granted Snowden v. Red River Bayou Des Glaises Levee, 52 S.Ct. 23, 284 U.S. 603, 76 L.Ed. 517, certiorari dismissed Snowden v. Red River & Bayou Des Glaises Levee & Drainage Dist. of Louisiana, 52 S.Ct. 198, 284 U.S. 592, 76 L.Ed. 510.
Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.
Okl.—Jennings v. Elliott, 97 P.2d 67, 186 Okl. 285—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569—Goldsmith v. City of Ardmore, 277 P. 230, 136 Okl. 201—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.
Tex.—City of Fort Worth v. Tarlton, Civ.App., 151 S.W.2d 268—Smith v. State, Civ.App., 140 S.W.2d 299—Smith v. Coleman, Civ.App., 127 S.W.2d 928—Mickle v. Garrett, Civ.App., 110 S.W.2d 1235—Dunlap v. Rotge, Civ.App., 85 S.W.2d 650.
Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390—State v. Superior Court of Washington for Snohomish County, 228 P. 847, 848, 130 Wash. 668, citing **Corpus Juris.**
32 C.J. p 27 note 82.

Status quo not maintained
Order restraining defendant from interfering with crops and permitting plaintiff to harvest and remove crops was not an order maintaining status quo.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.

88. Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.
Neb.—Meeske v. Baumann, 241 N.W. 550, 122 Neb. 786, 83 A.L.R. 131.
Okl.—Robertson v. Coy, 293 P. 1105, 146 Okl. 155—Goldsmith v. City of Ardmore, 277 P. 230, 136 Okl. 201—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.
Tex.—City of Jacksonville v. Devereux, Civ.App., 286 S.W. 572, 573, citing **Corpus Juris.**
32 C.J. p 28 note 83.

89. Okl.—Goldsmith v. City of Ardmore, 277 P. 230, 136 Okl. 201.
32 C.J. p 28 note 84.

90. Miss.—Water Valley v. State, 60 So. 576, 103 Miss. 645.

Full relief not obtainable
The function of a "temporary restraining order" is to maintain the status quo and not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.—State ex rel. Attorney General v. Manske, 285 N.W. 378, 231 Wis. 16.

91. U.S.—Northern Pac. R. Co. v. Spokane, C.C.Wash., 52 F. 428.

92. Mont.—Donlan v. Thompson Falls Copper & Milling Co., 112 P. 445, 42 Mont. 251.
Neb.—State v. Graves, 117 N.W. 717, 82 Neb. 282—Trester v. Pike, 83 N.W. 676, 60 Neb. 510.

93. Iowa.—Lemmon v. Guthrie Center, 84 N.W. 986, 113 Iowa 36, 86 Am.S.R. 361.

94. Miss.—Edward E. Morgan Co. v. City of Natchez, 196 So. 251, 188 Miss. 781.

95. S.D.—Strand v. Steppa, 186 N.W. 959, 45 S.D. 244.

96. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233,

held in effect an injunction,[97] it has also been distinguished therefrom.[98] Whether an order is a restraining order or a temporary injunction must be determined from its form and substance.[99] The restraint which the order purports to impose and not the name given to it determines its true name and character.[1] The fact that a bond is required by the court and given by the party applying for a restraining order will not change it to a temporary injunction.[2]

Duration and dissolution. The duration of a restraining order should be limited to the time speci-

rehearing denied 173 N.E. 287, 202 Ind. 233.
Kan.—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550.
Tex.—Shelton v. City of Abilene, Civ. App., 75 S.W.2d 934.
Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390.
62 C.J. p 311 note 93.

Injunction for short time only

Although "temporary restraining order" usually expires at a definite date and a "temporary injunction" is effective until final hearing on the merits, the two terms are often used synonymously to denote an injunction for a short time only.—Speed v. Keys, Tex.Civ.App., 110 S.W.2d 1245—Barkley v. Conklin, Tex.Civ.App., 101 S.W.2d 405.

97. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Mont.—McKelvy v. Broadwater, 285 P. 190, 87 Mont. 103—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.
Tex.—Yellow Cab & Baggage Co. v. City of Amarillo, Civ.App., 20 S. W.2d 855.
62 C.J. p 311 note 93 [a].

Same force and effect

"Restraining orders" granted on furnishing of bond have same temporary force and effect as "preliminary injunctions."—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.

98. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.
Tex.—Speed v. Keys, Civ.App., 110 S. W.2d 1245.
Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390—State v. Superior Court of Washington for Snohomish County, 228 P. 847, 130 Wash. 668.
62 C.J. p 312 note 94.

It is distinguishable from an injunction, in that a restraining order is intended only as a restraint on defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination.
Kan.—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550.
La.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.
Mont.—Wetzstein v. Boston & M. Consol. Copper & Silver Mining Co., 63 P. 1043, 25 Mont. 135.
Okl.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.
Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523.

Orders held to be restraining orders

(1) An order restraining defendant from prosecuting action in another state specifically providing the restraint should be effective only until further order of court and which also fixed date of hearing on temporary injunction was a "restraining order" and not a "temporary injunction."—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550.

(2) Fiat, indorsed injunction petition to restrain construction of underpass by railroad, reciting that temporary injunction was granted, and commanding defendant's appearance at judge's office four days after issuance of order to show cause and that injunction should cease on day of hearing unless extended by order, held to order issuance of mere "restraining order" which would be dissolved by judgment at final hearing.—Shelton v. City of Abilene, Tex.Civ. App., 75 S.W.2d 934.

(3) Other orders.—Ex parte Rains, 257 S.W. 217, 113 Tex. 428.

Orders held to be injunctions

(1) Order, made some six weeks after institution of action, restraining influence of which was to continue until determination of suit was held a preliminary injunction as distinguished from a restraining order.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal. App. 434.

(2) Restraining order which made no provision for hearing and did not limit its effect as to time was held a "temporary injunction."—Dyer v. Dyer, Tex.Civ.App., 87 S.W.2d 489.

99. Mont.—State ex rel. Public Service Commission v. District Court of First Judicial Dist., 63 P.2d 1032, 1034, 103 Mont. 563, quoting **Corpus Juris.**
Neb.—Harbin v. Love, 227 N.W. 145, 146, 119 Neb. 76, citing **Corpus Juris**—State v. Baker, 38 N.W. 124, 62 Neb. 840.
Tex.—Smith v. Coleman, Civ.App., 127 S.W.2d 928, 931, citing **Corpus Juris**—Shelton v. City of Abilene, Civ.App., 75 S.W.2d 934, 936, quoting **Corpus Juris**—Terrell v. Alpha Petroleum Co., Civ.App., 54 S.W.2d 821, 825, quoting **Corpus Juris,** and affirmed Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 122 Tex. 257, amended on other grounds 59 S.W.2d 372, 122 Tex. 257, followed in Alpha Petroleum Co. v. Walker, 59 S.W.2d 373, 122 Tex. 246.

Purported extension

Temporary injunction not fixing day for its expiration held not changed to temporary restraining order by purported ten-day extension from specified date.—Terrell v. Alpha Petroleum Co., Tex.Civ.App., 54 S.W. 2d 821, affirmed Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 122 Tex. 257, amended on other grounds 59 S.W.2d 372, 122 Tex. 257, followed in Alpha Petroleum Co. v. Walker, 59 S.W.2d 373, 122 Tex. 246.

Continuance of hearing on temporary injunction from time provided in restraining order is not sufficient to convert restraining order into injunction.—Harbin v. Love, 227 N.W. 145, 119 Neb. 76.

Entire scope, purpose, and effect of an order must be considered in order to determine whether it is a temporary restraining order or an injunction.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.

1. Cal.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal.App. 434.
Kan.—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550—City of Wichita v. Home Cab Co., 101 P.2d 219, 151 Kan. 679.
Mont.—State ex rel. Public Service Commission v. District Court of First Judicial Dist., 63 P.2d 1032, 1034, 103 Mont. 563, quoting **Corpus Juris.**
Tex.—Smith v. Coleman, Civ.App., 127 S.W.2d 928, 931, citing **Corpus Juris**—Shelton v. City of Abilene, Civ.App., 75 S.W.2d 934, 936, quoting **Corpus Juris**—Terrell v. Alpha Petroleum Co., Civ.App., 54 S. W.2d 821, 825, quoting **Corpus Juris,** and affirmed Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 122 Tex. 257, amended on other grounds 59 S.W.2d 372, 122 Tex. 257, followed in Alpha Petroleum Co. v. Walker, 59 S.W.2d 373, 122 Tex. 246.
32 C.J. p 28 note 89.

2. Okl.—Ex parte Grimes, 94 P. 668, 1 Okl.Cr. 102, 20 Okl. 446.

fied by statute, or, in the absence of statute, to such a reasonable time as may be necessary to notify the adverse party,[3] especially where he is likely to be damaged by delay,[4] or until the hearing of the application for a temporary injunction.[5] Unless extended by the court,[6] a restraining order ceases to be operative at the expiration of the time fixed by its terms,[7] or if at the time fixed by it to show cause there is no appearance by either party,[8] and this is so although there is no order of dissolution,[9] and although the restraining order provides that it shall be effective until further order.[10] The force of the restraining order ceases on hearing of the application for a temporary injunction,[11] or on the granting[12] or refusal[13] of the injunction without any express order to that effect.[14]

Where a restraining order has terminated as a matter of law, the belief of the parties and the judge to the contrary will not change it.[15] Where the order refusing the injunction is appealed from, the restraining order is not prolonged, nor, where an injunction has been granted and dissolved, does an appeal from the order of dissolution revive the restraining order.[16] In case a restraining order is dissolved, a party is not entitled to have the order dissolving it superseded pending review.[17] Where a restraining order has been granted ex parte, it may be dissolved on motion before answer.[18]

3. Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.
32 C.J. p 28 note 94.

4. U.S.—Walworth v. Cook County, C.C.Ill., 29 F.Cas.No.17,136, 5 Biss. 133.
Mont.—Wetzstein v. Boston & M. Consol. Copper & Silver Mining Co., 63 P. 1043, 25 Mont. 135.

5. Cal.—Prader v. Grim, 13 Cal. 585—Kelsey v. San Diego County Super. Ct., 180 P. 662, 40 Cal.App. 229.
32 C.J. p 28 note 96.

6. Tex.—Ex parte Rains, 257 S.W. 217, 113 Tex. 428.

Court order necessary

If the hearing provided for in a restraining order, to show cause why such order should not be made permanent till further order of the court, was at any time passed in such manner as to continue in force such order, it would take an order or judgment, properly entered of record at the time or during the term, or thereafter by nunc pro tunc order, to effectuate that purpose.—Ex parte Rains, supra.

Effect of continuance

Temporary restraining order, continued in effect by parties' agreement or court order until hearing on merits after disposition of issues presented thereby, becomes temporary injunction.—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390.

7. La.—Ducros v. St. Bernard Parish Police Jury, 8 So.2d 694, 200 La. 766—Snowden v. Red River and Bayou Des Glaises Levee and Drainage Dist., 134 So. 389, 172 La. 447, followed in 134 So. 394, 172 La. 463, and certiorari granted Snowden v. Red River Bayou Des Glaises Levee, 52 S.Ct. 23, 284 U.S. 603, 76 L.Ed. 517, certiorari dismissed Snowden v. Red River & Bayou Des Glaises Levee & Drainage Dist. of Louisiana, 52 S.Ct. 198, 284 U.S. 592, 76 L.Ed. 510—Austin v. Currie, 134 So. 723, 16 La. App. 375.
Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.
Va.—Personal Small Loan Corporation v. Dahn, 186 S.E. 45, 47, 166 Va. 472, citing **Corpus Juris.**
32 C.J. p 28 note 97.

Day set for hearing

A restraining order expires on the day set for hearing.—Ex parte Rains, 257 S.W. 217, 113 Tex. 428—Dunlap v. Rotge, Tex.Civ.App., 85 S.W.2d 650—Yellow Cab & Baggage Co. v. City of Amarillo, Tex.Civ.App., 20 S.W.2d 855—Jacksonville Independent School Dist. v. Devereux, Tex.Civ.App., 286 S.W. 573—Robinson v. Theis, Tex.Civ.App., 252 S.W. 249.

Failure to designate judge to try cause

Restraining order requiring parties to appear in court on specified day to show cause why temporary injunction should not issue was held merely temporary restraining order expiring at date set for hearing, even though no judge was designated to try cause until thereafter.—Johnson v. Sunset Stores, Tex.Civ.App., 27 S.W.2d 644.

8. Okl.—Ex parte Grimes, 94 P. 668, 20 Okl. 446, 452, 1 Okl.Cr. 102.
32 C.J. p 28 note 98.

9. Okl.—Goldsmith v. City of Ardmore, 277 P. 230, 136 Okl. 201.
Tex.—Mickle v. Garrett, Civ.App., 110 S.W.2d 1235—Frisby v. Rockins, Civ.App., 105 S.W.2d 362, error dismissed.
Wash.—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390.
32 C.J. p 28 note 99.

10. Okl.—Callaway v. Sparks, 89 P. 2d 275, 184 Okl. 569.
32 C.J. p 28 note 1.

11. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.
Kan.—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550.
Okl.—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.
32 C.J. p 29 note 2.

12. Colo.—Axelson v. Columbine Laundry Co., 254 P. 990, 81 Colo. 254.
32 C.J. p 29 note 3.

13. La.—Ducros v. St. Bernard Parish Police Jury, 8 So.2d 694, 200 La. 766—Snowden v. Red River and Bayou Des Glaises Levee and Drainage Dist., 134 So. 389, 172 La. 447, followed in 134 So. 394, 172 La. 463, and certiorari granted Snowden v. Red River Bayou Des Glaises Levee, 52 S.Ct. 23, 284 U.S. 603, 76 L.Ed. 517, certiorari dismissed Snowden v. Red River & Bayou Des Glaises Levee & Drainage Dist. of Louisiana, 52 S.Ct. 198, 284 U.S. 592, 76 L.Ed. 510.
32 C.J. p 29 note 4.

14. S.D.—Beers v. Watertown, 176 N.W. 149, 42 S.D. 441.

15. Tex.—Johnson v. Sunset Stores, Civ.App., 27 S.W.2d 644.

Motion for vacation

Where a restraining order has spent its force because no action was taken on the day set to show cause, the belief that it is still effective and a motion filed by defendants for its vacation will not revive it for or against either of them.—Ex parte Grimes, 94 P. 668, 20 Okl. 446, 1 Okl.Cr. 102.

16. Cal.—Hicks v. Michael, 15 Cal. 107.

17. Neb.—State v. Baker, 88 N.W. 124, 62 Neb. 840—State v. Greene, 67 N.W. 162, 48 Neb. 327.
Wash.—State v. Lichtenberg, 30 P. 716, 4 Wash. 407.

18. U.S.—Fenwick Hall Co. v. Old Saybrook, C.C.Conn., 66 F. 389.
32 C.J. p 29 note 10.

§ 9. Distinguished from Mandamus

While mandatory injunction has been held equivalent to mandamus and governed by like considerations, the terms "injunction" and "mandamus" are not interchangeable.

The terms "injunction" and "mandamus" are not interchangeable,[19] but present several well defined points of difference. Mandamus is strictly a legal remedy while the remedy of injunction is solely equitable and cognizable in no other forum than a court of equity.[20] Also mandamus is a remedy to compel action while injunction is a remedy to prevent action,[21] and while there are a limited number of cases in which the rule is apparently denied altogether,[22] or greatly limited,[23] it is very generally held that mandamus is not the proper remedy where the relator does not ask that defendant be compelled to do an act, but demands on the contrary that he be forbidden to do certain acts, and that mandamus cannot be made to perform the office of an injunction.[24] On the other hand, mandamus and not injunction ordinarily is the proper remedy where nothing is sought but the enforcement of a legal duty,[25] although under some circumstances a mandatory injunction will issue to compel the performance of a duty of this character if for any reason mandamus is not available,[26] and in some cases mandatory injunction has been held equivalent to mandamus and governed by like considerations.[27]

§ 10. Distinguished from Prohibition

Prohibition and injunction against proceedings at law are distinguished by the fact that an injunction is directed only to the parties litigant while a prohibition is directed to the court itself.

While prohibition is similar to the remedy by injunction against proceedings at law in that the object of the former, as well as of the latter, is the restraint of legal proceedings, the remedies are to be distinguished by the fact that an injunction is directed only to the parties litigant, without in any manner interfering with the court, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim.[28]

§ 11. Constitutional and Statutory Provisions in General

The right to injunction is not a constitutional right, but is one that is sometimes granted by statute and it may be enlarged or limited at the will of the legislature.

While the power of a court of equity to grant writs of injunction antedates specific legislative sanction and has been said not to be a statutory grant of power to a court, as discussed infra § 12, the issuance of injunctions, preventive or mandatory, is sometimes authorized by statute,[29] and where the right to an injunction is not a constitu-

19. Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—Film Classics v. Dever, 234 Ill.App. 614.
Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 287, 191 Miss. 192, quoting **Corpus Juris.**
Tenn.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.
38 C.J. p 545 note 65.

20. Ill.—Film Classics v. Dever, 234 Ill.App. 614—Clingen v. Harrison, 195 Ill.App. 301.

21. Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.
Kan.—Public Service Commission of Kansas v. Kansas Gas & Electric Co., 246 P. 178, 179, 121 Kan. 14, quoting **Corpus Juris.**
Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 287, 191 Miss. 192, quoting **Corpus Juris.**
Ohio.—State ex rel. Smith v. Industrial Commission, 39 N.E.2d 838, 139 Ohio St. 303—Fischer v. Damm, 173 N.E. 449, 36 Ohio App. 515.
38 C.J. p 545 note 70.

Preserve or change status

Generally functions of injunction are to restrain motion and enforce inaction, thereby preserving matters in statu quo, while those of mandamus are to set in motion and compel action and object of such writ is to change status of affairs and substitute action for inactivity.—Department of Public Utilities v. Trustees of Properties of New York, N. H. & H. R. Co., 24 N.E.2d 647, 304 Mass. 664.

22. Md.—Hummelshine v. Hirsch, 79 A. 38, 114 Md. 39.
38 C.J. p 545 note 68.

23. N.Y.—People ex rel. Conklin v. Boyle, 163 N.Y.S. 72, 98 Misc. 364, affirmed 164 N.Y.S. 1107, 178 App. Div. 908.
38 C.J. p 545 note 69.

24. Ohio.—State ex rel. Smith v. Industrial Commission, 39 N.E.2d 838, 139 Ohio St. 303.
38 C.J. p 545 note 70.

25. Iowa.—Boardman v. Marshalltown Grocery Co., 75 N.W. 343, 105 Iowa 445.
38 C.J. p 546 note 72.

26. Ky.—Williams v. Maysville Tel. Co., 82 S.W. 995, 119 Ky. 33, 26 Ky. L. 945.
38 C.J. p 546 note 73.

27. U.S.—Miguel v. McCarl, 54 S. Ct. 465, 291 U.S. 442, 78 L.Ed. 901, modifying McCarl v. Miguel, 66 F. 2d 564, 62 App.D.C. 259, certiorari granted Miquel v. McCarl, 54 S.Ct. 102, 290 U.S. 618, 78 L.Ed. 540.

Alike in essential respects

(1) A mandatory injunction is like a mandamus in all essential respects, although the latter is directed to a public officer to compel performance of an administrative act as to which he has no discretion.—McNulty v. National Mediation Board, D.C.N.Y., 18 F.Supp. 494.

(2) A mandatory injunction to compel a judge to act is equivalent in legal effect to mandamus, and the same principles apply.—Hargis v. Swope, 114 S.W.2d 75, 272 Ky. 257.

28. Mo.—State v. Tracy, 140 S.W. 888, 237 Mo. 109, 37 L.R.A.,N.S., 448.
Ohio.—State v. Duffy, 152 N.E. 656, 114 Ohio St. 702.
Okl.—State ex rel. Attorney General v. Higgins, 137 P.2d 273, 76 Okl. Cr. 321.

29. Ky.—W. D. Harris & Co. v. Lewis, 32 S.W.2d 401, 235 Ky. 810.

Policy to extend remedy

Statutes authorizing injunction in particular cases have been held to manifest the policy of extending the remedy rather than restricting it.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing

tional right, but is one granted by statute, it may be enlarged or limited at the will of the legislature.[30] A remedial statute prescribing rules for the issuance of a preliminary injunction should be construed liberally.[31]

As order instead of writ. By the statutes of some of the states the writ of injunction has been abolished, and an injunction is merely an order rather than a writ.[32]

II. GENERAL PRINCIPLES GOVERNING ISSUANCE

§ 12. In General

The propriety of granting an injunction depends on the facts of each particular case and the general principles of equity as related to injunctions.

The grant or refusal of an injunction is a matter of equitable jurisdiction.[33] The power of a court of equity to grant writs of injunction antedates specific legislative sanction,[34] and ordinarily is not a statutory grant of power to a court.[35]

The propriety of granting an injunction depends on the facts of each particular case and the general principles of equity as related to injunctions,[36] and the right to exercise common sense in the granting or refusing of injunctions is one of the fundamental prerogatives of a court of chancery.[37] Since an injunction should not be made an instrument of oppression and injury,[38] it will not be granted when good conscience does not require it,[39] where it will operate oppressively or contrary to justice,[40] where it is not reasonable and equitable under the circumstances of the case,[41] or where it will tend to pro-

295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704.

30. La.—Dehan v. Hotel and Restaurant Employees and Beverage Dispensers, Local Union No. 183, App., 159 So. 637.

31. La.—American Nat. Bank v. Bauman, 137 So. 54, 173 La. 336.

Restriction to temporary orders
Act regulating procedure and practice with respect to restraining orders and writs of injunction is restricted in its application to temporary restraining orders and preliminary writs of injunction.—Meers v. Seymour, La.App., 175 So. 431.

32. S.C.—Ellis v. Commander, 20 S.C.Eq. 188.
32 C.J. p 20 note 3.

33. Del.—Simon v. Pyrites Co., 128 A. 370, 2 W.W.Harr. 581.
Utah.—Riggins v. District Court of Salt Lake County, 51 P.2d 645, 89 Utah 183.
Jurisdiction of particular courts see infra §§ 168, 169.

Case must be within jurisdiction
There must be some special circumstances bringing case under some recognized head of equity jurisdiction before writ of injunction may be granted.—State ex rel. and to Use of Bader v. Flynn, 159 S.W.2d 379, 236 Mo.App. 577.

34. U.S.—Miles Laboratories v. Seignious, D.C.S.C., 30 F.Supp. 549.
N.H.—Hatch v. Hillsgrove, 138 A. 428, 83 N.H. 91, reheard 139 A. 366, 83 N.H. 91.

Special legislative authorization unnecessary
It is not necessary that special legislative authorization be found to permit the use of injunction process.—Lukens Steel Co. v. Perkins, 107 F.2d 627, 70 App.D.C. 354, certiorari granted Perkins v. Lukens Steel Co., 60 S.Ct. 513, 309 U.S. 643, 84 L.Ed. 997, reversed on other grounds 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

Inherent authority
Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.

35. U.S.—Miles Laboratories v. Seignious, D.C.S.C., 30 F.Supp. 549.

36. U.S.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227.
Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 183 So. 759, 134 Fla. 1, 119 A.L.R. 956.
Ga.—Hudson v. Tate, 4 S.E.2d 577, 188 Ga. 707.
Mont.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.
N.Y.—L. Daitch & Co. v. Retail Grocery & Dairy Clerks Union of Greater New York, 221 N.Y.S. 446, 129 Misc. 343.

Equity takes jurisdiction where it is necessary to administer preventive remedy.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Tex.Com.App., 53 S.W.2d 1001, reversing, Civ.App., 37 S.W.2d 299.

Jurisdiction should appear clearly
In order to grant a preliminary injunction, it should appear clearly that the court has jurisdiction.—Kennedy v. Public Works Administration, D.C.N.Y., 23 F.Supp. 771.

Extraordinary cases
Relief by injunction is drastic and will be granted only in extraordinary cases.—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897.

Not granted merely because unresisted
U.S.—Fleming v. Montana Coal & Iron Co., D.C.Mont., 286 F. 453, affirmed, C.C.A., 289 F. 793.

37. Ky.—Noble v. Combs, 117 S.W.2d 579, 273 Ky. 578.

38. Fla.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1.

39. U.S.—Brehme v. Watson, C.C.A. Cal., 67 F.2d 359, 362, citing **Corpus Juris.**
32 C.J. p 33 note 27.

40. U.S.—Brehme v. Watson, supra, citing **Corpus Juris.**
32 C.J. p 33 note 28.

41. U.S.—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143—Brehme v. Watson, C.C.A. Cal., 67 F.2d 359, 362, citing **Corpus Juris**—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528, reversed on other grounds 137 F.2d 689, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, and reversed on other grounds 64 S.Ct. 587.
Cal.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal.App.2d 726.
Utah.—Winters v. Turner, 278 P. 816, 74 Utah 222, appeal dismissed and certiorari denied Turner v. Winters, 50 S.Ct. 238, 281 U.S. 692, 74 L.Ed. 1121.
32 C.J. p 33 note 29.
Relative inconvenience or injury to parties see infra § 30.

note, rather than to prevent, fraud and injustice.[42] An injunction will be granted to protect clear legal rights, but not to accomplish a wrong,[43] and the equities of the case must be in favor of the party seeking the injunctive relief.[44] However, injunction will lie if the court can by its decree assure the parties that its operative effect will be wholly without injustice or oppression to either party.[45]

§ 13. Actions and Proceedings in Aid of Which Injunction Authorized

Injunction may properly be granted in aid of other actions and proceedings.

An equity court has the right to use a writ of injunction as an auxiliary remedy,[46] and an injunction may properly be granted in aid of other actions or proceedings.[47] However, an injunction asked in a proceeding brought for other purposes must have some relation and be subsidiary to those purposes;[48] it is not proper in that proceeding to ask an injunction for some independent purpose.[49] An ancillary injunction action may be maintained to protect, but not to defeat, the jurisdiction of the body which has a matter under consideration,[50] but, in order to maintain such ancillary action pending the determination of a primary proceeding, there must exist a res which may be endangered by the acts sought to be enjoined.[51]

An injunction is not necessarily a mere incident to the enforcement of some other equitable right,[52] and an application for an injunction is not merely auxiliary to a proceeding at law where the entire and final remedy is sought in the equity court.[53]

§ 14. Discretion of Court

Injunctive relief is not a matter of right, but its grant or refusal usually rests in the sound discretion of the court, exercised in harmony with well established principles.

Except in cases where a statute gives an absolute right to an injunction,[54] an injunction, whether temporary or permanent, cannot as a general rule be sought as a matter of right, but the power to grant or refuse it rests in the sound discretion of the court under the circumstances and the facts of the particular case,[55] unless perhaps in cases where facts

42. Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.
32 C.J. p 33 note 30.

43. N.Y.—Skelly v. Knell, 3 N.Y.S. 2d 112, 167 Misc. 218.

44. U.S.—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808.

45. Minn.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.
N.Y.—Epstein v. Gluckin, 135 N.E. 861, 233 N.Y. 490.

46. Iowa.—Equitable Life Ins. Co. of Iowa v. Johnston, 269 N.W. 767, 222 Iowa 687, 108 A.L.R. 257.

47. U.S.—Chicago, M. & St. P. Ry. Co. v. Schendel, C.C.A.Minn., 292 F. 326.
Ill.—Moroney v. Allman, 271 Ill.App. 336.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
Ancillary or incidental jurisdiction of federal courts generally see Federal Courts § 13.
Restraining actions at law pending proceedings in equity see infra § 37.

Continuing trespass

Injunction is a proper remedy for relief against continuing trespass, when sought as an ancillary remedy in an action in which the title to land or the right to its possession is at issue.—Jackson v. Jernigan, 5 S.E. 2d 148, 216 N.C. 401.

Disposition of property

Enjoining defendant from disposing of property declared to be plaintiff's in an action for declaratory relief has been held proper.—James v. Hall, 264 P. 516, 88 Cal.App. 528.

48. N.C.—Wilson v. Alleghany Co., 32 S.E. 326, 124 N.C. 7.

49. N.C.—Wilson v. Alleghany Co., supra.

50. N.Y.—Domanick v. Triboro Coach Corporation, 20 N.Y.S.2d 306, 259 App.Div. 657, reversing 18 N.Y.S.2d 960, 173 Misc. 911.

51. N.Y.—Domanick v. Triboro Coach Corporation, supra.

52. Ala.—Campbell v. State, 5 So.2d 466, 242 Ala. 215.

53. N.Y.—People ex rel. Bennett v. Laman, 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704, and reversed on other grounds 14 N.E. 2d 439, 277 N.Y. 368—Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371.

54. Iowa.—Sawyer v. Termohlen, 122 N.W. 924, 144 Iowa 247.
La.—Algiers R. & Lighting Co. v. New Orleans R. & Light Co., 68 So. 960, 137 La. 579.

Emergency Price Control Act providing that an injunction "shall be granted" on application of the price administrator against violation of price regulations does not mandatorily require issuance of an injunction against the violation of a price regulation merely because the administrator asks it, but the court may exercise discretion in determining what order shall be made.—U. S.—Hecht Co. v. Bowles, App.D.C., 64 S.Ct. 587, reversing, C.C.A., 137 F.2d 689, which reversed, D.C., Brown v. Hecht Co., 49 F.Supp. 528, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81.

Fair Labor Standards Act, giving the court jurisdiction for cause shown to restrain violations of the act, gives jurisdiction to grant, but does not require in every case the grant of, an injunction, and the granting of an injunction usually is in the discretion of the court.—Fleming v. Jacksonville Paper Co., C.C.A.Fla., 128 F.2d 395.

Purpose of statute

Purpose of statute relating to injunctions was to end abuse of their issuance ex parte and to provide for prompt hearing and issuance in sound discretion of trial court.—United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co., 147 So. 66, 176 La. 1024.

55. U.S.—City of Harrisonville, Mo., v. W. S. Dickey Clay Mfg. Co., Mo., 53 S.Ct. 602, 289 U.S. 334, 77 L.Ed. 1208 reversing, C.C.A., 61 F.2d 210, certiorari granted 53 S. Ct. 319, 288 U.S. 594, 77 L.Ed. 972—State of Alabama v. U. S., Ala., 49 S.Ct. 266, 279 U.S. 229, 73 L.Ed. 675—Rice & Adams Corporation v. Lathrop, N.Y., 49 S.Ct. 220, 278 U.S. 509, 73 L.Ed. 480, affirming, C.C.A., 24 F.2d 1021, certiorari granted 49 S.Ct. 10, 278 U.S. 585, 73 L.Ed. 520, which affirmed, D. C., Lathrop v. Rice & Adams Corporation, 21 F.2d 124—Taylor v. Brown, Em.App., 137 F.2d 654, certiorari denied 64 S.Ct. 194—Central Hanover Bank & Trust Co. v. Cal-

laway, C.C.A.Ga., 135 F.2d 592, affirming, D.C., In re Central of Georgia Ry. Co., 48 F.Supp. 445—Sun Oil Co. v. Burford, C.C.A.Tex., 130 F.2d 10, vacating 124 F.2d 467, certiorari granted Burford v. Sun Oil Co., 63 S.Ct. 265, 317 U.S. 621, 87 L.Ed. 503, and 63 S.Ct. 524, 317 U.S. 623, 87 L.Ed. 505, reversed on other grounds 63 S.Ct. 1098, 319 U.S. 315, 87 L.Ed. 1424, rehearing denied 63 S.Ct. 1442, two cases, 320 U.S. 214, 87 L.Ed. 1851—Sims v. Central Trust Co., C.C.A.W.Va., 123 F.2d 89—Hannan v. City of Haverhill, C.C.A.Mass., 120 F.2d 87, affirming, D.C., 38 F.Supp. 234, certiorari denied 62 S.Ct. 81, 314 U.S. 641, 86 L.Ed. 514—Spring v. Ohio Oil Co., C.C.A.Tex., 108 F.2d 560—Mendez v. Baetjer, C.C.A. Puerto Rico, 106 F.2d 163, certiorari denied 60 S.Ct. 263, 308 U.S. 618, 84 L.Ed. 516—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A. Ark., 100 F.2d 202—Murray Hill Restaurant v. Thirteen Twenty-One Locust, C.C.A.Pa., 98 F.2d 578—Wilson v. Byron Jackson Co., C. C.A.Cal., 93 F.2d 572—Ætna Casualty & Surety Co. v. Quarles, C. C.A.S.C., 92 F.2d 321—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172—Roach v. First Nat. Bank, C.C.A. Miss., 84 F.2d 969—Munoz v. Porto Rico Ry. Light & Power Co., C. C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U. S. 689, 80 L.Ed. 1408—Tyler v. Stanolind Oil & Gas Co., C.C.A.Tex., 77 F.2d 802, certiorari denied Allred v. Stanolind Oil & Gas Co., 56 S.Ct. 149, 296 U.S. 627, 80 L.Ed. 445, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 472—Community Natural Gas Co. v. City of Cisco, C.C.A.Tex., 65 F.2d 320—Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., C.C. A.Kan., 64 F.2d 881—Sinclair Refining Co. v. Midland Oil Co., C.C. A.N.C., 55 F.2d 42—Bankers' Utilities Co. v. National Bank Supply Co., C.C.A.Cal., 53 F.2d 432, certiorari denied 52 S.Ct. 313, 285 U.S. 541, 76 L.Ed. 933—Interstate Transit v. City of Detroit, C.C.A. Mich., 46 F.2d 42—Williams v. Southern Cotton Oil Co., C.C.A.Ga., 45 F.2d 387—Northwestern Stevedoring Co. v. Marshall, C.C.A. Wash., 41 F.2d 28—Saunders v. Piggly-Wiggly Corporation, C.C.A. Tenn., 30 F.2d 385, modifying, D. C., Piggly-Wiggly Corporation v. Saunders, 1 F.2d 572—Cambridge Electric Light Co. v. Atwill, D.C. Mass., 25 F.2d 485—Security Metal Products Co. v. Kawneer Co., C.C. A.Mo., 14 F.2d 569—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A.Iowa, 9 F.2d 246—Henderson v. Kimmel, D.C.Kan., 47 F. Supp. 635—G. F. Heublein & Bro. v. Bushmill Wine & Products Co., D.C.Pa., 39 F.Supp. 549—Bay Petroleum Corporation v. Corporation Commission of State of Kansas, D. C.Kan., 36 F.Supp. 66—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792—Interstate Commerce Commission v. Chester, D.C.Pa., 26 F.Supp. 710—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370—U. S. Gypsum Co. v. Masonite Corporation, D.C.Del., 21 F.Supp. 551—Bristol Myers Co. v. Tischauser, D.C.Cal., 18 F.Supp. 228—Independent Workers of Clayton Mark & Co. v. Beman, D.C.Ill., 13 F.Supp. 627—Koppers Gas & Coke Co. v. U. S., D.C.Minn., 11 F.Supp. 467—U. S. v. Rogles, D.C.Mo., 9 F.Supp. 857—U. S. v. Weirton Steel Co., D. C.Del., 7 F.Supp. 255—Williamson Candy Co. v. Ucanco Candy Co., C. C.A.Iowa, 297 F. 454—National Commodities Co. v. Viret, C.C.A. N.Y., 296 F. 664.

Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489—Dean v. Coosa County Lumber Co., 167 So. 566, 232 Ala. 177—Boatwright v. Town of Leighton, 166 So. 418, 231 Ala. 607—City of Mobile v. Farrell, 158 So. 539, 542, 229 Ala. 582, citing **Corpus Juris,** and followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587, and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588—State v. Mobile & O. R. Co., 154 So. 91, 228 Ala. 533.

Cal.—People v. Black's Food Store, 105 P.2d 361, 362, 16 Cal.2d 59, citing **Corpus Juris**—Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 82 P.2d 3, 11 Cal.2d 634, 118 A.L.R. 486—Brock v. Superior Court in and for Los Angeles County, 81 P.2d 931, 11 Cal.2d 682, followed in 81 P.2d 934, 11 Cal.2d 781—Isert v. Riecks, 234 P. 371, 195 Cal. 569—Lutz v. Western Iron & Metal Co., 213 P. 962, 190 Cal. 554—Gray v. Bybee, App., 141 P.2d 32—Bemmerly v. Lake County, 132 P.2d 249, 251, 55 Cal.App.2d 829, citing **Corpus Juris**—Breedlove v. J. W. & E. M. Breedlove Excavating Co., 132 P.2d 239, 56 Cal.App.2d 141—Ellis v. American Federation of Labor, 120 P.2d 79, 48 Cal.App. 2d 440—Monterey Club v. Superior Court of Los Angeles, 119 P.2d 349, 48 Cal.App.2d 131—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal.App.2d 646—Thome v. Honcut Dredging Co., 111 P.2d 368, 43 Cal.App.2d 737—Almaden Vineyards Corporation v. Arnerich, 70 P.2d 243, 2 Cal.App. 2d 701—Vesper v. Forest Lawn Cemetery Ass'n, 67 P.2d 368, 20 Cal.App.2d 157—Metropolitan Laundry Co. v. Greenfield, 66 P. 2d 722, 20 Cal.App.2d 246—Miller & Lux v. San Joaquin Light & Power Corporation, 8 P.2d 560, 120 Cal.App. 589—Sun Maid Raisin Growers of California v. Mosesian, 258 P. 630, 84 Cal.App. 485—Huenemе, M. & P. L. A. Ry. v. Fletcher, 224 P. 774, 65 Cal.App. 698—Pavilion Ice Rink v. O'Brien, 212 P. 632, 60 Cal.App. 185.

Conn.—Point O'Woods Ass'n v. Busher, 167 A. 546, 117 Conn. 247—Carter v. Spring Perch Co., 155 A. 832, 836, 113 Conn. 636, citing **Corpus Juris.**

Del.—Consolidated Film Industries v. Johnson, 192 A. 603, 21 Del.Ch. 417.

D.C.—White v. Hess, 48 F.2d 1018, 1019, 60 App.D.C. 106, quoting **Corpus Juris.**

Fla.—Watson v. Cochrane, 8 So.2d 664, 150 Fla. 733—Clark v. Kreidt, 199 So. 333, 145 Fla. 1—Bishop v. First Old State Bank, 194 So. 488, 142 Fla. 190—Roberts v. Peacock, 193 So. 548, 141 Fla. 214—Davis v. Wilson, 190 So. 716, 139 Fla. 698—Wells v. Cochrane, 188 So. 87, 137 Fla. 241—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440—Ruff v. Fisher, 155 So. 642, 115 Fla. 247—Masser v. London Operating Co., 145 So. 72, 106 Fla. 474—Seaboard Oil Co. v. Donovan, 128 So. 821, 99 Fla. 1296—Willis v. Hathaway, 117 So. 89, 95 Fla. 608—Gillis v. State Live Stock Sanitary Board, 114 So. 509, 94 Fla. 890—McMullen v. Pinellas County, 106 So. 73, 90 Fla. 398.

Ga.—Moon v. Clark, 14 S.E.2d 481, 192 Ga. 47—Ingram & Le Grand Lumber Co. v. McAllister, 4 S.E.2d 558, 188 Ga. 626—Crockett v. Wilson, 192 S.E. 19, 184 Ga. 539—Clements v. Chandler, 186 S.E. 188, 182 Ga. 585—Voyles v. Carr, 160 S.E. 801, 173 Ga. 627.

Idaho.—Independent Irr. Co. v. Baldwin, 252 P. 489, 43 Idaho 371—Washington Water Power Co. v. Crane, 233 P. 878, 40 Idaho 310—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.

Ill.—Penkala v. Tomczyk, 148 N.E. 64, 317 Ill. 356—Kelly v. Brice, 49 N.E.2d 742, 319 Ill.App. 513—Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co., 4 N.E.2d 658, 287 Ill.App. 187—Cleaning & Dyeing Plant Owners Ass'n of Chicago v. Sterling Cleaners & Dyers, 278 Ill.App. 70—Hurt v. Hejhal, 259 Ill.App. 221—Grounds v. Van Laningham, 256 Ill.App. 540.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43—Kern v. Cleveland, C., C. & St. L. Ry. Co., 185 N.E. 446, 204 Ind. 595—Tuf-Tread Corporation v. Kilborn, 172 N.E. 353, 202 Ind. 154—Drake v. Durreger, 11 N. E.2d 88, 104 Ind.App. 323.

Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550—Ontjes v. Bagley, 250 N.W. 17, 217 Iowa 1200—Pisny v. Chicago &

N. W. Ry. Co., 221 N.W. 205, 207 Iowa 515, modified on other grounds 222 N.W. 609, 207 Iowa 515—Baehne v. Independent School Dist. of Manly, 207 N.W. 755, 201 Iowa 625.

Kan.—Babb v. Rose, 134 P.2d 655, 656, 156 Kan. 587, citing **Corpus Juris**—Emporia Loan & Investment Co. v. Dailey, 44 P.2d 288, 141 Kan. 845—Atchison, T. & S. F. Ry. Co. v. Hamilton, 288 P. 560, 130 Kan. 685—Wyatt v. Mickey, 271 P. 304, 126 Kan. 690.

Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194—Breathitt County v. Cockrell, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626.

La.—Foscue v. Mitchell, 171 So. 91, 185 La. 963—Drew v. Town of Zwolle, Sabine Parish, 171 So. 59, 185 La. 867—Young v. International Paper Co., 155 So. 231, 179 La. 803—Palama v. Livaudais, 153 So. 691, 179 La. 201—United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co., 147 So. 66, 176 La. 1024—Marcev v. Mandich, 103 So. 389, 158 La. 15—Brunning v. City of New Orleans, 94 So. 909, 152 La. 989—Noe v. Maestri, App., 190 So. 590.

Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236—Gaither v. Cate, 144 A. 239, 156 Md. 254.

Mich.—City of Grand Rapids v. Central Land Co., 292 N.W. 579, 294 Mich. 103—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692—Furniture Mfrs.' Ass'n of Grand Rapids v. Grand Rapids Guild of Exhibitors, 256 N.W. 595, 268 Mich. 685—Flemming v. Heffner & Flemming, 248 N.W. 900, 263 Mich. 561—Roy v. Chevrolet Motor Car Co., 247 N.W. 774, 262 Mich. 663.

Minn.—East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 298 N.W. 722, 210 Minn. 433—McFadden Lambert Co. v. Winston & Newell Co., 296 N.W. 18, 209 Minn. 242—Jannetta v. Jannetta, 285 N.W. 619, 205 Minn. 266—Behrens v. City of Minneapolis, 271 N.W. 814, 199 Minn. 363—State v. Nelson, 248 N.W. 751, 189 Minn. 87—Crescent Oil Co. v. City of Minneapolis, 221 N.W. 6, 175 Minn. 276—Schmidt v. Gould, 215 N.W. 215, 172 Minn. 179—Durgin v. Mercantile Acceptance Co., 209 N.W. 5, 167 Minn. 330—Kief v. Chippewa County State Bank, 203 N.W. 784, 163 Minn. 278, followed in Moyer v. Chippewa County State Bank, 203 N.W. 784, 163 Minn. 510—Minneapolis Electric Lamp Co. v. Federal Holding Co., 201 N.W. 324, 161 Minn. 198—Mitchell v. City of St. Paul, 180 N.W. 66, 114 Minn. 141.

Mo.—Lyons v. School District of Joplin, 278 S.W. 74, 311 Mo. 349—Commission Row Club v. Lambert, App., 161 S.W.2d 732—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140—White v. Boyne, App., 30 S.W.2d 791—Cavitt v. Fowler, App., 285 S.W. 175—Putnam v. Coates, 283 S.W. 717, 220 Mo. App. 218.

Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218—Williams v. Neal, 271 P. 455, 83 Mont. 244—National Bank of Montana v. Bingham, 269 P. 162, 83 Mont. 21—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.

Neb.—Neisius v. Henry, 5 N.W.2d 291, 295, 142 Neb. 29, citing **Corpus Juris**, and rehearing overruled 9 N.E.2d 163—Richardson v. Kildow, 218 N.W. 429, 116 Neb. 648.

N.J.—Braverman v. Braverman, 33 A. 2d 890, 134 N.J.Eq. 4, affirmed 37 A.2d 57—Wilentz v. Hendrickson, 33 A.2d 366, 133 N.J.Eq. 447—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J. Eq. 302—Benton v. Kernan, 8 A.2d 719, 126 N.J.Eq. 343, modifying 6 A.2d 195, 125 N.J.Eq. 412—Adams v. Adams, 4 A.2d 58, 125 N.J.Eq. 166—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J. Eq. 91—Benton & Holden v. Central R. Co. of New Jersey, 194 A. 805, 122 N.J.Eq. 309, affirmed Benton & Holden v. Central R. of New Jersey, 196 A. 352, 123 N.J.Eq. 163—Auburn Button Works v. Perryman Electric Co., 154 A. 1, 107 N.J.Eq. 554—Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 135 A. 284, 100 N.J.Eq. 185—Health Products Corporation v. Weber, 127 A. 30, 97 N.J.Eq. 159.

N.M.—Hobbs v. Town of Hot Springs, 106 P.2d 856, 44 N.M. 592.

N.Y.—Walker Memorial Baptist Church v. Saunders, 35 N.E.2d 42, 285 N.Y. 462, reversing 21 N.Y.S. 2d 512, 259 App.Div. 1010, affirming 17 N.Y.S.2d 842, 173 Misc. 455, appeal denied 22 N.Y.S.2d 462, 259 App.Div. 1077, reargument denied 35 N.E.2d 944, 286 N.Y. 607, motion denied 37 N.E.2d 147, 286 N.Y. 707, motion denied 39 N.E.2d 294, 287 N.Y. 679—Drabinsky v. Sea Gate Ass'n, 146 N.E. 614, 239 N.Y. 321, modifying 204 N.Y.S. 904, 209 App.Div. 827, which affirmed 201 N.Y.S. 102, 121 Misc. 195—Cowan v. City of Buffalo, 288 N.Y.S. 239, 247 App.Div. 591, affirming 282 N. Y.S. 880, 157 Misc. 71—Holton v. Board of Sup'rs of Monroe County, 281 N.Y.S. 350, 245 App.Div. 144—Village of Pelham Manor v. Werner, 262 N.Y.S. 730, 238 App. Div. 847—Jenkins v. Marsh, 233 N. Y.S. 360, 225 App.Div. 401—R. Prescott & Son v. Nye, 228 N.Y.S. 156, 223 App.Div. 356—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371—Town of Mamaroneck v. New York Interurban Water Co., 205 N.Y.S. 580, 209 App.Div. 897—Hartsell v. Village of Hamburg, 279 N.Y.S. 650, 155 Misc. 345, affirmed Caudwell v. Village of Hamburg, 289 N.Y.S. 910, 248 App.Div. 667, and Ferguson v. Village of Hamburg, 289 N.Y.S. 910, 248 App.Div. 667, modified on other grounds 5 N.E. 2d 801, 272 N.Y. 234, modified on other grounds 6 N.E.2d 411, 273 N.Y. 476—Coffey v. Metro-Goldwyn-Mayer Corporation, 289 N.Y.S. 882, 160 Misc. 186—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N.Y.S. 510, 230 App. Div. 601.

N.D.—Lee v. Jordan, 195 N.W. 660, 50 N.D. 365.

Okl.—Barnsdall Oil Co. v. Jackson, 71 P.2d 719, 180 Okl. 589—Inselman v. Berryman, 68 P.2d 527, 180 Okl. 136—Cooke v. Southwest Petroleum Co., 61 P.2d 16, 177 Okl. 458—Cherry v. Sharp, 45 P.2d 70, 172 Okl. 241—Head v. Carlton, 229 P. 178, 100 Okl. 292—Midland Valley R. Co. v. Imler, 225 P. 919, 101 Okl. 298.

Or.—Anderson v. Harju, 233 P. 848, 113 Or. 552.

Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97—Harris v. Susquehanna Collieries Co., 156 A. 159, 304 Pa. 550—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172—Hance v. Easton Hospital, 29 North.Co. 46.

Puerto Rico.—Gurabo v. Juncos-Central Co., 18 Puerto Rico 398—Morphi v. Fajardo Dev. Co., 17 Puerto Rico 766.

R.I.—McGee v. Local 682 of the Brotherhood of Painters, Decorators, and Paperhangers of America, A. F. of L., 30 A.2d 461—Miller v. Tanenbaum, 200 A. 449, 61 R.I. 92—Smart v. Boston Wire Stitcher Co., 148 A. 803, 50 R.I. 409.

S.C.—Sanders v. Textile Workers Organizing Committee, 196 S.E. 543, 187 S.C. 66—Metcalf v. Huntley-Richardson Lumber Co., 170 S. E. 162, 168, 170 S.C. 226, quoting **Corpus Juris**—Seabrook v. Carolina Power & Light Co., 156 S.E. 1, 159 S.C. 1—Metts v. Wenberg, 155 S. E. 734, 158 S.C. 411—Norris v. Brown, 143 S.E. 878, 146 S.C. 279—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225—Williams v. Jones, 75 S.E. 705, 92 S.C. 342.

S.D.—Parsons v. City of Sioux Falls, 272 N.W. 288, 65 S.D. 145.

Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 161 Tenn. 592—Spencer v. O'Brien, 158 S.W. 2d 445, 25 Tenn.App. 429—White v. Nashville C. & St. L. Ry., 1 Tenn. App. 467.

Tex.—Southwestern Greyhound Lines v. Railroad Commission of Texas, 99 S.W.2d 263, 128 Tex. 560,

109 A.L.R. 1286, reversing Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ.App., 92 S.W.2d 296—Southland Life Ins. Co. v. Egan, 86 S.W.2d 722, 126 Tex. 160, reversing, Civ.App., 79 S.W.2d 899—Shugart v. Rogers, Civ.App., 170 S.W.2d 813, error refused—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Pacific Mid-Continent Corporation v. Tunstill, Civ.App., 159 S.W.2d 908—The Fair, Inc. v. Retail Clerks International Protective Ass'n, Local No. 131, Civ.App., 157 S.W.2d 716—Houston Natural Gas Corporation v. Nueces County Water Improvement Dist. No. 1, Civ. App., 157 S.W.2d 170—Iden v. Lippard, Civ.App., 153 S.W.2d 642—Mitchell v. City of Temple, Civ. App., 152 S.W.2d 1116, error refused—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ. App., 152 S.W.2d 828, error refused—Harris County v. Bassett, Civ. App., 139 S.W.2d 180, error refused—Ford v. State ex rel. Schultz, Civ. App., 138 S.W.2d 1105—Pancake v. Kansas City Life Ins. Co., Civ.App., 134 S.W.2d 776—Frels v. Consolidated Theatres, Civ.App., 134 S.W.2d 369, error dismissed, judgment correct—Wilburn v. City of Ladonia, Civ.App., 125 S.W.2d 1061—State v. Guardian Foundation of Texas, Civ.App., 112 S.W.2d 806—Mast v. Oakley-Metcalf Funeral Home, Civ.App., 101 S.W.2d 819—Moffitt v. Lloyd, Civ.App., 98 S.W.2d 860—Cooper v. Walker, Civ. App., 96 S.W.2d 847—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ.App., 95 S.W.2d 1346—Vireca Corporation v. Cole, Civ. App., 93 S.W.2d 567—Lone Star Building & Loan Ass'n of Houston v. State ex rel. Atty. Gen., Civ. App., 91 S.W.2d 941, error dismissed—First Trust Joint Stock Land Bank of Chicago v. Hayes, Civ.App., 90 S.W.2d 331—Hutchison v. Ross, Civ.App., 89 S.W.2d 495—City of Dallas v. City Packing Co., Civ.App., 86 S.W.2d 60, error dismissed—Glass v. Hoblitzelle, Civ.App., 83 S.W.2d 796, error dismissed—Fisher v. Frito Co., Civ.App., 81 S.W.2d 282—Wizig v. Jefferson, Civ.App., 74 S.W.2d 428—Jackson v. Reagan, Civ.App., 70 S.W.2d 446—Anthony v. North American Building & Loan Ass'n, Civ.App., 68 S.W.2d 581—Harris v. Siegel, Civ.App., 68 S.W.2d 330—City of Amarillo v. Garwood, Civ.App., 63 S.W.2d 888, error refused—Diamond v. Hodges, Civ. App., 58 S.W.2d 187—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 53 S.W.2d 329—Tyrrell & Garth Inv. Co. v. City of Highland, Civ.App., 44 S.W.2d 1059—Beall v. Baresch, Civ.App., 37 S.W.2d 761—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079—Pearce v. Atlantic Life Ins. Co., Civ.App., 36 S.W.2d 553—Midland Building & Loan Ass'n v. Sparks Chapel Colored M. E. Church in America, Civ.App., 35 S.W.2d 774—Pena v. Le Comte, Civ.App., 35 S.W.2d 252—Fort v. Moore, Civ.App., 33 S.W.2d 807—Clarke v. Ogden, Civ.App., 33 S.W. 2d 589—Goldberg v. Soltes, Civ. App., 32 S.W.2d 246—Hudson v. Kerby, Civ.App., 5 S.W.2d 1007—Yonack v. Emery, Civ.App., 4 S.W. 2d 293, affirmed, Com.App., 13 S.W. 2d 667, 70 A.L.R. 684—L. E. Whitham & Co. v. Hendrick, Civ.App., 1 S.W.2d 907, error refused—Diamond Steel Highway Sign Co. v. Commercial Trust Co., Civ.App., 298 S.W. 456—Herman v. Forrest, Civ.App., 294 S.W. 624—Grant v. Grant, Civ.App., 286 S.W. 647—Woods v. Humber, Civ.App., 282 S.W. 834—Blair v. Paggi, Civ.App., 282 S.W. 627—City of Waco v. Grimes, Civ.App., 279 S.W. 312—Dilworth v. Buchanan, Civ.App., 275 S.W. 177—Meyer v. Cockcroft, Civ.App., 273 S.W. 665—Fry v. Jackson, Civ.App., 264 S.W. 612—Railroad Commission of Texas v. San Antonio Compress Co., Civ. App., 264 S.W. 214, error denied 278 S.W. 1115, 114 Tex. 582—City of Dallas v. Fry, Civ.App., 263 S.W. 653—Massa v. Guardian Trust Co., Civ.App., 258 S.W. 598—Mahoney v. City of Cisco, Civ.App., 248 S.W. 420.

Utah.—Shell Oil Co. v. Stiffler, 48 P. 2d 503, 87 Utah 176, rehearing denied 49 P.2d 1150, 87 Utah 197—Melrose v. Low, 15 P.2d 319, 320, 80 Utah 356, citing **Corpus Juris.**

Va.—Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1.

Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396—Goetz v. Russell, 232 P. 300, 132 Wash. 339.

W.Va.—Mercer County Court v. Princeton Power Co., 169 S.E. 450, 113 W.Va. 617—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

Wis.—State v. Benz, 295 N.W. 779, 236 Wis. 390—State ex rel. Attorney General v. Manske, 285 N.W. 378, 231 Wis. 16—Gross v. Peter Pirsch & Sons Co., 247 N.W. 335, 210 Wis. 682—J. Greenebaum Tanning Co. v. Railroad Commission of Wisconsin, 217 N.W. 282, 194 Wis. 634—Fassbender v. Peters, 191 N. W. 973, 179 Wis. 587.

Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.

32 C.J. p 29 note 13.

Discretion of court in:

Continuing, dissolving, or vacating injunction see infra § 226.

Requiring bond see infra §§ 165, 166.

No discretion in final stay of action

Grant of temporary injunction is usually discretionary, but not decree allowing perpetual stay.—Colson v. Pelgram, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App. Div. 137—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111.

Preserving court's jurisdiction

Trial court's discretion as to granting or refusing temporary injunction should ordinarily be exercised in favor of granting writ, where it is necessary to preserve court's jurisdiction or status quo.—First Trust Joint Stock Land Bank of Chicago v. Hayes, Tex.Civ.App., 90 S.W.2d 331.

Failure fully to disclose facts

An application for an injunction goes to the sound conscience of the court, acting on all the circumstances of each particular case; and the court, having the right to require a full and candid disclosure of all the facts, may refuse to exercise its extraordinary power by writ of injunction if the proceedings are such as to show that a full disclosure has not been made.—Western Maryland Dairy v. Chenowith, 23 A. 2d 660, 180 Md. 236—American-Stewart Distillery v. Stewart Distilling Co., 177 A. 473, 168 Md. 212—32 C.J. p 29 note 13 [b].

More inadequacy of a legal remedy will not necessarily require equity to exercise extraordinary power by injunction.

Kan.—Clark v. Vaughan, 292 P. 783, 131 Kan. 438.

N.H.—Hatch v. Hillsgrove, 138 A. 428, 83 N.H. 91, reheard 139 A. 366, 83 N.H. 91.

Relief refused although right infringed

Chancellor has discretion to refuse injunction, where refusal is not arbitrary, even though there is infringement of a right, leaving plaintiff to action at law for redress of damages.—Christenson v. Nielsen, 54 P.2d 430, 88 Utah 336.

Discretion not abused in granting:

(1) Permanent injunction.—Otis & Co. v. Securities and Exchange Commission, C.C.A.Ohio, 106 F.2d 579, affirming, D.C., Securities and Exchange Commission v. Otis & Co., 18 F.Supp. 100.

(2) Temporary injunction.

U.S.—Deckert v. Independence Shares, Corporation, 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000—Far-

on which the injunction is asked present questions of law only.[56] The general rule applies with equal force whether the injunction asked is a preventive or mandatory injunction,[57] and also to the issuance of a restraining order,[58] and is especially applicable in the case of a temporary injunction where the

rington v. T. Tokushige, Hawaii, 47 S.Ct. 406, 273 U.S. 284, 71 L.Ed. 646, affirming, C.C.A., 11 F.2d 710, certiorari granted 47 S.Ct. 99, 273 U.S. 677, 71 L.Ed. 835—Cone v. Rorick, C.C.A.Fla., 112 F.2d 394—City of Tampa v. Texas Co., C.C.A. Fla., 89 F.2d 221—Madison Square Garden Corporation, Ill. v. Carnera, C.C.A.N.Y., 52 F.2d 47.

Ga.—Sullivan v. Farlow, 5 S.E.2d 641, 189 Ga. 186—Summer v. Loggins, 180 S.E. 121, 180 Ga. 647—City of Acworth v. Western & A. R. Co., 126 S.E. 454, 159 Ga. 610—Kirkland v. Odum, 118 S.E. 706, 156 Ga. 131.

Mich.—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692.

Minn.—Habermann v. Ullman, 202 N. W. 484, 162 Minn. 210.

N.Y.—Remington Rand v. Crofoot, 289 N.Y.S. 1025, 248 App.Div. 356, affirmed 18 N.E.2d 37, 279 N.Y. 635, answering questions certified 292 N.Y.S. 701, 249 App.Div. 706—Davies v. Iroquois Gas Corporation, 292 N.Y.S. 111, 161 Misc. 103, reversed on other grounds 288 N.Y.S. 927, 248 App.Div. 670, reversed on other grounds 4 N.E.2d 742, 272 N. Y. 572.

Tex.—Southwestern Greyhound Lines v. Railroad Commission of Texas, 99 S.W.2d 263, 128 Tex. 560, 109 A. L.R. 1235, reversing Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ.App., 92 S. W.2d 296—Kilburn v. Childers, Civ. App., 86 S.W.2d 832—Vernon v. Googe, Civ.App., 26 S.W.2d 662—Texarkana & Ft. S. Ry. Co. v. Miller-Vidor Lumber Co., Civ.App., 288 S.W. 498.

Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

Discretion held not abused in refusing:

(1) Permanent injunction.

U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395.

Ky.—Brown v. Commonwealth ex rel. State Highway Commission, 82 S. W.2d 770, 259 Ky. 631.

(2) Temporary injunction.

U.S.—Gaines Dry Cleaners v. City of Chicago, C.C.A.Ill., 123 F.2d 104—Hannan v. City of Haverhill, C.C. A.Mass., 120 F.2d 87, affirming 38 F.Supp. 234, certiorari denied 62 S. Ct. 81, 314 U.S. 641, 86 L.Ed. 514—Æolian Co. v. Fischer, C.C.A.N.Y., 29 F.2d 679, affirming, D.C., 27 F. 2d 560.

Cal.—Wood v. Bufford, 214 P. 516, 61 Cal.App. 150.

Ga.—Thompson v. Mutual Inv. Corporation, 4 S.E.2d 44, 188 Ga. 476—Bernstein v. City of Vidalia, 141 S.E. 432, 165 Ga. 491—Cook v. State Highway Board of Georgia, 132 S. E. 902, 162 Ga. 84—Strand Amusement Co. v. City of La Grange, 127 S.E. 751, 160 Ga. 307.

Mich.—City of Grand Rapids v. Central Land Co., 292 N.W. 579, 294 Mich. 103.

Minn.—State v. Tri-State Telephone & Telegraph Co., 267 N.W. 489, 197 Minn. 575—Leslie & Bacich Co. v. Midway Development Co., 204 N.W. 925, 164 Minn. 152.

S.D.—Jones v. Humphrey, 199 N.W. 772, 47 S.D. 525.

Tex.—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ.App., 152 S.W.2d 828, error refused—Sisk v. Richards, Civ.App., 130 S. W.2d 1076—Marchiondo v. Wacasey, Civ.App., 114 S.W.2d 288—Ford Rent Co. v. Mayfair Taxicab Co., Civ.App., 99 S.W.2d 1023—Lewis Ice & Cold Storage Co. v. Gibbons, Civ.App., 49 S.W.2d 958—Farrall v. Hood, Civ.App., 32 S.W. 2d 480.

58. Tex.—Kilburn v. Childers, Civ. App., 86 S.W.2d 832—Tyree v. Navarro County Road Dist. No. 5, Civ.App., 199 S.W. 644.

57. U.S.—Moor v. Texas & N. O. R. Co., Tex., 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509, dismissing appeal, C. C.A., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678—Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 290 F. 306, 53 App.D.C. 331—Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, C.C.A.Va., 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, and affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—Czieslik v. Burnet, D.C.N.Y., 57 F. 2d 715—Stafford Mills v. White, D. C.Mass., 41 F.2d 58—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374—Asher v. Ingels, D.C. Cal., 13 F.Supp. 654.

Cal.—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 128 Cal.App. 348.

Fla.—Zetrouer v. Zetrouer, 103 So. 625, 89 Fla. 253.

Ill.—Lyle v. City of Chicago, 191 N. E. 255, 357 Ill. 41, 93 A.L.R. 1492—Brandenburg v. Country Club Bldg. Corporation, 163 N.E. 440, 332 Ill. 136.

Ky.—Brown v. Commonwealth ex rel. State Highway Commission, 82 S. W.2d 770, 259 Ky. 631.

N.Y.—Lexington & Fortieth Corporation v. Callaghan, 24 N.E.2d 316, 281 N.Y. 526, affirming 11 N.Y.S.2d 554, 256 App.Div. 978, leave to appeal denied 12 N.Y.S.2d 362, 257 App.Div. 806, motion denied 25 N. E.2d 147, 282 N.Y. 594.

Okl.—State ex rel. State Highway Commission v. Gillam, 105 P.2d 773, 188 Okl. 10.

Tenn.—White v. Nashville, C. & St. L. Ry., 1 Tenn.App. 467.

Tex.—Huguley v. White, Civ.App., 102 S.W.2d 451.

W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.

32 C.J. p 31 note 15.

Absence of party

Exercise of discretion to refuse mandatory injunction may properly be influenced by absence from suit of party defendant having beneficial interest in resisting claim asserted by plaintiff.—Moor v. Texas & N. O. R. Co., C.C.A.Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509.

Doubt as to validity of statute

Exercise of judicial discretion to grant mandatory injunction may properly be influenced by doubt as to validity of statute under color of which party resisting application for writ did what is sought to be forbidden.—Moor v. Texas & N. O. R. Co., supra.

58. U.S.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F. 2d 42—Willamette Valley Lumber Co. v. Watsek, D.C.Or., 5 F.Supp. 689.

Ark.—Riggs v. Hill, 144 S.W.2d 26, 201 Ark. 206.

Cal.—General Distillers v. Wholesale Liquor Drivers-Salesmen Union, Local 109, 135 P.2d 592, 57 Cal. App.2d 908—Palm Springs-La Quinta Development Co. v. Kieberk Corporation, 100 P.2d 346, 37 Cal. App.2d 642—Sturgeon v. City of Hawthorne, 289 P. 229, 106 Cal. App. 352.

Fla.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1—Roberts v. Peacock, 193 So. 548, 141 Fla. 214—Paramount Enterprises v. Mitchell, 140

granting of the injunction depends on the determination of questions of fact and the evidence is conflicting.[59]

Nature of the discretion. This discretionary power, however, is not arbitrary and unlimited, but must be exercised reasonably and in harmony with well established principles.[60] In every case in which the law leaves anything to the discretion of the court, a sound and legal discretion is understood and not an arbitrary one.[61] A proper discretion does not include the misapplication of the law to conceded facts;[62] and the court must be guided by conclusions based on the law and facts disclosed by the particular case.[63] Where the case made out by the complainant is perfectly clear, and he has complied with all the requirements of the law for the issuance of an injunction, he is entitled to the injunction as a matter of right.[64] On the other hand, if the facts conclusively show that it would be inequitable and unjust to award an injunction, the court has no discretion in the matter but must refuse it.[65] A temporary injunction may be refused under circumstances

So. 328, 104 Fla. 407—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.
Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P. 2d 628, 52 Idaho 728.
Minn.—East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 298 N.W. 722, 210 Minn. 433.
N.D.—Vinquist v. Siegert, 225 N.W. 806, 58 N.D. 295—Campbell v. Campbell, 225 N.W. 805, 58 N.D. 244—Bessel v. Bethke, 215 N.W. 868, 56 N.D. 1.
Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Logue v. Perry, Civ. App., 67 S.W.2d 1047, error dismissed—Mahaney v. City of Cisco, Civ.App., 248 S.W. 420.
32 C.J. p 31 note 16.

Discretion held not abused:

(1) In granting restraining order.
Fla.—City of Miami v. Direct Distributors, 183 So. 841, 134 Fla. 430.
Ga.—Wohlwender v. Franklin, 194 S. E. 359, 185 Ga. 73.
N.D.—Bessel v. Bethke, 215 N.W. 868, 56 N.D. 1.

(2) In refusing restraining order.
Cal.—General Distillers v. Wholesale Liquor Drivers-Salesmen Union, Local 109, 135 P.2d 592, 57 Cal. App.2d 908.
Fla.—First Nat. Bank v. Massey, 182 So. 187, 132 Fla. 113—Gillis v. State Live Stock Sanitary Board, 114 So. 509, 94 Fla. 890.
Iowa.—Brodkey v. Sioux City, 291 N. W. 171, 229 Iowa 1291, modified on other grounds 296 N.W. 352, 229 Iowa 1291.
N.D.—Campbell v. Campbell, 225 N. W. 805, 58 N.D. 244.

59. U.S.—Ruckstell Sales & Mfg. Co. v. Perfecto Gear Differential Co., C.C.A.Cal., 14 F.2d 297—Williamson Candy Co. v. Ucanco Candy Co., C.C.A.Iowa, 297 F. 454.
Cal.—People v. Black's Food Store, 105 P.2d 361, 16 Cal.2d 59.
Ga.—Ballard v. Waites, 21 S.E.2d 848, 194 Ga. 427—Harrison v. Fulton County Board of Health, 195 S.E. 864, 185 Ga. 624—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536—Gheesling v. Martin, 168 S.E. 767, 176 Ga. 738—Sapp v. Ritch, 149 S.E. 636, 169 Ga. 33—Johnson v. Southern States Phosphate & Fertilizer Co., 135 S.E. 435, 163 Ga. 98.
Idaho.—White v. Coeur D'Alene Big Creek Mining Co., 55 P.2d 720, 56 Idaho 282.
Tex.—Tips v. Railroad Commission of Texas, Civ.App., 110 S.W.2d 585, error dismissed.
32 C.J. p 31 note 17, p 352 notes 86, 87.

60. U.S.—Western Electric Co. v. Cinema Supplies, C.C.A.Minn., 80 F.2d 106, certiorari denied Cinema Supplies v. Western Electric Co., 56 S.Ct. 595, 297 U.S. 717, 80 L.Ed. 1003—Behre v. Anchor Ins. Co. of New York, C.C.A.N.Y., 297 F. 986—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897.
Cal.—Diederichsen v. Sutch, 118 P. 2d 863, 47 Cal.App.2d 646.
Fla.—Decumbe v. Smith, 196 So. 595, 143 Fla. 5—Bishop v. First Old State Bank, 194 So. 488, 142 Fla. 190—Roberts v. Peacock, 193 So. 548, 141 Fla. 214—Reaves v. Sadler, 189 So. 41, 136 Fla. 553—First Nat. Bank v. Massey, 182 So. 187, 132 Fla. 113—City of West Palm Beach v. Eppelman, 181 So. 894, 132 Fla. 686.
N.M.—De Soto v. De Jaquez, 106 P. 2d 301, 44 N.M. 564.
Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079.
32 C.J. p 32 note 18.

Maintenance of status quo

Court's discretion should be exercised in favor of temporary injunction where it serves to maintain status quo until final trial, but should be exercised against temporary injunction if its issuance would change status quo.—Gill v. Hudspeth County Conservation & Reclamation Dist. No. 1, Tex.Civ.App., 88 S.W.2d 517.

61. U.S.—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C.Or., 296 F. 928, affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468.
Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 120 A. 486, 14 Del.Ch. 1.
La.—Beebe v. Guinault, 29 La.Ann. 795.
Tenn.—Collier v. City of Memphis, 4 Tenn.App. 322.

62. Tex.—Southland Life Ins. Co. v. Egan, 86 S.W.2d 722, 723, 126 Tex. 160, citing **Corpus Juris.**
32 C.J. p 32 note 20.

63. S.C.—Metcalf v. Huntley-Richardson Lumber Co., 170 S.E. 162, 168, 170 S.C. 226, quoting **Corpus Juris.**
32 C.J. p 32 note 21.

64. U.S.—Western Electric Co. v. Cinema Supplies, C.C.A.Minn., 80 F.2d 106, certiorari denied Cinema Supplies v. Western Electric Co., 56 S.Ct. 595, 297 U.S. 717, 80 L.Ed. 1003.
La.—Vicksburg, S. & P. Ry. Co. v. Bradley, 96 So. 20, 153 La. 427.
S.C.—Metcalf v. Huntley-Richardson Lumber Co., 170 S.E. 162, 168, 170 S.C. 226, quoting **Corpus Juris.**
Tex.—McAnally v. Person, Civ.App., 57 S.W.2d 945, error refused.
Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.
32 C.J. p 32 note 22.

Duty to grant injunction

Trial court has duty to grant temporary injunction when there is substantial controversy and one party is committing or threatening immediate commission of act that will destroy status quo before full hearing can be had on merits of case.—Houston Funeral Home v. Boe, Tex.Civ.App., 78 S.W.2d 1091—Dallas Joint Stock Land Bank of Dallas v. Davis, Tex. Civ.App., 73 S.W.2d 989—Amarillo Mut. Benev. Ass'n v. Sims, Tex.Civ. App., 53 S.W.2d 329—City of Farmersville v. Texas-Louisiana Power Co., Tex.Civ.App., 33 S.W.2d 272.

65. U.S.—Nisonoff v. Irving Trust Co., C.C.A.N.Y., 68 F.2d 32—Brehme v. Watson, C.C.A.Cal., 67 F.2d 359, 362, citing **Corpus Juris**—Interstate Commerce Commission v. Chester, D.C.Pa., 26 F.Supp. 710.
N.Y.—McClure v. Leaycraft, 75 N.E. 961, 183 N.Y. 86, 5 Ann.Cas. 45, reversing 90 N.Y.S. 233, 97 App.Div. 518.

where a permanent injunction might be granted,[66] particularly where sought on an ex parte application,[67] and the fact that the object of an action may be defeated by refusing a temporary injunction is not of itself sufficient to deprive the court of all discretionary power in the matter.[68]

The court which is to exercise the discretion is the trial court and not the appellate court.[69] The action of the court may be reviewed on appeal or error in case of a clear abuse of discretion, but not otherwise, as shown in Appeal and Error § 1591, and ordinarily mandamus will not lie to control such discretion, as discussed in the C.J.S. title Mandamus § 110, also 38 C.J. p 653 note 59–p 655 note 74.

§ 15. Caution Required

The power to issue injunctions should be exercised with great caution and only where the reason and necessity therefor are clearly established.

The power of the courts to issue injunctions should be exercised with great caution and only where the reason and necessity therefor are clearly established.[70] This rule has been applied more frequently in the cases of preliminary[71] and mandatory[72] injunctions, and to restraining orders.[73]

66. Kan.—Olmstead v. Koester, 14 Kan. 463.
32 C.J. p 33 note 24.

67. La.—State v. Judge Orleans Parish Civ. Dist. Ct., 26 So. 374, 51 La.Ann. 1768—Chatard v. New Orleans, 10 La.Ann. 752.

68. N.Y.—Young v. Campbell, 75 N.Y. 525.

69. U.S.—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612.
32 C.J. p 33 note 31.

By appellate court as original proposition

Issuance of preliminary injunction by appellate court as original proposition involved judicial discretion.—Set-O-Type Co. v. American Multigraph Co., C.C.A.Ohio, 55 F.2d 800.

70. U.S.—Brehme v. Watson, C.C.A. Cal., 67 F.2d 359, 362, citing **Corpus Juris**—Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.Pa., 15 F.2d 16, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 871—U. S. v. Rogles, D.C.Mo., 9 F.Supp. 857.
Alaska.—Anderson v. Smith, 8 Alaska 470.
Cal.—Almaden Vineyards Corporation v. Arnerich, 70 P.2d 243, 2 Cal.App.2d 701.
Fla.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1—Seaboard All Florida Ry. Co. v. Underhill, 141 So. 306, 105 Fla. 409—Willis v. Hathaway, 117 So. 89, 95 Fla. 608.
Ill.—Lyle v. City of Chicago, 191 N.E. 255, 357 Ill. 41, 93 A.L.R. 1492—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40.
Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.
Ky.—Kentucky Utilities Co. v. Carlisle Ice Co., 131 S.W.2d 499, 279 Ky. 585.
Md.—Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 12 A.2d 201, 178 Md. 38—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
Mo.—Clevenger v. McAfee, App., 170 S.W.2d 424, transferred, see Sup., 165 S.W.2d 411—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140, 146, citing **Corpus Juris**—Cavitt v. Fowler, App., 285 S.W. 175—Putnam v. Coates, 283 S.W. 717, 719, 220 Mo.App. 218, quoting **Corpus Juris.**
N.J.—Adams v. Adams, 4 A.2d 58, 125 N.J.Eq. 166.
N.Y.—Lyon v. Water Com'rs of City of Binghamton, 240 N.Y.S. 647, 228 App.Div. 585.
Or.—State v. Beaver Portland Cement Co., 124 P.2d 524, 169 Or. 1, rehearing denied State by Wilson v. Beaver Portland Cement Co., 126 P.2d 1094, 169 Or. 1.
Tex.—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690—Wilson v. State, Civ.App., 59 S.W.2d 303, 304, citing **Corpus Juris**—Brownsville & Matamoros Municipal Bridge Co. v. Gateway Bridge Co., Civ.App., 2 S.W.2d 1012, 1014, citing **Corpus Juris**—Thurman v. Kirkland, Civ.App., 260 S.W. 677.
32 C.J. p 33 note 34.
Weight and sufficiency of evidence in suits for injunction see infra § 192.

Power exercised sparingly

U.S.—Sun Valley Mfg. Co. v. Sun Valley Togs, D.C.N.Y., 39 F.Supp. 502.
Fla.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1.
Iowa.—Relph v. Goltry, 240 N.W. 646, 213 Iowa 1118.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

A delicate power

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction."—Benton v. Kernan, 8 A.2d 719, 721, 126 N.J.Eq. 343, modifying 6 A.2d 195, 125 N.J.Eq. 412—Auburn Button Works v. Perryman Electric Co., 154 A. 1, 3, 107 N.J.Eq. 554—32 C.J. p 33 note 34 [b].

71. U.S.—Warner Bros. Pictures v. Gittone, C.C.A.Pa., 110 F.2d 292, reversing, D.C., Gittone v. Warner Bros. Pictures, 30 F.Supp. 823—Murray Hill Restaurant v. Thirteen Twenty One Locust, C.C.A.Pa., 98 F.2d 578—Singer Mfg. Co. v. Axelrud, D.C.N.Y., 28 F.Supp. 450—Bristol-Myers Co. v. Tischauser, D.C.Cal., 18 F.Supp. 228—Williamson Candy Co. v. Ucanco Candy Co., C.C.A.Iowa, 297 F. 454.
Cal.—Breedlove v. J. W. & E. M. Breedlove Excavating Co., 132 P.2d 239, 56 Cal.App.2d 141.
Ill.—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill.App. 357, 370, citing **Corpus Juris.**
N.J.—Board of Health of Medford Tp. v. Jennings, 18 A.2d 62, 129 N.J.Eq. 51, affirmed Board of Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511—Adelman v. Universal Fur Dressing Co., 174 A. 523, 116 N.J.Eq. 511.
N.Y.—Acorn Employment Service v. Moss, 24 N.Y.S.2d 669, 261 App.Div. 178, appeal denied 26 N.Y.S.2d 315, 261 App.Div. 897—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1042, 235 App.Div. 651.
Puerto Rico.—Morphi v. Fajardo Dev. Co., 17 Puerto Rico 766.
32 C.J. p 33 note 35.

72. Ill.—Lyle v. City of Chicago, 191 N.E. 255, 357 Ill. 41, 93 A.L.R. 1492—Cleaning & Dyeing Plant Owners Ass'n of Chicago v. Sterling Cleaners & Dyers, 278 Ill.App. 70.
Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 168.
Tex.—White v. State, Civ.App., 122 S.W.2d 714—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079.
32 C.J. p 34 note 36.

73. Puerto Rico.—Boudens v. Korber, 18 Puerto Rico 252.

§ 16. Grounds for Granting or Denying Injunction in General

As a general rule, an injunction should issue only in cases specifically pointed out by law, or where irreparable injury to the personal or property rights of the individual will result unless protected by its restraining effect.

It has been stated broadly that an injunction should issue only in cases specifically pointed out by law, or where irreparable injury to the personal or property rights of the individual will result unless protected by its restraining effect.[74] While it has been held that a statute specifying the grounds for issuance of an injunction is controlling, regardless of what the rule may be in equity,[75] and that an injunction, as an independent remedy under statute, may be obtained in cases where such relief would have been granted in equity previous to the adoption of the statute,[76] it has also been said that injunction is granted only on equitable grounds,[77] and that the writ of injunction is not exercised indiscriminately notwithstanding a statute providing that it may be obtained as an independent remedy in an action by equity proceeding in all cases where such relief would have been granted in equity previous to the adoption of the statute.[78]

Various other matters considered by the court in determining the right to an injunction are considered infra §§ 18–33.

§ 17. —— Preliminary Injunction

A temporary injunction usually should be granted where the questions presented are grave and injury to the moving party will be certain, substantial, and irreparable if it is denied and the final determination is in his favor, while if it is granted and the decision is unfavorable the inconvenience and loss to the opposing party will be inconsiderable or may be adequately protected by a bond.

In the cases dealing with injunctions, there are various general expressions involving a combination of the principles, discussed specifically infra §§ 18–33, which justify or are necessary to warrant the issuance of a preliminary or interlocutory injunction.[79] Thus it has been said that a temporary injunction usually should be granted where the questions presented are grave and injury to the moving party will be certain, substantial, and irreparable if it is denied and the final determination is in his favor, while if it is granted and the decision is unfavorable the inconvenience and loss to the opposing party will be inconsiderable or may be adequately protected by a bond;[80] that the court will grant a preliminary injunction when it is made to appear that there is a substantial controversy between the parties and that one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the status quo of the controversy before a full hearing can be had on the merits of the case;[81] that power

74. La.—Minden Syrup Co. v. Applegate, App., 150 So. 421.

75. Tex.—Skipper v. Davis, Civ. App., 59 S.W.2d 454, set aside on other grounds Davis v. Skipper, 83 S.W.2d 318, 125 Tex. 364.

76. Iowa.—Sinclair Refining Co. v. Cole, 294 N.W. 884, 229 Iowa 763.

77. Tex.—Scurry v. Nicholson, Civ. App., 9 S.W.2d 747, reversed on other grounds Nicholson v. Scurry, 28 S.W.2d 512, 119 Tex. 250.

78. Iowa.—Drennen v. Olmstead, 275 N.W. 884, 224 Iowa 85.

79. U.S.—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Bradford v. Hurt, C.C.A.Tex., 84 F.2d 722, affirming, D.C., 15 F.Supp. 426—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F.2d 394—White v. Federal Radio Commission, D.C.Ill., 29 F.2d 113—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A.Iowa, 9 F.2d 246—Polk Co. v. Glover, D.C.Fla., 22 F.Supp. 575, reversed on other grounds 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Birkheiser v. City of Los Angeles, D.C.Cal., 11 F.Supp. 689—Iowa Southern Utilities Co. v. Town of Lamoni, D.C.Iowa, 11 F. Supp. 581, appeal dismissed, C.C.A., Iowa Southern Utilities Co. v. Town of Lamoni, Iowa, 79 F.2d 1000—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897—Willamette Valley Lumber Co. v. Watzek, D.C.Or., 5 F.Supp. 689.
Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.
Ga.—Jones v. Lanier Development Co., 2 S.E.2d 923, 188 Ga. 141.
Idaho.—White v. Coeur D'Alene Big Creek Mining Co., 55 P.2d 720, 56 Idaho 282.
Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.
N.J.—Sneath v. Lehsten, 185 A. 55, 120 N.J.Eq. 327—Helbig v. Phillips, 147 A. 787, 105 N.J.Eq. 328, affirmed 152 A. 919, 107 N.J.Eq. 138—Gluck v. Rynda Development Co., 134 A. 363, 99 N.J.Eq. 788, affirmed 135 A. 917, 100 N.J.Eq. 554—Sayre & Fisher Land Co. v. R. U. Rue Co., 128 A. 862, 2 N.J.Misc. 1081.
N.Y.—International Ry. Co. v. Barone, 284 N.Y.S. 122, 246 App.Div. 450—Goldman v. Cohen, 227 N.Y.S. 311, 222 App.Div. 631—Suttin v. Unity Button Works, 258 N.Y.S. 863, 144 Misc. 784—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1042, 235 App. Div. 651—Pepsi-Cola Co. v. Billy Rose's Exposition Spectacles, 14 N. Y.S.2d 301.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

80. U.S.—Ohio Oil Co. v. Conway, La., 49 S.Ct. 256, 279 U.S. 813, 73 L.Ed. 972, vacating, D.C., Ohio Oil Co. v. McFarland, 28 F.2d 441—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Bay Petroleum Corporation v. Corporation Commission of State of Kansas, D.C. Kan., 36 F.Supp. 66—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C. Minn., 24 F.Supp. 370—Independent Workers of Clayton Mark & Co. v. Beman, D.C.Ill., 13 F.Supp. 627.
N.J.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 485, 120 N.J.Eq. 376.
N.Y.—Koukly v. Weber, 277 N.Y.S. 39, 154 Misc. 659.

81. Pa.—Commonwealth v. Simon, 6 Pa.Dist. & Co. 93, 95, quoting **Corpus Juris.**
Tex.—Southland Life Ins. Co. v. Egan, Civ.App., 79 S.W.2d 899, reversed on other grounds 86 S.W.2d 722, 126 Tex. 160—Texas Milk Products Co. v. City of Mt. Pleas-

to issue an injunction pendente lite is exercised whenever necessary to subserve the ends of justice;[82] that a preliminary injunction should not issue unless from the pressure of an urgent necessity;[83] or that a preliminary injunction should not be granted except to maintain the status quo or to prevent irreparable injury.[84]

A preliminary injunction may be granted by the court, without expressing, or without having the means of forming, a final opinion as to the rights of the parties,[85] and, while it has been held that a preliminary injunction should not be denied merely because a final hearing may be had promptly,[86] it has also been held that an injunction pendente lite will not be granted if an immediate trial is possible.[87] Where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, ordinarily it will not be granted,[88] unless complainant's right to relief is clear.[89]

The status quo which will be preserved by a preliminary injunction is the last, actual, peaceable, noncontested status which preceded the pending controversy.[90]

ant, Civ.App., 55 S.W.2d 1101, 1104, quoting **Corpus Juris.**
32 C.J. p 21 note 8.

82. N.J.—Wilentz v. Hendrickson, 33 A.2d 366, 133 N.J.Eq. 447.

83. U.S.—Luckenbach S. S. Co. v. Norton, D.C.Pa., 21 F.Supp. 707.
N.J.—Cascade Laundry v. Volk, 20 A.2d 505, 129 N.J.Eq. 603—Benton v. Kernan, 8 A.2d 719, 126 N.J.Eq. 343, modifying 6 A.2d 195, 125 N.J.Eq. 412—Sneath v. Lehsten, 185 A. 55, 120 N.J.Eq. 327—Morse v. Borough of Essex Fells, 173 A. 921, 116 N.J.Eq. 350—Dvorin v. Greenberg, 151 A. 95, 106 N.J.Eq. 495—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108.
N.Y.—Homes v. Weisser, 260 N.Y.S. 515, 146 Misc. 5.
Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079.

84. U.S.—Community Natural Gas Co. v. City of Cisco, C.C.A.Tex., 65 F.2d 320.
Fla.—Bowling v. National Convoy & Trucking Co., 135 So. 541, 101 Fla. 634.
N.Y.—Birn v. Childs Co., 36 N.Y.S.2d 250.
Pa.—Merchants' Warehouse Co. v. Crossen, 46 Dauph.Co. 185.
Tex.—Ford Rent Co. v. Mayfair Taxicab Co., Civ.App., 99 S.W.2d 1023—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ.App., 95 S.W.2d 1346—City of Farmersville v. Texas-Louisiana Power Co., Civ. App., 33 S.W.2d 272—Welsh v. Carter, Civ.App., 30 S.W.2d 354.
Wis.—Rust v. State Board of Dental Examiners of Wisconsin, 256 N.W. 919, 216 Wis. 127.

85. Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.
Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.
32 C.J. p 21 note 8.

86. U.S.—Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission, D.C.Mich., 292 F. 139.

87. N.Y.—Suma v. Landriscina, 36 N.Y.S.2d 279.

88. U.S.—Selchow & Righter Co. v. Western Printing & Lithographing Co., C.C.A.Wis., 112 F.2d 430, affirming, D.C., 29 F.Supp. 569—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987—Gray v. Yellowley, D.C.N.Y., 290 F. 400.
Ill.—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill.App. 357, 370, citing **Corpus Juris.**
Mich.—Epworth Assembly v. Ludington & N. Ry., 194 N.W. 562, 223 Mich. 589.
N.J.—Elevator Supplies Co. v. Wylde, 150 A. 347, 106 N.J.Eq. 168.
N.Y.—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413—Giordano v. Dellwood Dairy Co., 275 N.Y.S. 193, 153 Misc. 54.
Pa.—Commonwealth v. Simon, 6 Pa. Dist. & Co. 93, 95, quoting **Corpus Juris.**
Tex.—Perry v. Stringfellow, 134 S. W.2d 1031, 134 Tex. 328, reversing, Civ.App., 113 S.W.2d 1012—Humble Oil & Refining Co. v. Manziel, Civ. App., 165 S.W.2d 909, 911, citing **Corpus Juris**—Nelms v. Electro-Ball Co., Civ.App., 157 S.W.2d 681, error refused—McMurrey Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Kimbrough v. State, Civ.App., 139 S.W.2d 165, 168, quoting **Corpus Juris**—Hume v. Zuehl, Civ.App., 119 S.W.2d 905, error refused—Morgan v. Brannon, Civ.App., 95 S.W.2d 509—Vireca Corporation v. Cole, Civ.App., 93 S. W.2d 567, 569, citing **Corpus Juris**—Morgan v. Smart, Civ.App., 88 S. W.2d 769, 771, quoting **Corpus Juris**—Williams v. Sinclair Prairie Oil Co., Civ.App., 87 S.W.2d 892—Railroad Commission of Texas v. Real, Civ.App., 80 S.W.2d 494, 495, citing **Corpus Juris**—Sinclair Refining Co. v. City of Paris, Civ. App., 68 S.W.2d 230—Gordon v. Hawkins, Civ.App., 66 S.W.2d 432, 434, citing **Corpus Juris**—Nelson v. Thompson, Civ.App., 64 S.W.2d 373, error dismissed—City of University Park v. Rahl, Civ.App., 36 S.W.2d 1075, 1078, citing **Corpus Juris**—City of Farmersville v. Texas-Louisiana Power Co., Civ.App., 33 S.W.2d 272, 275, citing **Corpus Juris**—Welsh v. Carter, Civ.App., 30 S.W.2d 354, 355, quoting **Corpus Juris.**
Wash.—State v. Sutton, 98 P.2d 680, 684, 2 Wash.2d 523, quoting **Corpus Juris.**
32 C.J. p 21 note 10.

89. Tex.—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73.

90. U.S.—Warner Bros. Pictures v. Gittone, C.C.A.Pa., 110 F.2d 292, reversing, D.C., Gittone v. Warner Bros. Pictures, 30 F.Supp. 823.
Fla.—Bowling v. National Convoy & Trucking Co., 135 So. 541, 101 Fla. 634.
Mo.—State, on Inf. of McKittrick, v. American Ins. Co., 173 S.W.2d 51.
Okl.—Dusbabek v. Local Building & Loan Ass'n, 63 P.2d 756, 178 Okl. 592.
Pa.—O'Donnell v. Lehigh Nav. Coal Co., 188 A. 348, 324 La. 369—Commonwealth v. Cohen, 28 A.2d 723, 150 Pa.Super. 487—Jackson v. Sarajean Building & Loan Ass'n, 13 Pa.Dist. & Co. 409—McDevitt v. Phillips, 45 Dauph.Co. 394.
Tex.—Humble Oil & Refining Co. v. Manziel, Civ.App., 165 S.W.2d 909, 910, citing **Corpus Juris**—Humble Oil & Refining Co. v. Neeks Drilling Co., Civ.App., 119 S.W.2d 169, error dismissed—White v. Sparks, Civ.App., 118 S.W.2d 649, opinion supplemented 119 S.W.2d 114—Hartley v. Brady, Civ.App., 114 S. W.2d 406, 408, quoting **Corpus Juris**—Hodge v. Hendrick, Civ.App., 97 S.W.2d 722—Morgan v. Smart, Civ.App., 88 S.W.2d 769, 772, quoting **Corpus Juris**—Gill v. Hudspeth County Conservation & Reclamation Dist. No. 1, Civ.App., 88 S.W. 2d 517—Williams v. Sinclair Prairie Oil Co., Civ.App., 87 S.W.2d 892—Houston Funeral Home v. Boe, Civ.App., 78 S.W.2d 1091—City of

Statutory regulation. Under statutes in some jurisdictions, an injunction pendente lite can be issued only in a pending action or special proceeding, or to enjoin a mortgage foreclosure by advertisement.[91]

§ 18. —— Absence of Precedent for Injunction Sought

It is not a fatal objection to the granting of an injunction that the use of the writ for the particular purpose for which it is sought is novel.

While it has been said that the writ of injunction will not be awarded in new and doubtful cases not coming within the well established principles of equity,[92] yet the absence of precedent, although not to be overlooked entirely, does not of itself determine questions of jurisdiction.[93] It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel.[94] Courts may amplify remedies and apply rules and general principles for the advancement of substantial justice.[95] If this were not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring.[96]

§ 19. Existence and Nature of Right Protected

a. In general
b. Nature of rights in general
c. Doubtful rights
d. Violation of right

a. In General

The existence of a right violated is a prerequisite to the granting of an injunction; an injunction will not issue to protect a right not in esse and which may never arise.

The existence of a right violated is a prerequisite to the granting of an injunction,[97] and, where it is clear that the complainant does not have the right that he claims, he is not entitled to an injunction, either temporary or perpetual, to prevent a violation of such supposed right.[98] This principle has been applied where complainant claims the right under a law that is unconstitutional[99] or which has been repealed,[1] or under a contract that is illegal.[2] An injunction will not issue to protect a right not in esse and which may never arise[3] or to restrain an act which does not give rise to a cause of ac-

Farmersville v. Texas-Louisiana Power Co., Civ.App., 33 S.W.2d 272, 275, citing **Corpus Juris.**
Wash.—State v. Sutton, 98 P.2d 680, 684, 2 Wash.2d 523, quoting **Corpus Juris.**
32 C.J. p 21 note 9.

91. N.D.—Security State Bank of Crosby v. Peterson, 229 N.W. 921, 59 N.D. 341.

92. Kan.—Depew v. Wichita Retail Credit Ass'n, 42 P.2d 214, 215, 141 Kan. 481, quoting **Corpus Juris.**
32 C.J. p 34 note 40.

93. Md.—Hamilton v. Whitridge, 11 Md. 128, 69 Am.D. 184.

94. Ariz.—Funk Jewelry Co. v. State, 50 P.2d 945, 947, 46 Ariz. 348, citing **Corpus Juris.**
Kan.—Depew v. Wichita Retail Credit Ass'n, 42 P.2d 214, 215, 141 Kan. 481, quoting **Corpus Juris.**
32 C.J. p 34 note 42.

95. U.S.—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C.Or., 296 F. 928, 934, quoting **Corpus Juris,** and affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468.
Md.—Hamilton v. Whitridge, 11 Md. 128, 69 Am.D. 184.

96. Md.—Hamilton v. Whitridge, supra.

97. U.S.—Coty v. Prestonettes, Inc., C.C.A.N.Y., 285 F. 501, certiorari granted Prestonettes, Inc. v. Coty, 43 S.Ct. 250, 260 U.S. 720, 67 L.Ed. 480, reversed on other grounds 44 S.Ct. 350, 264 U.S. 359, 68 L.Ed. 731.
N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App. Div. 135.

Academic questions
An injunction cannot be invoked to decide an academic question.—Bellarts v. Gleeton, 132 P. 961, 65 Or. 269.

Right in the abstract
Injunction will not issue to enforce right or prevent wrong in the abstract.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.

Establishment and invasion of legal right ordinarily entitles owner to injunctive relief.—Howland v. Union Bag & Paper Corporation, 282 N.Y.S. 357, 156 Misc. 507.

Statutory rights
In a suit for injunction, complainant's rights, where they depend on a statute, are to be determined with reference to the statute in force when the relief is awarded.—Dieterich v. Fargo, 87 N.E. 518, 194 N.Y. 359, 22 L.R.A.,N.S., 696, reversing 104 N.Y.S. 334, 119 App.Div. 315.

98. U.S.—L. Singer & Sons v. Union Pac. R. Co., D.C.Mo., 26 F.Supp. 721, affirmed, C.C.A., 109 F.2d 493, certiorari granted 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, and Kansas City, Mo., v. Singer & Sons, 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, affirmed L. Singer & Sons v. Union Pac. R. Co., 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198.
Cal.—McKesson & Robbins v. Collins, 64 P.2d 469, 18 Cal.App.2d 648.
Mass.—Mullholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.
N.Y.—Murray v. Rose, 30 N.Y.S.2d 6.
Tenn.—Cravens v. Storie, 133 S.W.2d 609, 175 Tenn. 285.
Tex.—Kemp Hotel Operating Co. v. City of Wichita Falls, Com.App., 170 S.W.2d 217, affirming, Civ.App., City of Wichita Falls v. Kemp Hotel Operating Co., 162 S.W.2d 150 —Crawford v. Maples, Civ.App., 114 S.W.2d 696—De Shong Motor Freight Line v. Whisnand, Civ.App., 98 S.W.2d 389, 393, citing **Corpus Juris.**
32 C.J. p 34 note 47.

Not used to establish right
A writ of injunction cannot be used to establish a legal right.
D.C.—Brunswick v. Elliott, 103 F.2d 746, 70 App.D.C. 45.
Pa.—Lare v. Young, 33 A.2d 662, 153 Pa.Super. 28.

99. Cal.—U. S. v. Superior Court, 120 P.2d 26, 19 Cal.2d 189.
Me.—Moor v. Veazie, 31 Me. 360.

1. Ga.—McCall v. Wilkins, 89 S.E. 219, 145 Ga. 342.

2. Ala.—Pearson v. Duncan, 73 So. 406, 198 Ala. 25, 3 A.L.R. 242.
N.Y.—Bennett v. American Art Union, 7 N.Y.Super. 614.

3. Md.—Harlan v. Employers' Ass'n

tion,[4] or to prevent the perpetration of an act prohibited by statute in favor of one who urges as his only ground for relief the diminution of the profits of a trade or business pursued by complainant in common with others.[5]

b. Nature of Rights in General

While injunction will not be granted unless there is some substantial right to be protected, the question whether such relief will be granted to protect political rights or rights other than property rights frequently is dependent on the provisions of the statutes in the various jurisdictions.

While equitable, as well as legal, rights are entitled to the protection of equity by injunction if the case is otherwise a proper one for such relief,[6] injunction will not be granted unless there is some substantial right to be protected.[7] While it has been held in some cases, sometimes by virtue of express statutory provisions, that injunctive relief is not limited to cases where property rights are involved,[8] it has also been held that, in the absence of statutory provisions, injunction will not issue except in support of property rights,[9] or that it is limited to the protection of civil and property rights.[10]

Only civil rights protected. The subject matter of equitable jurisdiction being civil property and the maintenance of civil rights, injunction will issue only in cases where complainant's civil rights have been invaded.[11] Courts of equity have no jurisdiction over matters or questions of a political nature unless civil property rights are involved and will not interfere to enforce or protect purely political rights,[12] and the fact that complainant in a suit

of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.
Miss.—Hodges v. Trantham, 157 So. 715, 171 Miss. 374.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 795, 188 Okl. 690, quoting **Corpus Juris.**
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Wash.—State ex rel. Hays v. Wilson, 137 P.2d 105, 107, quoting **Corpus Juris.**
32 C.J. p 35 note 51.

4. U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529.
Miss.—Hodges v. Trantham, 157 So. 715, 171 Miss. 374.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 795, 188 Okl. 690, quoting **Corpus Juris.**
S.C.—Padgett v. State Highway Commission, 148 S.E. 548, 150 S.C. 538, citing **Corpus Juris.**
32 C.J. p 35 note 52.

Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.—Watson v. Santa Carmelita Mut. Water Co., 137 P.2d 757, 58 Cal.App.2d 709—Shell Oil Co. v. Richter, 125 P.2d 930, 52 Cal.App.2d 164.

5. Ohio.—Merz v. Murchison, 30 Ohio Cir.Ct. 646.
32 C.J. p 35 note 53.

6. Pa.—Stockdale v. Ullery, 37 Pa. 486, 78 Am.D. 440.

Establishment at law
Equity will protect a legal right which has not been established at law, where it is clear and there is no serious dispute as to any of the material facts, or where it is admitted.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417.

7. Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587, and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.
N.Y.—De Raay v. De Raay, 8 N.Y.S.2d 361, 255 App.Div. 544, affirmed 21 N.E.2d 879, 280 N.Y. 822—Gold v. Gold, 287 N.Y.S. 217, 158 Misc. 570.
Necessity of substantial injury see infra § 22 a.

Technical right
A chancellor will not use his injunctive power to curb progress, even though some private individual has suffered a civil wrong, or to redress a technical legal right.—Spencer v. O'Brien, 158 S.W.2d 445, 25 Tenn.App. 429.

Vote in union affairs
Trade union will be restrained from taking from members of subordinate union right to vote for certain officers.—Howard v. Weissmann, C.C.A. Ind., 31 F.2d 689, certiorari denied 50 S.Ct. 30, 280 U.S. 575, 74 L.Ed. 626.

8. Ala.—Henley v. Rockett, 8 So.2d 852, 243 Ala. 172—Try-Me Bottling Co. v. State, 178 So. 231, 235 Ala. 207.
Nev.—Itcaina v. Marble, 55 P.2d 625, 56 Nev. 420.
Tenn.—Lamb v. Whitaker, 105 S.W. 2d 105, 171 Tenn. 485.
Tex.—Hawks v. Yancey, Civ.App., 265 S.W. 233.
Injunction to protect:
Personal rights and duties see infra §§ 130–137.
Public welfare, property, and rights see infra §§ 123–129.

Usual rules of equity jurisdiction
A court of equity has no authority to issue an injunction unless some property right is involved or some other right which would bring it within the usual rules of equity jurisdiction, or unless it is provided for by statute.—Ex parte Castro, 273 S.W. 795, 115 Tex. 77.

Not confined to rigid categories
The jurisdiction of equity is flexible and should not be confined to rigid categories so that the granting of an injunction will depend on nomenclature rather than on substance.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27.

Right in nature of property right
Equity will exercise its restraining powers only where there is some threatened injury to a property right or right in the nature thereof.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J. Eq. 333.

9. U.S.—Texas Co. v. Grosjean, D.C. La., 16 F.Supp. 264.
Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.
Ill.—Booth v. Baker, 268 Ill.App. 474.
Mass.—Mulholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.
Tex.—Bledsoe v. Wesley, Civ.App., 22 S.W.2d 718, error dismissed.
32 C.J. p 272 note 67.

10. Ind.—State ex rel. Indiana Alcoholic Beverages Commission v. Circuit Court of Marion County, 49 N.E.2d 538.

11. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.
32 C.J. p 41 note 96.
Enjoining elections or election officers see infra § 115.
Injunction to restrain criminal acts, etc., see infra §§ 150–155.

12. Ind.—State ex rel. Blaize v. Hoover, 2 N.E.2d 391, 210 Ind. 215—State v. Superior Court of Marion County, 149 N.E. 174, 196 Ind. 614—Haupt v. Schmidt, 122 N.E. 343, 70 Ind.App. 260.
Pa.—Kenneck v. Pennock, 157 A. 613, 305 Pa. 288.
32 C.J. p 41 note 98.

seeking to enforce a political right by injunction assumes to litigate on behalf of other voters or of the people of the state generally does not affect the rule, as the claims thus attempted to be set up are all of the same nature and are none the less political,[13] and ample means are afforded in the courts of law for the vindication of rights of this character.[14]

However, where the court is vested with jurisdiction of all cases where the right to office, or civil or political rights, are involved, it has been held that injunction may issue in a proper case to protect political rights,[15] and, as injury to property, whether actual or prospective, is the foundation on which the jurisdiction of courts of equity rests, if there is a foundation for equitable jurisdiction the mere fact that the determination of a controversy may depend on the decision of a political question will not deprive the court of jurisdiction.[16]

c. Doubtful Rights

(1) Permanent injunction
(2) Temporary injunction

(1) Permanent Injunction

Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed and the right made certain.

A permanent injunction should not be awarded except in a clear case and to prevent irreparable injury.[17] Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed by a proper proceeding and the right made certain,[18] the only proper relief which may be granted in such cases being a temporary injunction maintaining the status quo until the right or title in question is established.[19]

Doubtful rights as affecting the right to enforce a contract in restraint of trade are discussed infra § 84, the right to an injunction in a suit involving a breach of contract infra § 80, or involving corporate franchises, management, and dealings infra §§ 97–99, or to enforce a restrictive covenant as to the use of land infra § 87.

(2) Temporary Injunction
(a) In general
(b) Prima facie case
(c) Disputed questions of fact or law

(a) In General

While the rule has been frequently laid down that a preliminary injunction will not issue where the right which complainant seeks to have protected is in doubt or where the right to the relief asked is doubtful, nevertheless it has often been held proper to maintain the status quo by a temporary injunction even though complainant's right to permanent relief is doubtful.

The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which complainant seeks to have protected is in doubt,[20] where the right to relief asked is

13. Ill.—Fletcher v. Tuttle, 37 N.E. 683, 151 Ill. 41, 42 Am.S.R. 220, 25 L.R.A. 143.
Iowa.—U. S. Standard Voting Mach. Co. v. Hobson, 109 N.W. 458, 132 Iowa 38, 119 Am.S.R. 539, 7 L.R.A., N.S., 512, 10 Ann.Cas. 972.

14. Mo.—State v. Aloe, 54 S.W. 494, 152 Mo. 466, 47 L.R.A. 393.

15. La.—Dastague v. Cohen, 131 So. 746, 14 La.App. 475.

16. Ill.—People v. McWeeney, 102 N.E. 233, 259 Ill. 161, Ann.Cas. 1916B 34.
32 C.J. p 42 note 2.

17. Colo.—Blanchard v. Holland, 103 P.2d 18, 21, 106 Colo. 147, citing **Corpus Juris.**
32 C.J. p 36 note 57.

18. U.S.—U. S. v. Tilley, C.C.A.Neb., 124 F.2d 850, certiorari denied Scott v. U. S., 62 S.Ct. 1281, 316 U.S. 691, 86 L.Ed. 1762—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331, 334, citing **Corpus Juris**—Texas Co. v. Grosjean, D.C.La., 16 F.Supp. 264—U. S. v. Rogles, D. C.Mo., 9 F.Supp. 857.
Cal.—Almaden Vineyards Corporation v. Arnerich, 70 P.2d 243, 21 Cal.App.2d 701.
Colo.—Barrios v. Pleasant Valley & Lake Canal Co., 17 P.2d 301, 302, 91 Colo. 563, citing **Corpus Juris.**
D.C.—McCarl v. Miguel, 66 F.2d 564, 62 App.D.C. 259, certiorari granted Miquel v. McCarl, 54 S.Ct. 102, 290 U.S. 618, 78 L.Ed. 540, modified on other grounds Miguel v. McCarl, 54 S.Ct. 465, 291 U.S. 442, 78 L.Ed. 901.
Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see, 20 N.E.2d 568, 371 Ill. 261—Moroney v. Allman, 271 Ill.App. 336.
Md.—Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 12 A.2d 201, 178 Md. 38.
Mo.—Prendergast v. Blomberg, App., 141 S.W.2d 156.
Neb.—Gering Irr. Dist. v. Mitchell Irr. Dist., 3 N.W.2d 566, 141 Neb. 344.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
Ohio.—Conway v. Cull, 11 Ohio Supp. 1.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417—Lombardi v. Vudragovich, 22 West.Co. 23.
Tex.—General Tire & Rubber Co. v. Texas Pacific Coal & Oil Co., Civ. App., 102 S.W.2d 1086, error refused.
Wash.—State ex rel. Hays v. Wilson, 137 P.2d 105, 17 Wash.2d 670.
32 C.J. p 35 note 55.

Alteration of buildings
Where defendant had acted in good faith and it appeared might be entitled to relief from board of adjustment to permit alteration of existing buildings for prohibited use, injunction to restrain alteration and proposed use of property in violation of single residence provision of zoning ordinance was withheld pending board's decision.—Sullivan v. Anglo-American Inv. Trust, 193 A. 225, 89 N.H. 112.

19. Ill.—Moroney v. Allman, 271 Ill. App. 336.
32 C.J. p 36 note 56.

20. U.S.—Bay Petroleum Corporation v. Corporation Commission of State of Kansas, D.C.Kan., 36 F. Supp. 66—Petroleum Exploration v. Public Service Commission of Kentucky, D.C.Ky., 21 F.Supp. 254, motion denied 58 S.Ct. 537, affirmed

doubtful,[21] or except in a clear case of right.[22] It has similarly been declared that the right asserted by complainant must be perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo,[23] or where the injunction will cause defendant greater loss and inconvenience than that which would be suffered by complainant in the absence of an injunction,[24] and that an injunction must be refused if complainant's case is so doubtful that it does not appear reasonably probable that he has the right claimed and that it is being violated,[25] or if he does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be had,[26] and that the acts complained of are being committed,[27] and are the real cause of the threatened or existing injury.[28]

It has also been declared that a temporary injunction will not issue where the right depends on the complicated relations of the parties, and the issues can be properly determined only by the testimony on a trial of the case,[29] and that a preliminary injunction should not be granted if the ultimate relief sought is doubtful of attainment.[30] Obviously a preliminary injunction should not be granted where it is clear that the specific relief of the sort asked

58 S.Ct. 834, 304 U.S. 209, 82 L.Ed. 1294—Kilburn v. Ingersoll, C.C. Minn., 67 F. 46.

Ala.—Williams v. Prather, 196 So. 118, 239 Ala. 524—Alabama Power Co. v. City of Guntersville, 183 So. 396, 236 Ala. 503, 119 A.L.R. 429.

Fla.—Dade Enterprises v. Wometco Theaters, 160 So. 209, 119 Fla. 70.

Ga.—Tarver v. Silver, 178 S.E. 377, 379, 180 Ga. 124, quoting **Corpus Juris.**

Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.

N.J.—Schindler Advertising Co. v. Public Service Transp. Co., 127 A. 786, 97 N.J.Eq. 542—Godfrey v. Atlantic City, 122 A. 613, 95 N.J. Eq. 183—Jersey City Gaslight Co. v. Consumers Gas Co., 2 A. 922, 40 N.J.Eq. 427.

N.Y.—Squier v. Houghton, 226 N.Y.S. 172, 131 Misc. 136—Village of Great Neck Estates v. Bemak & Lehman, 218 N.Y.S. 359, 128 Misc. 441—Nassau County v. O'Connell, 37 N.Y.S.2d 1009.

Pa.—Conference of Pennsylvania & Delaware Locals of American Federation of Musicians v. Hitchler, 48 Dauph.Co. 201—Hance v. Easton Hospital, 29 North.Co. 46—Ford v. Cary, 52 York Leg.Rec. 7.

Tex.—Sinclair Refining Co. v. City of Paris, Civ.App., 68 S.W.2d 230—City of University Park v. Rahl, Civ.App., 86 S.W.2d 1075, error dismissed.

32 C.J. p 36 note 59.

21. U.S.—Madison Square Garden Corporation v. Braddock, C.C.A.N. J., 90 F.2d 924, affirming, D.C., 19 F.Supp. 392—Cywan v. Blair, D.C. Ill., 16 F.2d 279—Live Poultry Dealers' Protective Ass'n v. U. S., C.C.A.N.Y., 4 F.2d 840, affirming, D.C., U. S. v. Live Poultry Dealers' Protective Ass'n, 298 F. 139—Harris v. Twentieth Century-Fox Film Corporation, D.C.N.Y., 35 F.Supp. 155—Green v. Gravatt, D.C.Pa., 19 F.Supp. 87—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897—Fleetway, Inc., v. Public Service Interstate Transp. Co., D.C. N.J., 4 F.Supp. 482, affirmed, C.C. A., 72 F.2d 761, certiorari denied 55 S.Ct. 347, 293 U.S. 626, 79 L.Ed. 713—Southern Counties Gas Co. of California v. City of Long Beach, D.C.Cal., 295 F. 530—Schnitzler v. Yellowley, D.C.N.Y., 288 F. 84.

Ala.—Hancock v. Watt, 169 So. 704, 706, 233 Ala. 29, citing **Corpus Juris.**

Cal.—McPheeters v. McMahon, 21 P. 2d 606, 131 Cal.App. 418—Hueneme, M. & P. L. A. Ry. v. Fletcher, 224 P. 774, 65 Cal.App. 698.

Ill.—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill.App. 357, 370, citing **Corpus Juris.**

N.J.—Fraxam Amusement Corporation v. Skouras Theatre Corporation, 167 A. 672, 113 N.J.Eq. 509—Hamilton v. United Laundries Corporation, 161 A. 347, 111 N.J.Eq. 78—Costello v. Thomas Cusack Co., 124 A. 615, 96 N.J.Eq. 83, 90, affirmed 120 A. 15, 94 N.J.Eq. 423.

N.Y.—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103—Ufa Films, Inc., v. Ufa Eastern Division Distribution, 234 N.Y.S. 147, 134 Misc. 129, affirmed Ufa Films, Inc. v. Brill, 235 N.Y.S. 902, 226 App.Div. 869.

Pa.—Herr v. Rumisek, 153 A. 728, 303 Pa. 9.

32 C.J. p 36 note 60.

Substantial doubt

Preliminary injunction should not be granted if there is substantial doubt as to plaintiff's right thereto.—Guerlain Perfumery Corporation of Delaware v. Klein, D.C.N.Y., 56 F.2d 439—Ross v. Neuville, D.C.N.Y., 34 F.Supp. 466.

22. U.S.—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, 470, citing **Corpus Juris,** and appeal dismissed, C.C.A., 99 F.2d 1001.

N.Y.—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243—Levine v. Brooklyn Nat. League Baseball Club, 36 N. Y.S.2d 474, 179 Misc. 22—Village of Owego v. Tioga County Agr. Soc., 273 N.Y.S. 828, 152 Misc. 544—Ohio Match Sales Co. v. Everhard, 211 N.Y.S. 856, 126 Misc. 21—Nassau County v. O'Connell, 37 N.Y.S.2d 1009.

Pa.—Howard v. Goodnough, 141 A. 483, 292 Pa. 547—Commonwealth v. Everett, 35 Luz.Leg.Reg. 55.

32 C.J. p 36 note 61.

23. Alaska.—Snyder v. Kelter, 4 Alaska 447.

32 C.J. p 36 note 62.

24. Tex.—Texas Pac. Coal & Oil Co. v. Howard, Civ.App., 212 S.W. 735.

32 C.J. p 36 note 63.

25. Wis.—Halsey, Stuart & Co. v. Public Service Commission of Wisconsin, 248 N.W. 458, 212 Wis. 184.

32 C.J. p 36 note 64.

26. U.S.—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897—Southern Counties Gas Co. of California v. City of Long Beach, D.C.Cal., 295 F. 530.

32 C.J. p 36 note 65.

27. Pa.—Randall v. City of Clairton, 10 A.2d 779, 337 Pa. 276.

32 C.J. p 37 note 66.

28. N.Y.—Cornell v. New York, 20 N.Y.S. 314.

29. S.C.—Cooper v. Boylston, 113 S. E. 347, 120 S.C. 381.

30. U.S.—Miller v. Rudolph Wurlitzer Co., D.C.N.Y., 48 F.Supp. 772.

Ala.—Walker v. Cox, 96 So. 707, 209 Ala. 627.

Minn.—Jones v. Williams, 206 N.W. 654, 165 Minn. 415.

N.Y.—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243—Village of Owego v. Tioga County Agr. Soc., 273 N.Y.S. 828, 152 Misc. 544—Suma v. Landriscina, 36 N.Y.S.2d 279.

Tex.—Terry v. Crosswy, Civ.App., 264 S.W. 718.

for by preliminary injunction could not be awarded on the final hearing.[31]

Nevertheless, there are a large number of decisions which hold that it is not sufficient ground for refusing a preliminary injunction that it is not absolutely certain that the complainant has the right that he claims or that the injury feared will occur; and even though complainant's right to permanent relief is doubtful, it may be proper to maintain the status quo pending the determination of his right, the issuance of a temporary injunction in such cases depending chiefly on the relative inconvenience to be caused the parties.[32] Complainant, it has been said, may be entitled to a preliminary injunction in cases where his right to the relief prayed may fail on a hearing on the merits,[33] and it has been held that, where there is a prospect of irremediable injury, even though the title or right is disputed, a temporary injunction may issue at once, without waiting until a trial at law is had;[34] that the injunction may be granted, although an action at law has not been commenced;[35] and that complainant or defendant may be ordered to institute a suit at law immediately.[36]

(b) Prima Facie Case

To authorize a temporary injunction, complainant must make out at least a prima facie showing of a right to the final relief.

While it is not a ground for refusing a preliminary injunction that it is not absolutely certain that complainant has the right to relief, as considered supra subdivision c (2) (a) of this section, yet to authorize a temporary injunction, complainant must make out at least a prima facie showing of a right to the final relief.[37] It is necessary also that complainant make a full presentation of his case and of the facts;[38] and if it appears from complainant's own statement of his case that he will not be entitled to the permanent relief sought, or that his right to such relief will depend on a contingency not yet determined, no preliminary injunction should issue.[39] Nevertheless, a temporary injunction should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by plaintiff,[40] especially where the acts complained of are denied and no harm will therefore result to defendants in their being enjoined.[41] It is not necessary to show that complainant would be en-

31. U.S.—Greater New York Film Rental Co. v. Biograph Co., N.Y., 203 F. 39, 121 C.C.A. 375.
N.Y.—Gentil v. Arnand, 38 How.Pr. 94, affirmed 31 N.Y.Super. 641.

32. U.S.—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F. 2d 42—Borg v. International Silver Co., C.C.A.N.Y., 11 F.2d 147, affirming, D.C., 11 F.2d 143—Fordson Coal Co. v. Maggard, C.C.A.Ky., 2 F.2d 708.
Ill.—Moroney v. Allman, 271 Ill.App. 336.
N.J.—Wilentz v. Hendrickson, 33 A. 2d 366, 133 N.J.Eq. 447—Christiansen v. Local 680 of Milk Drivers and Dairy Employes of New Jersey, 12 A.2d 170, 127 N.J.Eq. 215.
Tex.—Freis v. Consolidated Theatres, Civ.App., 134 S.W.2d 369, error dismissed, judgment correct—Laning v. Langford Inv. Co., Civ. App., 36 S.W.2d 1079, 1082, quoting **Corpus Juris**—Rosenfield v. Seifert, Civ.App., 270 S.W. 220, motion to correct judgment denied 274 S.W. 642.
32 C.J. p 37 note 70, p 38 note 75.

Fair question to raise

While court need not find that complainant has certain right to injunction before granting it, it must appear that he has fair question to raise as to existence of such right. —Hancock v. Watt, 169 So. 704, 233 Ala. 29—Wood v. Master Schools, 130 So. 178, 221 Ala. 645—Thetford v. Town of Cloverdale, 115 So. 165, 217 Ala. 241.

33. S.C.—Williams v. Jones, 75 S.E. 705, 92 S.C. 342.
Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079, 1082, quoting **Corpus Juris**.
32 C.J. p 38 note 71.

34. Ill.—Moroney v. Allman, 271 Ill.App. 336.
32 C.J. p 38 note 72.

35. Ill.—Moroney v. Allman, supra.
32 C.J. p 38 note 73.

36. Ill.—Moroney v. Allman, supra.
32 C.J. p 38 note 74.

37. Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 1045, 161 Tenn. 592, citing **Corpus Juris**.
Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, citing **Corpus Juris**.
32 C.J. p 38 note 76.
Pleadings and affidavits as evidence see infra §§ 193–197.
Sufficiency of evidence to warrant issuance of temporary injunction see infra § 192.

Reasonable probability

A preliminary injunction will issue only where complainant satisfies the court that there is at least a reasonable probability of his ultimate success on a final hearing.
U.S.—Van Wert Gaslight Co. v. Public Utilities Commission of Ohio, D.C.Ohio, 299 F. 670.
Del.—Consolidated Film Industries v. Johnson, 192 A. 603, 21 Del.Ch. 417.
Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.
Wis.—Halsey, Stuart & Co. v. Public Service Commission of Wisconsin, 248 N.W. 458, 212 Wis. 184.

Reasonable certainty

In actions in equity not involving Sherman Anti-Trust Act, the court, before granting temporary injunction, must be convinced with reasonable certainty that complainant must succeed.—U. S. v. Schine Chain Theatres, D.C.N.Y., 31 F.Supp. 270.

38. U.S.—Richmond Mica Co. v. De Clyne, C.C.N.J., 90 F. 661.
Pa.—Mellor v. Farmers Deposit Nat. Bank, 33 Pittsb.Leg.J.,N.S., 55.

39. Minn.—Davis v. Forrestal, 144 N.W. 423, 124 Minn. 10, L.R.A. 1915F 1012, Ann.Cas.1915B 448.
32 C.J. p 39 note 78.

40. U.S.—Premier-Pabst Sales Co. v. McNutt, D.C.Ind., 17 F.Supp. 708—Indiana General Service Co. v. McCardle, D.C.Ind., 1 F.Supp. 113.
Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Ill.—Moroney v. Allman, 271 Ill.App. 336, 346, citing **Corpus Juris**.
La.—Marcev v. Mandich, 103 So. 389, 158 La. 15.
Pa.—Merchants' Warehouse Co. v. Crossen, 46 Dauph.Co. 185.
32 C.J. p 39 note 79.

41. N.Y.—Finnegan v. Butler, 182 N.Y.S. 671, 112 Misc. 280.

titled to relief at all events on final hearing.[42] A fortiori whenever it is manifest that the ultimate outcome will be in favor of plaintiff, a preliminary injunction should issue almost as a matter of course.[43]

(c) Disputed Questions of Fact or Law

Applications for preliminary injunctions are frequently refused where the right is doubtful because of disputed questions of fact or law.

Applications for preliminary injunctions are frequently refused on the ground that the facts on which the application is based are disputed, the evidence in regard to them being conflicting,[44] but the fact that there is such a dispute or conflict is not in itself sufficient ground for refusing the application, and if complainant shows that an irreparable injury will probably be suffered by him before the final hearing, that there is a reasonable probability that he will establish the facts as he alleges, and that the injunction will not cause a great injury to defendant, a preliminary injunction should issue to maintain the status quo, despite the conflict as to facts.[45] In cases, however, where the equities of complainant's bill are satisfactorily denied in the answer, where the facts on which complainant's right is based are disputed, or where defendant denies that he is doing the injurious acts charged, no injunction will issue except to prevent an irreparable injury that will occur before final hearing can be reached.[46]

Disputed questions of law. The general rule is well settled that, when the principles of law on which the right to a preliminary injunction rests are disputed and will admit of doubt, a court of equity will not grant such injunction without a decision of the courts of law establishing such principles,[47] although satisfied as to what is a correct

42. U.S.—Fordson Coal Co. v. Maggard, C.C.A.Ky., 2 F.2d 708.
Idaho.—White v. Coeur D'Alene Big Creek Mining Co., 55 P.2d 720, 56 Idaho 282—Washington Water Power Co. v. Crane, 233 P. 878, 40 Idaho 310—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.
32 C.J. p 39 note 81.

43. N.Y.—Rosenberg v. Rosenthal, 238 N.Y.S. 62, 135 Misc. 282.
32 C.J. p 39 note 82.

44. U.S.—Knapp v. Callaway, D.C. N.Y., 52 F.2d 476—Parrot Speed Fastener Corporation v. E. W. Carpenter Mfg. Co., D.C.Conn., 26 F. Supp. 622—U. S. v. Republic Oil Refining Co., D.C.N.J., 8 F.Supp. 897—U. S. v. Weirton Steel Co., D. C.Del., 7 F.Supp. 255—Gray v. Yellowley, D.C.N.Y., 290 F. 400—Millstone v. Yellowley, D.C.N.Y., 287 F. 941—Blackmore v. Collins, D.C. Mich., 286 F. 629, affirmed, C.C.A., 290 F. 204.
Alaska.—Johnson v. Hummel, 7 Alaska 314.
Minn.—Neill v. City of Red Wing, 195 N.W. 145, 156 Minn. 467.
N.J.—Cascade Laundry v. Volk, 20 A.2d 505, 129 N.J.Eq. 603—Board of Health of Medford Tp. v. Jennings, 18 A.2d 62, 129 N.J.Eq. 51, affirmed Board of Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511—Hamilton v. United Laundries Corporation, 161 A. 347, 111 N.J.Eq. 78—Coles v. City of Newark, 121 A. 782, 95 N.J.Eq. 73, affirmed 123 A. 926, 95 N.J.Eq. 775.
N.Y.—Kakalios v. Mesevich, 18 N.Y.S.2d 189, 259 App.Div. 112—Democratic Organization of Richmond County v. Democratic Organization of Richmond County, 1 N.Y.S.2d 349, 253 App.Div. 820—Voorhees & Hobart v. Hobart, 295 N.Y.S. 616, 251 App.Div. 111—Haberman v. New York Telephone Co., 300 N. Y.S. 870, 252 App.Div. 664—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243—Kalwin Business Men's Ass'n v. McLaughlin, 214 N.Y.S. 507, 216 App.Div. 6, reversing 214 N.Y.S. 99, 126 Misc. 698—Jones v. Jones, 42 N.Y.S.2d 268, 180 Misc. 703—Jewel Productions v. Esmond, 6 N.Y.S.2d 711, 168 Misc. 838—Standard Library v. Addis, 3 N.Y.S.2d 488, 167 Misc. 469—Joesam Homes v. Weisser, 260 N.Y.S. 515, 146 Misc. 5—Ohio Match Sales Co. v. Everhard, 211 N.Y.S. 856, 126 Misc. 21—Reubel v. Lewis, 43 N.Y.S.2d 540.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417.
Tex.—City of University Park v. Rahl, Civ.App., 36 S.W.2d 1075, error dismissed.
32 C.J. p 39 note 83.

Suit to recover stock

In suit to recover corporation's stock immediately before election, injunction should be denied, where control by court would change result of election without permitting stockholders sought to be restrained to be heard in their own defense.—Johnson v. Hummel, 7 Alaska 314.

45. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.
Minn.—Neill v. City of Red Wing, 195 N.W. 145, 156 Minn. 467.
Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079, 1082, quoting **Corpus Juris.**
32 C.J. p 39 note 85.

46. U.S.—U. S. v. Southern Pac. R. Co., C.C.Cal., 55 F. 566.
32 C.J. p 40 note 86.

47. U.S.—Bristol-Myers Co. v. Tischauser, D.C.Cal., 18 F.Supp. 228—U. S. v. Weirton Steel Co., D.C.Del. 7 F.Supp. 255—Millstone v. Yellowley, D.C.N.Y., 287 F. 941.
Fla.—Stephens v. Stickel, 200 So. 396, 146 Fla. 104—Dade Enterprises v. Wometco Theaters, 160 So. 209, 119 Fla. 70.
Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.
N.J.—Board of Health of Medford Tp. v. Jennings, 18 A.2d 62, 129 N.J.Eq. 51, affirmed Board of Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511—Wilentz v. Crown Laundry Service, 172 A. 331, 116 N.J.Eq. 40—Kellett v. Local No. 274, United Ass'n of Journeymen Plumbers and Steamfitters of U. S. and Canada, 168 A. 265, 114 N.J.Eq. 107—Public Bancorporation v. Atlantic City Wimsett Thrift Co., 164 A. 479, 112 N.J.Eq. 367, affirming 158 A. 729, 110 N.J. Eq. 23—Hamilton v. United Laundries Corporation, 161 A. 347, 111 N.J.Eq. 78—Lulevitch v. Roberts, 129 A. 616, 98 N.J.Eq. 373, reversing 129 A. 420, 2 N.J.Misc. 812—Coles v. City of Newark, 121 A. 782, 95 N.J.Eq. 73, affirmed 123 A. 926, 95 N.J.Eq. 775.
N.Y.—Morrin v. Structural Steel Board of Trade, 248 N.Y.S. 273, 231 App.Div. 673—Reliance-Grant Elevator Equipment Corporation v. Reliance Ball-Bearing Door Hanger Co., 199 N.Y.S. 476, 205 App.Div.

conclusion of law on the facts.[48] However, where the legal right, although disputed, is clear on facts which are not denied and legal rules which are well settled, and the object of the bill is to ascertain the extent of the right and enforce and protect it in a manner not attainable at law, the rights need not be first settled in an action at law,[49] and there are a number of decisions in which it is held that the fact that the right to a preliminary injunction depends on a disputed question of law is not necessarily a fatal objection to its allowance and a preliminary injunction has been awarded in such a case, although the principles justifying a departure from the general rule are not very clearly defined.[50]

d. Violation of Right

Complainant must show not only the existence of his right but also that the acts sought to be restrained will be a violation thereof.

The complainant must show not only the existence of his right but he must affirmatively show that the acts sought to be restrained will be a violation thereof.[51] The doing of an act in good faith by fair and proper means for a lawful purpose cannot be restrained,[52] and where the party sought to be enjoined has the legal right to do a given thing, the courts will not inquire into his purpose in doing it.[53]

§ 20. —— Adverse Right or Claim

Where there is no present controversy and there cannot be any future controversy between the parties, a court of equity is without jurisdiction to grant injunctive relief.

Where there is no present controversy and there cannot be any future controversy between the parties, a court of equity is without jurisdiction to grant injunctive relief.[54] The necessity that there be a violation of some right of complainant in order to entitle him to an injunction is discussed supra § 19.

§ 21. —— Anticipated or Actual Violation of Right

a. In general
b. Threats

a. In General

While an injunction will be granted if irreparable injury is threatened and impending to the rights of complainant, injunction will not issue to allay the mere fears and apprehensions of individuals.

320—Squier v. Houghton, 226 N.Y.S. 172, 131 Misc. 136.
Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 1045, 161 Tenn. 592, citing **Corpus Juris.**
32 C.J. p 40 note 87.

48. N.J.—Hackensack Improvement Commission v. New Jersey Midland R. Co., 22 N.J.Eq. 94.

49. N.J.—Banks v. Simpkins, 102 A. 680, 88 N.J.Eq. 1—Hart v. Leonard, 7 A. 865, 42 N.J.Eq. 416.

50. N.J.—Johnston v. Belmar, 44 A. 166, 58 N.J.Eq. 354.
32 C.J. p 40 note 90.

51. U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529—R. W. Eldridge Co. v. Southern Handkerchief Mfg. Co., D.C.S.C., 23 F.Supp. 179—Coty v. Prestonettes, Inc., C.C.A.N.Y., 285 F. 501, certiorari granted Prestonettes, Inc., v. Coty, 43 S.Ct. 250, 260 U.S. 720, 67 L.Ed. 480, and reversed on other grounds 44 S.Ct. 350, 264 U.S. 359, 68 L.Ed. 731.
Ark.—Micklish v. Grand Lodge of Loyal Star, 257 S.W. 353, 162 Ark. 71.
Mo.—Howe v. Standard Oil Co. of Indiana, App., 150 S.W.2d 496.
N.Y.—People ex rel. Bennett v. Laman, 286 N.Y.S. 467, 158 Misc. 909, affirmed 295 N.Y.S. 728, 250 App.Div. 660, motion denied 298 N.Y.S. 995, 252 App.Div. 704, reversed on other grounds 14 N.E.2d 439, 277 N.Y. 368—Co-operative Dairymen of Fraser v. Ten Eyck, 286 N.Y.S. 351, 158 Misc. 726—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819—Juran v. Title Guarantee & Trust Co., 273 N.Y.S. 493, 151 Misc. 631.
Okl.—Dickey v. Williams, 98 P.2d 604, 186 Okl. 376.
S.C.—Padgett v. State Highway Commission, 148 S.E. 548, 150 S.C. 538.
Tex.—Yett v. Cook, 268 S.W. 715, 115 Tex. 175—Thomas v. Bunch, Civ.App., 41 S.W.2d 359, affirmed Bunch v. Thomas, 49 S.W.2d 421, 121 Tex. 225—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, quoting **Corpus Juris.**
32 C.J. p 41 note 93.

52. Cal.—Gaume v. City of Redlands, 73 P.2d 917, 23 Cal.App.2d 464.
Mo.—Frank Schmidt Planing Mill Co. v. Mueller, App., 154 S.W.2d 610, transferred, see 147 S.W.2d 670, 347 Mo. 466.
N.J.—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 195 A. 378, 122 N.J. Eq. 545, modified on other grounds 199 A. 598, 124 N.J.Eq. 71.
32 C.J. p 35 note 52 [a].

Aid in economic struggle

A court should not use its coercive implements, such as injunction, to aid one party in economic struggle wherein other party has substantial interest, to further which it is employing means not unlawful in themselves.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, and certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

Depreciation in value of adjacent or nearby property by an owner's lawful use of his land will not authorize an injunction restraining such use at the suit of the injured landowner.
Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247.
Tex.—Marshall v. City of Dallas, Civ.App., 253 S.W. 887.

Telling truth

Equity will not generally enjoin against telling the truth.—Standard Oil Co. v. California Peach & Fig Growers, D.C.Del., 28 F.2d 283.

Purpose and means

Courts may interpose their mandates only to prevent the effectuation of an unlawful purpose or of a lawful purpose by unlawful means. —Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.

53. Mo.—Howe v. Standard Oil Co. of Indiana, App., 150 S.W.2d 496.
N.Y.—Clinton v. Myers, 46 N.Y. 511, 7 Am.R. 373.
32 C.J. p 41 note 94.

54. U.S.—Beranek v. Wallace, D.C. Ind., 25 F.Supp. 841.

If irreparable injury is threatened and impending to rights of a complainant, an injunction usually will be granted,[55] as it is not necessary to wait for the actual occurrence of an injury which it is shown may be reasonably expected.[56]

However, an injunction will not lie to restrain one from doing what he is not attempting and does not intend to do,[57] and, a fortiori, an injunction will not issue where it is shown that defendants are without power to accomplish that which it is alleged they are attempting to do.[58]

Injunction will not issue in the absence of an actual or presently threatened interference;[59] it is not sufficient ground for an injunction that the in-

55. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U. S. 671, 68 L.Ed. 499, and reheard 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144—Vaughn v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughn, 11 F.Supp. 954—Standard Oil Co. of New Mexico v. Standard Oil Co. of California, C.C.A.N.M., 56 F.2d 973—New Hampshire Gas & Electric Co. v. Morse, D.C.N.H., 42 F.2d 490—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808—Holland v. Amoskeag Mach. Co., D.C. N.H., 44 F.Supp. 884—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015—Miles Laboratories v. Seignious, D.C.S.C., 30 F. Supp. 549—Ganley v. Wallace, D. C.D.C., 17 F.Supp. 115, reversed on other grounds Wallace v. Ganley, 95 F.2d 364, 68 App.D.C. 235.

Ala.—Stack v. Tennessee Land Co., 96 So. 355, 209 Ala. 449.

Ark.—Storthz v. Midland Hills Land Co., 90 S.W.2d 772, 192 Ark. 273.

Cal.—McMullen v. Glenn-Colusa Irr. Dist., 62 P.2d 1083, 17 Cal.App.2d 696.

Conn.—Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 24 A.2d 841, 128 Conn. 596.

Ind.—Burke v. Gardner, 47 N.E.2d 148.

La.—Connell v. Commission Council of City of Baton Rouge, 96 So. 657, 153 La. 788.

Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

Mich.—Wolgamood v. Village of Constantine, 290 N.W. 388, 292 Mich. 222.

Mo.—Magee v. Pope, 112 S.W.2d 891, 900, 234 Mo.App. 191, citing **Corpus Juris.**

N.Y.—Oltarsh v. Oltarsh, 43 N.Y.S.2d 901.

Ohio.—Portmann v. Board of Elections of Stark County, 19 N.E.2d 531, 60 Ohio App. 54.

Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 1045, 161 Tenn. 592, citing **Corpus Juris.**

Tex.—Kauffman v. Parker, Civ.App., 99 S.W.2d 1074, 1079, citing **Corpus Juris**—Richardson v. Webster-Richardson Pub. Co., Civ.App., 46 S.W.2d 384—Walter v. Hammonds, Civ.App., 42 S.W.2d 1083, 1084, quoting **Corpus Juris**—Fry v. Jackson, Civ.App., 264 S.W. 612.

Va.—Turner v. Hicks, 180 S.E. 543, 164 Va. 612.

Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

32 C.J. p 42 note 5.

The owner of a bridge may enjoin an improper method of navigation through a draw which threatens injury to the bridge.—Texas & P. R. Co. v. Interstate Transp. Co., La., 15 S.Ct. 228, 155 U.S. 585, 39 L.Ed. 271, affirming, C.C., 45 F. 5—45 C.J. p 465 note 98.

56. U.S.—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and reheard 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144—Ganley v. Wallace, D.C.D.C., 17 F.Supp. 115, reversed on other grounds Wallace v. Ganley, 95 F.2d 364, 68 App.D.C. 235—Standard Oil Co. of New Mexico v. Standard Oil Co. of California, C.C.A.N.M., 56 F.2d 973.

Cal.—Rosenthal v. Brasley-Krieger Shoe Co., 64 P.2d 1109, 19 Cal.App. 2d 257, citing **Corpus Juris.**

Mass.—Shaw v. Harding, 28 N.E.2d 469, 306 Mass. 441.

N.Y.—Runcie v. Bankers Trust Co., 11 N.Y.S.2d 924, application granted 17 N.Y.S. 197.

Tex.—Fry v. Jackson, Civ.App., 264 S.W. 612.

32 C.J. p 42 note 6.

Remedy preventive

As the remedy by interlocutory injunction is preventive in its nature, it is not necessary that a wrong should have been actually committed before a court of equity will interfere, since, if this were required, it would in most cases defeat the very purpose for which the relief is sought, by allowing the commission of the act which complainant seeks to restrain.—Kimberly & Clark Co. v. Hewitt, 44 N.W. 303, 75 Wis. 371—32 C.J. p 42 note 7.

57. U.S.—Virginia Electric & Power Co. v. National Labor Relations Board, C.C.A., 115 F.2d 414, certiorari granted National Labor Relations Board v. Virginia Electric & Power Co., 61 S.Ct. 826, 312 U.S. 677, 85 L.Ed. 1117—Independent Organization of Employees of Virginia Electric & Power Co. v. National Labor Relations Board, C. C.A., 115 F.2d 414, certiorari granted National Labor Relations Board v. Independent Organization of Employees of Virginia Electric & Power Co., 61 S.Ct. 826, 312 U.S. 677, 85 L.Ed. 1117—Blease v. Safety Transit Co., C.C.A.S.C., 50 F.2d 852—Walling v. Livernois, D.C. Mich., 50 F.Supp. 978—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528.

Cal.—Pezold v. Amalgamated Meat Cutters and B. Workmen of North America, 128 P.2d 611, 54 Cal.App. 2d 120.

Ga.—Walden v. Sellers, 163 S.E. 897, 174 Ga. 774.

Iowa.—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392.

La.—Cooley v. Meridian Lumber Co., 197 So. 255, 195 La. 631.

Mass.—Franz v. Franz, 32 N.E.2d 205, 308 Mass. 262, 135 A.L.R. 1448.

N.J.—Borough of West Long Branch v. Home Building & Realty Co. of Long Branch, 133 A. 758, 99 N.J. Eq. 738.

58. U.S.—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382—Boggus Motor Co. v. Onderdonk, D.C.Tex., 9 F.Supp. 950—Bookbinders' Trade Ass'n v. Book Mfrs.' Institute, D.C.N.Y., 7 F.Supp. 847—Royal Farms Dairy v. Wallace, D. C.Md., 7 F.Supp. 560.

32 C.J. p 44 note 13.

59. U.S.—State of Connecticut v. Commonwealth of Massachusetts, Mass., 51 S.Ct. 356, 283 U.S. 789, 75 L.Ed. 1416—State of Connecticut v. Commonwealth of Massachusetts, Mass., 51 S.Ct. 286, 282 U. S. 660, 75 L.Ed. 602—State of New York v. State of Illinois, 47 S.Ct. 661, 274 U.S. 488, 71 L.Ed. 1164—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932, certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, and affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed.

jurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented; but there must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension, since injunctions will not be granted merely to allay the fears and apprehensions of individuals,[69] which, it has been said, may exist without

381—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F. 2d 394—Fidler v. Roberts, C.C.A. Ill., 41 F.2d 305—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192—Burlington Mills Corporation v. Textile Workers Union of America, D.C. Va., 44 F.Supp. 699—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—R. W. Eldridge Co. v. Southern Handkerchief Mfg. Co., D.C.S.C., 23 F.Supp. 179—Sheldon v. Moredall Realty Corporation, D.C.N.Y., 22 F.Supp. 91, modified on other grounds, C.C.A., 95 F. 2d 48—Condenser Corporation of America v. Delaney, D.C.N.J., 18 F. Supp. 611—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201—McNally v. Reynolds, D.C.Wash., 7 F.Supp. 112—Behre v. Anchor Ins. Co. of New York, C.C.A.N.Y., 297 F. 986.

Alaska.—City of Skagway v. Home Power Co., 8 Alaska 333.

Cal.—People v. Robin, 133 P.2d 436, 56 Cal.App.2d 885—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.

Fla.—Hernandez v. Board of Com'rs of Hillsborough County, 153 So. 790, 114 Fla. 219.

Ga.—Fleisher v. Duncan, 24 S.E.2d 15, 195 Ga. 309—Randall v. Sims, 22 S.E.2d 505, 194 Ga. 756—Hudson v. Tage, 4 S.E.2d 577, 188 Ga. 707—Georgia Music Operators Ass'n v. City of Atlanta, 190 S.E. 32, 183 Ga. 794—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 857.

Ind.—Public Service Commission v. City of Indianapolis, 137 N.E. 705, 193 Ind. 37—Doss v. Yingling, 9 N. E.2d 139, 103 Ind.App. 555.

Ky.—Fackler v. Cincinnati, N. O. & T. P. Co., 17 S.W.2d 194, 229 Ky. 339.

La.—Cook & Boyett v. Police Jury of Bienville Parish, 5 La.App. 692.

Md.—Hecht Co. v. Rosenberg, 166 A. 440, 165 Md. 116.

Mass.—Davis v. Retirement Board of Middlesex County, 43 N.E.2d 330, 312 Mass. 115—Sturtevant v. Ford, 182 N.E. 560, 280 Mass. 303.

Miss.—Meek v. Humphreys County, 97 So. 674, 133 Miss. 386.

Mo.—State ex rel. Hyde v. Westhues, 290 S.W. 443, 316 Mo. 457—Eckhardt v. Bock, App., 159 S.W.2d 395.

N.J.—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333.

N.Y.—De Raay v. De Raay, 8 N.Y.S. 2d 361, 255 App.Div. 544, affirmed 21 N.E.2d 879, 280 N.Y. 822—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103—Lair v. Grant, 244 N.Y.S. 427, 137 Misc. 470—Municipal Gas Co. of City of Albany v. Nolan, 201 N.Y.S. 582, 121 Misc. 606—Parkview Towers v. Nordheim, 27 N.Y.S.2d 268.

N.D.—McIntyre v. State Board of Higher Education, 3 N.W.2d 463, 71 N.D. 630.

Ohio.—Lange v. Winkler, App., 37 N. E.2d 552.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467—Shryock v. Association of United Fraternal Buyers, 5 A.2d 581, 135 Pa.Super. 428.

Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 161 Tenn. 592.

Tex.—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused—Hearn v. Covington, Civ.App., 22 S.W.2d 1073—Elder v. Highsmith, Civ.App., 10 S.W.2d 736.

Wash.—Hall v. Elliott, 131 P.2d 137, 15 Wash.2d 518.

Effect of cessation of acts before or after suit see infra § 22 d.

Doing of illegal act not assumed

Court will not assume that officer will disregard law, or do illegal act and enjoin him from doing it.—Kostmayer v. Police Jury of Parish of Jefferson, 1 La.App. 618.

Cause at time complaint filed

Cause of action for injunction must exist at time complaint is filed and not when something in future might come to pass.—Vesper v. Forest Lawn Cemetery Ass'n, 67 P.2d 368, 20 Cal. App.2d 157.

60. U.S.—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F.2d 394—Graves v. Mount Vernon Trust Co., C.C.A.N.Y., 69 F.2d 101—City of Osceola, Iowa, v. Utilities Holding Corporation, C.C.A.Iowa, 55 F.2d 155—Norwood v. Ward, D.C.N.Y., 46 F.2d 312, affirmed Norwood v. Bennett, 51 S.Ct. 494, 283 U.S. 800, 75 L.Ed. 1422—Walling v. Lacy, D. C.Colo., 51 F.Supp. 1002—Eastman v. U. S., D.C.Wash., 31 F.Supp. 754, reversed on other grounds, C.C.A., U. S. v. Eastman, 118 F.2d 421, certiorari denied Eastman v. U. S., 62 S.Ct. 68, 314 U.S. 635, 86 L.Ed. 510—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—Northrop Corporation v. Madden, D.C.Cal., 30 F.Supp. 993—Sunray Oil Co. v. Thompson, D.C.Tex., 13 F.Supp. 867—Kelley v. Kavanaugh, D.C.N.Y., 3 F.Supp. 666—Behre v. Anchor Ins. Co. of New York, C. C.A.N.Y., 297 F. 986—Farmers' State Bank of New Washington, Ohio, v. Board of Com'rs of Jensen Bridge Dist., D.C.Fla., 295 F. 755.

Ala.—McElderry v. Abercrombie, 104 So. 671, 213 Ala. 289.

Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 114 Conn. 319.

Del.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.

D.C.—Sigg-Fehr v. White, 285 F. 949, 52 App.D.C. 215.

Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.

Ga.—Behr v. City of Macon, 21 S.E. 2d 169, 194 Ga. 334—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491—Harvey v. Greenfield, 197 S.E. 276, 186 Ga. 192—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720—Christokas v. West, 182 S.E. 895, 181 Ga. 513—Wall v. Humphries, 175 S.E. 477, 179 Ga. 148—Cathcart Van & Storage Co. v. City of Atlanta, 151 S. E. 489, 169 Ga. 791.

Ill.—Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 144 N.E. 787, 313 Ill. 106, reversing 229 Ill. App. 549—Freehling v. Bankers Bldg., 16 N.E.2d 150, 296 Ill.App. 644.

Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344—Greathouse v. Board of School Com'rs of City of Indianapolis, 151 N.E. 411, 198 Ind. 95.

Ky.—City of Ashland v. Beckham, 111 S.W.2d 575, 271 Ky. 96—Hamlin v. Durham, 32 S.W.2d 413, 235 Ky. 842.

La.—Jackson v. Walton, 2 La.App. 53.

Md.—International Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.

Mass.—Shaw v. Harding, 28 N.E.2d 469, 306 Mass. 441—Hubrite Informal Frocks v. Kramer, 9 N.E.2d 570, 297 Mass. 530.

Mo.—Fugel v. Becker, 2 S.W.2d 743—Commission Row Club v. Lambert, App., 161 S.W.2d 732—Eckhardt v. Bock, App., 159 S.W.2d 395—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717—Polhemus v. Daly, App., 296 S.W. 442—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.

N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441—First Camden Nat. Bank & Trust Co. v. Wilentz, 19 A.2d 648, 129 N.J.Eq. 333—Scott v. Cholmondeley, 18 A.2d 617, 129 N. J.Eq. 152—Sneath v. Lehsten, 185 A. 55, 120 N.J.Eq. 327—Rissler v.

substantial reasons and be absolutely groundless.[61] In these circumstances the mere fact that an injunction would not injure defendant will not authorize its issuance,[62] and especially is the principle applicable where the injury is not certain to occur if defendant is not enjoined, and, on the other hand, an injury would certainly occur if the injunction were granted.[63] Also a defendant will not be enjoined from doing an act merely because others are likely to follow his example and thereby cause in-

Plumbers' Local No. 326 of United Ass'n of Journeymen Plumbers & Steamfitters of U. S. and Canada, 156 A. 498, 109 N.J.Eq. 91.

N.Y.—Baumann v. Baumann, 165 N.E. 819, 250 N.Y. 382, modifying 229 N.Y.S. 833, 224 App.Div. 719, affirming 228 N.Y.S. 539, 132 Misc. 217, and reargument denied 166 N. E. 344, 250 N.Y. 612—Carlisle v. Bennett, 277 N.Y.S. 187, 243 App. Div. 186, affirming 275 N.Y.S. 152, 153 Misc. 151, affirmed 277 N.Y.S. 197, 243 App.Div. 655, reversed on other grounds 197 N.E. 220, 268 N.Y. 212—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819—Juran v. Title Guarantee & Trust Co., 273 N.Y.S. 493, 151 Misc. 631—People ex rel. Hastings v. Hofstadter, 255 N.Y.S. 603, 142 Misc. 886, affirmed 255 N.Y.S. 13, 234 App. Div. 388, affirmed 180 N.E. 106, 255 N.Y. 425, modifying In re Investigation of Administration of Various Departments of Government of City of New York, 255 N.Y.S. 225, 235 App.Div. 662.

Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 188 Okl. 690—Simons v. Fahnestock, 78 P.2d 388, 390, 182 Okl. 460, citing **Corpus Juris.**

Pa.—Commonwealth v. Eckert, 9 Pa. Dist. & Co. 158, 40 Lanc.L.Rev. 253.

Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 1045, 161 Tenn. 592, citing **Corpus Juris**—White v. Gulf Refining Co., 2 S.W. 2d 414, 156 Tenn. 474.

Tex.—Woods v. Kiersky, Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ.App., 137 S.W.2d 802—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused—General Tire & Rubber Co. v. Texas Pacific Coal & Oil Co., Civ.App., 102 S.W.2d 1086, error refused—Young v. Taylor, Civ.App., 92 S.W.2d 1075—San Antonio Public Service Co. v. Long, Civ.App., 72 S.W.2d 696—City of Dallas v. Cain, Civ.App., 52 S.W.2d 269, 270, citing **Corpus Juris**—Thomas v. Bunch, Civ.App., 41 S. W.2d 359, affirmed Bunch v. Thomas, 49 S.W.2d 421, 121 Tex. 225—Commerce Realty Co. v. Warner Bros. Pictures, 8 S.W.2d 189, reversed on other grounds, Com.App., Warner Bros. Pictures v. Commerce Realty Co., 12 S.W.2d 203, modified on other grounds and rehearing denied 13 S.W.2d 337—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471—Fry v. Jackson, Civ.App., 264 S.W. 612—Moon v. Thomas, Civ.App., 261 S. W. 476.

Wash.—State ex rel. Hays v. Wilson, 137 P.2d 105, 107, 17 Wash.2d 670, citing **Corpus Juris**—Hall v. Elliott, 131 P.2d 137, 15 Wash.2d 518.

W.Va.—Kohlsaat v. Main Island Creek Coal Co., 132 S.E. 721, 101 W.Va. 256.

32 C.J. p 43 note 9.

Perpetual injunction

The general principle enunciated in the text is applicable on final hearing as well as on applications for preliminary injunctions.

U.S.—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F.2d 394.

N.J.—Meyer v. Somerville Water Co., 89 A. 545, 82 N.J.Eq. 572.

Injunction properly denied

(1) To prevent a city council from taking action on a proposed ordinance before the ordinance has been duly passed and approved.—Gray v. Wilmington, 83 A. 321, 10 Del.Ch. 39.

(2) To prevent the carrying out of the contract which is conceded by all the parties thereto to be void.—Platt v. Carlton, 168 P. 1118, 69 Colo. 85.

(3) To prevent the enforcement of a law or ordinance before the election required for ratifying it has been held.—Kerr v. Riddle, Tex.Civ. App., 31 S.W. 328.

(4) To prevent the holding of an election to levy a tax.—Roudanez v. New Orleans, 29 La.Ann. 271—32 C. J. p 44 note 18.

(5) To restrain a prison commission from pledging the income of the prison system for a loan where the undisputed evidence was that they not only had been advised that they could not do so but that none of the members contemplated doing so.—Herring v. Houston Nat. Exch. Bank, Tex.Civ.App., 241 S.W. 534.

(6) To restrain the collection of a fine before a judgment assessing it has been rendered.—Kansas City Southern R. Co. v. Railroad Commn., 31 So. 131, 106 La. 583—32 C.J. p 44 note 20.

(7) To restrain the enforcement of a statute alleged to be unconstitutional where defendant disclaimed any intention to do so until its validity had been adjudicated in another action theretofore brought.—Weir v. Winnett, C.C.Neb., 155 F. 824.

(8) To restrain the execution of contracts which cannot work any present injury to complainant.—Kearny v. Bayonne, 114 A. 550, 92 N. J.Eq. 627.

(9) To restrain the exercise of the right of eminent domain by a railroad company which had not attempted or expressed any intention of attempting to exercise such right.

La.—Mansfield Northeastern R. Co. v. Nabors, 66 So. 229, 135 La. 807.

Miss.—State v. Louisville & N. R. Co., 53 So. 454, 97 Miss. 35, Ann. Cas.1912C 1150, overruling suggestion of error 51 So. 918, 97 Miss. 35.

(10) To restrain a police jury from promulgating the returns of a local option election before the result of the election has been proclaimed.—Ponchatoula v. Tangipahoa Parish Police Jury, 46 So. 16, 120 La. 1040.

(11) To restrain the turning over of assets by one corporation to another where it is shown that the plan had been abandoned.—Shera v. Carbon Steel Co., D.C.W.Va., 245 F. 589.

(12) Other cases.—Pittsburg Safe Deposit & Trust Co. of Pittsburg v. Mehaffey, 75 A. 862, 227 Pa. 48—32 C.J. p 44 note 14, p 45 note 27.

Corpus Juris has been cited in a case in which a writ of prohibition was sought and denied on the ground that no injury would result to complainant from the contemplated action.—Yager v. Superior Court in and for Los Angeles County, 33 P.2d 451, 453, 139 Cal.App. 84, citing **Corpus Juris.**

61. Okl.—Woodward v. Raynor, 118 P. 964, 29 Okl. 493.

Tex.—Huguley v. White, Civ.App., 102 S.W.2d 451—City of Dallas v. Cain, Civ.App., 52 S.W.2d 269, 270, citing **Corpus Juris.**

62. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

32 C.J. p 44 note 11.

63. Pa.—Lehigh & W. Coal Co. v. Delaware & H. Canal Co., 11 Pa. Co. 185.

jury.[64]

b. Threats

While the authorities are conflicting as to whether an injunction may issue on mere threats to commit an act, it is not a condition precedent to the issuance of an injunction that actual threats to do the injury complained of have been made.

It is not a condition precedent to the issuance of an injunction that actual threats to do the injury complained of have been made, but it will be sufficient if the acts evincing such intention have been committed.[65] While, according to some decisions, mere threats to commit the act complained of unaccompanied by some overt act will not authorize the issuance of an injunction,[66] it has also been held that if defendants threaten to do the wrong and have the power to do so an injunction should issue.[67] However, the mere fact that defendant denies his intention to do the threatened act is not sufficient ground for denying the injunction,[68] as the court is not bound to accept such denial;[69] but the denial should be accepted and an injunction refused where the evidence satisfies the court that the denial is truthful,[70] and it has been held that this requirement is satisfied where there is no evidence to disprove the denial.[71]

§ 22. Existence and Nature of Injury

a. In general
b. Injury suffered in common with public
c. Injury sustained prior to suit
d. Discontinuance of acts

a. In General

Subject to some exceptions, in order to entitle a person to injunctive relief, ordinarily he must establish an actual and substantial injury or an affirmative prospect thereof.

Usually a complainant is not entitled to an injunction where he can show no injury to himself from the action sought to be prevented,[72] and ordinarily, in order to entitle a person to injunctive relief, whether prohibitory or mandatory in its nature, he must establish as against defendant an actual and substantial injury or an affirmative prospect thereof.[73] This is true whether the injury is single or

64. N.Y.—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245.
32 C.J. p 44 note 26.

65. U.S.—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.
32 C.J. p 45 note 31.

66. U.S.—Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475.
Ga.—West v. Chastain, 198 S.E. 736, 186 Ga. 667—Walden v. Sellers, 163 S.E. 897, 171 Ga. 774.
32 C.J. p 45 note 32.

67. U.S.—New Hampshire Gas & Electric Co. v. Morse, D.C.N.H., 42 F.2d 490—Fidler v. Roberts, C.C.A. Ill., 41 F.2d 305.
32 C.J. p 45 note 33.

68. U.S.—Vaughn v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughn, 11 F.Supp. 954—Fidler v. Roberts, C.C.A.Ill., 41 F. 2d 305—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.
32 C.J. p 45 note 34.

69. U.S.—Vaughn v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughn, 11 F.Supp. 954.
32 C.J. p 45 note 35.

70. Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 675, citing **Corpus Juris.**
32 C.J. p 45 note 36.

71. Tex.—Sanitary Appliance Co. v. French, supra, citing **Corpus Juris.**
32 C.J. p 45 note 37.

72. U.S.—Connecticut Telephone & Electric Co. v. Automotive Equipment Co., D.C.N.J., 14 F.2d 957, affirmed Automotive Equipment Co. v. Connecticut Telephone & Electric Co., C.C.A., 19 F.2d 990, certiorari denied 48 S.Ct. 121, 275 U.S. 564, 72 L.Ed. 428—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417—Missouri Power & Light Co. v. City of La Plata, Mo., D.C.Mo., 10 F.Supp. 653, appeal dismissed, C.C.A., 82 F.2d 1016—Starring v. Frazier, D.C.Tenn., 4 F.Supp. 818.
Or.—Cove Lodge No. 52 I. O. O. F. v. Harris, 294 P. 355, 134 Or. 566.
Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 161 Tenn. 592.
Tex.—Smiley v. City of Graham, Civ. App., 37 S.W.2d 289, error dismissed—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, quoting **Corpus Juris**—Terry v. Crossvy, Civ.App., 264 S.W. 718.
32 C.J. p 50 note 70.

73. U.S.—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201—Quigley Pub. Co. v. Showmen's Round Table, D.C. N.Y., 7 F.Supp. 410.
Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.
Ark.—Lewis v. A. Hirsch & Co., 90 S.W.2d 976, 977, 192 Ark. 209, quoting **Corpus Juris**—Micklish v. Grand Lodge of Loyal Star, 257 S. W. 353, 162 Ark. 71.
Cal.—Lowe v. Copeland, 13 P.2d 522, 526, 125 Cal.App. 315, citing **Corpus Juris.**
Conn.—Sisters of St. Joseph Corporation v. Atlas Sand, Gravel & Stone Co., 180 A. 303, 120 Conn. 168.
Ill.—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168.
Ind.—Burton v. Sparks, 36 N.E.2d 962, 109 Ind.App. 531.
Miss.—Greenwood Lodge No. 118, I. O. O. F. v. Hyman, 177 So. 43, 45, quoting **Corpus Juris.**
N.Y.—Garrison v. Paramount Bus Corporation, 227 N.Y.S. 510, 223 App.Div. 75—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103—Lair v. Grant, 244 N. Y.S. 427, 137 Misc. 470.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 795, 188 Okl. 690, citing **Corpus Juris.**
Or.—Cove Lodge No. 52 I. O. O. F. v. Harris, 294 P. 355, 134 Or. 566.
Tex.—San Antonio Public Service Co. v. Long, Civ.App., 72 S.W.2d 696—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, quoting **Corpus Juris**—Moon v. Thomas, Civ.App., 261 S.W. 476.
32 C.J. p 49 note 67.

Expenses incident to threatened proceeding

Subjection of complainant to the costs and expenses incident to a threatened proceeding has been held insufficient to warrant injunctive relief.—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—

continuous,[74] and especially is this true where in addition the writ would operate oppressively or contrary to true justice.[75] Thus an injunction will not be granted where the damage is so small and the right so unimportant as to make the case a trivial one,[76] or is technical and inconsequential,[77] or fanciful and sentimental,[78] or a mere inconvenience,[79] or is merely nominal, theoretical, or speculative,[80] even though an action at law might be maintained for the same injury.[81]

However, there is an obvious distinction between injury and damage that is not always observed in dealing with the question of injunctive relief,[82] and courts of equity will interpose in a proper case to protect a right, without any reference to the question of actual damage.[83] The words "substantial and serious," as applicable to damage prerequisite to the application of equity's extraordinary remedies, are used in a relative sense and their use is not intended to limit such relief to matters of large magnitude.[84] While it has been held that one whose rights would be invaded may invoke the aid of equity to prevent an act which, if done, would entitle him to damages,[85] the granting of an injunction is not governed by the mere value of the property,[86]

Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

Injury held sufficient

Injuries to persons transporting uncompressed cotton and similar commodities by enforcement of act limiting weight of vehicle loads containing packages of more than prescribed size and weight were held sufficient to entitle them to interlocutory injunction against enforcement thereof.—Sproles v. Binford, D.C.Tex., 52 F.2d 730, followed in J. H. McLeaish & Co. v. Binford, 52 F. 2d 737.

Injunctions have been refused to prevent

(1) The building of a bridge.—Bigelow v. Hartford Bridge Co., 14 Conn. 565, 36 Am.D. 502—32 C.J. p 51 note 77.

(2) The building of a railroad.—Barnes v. South Side R. Co., 2 Abb. Pr.,N.S., N.Y., 415.

(3) The building of a sewer.—Reid v. Macon, 24 Ga. 205.

(4) The construction of a flume.—Thorne v. Sweeney, 13 Nev. 415.

(5) The erection or maintenance of bay windows extending several feet beyond the building line but within the stoop line of the street.—Wormser v. Brown, 43 N.E. 524, 149 N.Y. 163.

(6) The maintenance of a ditch or drain.—Swan Creek Tp. v. Brown, 90 N.W. 38, 130 Mich. 382—32 C.J. p 51 note 83.

(7) The making of excavations on an adjoining lot.
Ga.—Morrison v. Latimer, 51 Ga. 519.
R.I.—McMaugh v. Burke, 12 R.I. 499.

(8) The enforcement of an ordinance prohibiting the running of stock at large in a city at the suit of one who owns no stock in the city.—Lilly v. Houston Heights, Tex. Civ.App., 158 S.W. 189.

(9) The exaction of overcharges by warehousemen.—Gulf Compress Co. v. Jones Cotton Co., 48 So. 481, 159 Ala. 670—32 C.J. p 51 note 86.

(10) The holding of an election without authority of law.—State v. Thorson, 68 N.W. 202, 9 S.D. 149, 33 L.R.A. 582.

(11) Acts that may possibly create a cloud on title to land.—Taylor v. Underhill, 40 Cal. 471—32 C.J. p 51 note 88.

74. Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, quoting **Corpus Juris.**
32 C.J. p 50 note 68.

75. Mo.—Holland Realty & Power Co. v. St. Louis, 221 S.W. 51, 282 Mo. 180.
32 C.J. p 50 note 69.

76. U.S.—James V. Reuter, Inc., v. Walling, C.C.A.La., 137 F.2d 315, reversing, D.C., Walling v. James V. Reuter, Inc., 49 F.Supp. 485.
Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.
Mo.—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.
32 C.J. p 50 note 71.

77. Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.
Mo.—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
Tex.—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed.
Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.
Wis.—Milwaukee Electric Ry. & Light Co. v. Pallange, 236 N.W. 549, 205 Wis. 126.
32 C.J. p 50 note 72.

78. U.S.—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995.
D.C.—Original La Tosca Social Club v. La Tosca Social Club, 23 App.D.C. 96.
Miss.—Greenwood Lodge No. 118, I. O. O. F. v. Hyman, 177 So. 43, 45, quoting **Corpus Juris.**

79. U.S.—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201.
Ga.—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.
Mo.—Howe v. Standard Oil Co. of Indiana, App., 150 S.W.2d 496.
Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673, 676, quoting **Corpus Juris.**
32 C.J. p 41 note 93.

80. U.S.—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.
Ga.—Hudson v. Tate, 4 S.E.2d 577, 188 Ga. 707.
N.Y.—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245.
N.C.—Town of Greenville v. State Highway Commission, 145 S.E. 31, 196 N.C. 226.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 795, 188 Okl. 690, citing **Corpus Juris.**
Tex.—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused—San Antonio Public Service Co. v. Long, Civ.App., 72 S.W.2d 696—Perry v. Ripley, Civ. App., 282 S.W. 329.
32 C.J. p 50 note 75.

Injury must be real and not imaginary

Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

81. N.Y.—Neiman v. Butler, 19 N.Y.S. 403.
Vt.—Sargent v. George, 56 Vt. 627.

82. Ind.—Burton v. Sparks, 36 N.E. 2d 962, 109 Ind.App. 531.

83. Ind.—Burton v. Sparks, supra.

Nature of injury controlling

Equity looks chiefly to nature of injury inflicted, and its constant repetition or continuation, rather than to magnitude of damages resulting.—Byram v. Lawein, 232 N.W. 907, 57 S.D. 403.

84. N.H.—Hatch v. Hillsgrove, 138 A. 428, 83 N.H. 91, reversed on other grounds 139 A. 366, 83 N.H. 91.

85. La.—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, rehearing denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

86. Mich.—White v. Forbes, Walk. p 112.

or right involved,[87] or on the extent of the damage measured by a money standard;[88] nor is it limited to cases in which damages could be recovered in an action at law.[89]

Exceptions. The presence of actual or threatened injury or damage has been held not a condition precedent to issuance of an injunction under some statutory provisions,[90] or where the state is concerned,[91] or in actions to restrain the breach of a restrictive covenant as to the use of land, as discussed infra § 87, or the breach of a contract in restraint of trade, as discussed infra § 84.

b. Injury Suffered in Common with Public

(1) General rule
(2) Exceptions to rule
(3) Special injury in addition to public injury

(1) General Rule

In the absence of special statutory regulation of the question, it has been almost universally held that where the injury complained of is in fact a public injury and the right violated is a public right, an individual cannot as a general rule maintain a suit for an injunction unless he suffers a special injury different from that suffered by the public at large.

Although it may be stated broadly that, where the subject matter of the suit affects the public, or the object of the writ is to compel the proper execution of the laws and to confine tribunals within their rightful jurisdiction or to prevent a clear transgression of their authority, any citizen of the state, county, or municipality affected may maintain the action,[92] and while there is an early case to the contrary,[93] it has been almost universally held, in the absence of special statutory regulation of the question, discussed infra subdivision b (2) of this section, that where the injury complained of is in fact a public injury, and the right violated is a public right, an individual cannot as a general rule maintain a suit for an injunction unless he suffers a special injury different from that suffered by the public at large.[94] The rule is not a technical and

87. N.Y.—Grunzfelder v. Interborough Rapid Transit Co., 149 N.Y.S. 437, 164 App.Div. 928.

88. U.S.—Miles Laboratories v. Seignious, D.C.S.C., 30 F.Supp. 549.
N.Y.—St. Vincent's Orphan Asylum v. Madison-Warren Corporation, 233 N.Y.S. 364, 225 App.Div. 379.
32 C.J. p 51 note 91.

The nonexistence of provable damage does not prevent the interposition of a court of equity and the granting of injunctive relief.—Burton v. Sparks, 36 N.E.2d 962, 109 Ind. App. 531.

An adverse use may be restrained, even though the damage suffered is small where its continuance might ripen it into a right.—Cobb v. Massachusetts Chemical Co., 60 N.E. 790, 179 Mass. 423—32 C.J. p 51 note 93.

89. N.Y.—Schuyler v. Curtis, 15 N.Y.S. 787, affirmed 19 N.Y.S. 264, 64 Hun 594.

90. Mass.—China Clipper Restaurant v. Yue Joe, 45 N.E.2d 748, 312 Mass. 540.

Use of name

Under statute prohibiting any person conducting business in the commonwealth from assuming name of any other person, without written consent, an injunction may be had to prevent violation of such statute, even where there is no damage.—China Clipper Restaurant v. Yue Joe, supra.

91. Fla.—Valdes v. State ex rel. Farrior, 194 So. 388, 142 Fla. 123.

92. Mont.—Garry v. Martin, 227 P. 573, 70 Mont. 587.

93. Iowa.—Collins v. Ripley, 8 Iowa 129, 131.
32 C.J. p 47 note 49.

94. U.S.—Perkins v. Lukens Steel Co., 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108, reversing Lukens Steel Co. v. Perkins, 107 F.2d 627, 70 App.D.C. 354, certiorari granted Perkins v. Lukens Steel Co., 60 S.Ct. 513, 309 U.S. 643, 84 L.Ed. 997—Mills v. Lowndes, D.C.Md., 26 F. Supp. 792—L. Singer & Sons v. Union Pac. R. Co., D.C.Mo., 26 F. Supp. 721, affirmed, C.C.A., 109 F.2d 493, certiorari granted 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, and Kansas City, Mo. v. Singer & Sons, 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, affirmed L. Singer & Sons v. Union Pac. R. Co., 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198—Lawless v. Duval County, Fla., 6 F. Supp. 303, 304, citing **Corpus Juris.**
Cal.—Mering v. Yolo Grocery & Meat Market, App., 127 P.2d 985.
D.C.—Hutchins v. Munn, 22 App.Cas. 88.
Ill.—American Legion v. Miller, 189 S.E. 837, 183 Ga. 754—Avery v. Village of La Grange, 45 N.E.2d 647, 381 Ill. 432—Fletcher v. City of Paris, 35 N.E.2d 329, 377 Ill. 89—People ex rel. Terp v. Washingtonian Home of Chicago, 198 N.E. 721, 361 Ill. 522—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319—Stevens Hotel Co. v. Chicago Yacht Club, 171 N.E. 550, 339 Ill. 463, certiorari denied 51 S.Ct. 79, 282 U.S. 875, 75 L.Ed. 773—McCormick v. Chicago Yacht Club, 163 N.E. 418, 331 Ill. 514, 60 A.L.R. 763.
Ind.—Greene v. Holmes, 166 N.E. 281, 201 Ind. 123—Burton v. Sparks, 36 N.E.2d 962, 109 Ind.App. 531.
Ky.—Mitchell v. State Highway Commission, 56 S.W.2d 991, 247 Ky. 188.
Md.—Jewel Tea Co. v. Town of Bel Air, 192 A. 417, 172 Md. 536—Harlan v. Employers' Ass'n of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
Mich.—United-Detroit Theaters Corporation v. Colonial Theatrical Enterprise, 273 N.W. 756, 280 Mich. 425.
Minn.—Caton v. Board of Education of City of Minneapolis, 6 N.W.2d 266, 213 Minn. 165—Schultz v. Krosch, 284 N.W. 782, 784, 204 Minn. 585, citing **Corpus Juris.**
Mo.—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 229 Mo.App. 622.
Mont.—State ex rel. Helena Allied Printing Council v. Mitchell, 74 P.2d 417, 105 Mont. 326.
N.H.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., 9 A.2d 513, 90 N.H. 368.
N.M.—Tomlin v. Town of Las Cruces, 31 P.2d 258, 38 N.M. 247, 97 A.L.R. 185.
N.Y.—New York League for Separation of Church and State v. Graves, 10 N.Y.S.2d 142, 170 Misc. 196—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 189, 148 Misc. 529, citing **Corpus Juris**—Town of Kiantone v. West Ridge Transp. Co., 246 N.Y.S. 613, 138 Misc. 692, reversed on other grounds 250 N.Y.S. 89, 232 App.Div.

arbitrary one, but has a solid foundation in principle and is sustained by very sound reasons of public policy, its object being to protect defendant against a multiplicity of suits and to secure him in one suit a final determination of all the controverted questions involved.[95] In case the government is obstructed in exercising its powers and discharging its duties, it has a right to apply to its own courts for any proper assistance by way of injunction.[96]

(2) Exceptions to Rule

It has been held that equity will grant an injunction on the complaint of a private individual whenever it clearly appears that in no other proceeding can public or private interests be fully protected, and, under some statutes, a private citizen may maintain a suit for injunction regardless of whether or not he will suffer particular injury.

An exception to the general rule stated supra subdivision b (1) of this section has been recognized in some cases, which, although recognizing the general rule as stated, hold that courts of equity will grant injunctions to restrain an attempted wrong whenever it clearly appears that in no other proceeding can public or private interests be fully protected,[97] and that the writ will issue at the instance of a private individual who shows he may suffer financial injury if the contemplated wrong is not enjoined, even though it may be made to appear that a part of the public may suffer in the same way or to the same extent.[98] It has also been held that an individual may be the relator in an action to enjoin a public wrong if the public officer whose duty it is to bring the suit refuses to do so.[99] Further, in some states the general rule does not apply with reference to suits for injunctions to restrain certain sorts of public injuries because of statutes providing that any citizen may maintain a suit for injunction regardless of whether or not he will suffer particular injury.[1]

(3) Special Injury in Addition to Public Injury

If there is an injury to private property, in its nature special and peculiar to the owner thereof, constituting a private wrong, the fact that the act causing the injury may also be a disturbance or obstruction to the public right will not bar his right to an injunction.

If there is an injury to private property, in its nature special and peculiar to the owner thereof, constituting a private wrong, the fact that the act causing the injury may also be a disturbance or obstruction to the public right will not bar his right to an injunction.[2] In these circumstances the mere

394—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869—Parkview Towers v. Nordheim, 27 N.Y.S.2d 268.
N.C.—Matthews v. Lawrence, 193 S. E. 730, 212 N.C. 537.
Pa.—Bailey v. Sharpe, 54 Montg.Co. 100.
Tex.—Allen v. Fisher, 9 S.W.2d 731, 118 Tex. 38—Dickson v. Strickland, 265 S.W. 1012, 114 Tex. 176—Wilson v. Pierce, Civ.App., 123 S.W.2d 695—Mickle v. Garrett, Civ.App., 110 S.W.2d 1235—Hoff v. Westhoff, Civ.App., 102 S.W.2d 293, error refused—Rushing v. Lynch, Civ. App., 22 S.W.2d 482.
W.Va.—Rudolph v. Glendale Improvement Co., 137 S.E. 349, 103 W.Va. 81.
32 C.J. p 47 note 51.

Duty owed to complainant

One seeking injunction on account of violation of duty imposed by law must show that duty is owed to him and, if it be statutory duty, must show that statute was enacted for his advantage or for advantage of class to which he belongs.—Mosig v. Jersey Chiropodists, 194 A. 248, 122 N.J.Eq. 382.

Taxpayers cannot restrain official acts merely because they are ultra vires.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Zoning regulations

(1) Ordinarily a private individual cannot maintain an action to restrain the violation of a zoning regulation.
Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.
Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387.
N.Y.—Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended 37 N.E.2d 456, 286 N.Y. 723—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245—Atkins v. West, 226 N.Y.S. 335, 222 App.Div. 308.
Wis.—Oeland v. Woldenberg, 201 N. W. 807, 185 Wis. 510.

(2) As respects right of property owners to complain in equity of corporation's violation of zoning ordinances, rights are not enlarged because several individuals have joined together as plaintiffs.—Mullholland v. State Racing Commission, 3 N.E. 2d 773, 295 Mass. 286.

(3) The right of an adjoining property owner is discussed infra subdivision b (3) of this section.

95. N.Y.—Davis v. New York, 9 N. Y.Super. 663, reversed on other grounds 14 N.Y. 506, 67 Am.D. 186.

96. N.C.—City of Goldsboro v. W. P. Rose Builders' Supply Co., 157 S. E. 58, 200 N.C. 405.
32 C.J. p 48 note 54.

97. Iowa.—Abbott v. Iowa City, 277 N.W. 437, 224 Iowa 698.
La.—Connell v. Commission Council of City of Baton Rouge, 96 So. 657, 153 La. 788.

98. Iowa.—Semones v. Needles, 114 N.W. 904, 137 Iowa 177, 14 L.R.A., N.S., 1156, 15 Ann.Cas. 1012.

99. Wis.—State v. Cunningham, 53 N.W. 35, 83 Wis. 90, 35 Am.S.R. 27, 17 L.R.A. 145.
32 C.J. p 48 note 58.

1. Cal.—Mering v. Yolo Grocery & Meat Market, App., 127 P.2d 985, 991, quoting **Corpus Juris.**
32 C.J. p 48 note 59.

2. Ga.—Jones v. Methvin, 17 S.E.2d 172, 193 Ga. 17.
Idaho.—Gasman v. Wilcox, 35 P.2d 265, 266, 54 Idaho 700, citing **Corpus Juris.**
Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.
La.—Oldstein v. Firemen's Bldg. Ass'n, 10 So. 928, 44 La.Ann. 492.
Mass.—Mueller v. Commissioner of Public Health, 30 N.E.2d 217, 307 Mass. 270.
Tex.—Chimene v. Baker, 75 S.W. 330, 32 Tex.Civ.App. 520.
Utah.—Adney v. State Road Commission of Utah, 248 P. 811, 67 Utah 567.
Wash.—State v. Superior Court for King County, 212 P. 259, 123 Wash. 116.
32 C.J. p 49 note 61.

Suit also in behalf of others

Fact that plaintiff brought suit on behalf of himself and others with-

fact that the injury is a public injury will not militate against his right to an injunction.[3] It is sufficient to show that he suffered a special injury different from that suffered by the public at large;[4] he need not show that he will be damaged specially and irreparably to an extent not sustained by other property owners in the vicinity.[5]

c. Injury Sustained Prior to Suit

Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, rights already lost and wrongs already perpetrated ordinarily may not be corrected by injunction.

Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief,[6] and as it is not used for the purpose

in class did not adversely affect plaintiff's individual rights, since he established his injury or threat of injury, thereby justifying preliminary injunction.—Spang v. Roper, D.C.Pa., 13 F.Supp. 840, vacated on other grounds, C.C.A., Gossnell v. Spang, 84 F.2d 889, certiorari denied Spang v. Gossnell, 57 S.Ct. 233, 299 U.S. 605, 81 L.Ed. 446.

Restrictions and zoning regulations

(1) One owning adjoining property, or property in the area protected by a restriction, has been held to sustain such special damage as to entitle him to injunctive relief against violation of the regulation or restriction.

U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F. 2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.

Iowa.—Boehner v. Williams, 239 N. W. 545, 213 Iowa 578.

N.J.—Stokes v. Jenkins, 152 A. 383, 107 N.J.Eq. 318.

N.M.—Alamogordo Imp. Co. v. Prendergast, 91 P.2d 428, 43 N.M. 245, 122 A.L.R. 1277.

N.Y.—Cordts v. Hutton Co., 262 N.Y. S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399—Cohen v. Rosevale Realty Co., 202 N.Y.S. 95, 121 Misc. 618—Cohen v. Rosedale Realty Co., 199 N.Y.S. 4, 120 Misc. 416, affirmed 199 N.Y.S. 916, 206 App.Div. 681, and Cohen v. Rosevale Realty Co., 206 N.Y.S. 893, 211 App.Div. 812.

Ohio.—Pritz v. Messer, 149 N.E. 30, 112 Ohio St. 628.

Wis.—Holzbauer v. Ritter, 198 N.W. 852, 184 Wis. 35.

(2) A provision in a zoning ordinance which provided that an official of the village should enforce the ordinance did not prevent a private property owner who suffered special damage by reason of violation of ordinance from maintaining action for redress.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325, reversing 16 N.Y.S.2d 626, 258 App.Div. 328.

(3) An owner of property abutting on an alley, which would be rendered a cul-de-sac by the vacation of part of the alley in the same block, had

such a different kind of resulting injury from that sustained by public as would enable him to maintain an action to enjoin threatened injury until he had been compensated.—Neudoefer Silcox Co. v. Marting Bros. Co., 17 Ohio App. 286.

3. Mont.—Iverson v. Dilno, 119 P. 719, 44 Mont. 270.

32 C.J. p 49 note 62.

4. U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F. 2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

Ark.—Lewis v. A. Hirsch & Co., 90 S.W.2d 976, 977, 192 Ark. 209, quoting **Corpus Juris.**

D.C.—Weeks v. Heurich, 40 App.D.C. 46.

5. U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F. 2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

32 C.J. p 49 note 64.

6. U.S.—Swift & Co. v. U. S., App.D. C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Standard Oil Co. of Maine v. Standard Oil Co. of New York, C.C.A.Me., 45 F.2d 309, modifying, D.C., Standard Oil Co. of New York v. Standard Oil Co. of Maine, 38 F.2d 677—J. C. McFarland Co. v. O'Brien, D.C.Ohio, 6 F.2d 1016—Securities and Exchange Commission v. Okin, D.C.N. Y., 51 F.Supp. 925—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F.Supp. 884—Basevi v. Edward O'Toole Co., D.C.N.Y., 26 F.Supp. 41—Boggus Motor Co. v. Onderdonk, D.C.Tex., 9 F.Supp. 950—Gerosa v. Apco Mfg. Co., C.C.A. R.I., 299 F. 19, affirming, D.C., Hudson Motor Specialties Co. v. Apco Mfg. Co., 288 F. 871.

Ala.—Scofield v. Perry Creamery Co., 176 So. 195, 234 Ala. 560—N. L. Pierce Nat. Detective Agency v. Pierce Detective Agency, 117 So. 191, 217 Ala. 594—McElderry v. Abercrombie, 104 So. 671, 213 Ala. 289.

Ariz.—Takiguchi v. State, 55 P.2d 802, 47 Ariz. 302.

Cal.—Vincent Petroleum Corporation v. Culver City, 111 P.2d 433, 43 Cal.App.2d 511.

Iowa.—Universal Loan Corporation v. Jacobson, 237 N.W. 436, 437, 212 Iowa 1088, citing **Corpus Juris.**

Mo.—Corken v. Workman, 98 S.W. 2d 153, 155, 231 Mo.App. 121, citing **Corpus Juris**—Lademan v. Lamb Const. Co., App., 297 S.W. 184.

Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418.

Neb.—Conrad v. Kaup, 291 N.W. 687, 688, 137 Neb. 900, quoting **Corpus Juris.**

N.H.—Hoban v. Bucklin, 184 A. 362, 88 N.H. 73.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N. Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N.E.2d 210, 282 N.Y. 804—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N. Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704—Miller v. Gallagher, 28 N.Y.S. 2d 606, 176 Misc. 647.

Ohio.—Antol v. Dayton Malleable Iron Co., App., 38 N.E.2d 100.

Pa.—Commonwealth v. Eckert, 9 Pa. Dist. & Co. 158, 40 Lanc.L.Rev. 253.

Tex.—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ. App., 137 S.W.2d 802—Morris v. Hughes Bros. Mfg. Co., Civ.App., 27 S.W.2d 849.

Wash.—State ex rel. Department of Public Works of Washington v. Skagit River Navigation & Trading Co., 45 P.2d 27, 29, 181 Wash. 642, quoting **Corpus Juris.**

32 C.J. p 45 note 38.

Looks to the future

An injunction looks to the future.

U.S.—Douglas v. City of Jeannette (Pennsylvania), Pa., 63 S.Ct. 877, 319 U.S. 157, 87 L.Ed. 1324, affirming, C.C.A., 130 F.2d 652, reversing, D.C., 39 F.Supp. 32, certiorari granted 63 S.Ct. 660, 318 U.S. 749, 87 L.Ed. 1125, rehearing denied 63 S.Ct. 1170, 319 U.S. 782, 87 L.Ed. 1726.

D.C.—Penn Oil Co. v. Vacuum Oil Co., 48 F.2d 1008, 60 App.D.C. 96. **Sole function** is preventive.—U. S.

of punishment or to compel persons to do right but merely to prevent them from doing wrong,[7] rights already lost and wrongs already perpetrated cannot be corrected by injunction,[8] and the party aggrieved must seek some other remedy for redress, which ordinarily is an action at law for damages.[9]

Injury continuing. If the acts sought to be enjoined and the injury resulting therefrom are continuing in their nature,[10] or if the injurious act has

v. Aluminum Co. of America, D.C.N.Y., 44 F.Supp. 97, 215.

7. U.S.—Brown v. Hecht Co., App.D.C., 64 S.Ct. 587, reversing 137 F.2d 689, reversing, D.C., 49 F.Supp. 528, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F.Supp. 884.

Cal.—Blumenthal v. Di Giorgio Fruit Corporation, 85 P.2d 580, 30 Cal.App.2d 11.

Neb.—Conrad v. Kaup, 291 N.W. 687, 688, 137 Neb. 900, quoting **Corpus Juris.**

N.J.—General Leather Products Co. v. Luggage & Trunk Makers Union, Local No. 49, 183 A. 165, 119 N.J.Eq. 432, appeal dismissed 187 A. 582, 121 N.J.Eq. 101.

Wash.—State ex rel. Department of Public Works of Washington v. Skagit River Navigation & Trading Co., 45 P.2d 27, 29, 181 Wash. 642, quoting **Corpus Juris.**

32 C.J. p 45 note 39.

Purpose is to deter defendant from engaging in prohibited acts and not to punish him for past conduct.—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528, reversed on other grounds, App.D.C., 137 F.2d 689, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, and reversed on other grounds 64 S.Ct. 587—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 333—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

8. U.S.—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306—Fidler v. Roberts, C.C.A.Ill., 41 F.2d 305—American Mercury v. Kiely, C.C.A.N.Y., 19 F.2d 295—J. C. McFarland Co. v. O'Brien, D.C.Ohio, 6 F.2d 1016—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002—International Carrier-Call & Television Corporation v. Radio Corporation of America, D.C.N.Y., 51 F.Supp. 156—Alpirn v. Huffman, D.C.Neb., 49 F.Supp. 337—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192—Snyder v. Gurnsey, D.C.N.H., 43 F.Supp. 204—Sheldon v. Moredall Realty Corporation, D.C.N.Y., 22 F.Supp. 91, modified on other grounds, C.C.A., 95 F.2d 43—Rinderknecht v. Toledo Ass'n of Credit Men, D.C.Ohio, 13 F.Supp. 555—Journal of Commerce Pub. Co. v. Tribune Co., C.C.A.Ill., 266 F. 111.

Ariz.—Takiguchi v. State, 55 P.2d 802, 47 Ariz. 302.

Cal.—Blake v. City of Eureka, 258 P. 945, 201 Cal. 643—Hodgeman v. City of San Diego, 128 P.2d 412, 53 Cal.App.2d 610—Vincent Petroleum Corporation v. Culver City, 111 P.2d 433, 43 Cal.App.2d 511—Thome v. Honcut Dredging Co., 111 P.2d 368, 43 Cal.App.2d 737.

Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698—Wilkinson v. Woodward, 141 So. 313, 105 Fla. 376.

Ga.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683.

Ind.—Standard Mercantile Co. v. Strong, 191 N.E. 140, 207 Ind. 55—Doss v. Yingling, 9 N.E.2d 139, 103 Ind.App. 555.

Iowa.—Universal Loan Corporation v. Jacobson, 237 N.W. 436, 437, 212 Iowa 1088, citing **Corpus Juris.**

La.—Adams v. Town of Ruston, 8 La.App. 188.

Md.—United Brotherhood of Carpenters and Joiners of America, Local No. 101, v. United Slate Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local No. 80, 29 A.2d 839.

Mich.—Rood v. City of Detroit, 240 N.W. 41, 256 Mich. 547—Johnson v. Gibson, 215 N.W. 333, 240 Mich. 515.

Miss.—Hodges v. Trantham, 157 So. 715, 171 Miss. 374—Hunter v. Hankinson, 106 So. 514, 141 Miss. 279.

Mo.—Fugel v. Becker, 2 S.W.2d 743—Corken v. Workman, 98 S.W.2d 153, 155, 231 Mo.App. 121, citing **Corpus Juris**—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.

Mont.—State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County, 53 P.2d 107, 101 Mont. 176, 103 A.L.R. 376.

Neb.—Conrad v. Kaup, 291 N.W. 687, 688, 137 Neb. 900, quoting **Corpus Juris**—Elson v. Schmidt, 287 N.W. 196, 136 Neb. 778.

N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.

N.Y.—Barlow v. Craig, 208 N.Y.S. 332, 211 App.Div. 775.

N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.

Ohio.—Antol v. Dayton Malleable Iron Co., App., 38 N.E.2d 100.

Okl.—Roper v. Board of Education of City of Okmulgee, 29 P.2d 950, 167 Okl. 382—Maxwell v. City of Tulsa, 292 P. 66, 145 Okl. 155—Fanning v. Board of Education of City of Tulsa, 282 P. 1099, 140 Okl. 252—Goldsmith v. City of Ardmore, 277 P. 230, 136 Okl. 201—Arinwine v. Sawner, 240 P. 1042, 112 Okl. 252—Youngblood v. Incorporated Town of Wewoka, 225 P. 695, 95 Okl. 28.

Or.—Barrett v. Union Bridge Co., 245 P. 308, 117 Or. 566, 45 A.L.R. 521, denying rehearing 243 P. 93, 117 Or. 220, 45 A.L.R. 521.

Pa.—Commonwealth v. Eckert, 9 Pa. Dist. & Co. 158, 40 Lanc.L.Rev. 253.

Puerto Rico.—Boudens v. Korber, 18 Puerto Rico 252.

Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619.

Tex.—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America, v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ.App., 137 S.W.2d 802—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218—Bell v. Ditmore, Civ.App., 38 S.W.2d 397—Anderson v. City of San Antonio, Civ.App., 26 S.W.2d 353—Bledsoe v. Wesley, Civ.App., 22 S.W.2d 718, error dismissed—Pope v. San Antonio, U. & G. Ry. Co., Civ.App., 20 S.W.2d 356—Wright v. Wright, Civ.App., 278 S.W. 925—Carter v. White, Civ.App., 260 S.W. 276—Ben. C. Jones & Co. v. Philquist, Civ.App., 249 S.W. 516.

Wash.—State ex rel. Department of Public Works of Washington v. Skagit River Navigation & Trading Co., 45 P.2d 27, 29, 181 Wash. 642, quoting **Corpus Juris.**

32 C.J. p 45 note 40.

Mandatory injunctions generally see supra § 5.

9. Cal.—Thome v. Honcut Dredging Co., 111 P.2d 368, 371, 43 Cal.App.2d 737, citing **Corpus Juris.**

Fla.—Wilkinson v. Woodward, 141 So. 313, 105 Fla. 376.

32 C.J. p 46 note 42.

10. U.S.—Sheldon v. Moredall Realty Corporation, D.C.N.Y., 22 F.Supp. 91, modified on other grounds, C.C.A., 95 F.2d 43.

Ark.—Meriwether Sand & Gravel Co. v. State, 26 S.W.2d 57, 181 Ark. 216.

Cal.—Thome v. Honcut Dredging Co., 111 P.2d 368, 43 Cal.App.2d 737.

Ga.—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491.

not yet been completed,[11] an injunction will be issued, provided, of course, the acts and the injuries resulting therefrom are within the scope of injunctive relief. On the other hand, where the acts complained of are such as cannot be enjoined the continuation, or threatening the continuation, of such acts cannot aid the case.[12]

d. Discontinuance of Acts

While the mere cessation by the defendant of the alleged acts or conduct, before or after the beginning of a suit for injunction, has been held not a bar to the issuance of an injunction, ordinarily injunction will not issue unless there is reasonable ground to believe that there will be a resumption of such activities.

A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future.[13] However, the mere cessation by defendant of the alleged acts or conduct, before or after the beginning of a suit for injunction, has been held not a bar to the issuance of an injunction,[14] and in a proper case, as where there is a reasonable ground to believe that there will be a resumption of such activities, a court of equity may issue an injunction.[15]

Mo.—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.
32 C.J. p 46 note 44.

11. Ga.—Brown v. Atlantic & B. R. Co., 55 S.E. 24, 126 Ga. 248, 7 Ann.Cas. 1026.
32 C.J. p 46 note 45.

12. Nev.—Sherman v. Clark, 4 Nev. 138, 97 Am.D. 516.

13. U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306—Securities and Exchange Commission v. Torr, C.C.A.N.Y., 87 F.2d 446, reversing D.C., 15 F.Supp. 315—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520—Walling v. Livernois, D.C. Mich., 50 F.Supp. 978—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528, reversed on other grounds, App.D.C., 137 F.2d 689, certiorari granted Hecht Co. v. Brown, 64 S. Ct. 81, and reversed on other grounds 64 S.Ct. 587—Walling v. Emery Wholesale Corporation, D. C.Ga., 49 F.Supp. 192—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F.Supp. 884—Snyder v. Gurnsey, D.C.N.H., 43 F.Supp. 204—Hughes Tool Co. v. Owen, D.C.Tex., 39 F.Supp. 656, reversed on other grounds, C.C.A., 123 F.2d 950—Fleming v. Phipps, D.C.Md., 35 F. Supp. 627—Journal of Commerce Pub. Co. v. Tribune Co., C.C.A.Ill., 286 F. 111.
D.C.—Bank of America Nat. Trust & Savings Ass'n v. Douglas, 132 F. 2d 9, 76 U.S.App.D.C. 373—Morrison v. Fall, 290 F. 306, 53 App.D. C. 331, affirmed Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394.
Cal.—Thome v. Honcut Dredging Co., 111 P.2d 368, 371, 43 Cal.App.2d 737, quoting **Corpus Juris.**
Iowa.—Universal Loan Corporation v. Jacobson, 237 N.W. 436, 437, 212 Iowa 1088, citing **Corpus Juris.**
Kan.—State ex rel. Boynton v. Englehart, 40 P.2d 329, 141 Kan. 101.
Md.—United Brotherhood of Carpenters and Joiners of America, Local No. 101, v. United Slate Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local No. 80, 29 A.2d 839.
Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403—Sullivan v. Barrows, 21 N.E. 2d 275, 303 Mass. 197.
Minn.—State v. Tri-State Telephone & Telegraph Co., 267 N.W. 489, 197 Minn. 575.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 184.
N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441.
Pa.—Commonwealth v. Eckert, 9 Pa. Dist. & Co. 158, 40 Lanc.L.Rev. 253.
Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.
32 C.J. p 46 note 43, p 75 note 84 [b], p 77 note 98.
Injunction ineffectual or unnecessary generally see infra § 29.

Inference of repetition not supported
Where defendants' alleged violations of statute in sale of stock took place only when they for good cause thought they were not violating law and had been discontinued, their past conduct would not support an inference of repetition in the future, so as to warrant a preliminary injunction.—Securities and Exchange Commission v. Torr, C.C.A. N.Y., 87 F.2d 446, reversing, D.C., 15 F.Supp. 315.

14. U.S.—Brown v. Hecht Co., App. D.C., 64 S.Ct. 587, reversing 137 F.2d 689, reversing, D.C., 49 F. Supp. 528, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81—Champion Spark Plug Co. v. Reich, C.C. A.Mo., 121 F.2d 769, modifying, D. C., 34 F.Supp. 414, appeal dismissed, C.C.A., Reich v. Champion Spark Plug Co., 117 F.2d 1014, certiorari denied 62 S.Ct. 130, 314 U. S. 669, 86 L.Ed. 535, mandate Conformed to, D.C., Champion Spark Plug Co. v. Reich, 42 F.Supp. 166—Metro-Goldwyn-Mayer Corporation v. Fear, C.C.A.Cal., 104 F.2d 892—Securities and Exchange Commission v. Torr, C.C.A.N.Y., 87 F.2d 446, reversing, D.C., 15 F. Supp. 315—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F.Supp. 884—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360—Securities and Exchange Commission v. Otis & Co., D.C.Ohio, 18 F.Supp. 100, affirmed, C.C.A., Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579.
Kan.—Pacific Mut. Tel. Co. v. Chicago & A. Bridge Co., 12 P. 560, 36 Kan. 118.
32 C.J. p 77 note 1.

15. U.S.—Fleming v. Jacksonville Paper Co., C.C.A.Fla., 128 F.2d 395—Otis & Co. v. Securities and Exchange Commission, C.C.A.Ohio, 106 F.2d 579, affirming, D.C., Securities and Exchange Commission v. Otis & Co., 18 F.Supp. 100—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A. Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519—Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475—Fidler v. Roberts, C. C.A.Ill., 41 F.2d 305—U. S. v. Aluminum Co. of America, D.C.N. Y., 44 F.Supp. 97, 215—U. S. v. Mahaney, D.C.Cal., 27 F.Supp. 463—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360.
Cal.—Thome v. Honcut Dredging Co., 111 P.2d 368, 43 Cal.App.2d 737.
Ga.—Denson v. Tarver, 197 S.E. 242, 244, 186 Ga. 180, citing **Corpus Juris.**
Mich.—Bohm v. Rogoff, 239 N.W. 320, 256 Mich. 199.

§ 23. —— Irreparable Injury in General

a. General rule
b. What constitutes

a. General Rule

Ordinarily, to warrant injunctive relief, it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking for such relief.

Except as changed by statute,[16] ordinarily to warrant the allowance of a writ of injunction it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking an injunction.[17] A temporary re-

Mo.—F. C. Church Shoe Co. v. Turner, 279 S.W. 232, 218 Mo.App. 516.
N.Y.—J. H. & S. Theatres v. Fay, 183 N.E. 509, 260 N.Y. 315, reversing 258 N.Y.S. 993, 236 App.Div. 744.
Ohio.—Antol v. Dayton Malleable Iron Co., App., 38 N.E.2d 100.
Wash.—Fornili v. Auto Mechanics' Union Local No. 297 of International Ass'n of Machinists, 93 P. 2d 422, 200 Wash. 283.
32 C.J. p 77 note 1.

Discretion of court

Whether an injunction will issue to enjoin acts abandoned by defendant since institution of suit is discretionary, and to warrant the refusal of an injunction because defendant, since action was instituted, has ceased to engage in the act sought to be enjoined, proof must be made that the abandonment is in good faith and permanent.—State ex rel. Whall v. Saenger Theatres Corporation, 200 So. 442, 190 Miss. 391.

The final test in determining whether injunction against unlawful practices should be issued is existence and manifestation of good faith by defendant, and issuance of writ depends on whether defendant's conduct in past indicates reasonable likelihood of further violations of law in future, and where defendant corporation, in its original answer and throughout trial, vigorously attacked court's jurisdiction on every possible ground, put government to its proof on every issue, and amended answer, so as to admit validity and applicability of act, only when it became readily apparent that no useful purpose would be gained by further refusal to do so, injunction should be issued as against contentions that defendant ceased all violations of act before institution of suit and was sincere in its promises not to violate any provisions thereof in future.—Wurling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. [illegible]

16. U.S.—Brown v. Hecht Co., App. D.C., 137 F.2d 689, reversing, D.C., 49 F.Supp. 528, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, 320 U.S. 727, 88 L.Ed. ——, reversed on other grounds Hecht Co. v. Bowles, 64 S.Ct. 587, 321 U.S. 321, 88 L.Ed. ——.
Me.—Kautz v. Sheridan, 105 A. 401, 118 Me. 28.

Injunction in public interest

Congress has power to permit injunctions to be issued without the showing of irreparable injury ordinarily required by equity tribunals, and this is generally true where an agency of the government is given the right to apply for injunction in the public interest.—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997.

17. U.S.—State Corporation Commission of Kansas v. Wichita Gas Co., Kan., 54 S.Ct. 321, 290 U.S. 561, 78 L.Ed. 500, modifying, D.C., Wichita Gas Co. v. Public Service Commission of Kansas, 2 F.Supp. 792—Campbell v. Medalie, C.C.A.N.Y., 71 F.2d 671, affirming, D.C., Campbell v. Chase Nat. Bank of City of New York, 5 F.Supp. 156, appeal dismissed U. S. v. Campbell, 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, and certiorari denied Campbell v. Medalie, 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686—Haldeman-Julius Pub. Co. v. Kiely, C.C.A.N.Y., 63 F.2d 814—Hubbard Inv. Co. v. Brast, C.C.A.W.Va., 59 F.2d 709—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382—Petroleum Exploration v. Public Service Commission of Kentucky, D.C.Ky., 21 F. Supp. 254, motion denied 58 S.Ct. 527, affirmed 58 S.Ct. 834, 304 U.S. 209, 82 L.Ed. 1294—Securities and Exchange Commission v. Electric Bond & Share Co., D.C.N.Y., 18 F. Supp. 131, affirmed, C.C.A., Electric Bond & Share Co. v. Securities and Exchange Commission, 92 F.2d 580, certiorari granted 58 S.Ct. 411, 302 U.S. 681, 82 L.Ed. 526, affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105—Texas Co. v. Grosjean, D.C.La., 16 F.Supp. 264 —Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.
Alaska.—Anderson v. Smith, 8 Alaska 470—Johnson v. Hummel, 7 Alaska 314.
Colo.—Blanchard v. Holland, 103 P. 2d 18, 106 Colo. 147, 139 A.L.R. 159.
Conn.—Point O'Woods Ass'n v. Busher, 167 A. 546, 117 Conn. 247.
Ga.—Fleisher v. Duncan, 24 S.E.2d 15, 195 Ga. 309.
Ill.—Peoples Gas Light & Coke Co. v. Slattery, 25 N.E.2d 482, 373 Ill. 31, appeal dismissed Peoples Gas Light & Coke Co. v. Hart, 60 S.Ct. 724, 309 U.S. 634, 84 L.Ed. 991—Baker v. Retail Clerks' International Protective Ass'n, Local Union No. 1000, Eldorado, 40 N.E.2d 571, 313 Ill.App. 432—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168.
Ind.—Burton v. Sparks, 36 N.E.2d 962, 109 Ind.App. 531.
Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.
La.—Rapides Dairy Dealers' Co-op. Ass'n v. Mathews, App., 158 So. 247—Minden Syrup Co. v. Applegate, App., 150 So. 421, 423, quoting **Corpus Juris.**
Mo.—Prendergast v. Blomberg, App., 141 S.W.2d 156.
Neb.—Gering Irr. Dist. v. Mitchell Irr. Dist., 3 N.W.2d 566, 141 Neb. 344—Golden v. Bartholomew, 299 N.W. 356, 140 Neb. 65.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596—Leader-Observer v. State Alcoholic Beverage Control Board of New York, 265 N.Y.S. 509, 148 Misc. 757, affirmed 269 N.Y.S. 935, 241 App.Div. 637—Mutual Life Ins. Co. of New York v. Marzec, 262 N.Y.S. 558, 146 Misc. 26—Hearn v. Leary, 211 N.Y. S. 668, 125 Misc. 446, affirmed 212 N.Y.S. 828, 215 App.Div. 735.
N.D.—McIntyre v. State Board of Higher Education, 3 N.W.2d 463, 71 N.D. 630.
Ohio.—Hassinger v. Kramer, 162 N. E. 752, 28 Ohio App. 449.
Pa.—Hance v. Easton Hospital, 29 North.Co. 46—Lombardi v. Vudragovich, 22 Westmoreland Co.L.J. 23.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
Tex.—Malott v. City of Brownsville, Com.App., 298 S.W. 540, affirming, Civ.App., 292 S.W. 606, and modified, Com.App., 300 S.W. 29, corrected 4 S.W.2d 965—Thomas v. Bunch, Civ.App., 41 S.W.2d 359, affirmed Bunch v. Thomas, 49 S.W.2d 421, 121 Tex. 225—Sanitary Appliance Co. v. French, Civ.App., 34 S. W.2d 673, 676, citing **Corpus Juris** —Labor Bank & Trust Co. v. Dow, Civ.App., 26 S.W.2d 925—Terry v. Crosswy, Civ.App., 264 S.W. 718 —Graham v. Omar Gasoline Co., Civ.App., 253 S.W. 896.
32 C.J. p 51 note 96.

straining order,[18] or a preliminary injunction[19] will not, as a general rule, be granted in a case where it is not shown that an irreparable injury is immediately impending and will be visited on complainant before the case can be brought to a final hearing. However, courts of equity, on cautionary grounds, exercise jurisdiction and act to preserve the status quo even in the absence of irreparable injury where there is threatened disturbance of the situation which is far-reaching and which it will do no real harm to hold in abeyance until the rights involved can be finally determined,[20] and under the statutes in some jurisdictions it is held that the injury need not be irreparable to authorize a temporary injunction, but that a great injury is sufficient;[21] and the statutes of some jurisdictions are broad enough to warrant the issuing of injunctions of all classes whatsoever in case great injury is shown.[22] Conversely, in an otherwise proper case, an injunction should be granted where irreparable damage would result if the injunction is not issued.[23]

b. What Constitutes

(1) In general
(2) Destruction or change of property

(1) In General

An injury is irreparable when it cannot be adequately compensated in damages, and it is not necessary that the pecuniary damage be shown to be great.

An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages,[24] or where there exists no certain pecuniary standard for the measurement of the

Irreparable injury as basis for enjoining:
Actions at law see infra § 37.
Trespass or other injury to property see infra § 61.

Preventing inequitable results
Injunctive relief is usually granted as appropriate remedy to prevent inequitable results to follow from litigation after transaction has been fully executed.—Brown v. Tuskegee Light & Power Co., 168 So. 159, 232 Ala. 361.

18. U.S.—McNally v. Reynolds, D.C. Wash., 7 F.Supp. 112.
Miss.—Water Valley v. State, 60 So. 576, 103 Miss. 645.

Doubt as to irreparable damage
A restraining order should be granted in all cases where there is any doubt as to whether defendant is doing irreparable damage.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.

19. U.S.—Warner Bros. Pictures v. Gittone, C.C.A.Pa., 110 F.2d 292, reversing Gittone v. Warner Bros. Pictures, 30 F.Supp. 823—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987—Murray Hill Restaurant v. Thirteen Twenty One Locust, C.C.A.Pa., 98 F.2d 578—American Mercury v. Kiely, C.C.A.N.Y., 19 F. 2d 295—Luckenbach S. S. Co. v. Norton, D.C.Pa., 21 F.Supp. 707—Blackmore v. Collins, D.C.Mich., 286 F. 629, affirmed, C.C.A., 290 F. 204.
Ala.—State v. Mobile & O. R. Co., 154 So. 91, 94, 228 Ala. 533, citing **Corpus Juris.**
La.—Minden Syrup Co. v. Applegate, App., 150 So. 421, 423, quoting **Corpus Juris.**
N.J.—Board of Health of Medford Tp. v. Jennings, 18 A.2d 62, 129 N.J.Eq. 51, affirmed Board of Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511—Stevens v. Busch Cleaners & Dyers Service, 171 A. 821, 116 N.J.Eq. 331—Earrusso v. Town of Montclair, 168 A. 398, 114 N.J.Eq. 12, modifying 164 A. 899, 112 N.J.Eq. 520—Kellett v. Local No. 274, United Ass'n of Journeymen Plumbers and Steamfitters of U. S. and Canada, 168 A. 265, 114 N.J.Eq. 107—Rissler v. Plumbers' Local No. 326 of United Ass'n of Journeymen Plumbers & Steamfitters of U. S. and Canada, 156 A. 498, 109 N.J.Eq. 91—Levison v. David, 151 A. 388, 106 N.J.Eq. 514—D'Elia v. Warren, 142 A. 553, 103 N.J.Eq. 190—Howard v. Jersey City, 140 A. 261, 102 N.J.Eq. 213—Feld v. Kantrowitz, 132 A. 657, 99 N.J.Eq. 847, affirming 130 A. 6, 98 N.J.Eq. 167—Schindler Advertising Co. v. Public Service Transp. Co., 127 A. 786, 97 N.J.Eq. 542.
N.Y.—J. Walter Thompson Co. v. Winchell, 278 N.Y.S. 781, 244 App. Div. 195—Mandel v. Brooklyn Nat. League Baseball Club, 37 N.Y.S. 2d 152, 179 Misc. 27—Lyon v. Holton, 4 N.Y.S.2d 538, 167 Misc. 585—Rabenold v. Associated Gas & Electric Co., 266 N.Y.S. 520, 148 Misc. 507—Suma v. Landriscina, 36 N.Y.S.2d 279.
N.C.—Castle v. Threadgill, 166 S.E. 313, 203 N.C. 441.
Pa.—Herr v. Rumisek, 153 A. 728, 303 Pa. 9.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.
32 C.J. p 52 note 99.

20. U.S.—Westmoreland Coal Co. v. Rothensies, D.C.Pa., 13 F.Supp. 321.

21. Idaho.—Price v. Grice, 79 P. 387, 10 Idaho 443.
32 C.J. p 52 note 1.

22. Ind.—Xenia Real Estate Co. v. Macy, 47 N.E. 147, 147 Ind. 568.
32 C.J. p 52 note 2.

23. U.S.—Gibbs v. Buck, Fla., 59 S. Ct. 725, 307 U.S. 66, 83 L.Ed. 1111.
Nev.—Caine v. Robbins, 131 P.2d 516, 61 Nev. 416.

24. La.—Minden Syrup Co. v. Applegate, App., 150 So. 421—Dastugue v. Cohen, 131 So. 746, 14 La.App. 475.
Mich.—Wagner Electric Corporation v. Hydraulic Brake Co., 257 N.W. 884, 269 Mich. 560.
Miss.—Hood v. Foster, 13 So.2d 652—Pitts v. Carothers, 120 So. 830, 832, 152 Miss. 694, citing **Corpus Juris.**
N.J.—Miller's, Inc., v. Journeymen Tailors Union Local No. 195, Ch., 15 A.2d 822, affirmed Miller's, Inc. v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, reversed on other grounds Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's, Inc., 61 S.Ct. 732, 312 U. S. 658, 85 L.Ed. 1106—Roseberg v. American Hotel & Garden Co., Ch., 121 A. 9, affirmed 123 A. 717, 95 N.J.Eq. 640—Sayre & Fisher Land Co. v. R. U. Rue Co., 128 A. 862, 2 N.J.Misc. 1081.
Ohio.—Hassinger v. Kramer, 162 N. E. 752, 28 Ohio App. 449.
Or.—Winslow v. Fleischner, 223 P. 922, 110 Or. 554.
Pa.—McDevitt v. Phillips, 45 Dauph. Co. 394.
32 C.J. p 53 note 3.

Beyond possibility of compensation
The term "irreparable injury," as used in the law of injunction, does not necessarily mean that the injury complained of is beyond the possibility of compensation in damages, or that the injury must be very

damages.[25] This inadequacy of damages as a compensation may be due to the nature of the injury itself or to the nature of the right or property injured,[26] and according to many decisions it may also be due to the insolvency or want of responsibility of the person committing the acts complained of,[27] although some courts have reached the opposite conclusion.[28] Of course if the injury is irreparable aside from the fact of defendant's insolvency, it is of no importance whether defendant is solvent or not.[29]

To render an injury irreparable, it is not necessary that the pecuniary damage be shown to be great;[30] but on the contrary, it has been said, the fact that in an action at law the jury could award nominal damages only often furnishes the very best reason for interference by a court of equity by injunction.[31] It has also been said that the injury is irreparable when the only remedy at law is by a large number of suits for damages which by reason of their number and cost will produce no substantial results,[32] or where one is deprived of some right to property which is essential to its full use.[33] Of course, where compensation in money would be adequate, the injury cannot be said to be irreparable,[34] and an injury which has a full, complete, and adequate remedy at law is not irreparable.[35]

(2) Destruction or Change of Property

Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury.

Acts which result in a serious change of, or are destructive to, the property affected either physically or in the character in which it has been held or enjoyed,[36] or acts committed without just cause or excuse that interfere with the carrying on of complainant's business, destroying his custom, his credit, or his profits, as considered infra § 138 et seq, do an irreparable injury and authorize the issuance of a preliminary injunction.

§ 24. Prevention of Multiplicity of Suits in General

a. In general

b. Numerous parties

great.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.

25. U.S.—Luckenbach S. S. Co. v. Norton, D.C.Pa., 21 F.Supp. 707.
La.—Minden Syrup Co. v. Applegate, App., 150 So. 421—Dastugue v. Cohen, 131 So. 746, 14 La.App. 475.
Miss.—Pitts v. Carothers, 120 So. 830, 832, 152 Miss. 694, citing **Corpus Juris.**
N.J.—Miller's Inc. v. Journeymen Tailors Union Local No. 195, Ch., 15 A.2d 822, affirmed Miller's Inc. v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, reversed on other grounds Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's Inc., 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106.
Or.—Crouch v. Central Labor Council of Portland and Vicinity, 293 P. 729, 134 Or. 612, 83 A.L.R. 193—Winslow v. Fleischner, 223 P. 922, 110 Or. 554.
32 C.J. p 53 note 4.

No narrow and artificial rules decide whether a wrong is irreparable.—Kirk v. Clark, 4 S.E.2d 13, 191 S. C. 205.

26. U.S.—Luckenbach S. S. Co. v. Norton, D.C.Pa., 21 F.Supp. 707.
Conn.—Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 24 A.2d 841, 128 Conn. 596.
N.J.—Miller's Inc. v. Journeymen Tailors Union Local No. 195, Ch., 15 A.2d 822, affirmed Miller's Inc. v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, reversed on other grounds Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's Inc., 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106.
Or.—Winslow v. Fleischner, 223 P. 922, 110 Or. 554.
32 C.J. p 53 note 5.

27. Ky.—Devou v. Pence, 106 S.W. 874, 875, 32 Ky.L. 697.
32 C.J. p 54 note 6.

28. U.S.—Luckenbach S. S. Co. v. Norton, D.C.Pa., 21 F.Supp. 707.
32 C.J. p 54 note 7.

29. Cal.—Harlow v. Feder, 264 P. 782, 89 Cal.App. 435.
Mont.—Wheeler v. McIntyre, 175 P. 892, 55 Mont. 295.

30. Ind.—Warehouse Distributing Corporation v. Dixon, 187 N.E. 217, 219, 97 Ind.App. 475, citing **Corpus Juris.**
Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.
Miss.—Pitt v. Carothers, 120 So. 830, 832, 152 Miss. 694, citing **Corpus Juris.**
32 C.J. p 54 note 9.

31. Ind.—Warehouse Distributing Corporation v. Dixon, 187 N.E. 217, 219, 97 Ind.App. 475, citing **Corpus Juris.**
Miss.—Pitt v. Carothers, 120 So. 830, 832, 152 Miss. 694, citing **Corpus Juris.**
32 C.J. p 54 note 10.

32. U.S.—Nashville, C. & St. L. R. Co. v. McConnell, C.C.Tenn., 82 F. 65.

33. Puerto Rico.—De Diego v. Rovire, 9 Puerto Rico Fed. 17.
32 C.J. p 54 note 12.

34. Cal.—Helms Bakeries v. State Board of Equalization, 128 P.2d 167, 171, 53 Cal.App.2d 417, citing **Corpus Juris.**
Ill.—Film Classics of Illinois v. Dever, 234 Ill.App. 614.
32 C.J. p 54 note 13.

35. Ky.—Wallace v. Jackson, 3 S.W. 2d 766, 224 Ky. 25.
Tenn.—Fort v. Dixie Oil Co., 95 S.W. 2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1260, 170 Tenn. 183, certiorari denied Dixie Oil Co. v. Fort, 57 S.Ct. 121, 299 U.S. 595, 81 L.Ed. 439; Fort v. Hammett Oil Co., 95 S.W.2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1264, 170 Tenn. 195; Fort v. Hudson, 95 S.W.2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1263, 170 Tenn. 192, certiorari denied Hudson v. Fort, 57 S.Ct. 121, 299 U.S. 595, 81 L.Ed. 439.

36. U.S.—Polk Co. v. Glover, 59 S. Ct. 15, 305 U.S. 5, 83 L.Ed. 6, reversing, D.C., 22 F.Supp. 575.
Miss.—Hood v. Foster, 13 So.2d 652.
N.J.—Roseberg v. American Hotel & Garden Co., Ch., 121 A. 9, affirmed 123 A. 717, 95 N.J.Eq. 640.
32 C.J. p 54 note 15.

Mere diminution in value of property without irreparable mischief will not furnish ground for injunction.—Hassinger v. Kramer, 162 N.E. 752, 28 Ohio App. 449.

a. In General

Courts of equity will freely grant injunctions to prevent a multiplicity of suits.

The prevention of a multiplicity of actions at law is one of the special grounds of equity jurisdiction, and for that purpose the remedy by injunction is freely used,[37] and that, too, although there may be a legal remedy,[38] and although the only injury resulting from the wrongful acts is pecuniary loss.[39] However, the court will consider the facts and circumstances of the particular case and will not overlook the "balance of convenience" rule,[40] and a theoretical inadequacy of the legal remedy may be outweighed by other considerations.[41] The saving of expense is not alone a sufficient ground for bringing a bill in equity.[42] Also, even though an injunction would prevent a multiplicity of actions at law, the interests of the public may be paramount to those of the complainant, and an injunction may be refused for that reason.[43] So an injunction will not be granted for the purpose of avoiding a multiplicity of suits where the party asking the injunction might have avoided the multiplicity of suits of which he complains by appropriate pleading when the case is brought.[44]

Multiplicity of actions between two parties. As a general rule, where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction.[45] The fact that an injured person has the right of successive actions for the continuance of the wrong does not make it an adequate remedy at law which bars the jurisdiction of a court of equity to grant an injunction to restrain the continuance of the injury.[46] On the other hand it has been held that an injunction will not be granted to relieve one person from the necessity of suing another for a succession of wrongful acts, where the remedy at law is adequate;[47] and it may be a prerequisite that the complainant first establish his right at law.[48]

b. Numerous Parties

In proper cases, equity will relieve a complainant of the burdensome necessity of bringing or defending a multiplicity of suits, by enjoining the performance of wrongful acts injurious to him.

Where the consummation of a wrongful act will injure complainant, and in order to obtain redress at law he would be required to bring many actions against many persons, he is entitled to an injunction to prevent the performance of the act,[49] where the rights of all depend on the same questions both of law and fact.[50]

Also where the consummation of a wrongful or illegal act will probably result in many disputed claims and many actions at law against complainant, his remedy at law is inadequate and he is entitled to the protection of equity by injunction.[51]

37. U.S.—Roof v. Conway, C.C.A. Ohio, 133 F.2d 819.
Fla.—Realty Bond & Share Co. v. Englar, 143 So. 152, 154, 104 Fla. 329, quoting **Corpus Juris.**
Ga.—Burns v. Hale, 133 S.E. 857, 162 Ga. 336.
Ill.—Ziebell v. Village of Posen, 257 Ill.App. 32.
Miss.—Rosenblatt v. Escher, 185 So. 551, 184 Miss. 274.
N.J.—State v. Newark Milk Co., 179 A. 116, 122, 118 N.J.Eq. 504, citing **Corpus Juris.**
N.C.—Johnson v. Jones, 119 S.E. 231, 186 N.C. 235.
Pa.—Miller v. Zinn, 53 York Leg. Rec. 189.
Wis.—Rust v. State Board of Dental Examiners of Wisconsin, 256 N. W. 919, 216 Wis. 127.
32 C.J. p 55 note 19.
Multiplicity of suits as a ground of jurisdiction for enjoining:
Action at law see infra § 38.
Boycott see infra § 139.
Criminal prosecution see infra § 157.
Trespass or other injury to property see infra § 62.

38. Miss.—Bishop v. Rosenbaum, 58 Miss. 84.
N.J.—State v. Newark Milk Co., 179 A. 116, 122, 118 N.J.Eq. 504, citing **Corpus Juris.**
S.C.—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.
32 C.J. p 55 note 20.

39. Ind.—Owen v. Phillips, 73 Ind. 284.

40. Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.

41. U.S.—Yellow Cab Transit Co. v. Overcash, C.C.A.Mo., 133 F.2d 228.

42. Conn.—Sheldon v. Centre School Dist., 25 Conn. 224.

43. Colo.—People v. Tenth Judicial Dist. Ct., 68 P. 242, 29 Colo. 182.

44. Tex.—Fulmore v. Benson, Civ. App., 245 S.W. 124.

45. Alaska.—Alaskan Airways v. Wien, 8 Alaska 179, 197, quoting **Corpus Juris.**
Ill.—First Trust & Savings Bank v. Economical Drug Co., 250 Ill.App. 112.
Ind.—Harris v. Krekler, 46 N.E.2d 267, 113 Ind.App. 190.
Tex.—Sinclair Refining Co. v. McElree, Civ.App., 52 S.W.2d 679, 681, quoting **Corpus Juris.**
Utah.—Ercanbrack v. Clark, 8 P.2d 1093, 79 Utah 233.
32 C.J. p 56 note 28.

46. N.Y.—Wheelock v. Noonan, 15 N.E. 67, 108 N.Y. 179, 2 Am.S.R. 405, affirmed 53 N.Y.Super. 286.

47. Wyo.—Alaska Development Co. v. Brannan, 275 P. 115, 40 Wyo. 106.
32 C.J. p 56 note 30.

48. Ill.—Cragg v. Levinson, 87 N. E. 121, 238 Ill. 69, 21 L.R.A.,N.S., 417, 15 Ann.Cas. 1229.
32 C.J. p 57 note 31.

49. N.Y.—Meyer v. Phillips, 97 N. Y. 485, 49 Am.R. 538.
32 C.J. p 55 note 25.

50. Me.—Farmington Village Corp. v. Sandy River Nat. Bank, 26 A. 965, 85 Me. 46.

51. Ga.—Shingler v. Shingler, 192 S. E. 824, 826, 184 Ga. 671, citing **Corpus Juris.**
32 C.J. p 55 note 27.
Independent causes for action
The mere fact that the numerous independent parties hold separate instruments on which they might bring separate suits is not sufficient to justify a court of equity in en-

§ 25. Existence, Adequacy, or Inadequacy of Other Remedies in General

a. In general
b. Exceptions to rule
c. Applications of rule
d. Remedy outside courts

a. In General

(1) General rule
(2) Sufficiency of legal remedy

(1) General Rule

As a general rule, an injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete.

Except where such rule may be changed by statute,[52] an injunction ordinarily will not be granted where the remedy at law for the injury complained of is full, adequate, and complete.[53] Conversely, a court of equity has jurisdiction to grant an injunc-

tertaining an action by a debtor to compel them to litigate their claims in an action in the forum he selects. —American Trading Company v. Monserrat, 18 Puerto Rico 268—32 C.J. p 55 note 27 [b].

52. U.S.—Brown v. Hecht Co., App. D.C., 137 F.2d 689, reversing, D.C., 49 F.Supp. 528, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, 320 U.S. 727, 88 L.Ed. —, reversed on other grounds Hecht Co. v. Bowles, 64 S.Ct. 587, 321 U.S. 321, 88 L.Ed. —— —Mills v. Board of Education of Anne Arundel County, D.C.Md., 30 F.Supp. 245.
Idaho.—Goble v. New World Life Ins. Co., 67 P.2d 280, 57 Idaho 516.
Md.—Universal Realty Corporation v. Felser, 22 A.2d 448, 179 Md. 635.
Tex.—West Texas Utilities Co. v. Farmers' State Bank in Merkel, Civ.App., 68 S.W.2d 648—Florence v. Fikes, Civ.App., 48 S.W.2d 1047 —Republic Ins. Co. v. O'Donnell Motor Co., Civ.App., 289 S.W. 1064.
32 C.J. p 57 notes 33, 34 [d] (1)-(4).

53. U.S.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954—Karr v. Baldwin, D.C.Tex., 57 F.2d 252—J. C. McFarland Co. v. O'Brien, D.C. Ohio, 6 F.2d 1016—Callison v. Welch, D.C.Tex., 42 F.Supp. 119—Kennedy v. Public Works Administration, D.C.N.Y., 23 F.Supp. 771—Texas Co. v. Grosjean, D.C.La., 16 F.Supp. 264—Stout v. Pratt, D.C. Mo., 12 F.Supp. 864, affirmed, C.C. A., Pratt v. Stout, 85 F.2d 172—Royal Farms Dairy v. Wallace, D. C.Md., 7 F.Supp. 560—Kreuts v. Elting, D.C.N.Y., 3 F.Supp. 364, affirmed, C.C.A., Kreuts v. Durning, 69 F.2d 802—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C.Or., 296 F. 928, affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468.
Ark.—Special School Dist. No. 50 v. Deason, 84 S.W.2d 1084, 188 Ark. 102.
Cal.—Teeter v. City of Los Angeles, 290 P. 11, 209 Cal. 685—Grettenberg v. Goggin, 298 P. 56, 113 Cal. App. 252.
D.C.—S. J. Groves & Sons Co. v. Warren, 135 F.2d 264, 77 App.D.C. 347, certiorari denied 63 S.Ct. 1327, 319 U.S. 766, 87 L.Ed. 1716—Utah Fuel Co. v. National Bituminous Coal Commission, 101 F.2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362, affirmed 59 S.Ct. 409, 306 U.S. 56, 83 L.Ed. 483—Black River Valley Broadcasts v. McNinch, 101 F. 2d 235, 69 App.D.C. 311, certiorari denied 59 S.Ct. 793, 307 U.S. 623, 83 L.Ed. 1501—Monocacy Broadcasting Co. v. Prall, 90 F.2d 421, 67 App.D.C. 176—Sykes v. Jenny Wren Co., 78 F.2d 729, 64 App.D.C. 379, 104 A.L.R. 864, certiorari denied Jenny Wren Co. v. Sykes, 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.
Fla.—Egan v. City of Miami, 178 So. 132, 130 Fla. 465—Price v. Gordon, 177 So. 276, 129 Fla. 715—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474—City of Jacksonville v. Giller, 135 So. 549, 102 Fla. 92—Williams v. Dormany, 126 So. 117, 99 Fla. 496.
Ga.—Lawrence v. Lawrence, 26 S.E. 2d 283, 196 Ga. 204—East v. Henry Darling, Inc., 136 S.E. 895, 163 Ga. 760.
Ill.—Lyle v. City of Chicago, 191 N. E. 255, 357 Ill. 41, 93 A.L.R. 1492.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339—Burton v. Sparks, 36 N.E.2d 962, 109 Ind.App. 531.
Kan.—Clark v. Vaughn, 292 P. 783, 131 Kan. 438.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194—Commercial Credit Co. v. Martin, 122 S.W.2d 135, 275 Ky. 548—Commonwealth ex rel. Grauman v. Continental Co., 121 S.W.2d 49, 275 Ky. 238—Robinson v. Town of Paintsville, 250 S. W. 972, 199 Ky. 247.
La.—Rapides Dairy Dealers' Co-op. Ass'n v. Mathews, App., 158 So. 247—Minden Syrup Co. v. Applegate, App., 150 So. 421.
Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254—Harlan v. Employers' Ass'n of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.
Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199.
Mich.—O'Melia v. Berghoff Brewing Corporation, 8 N.W.2d 141, 304 Mich. 471, 145 A.L.R. 679.
Mo.—Thompson v. City of Malden, App., 118 S.W.2d 1059—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 233 Mo.App. 26—Stevens v. Myers, App., 73 S.W.2d 334—Special Road Dist. No. 4 of Bolinger County v. Stepp, 4 S.W.2d 480, 222 Mo.App. 1216.
Mont.—State v. Zuck, 215 P. 806, 67 Mont. 324.
Neb.—Vance v. Henderson, 4 N.W.2d 833, 141 Neb. 758—Gering Irr. Dist. v. Mitchell Irr. Dist., 3 N.W.2d 566, 141 Neb. 344—Golden v. Bartholomew, 299 N.W. 356, 140 Neb. 65—Vance v. Sumner, 230 N.W. 490, 119 Neb. 630—Meyer v. City of Alma, 221 N.W. 438, 117 Neb. 511—Erickson v. Oakland First Nat. Bank, 62 N.W. 1078, 44 Neb. 622, 48 Am.S.R. 753, 28 L.R.A. 577.
N.J.—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506.
N.M.—Frank A. Hubbell Co. v. Gutierrez, 22 P.2d 225, 37 N.M. 309.
N.Y.—President Self Service v. Affiliated Restaurateurs, 21 N.E.2d 188, 280 N.Y. 354, reversing 9 N.Y.S.2d 585, 256 App.Div. 907, motion denied 21 N.E.2d 693, 280 N.Y. 806—Mandel v. Brooklyn Nat. League Baseball Club, 37 N.Y.S.2d 152, 179 Misc. 27—Coley v. Campbell, 215 N. Y.S. 679, 126 Misc. 869—Hearn v. Leary, 211 N.Y.S. 668, 125 Misc. 446, affirmed 212 N.Y.S. 828, 215 App.Div. 735—Birn v. Childs Co., 36 N.Y.S.2d 250—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S. 2d 50, affirmed 32 N.Y.S.2d 129, 263 App.Div. 802.
N.C.—Whitford v. North Carolina Joint Stock Land Bank of Durham, 176 S.E. 740, 207 N.C. 229.
N.D.—McIntyre v. State Board of Higher Education, 3 N.W.2d 463, 71 N.D. 630—Fish v. France, 2 N. W.2d 537, 71 N.D. 499.
Okl.—School Dist. No. 37, Washita County, v. Latimer, 126 P.2d 280, 190 Okl. 620—Ferk v. Hall, 249 P. 1106, 119 Okl. 251.
Pa.—Garvin v. Beaver Falls Borough, 10 Pa.Dist. & Co. 440—Har-

tion where an adequate and complete remedy cannot be had in the courts of law.[54] The ground of jurisdiction of a court of equity is its ability to afford more complete remedies than courts of law can afford—bound and tied down to remedies which they are not capable of moulding and adapting to the necessities of particular cases—thereby preventing irreparable injuries, preventing a multiplicity of suits, and avoiding vexatious litigation. As the court is not in the exercise of its ordinary jurisdiction, but is interfering to supply the deficiency of legal remedies, it interferes only where there is immediate pressing necessity for the prevention of injury, incapable of adequate compensation in damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented but by an injunction,[55] and equity does not assume the burden of preventing contemplated legal wrongs on the theory that subsequent remedies at law may prove inadequate or less satisfactory,[56] or that a court of law will decide the question presented incorrectly.[57]

(2) Sufficiency of Legal Remedy

(a) In general

(b) Insolvency of defendant

(a) In General

In order to warrant the denial of an injunction because of the existence of a remedy at law, such remedy must be plain, adequate, and complete, and it has been held that it must be as practical and efficient as is the equitable remedy.

All the courts agree as to the general rule, considered supra subdivision a (1) of this section, the problem in any individual case being whether the remedy at law is adequate,[58] to be determined under all the circumstances of the case and in view of the conduct of the parties.[59]

risburg Dairies v. Eisaman, 46 Dauph.Co. 204.

S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16—Atlantic Coast Line R. Co. v. Baker, 131 S. E. 678, 134 S.C. 106.

S.D.—Holdcroft v. Murphy, 283 N.W. 860, 66 S.D. 388.

Tenn.—Spencer v. O'Brien, 158 S.W. 2d 445, 25 Tenn.App. 429.

Tex.—Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 130 Tex. 386, affirming, Civ.App., 105 S.W. 2d 476—Powers v. Temple Trust Co., 78 S.W.2d 951, 124 Tex. 440, affirming Temple Trust Co. v. Powers, Civ.App., 50 S.W.2d 362, followed in Roberts v. Temple Trust Co., 50 S.W.2d 363, and Temple Trust Co. v. Sewell, 50 S.W.2d 364—Herring v. Houston Nat. Exch. Bank, 255 S.W. 1097, 113 Tex. 337—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Com.App., 53 S.W.2d 1001, reversing, Civ.App., 37 S.W.2d 299—Servtex Materials Co. v. Kelly, Civ. App., 171 S.W.2d 181, 184, citing **Corpus Juris**—Youngblood v. Youngblood, Civ.App., 163 S.W.2d 731—Humble Oil & Refining Co. v. Luckel, Civ.App., 154 S.W.2d 155, error refused—Texas Natural Gas Utilities v. City of El Campo, Civ. App., 135 S.W.2d 133, certiorari denied Texas Natural Gas Utilities v. City of El Campo, Tex., 60 S. Ct. 977, 310 U.S. 629, 84 L.Ed. 1400—Frels v. Consolidated Theatres, Civ.App., 134 S.W.2d 369, error dismissed, judgment correct—Texas Unemployment Compensation Commission v. Campbell, Wise & Wright, Civ.App., 119 S.W.2d 388, error dismissed—Antner v. State, Civ.App., 114 S.W.2d 640—Johnson v. Cameron, Civ.App., 110 S. W.2d 604—Culpepper v. West, Civ.App., 110 S.W.2d 231, cause dismissed West v. Culpepper, 140 S.W.2d 166, 135 Tex. 156—Vireca Corporation v. Cole, Civ.App., 93 S.W.2d 567—Berwald's, Inc. v. Brown, Civ.App., 69 S.W.2d 221—West Texas Utilities Co. v. Farmers' State Bank in Merkel, Civ. App., 68 S.W.2d 648, 651, citing **Corpus Juris**—Harris v. Siegel, Civ.App., 68 S.W.2d 330—Donna Independent School Dist. v. Sanders, Civ.App., 57 S.W.2d 857—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73—Smiley v. City of Graham, Civ.App., 37 S.W.2d 289, error dismissed—Jowell v. Carnine, Civ.App., 20 S.W.2d 1087, error refused—Malone v. U. S. Fidelity & Guaranty Co., Civ.App., 9 S.W.2d 461—Jeffers v. Rondeau, Civ.App., 1 S.W.2d 380—Garner v. Chicago, R. I. & G. Ry. Co., Civ.App., 297 S. W. 1067—Hudgens v. Yancey, Civ. App., 284 S.W. 347—Blair v. Paggi, Civ.App., 282 S.W. 627—Jones v. Whitehead, Civ.App., 278 S.W. 305.

Wash.—Constantino v. Moreschi, 115 P.2d 955, 5 Wash.2d 638.

Wyo.—Miller v. Hagie, 140 P.2d 746.

32 C.J. p 57 note 34.

Adequacy or inadequacy of remedy at law as affecting right to injunction:

To enjoin:

Action or other legal proceeding see infra § 37.

Breach of contract see infra § 80.

Criminal acts or omissions see infra § 150 et seq.

Inducing of breach of contract see infra § 89.

Municipalities and municipal officers see infra §§ 111, 118, 119.

Payment or other disposition of public funds see infra § 122.

Public officers or boards see infra §§ 108–122.

To prevent:

Boycott see infra § 139.

Trespass or other injury to property see infra §§ 60, 61, 64.

To protect:

Property rights in general see infra § 52.

Rights of public see infra § 123.

"It [injunction] cannot take the place of the law or be made a substitute for it, but must be used in upholding and aiding in the due execution of the law."—Hinds v. Minus, Tex.Civ.App., 64 S.W.2d 1093, 1095.

A fundamental basis of any right to injunctive relief is that the party seeking it is without adequate remedy at law.—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382.

54. Tex.—Labor Bank & Trust Co. v. Dow, Civ.App., 26 S.W.2d 925.
32 C.J. p 59 note 35.

Subsequent legal remedy

Equitable jurisdiction is not lost because a legal remedy subsequently may become available.—Pacific Telephone & Telegraph Co. v. City of Seattle, D.C.Wash., 14 F.2d 877.

55. Ala.—Ogletree v. McQuaggs, 67 Ala. 580, 42 Am.R. 112.

56. U.S.—Vassar College v. Loose-Wiles Biscuit Co., D.C.Mo., 197 F. 982.

57. Ariz.—Bisbe v. Arizona Ins. Agency, 127 P. 722, 14 Ariz. 313.

58. U.S.—Watson v. Sutherland, Md., 5 Wall. 74, 18 L.Ed. 580.
32 C.J. p 59 note 38.

59. Ind.—Drew v. Geneva, 50 N.E. 871, 150 Ind. 662, 42 L.R.A. 814—Fisher v. Carey, 119 N.E. 376, 67 Ind.App. 438.

Plain, adequate, and complete. The remedy at law must be plain, for if it be doubtful and obscure equity will not refuse to assume jurisdiction.[60] Also, the remedy at law must be adequate, that is, fully sufficient,[61] for if it falls short of what a party is entitled to, that founds a jurisdiction in equity.[62] So, too, the remedy at law must be complete,[63] that is, it must contain the full end and justice of the case, reach the whole mischief, and secure the whole right of the party in a perfect manner at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require.[64]

Practical, efficient and prompt. The mere existence of some remedy at law does not necessarily defeat the equitable jurisdiction;[65] the legal remedy must be as practical and efficient as is the equitable remedy in rendering justice and as prompt in its administration.[66] An injunction is in many cases more prompt and efficient than any legal remedy,

Rules for determination

(1) There is no rule, except the rule of reason, which can be applied to determine when an action at law is or is not an adequate remedy.—Spaulding v. Mayo, 122 A. 899, 81 N. H. 85.

(2) Whether there is an adequate remedy at law for a wrong is a question that is not decided by narrow and artificial rules.—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

Discretion

The granting of an injunction as against objection that legal remedy is adequate is a matter of discretion.—U. S. v. City of Hoboken, N. J., D.C.N.J., 29 F.2d 932.

60. Tex.—Brazos River Conservation & Reclamation Dist. v. Allen, 171 S.W.2d 842, affirming Allen v. Brazos River Conservation & Reclamation Dist., Civ.App., 166 S.W. 2d 386—Texas Unemployment Compensation Commission v. Campbell, Wise & Wright, Civ.App., 119 S.W. 2d 388, error dismissed—Frisby v. Rockins, Civ.App., 105 S.W.2d 362, error dismissed—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070—City Nat. Bank of Dallas v. Folsom, Civ.App., 247 S.W. 591.
32 C.J. p 59 note 41.

61. Fla.—Morgan v. City of Lakeland, 107 So. 269, 90 Fla. 525.
La.—Wachsen v. Commission Council of Lake Charles, 111 So. 177, 162 La. 823.
Tex.—Brazos River Conservation & Reclamation Dist. v. Allen, 171 S. W.2d 842, affirming Allen v. Brazos River Conservation & Reclamation Dist., Civ.App., 166 S.W.2d 386—Pacific Mid-Continent Corporation v. Tunstill, Civ.App., 159 S. W.2d 903—Frisby v. Rockins, Civ. App., 105 S.W.2d 362, error dismissed.
Wis.—Trustees of German Evangelical Congregation of New Elm v. Hoessli, 13 Wis. 388.
32 C.J. p 60 note 42.

Adequacy must be clear

To prevent the issuance of an injunction on the ground of adequate legal remedy, the adequacy of a remedy at law must be clear.—Wilson v. Illinois Southern Ry. Co., Ill., 44 S.Ct. 203, 263 U.S. 574, 68 L.Ed. 456.

62. N.H.—Winnipissiogee Lake Co. v. Worster, 29 N.H. 433.
32 C.J. p 60 note 43.

63. Ill.—Peoples Gas Light & Coke Co. v. Slattery, 25 N.E.2d 482, 373 Ill. 31, appeal dismissed Peoples Gas Light & Coke Co. v. Hart, 60 S. Ct. 724, 309 U.S. 634, 84 L.Ed. 991.
Okl.—Ferk v. Hall, 249 P. 1106, 119 Okl. 251.
Tex.—Brazos River Conservation & Reclamation Dist. v. Allen, 171 S. W.2d 842, affirming Allen v. Brazos River Conservation & Reclamation Dist., Civ.App., 166 S.W.2d 386—Pacific Mid-Continent Corporation v. Tunstill, Civ.App., 159 S.W.2d 903—Texas Unemployment Compensation Commission v. Campbell, Wise & Wright, Civ.App., 119 S.W.2d 388, error dismissed—Berwald's, Inc. v. Brown, Civ.App., 69 S.W.2d 221—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070.
32 C.J. p 60 note 45.

64. Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 191 Miss. 192.
32 C.J. p 60 note 45.

Relief as full and complete as injunction

Adequate legal remedy means a remedy which will afford relief as full and complete as injunction would afford.—Youngblood v. Youngblood, Tex.Civ.App., 163 S.W.2d 731.

Complete relief doubtful

Where complete relief is doubtful, and a more ample and appropriate remedy may be thereby afforded, equity will take cognizance and give relief, if it can be done in accordance with recognized principles of chancery jurisdiction.—Price v. Gordon, 177 So. 276, 129 Fla. 715—Morgan v. City of Lakeland, 107 So. 269, 90 Fla. 525.

Full compensation

The nonexistence of an adequate legal remedy by which the complainant may be fully compensated in damages is not only the foundation, but also an indispensable prerequisite for the exercise by equity of its power to grant injunctive relief.—Burton v. Sparks, 36 N.E.2d 962, 109 Ind.App. 531.

65. Tex.—Frisby v. Rockins, Civ. App., 105 S.W.2d 362, error dismissed.
32 C.J. p 60 note 47.

66. U.S.—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C.Oregon, 296 F. 928, affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Miss.—Rockett v. Finley, 184 So. 78, 183 Miss. 308—Pitts v. Carothers, 120 So. 830, 152 Miss. 694.
Neb.—Golden v. Bartholomew, 299 N.W. 356, 140 Neb. 65.
Ohio.—Sedaris v. Riley, 27 Ohio N.P., N.S., 215.
Pa.—Walsh v. Wissahickon Golf & Country Club, 58 Montg.Co. 327.
Tex.—Brazos River Conservation & Reclamation Dist. v. Allen, 171 S. W.2d 842, affirming Allen v. Brazos River Conservation & Reclamation Dist., Civ.App., 166 S.W.2d 386—Humble Oil & Refining Co. v. Luckel, Civ.App., 154 S.W.2d 155, error refused—Texas Unemployment Compensation Commission v. Campbell, Wise & Wright, Civ.App., 119 S.W.2d 388, error dismissed—Frisby v. Rockins, Civ.App., 105 S.W.2d 362, error dismissed—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190—Garner v. Chicago, R. I. & G. Ry. Co., Civ. App., 297 S.W. 1067—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070—City Nat. Bank of Dallas v. Folsom, Civ.App., 247 S.W. 591.
Vt.—Town of West Rutland v. Rutland Ry. Light & Power Co., 127 A. 883, 98 Vt. 379.
32 C.J. p 60 note 47.

"If the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability * * * equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power."—Kirk v. Clark, 4 S.E.2d 13, 16, 191 S.C. 205.

and because of this promptness and efficiency there is a strong tendency to grant injunctions in cases where formerly the remedy at law would have been deemed fully adequate.[67]

Negligence of party asking injunction. The remedy at law is not regarded as inadequate, where the injustice is likely to occur because of the party's own negligence, and in such case an injunction will not be granted.[68]

(b) Insolvency of Defendant

While it has been held that insolvency alone is never a ground for equitable interference by injunction, there is also authority to the effect that an injunction may be granted on the ground that defendant is insolvent, where except for such insolvency, an action for damages would be an adequate remedy.

The solvency or insolvency of defendant is not important where the injunction is sought on the ground of the impossibility of measuring the injury in terms of money; there the remedy at law is inadequate, however responsible defendant may be.[69] Nevertheless, under certain circumstances in considering what is an adequate remedy at law the court may take into consideration the pecuniary responsibility of defendant.[70] Insolvency of defendant is frequently an added ground for an injunction where complainant is really entitled on other grounds to the relief asked.[71]

While there is authority that insolvency alone is never a ground for equitable interference by injunction,[72] especially in cases where there are positive reasons why equity should not take jurisdiction and in cases over which the equitable jurisdiction has never been extended,[73] there is also authority to the effect that an injunction may be granted on the ground that defendant is insolvent where except for such insolvency, an action for damages would be an adequate remedy.[74] Thus an insolvent defendant has been enjoined from making a wrongful transfer of property,[75] from wrongfully paying out money that belongs to complainant, as considered infra § 76, or from doing other wrongful acts to the injury of complainant.[76] Also, suits for the purchase money of property have often been restrained where defendant therein has a set-off that he could make use of only in a separate action, and that action would afford him an inadequate remedy because the other party is insolvent,[77] and the payment of money by third persons to one who is insolvent may be restrained at the suit of those entitled to the money.[78]

Obviously, however, where damages would fully compensate for the injury and defendant is solvent and able to respond, no injunction should issue.[79]

b. Exceptions to Rule

Although there may be an adequate remedy at law, it is no objection to the granting of an injunction where complainant, for reasons beyond his control, cannot avail himself of it, or where equity has jurisdiction for some other purpose.

The existence of a remedy at law which would ordinarily be available is no objection to the granting of an injunction when, for reasons beyond his control, complainant cannot avail himself of it;[80]

Remedy entailing prosecution
A remedy, the invocation of which entails as a consequence prosecution of persons pursuing it, is no "remedy" such as to preclude granting injunction.—Birch v. McColgan, D.C. Cal., 39 F.Supp. 358.

67. Or.—Stotts v. Dichdel, 139 P. 932, 70 Or. 86.
32 C.J. p 61 note 48.
"The courts favor relief which prevents a wrong in preference to that which may afford redress."—Belmont Quadrangle Drilling Corporation v. Galek, 244 N.Y.S. 231, 237, 137 Misc. 637.

68. Tex.—Turner v. Patterson, 118 S.W. 565, 54 Tex.Civ.App. 581.
32 C.J. p 64 note 88.
Conduct of complainant generally see infra § 26.

69. Ky.—Friedberg v. McClary, 191 S.W. 300, 173 Ky. 579, L.R.A.1917C 777.
32 C.J. p 63 note 74.
Insolvency as affecting:
Question whether injury irreparable see supra § 23.
Right to enjoin:
Collection of purchase money see infra § 40.
Continuing trespass see infra § 63.

70. N.J.—Feigenspan v. Nizolek, 65 A. 703, 71 N.J.Eq. 50, affirmed 68 A. 1116, 72 N.J.Eq. 949—Shreve v. Black, 4 N.J.Eq. 117.

71. Mass.—Boston & M. R. Co. v. Sullivan, 58 N.E. 689, 177 Mass. 230, 83 Am.S.R. 275.
32 C.J. p 63 note 76.

72. Fla.—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474.
Pa.—Benfer v. Benfer, 10 Pa.Dist. & Co. 627—Walsh v. Wissahickon Golf & Country Club, 58 Montg. Co. 337.
32 C.J. p 64 note 77.

Damages at law fully compensating
In cases where damages at law are capable of fully compensating for the injury, the remedy at law is not to be deemed inadequate merely because defendant appears to be insolvent.—Bersch v. Rust, 95 A. 108, 249 Pa. 512—32 C.J. p 64 note 78.

73. Ala.—Brown v. Birmingham, 37 So. 173, 140 Ala. 590.
32 C.J. p 64 note 86.

74. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Tex.—Henderson v. Parish, Civ.App., 265 S.W. 226.
32 C.J. p 64 note 79.

75. N.C.—Phillips v. Tresevant, 67 N.C. 370.
32 C.J. p 64 note 80.

76. N.H.—Amoskeag Mfg. Co. v. Shirley, 39 A. 976, 69 N.H. 269.
32 C.J. p 64 note 82.

77. Ga.—Carswell v. Macon Mfg. Co., 38 Ga. 403.
32 C.J. p 64 note 83.

78. Tenn.—Chattanooga Grocery Co. v. Livingston, Ch.A., 59 S.W. 470.

79. Neb.—Brown v. Reed, 100 N.W. 143, 72 Neb. 167.
32 C.J. p 64 note 85.

80. Conn.—Winestine v. Rose Cloak & Suit Co., 107 A. 500, 93 Conn. 683.
32 C.J. p 63 note 65.

and the same has been held to be true where the remedy must be sought in a foreign court.[81] Also, the general rule does not apply where both parties represent the public, so that the loss must fall on the public whichever party succeeds.[82]

Where defendants come to a hearing on the merits, it is too late for them to say that plaintiffs have an adequate remedy at law where no such objection to the jurisdiction of the court was raised in the answer.[83]

Injunction incidental to other relief. There is authority that an injunction may be granted as incidental to relief asked in a case where equity has jurisdiction for some other purpose, even though the law might afford a sufficient remedy for the specific injury sought to be prevented by the injunction.[84] Equity having jurisdiction for one purpose may dispose of the entire matter in its own way.[85] The right to the injunction stands or falls with the right to the principal relief asked to which the injunction is incidental.[86]

c. Applications of Rule

(1) In general
(2) Statutory remedy
(3) Damages as remedy
(4) Mandamus as remedy

(1) In General

The general rule that an injunction will not be granted where there is an adequate remedy at law has been applied where complainants had various particular remedies at law, such as ejectment, replevin, etc.

The general rule that an injunction will not be granted where there is an adequate remedy at law has been applied where there was an adequate remedy by ejectment,[87] replevin,[88] trespass,[89] forcible entry and detainer,[90] a proceeding to establish boundaries,[91] or an action for damages, as considered infra subdivision c (3) of this section.

Complainant is not entitled to an injunction where there is an action already pending in which he may obtain relief.[92] Thus, a party to a pending suit is not entitled to relief by injunction with reference to any matter affected by that suit, when he might obtain adequate relief by a motion in that suit itself.[93] Also, an injunction will not be granted when relief may be obtained by appeal or certiorari, as considered infra § 40, by a writ of prohibition,[94] by attachment,[95] by habeas corpus,[96] by quo warranto,[97] or by mandamus, as considered infra subdivision c (4) of this section. So an injunction will not be granted where the acts or proceedings on which a claim may be asserted are void on their face, such fact constituting a good defense to any future proceeding at law.[98]

81. Conn.—Stanton v. Embry, 46 Conn. 595.
32 C.J. p 63 note 66.

82. N.Y.—Hoffman v. Schultz, 31 How.Pr. 385.
32 C.J. p 63 note 68.

83. N.J.—Morris Canal & Banking Co. v. Jersey City, 12 N.J.Eq. 252, reversed on other grounds 12 N.J. Eq. 547—Holmes v. Jersey City, 12 N.J.Eq. 299.

84. Ala.—Lee v. City of Birmingham, 135 So. 314, 315, 223 Ala. 196, citing **Corpus Juris.**
S.C.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 516, 187 S.C. 89, quoting **Corpus Juris.**
Tex.—Fuller v. Wright, Civ.App., 82 S.W.2d 179, 180, citing **Corpus Juris.**
32 C.J. p 63 note 70.

85. S.C.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 516, 187 S.C. 89, quoting **Corpus Juris.**
Tex.—Fuller v. Wright, Civ.App., 82 S.W.2d 179, 180, citing **Corpus Juris.**
32 C.J. p 63 note 70.

86. Fla.—Kahn v. Kahn, 15 Fla. 400.
S.C.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 516, 187 S.C. 89, quoting **Corpus Juris.**

87. Colo.—Building Laborers' International Protective Union of America No. 1 of Denver v. International Hod Carriers' Building and Common Laborers' Union, No. 720, 277 P. 781, 85 Colo. 585.
Neb.—Mohat v. Hutt, 106 N.W. 659, 75 Neb. 732.
32 C.J. p 61 note 49.

88. Colo.—Building Laborers' International Protective Union of America, No. 1, of Denver v. International Hod Carriers' Building and Common Laborers' Union, No. 720, 277 P. 781, 85 Colo. 585.
Mo.—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 555, 233 Mo.App. 26, citing **Corpus Juris.**
Pa.—Benfer v. Benfer, 10 Pa.Dist. & Co. 627.
32 C.J. p 61 note 50.

89. Pa.—Benfer v. Benfer, supra.
32 C.J. p 61 note 51.
Trespass to try title
Tex.—Dilworth v. Buchanan, Civ. App., 275 S.W. 177.

90. Cal.—Tomlinson v. Rubio, 16 Cal. 202.
Mo.—Walker v. Norris, App., 145 S. W.2d 972.
Neb.—Mohat v. Hutt, 106 N.W. 659, 75 Neb. 732.
Tex.—Dilworth v. Buchanan, Civ. App., 275 S.W. 177.

91. Or.—Hume v. Burns, 90 P. 1009, 50 Or. 124, rehearing denied 96 P. 865, 51 Or. 237, 31 L.R.A.,N.S., 396, 131 Am.S.R. 732.

92. Cal.—Grettenberg v. Goggin, 298 P. 56, 113 Cal.App. 252.
Mo.—Stevens v. Myers, App., 73 S. W.2d 334, 336, citing **Corpus Juris.**
32 C.J. p 61 note 55.

93. N.Y.—Wood v. Swift, 81 N.Y. 31.
32 C.J. p 63 note 64.

94. Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 643, 141 Neb. 270, quoting **Corpus Juris.**
Tex.—White v. State, Civ.App., 122 S.W.2d 714.
32 C.J. p 66 note 95.

95. Ga.—Lawrence v. Lawrence, 26 S.E.2d 283, 196 Ga. 204.

96. Ga.—Sharp v. McClung, 101 S.E. 119, 149 Ga. 503.
32 C.J. p 66 note 96.

97. Mich.—Gildemeister v. Lindsay, 180 N.W. 633, 212 Mich. 299.
32 C.J. p 66 note 97.

98. Ind.—Jeffersonville School Tp. v. Jeffersonville School City, 108 N.E. 966, 59 Ind.App. 83.
32 C.J. p 61 note 56.

(2) Statutory Remedy

As a general rule, where a statutory remedy has been provided for any particular wrong or injury, no relief in equity can be afforded by injunction. However, if such remedy obviously is not adequate, a bill for injunction may lie.

Where a remedy for any particular wrong or injury has been provided by statute, the general rule is that no relief in equity can be afforded in such case by injunction.[99] Constitutional objections being eliminated, a court of chancery will not intervene merely to better such remedy as the legislature has deemed sufficient,[1] and it has been said that the general rule is applicable although the provisions of the statute may conflict with the notions of natural justice entertained by a court of chancery.[2] However, if the statutory remedy obviously is not adequate a bill for injunction may lie.[3] Of course, the rule has no application unless the acts complained of are within the purview of the statute providing the remedy.[4]

(3) Damages as Remedy

Where damages will constitute an adequate compensation for the injury threatened or inflicted, equity will not interfere by injunction.

As the principal remedy afforded by courts of law for an injury is money damages, if such damages will constitute an adequate compensation for the injury threatened or inflicted, equity will not interfere by injunction.[5] In such case plaintiff must resort to an action at law for the damages sustained,[6] and especially is this doctrine applicable where the granting of an injunction would inconvenience the public.[7]

However, the mere fact that damages are recoverable at law is no objection to the granting of an injunction in case such damages would not be an adequate compensation for the injury.[8] An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be accurately computed,[9] or where the amount

99. U.S.—Morrison v. Work, 45 S. Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 290 F. 306, 53 App.D.C. 331—Bowe v. Judson C. Burns, Inc., C.C.A.Pa., 137 F. 2d 37, affirming, D.C., 46 F.Supp. 745.
Cal.—Teeter v. City of Los Angeles, 290 P. 11, 209 Cal. 685.
Kan.—City of Independence v. Hindenach, 61 P.2d 124, 128, 144 Kan. 414, quoting **Corpus Juris.**
Mass.—Mullholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.
Mo.—Stevens v. Myers, App., 73 S.W. 2d 334, 336, citing **Corpus Juris.**
N.J.—Benton & Holden v. Central R. Co. of New Jersey, 194 A. 805, 808, 122 N.J.Eq. 309, citing **Corpus Juris,** and affirmed Benton & Holden v. Central R. of New Jersey, 196 A. 352, 123 N.J.Eq. 163.
Ohio.—Sullivan v. Riegel, 25 Ohio N. P.,N.S., 118.
Pa.—Cohen v. Schofield, 149 A. 710, 712, 299 Pa. 496, citing **Corpus Juris**—Philadelphia & Easton Transit Co. v. Philadelphia Suburban Gas & Electric Co., 7 Pa.Dist. & Co. 327.
Tex.—Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees of America, Division 1142 v. McDowell, Civ.App., 150 S. W.2d 866—Antner v. State, Civ. App., 114 S.W.2d 640.
Wis.—Ritholz v. Ammon, 4 N.W.2d 173, 240 Wis. 578.
32 C.J. p 65 note 89.

1. Kan.—City of Independence v. Hindenach, 61 P.2d 124, 128, 144 Kan. 414, quoting **Corpus Juris.**
32 C.J. p 65 note 90.

2. Kan.—City of Independence v. Hindenach, supra, quoting **Corpus Juris.**
Md.—Glenn v. Fowler, 8 Gill & J. 340.

3. U.S.—Yazoo & M. V. R. Co. v. Grosjean, D.C.La., 16 F.Supp. 276.
Ill.—First Trust & Savings Bank v. Economical Drug Co., 250 Ill.App. 112.
Kan.—City of Independence v. Hindenach, 61 P.2d 124, 128, 144 Kan. 414, quoting **Corpus Juris.**
32 C.J. p 65 note 92.

4. N.Y.—People v. Vanderbilt, 38 Barb. 282, 24 How.Pr. 301, affirmed 26 N.Y. 287, 25 How.Pr. 139, 28 N. Y. 396, 84 Am.D. 351.
32 C.J. p 66 note 93.

5. U.S.—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F.Supp. 876.
Cal.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal.App. 2d 726.
Iowa.—Browneller v. Natural Gas Pipeline Co. of America, 8 N.W.2d 474, 215 Cal. 37.
Md.—Universal Realty Corporation v. Felser, 22 A.2d 448, 179 Md. 635.
N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N. Y.S.2d 129, 263 App.Div. 802.
Pa.—Ferri v. Mulhern, 36 Luz.Leg. Reg. 213—Norris v. Holzinger, 32 Luz.Leg.Reg. 84—Walsh v. Wissahickon Golf & Country Club, 58 Montg.Co. 337.
Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct—Johnson v. Cameron, Civ.App., 110 S.W.2d 604—Harris v. Siegel, Civ.App., 68 S.W.2d 330, 331, quoting **Corpus Juris**—Dilworth v. Buchanan, Civ.App., 275 S. W. 177.
32 C.J. p 61 note 58.

6. Ky.—Campbell v. Irvine Toll Bridge Co., 190 S.W. 1098, 173 Ky. 313.
Tex.—Harris v. Siegel, Civ.App., 68 S.W.2d 330, 331, quoting **Corpus Juris.**

7. Md.—Baltimore v. Baltimore County, 115 A. 43, 139 Md. 210.

8. Mo.—Thompson v. City of Malden, App., 118 S.W.2d 1059—Keener v. Sharp, App., 95 S.W.2d 648, transferred, see 111 S.W.2d 118, 341 Mo. 1192—Summit City Creamery Co. v. Leach, App., 41 S.W.2d 191.
N.J.—Walter v. Danisch, 29 A.2d 897, 133 N.J.Eq. 127.
32 C.J. p 62 note 61.

Absence of, or trivial, monetary damage

The absence of monetary damage accompanying the invasion or threatened invasion of a right, or the fact that the monetary damage is trivial, evidences the inadequacy of a remedy at law, and is not a reason for denying injunctive relief but rather supports an application for such relief.—Miles Laboratories v. Seignious, D.C.S.C., 30 F.Supp. 549.

9. U.S.—Rieder v. Rogan, D.C.Cal., 12 F.Supp. 307, 318, citing **Corpus Juris.**
32 C.J. p 62 note 62.

Difficulty in estimating damages in action at law may justify the exercise by a court of equity of its injunctive power to restrain wrongdo-

cannot be adequately proved.[10]

(4) Mandamus as Remedy

As a general rule, a mandatory injunction will not be granted where mandamus furnishes an adequate remedy.

While there is some authority to the contrary,[11] the well settled rule is that a mandatory injunction will not be granted where mandamus furnishes an adequate remedy.[12] Such is the case where the object of the bill is to compel the performance of some official ministerial act as required by law,[13] or to test the validity of a legislative apportionment,[14] or to compel a public service corporation to perform a quasi-public duty;[15] and mandamus is the proper and adequate remedy to compel a municipal corporation to apply its funds in payment of a judgment, as considered infra § 122.

Nevertheless an injunction may issue where mandamus would not be sufficiently prompt to afford relief,[16] or for any other reason would not be adequate;[17] and where the relief asked is prohibitory in its nature injunction and not mandamus is the proper remedy.[18]

d. Remedy outside Courts

Where complainant has an adequate means of redress in his own hands, or before a public or private quasi judicial tribunal, he ordinarily is not entitled to an injunction.

Where complainant has an adequate means of redress in his own hands;[19] or before a public[20] or private[21] quasi-judicial tribunal, he ordinarily is not entitled to an injunction.

However, it has been held no objection to an injunction that complainant may have the right to redress his own grievance by force. Although he may be allowed to take the law into his own hands in some cases, the law will in no case compel him so to do.[22]

§ 26. Conduct and Motive of Complainant

a. In general
b. Estoppel, waiver, and election

a. In General

The complainant must show that he is entitled in good conscience to the injunction which he seeks. Where the right to injunction is shown, the motive actuating him usually is held to be immaterial.

It is the duty of the court to take into consideration the conduct and situation of the parties in determining whether or not the relief asked by way of injunction should be given.[23] Plaintiff must

ing.—Roof v. Conway, C.C.A.Ohio, 133 F.2d 819.

The mere uncertainty of fixing the measure of damage to an injured party may itself be sufficient to justify injunctive process.—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

10. U.S.—Rieder v. Rogan, D.C.Cal., 12 F.Supp. 307, 318, citing **Corpus Juris.**
32 C.J. p 68 note 63.
"Inadequacy of legal remedy may arise from inability to prove the extent of injury with the certainty required for a recovery of damages at law."—Shelton v. Shelton, 192 So. 55, 58, 238 Ala. 489.

11. Kan.—Bissey v. Marion, 178 P. 611, 104 Kan. 311.

12. Ill.—Lyle v. City of Chicago, 191 N.E. 255, 357 Ill. 41, 93 A.L.R. 1492—Fox Film Corporation v. Collins, 236 Ill.App. 281—Film Classics of Illinois v. Dever, 234 Ill.App. 614.
Mass.—Mullholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.
Pa.—Pennsylvania Chiropractor's Ass'n v. State Board of Medical Education, 41 Pa.Dist. & Co. 519, 50 Dauph.Co. 324.
Tex.—Wertheimer v. Walker, Civ. App., 96 S.W.2d 831—Hinds v. Minus, Civ.App., 64 S.W.2d 1092.
32 C.J. p 66 note 99.

13. Tex.—Wertheimer v. Walker, Civ.App., 96 S.W.2d 831.
32 C.J. p 66 note 1.

14. N.Y.—In re Reynolds, 96 N.E. 87, 202 N.Y. 430, affirming 129 N.Y.S. 629, 144 App.Div. 458.
32 C.J. p 66 note 2.

15. Mass.—Cox v. Malden & Melrose Gas Light Co., 85 N.E. 180, 199 Mass. 324, 127 Am.S.R. 503, 17 L.R.A.,N.S., 1235.
32 C.J. p 66 note 3.

16. Ky.—City of Catlettsburg v. Davis' Adm'r, 91 S.W.2d 56, 262 Ky. 726.
Tex.—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190.
32 C.J. p 66 note 5.

17. U.S.—Vaughn v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughn, 11 F.Supp. 954.
Ill.—Brandl v. Village of Winnetka, 4 N.E.2d 800, 287 Ill.App. 622.
32 C.J. p 66 note 6.

18. Mont.—State v. Moran, 63 P. 390, 24 Mont. 433.
32 C.J. p 66 note 7.

19. U.S.—Holthusen v. Edward G. Budd Mfg. Co., D.C.Pa., 50 F.Supp. 621.
32 C.J. p 67 note 8.

20. U.S.—Moreschi v. Mosteller, D.C.Pa., 28 F.Supp. 613.
Mo.—Chicago, R. I. & P. Ry. Co. v. State Highway Commission of Missouri, 17 S.W.2d 535, 322 Mo. 419.
N.Y.—Domanick v. Triboro Coach Corporation, 20 N.Y.S.2d 306, 259 App.Div. 657, reversing 18 N.Y.S.2d 960, 173 Misc. 911—People v. Horton, 5 Hun 516, affirmed 64 N.Y. 610.

21. Ind.—Long v. Van Osdale, 29 N.E.2d 953, 218 Ind. 483.
Pa.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314.
32 C.J. p 67 note 9.

22. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.
Conn.—Stamford v. Stamford Horse R. Co., 15 A. 749, 56 Conn. 81, 1 L.R.A. 375.
Effect of rule on suit for injunction against nuisance see the C.J.S. title Nuisances § 111, also 32 C.J. p 67 note 11.

23. Ohio.—Bernstein v. Retail Cleaners' & Dyers' Ass'n, 31 Ohio N.P.,N.S., 433.
32 C.J. p 67 note 13.
Conduct of complainant as affecting:
Right to restrain breach of contract:
Generally see infra § 80.
For personal services see infra § 82.
Rule as to adequacy of remedy at law see supra § 25.

show that he is equitably and in good conscience entitled to relief by injunction in addition to showing equitable grounds for relief,[24] and, where the established facts do not show any superior equity entitling complainant to the injunction asked as against defendant, it should not be granted.[25]

Motive. The court ordinarily will not inquire into the motives which actuate plaintiff in bringing the suit.[26] Where he shows a right to an injunction, it is immaterial that he is seeking it for other purposes than the assertion and enforcement of the rights on which he relies.[27]

Coming into equity with clean hands. The maxim that he who comes into equity must come with clean hands, as discussed in Equity § 93 et seq, is, of course, applicable in suits to obtain relief by injunction.[28] Injunction will be denied, even though complainant shows that he has a right and would otherwise be entitled to the remedy in case it appears that he himself acted dishonestly, fraudulently, or illegally in respect of the matter in which redress is sought,[29] or where he has encouraged, invited, or contributed to the injury sought to be enjoined.[30] However, the general principle that he who comes into equity must come with clean hands applies only to plaintiff's conduct in relation to the very matter in litigation.[31] The want of equity that will bar a right to equitable relief for coming into court with unclean hands must be so directly connected with the matter in litigation that it has affected the equitable relations of the parties arising out of the transaction in question.[32]

Doing equity. The maxim that he who seeks equity must do equity, as discussed in Equity § 90 et seq, applies with full force and effect to suits to obtain injunctions.[33]

Contradictory testimony

Plaintiff's testimony, contradictory of former testimony and declaration in prior suit, was held not to preclude relief on ground of perjury.—Buckeye Cotton Oil Co. v. Ragland, C.C.A.Miss., 11 F.2d 231.

24. Mich.—Campau v. National Film Co., 123 N.W. 606, 159 Mich. 169.
Pa.—Weyl v. Mt. Sinai Cemetery Ass'n, 13 Pa.Dist. & Co. 389.

25. Minn.—Marks v. Jones, 73 N.W. 719, 71 Minn. 136.

26. Fla.—Valdez v. State, 194 So. 388, 394, 142 Fla. 123, citing **Corpus Juris.**
Iowa.—Brockman v. Creston, 44 N.W. 822, 79 Iowa 587.
Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.

Legal or equitable rights

If the complainant's rights are legal as well as equitable, the court of equity may perhaps, on the final hearing or on the application for preliminary injunction, consider the question of motive as bearing on the right to equitable relief, or remitting complainant to his purely legal rights. Where, however, his property rights are equitable only, it would seem to be clear that whatever his motives in prosecuting the suit may be, he is not only entitled to have his case heard on final hearing, but also to have the protection by preliminary injunction, if his right is sufficiently established and such protection is absolutely necessary for the protection, pendente lite, of the equitable right.—Hodge v. U. S. Steel Corp., 53 A. 553, 64 N.J.Eq. 111.

27. Iowa.—Brockman v. Creston, 44 N.W. 822, 79 Iowa 587.

28. U.S.—International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Local No. 655 v. Rex Theatre Corporation, C.C.A.Wis., 73 F.2d 92.
Mo.—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 268, 130 N.J.Eq. 433, citing **Corpus Juris.**
Tenn.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281.
Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—Donna Independent School Dist. v. Sanders, Civ.App., 57 S.W.2d 857.
32 C.J. p 67 note 18.

Injunction properly granted

N.Y.—National Dress Mfrs' Ass'n v. United Ass'n of Dress Manufacturers, 272 N.Y.S. 360, 151 Misc. 827.

29. Pa.—Northampton Mint Co. v. Frederick, 9 Pa.Dist. & Co. 59, 20 North Co. 312, 40 York Leg.Rec. 147.
32 C.J. p 68 note 19.

Sharp practice

Sharp practice by insurance company, suing to cancel policy on grounds of fraud and to enjoin action at law, was held not ground for denying injunction.—Abraham Lincoln Life Ins. Co. v. Kleven, D.C. Mass., 33 F.2d 638.

30. Kan.—Freeman v. Scherer, 154 P. 1019, 97 Kan. 184.

Negligence

Injunction will not issue to relieve party from situation brought about by his own negligent act.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281.

31. Colo.—Kirby v. Union Pac. R. Co., 119 P. 1042, 51 Colo. 509, Ann. Cas.1913B 461, followed in 119 P. 1056, 51 Colo. 508.
32 C.J. p 68 note 21, p 69 note 26.

32. Pa.—Patterson v. Wilkes-Barre Bldg. Trades Council, 11 Pa.Dist. 500, 11 Kulp 15.
32 C.J. p 68 note 22.

33. U.S.—Walling v. McCracken County Peach Growers Ass'n, D.C. Ky., 50 F.Supp. 900.
Ark.—Word v. Grigsby, 174 S.W.2d 439, 441, citing **Corpus Juris.**
Ga.—Harton v. Federal Land Bank of Columbia, 2 S.E.2d 62, 187 Ga. 700.
Ill.—Hruby v. Steinman, 24 N.E.2d 175, 302 Ill.App. 480, affirmed 30 N.E.2d 7, 374 Ill. 465.
Mich.—Weco Products Co. v. Sam's Cut Rate, 295 N.W. 611, 296 Mich. 190.
Miss.—E. J. Platte Fisheries v. Wadford, 155 So. 161, 170 Miss. 617.
Mo.—Reed v. Steward, 276 S.W. 12.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 268, 130 N.J.Eq. 433, citing **Corpus Juris**—Lentheric, Inc., v. Weissbard, 195 A. 818, 122 N.J.Eq. 573.
Or.—Camas Stage Co. v. Kozer, 269 P. 95, 104 Or. 600, 25 A.L.R. 27.
Pa.—Pennsylvania R. Co. v. Sagamore Coal Co., 126 A. 386, 281 Pa. 233, 39 A.L.R. 882, certiorari denied Sagamore Coal Co. v. Mountain Water Supply Co., 45 S.Ct. 228, 267 U.S. 592, 69 L.Ed. 803.
S.C.—Percival v. Faris, 113 S.E. 353, 121 S.C. 170.
Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari grant-

b. Estoppel, Waiver, and Election

Injunctive relief will be barred by acts of the complainant constituting estoppel, waiver, or election of remedies.

If complainant has himself acted in such a way as to raise an estoppel against him, he will not be granted an injunction to prevent the act in question.[34] Also his conduct may be such as to constitute the waiver of a right to injunction.[35] It has been held that, where a suit is brought for an injunction and damages and payment of partial damages in satisfaction is accepted, such election precludes complainant from thereafter claiming an injunction.[36]

Laches as a ground for denial of injunctive relief is discussed infra § 171.

§ 27. Former Injunction or Application Therefor

a. In general
b. Injunction already in force or application pending therefor

a. In General

Ordinarily, where an injunction has been refused, or dissolved if granted, the complainant may thereafter be entitled to an injunction only on grounds which did not exist when the first bill was filed.

Successive injunction suits, even on new grounds, are not favored,[37] and on a subsequent application an injunction ordinarily should be refused, or dissolved if granted, where the new, supplemental, or amended bill contains the same grounds as those alleged in the first bill.[38] However, where an injunction has been refused, or has been granted and dissolved, by the court, complainant may be entitled to an injunction, if he amends his bill or files a supplemental or new bill setting up new grounds which did not exist when the first bill was filed;[39] but, except where a salutary rule of public policy would otherwise be infringed,[40] successive injunctions on different grounds which might have been put at issue in a prior proceeding should not be allowed,[41] where no sufficient reason why the grounds were not urged on the first application for an injunction

ed Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—Willcox v. Jackson, Civ.App., 106 S.W.2d 766, error dismissed—Southwest Gas Co. v. Hoff, Civ.App., 50 S.W.2d 379, error dismissed.

32 C.J. p 68 note 25.

Offering to do equity see infra § 182.

Offer to do equity not fulfilled by resort to legal niceties.—Town of Kearny v. New Jersey Suburban Water Co., 162 A. 126, 10 N.J.Misc. 1015, affirmed 176 A. 556, 117 N.J.Eq. 474.

Injunction improperly refused

Failure of obligors on notes for balance due on land contract to offer to pay taxes as required by note and contract before advertisement of sale reciting acceleration of maturity for nonpayment of installment, or before interlocutory hearing, was held not to prevent obligors from enjoining sale as against contention that obligors were required to do equity.—Lee v. O'Quinn, 190 S.E. 564, 184 Ga. 44.

34. U.S.—Gray v. Yellowley, D.C.N.Y., 290 F. 400.
Mo.—Reed v. Steward, 276 S.W. 12.
Neb.—Meyer v. City of Alma, 221 N.W. 438, 117 Neb. 511.
Tenn.—Saylor v. Trotter, 255 S.W. 590, 148 Tenn. 359, rehearing overruled 257 S.W. 93, 148 Tenn. 375.
32 C.J. p 69 note 28.
Estoppel in action to enjoin breach of restrictive covenants as to use of land see infra § 87.

Estoppel not created

(1) In suit to restrain payment of dividends to common stockholders until dividends for 1936 and 1938 due preferred stockholders based on surplus net profits of parent corporation were paid, in the absence of evidence that the same conditions complained of existed in previous years, the presentation by the parent corporation of consolidated reports to its stockholders for many years did not operate as an "estoppel."—Cintas v. American Car & Foundry Co., 25 A.2d 418, 131 N.J.Eq. 419, affirmed 28 A.2d 531, 132 N.J.Eq. 460.

(2) One opposing issuance of building permit before zoning commission was held not estopped by laches to sue for injunction against erection of building.—Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287.

35. U.S.—Leiby v. City of Manchester, D.C.N.H., 33 F.Supp. 842, reversed on other grounds City of Manchester v. Leiby, 117 F.2d 661, certiorari denied Leiby v. City of Manchester, 61 S.Ct. 838, 313 U.S. 562, 85 L.Ed. 1522.
Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.
32 C.J. p 69 note 29.

36. Ky.—Husbands v. Paducah & I. R. Co., 195 S.W. 831, 176 Ky. 290.

37. Mo.—Powell v. City of Joplin, 73 S.W.2d 408, 335 Mo. 562.
Effect of prior injunctive relief in litigation relating to trade-marks, trade-names, and unfair competition see the C.J.S. title Trade-Marks, Trade-Names, and Unfair Competition § 212, also 63 C.J. p 567 note 80–p 569 note 2.

38. Tex.—Birchfield v. Bourland, Civ.App., 187 S.W. 422.
32 C.J. p 74 note 71.

39. Tex.—Birchfield v. Bourland, supra.
32 C.J. p 74 note 70.

40. La.—Lee v. Cooper, 98 So. 869, 155 La. 143.

Homestead exemption

The rule that a party having several grounds for obtaining an injunction must urge all of them in one suit is not applicable to an injunction to restrain foreclosure sale of a homestead exemption because the homestead exemption is a matter of public policy, and is granted not so much in favor of the head of a family as in favor of the dependent members of the family, and also because the homestead exemption does not give to the beneficiary the absolute right to prevent seizure or sale thereof, but gives the beneficiary the right merely to require that the property shall not be sold except for a sum exceeding a specified amount. —Lee v. Cooper, supra.

Enjoining sale of exempt property generally see Exemptions § 153.

41. La.—Cooper v. Federal Land Bank of New Orleans, App., 197 So. 822—Givens v. Arcadia Cotton Oil & Manufacturing Co., App., 175 So. 91.
32 C.J. p 74 note 72.

is shown;[42] and ignorance neither of the law nor of the facts will present any excuse for failure to present such grounds.[43] It has been held that the issuing, through inadvertence, of a void order for injunctive relief does not preclude the court from thereafter granting a valid order therefor on the same grounds.[44]

The refusal to grant an injunction pendente lite without bond is no bar to a second application for the issuance of such an injunction on bond.[45]

b. Injunction Already in Force or Application Pending Therefor

Ordinarily, where a prior injunction has been obtained and is still in force, a second injunction in the same or another court will be refused.

If complainant has obtained an injunction in one court and that injunction is still in force, a second injunction in that or in another court will be refused.[46] While it has been broadly stated that it is only where the first injunction has been withdrawn by agreement and satisfactory grounds are shown for a renewal that a second injunction will be granted,[47] the issuance of an injunction prohibiting a corporation through its officers, agents, and servants from committing designated acts does not preclude the issuance of an injunction prohibiting certain of its officers from committing such acts in their individual capacity,[48] and the issuance of an injunction restraining a person from doing certain acts has been held not to preclude the issuance of an injunction against the same person and another, as joint defendants, from committing such acts.[49]

The mere pendency of another bill asking for the same relief is no objection to the granting of an injunction,[50] but a temporary injunction may be denied where another injunction suit in a court of coordinate jurisdiction between the same parties and seeking the same relief is pending.[51]

Counter injunction. If complainant has been enjoined from erecting a structure, he cannot obtain an injunction to prevent interference with his erecting such structure.[52]

§ 28. —— Successive Injunctions

The effect of a former injunction or an application therefor is considered supra § 27.

Examine Pocket Parts for later cases.

§ 29. Injunction Ineffectual or Unnecessary

a. In general
b. Change in circumstances after suit brought

a. In General

Usually an injunction will not be granted if it is unenforceable, unnecessary, or ineffectual.

An injunction will be refused where the circumstances are such that the injunction cannot be enforced by the court,[53] or where such enforcement would require a continuous supervision on the part of the court,[54] or where there is no necessity therefor,[55] or where for any reason it can be of no ben-

42. La.—Fluker v. Davis, 12 La.Ann. 613.
32 C.J. p 74 note 73.

43. Mo.—Powell v. City of Joplin, 73 S.W.2d 408, 412, 335 Mo. 562, citing **Corpus Juris.**
32 C.J. p 74 note 74.

44. Cal.—McDonald v. Superior Court in and for Sierra County, 64 P.2d 738, 18 Cal.App.2d 652.

45. La.—State v. Ellis, 9 La.A., Orleans, 205.

46. Ky.—Jones v. Kentucky State Board of Dental Examiners, 163 S.W.2d 297, 298, 291 Ky. 136, citing **Corpus Juris.**
32 C.J. p 74 note 76.

Disobedience of prior injunction
Plaintiff cannot have more than one injunction pendente lite in same action, remedy for disobedience being by proceeding for contempt.—Tobin v. Hennessy, 227 N.Y.S. 363, 223 App.Div. 10, affirming 223 N.Y.S. 676, 130 Misc. 226.

47. Iowa.—Dickinson v. Eichorn, 43 N.W. 620, 78 Iowa 710, 6 L.R.A. 721.
N.Y.—Livingston v. Gibbons, 4 Johns.Ch. 571.

48. U.S.—Saxlehner v. Eisner, N.Y., 147 F. 189, 77 C.C.A. 417, affirming, C.C., 140 F. 938, and certiorari denied 27 S.Ct. 778, 203 U.S. 591, 51 L.Ed. 331.

49. Iowa.—Carter v. Steyer, 61 N.W. 956, 93 Iowa 533.

50. Va.—Roberts v. Jordan, 3 Munf. 488, 17 Va. 488.

Distinct proceedings
In suit under Agricultural Adjustment Act against milk distributors to compel compliance with secretary of agriculture's order regulating handling of milk, defenses of interstate distributors that they had been named in earlier proceedings still pending of record.—U. S. v. Andrews, 26 F.Supp. 123.

51. Wash.—State v. Smith, 208 P. 1, 120 Wash. 540.

52. Miss.—Martin v. O'Brien, 34 Miss. 21.
32 C.J. p 75 note 79.
Cross injunctions see supra § 7.

53. Ill.—Peru Wheel Co. v. Union Coal Co., 14 N.E.2d 998, 295 Ill.App. 276.
Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254.
N.J.—Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 135 A. 284, 285, 100 N.J.Eq. 185, citing **Corpus Juris.**
N.Y.—Fletcher v. Hylan, 211 N.Y.S. 397, 125 Misc. 489.
32 C.J. p 75 note 82.

54. Ill.—Tidd v. General Printing Co., 257 Ill.App. 596.
N.J.—Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 135 A. 284, 285, 100 N.J.Eq. 185, citing **Corpus Juris.**
N.Y.—Fletcher v. Hylan, 211 N.Y.S. 397, 125 Misc. 489.
32 C.J. p 75 note 83.

55. U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U. S. 622, 84 L.Ed. 519—Securities and Exchange Commission v. Lawson,

efit to complainant,[56] or could not correct the mischief complained of,[57] or would bring about the very conditions which it is sought to prevent.[58]

However, an injunction will not be refused merely because of a lack of power in the court to enforce its decree in case one of defendants can and may disregard it,[59] or because the court cannot regulate the incidental consequences of its decree when there exists an executive agency with power to prescribe such regulations.[60] Also, an injunction will not be denied because it would have the effect of enjoining a subsequent act of defendant which would otherwise produce the same result as the act sought to be enjoined.[61]

Injuria sine damno. A defendant will not be enjoined from doing an illegal or wrongful act where, because of the illegality or for other reasons, the attempted action will be void and of no effect, and hence of no injury to complainant;[62] but, where such invalidity appears only in connection with outside facts which must be established by evidence aliunde, it has been held that an injunction will not be refused.[63]

b. Change in Circumstances after Suit Brought

Where events occur after the filing of the bill which render an injunction unnecessary or ineffectual, it will ordinarily be refused.

It has been said that equity acts in the present tense,[64] and that relief is dependent on present and future conditions rather than solely on those existing when the suit was brought.[65] While an injunction will not be denied where the question has not really become moot either because there still remains a justiciable issue,[66] or because petitioner was

D.C.Md., 24 F.Supp. 360, 365, citing **Corpus Juris.**

Ga.—Kaiser v. Kaiser, 22 S.E.2d 390, 194 Ga. 653.

Mass.—Rosenthal v. Shepard Broadcasting Service, 12 N.E.2d 819, 299 Mass. 286, 114 A.L.R. 1502.

N.J.—General Leather Products Co. v. Luggage & Trunk Makers Union, Local No. 49, 183 A. 165, 119 N.J. Eq. 432, appeal dismissed 187 A. 582, 121 N.J.Eq. 101.

N.Y.—Koppelman v. Sunset Wine Co., 44 N.Y.S.2d 225, 180 Misc. 812.

32 C.J. p 75 note 84.

Contract expiring before possible breach

Injunction denied, where city's electric plant could not be completed within lifetime of contract in which city agreed not to build or operate a new plant.—Consumers' Power Co. v. City of Allegan, 226 N.W. 680, 248 Mich. 34.

56. U.S.—Withington v. Roberts & Co., D.C.Del., 22 F.Supp. 460.

Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254.

Mass.—Rosenthal v. Shepard Broadcasting Service, 12 N.E.2d 819, 299 Mass. 286, 114 A.L.R. 1502—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.

Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

N.Y.—Greenebaum v. Ripley, 22 N.Y.S.2d 385.

Va.—Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1.

Wyo.—Mitchell Irr. Dist. v. Whiting, 136 P.2d 502, 508, quoting **Corpus Juris,** and certiorari denied 64 S.Ct. 944.

32 C.J. p 76 note 85.

Futile gesture

Injunctive relief will not be granted where the granting of it would be but a futile gesture and would serve no useful purpose in protecting any substantial right or interest of the petitioner.—Levine v. Black, 44 N.E.2d 774, 312 Mass. 242.

57. Mass.—Levine v. Black, supra—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.

N.Y.—Koppelman v. Sunset Wine Co., 44 N.Y.S.2d 225, 180 Misc. 812.

32 C.J. p 76 note 86.

58. N.Y.—Reardon v. International Mercantile Marine Co., 178 N.Y.S. 722, 189 App.Div. 515, reversing 177 N.Y.S. 803, 107 Misc. 541.

32 C.J. p 76 note 87.

59. U.S.—Cherry v. Insull Utility Investments, D.C., 58 F.2d 1022, reversed on other grounds, C.C.A., Guaranty Trust Co. of New York v. Fentress, 61 F.2d 329—Higgins v. California Prune & Apricot Growers, Inc., C.C.A.N.Y., 282 F. 550.

Ind.—Ellingham v. Dye, 99 N.E. 1, 178 Ind. 336, Ann.Cas.1915C 200.

32 C.J. p 76 note 88.

60. U.S.—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and reheard 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144.

61. N.Y.—Koukly v. Canavan, 277 N.Y.S. 28, 154 Misc. 343.

62. U.S.—Stevens v. Missouri, K. & T. R. Co., N.Y., 106 F. 771, 45 C.C.A. 611.

32 C.J. p 76 note 89.

63. U.S.—Los Angeles City Water Co. v. City of Los Angeles, C.C. Cal., 88 F. 720, affirmed 20 S.Ct. 736, 177 U.S. 558, 44 L.Ed. 886.

64. U.S.—Champion Spark Plug Co. v. Reich, C.C.A.Mo., 121 F.2d 769, 772, citing **Corpus Juris,** and modifying, D.C., 34 F.Supp. 414, appeal dismissed, C.C.A., Reich v. Champion Spark Plug Co., 117 F.2d 1014, certiorari denied 62 S.Ct. 130, 314 U.S. 669, 86 L.Ed. 535, mandate conformed to, D.C., Champion Spark Plug Co. v. Reich, 42 F.Supp. 166—Continental Securities Co. v. Interborough Rapid Transit Co., D.C.N.Y., 207 F. 467, affirmed 221 F. 44, 136 C.C.A. 570.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 443, 126 Neb. 333, quoting **Corpus Juris.**

Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 251, 57 Wyo. 213, quoting **Corpus Juris.**

65. Cal.—American Fruit Growers v. Parker, 140 P.2d 23, prior opinion, App., 129 P.2d 46.

Md.—United Brotherhood of Carpenters and Joiners of America, Local No. 101, v. United Slate Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local No. 80, 29 A.2d 839.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 443, 126 Neb. 333, quoting **Corpus Juris.**

N.Y.—Dickinson v. Springer, 158 N.E. 74, 246 N.Y. 203, reversing 219 N.Y.S. 799, 218 App.Div. 831, and motion denied 159 N.E. 642, 246 N.Y. 539.

Pa.—Penn Cress Ice Cream Co. v. Stites, 43 Pa.Dist. & Co. 80, 51 Dauph.Co. 305.

S.D.—Alsager v. Peterson, 141 N.W. 391, 31 S.D. 452, Ann.Cas.1915D 1251.

Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 251, 57 Wyo. 213, quoting **Corpus Juris.**

66. U.S.—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., D.C.Okl., 6 F.Supp. 893, vacated on other grounds 54 S.Ct. 782, 292 U.S. 386, 78 L.Ed. 1318.

Wis.—Trustees of Wisconsin State

not a party to the litigation wherein it is claimed the issue was adjudicated,[67] nevertheless, although the bill may state good grounds for the granting of an injunction,[68] where events occur after the filing of the bill which render an injunction unnecessary or ineffectual, it will ordinarily be refused.[69] However, defendant cannot, by hastening his wrongful acts to completion after the filing of the bill, thereby deprive the court of jurisdiction,[70] for, although it cannot prevent the act, it can give damages,[71] and has power to compel by mandatory injunction the restoration of the former condition of things, as shown supra § 5.

§ 30. Relative Inconvenience or Injury to Parties

a. In general

b. Temporary or preliminary injunction

a. In General

Subject to certain exceptions, the court ordinarily will take into consideration the relative inconvenience or

Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.

67. U.S.—Truax-Traer Coal Co. v. National Bituminous Coal Commission, C.C.A., 95 F.2d 218.

Same relief granted in other litigation

Complainant on proving case for injunctive relief in her own right was held entitled to have temporary injunction granted in her own name, although injunction to same effect had already been granted in other litigation in which complainant was not a party.—Anderson v. Tower Amusement Co., 159 So. 782, 118 Fla. 437, vacated on other grounds 160 So. 523, 118 Fla. 895.

68. U.S.—Continental Securities Co. v. Interborough Rapid Transit Co., D.C.N.Y., 207 F. 467, affirmed 221 F. 44, 136 C.C.A. 570.

Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 251, 57 Wyo. 213, quoting **Corpus Juris.**

69. U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Newcomb v. U. S., C.C.A. Cal., 98 F.2d 25, certiorari denied 59 S.Ct. 243, 305 U.S. 651, 83 L. Ed. 421—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Z. & F. Assets Realization Corporation v. Hull, D.C., 31 F.Supp. 371, affirmed 114 F.2d 464, 72 App.D.C. 234, certiorari granted 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, and American Hawaiian S. S. Co. v. Hull, 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, affirmed Z. & F. Assets Realization Corporation v. Hull, 61 S.Ct. 351, 311 U.S. 470, 85 L.Ed. 288—Boysell Co. v. Franco, D.C. Ga., 26 F.Supp. 421—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360, 365, citing **Corpus Juris**—Parker v. McDermitt, D.C.N.J., 23 F.Supp. 207—Withington v. Roberts & Co., D.C. Del., 22 F.Supp. 460.

Cal.—Ratterree Land Co. v. Hutton, 47 P.2d 732, 4 Cal.2d 100—Blackmore Inv. Co. v. Johnson, 1 P.2d 978, 213 Cal. 148.

Fla.—Miami Bottled Gas v. Dri-Gas Corporation, 183 So. 828, 134 Fla. 309.

Ill.—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see 20 N.E.2d 568, 371 Ill. 261.

Iowa.—Gunnar v. Town of Montezuma, 293 N.W. 1, 228 Iowa 581.

Md.—United Brotherhood of Carpenters and Joiners of America, Local No. 101 v. United Slate Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local No. 80, 29 A.2d 839.

Mass.—Levine v. Black, 44 N.E.2d 774, 312 Mass. 242—Suburban Coat, Apron & Linen Supply Co. v. Le Blanc, 15 N.E.2d 828, 300 Mass. 509—Rosenthal v. Shepard Broadcasting Service, 12 N.E.2d 819, 299 Mass. 286, 114 A.L.R. 1502—Hubrite Informal Frocks v. Kramer, 9 N.E.2d 570, 297 Mass. 530.

Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.

Mo.—Corken v. Workman, 98 S.W.2d 153, 231 Mo.App. 121.

Neb.—Conrad v. Kaup, 291 N.W. 687, 137 Neb. 900.

N.J.—General Leather Products Co. v. Luggage & Trunk Makers Union, Local No. 49, 183 A. 165, 119 N.J.Eq. 432, appeal dismissed 187 A. 582, 121 N.J.Eq. 101.

N.Y.—Dickinson v. Springer, 158 N. E. 74, 246 N.Y. 203, reversing 219 N.Y.S. 799, 218 App.Div. 831, and motion denied 159 N.E. 642, 246 N.Y. 539—Orange County Theatres v. City of Newburgh, 5 N.Y.S.2d 521, 254 App.Div. 905, reargument denied 7 N.Y.S.2d 221, 255 App.Div. 783, affirmed 20 N.E.2d 14, 280 N. Y. 558—Great Atlantic & Pacific Tea Co. v. Boland, 25 N.Y.S.2d 517, 176 Misc. 258, affirmed 26 N.Y.S.2d 492, 261 App.Div. 900—In re Forty-Second St. Spur of Manhattan Ry. Co. in City of New York, 216 N.Y. S. 2, 126 Misc. 879, modified on other grounds In re Elevated Railroad Structures, etc., in East Forty-Second St., City of New York, 243 N. Y.S. 665, 229 App.Div. 617—Gwathmey v. Gwathmey, 209 N.Y.S. 60, 125 Misc.Rep. 106, appeal dismissed 210 N.Y.S. 858, 214 App.Div. 766—Brook-Maid Food Co. v. Goldberg, 24 N.Y.S.2d 572.

Okl.—Oklahoma City v. Keaton, 62 P. 2d 981, 178 Okl. 294—Simms v. Smith, 276 P. 740, 136 Okl. 144.

Pa.—Penn Cress Ice Cream Co. v. Stites, 43 Pa.Dist. & Co. 80, 51 Dauph.Co. 305—Wright v. Eagan, 22 Erie Co. 231.

Tenn.—Malone v. Peay, 7 S.W.2d 40, 157 Tenn. 429.

Tex.—Blythe v. Yates, 86 S.W.2d 219, 126 Tex. 85, dismissing error Yates v. Blythe, Civ.App., 79 S.W. 2d 913—Robinson Springs School Dist., Board of Trustees, v. McCorkel, Civ.App., 118 S.W.2d 837—Ben C. Jones & Co. v. Philquist, Civ. App., 249 S.W. 516.

Va.—Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1.

Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 251, 57 Wyo. 213, quoting **Corpus Juris.**

32 C.J. p 76 note 95.

Right to injunction for injury sustained prior to suit see supra § 22.

Contract executed

Where taxpayer's complaint prayed only for injunction to restrain city from entering into contract, injunction will be denied, where contract was executed and work nearly completed.—Fraser v. City of Buffalo, 210 N.Y.S. 548, 125 Misc. 83, modified on other grounds 213 N.Y.S. 804, 215 App.Div. 861, affirmed 154 N.E. 602, 243 N.Y. 554.

Existing political situation

Injunction cannot lie to alter existing political situation or to maintain one in office if, in fact, he is no longer in actual possession of the office.—Reynaud v. Songy, 124 So. 684, 14 La.App. 318.

70. Hawaii.—Anderson v. W. G. Rawley Co., 27 Hawaii 150.

32 C.J. p 77 note 97.

71. Mass.—Suburban Coat, Apron & Linen Supply Co. v. Le Blanc, 15 N.E.2d 828, 300 Mass. 509.

32 C.J. p 77 note 97.

Nominal damages notwithstanding change in situation before trial see infra § 314.

injury which the parties will sustain by the granting or refusal of an injunction.

Ordinarily, on application for an injunction, the court will in the exercise of the wide discretion with which it is vested take into consideration the relative inconvenience or injury which the parties will sustain by the granting or refusal of the application for an injunction.[72] The rule is laid down in a large number of decisions that, when the issuance of an injunction will cause great injury to defendant, and will confer no benefit or very little benefit in comparison on complainant, it is proper to refuse the injunction,[73] especially where the right

72. U.S.—Smith v. Staso Milling Co., C.C.A.Vt., 18 F.2d 736—Latta Truck Lines Inc. v. Hargus, D.C. Mo., 29 F.Supp. 53, 55, citing **Corpus Juris.**

Cal.—Blumenthal v. Di Giorgio Fruit Corporation, 85 P.2d 580, 30 Cal. App.2d 11—Vesper v. Forest Lawn Cemetery Ass'n, 67 P.2d 368, 20 Cal.App.2d 157.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43—Drake v. Durreger, 11 N. E.2d 88, 104 Ind.App. 323.

Ky.—Wise v. Chandler, 108 S.W.2d 1024, 1036, 270 Ky. 1, citing **Corpus Juris**—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris.**

Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.

Mass.—Godard v. Babson-Dow Mfg. Co., 47 N.E.2d 303, 313 Mass. 280, 145 A.L.R. 603.

Mich.—Wagner Electric Corporation v. Hydraulic Brake Co., 257 N.W. 884, 269 Mich. 560—Hasselbring v. Koepke, 248 N.W. 869, 873, 263 Mich. 466, 93 A.L.R. 1170, citing **Corpus Juris**—F. W. Stock & Sons v. Litchfield Co-op. Shippers' Ass'n, 232 N.W. 395, 251 Mich. 488.

Okl.—Tulsa Creamery Co. v. Tulsa Milk Products Co-operative Ass'n, 51 P.2d 950, 952, 175 Okl. 51, citing **Corpus Juris.**

Pa.—Township of Haverford v. Bruno, 29 Del.Co. 307, 31 Mun.L.R. 152 —Shuck v. Borough of Ligonier, 23 West.Co. 20, reversed on other grounds 22 A.2d 735, 343 Pa. 265.

Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—General Tire & Rubber Co. v. Texas Pacific Coal & Oil Co., Civ.App., 102 S.W.2d 1086, error refused—Smiley v. City of Graham, Civ.App., 37 S.W.2d 289, error dismissed—King's Estate v. School Trustees of Willacy County, Civ.App., 33 S.W.2d 753, error refused—Fields Sewerage Co. v. Bishop, Civ.App., 30 S.W.2d 412, error refused.

32 C.J. p 77 note 5.

Balancing convenience:

Affecting right to enforce contracts generally see infra § 80.

In action to enjoin proceedings in another state see infra § 49.

In continuing or dissolving injunction see infra §§ 227, 228.

In enforcement of restrictive covenants as to use of property see infra § 87.

In proceedings to enjoin encroachments by buildings or other structures see infra § 67.

In proceedings to protect property pending litigation of right to title see infra § 56.

Mandatory injunction

In view of drastic character of mandatory injunction, the rule as to balancing relative conveniences of the parties applies with special force to a prayer for mandatory relief.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.

Bondholders' constructive knowledge of corporation's erection of twenty-story building without setback prescribed by ordinance, despite protests and legal action by near-by property owners, did not prevent bondholders from invoking doctrine of balancing of equities in injunction proceeding to make building conform to law.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F.2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S. Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

Strike suit

The relative inconvenience and injury may be considered where the suit is obviously a "strike suit" and not brought in good faith.—General Inv. Co. v. Bethlehem Steel Corp., 102 A. 252, 88 N.J.Eq. 237—32 C.J. p 78 note 12.

73. U.S.—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792.

Cal.—Wright v. Best, 121 P.2d 702, 19 Cal.2d 368—Morris v. George, 135 P.2d 195, 57 Cal.App.2d 665—Blumenthal v. Di Giorgio Fruit Corporation, 85 P.2d 580, 30 Cal. App.2d 11.

Colo.—Barker v. Mintz, 215 P. 534, 73 Colo. 262.

Conn.—Waterbury Trust Co. v. G. L. D. Realty Co., 199 A. 106, 124 Conn. 191—Sisters of St. Joseph Corporation v. Atlas Sand, Gravel & Stone Co., 180 A. 303, 120 Conn. 168.

Fla.—Gibson v. City of Tampa, 154 So. 842, 114 Fla. 619.

Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535.

Ind.—Taylor v. Hadnott, 199 N.E. 228, 210 Ind. 26.

Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris**—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 760, 218 Ky. 557, quoting **Corpus Juris.**

Md.—Schnepfe v. Consolidated Gas, Electric Light & Power Co. of Baltimore City, 165 A. 889, 164 Md. 630.

Mass.—Malinoski v. D. S. McGrath, Inc., 186 N.E. 225, 283 Mass. 1.

Neb.—Richardson v. Kildow, 218 N. W. 429, 116 Neb. 648.

N.J.—Pappas v. Meyer, 130 A. 834, 98 N.J.Eq. 18.

N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App.Div. 135—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1042, 235 App.Div. 651—Todd v. North Ave. Holding Corporation, 201 N.Y. S. 31, 121 Misc.Rep. 301, affirmed 204 N.Y.S. 953, 209 App.Div. 834 —Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S.2d 129, 263 App.Div. 802.

N.C.—Tobacco Growers' Co-op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 367.

Tenn.—Spencer v. O'Brien, 158 S.W. 2d 445, 25 Tenn.App. 429.

Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—General Tire & Rubber Co. v. Texas Pacific Coal & Oil Co., Civ.App., 102 S.W.2d 1086, error refused—Smiley v. City of Graham, Civ.App., 37 S.W.2d 289, error dismissed.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456—Winters v. Turner, 278 P. 816, 74 Utah 222, appeal dismissed and certiorari denied Turner v. Winters, 50 S.Ct. 238, 281 U. S. 692, 74 L.Ed. 1121.

Va.—Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1.

Wash.—Funk v. Inland Power &

is doubtful,[74] or where money damages will compensate plaintiff,[75] or where the wrong may be otherwise redressed,[76] or where complainant may at comparatively slight cost protect himself.[77] For obvious reasons the injunction should be refused where its effect would work irreparable injury and be detrimental to whichever party was successful in the suit.[78] Conversely, an injunction should not be granted merely on the theory that no material injury will result to the party enjoined.[79]

The general rule is not applicable to all cases.[80] Thus it does not apply to cases controlled by positive statutory enactments,[81] or to suits to enjoin breach of restrictive covenants as to the use of land, as shown infra § 87, and it has been held in numerous decisions that, if it is clear that there is a violation of a right of complainant and his injury is regarded as irreparable and his other remedies inadequate, he is ordinarily entitled to an injunction, even though the injury inflicted by the acts complained of is relatively small as compared with the injury which will accrue to defendant as a result of the issuance of an injunction.[82] Also the rule will not be applied in cases where the wrong complained of is so unwarranted and unprovoked as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences,[83] as, for

Light Co., 1 P.2d 872, 164 Wash. 110.

Wis.—Cities Service Oil Co. of Wisconsin v. Kuckuck, 267 N.W. 322, 221 Wis. 633.

32 C.J. p 77 note 7.

Mandatory injunctions

The text rule applies particularly to injunctions mandatory in their nature.—Weis v. Cox, 185 N.E. 631, 633, 205 Ind. 43, citing **Corpus Juris**—32 C.J. p 77 note 7 [b].

Unconscionable damage

If damage and injury resulting to defendant by grant of injunction will be so great as to be unconscionable in view of benefits to be derived from injunction by plaintiff, the court will act with great reluctance and will seek remedy at law by which plaintiff's rights may be protected without undue injury to defendant.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43—Drake v. Durregar, 11 N.E.2d 88, 104 Ind.App. 323.

Operation of a business at the only practical place and in the only practical manner will not be enjoined for trivial causes or for slight damage resulting to others.—Meriwether Sand & Gravel Co. v. State, 26 S.W. 2d 57, 181 Ark. 216.

74. U.S.—Park & Tilford Import Corporation v. Hunter Baltimore Ry., D.C.N.Y., 5 F.Supp. 888.

Ga.—Ballard v. Waites, 21 S.E.2d 848, 194 Ga. 427.

Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris.**

N.Y.—Lakes Island Realty Co. v. McDermott, 160 N.Y.S. 450, 96 Misc. 37.

Tex.—Labor Bank & Trust Co. v. Dow, Civ.App., 26 S.W.2d 925—Allen & Yarbrough v. Texas & P. Ry. Co., 7 S.W.2d 1102.

75. Conn.—Waterbury Trust Co. v. G. L. D. Realty Co., 199 A. 106, 124 Conn. 191—Sisters of St. Joseph Corporation v. Atlas Sand, Gravel & Stone Co., 180 A. 303, 120 Conn. 168.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris**—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 760, 218 Ky. 557, quoting **Corpus Juris.**

N.Y.—Todd v. North Ave. Holding Corporation, 201 N.Y.S. 31, 121 Misc.Rep. 301, affirmed 204 N.Y.S. 953, 209 App.Div. 834.

Va.—Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1.

32 C.J. p 78 note 9.

76. U.S.—Holthusen v. Edward G. Budd Mfg. Co., D.C.Pa., 50 F.Supp. 621.

Conn.—Mitchell v. Southern New England Tel. Co., 96 A. 966, 90 Conn. 179.

Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris.**

Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.

N.Y.—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S.2d 129, 263 App. Div. 802.

77. Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75 S.W.2d 1088, 1095, 256 Ky. 203, quoting **Corpus Juris.**

32 C.J. p 78 note 11.

78. U.S.—U. S. v. Dominion Oil Co., D.C.Cal., 241 F. 425.

32 C.J. p 79 note 16.

79. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.

Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

32 C.J. p 34 note 39.

80. Vt.—Kasuba v. Graves, 194 A. 455, 109 Vt. 191.

81. N.C.—Taylor v. Riley, 69 S.E. 68, 153 N.C. 195.

82. U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F.2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S. Ct. 105, 293 U.S. 590, 79 L.Ed. 685—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F. Supp. 188.

Ark.—Meriwether Sand & Gravel Co. v. State, 26 S.W.2d 57, 181 Ark. 216.

Cal.—Morris v. George, 135 P.2d 195, 57 Cal.App.2d 665—Bemmerly v. Lake County, 132 P.2d 249, 55 Cal. App.2d 829.

Colo.—Twin Lakes Reservoir & Canal Co. v. Sill, 89 P.2d 1012, 104 Colo. 215.

Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.

Fla.—Lincoln-Tower Corporation v. Richter's Jewelry Co., 12 So.2d 452.

Ill.—Rosehill Cemetery Co. v. City of Chicago, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.

Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Nelson v. American Telephone & Telegraph Co., 170 N.E. 416, 270 Mass. 471.

N.J.—Cutrona v. Columbus Theater, 151 A. 467, 107 N.J.Eq. 281.

N.Y.—Squaw Island Freight Terminal Co. v. City of Buffalo, 284 N.Y. S. 598, 246 App.Div. 472, modified on other grounds 7 N.E.2d 10, 273 N.Y. 119.

Pa.—Weiss v. Greenberg, 101 Pa.Super. 24.

Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, 181, citing **Corpus Juris,** affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—McAnally v. Person, Civ.App., 57 S.W.2d 945, 950, citing **Corpus Juris.**

32 C.J. p 78 note 13.

83. Ky.—Kentucky Electric Development Co.'s Receiver v. Wells, 75

example, where the act complained of is tortious in itself as well as in its incidents,[84] or where defendant acted with full knowledge of complainant's rights and his acts were unwarranted and unprovoked.[85]

b. Temporary or Preliminary Injunction

On an application for a preliminary injunction the court in the exercise of its discretionary powers will consider the relative convenience or inconvenience to the parties resulting from the grant or refusal of relief.

On an application for a preliminary injunction the court, in the exercise of its discretionary powers, will consider what is commonly described as the balance of convenience, that is to say, it will consider whether a greater injury would be done by granting the injunction than would result from a refusal thereof.[86] If it is shown that the refusal of the injunction would cause complainant great inconvenience and injury, and that the granting thereof would result in but little injury or inconvenience to defendant, the court will ordinarily grant the injunction, although complainant's right may be doubtful or not clearly established,[87] but, on the other

S.W.2d 1088, 1095, 256 Ky. 203, quoting Corpus Juris.
32 C.J. p 77 note 6.

84. Cal.—Wright v. Best, 121 P.2d 702, 19 Cal.2d 368—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal.App. 383.
Pa.—Weiss v. Greenberg, 101 Pa. Super. 24.
32 C.J. p 79 note 14.

85. U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F. 2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S. Ct. 105, 293 U.S. 590, 79 L.Ed. 685.
Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
N.J.—Phillips Oil Co. v. Galka, 22 A. 2d 533, 130 N.J.Eq. 386.
Okl.—Williamson v. Needles, 133 P. 2d 211, 191 Okl. 560.
32 C.J. p 79 note 15.

Planned violation

A defendant purchasing property in a restricted neighborhood intending to violate the restriction, under an agreement with his grantor for a refund of the purchase price should his project be enjoined, will not be heard to say that such an injunction is a hardship.—Todd v. North Ave. Holding Corporation, 201 N.Y.S. 31, 121 Misc. 301, affirmed 204 N.Y.S. 953, 209 App.Div. 834.

86. U.S.—Rice & Adams Corporation v. Lathrop, N.Y., 49 S.Ct. 220, 278 U.S. 509, 73 L.Ed. 480, affirming, C.C.A., 24 F.2d 1021, certiorari granted 49 S.Ct. 10, 278 U.S. 585, 73 L.Ed. 520, which affirmed, D. C., Lathrop v. Rice & Adams Corporation, 21 F.2d 124—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F. 2d 864—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F. 2d 42—G. F. Heublein & Bro. v. Bushmill Wine & Products Co., D. C.Pa., 39 F.Supp. 549—Latta Truck Lines v. Hargus, D.C.Mo., 29 F. Supp. 53, 55, citing Corpus Juris—Green v. Gravatt, D.C.Pa., 19 F. Supp. 87.
Ala.—Dean v. Coosa County Lumber Co., 167 So. 566, 232 Ala. 177—Boatwright v. Town of Leighton, 166 So. 416, 231 Ala. 607—Castleman v. Knight, 110 So. 911, 215 Ala. 429.
Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.
Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237—Ballard v. Waites, 21 S.E.2d 848, 194 Ga. 427.
Ill.—Kelly v. Brice, 49 N.E.2d 742, 319 Ill.App. 513—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E. 2d 584, 298 Ill.App. 92—South East Nat, Bank of Chicago v. Board of Education of City of Chicago, 18 N. E.2d 599, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 601, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 602, 298 Ill. App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 603, 298 Ill.App. 621—Kuhl v. Clark, 261 Ill.App. 491.
Iowa.—Ontjes v. Bagley, 250 N.W. 17, 217 Iowa 1200.
Minn.—Minneapolis Electric Lamp Co. v. Federal Holding Co., 201 N.W. 324, 161 Minn. 198.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 396, 61 Nev. 301, citing Corpus Juris.
N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J. Eq. 283—Howard v. Jersey City, 140 A. 261, 102 N.J.Eq. 213.
N.Y.—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1042, 235 App.Div. 651—Export & Import Film Co. v. B. P. Schulberg Productions, 211 N.Y.S. 338, 125 Misc. 756, affirmed 218 N.Y.S. 740, 218 App.Div. 823—Max Hart Attractions v. Serpico, 22 N.Y.S.2d 745.
Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.
Tex.—Ford Rent Co. v. Mayfair Taxicab Co., Civ.App., 99 S.W.2d 1023—Gill v. Hudspeth County Conservation & Reclamation Dist. No. 1, Civ.App., 88 S.W.2d 517—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190—Great Plains Oil & Gas Co. v. Cox, Civ. App., 5 S.W.2d 796—Terry v. Crosswy, Civ.App., 264 S.W. 718.
W.Va.—Tennant v. Kilcoyne, 196 S.E. 559, 120 W.Va. 137.
32 C.J. p 80 note 18.
Balancing conveniences on application for temporary injunction in protection of property pending litigation as to right or title see infra § 56.

87. U.S.—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864.
Conn.—Olcott v. Pendleton, 22 A.2d 633, 128 Conn. 292.
Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244.
N.Y.—Murphy v. Ralph, 299 N.Y.S. 270, 165 Misc. 335.
N.C.—Norfolk Southern R. Co. v. Rapid Transit Co., 141 S.E. 882, 195 N.C. 305.
Tex.—Bellows-MacLay Const. Co. v. MacLay, Civ.App., 98 S.W.2d 213—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190—Great Plains Oil & Gas Co. v. Cox, Civ.App., 5 S.W.2d 796.
32 C.J. p 80 note 19.

Clearly on side of complainant

Since a temporary ex parte injunction is particularly drastic, the balance of inconveniences must be very clearly on the side of complainant before such relief will be granted.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.

Protection of defendant by bond

(1) Where the denial of a motion for preliminary injunction will result in great injury to plaintiff and in defendant's getting substantial advantage to which he would be entitled only as the result of a final adjudication in his favor, the preliminary injunction should be granted if defendant's interest can be protected by an indemnifying bond.—Selchow & Righter Co. v. Western Printing & Lithographing Co., C.C.A.Wis., 112 F. 2d 430, affirming, D.C., 29 F.Supp. 569.

(2) Temporary injunction was

hand, a temporary injunction will usually be denied in a doubtful case where the granting of it would cause greater detriment to defendant should he ultimately prevail than would be caused to complainant by its refusal if he should ultimately prevail.[88] Also, where the inconvenience to result is equally divided as between the parties, the injunction will usually be denied.[89] The doubt may relate either to the facts or the law of the case or both.[90]

§ 31. Injury or Inconvenience to Public or Third Persons

On an application for an injunction the court will take into consideration the inconvenience or injury to the public or third persons which may result from the granting of such relief.

On an application for an injunction it is the duty of the court to take into consideration the injury or inconvenience which may result to the public if an injunction is awarded.[91] Accordingly, while there are cases in which an injunction has been granted,[92]

granted plaintiff with requirement that it provide adequate bond, pending hearing on merits, where likelihood of injury to defendants caused by granting temporary injunction was trivial and injury to plaintiff which would be occasioned by denial of temporary injunction would be serious, if not irreparable, should final hearing disclose plaintiff to be entitled to injunctive relief.—Menominee & Marinette Light & Traction Co. v. City of Menominee, Mich., D.C.Mich., 11 F.Supp. 989.

(3) Bond, undertaking, or other security generally see infra §§ 165, 166.

88. Ala.—Alabama Power Co. v. City of Guntersville, 183 So. 396, 236 Ala. 503, 119 A.L.R. 429.
Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.
N.J.—Howard v. Jersey City, 140 A. 261, 102 N.J.Eq. 213.
N.Y.—Eith v. City of New York, 300 N.Y.S. 558, 165 Misc. 18—Giordano v. Dellwood Dairy Co., 275 N.Y.S. 193, 153 Misc. 54—Lyon v. Bethlehem Engineering Corporation, 223 N.Y.S. 506, 129 Misc. 668—Export & Import Film Co. v. B. P. Schulberg Productions, 211 N.Y.S. 838, 125 Misc. 756, affirmed 218 N.Y.S. 740, 218 App.Div. 823—Birn v. Childs Co., 36 N.Y.S.2d 250—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S. 2d 129, 263 App.Div. 802—Max Hart Attractions v. Serpico, 22 N. Y.S.2d 745.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.
Tex.—Monk v. Danna, Civ.App., 110 S.W.2d 84, error dismissed—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190—State v. Norris, Civ.App., 33 S.W.2d 850—Owen v. Willis, Civ.App., 20 S. W.2d 338, error dismissed.
W.Va.—Tennant v. Kilcoyne, 196 S. E. 559, 120 W.Va. 137.
32 C.J. p 80 note 20.

Financial responsibility of defendant
In an action in which defendants were apparently financially responsible, plaintiff was held not entitled to a temporary injunction where defendants' business would be irreparably damaged thereby.—John Aquino, Inc., v. Luigi Bosca & Figlia, 270 N. Y.S. 152, 241 App.Div. 760.

Security in lieu of injunction
Under statutes giving courts broad powers in issuance of temporary injunction, an injunction should not be granted if its effect would be to interrupt defendant's operations in mining gravel and perhaps seriously impair defendant's credit and injuriously affect employment of numerous persons, where plaintiffs' rights can be protected by requiring defendant to give bond or by appointing a receiver.—Hurwitz v. Carolina Sand & Gravel Co., 126 S.E. 171, 189 N.C. 1.

89. U.S.—Shinkle, Wilson & Kreis Co. v. Louisville & N. R. Co., C.C. Ohio, 62 F. 690.
32 C.J. p 81 note 22.

90. U.S.—Chew v. First Presb. Church, D.C.Del., 237 F. 219.
Tex.—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W. 2d 190—Great Plains Oil & Gas Co. v. Cox, Civ.App., 5 S.W.2d 796.

91. U.S.—Snively Groves v. Florida Citrus Commission, D.C.Fla., 23 F. Supp. 600—Polk Co. v. Glover, D. C.Fla., 22 F.Supp. 575, reversed on other grounds 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Pope v. Blanton, D. C.Fla., 10 F.Supp. 18, 19, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384, citing **Corpus Juris.**
Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 33, 195 Ga. 237, citing **Corpus Juris.**
Md.—Schnepfe v. Consolidated Gas, Electric Light & Power Co. of Baltimore City, 165 A. 889, 891, 164 Md. 630, quoting **Corpus Juris.**
Mo.—State ex rel. Hog Haven Farms v. Pearcy, 41 S.W.2d 403, 409, 328 Mo. 560, citing **Corpus Juris.**
N.Y.—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1042, 235 App.Div. 651—Belmont Quadrangle Drilling Corporation v. Galek, 244 N.Y.S. 231, 137 Misc. 637—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.
Tex.—Mitchell v. City of Temple, Civ.App., 152 S.W.2d 1116, error refused.
32 C.J. p 81 note 25.
Injury or inconvenience to public or third persons as affecting right to enjoin breach of contract see infra §§ 80, 87.

Minimum prejudice to public
"A court of equity will exercise its preventative power only at that time when it will result in a minimum amount of prejudice to the public."—Simmons v. Woodward, 26 N. E.2d 37, 41, 217 Ind. 15.

92. U.S.—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188.
Mass.—Godard v. Babson-Dow Mfg. Co., 47 N.E.2d 303, 313 Mass. 280, 145 A.L.R. 603.
32 C.J. p 81 note 26, p 82 note 28.

Mere pretense of public interest
If the alleged necessity for protecting the public interest and convenience is nothing more than a pretense and a cloak for the unlawful appropriation of private property to suit defendant's convenience, no reason exists why an injunction should not be granted, to restrain such unlawful acts.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 728, 120 Or. 202, citing **Corpus Juris**—32 C.J. p 82 note 44.

Injunction allowed
(1) Rule that one cannot sit idly by while his property is being devoted to public use and expensive works erected to that end and then assert claim to injunctive relief, having its foundation chiefly to the inconvenience to the public if service is interrupted by issuance of injunction, should not apply unless public is interested and unless service is to be impaired.—Miller & Lux v. San Joaquin Light & Power Corporation, 65 P.2d 1289, 8 Cal.2d 427.

(2) Where public has no interest in construction which plaintiff desires removed from his land, the rule protecting improvement from injunctive relief does not apply.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, Cal.App., 141 P. 2d 46.

ordinarily, when the issuance of an injunction will cause serious public inconvenience or loss, without a correspondingly great advantage to complainant, no injunction will be granted,[93] and this is so, even though, as against defendant, complainant would be entitled to its issuance.[94]

The general rule under consideration has been applied where the allowance of an injunction would seriously interfere with or work detriment to public works or works of public benefit,[95] where the issuance of the injunction asked would result in cutting off the public water supply,[96] or the supply of electricity for lights and power,[97] or where it would deprive the public of a necessary railroad,[98] street,[99] sidewalk,[1] bridge,[2] public ferry,[3] canal,[4] or viaduct,[5] or prevent the necessary discharge of sewage,[6] or interfere with the public system of taxation.[7]

Injury or inconvenience to third persons. In suits for relief by injunction, the court in the exercise

93. U.S.—Commonwealth of Pennsylvania v. Williams, Pa., 55 S.Ct. 380, 294 U.S. 176, 79 L.Ed. 841, 96 A.L.R. 1166, reversing, C.C.A., 72 F.2d 509, which affirmed, D.C., Elson v. Mortgage Bldg & Loan Ass'n, 4 F.Supp. 779, and certiorari granted Commonwealth of Pennsylvania v. Williams, 55 S.Ct. 124, 293 U.S. 547, 79 L.Ed. 651, and followed, C.C.A., Gordon v. Ominsky, 72 F.2d 517, certiorari granted 55 S.Ct. 140, 293 U.S. 548, 79 L.Ed. 651, reversed on other grounds 55 S.Ct. 391, 294 U.S. 186, 79 L.Ed. 848—Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A.Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792, 803, citing **Corpus Juris**—Kennedy v. Public Works Administration, D.C.N.Y., 23 F.Supp. 771—Gulf, M. & N. R. Co. v. Illinois Cent. R. Co., D.C.Tenn., 21 F.Supp. 282, appeal dismissed, C.C.A., 109 F.2d 1016—Pope v. Blanton, D.C.Fla., 10 F.Supp. 18, 19, citing **Corpus Juris**, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384.

Cal.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, App., 141 P.2d 46—Blumenthal v. Di Giorgio Fruit Corporation, 85 P.2d 580, 30 Cal.App.2d 11—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal.App.2d 726.

Fla.—Bronson v. Board of Public Instruction for Osceola County, 145 So. 833, 108 Fla. 1.

Iowa.—Browneller v. Natural Gas Pipeline Co. of America, 8 N.W.2d 474.

Md.—Schnepfe v. Consolidated Gas, Electric Light & Power Co. of Baltimore City, 165 A. 889, 891, 164 Md. 630, quoting **Corpus Juris**.

Mass.—Godard v. Babson-Dow Mfg. Co., 47 N.E.2d 303, 313 Mass. 280, 145 A.L.R. 603.

Mo.—State ex rel. Hog Haven Farms v. Pearcy, 41 S.W.2d 403, 409, 328 Mo. 560, citing **Corpus Juris**—Place v. Union Tp., App., 66 S.W.2d 584.

Neb.—Richardson v. Kildow, 218 N.W. 429, 116 Neb. 648—Krueger v. Crystal Lake Co., 197 N.W. 675, 111 Neb. 724.

N.J.—Philadelphia & Camden Ferry Co. v. Johnson, 121 A. 900, 94 N.J.Eq. 296.

N.Y.—Wallerstein v. Westchester Joint Water Works No. 1, 1 N.Y.S.2d 111, 166 Misc. 34—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S.2d 129, 263 App.Div. 802.

Or.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 727, 120 Or. 202, citing **Corpus Juris**.

Tex.—Mitchell v. City of Temple, Civ.App., 152 S.W.2d 1116, error refused—Henderson v. City of Longview, Civ.App., 111 S.W.2d 740.

32 C.J. p 81 note 27.

Technical or unsubstantial right

An injunction will not issue to protect a technical or unsubstantial right where its issuance would produce great public loss or mischief.

Cal.—Wright v. Best, 121 P.2d 702, 19 Cal.2d 368.

N.Y.—Reidy v. City of Syracuse, 300 N.Y.S. 440, 164 Misc. 656, affirmed 299 N.Y.S. 122, 252 App.Div. 838, appeal dismissed 11 N.E.2d 765, 275 N.Y. 582—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762—Stampp v. Board of Sup'rs of Cayuga County, 252 N.Y.S. 303, 141 Misc. 487, affirmed 254 N.Y.S. 1142, 235 App.Div. 651.

32 C.J. p 81 note 27 [b].

Prohibition statute

A temporary injunction will not be granted against the enforcement of the War-Time Prohibition Act pending the outcome of an appeal from a denial of a permanent injunction because of the irreparable damage to the public welfare that might result if the validity of the statute were ultimately upheld.—Hannah v. Clyne, D.C.Ill., 263 F. 599.

94. U.S.—Feinglass v. Reinecke, D.C.Ill., 48 F.Supp. 438.

Fla.—Bronson v. Board of Public Instruction for Osceola County, 145 So. 833, 108 Fla. 1.

N.Y.—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S.2d 129, 263 App. Div. 802.

32 C.J. p 82 note 29.

95. U.S.—Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A.Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331.

N.J.—Benton & Holden v. Central R. Co. of New Jersey, 194 A. 805, 122 N.J.Eq. 309, affirmed Benton & Holden v. Central R. Co. of New Jersey, 196 A. 352, 123 N.J.Eq. 163.

Tex.—Henderson v. City of Longview, Civ.App., 111 S.W.2d 740.

32 C.J. p 82 note 30.

96. Cal.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal. App.2d 726.

32 C.J. p 82 note 31.

97. Pa.—Elliott Nursery Co. v. Du Quesne Light Co., 126 A. 345, 281 Pa. 166, 37 A.L.R. 793.

32 C.J. p 82 note 32.

98. N.C.—South Atlantic Waste Co. v. Raleigh C. & S. R. Co., 83 S.E. 618, 167 N.C. 340.

32 C.J. p 82 note 33.

99. Ohio.—Fogarty v. Cincinnati, 9 Ohio S. & C. P. 753, 7 Ohio N.P. 100.

1. N.J.—Scharr v. Camden, Ch., 49 A. 817.

2. N.J.—United New Jersey R. & Canal Co. v. Hudson, 104 A. 98, 89 N.J.Eq. 95, affirmed 105 A. 895, 89 N.J.Eq. 580—Delaware River Bridge v. Trenton City Bridge Co., 13 N.J.Eq. 46.

3. U.S.—Turner v. People's Ferry Co., C.C.N.Y., 21 F. 90.

4. N.Y.—Halfmoon Bridge Co. v. Acme Constr. Co., 141 N.Y.S. 865, 157 App.Div. 183.

5. Ohio.—Cincinnati Union Stock Yards Co. v. Cincinnati, 34 Ohio Cir.Ct. 251.

6. Tex.—Mitchell v. City of Temple, Civ.App., 152 S.W.2d 1116, error refused.

32 C.J. p 82 note 41.

7. Colo.—People v. Tenth Judicial Dist. Ct., 68 P. 242, 29 Colo. 182.

32 C.J. p 82 note 42.

of its discretion will consider the injury or inconvenience which will result to third persons by the issuance of an injunction.[8]

§ 32. Other Objections to Issuance

Where a crime would naturally and directly vest property in a criminal, injunction will issue to prevent such result, although a contract, a will, or a statute is thereby nullified.

Where a crime would naturally and directly vest property in a criminal, injunction will issue to prevent such result, although a contract, a will, or a statute is thereby nullified. In the application of this rule it is immaterial whether the crime was committed for that purpose or with some other felonious design.[9]

§ 33. —— Furtherance of Illegal Act

An injunction will not be granted where the effect thereof would be to aid an act which, if done, would be criminal or illegal.

A court of equity will not grant an injunction, the effect of which would be in aid of an act which, if done, would be criminal or illegal,[10] and, when the objection of violation of property rights is raised in an effort to circumvent laws designed to protect the public interest, injunctive relief will not be granted to aid the attempt.[11]

§ 34. Persons Who May Be Restrained in General

An injunction will not be issued restraining a defendant from taking certain action unless he is himself the person attempting to take such action or is the person in control thereof.

An injunction issues against persons, and does not issue to suppress a business as such.[12] An injunction will not be issued restraining defendant from taking certain action unless he is himself the person attempting to take such action or is the person in control thereof.[13] On the other hand it is no reason for refusing an injunction that defendant in committing the injurious acts did not act for himself and receive no benefit,[14] or that he is not the only guilty party,[15] or that others contributed to the results against which the injunction is sought.[16]

Persons who may be restrained from breach of contract are discussed infra § 95; from boycotts, infra §§ 140, 141; from picketing, infra § 143; from committing acts in the course of labor disputes, infra § 147; and from the improper use of trade secrets, infra § 148. Restraint of corporate officers is considered infra § 106, and injunctions against public officers and boards infra §§ 108–122. Injunction against society for prevention of cruelty to animals is discussed in Animals § 84.

§ 35. Persons Entitled to Injunction in General

In order to be entitled to injunction, complainant must be the real party in interest.

In order to be entitled to an injunction, complainant must be the real party in interest.[17] The per-

8. Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 33, 195 Ga. 237, citing **Corpus Juris.**
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
Tex.—Shattuck v. Southern Travelers' Ass'n, Civ.App., 298 S.W. 461.
32 C.J. p 83 note 45.

9. N.Y.—Van Alstyne v. Tuffy, 169 N.Y.S. 173, 103 Misc. 455.
32 C.J. p 83 note 47.

10. Ky.—Strand Amusement Co. v. City of Owensboro, 47 S.W.2d 710, 712, 242 Ky. 772, quoting **Corpus Juris.**
Ohio.—Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 64 Ohio App. 105, affirmed 30 N.E.2d 799, 137 Ohio St. 460.
32 C.J. p 83 note 46.

11. Md.—Howard Sports Daily v. Weller, 18 A.2d 210, 179 Md. 355.

12. N.J.—Fleckenstein Bros. Co. v. Fleckenstein, 57 A. 1025, 66 N.J.Eq. 252.
Jurisdiction of parties see infra § 168.

13. N.Y.—Stefanin v. Levy, 63 N.Y.S. 267, 49 App.Div. 638.
32 C.J. p 83 note 55.

Acts of Secretary of Agriculture
In proceeding to enjoin control committee, selected in manner provided in marketing agreement and license issued by secretary of agriculture under Agricultural Adjustment Act, from enforcing regulations governing citrus industry, where court acquired no jurisdiction over secretary, court could not enjoin suspension or revocation of any license issued by secretary, or enjoin enforcement of any fine or penalty resulting from orders which, under act, only secretary could make.—Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475.

14. U.S.—Chicago Bd. of Trade v. Price, C.C.A., 213 F. 336, 130 C.C.A. 302.
32 C.J. p 84 note 56.

Person inducing fraud
That defendant, furnishing others with instrument of fraud, is satisfied to take small profit and leave consummation of fraud to others was no defense to application for injunction, since he who induces another to commit fraud and furnishes the means is equally guilty with person who commits fraud.—American Philatelic Soc. v. Claibourne, 46 P.2d 135, 3 Cal.2d 689.

15. N.Y.—Sammons v. Gloversville, 70 N.Y.S. 284, 34 Misc. 459, affirmed 74 N.Y.S. 1145, 67 App.Div. 628, affirmed 67 N.E. 622, 175 N.Y. 346.

16. Mass.—Parker v. American Woolen Co., 81 N.E. 468, 195 Mass. 591, 10 L.R.A.,N.S., 584.

17. U.S.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.
Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.
Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Playing phonograph records
An orchestra leader who had granted to recording company absolute right to sell, lease, or otherwise dispose of phonograph recordings throughout the world could not maintain suit to enjoin hotel corporation from playing his records and transmitting them through loudspeakers into restaurant at patrons' requests, especially where recording company had not limited use of records to homes.—Noble v. One Sixty Commonwealth Avenue, D.C.Mass., 19 F.Supp. 671.

sons entitled to restrain actions or other legal proceedings are discussed infra § 51; to enjoin trespass or other injury to property, infra § 58; to restrain a breach of contract, infra § 94; to enjoin municipalities or municipal officers, infra § 111; to restrain payment or disposition of public funds, infra § 122; to enjoin unauthorized contracts of public bodies, infra § 120; to restrain boycotts, infra §§ 140, 141; or to prevent the improper use of trade secrets, infra § 148. The necessity that there be an actual or threatened violation of a right in order to entitle a person to an injunction generally is considered supra § 21.

III. SUBJECTS OF PROTECTION AND RELIEF

A. ACTIONS AND OTHER LEGAL PROCEEDINGS

§ 36. In General

In the absence of a constitutional or statutory provision otherwise, the power of a court of equity to enjoin an action or proceeding at law in a proper case is well settled.

Except where the right to pursue a remedy at law is positively given by constitutional or statutory provision,[18] the power of courts of equity in a proper case to enjoin actions or proceedings at law is of long settled standing, and rests on the clear authority vested in them over persons within their jurisdiction,[19] and the propriety of affording such relief resting in the court's discretion to be exercised according to the circumstances of the particular case.[20] Litigation at law, however, may be enjoined only where plaintiff has already, satisfactorily, established his right at law,[21] or where those controverting such right are so numerous that a multiplicity of suits would result.[22]

§ 37. Grounds for Relief in General

a. More adequate remedy
b. Equities warranting or requiring injunction in general
c. Prevention of irreparable injury
d. Protection of officers of court
e. Confining litigation to one forum
f. Aid of equitable remedy.
g. Fraud
h. Accident and mistake

a. More Adequate Remedy

Equity will enjoin an action at law where equity affords a more adequate remedy than is available in the law action and where the equities invoking equity jurisdiction are apparent and strong.

Equity will interfere to enjoin an action or proceeding at law where equity affords a plainer and more adequate and complete remedy for the wrong complained of than can be afforded in the law action or proceeding.[23] This power of equity, however, is to be sparingly exercised, and only when other remedies are inadequate and the equities invoking it are apparent and strong,[24] and when by

18. Pa.—Brown's Appeal, 66 Pa. 155. 32 C.J. p 84 note 60.

19. U.S.—Banker v. Ford Motor Co., D.C.Pa., 3 F.Supp. 737, 741, quoting **Corpus Juris.**
Del.—Pefkaros v. Harman, 174 A. 124, 20 Del.Ch. 238.
Fla.—Curtis v. Albritton, 132 So. 677, 101 Fla. 853.
Md.—Keyser v. Rice, 47 Md. 203, 28 Am.R. 448.
Okl.—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.
32 C.J. p 84 note 62.
Jurisdiction as affected by parties generally see infra § 168.

20. N.J.—Lurie v. J. J. Hockenjos Co., 170 A. 593, 115 N.J.Eq. 304, affirming 167 A. 766, 113 N.J.Eq. 504.
N.Y.—Mutual Life Ins. Co. of New York v. Marzec, 262 N.Y.S. 558, 146 Misc. 26.
Tenn.—Ætna Life Ins. Co. v. Bellos, 14 S.W.2d 961, 158 Tenn. 554, denying rehearing, 13 S.W.2d 795, 158 Tenn. 554.
Arbitrary exercise of power improper
N.Y.—Travelers Indemnity Co. v. Burg, 1 N.Y.S.2d 172, 253 App.Div. 43.
Discretion of court as to injunctions generally see supra § 14.

21. N.Y.—Eldridge v. Hill, 2 Johns. Ch. 281.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Persons entitled to injunction see infra § 51.

22. N.Y.—Eldridge v. Hill, 2 Johns. Ch. 281.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Multiplicity of suits as ground for injunction see infra § 38.

23. Fla.—North American Const. Co. v. Olson, 179 So. 659, 131 Fla. 440—Pepple v. Rogers, 140 So. 205, 104 Fla. 462.
Ga.—Peeples v. Peeples, 18 S.E.2d 629, 193 Ga. 358—Crummey v. Crummey, 10 S.E.2d 859, 190 Ga. 774—Ferrell v. Wight, 200 S.E. 271, 187 Ga. 360—Clower v. Bryan, 166 S.E. 194, 175 Ga. 790.
Md.—Glenn v. Fowler, 8 Gill & J. 340.
N.J.—Lewis v. Morgan, 28 A.2d 215, 132 N.J.Eq. 343.
N.Y.—Bomeisler v. Forster, 48 N.E. 534, 154 N.Y. 229, 39 L.R.A. 240.
W.Va.—Bungalow Gas Co. v. Swanson, 188 S.E. 235, 117 W.Va. 763.
32 C.J. p 85 note 85.
The general test in determining whether an equity suit will lie to enjoin an action at law and try its issues in the equity suit is whether the two suits could have been joined originally, and that depends on whether a misjoinder or multifariousness would result.—Beavers v. Mabry, 23 S.E.2d 672, 195 Ga. 169.

24. Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 197 So. 540, 143 Fla. 788—North American Const. Co. v. Olson, 179 So. 659, 131 Fla. 440—Pepple v. Rogers, 140 So. 205, 209, 104 Fla. 462, citing **Corpus Juris.**
Ga.—Georgia Power Co. v. Yorkshire

compelling issues of sufficient fact or law it is required to do so to protect the parties' rights.[25]

Inadequacy of remedy at law. Subject to the rules relating to the adequacy or inadequacy of a remedy at law as a ground for equity jurisdiction in general, as discussed in Equity §§ 19–38, inadequacy of remedies at law, in this connection, mean that the ordinary processes of the law, under the circumstances of the particular case, are not fitted or adapted to the end in view,[26] as where the law court could adjudicate some questions but could not afford adequate and full relief.[27] The remedy at law is not inadequate merely because no appeal is allowed from the judgment in the action sought to be enjoined,[28] or because the court refuses to grant a continuance or to postpone a trial, this being a matter of discretion for that court,[29] or because complainant is unable to furnish the bond required by law as a prerequisite to the remedy,[30] or because the action will cause expense to the person asking the injunction and to the general public,[31] or that the well settled rules of law will work a hardship in the individual case.[32] When the bringing in of new parties is necessary in order to do complete justice, and this cannot be done at law, equity will assume jurisdiction of the case and enjoin the proceedings at law.[33]

b. Equities Warranting or Requiring Injunction in General

Injunction will be granted only where it appears clearly that the prosecution of the law action will result in a fraud, gross wrong, or oppression, and that justice clearly requires equitable interference.

The power of a court of equity to interfere with

Ins. Co., 186 S.E. 691, 182 Ga. 589—Crandall v. Shepard, 143 S.E. 587, 166 Ga. 396—Arthur Tufts Co. v. De Jarnette Supply Co., 123 S.E. 16, 158 Ga. 85.

Miss.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.

N.J.—Braverman v. Braverman, 33 A.2d 890, 134 N.J.Eq. 4—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302—Koehler v. Saltzman, 4 A.2d 509, 125 N.J.Eq. 97—Borough of Eatontown v. Hendrickson, 157 A. 118, 109 N.J.Eq. 292.

Okl.—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.

Or.—Kroschel v. Martineau Hotels, 18 P.2d 818, 142 Or. 31.

Tenn.—Ætna Life Ins. Co. v. Bellos, 14 S.W.2d 961, 158 Tenn. 554, denying rehearing 13 S.W.2d 795, 158 Tenn. 554.

Wash.—Burdick v. Burdick, 267 P. 767, 148 Wash. 15.

W.Va.—Price v. Price, 188 S.E. 770, 118 W.Va. 48.

32 C.J. p 85 note 86.

Equity will not enjoin law action

(1) Because of the appointment of a receiver pending action.—Farmers' & Merchants' State Bank of Hawley v. Mellum, 217 N.W. 381, 173 Minn. 325, remittitur denied 219 N.W. 179, 174 Minn. 605.

(2) On notes, because proof of unauthorized oral agreement to look to other than makers for payment could not be made therein.—Giberson v. First Nat. Bank, 136 A. 323, 100 N.J.Eq. 502.

Election as to form of action

An employee's right under the federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to choose among three forms in which to bring action should not be enjoined, unless the employee's action imposes an unusual hardship on the employer.—Baltimore & O. R. Co. v. Inlow, 28 N.E.2d 373, 64 Ohio App. 134.

25. U.S.—Paramino Lumber Co. v. Marshall, D.C.Wash., 18 F.Supp. 645, affirmed, C.C.A., 95 F.2d 203, certiorari denied 59 S.Ct. 63, 306 U.S. 603, 83 L.Ed. 382.

N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

Petition to enjoin suits against insurance company on ground that claims required presentation to industrial accident board and containing no express denial of plaintiff's cause of action, is not within equity's jurisdiction.—Malone v. Texas Indemnity Ins. Co., Tex.Civ.App., 9 S.W.2d 1055, error refused.

26. U.S.—Cruickshank v. Bidwell, N.Y., 20 S.Ct. 280, 176 U.S. 73, 44 L.Ed. 377—Safe-Deposit & Trust Co. of Baltimore v. City of Anniston, C.C.Ala., 96 F. 661.

N.J.—Morgan Realty Co. v. Pazen, 139 A. 712, 102 N.J.Eq. 33.

Unauthorized prosecution of suit

Defendant may be enjoined from prosecuting a certain action on behalf of another, which defendant was without color of right to do, since remedy of waiting until defendant's action came up for trial and then asking court not to permit defendant to conduct case was not adequate.—Steinberg v. McKay, 3 N.E.2d 23, 295 Mass. 139.

Adequacy or inadequacy of other remedies in general see supra § 25.

27. Ala.—Carpenter v. First Nat. Bank, 181 So. 239, 236 Ala. 213.

28. Tex.—Galveston, H. & S. A. R. Co. v. Dowe, 6 S.W. 790, 70 Tex. 1—Bird v. Alexander, Civ.App., 294 S.W. 305.

32 C.J. p 86 note 89.

Injunction cannot be used to review a judgment, by enjoining the prosecution of the action, where the right of appeal has been taken away by statute.

Mo.—Dorris Motor Car Co. v. Colburn, 270 S.W. 339, 307 Mo. 137.

Tex.—Courchesne v. Santa Fe Fuel Co., Civ.App., 155 S.W. 684.

Injunctive relief against judgments generally see the C.J.S. title Judgments § 341 et seq, also 34 C.J. p 442 note 1 et seq.

Remedy by appeal as precluding injunction see infra § 40 k.

29. N.J.—Hamilton v. Dobbs, 19 N.J.Eq. 227.

N.Y.—Woodworth v. Van Buskerk, 1 Johns.Ch. 432.

30. Ga.—Hall v. Holmes, 42 Ga. 179.

N.Y.—Huyler v. Westervelt, 7 Paige 155.

32 C.J. p 99 note 41.

Bail trover action cannot be enjoined because of inability to give required bond.—American Surety Co. v. Sealey, 161 S.E. 253, 173 Ga. 754—Skinner v. Stewart Plumbing Co., 144 S.E. 261, 166 Ga. 800—Calhoun v. Davis, 137 S.E. 236, 163 Ga. 760—Napier v. Varner, 101 S.E. 580, 149 Ga. 586.

31. Iowa.—Hall v. Chicago, B. & Q. R. Co., 124 N.W. 1073, 146 Iowa 225.

32 C.J. p 86 note 90.

32. Md.—Glenn v. Fowler, 8 Gill & J. 340.

Mich.—Wierengo v. Mason, 74 N.W. 183, 115 Mich. 646.

33. Fla.—Pepple v. Rogers, 140 So. 205, 209, 104 Fla. 462, quoting **Corpus Juris.**

Ga.—Radcliffe v. Varner, 56 Ga. 222.

N.Y.—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111.

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Okl.—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.

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Election as to form of action

An employee's right under the federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to choose among three forms in which to bring action should not be enjoined, unless the employee's action imposes an unusual hardship on the employer.—Baltimore & O. R. Co. v. Inlow, 28 N.E.2d 373, 64 Ohio App. 134.

25. U.S.—Paramino Lumber Co. v. Marshall, D.C.Wash., 18 F.Supp. 645, affirmed, C.C.A., 95 F.2d 203, certiorari denied 59 S.Ct. 63, 306 U.S. 603, 83 L.Ed. 382.

N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.

Petition to enjoin suits against insurance company on ground that claims required presentation to industrial accident board and containing no express denial of plaintiff's cause of action, is not within equity's jurisdiction.—Malone v. Texas Indemnity Ins. Co., Tex.Civ.App., 9 S.W.2d 1055, error refused.

26. U.S.—Cruickshank v. Bidwell, N.Y., 20 S.Ct. 280, 176 U.S. 73, 44 L.Ed. 377—Safe-Deposit & Trust Co. of Baltimore v. City of Anniston, C.C.Ala., 96 F. 661.

N.J.—Morgan Realty Co. v. Pazen, 139 A. 712, 102 N.J.Eq. 33.

Unauthorized prosecution of suit

Defendant may be enjoined from prosecuting a certain action on behalf of another, which defendant was without color of right to do, since remedy of waiting until defendant's action came up for trial and then asking court not to permit defendant to conduct case was not adequate.—Steinberg v. McKay, 3 N.E.2d 23, 295 Mass. 139.

Adequacy or inadequacy of other remedies in general see supra § 25.

27. Ala.—Carpenter v. First Nat. Bank, 181 So. 239, 236 Ala. 213.

28. Tex.—Galveston, H. & S. A. R. Co. v. Dowe, 6 S.W. 790, 70 Tex. 1—Bird v. Alexander, Civ.App., 294 S.W. 305.

32 C.J. p 86 note 89.

Injunction cannot be used to review a judgment, by enjoining the prosecution of the action, where the right of appeal has been taken away by statute.

Mo.—Dorris Motor Car Co. v. Colburn, 270 S.W. 339, 307 Mo. 137.

Tex.—Courchesne v. Santa Fe Fuel Co., Civ.App., 155 S.W. 684.

Injunctive relief against judgments generally see the C.J.S. title Judgments § 341 et seq, also 34 C.J. p 442 note 1 et seq.

Remedy by appeal as precluding injunction see infra § 40 k.

29. N.J.—Hamilton v. Dobbs, 19 N.J.Eq. 227.

N.Y.—Woodworth v. Van Buskerk, 1 Johns.Ch. 432.

30. Ga.—Hall v. Holmes, 42 Ga. 179.

N.Y.—Huyler v. Westervelt, 7 Paige 155.

32 C.J. p 99 note 41.

Bail trover action cannot be enjoined because of inability to give required bond.—American Surety Co. v. Sealey, 161 S.E. 253, 173 Ga. 754—Skinner v. Stewart Plumbing Co., 144 S.E. 261, 166 Ga. 800—Calhoun v. Davis, 137 S.E. 236, 163 Ga. 760—Napier v. Varner, 101 S.E. 580, 149 Ga. 586.

31. Iowa.—Hall v. Chicago, B. & Q. R. Co., 124 N.W. 1073, 146 Iowa 225.

32 C.J. p 86 note 90.

32. Md.—Glenn v. Fowler, 8 Gill & J. 340.

Mich.—Wierengo v. Mason, 74 N.W. 183, 115 Mich. 646.

33. Fla.—Pepple v. Rogers, 140 So. 205, 209, 104 Fla. 462, quoting **Corpus Juris.**

Ga.—Radcliffe v. Varner, 56 Ga. 222.

N.Y.—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111.

the general right of a person to sue and to restrain him therefrom will be exercised only where it appears clearly that the prosecution of the law action will result in a fraud, gross wrong, or oppression,[34] and that conscience and justice clearly require equitable interference,[35] as where a person is attempting to, or would, through the instrumentality of an action at law, obtain an unconscionable advantage of another,[36] or where defendant in the action at law has without his own fault been handicapped by laches or inequitable conduct of plaintiff which would be sufficient to authorize the refusal of a decree in a suit in equity brought by him on the same cause of action.[37]

Abuse of process. An injunction may be granted where an unfair, oppressive, or fraudulent use is being made of legal process,[38] although a contrary view has been maintained on the ground that the remedy, if any, is at law for a malicious abuse of process.[39] Where, however, plaintiff in the action at law is not abusing the legal process, and defendant is not being oppressed or defrauded, defendant has no standing in a court of equity and no right to an injunction.[40]

c. Prevention of Irreparable Injury

An action or proceeding at law will be enjoined to prevent irreparable injury from the assertion of a doubtful right or title.

A judicial proceeding will be enjoined to restrain the assertion of doubtful rights in a manner productive of irreparable damage[41] and to prevent injury to a person from the doubtful title of others.[42] The injury must be an impending irreparable injury which can be averted only by injunctive proc-

34. U.S.—Miles v. Illinois Cent. R. Co., Tenn., 62 S.Ct. 827, 315 U.S. 698, 86 L.Ed. 1129, rehearing denied 62 S.Ct. 1037, 316 U.S. 708, 86 L.Ed. 1775.
Ill.—Lindheimer v. Supreme Liberty Life Ins. Co., 263 Ill.App. 524.
N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518—Briscoe v. O'Connor, 170 A. 884, 115 N.J.Eq. 360.

Suit on agreement or obligation for counsel fees will be restrained, pending investigation as to its fairness.—Raimondi v. Bianchi, 134 A. 866, 100 N.J.Eq. 238—Kelley v. Schwinghammer, 79 A. 260, 78 N.J. Eq. 437.
Fraud as ground for relief generally see infra subdivision g of this section.

35. Conn.—Tyler v. Hammersley, 44 Conn. 419, 26 Am.R. 479.
Fla.—Curtis v. Albritton, 132 So. 677, 101 Fla. 853.
Ill.—Chapman v. American Surety Co., 104 N.E. 247, 261 Ill. 594—Lindheimer v. Supreme Liberty Life Ins. Co., 263 Ill.App. 524.
Mass.—Dehon v. Foster, 4 Allen 545.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302—New York Life Ins. Co. v. Stein, 8 A.2d 555, 126 N.J.Eq. 258.
N.Y.—Travelers Indemnity Co. v. Burg, 1 N.Y.S.2d 172, 253 App.Div. 43.
Okl.—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.
Tenn.—Ætna Life Ins. Co. v. Bellos, 14 S.W.2d 961, 158 Tenn. 554, denying rehearing 13 S.W.2d 795, 158 Tenn. 554.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Com.App., 53 S.W.2d 1001, reversing, Civ.App., 37 S.W.2d 299.

Interference with jurisdiction of appellate court

A suit is enjoinable as interference with jurisdiction of appellate court where it attempts to relitigate matters which were raised or could have been raised in the former suit.—Ferguson v. Ferguson, Tex.Civ.App., 98 S.W.2d 847.

36. U.S.—Thorpe v. Wm. Filene's Sons Co., D.C.Mass., 40 F.2d 269—Baltimore & O. R. Co. v. Clem, D. C.W.Va., 36 F.Supp. 703, affirmed, C.C.A., 123 F.2d 399.
Fla.—Pepple v. Rogers, 140 So. 205, 209, 104 Fla. 462, quoting **Corpus Juris.**
Ill.—Sleichert v. Turek, 259 Ill.App. 467.
N.J.—Lurie v. J. J. Hockenjos Co., 170 A. 593, 115 N.J.Eq. 304, affirming 167 A. 766, 113 N.J.Eq. 504.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.
32 C.J. p 86 note 94.

Mere priority

A debtor cannot enjoin a creditor from proceeding at law to obtain a judgment on a legal demand simply because he would thereby obtain a preference over other creditors who did not obtain like judgments.—Hagan v. Dungannon Lumber Co., 134 S.E. 570, 145 Va. 568.

37. Me.—Clark v. Chase, 64 A. 493, 101 Me. 270.
Miss.—Wall v. Harris, 44 So. 36, 90 Miss. 671.
32 C.J. p 86 note 97.

38. U.S.—Brehme v. Watson, C.C.A. Cal., 67 F.2d 359, 362, citing **Corpus Juris.**
32 C.J. p 86 note 95.

39. Ark.—Baxley v. Laster, 101 S.W. 755, 82 Ark. 236, 118 Am.S.R. 64, 10 L.R.A.,N.S., 983, 12 Ann.Cas. 332.
32 C.J. p 86 note 96.

40. Iowa.—Thompson v. Great Western Acc. Assoc., 114 N.W. 31, 136 Iowa 557, 561.
N.J.—Briscoe v. O'Connor, 182 A. 855, 119 N.J.Eq. 378, reversing 179 A. 253, 118 N.J.Eq. 322.
32 C.J. p 87 note 98.

41. Colo.—Nelson v. Meyer, 180 P. 86, 66 Colo. 164.
Ill.—Sleichert v. Turek, 259 Ill.App. 467.
Mo.—Beck v. Hughes, App., 116 S.W. 2d 210.
32 C.J. p 87 note 99.

Fact that an insurance policy would become incontestable, under its clause limiting a contest thereof, before insurer could present its defense in an action on the policy, would be a special circumstance peculiar to the case, giving jurisdiction to equity to entertain suit to enjoin beneficiary's action on the policy.
Pa.—Maccabees v. Cappas, 91 Pittsb. Leg.J. 88.
Tenn.—Humpston v. State Mut. Life Assur. Co. of Worcester, Mass., 256 S.W. 438, 148 Tenn. 439, 31 A.L.R. 78.

42. Mich.—Shaw v. Chambers, 12 N. W. 486, 48 Mich. 355.
N.J.—Henwood v. Jarvis, 27 N.J.Eq. 247.
Defect in title as ground for injunction generally see infra § 40 d.

ess.[43] A mere threat of suit,[44] or a mere apprehension or fear that an action may be brought in the future,[45] or that the court of law may decide improperly[46] is not sufficient for injunctive relief.

d. Protection of Officers of Court

An action against an officer of a court of equity for carrying out his orders ordinarily will be enjoined.

If an officer of a court of equity is sued at law for carrying out his orders, the action ordinarily will be enjoined;[47] and this rule applies for the protection of a solicitor, as an officer of the court, in the proper conduct of his duties.[48] Where, however, the officer has transcended his authority and interfered with the personal rights of others, the court may allow the injured person to seek his redress by an action at law, and refuse an injunction.[49]

e. Confining Litigation to One Forum

An injunction may be issued to restrain the removal of litigation from a forum having jurisdiction thereof to another forum.

Where a court whose power is adequate to the administration of complete justice in the premises has acquired jurisdiction of a case, the litigation should be confined to that forum, and any attempt by either party to divert the litigation to another court will be restrained by injunction,[50] especially after an adverse decision on the claim of the party seeking relief in a new forum.[51] The observance of this rule is essential to the due and orderly administration of justice and the integrity of judgments and decrees,[52] and in order to render valid its operation it is not essential that the element of irreparable damage should be involved.[53] Furthermore the propriety of the remedy by injunction is not affected by the fact that the court subsequently acquiring jurisdiction of the matter has equity as well as common-law powers.[54]

f. Aid of Equitable Remedy

Equity having acquired jurisdiction may grant an injunction in aid of the equitable remedy, such as to obtain a discovery.

Where complainant shows himself to be entitled to some purely equitable remedy, thus giving equity jurisdiction of the case, an injunction will be granted to restrain pending or threatened actions at law concerning the same subject matter,[55] in order

43. U.S.—Truly v. Wanzer, Miss., 5 How. 141, 12 L.Ed. 88—Atlantic Pipe Line Co. v. State Tax Board, D.C.Tex., 12 F.Supp. 265—Farmers' State Bank of New Washington, Ohio v. Board of Com'rs of Jensen Bridge Dist., D.C.Fla., 295 F. 755.
Fla.—Crawford v. Bradford, 2 So. 782, 23 Fla. 404.
N.J.—Braverman v. Braverman, 33 A. 2d 890, 134 N.J.Eq. 4, affirmed 37 A.2d 57.

44. U.S.—Northport Power & Light Co. v. Hartley, Wash., 51 S.Ct. 581, 283 U.S. 568, 75 L.Ed. 1275, affirming, D.C., 35 F.2d 199—Atlantic Pipe Line Co. v. State Tax Board, D.C.Tex., 12 F.Supp. 265.
Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.

45. U.S.—Farmers' State Bank of New Washington, Ohio v. Board of Com'rs of Jensen County, D.C.Fla., 295 F. 755.
Ala.—Robertson v. Montgomery Baseball Ass'n, 37 So. 388, 141 Ala. 348, 109 Am.S.R. 30, 3 Ann.Cas. 965.

46. U.S.—Farmers' State Bank of New Washington, Ohio, v. Board of Com'rs of Jensen Bridge Dist., D.C.Fla., 295 F. 755.
W.Va.—National Tube Co. v. Smith, 50 S.E. 717, 57 W.Va. 210, 1 L.R.A., N.S., 195.
32 C.J. p 86 note 91.

47. N.Y.—Matter of Merritt, 5 Paige 125, affirmed 16 Wend. 405.
32 C.J. p 87 note 2.

48. N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518.

49. N.Y.—Mackay v. Blackett, 9 Paige 437.

50. Cal.—Engleman v. Superior Court in and for Fresno County, 288 P. 723, 105 Cal.App. 754.
Del.—Peyton v. William C. Peyton Corporation, 187 A. 849, 21 Del.Ch. 299.
Pa.—Trees v. Glenn, 181 A. 579, 582, 319 Pa. 487, 102 A.L.R. 304, quoting **Corpus Juris.**
Tex.—Cooper v. United Producers Co., Civ.App., 95 S.W.2d 211.
32 C.J. p 87 note 7.

Plea in abatement as inadequate remedy
Tex.—Cooper v. United Producers Co., supra.

Executor, waiting until proceeding in surrogate's court, could not remove from surrogate's court matter over which surrogate had jurisdiction.—MacLean v. Hart, 239 N.Y.S. 1, 228 App.Div. 379.

Where court does not have jurisdiction of all parties in interest, injunction will not issue to prevent bringing of suit elsewhere if effect of such injunction would be to interfere with attempt by defendant to bring matter to head in court where all parties could be served and their respective claims determined.—Peyton v. William C. Peyton Corporation, 187 A. 849, 21 Del.Ch. 299.

51. N.J.—Logan v. Flattau, 67 A. 1007, 73 N.J.Eq. 222.
N.Y.—Conover v. New York, 25 Barb. 513.
Pa.—Trees v. Glenn, 181 A. 579, 582, 319 Pa. 487.

52. Del.—Peyton v. William C. Peyton Corporation, 187 A. 849, 852, 21 Del.Ch. 299, citing **Corpus Juris.**
Pa.—Trees v. Glenn, 181 A. 579, 319 Pa. 487.
Va.—Shanks v. Calvert Mortgage & Deposit Co., 89 S.E. 99, 119 Va. 239.

53. Tex.—Blume v. J. I. Case Threshing Mach. Co., Civ.App., 225 S.W. 831.

54. N.Y.—Conover v. New York, 25 Barb. 513.

55. Fla.—Pepple v. Rogers, 140 So. 205, 209, 104 Fla. 462, quoting **Corpus Juris.**
Mo.—State ex rel. Gabbert, 246 S.W. 208, 295 Mo. 538.
32 C.J. p 88 note 14.

In suit for accounting
Defendant in a law action on common counts was entitled to continue litigation in equity in suit for accounting and to enjoin further proceeding at law where controversy be-

to prevent circuity of action and a multiplicity of suits and to render justice more completely and conveniently.[56]

To obtain discovery. An injunction may be issued, in a proper case, on a bill for discovery.[57] A court of equity may compel a discovery in aid of a defense at law and enjoin proceedings at law until an answer to the bill of discovery has been obtained,[58] and it does not lose this jurisdiction because the law court's powers have been enlarged by statute so as to make the equitable remedy unnecessary under some circumstances.[59] The discovery sought, however, must be of facts which are material and incapable of proof without the answer of defendant,[60] and it must be shown wherein the facts are material, as the court will not rely exclusively on the party's own opinion as to the materiality of the disclosure sought.[61]

g. Fraud

Fraud ordinarily is not a ground for enjoining an action at law unless it gives the person bringing the action an unfair advantage and the court at law cannot give complete and adequate relief against the fraud.

As a general rule, an action at law based on or involving fraud will not be enjoined if there is nothing in the nature of the fraud or inquiries to which it gives rise which affords a reason why complete and adequate redress cannot be had at law.[62] On the other hand, an action at law will be enjoined where by reason of the fraud the person bringing the action has an unfair advantage in the law court which cannot give to complainant complete and adequate relief against the fraud;[63] but the unfair advantage must be due to the fraud, and not to negligence on the part of complainant.[64] In any event, an injunction will not be granted on the ground of fraud if the facts alleged do not amount to fraud[65] or the fraudulent representations were made by a third person, not acting for plaintiff at law.[66]

tween parties grew out of a construction contract and numerous collateral agreements affecting interpretation thereof, and it was shown that there were unsettled accounts between parties and transactions that were involved to extent that court of equity could treat them more efficaciously than a court of law.—North American Const. Co. v. Olson, 179 So. 659, 131 Fla. 440.

Protection of decree

(1) In general.—In re Zimmermann, C.C.A.N.Y., 66 F.2d 397, affirming, D.C., 4 F.Supp. 801, and certiorari denied Z & F Assets Realization Corporation v. Doerschuck, 54 S. Ct. 208, 290 U.S. 697, 78 L.Ed. 599.

(2) To protect decree of injunction.—Kane & E. R. Co. v. Pittsburgh & W. R. Co., 88 A. 793, 241 Pa. 608—32 C.J. p 87 note 7 [e].

Injunction incidental to:

Foreclosure of mortgage see the C.J.S. title Mortgages §§ 656–674, also 42 C.J. p 119 note 84–p 132 note 3.

Partition see the C.J.S. title Partition § 86, also 47 C.J. p 396 note 78–p 397 note 92.

Specific performance see the C.J.S. title Specific Performance § 122, also 58 C.J. p 1145 note 73–p 1148 note 7.

56. U.S.—Camp v. Boyd, App.D.C., 33 S.Ct. 785, 229 U.S. 530, 57 L.Ed. 1317.
Ga.—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203.
32 C.J. p 88 note 15.

57. Md.—Glenn v. Fowler, 8 Gill & J. 340.
32 C.J. p 88 note 15 [b].
Retaining jurisdiction on bill for discovery for other equitable relief generally see Equity § 78.

58. Conn.—Peyton v. Werhane, 11 A.2d 800, 126 Conn. 382.
32 C.J. p 98 note 32.

59. U.S.—Carpenter v. Winn, N.Y., 31 S.Ct. 683, 221 U.S. 533, 55 L.Ed. 842.
Conn.—Peyton v. Werhane, 11 A.2d 800, 126 Conn. 382.

60. Hawaii.—Gay v. Haiku Fruit & Packing Co., 29 Hawaii 702.
32 C.J. p 98 note 33.

61. N.Y.—McIntyre v. Mancius, 3 Johns.Ch. 45, reversed on other grounds 16 Johns. 592.

62. U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872.
W.Va.—Western & Southern Life Ins. Co. v. Smith, 158 S.E. 912, 110 W.Va. 473.
32 C.J. p 96 note 3.
As defense to action at law see infra § 40.

63. U.S.—Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, D. C.W.Va., 24 F.Supp. 249, modified on other grounds, C.C.A., U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., 104 F.2d 856.
Mo.—Dorris Motor Car Co. v. Colburn, 270 S.W. 339, 307 Mo. 137.
N.J.—Verdi v. Jefferson Trust Co., 198 A. 543, 123 N.J.Eq. 446.
N.Y.—Boyajian v. Boyajian, 43 N.Y.S.2d 643.
W.Va.—Western & Southern Life Ins. Co. v. Smith, 158 S.E. 912, 110 W.Va. 473.
32 C.J. p 96 notes 4, 5.

Rule applied to restrain action on insurance policy procured by fraud.
Ga.—Whetstone v. New York Life Ins. Co., 169 S.E. 352, 177 Ga. 24.
N.J.—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J.Eq. 33.
Pa.—Home Friendly Ins. Co. v. Magdon, 36 Luz.Leg.Reg. 41—Maccabees v. Cappas, 91 Pittsb.Leg.J. 88.

Conspiracy to defraud

If defendant corporation permits judgment to be taken without cause, stockholders may restrain prosecution of cause on showing conspiracy to defraud.—Schmidt v. A. M. Schwartz Bldg. & Const. Co., 250 N.Y.S. 732, 232 App.Div. 549.

64. Del.—Witaker v. Wickersham, 5 Del.Ch. 187.
Tex.—Harrison v. Crumb, 1 Tex.App. Civ.Cas. § 991.

65. Ill.—Scott v. Hatch, 280 Ill.App. 269.
N.J.—Universal Indemnity Ins. Co. v. Caltagirone, 182 A. 862, 119 N.J.Eq. 491.
32 C.J. p 96 note 7.

Fraud of insured

Misrepresentation or fraud not deceitfully or willfully made by insured in connection with application for a life policy is not sufficient, without more, to justify injunctive relief to insurer in a suit to enjoin a law action brought by insured to recover disability benefits.—New York Life Ins. Co. v. Stein, 8 A.2d 555, 126 N.J.Eq. 253.

66. Va.—Griffith v. Reynolds, 4 Gratt. 46, 45 Va. 46.

h. Accident and Mistake

Equity will enjoin the use of an advantage gained in an action at law by accident or mistake.

A court of equity will interfere to restrain by injunction the use of an advantage gained in a court of law, which must necessarily make that court an instrument of injustice, in cases where such advantage has been gained by accident or mistake.[67] On the other hand accident and mistake have been held to constitute no ground for enjoining an action at law where there has been no refusal to correct the mistake on the part of the person sought to be enjoined,[68] or where he acknowledges the error and offers to rectify it.[69] The usual rules apply in the matter of requiring the mistake to be mutual[70] and in cases where the mistake is purely a mistake of law.[71] Accident and mistake may also be made grounds for granting an injunction of an action at law, and for other specific equitable relief.[72]

§ 38. —— Multiplicity of Suits

a. In general
b. Assertion of rights of many against one
c. Assertion of rights of one against many
d. Assertion of rights of many against many
e. Numerous suits between two parties
f. Cause of action available as set-off or counterclaim
g. Adequate remedy at law by consolidation
h. Award as incidental to jurisdiction on other grounds
i. Ascertaining right at law as condition precedent

a. In General

To prevent a multiplicity of suits or circuity of action, a court of equity may determine the rights of all the parties in one proceeding and enjoin all the pending or threatened actions at law relating to the same subject matter.

In the exercise of its jurisdiction to prevent a multiplicity of suits or a circuity of action, as discussed generally in Equity §§ 42, 43, and supra § 24, a court of equity may determine the rights of all the parties in one proceeding and enjoin all the pending or threatened actions at law relating to the same subject matter or cause of action,[73] or according to some decisions may restrain the prosecution of every suit but one and allow that one to proceed to trial in order to test the legal questions on which all the actions are dependent.[74] The right

67. Mich.—Scott v. Grow, 3 N.W.2d 254, 301 Mich. 226, 141 A.L.R. 819.
Mo.—Dorris Motor Car Co. v. Colburn, 270 S.W. 339, 307 Mo. 137.
N.J.—Briscoe v. O'Connor, 170 A. 884, 115 N.J.Eq. 360.
32 C.J. p 97 note 11.

68. Ala.—Williams v. Mitchel, 30 Ala. 299.
32 C.J. p 97 note 13.

69. Ga.—Conyers v. Hamilton, 19 Ga. 76.
32 C.J. p 97 note 14.

70. N.J.—Rommel v. Mass, Ch., 32 A. 127.
32 C.J. p 97 note 15.

71. U.S.—Griswold v. Hazard, R.I., 11 S.Ct. 972, 141 U.S. 260, 35 L.Ed. 678.
32 C.J. p 97 note 16.

72. U.S.—Crellin v. Ely, C.C.Cal., 13 F. 420, 7 Sawy. 532.
Fla.—Raulerson v. Peeples, 84 So. 370, 79 Fla. 367.
Mass.—Eustis Mfg. Co. v. Saco Brick Co., 84 N.E. 449, 193 Mass. 212.
Mich.—Scott v. Grow, 3 N.W.2d 254, 301 Mich. 226, 141 A.L.R. 819.
N.J.—Field v. Cory, 7 N.J.Eq. 574.
Or.—De Tweed Northwestern & Pacific Hypotheekbank v. W. M. Barnett Estate, 85 P.2d 361, 160 Or. 406.
32 C.J. p 97 note 19.
Additional, alternative, or incidental relief generally see infra § 217.

73. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
Ga.—Babb v. McKinnon, 196 S.E. 488, 185 Ga. 663—Zachry v. Industrial Loan & Investment Co., 186 S.E. 832, 182 Ga. 738—Sexton v. MacDougald Const. Co., 168 S.E. 32, 176 Ga. 468.
Mich.—City of Grand Rapids v. Central Land Co., 292 N.W. 579, 294 Mich. 103.
N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.
Or.—Logan v. Equitable Trust Co., 29 P.2d 511, 145 Or. 684.
S.D.—City of Sioux Falls v. Hossack, 5 N.W.2d 880.
Tenn.—Dixie Fire Ins. Co. v. American Confectionery Co., 136 S.W. 915, 124 Tenn. 247, 34 L.R.A.,N.S., 897.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Com.App., 53 S.W.2d 1001, reversing, Civ.App., 37 S.W.2d 299—Commonwealth Casualty & Insurance Co. v. Morris, Civ.App., 155 S.W.2d 394—Gulf Refining Co. v. Boren, Civ.App., 50 S.W.2d 883.
32 C.J. p 88 note 18.

Injunctions favored

"Injunction to restrain a multiplicity of suits is not only permitted, but favored, by the courts."—Luttring v. American Fruit Growers, Tex.Civ.App., 49 S.W.2d 980, 983.

Failure to join unnecessary parties to action does not warrant injunction against prosecution of the action, to avoid a multiplicity of suits.—Robinson v. Turfitt, Miss., 11 So.2d 440.

Multiplicity of suits as ground for enjoining suit in equity see infra § 41.

74. Mo.—Kansas City Breweries Co. v. Markowitz, 221 S.W. 398, 203 Mo. App. 390, transferred, see, Sup., 212 S.W. 849.
N.Y.—Third Ave. R. Co. v. New York, 54 N.Y. 159—Cuthbert v. Chauvet, 14 N.Y.S. 385, 20 N.Y.Civ.Proc. 391.

Where many ejectment suits are pending, it has been held proper, even though the title has not been determined, to enjoin all but one and to let that one proceed.—Cuthbert v. Chauvet, supra.

Successive actions in ejectment generally see the C.J.S. title Judgments § 739, also 34 C.J. p 947 note 14 et seq.

to an injunction in such cases does not depend solely on the merits of the actions to be enjoined,[75] and the existence of an adequate defense or remedy at law is immaterial,[76] as the purpose of the injunction is to dispense with cumbersome and time-wasting procedure in a multitude of suits with the attendant trouble and expense to the public as well as to complainant,[77] although the bringing of several suits will not be enjoined merely for the purpose of preventing costs or expenses of separate actions.[78]

What constitutes a multiplicity of suits, such as to justify the interference of equity, cannot be determined by any fixed rule,[79] but rests within the sound discretion of the court granting the writ,[80] and, unless it is brought directly within the principle of some preceding case,[81] is to be determined from the facts and circumstances of the particular case,[82] such as in respect of the number of actions which may constitute a multiplicity.[83] The mere fact that there is a multitude of actions pending or threatened does not in itself constitute multiplicity of actions in such sense that equity will enjoin them;[84] but before several actions at law will be enjoined in order that the controversies may be determined in a single suit, it must appear that the different suits may be determined by the settlement of one or more issues of law or fact common to them all, so that a determination of one will be practically a determination of all.[85]

75. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.

76. Cal.—Lincoln v. Superior Court of Madera County, 124 P.2d 179, 51 Cal.App.2d 61.
N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.
32 C.J. p 88 note 18.

77. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
Tex.—Cravens v. Adams, Civ.App., 94 S.W.2d 877—Luttring v. American Fruit Growers, Civ.App., 49 S.W. 2d 980, 983.
32 C.J. p 88 note 18.

"It is . . . a question of vast importance to the taxpayers of the state, whose tax money pays the judges, the juries, and officers of the court. The public can claim protection from a monopoly of the time of the courts by litigious men who stand for their own interests regardless of the rights of others. A multiplicity of suits, not only vexes and harasses the unfortunate defendant, but tramples upon and impairs the rights of the public. Public policy demands a repression of a multiplicity of suits on the same subject, based on the same or similar evidence."—Luttring v. American Fruit Growers, supra.

78. S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S. C. 369.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S. W.2d 1001.
32 C.J. p 89 note 27.

Counsel fees

Expense which insurer would incur for counsel fees in defending a number of actions against insured truck owner as result of collision of truck with bus is not ground for enjoining such actions pending determination of insurer's liability to insured.—Columbia Casualty Co. v. Thomas, D.C.Fla., 20 F.Supp. 251.

79. Tex.—Curfman v. Jefferson Standard Life Ins. Co., Civ.App., 126 S.W.2d 745—St. Louis Southwestern R. Co. v. Woldert Grocery Co., Civ.App., 162 S.W. 1174.

80. Mass.—McLaughlin v. Levenbaum, 142 N.E. 906, 248 Mass. 170.
Tex.—Curfman v. Jefferson Standard Life Ins. Co., Civ.App., 126 S.W. 2d 745.

81. U.S.—Hale v. Allinson, Pa., 23 S.Ct. 244, 188 U.S. 56, 47 L.Ed. 380.
Tex.—Houston Heights Water & Light Ass'n v. Gerlach, Civ.App., 216 S.W. 634.

82. Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.
Tex.—St. Louis Southwestern R. Co. v. Woldert Grocery Co., Civ.App., 162 S.W. 1174.
32 C.J. p 89 note 23.

Matters to be considered

Parties' real and substantial convenience, adequacy of plaintiff's legal remedy, different parties' situations, points to be contested, and result of assuming or denying jurisdiction must be considered.—Armour & Co. v. Haugen, C.C.A.N.D., 95 F.2d 196—32 C.J. p 89 note 23 [a].

83. Tex.—Luttring v. American Fruit Growers, Civ.App., 49 S.W.2d 980.

Two suits are in no case sufficient to constitute a multiplicity of actions such as equity will relieve against by injunction.—Susquehanna SS. Co., Inc. v. A. O. Anderson & Co., Inc., 186 N.Y.S. 338, 195 App.Div. 161—32 C.J. p 90 note 36.

Two suits filed and many threatened constitute a multiplicity of suits.—Luttring v. American Fruit Growers, Tex.Civ.App., 49 S.W.2d 980.

84. U.S.—Frischer & Co. v. Elting, C.C.A.N.Y., 60 F.2d 711, certiorari denied 53 S.Ct. 96, 287 U.S. 649, 77 L.Ed. 561—Travelers Ins. Co. v. Helmer, D.C.Ga., 15 F.Supp. 355.
Del.—Murphy v. Wilmington, 11 Del. 108, 22 Am.S.R. 345.
Ill.—People v. Universal Chiropractors' Assoc., 134 N.E. 4, 302 Ill. 228.
32 C.J. p 89 note 26.

The multiplicity abhorred in equity "includes something less . . . than the dictionary definition of the word, but when there are but four suits growing out of four different contracts, and when a single assertion is made upon each contract, one cannot certainly say that there is a multiplicity, in the equity sense."—Union Central Life Ins. Co. v. McAden, D.C.Tex., 21 F.Supp. 110, 112.

85. U.S.—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 92 F.2d 845.
Cal.—Lincoln v. Superior Court of Madera County, 124 P.2d 179, 51 Cal.App.2d 61.
Neb.—Epp v. Federal Trust Co., 242 N.W. 922, 123 Neb. 375.
Tex.—Curfman v. Jefferson Standard Life Ins. Co., Civ.App., 126 S.W. 2d 745—Standard Inv. Co. v. Dowdy, Civ.App., 122 S.W.2d 1107, error dismissed, judgment correct—Eclipse Oil Co. v. McAlister, Civ. App., 103 S.W.2d 420, error dismissed—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S. W.2d 1001—Fleming-Stitzer Road Bldg. Co. v. Chastain, Civ.App., 241 S.W. 619.

Each action must rest on virtually the same evidence in order to invoke equity to prevent multiplicity of suits.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Tex.Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S.W. 2d 1001.

It is sufficient to sustain an injunction pendente lite that all the parties to suits sought to be re-

Hardship of which applicant may complain. As a general rule the multiplicity of suits must be one to which complainant will be subject and of which he may complain.[86] An injunction should be denied where there is no showing of a necessity for, or probability that there will be, a multiplicity of suits;[87] where it does not appear that the party asking the injunction has a defense to the actions at law;[88] or where a multiplicity of actions would not be prevented by the allowance of the injunction asked,[89] as where each of the causes of action involves the determination of a separate question of fact, and the determination of one claim would not settle the issues of the other claims.[90]

Commencement or imminency of actions. Although there is some authority to the contrary;[91] in order to make multiplicity of suits a ground for interposition of a court of equity, more than one suit must have been commenced, or at least about to be begun;[92] and, under some statutes, a judicial proceeding which is pending at the commencement of the action in which the injunction is asked can be stayed by injunction only when necessary to prevent a multiplicity of such proceedings.[93]

b. Assertion of Rights of Many against One

Equity generally may enjoin numerous actions by different plaintiffs against one defendant, if the questions of law and fact involved are the same, and the various parties have the same common interest therein.

Where numerous actions are brought by different plaintiffs against one defendant, the authorities agree that equity may award an injunction for the

strained are substantially the same, and that all the causes of action arose out of the same transaction, and were connected with the same subject matter.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.

Actions as to liability of truck owner and of insurer

Occupants of bus are entitled to have their actions against owner of truck which collided with bus speedily tried and determined, and hence such actions will not be enjoined pending determination of insurer's liability to truck owner under terms of automobile liability policy to which such occupants were not parties, particularly since insurer's rights against estoppel will be amply protected by service of notice.—Columbia Casualty Co. v. Thomas, D.C.Fla., 20 F.Supp. 251.

86. Cal.—Grettenberg v. Goggin, App., 298 P. 56, 57, 113 Cal.App. 252, quoting **Corpus Juris.**
32 C.J. p 89 note 28.

Denial of an injunction to prevent multiplicity is not improper where it does not appear that plaintiff will suffer any damage or injury by the trial of the actions, or that the remedies pursued in the several actions are improper.—Phillips v. Clifford F. Reid, Inc., 39 P.2d 512, 3 Cal.App.2d 304, followed in 39 P.2d 515, 3 Cal. App.2d 753, and Phillips v. Chandler, 39 P.2d 516, 3 Cal.App.2d 753.

Fact that defendant, in injunction suit, may thereby be saved a multiplicity of suits cannot be urged by complainant.—Scruggs v. American Cent. Ins. Co., Ala., 176 F. 224, 100 C.C.A. 142, 36 L.R.A.,N.S., 92—Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C. A. 400, 32 L.R.A.,N.S., 940.
Persons entitled to injunction generally see infra § 51.

87. U.S.—Matthews v. Rodgers, Miss., 52 S.Ct. 217, 284 U.S. 521, 76 L.Ed. 447—Louisville & N. R. Co. v. Kentucky R. Commn., D.C. Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379.
Ga.—Morris v. West, 187 S.E. 861, 183 Ga. 214.
32 C.J. p 89 note 29.

Actions for disability benefits

Equitable jurisdiction to enjoin prosecution of actions at law for disability benefits under insurance policies incontestable as to accidental death provision for fraud cannot be invoked to avoid multiplicity of suits, all relief necessary for insurer's protection being obtainable in one such action.—Pacific Mut. Life Ins. Co. of California v. Parker, C. C.A.S.C., 71 F.2d 872.

88. Ark.—Jones v. Harris, 117 S.W. 1077, 90 Ark. 51.
Right at law as condition precedent to injunction see infra subdivision 1 of this section.

89. U.S.—Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C.A. 400, 32 L.R.A.,N. S., 940.
Cal.—Phillips v. Clifford F. Reid, Inc., 39 P.2d 512, 3 Cal.App.2d 304, followed in 39 P.2d 515, 3 Cal.App. 2d 753 and Phillips v. Chandler, 39 P.2d 516, 3 Cal.App.2d 753.
Mo.—Insurance Co. of North America v. Cullen, 141 S.W. 626, 237 Mo. 557.

90. U.S.—Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C.A. 400, 32 L.R.A.,N. S., 940.
Mass.—McLaughlin v. Levenbaum, 142 N.E. 906, 248 Mass. 170.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S. W.2d 1001.

Actions on separate policies

Where insured has brought separate actions at law on separate policies against several companies insuring the same risk, it has been held that the companies are not entitled to an injunction on a bill in which they all join to restrain the further prosecution of the actions at law, notwithstanding each of the policies provides that the company shall not be liable thereunder for any more than the proportion of the loss that the amount of the policy bears to the total amount of valid insurance, since no one company has under such a contract any interest in what another company shall pay under its policy.—Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C.A. 400, 32 L.R.A.,N.S., 940.

91. Mo.—Kansas City Breweries Co. v. Markowitz, 221 S.W. 398, 203 Mo.App. 390.
32 C.J. p 89 note 32.

92. U.S.—Boise Artesian Hot & Cold Water Co. v. Boise City, Idaho, 29 S.Ct. 426, 213 U.S. 276, 53 L.Ed. 796—General Film Co. v. Sampliner, Ohio, 252 F. 443, 164 C. C.A. 367.

Where no multiplicity of suits is pending or expected, an injunction will not be granted.—Troy & Boston R. Co. v. Boston, Hoosac Tunnel & Western R. Co., 86 N.Y. 107.

93. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216—Lincoln v. Superior Court of Madera County, 124 P.2d 179, 51 Cal.App.2d 61.

Such a statute forbids use of injunctive measures whenever end which could be reached through injunction can be reached with same effect through other forms of procedure.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.

"Injunction," in such statute, includes preliminary injunction or restraining order.—Lincoln v. Superior Court of Madera County, 124 P.2d 179, 51 Cal.App.2d 61.

purpose of avoiding a multiplicity of suits, only where the questions of law and fact involved in the actions are the same and the various parties have some common interest therein.[94] As discussed in Equity § 42 it is difficult to make a clear statement of the nature of the relationship which must subsist between the claims of the numerous persons, in order to invoke equitable relief, in avoidance of a multiplicity of suits. According to some decisions, in order to give jurisdiction to a court of equity to enjoin numerous actions by different plaintiffs against the same defendant, it will be sufficient if the causes of action grew out of the same transaction or occurrence and the questions of law or fact in all the actions are the same.[95] On the other hand, it has been held by other decisions that merely a community of interests in the questions of law and fact involved is not sufficient, but that there must also be a common interest in the subject matter involved in each action;[96] and that it is not sufficient that the actions are based merely on the same transaction and depend for their solution on the same questions of law and fact.[97] It has been held that equity will enjoin numerous suits against the same person only where they are based on the same cause of action,[98] or causes of action that can be legally joined in one suit,[99] and will not enjoin the prosecution of separate suits by several parties against the same person, and compel them to be determined in one proceeding, if each claim is a distinct cause of action, arising out of different transactions and relating to different property.[1] An injunction will not lie to prevent numerous actions by creditors when they are seeking to reach equitable assets of the debtor, to do which it is necessary that they should obtain judgment on their claims.[2] Where, however, the creditors of an insolvent estate are numerous, the executor may file a bill to enjoin them from proceeding at law and to have the estate administered in equity.[3]

c. Assertion of Rights of One against Many

An injunction will generally lie to prevent a multiplicity of actions by one against many where the various defendants seek to litigate the same legal right and liability.

According to some decisions an injunction will lie to prevent a multiplicity of actions at law brought by one person against many where the various defendants seek to litigate the same legal right and their legal liability, if there is any, is the same;[4] but other decisions hold that a community of interest in the questions of law and fact involved is not sufficient, but that it is necessary that there should be a community of interest in the subject matter.[5]

d. Assertion of Rights of Many against Many

Equity ordinarily will not enjoin the bringing of many actions or suits by different plaintiffs against different defendants, although the grounds of action are similar in character.

94. Minn.—Albert Lea v. Neilsen, 86 N.W. 83, 83 Minn. 246.
Tex.—American Nat. Ins. Co. v. Smith, Civ.App., 1 S.W.2d 515.
32 C.J. p 90 note 37.

Attaching creditor may apply for an injunction to restrain numerous replevin suits which have been brought to recover the property attached.—National Park Bank v. Goddard, 30 N.E. 566, 131 N.Y. 494—32 C.J. p 92 note 51.

Suit to enjoin depositors from prosecuting actions to recover deposits in violation of their agreements to cancel part thereof is maintainable in equity on ground of avoidance of multiplicity of suits, although there were only three such depositors.—Hollingsworth v. People's Bank of Carrollton, 177 S.E. 743, 179 Ga. 704.

Difference as to amount of damages
Where only difference in any of suits pending and threatened is in amounts of damages, defendant is entitled to injunction requiring plaintiffs to file joint suit.—Stewart v. Orsburn, Tex.Civ.App., 41 S.W.2d 1003.

95. Tex.—Cravens v. Adams, Civ. App., 94 S.W.2d 877, error refused —Luttring v. American Fruit Growers, Civ.App., 49 S.W.2d 980, error dismissed.
32 C.J. p 90 note 39.

96. U.S.—Georgia Power Co. v. Hudson, C.C.A.S.C., 49 F.2d 66, 75 A.L.R. 1439.
Ala.—McWhorter v. Williams, 155 So. 309, 228 Ala. 632.
N.J.—Fidelity & Deposit Co. of Maryland v. Storr, 169 A. 863, 115 N.J.Eq. 150.
S.D.—Hossack v. City of Sioux Falls, 10 N.W.2d 751.
W.Va.—Rummel v. Young, 149 S.E. 166, 168, 107 W.Va. 512, quoting Corpus Juris.
32 C.J. p 91 note 40.

97. W.Va.—Rummel v. Young, 149 S.E. 166, 168, 107 W.Va. 512, quoting Corpus Juris.
32 C.J. p 92 note 41.

98. U.S.—McCloskey v. San Antonio Tract. Co., Civ.App., 192 S.W. 1116.

Breach of contract
Lessee could enjoin bringing of multiplicity of separate suits in justice's court by lessors and third party, where suits involved breach of indivisible contract to employ third party.—Gulf Refining Co. v. Boren, Tex.Civ.App., 50 S.W.2d 883.

99. Tex.—McCloskey v. San Antonio Tract. Co., Civ.App., 192 S.W. 1116

1. U.S.—Travelers Ins. Co. v. Helmer, D.C.Ga., 15 F.Supp. 355.
Miss.—Mississippi Power Co. v. Ballard, 146 So. 874, 166 Miss. 631.
32 C.J. p 92 note 43.

2. U.S.—French v. Union Pac. R. Co., C.C.N.Y., 92 F. 28.
W.Va.—Rummel v. Young, 149 S.E. 166, 107 W.Va. 512.
Injunction in aid of creditors' suit see Creditors' Suits § 72.
Enjoining suits in equity see infra § 41.

3. S.C.—Thomson v. Palmer, 19 S.C. Eq. 32.

4. U.S.—Virginia-Carolina Chemical Co. v. New York Home Ins. Co., S.C., 113 F. 1, 51 C.C.A. 21.
Miss.—Tisdale v. Philadelphia Underwriters Ins. Co., 36 So. 568, 84 Miss. 709.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.
32 C.J. p 92 note 54.

5. Ala.—Ætna Ins. Co. v. Hann, 72 So. 48, 196 Ala. 234.
32 C.J. p 92 note 55.

A court of equity will not enjoin the bringing of many actions or suits by different plaintiffs against many different defendants, although the ground of these actions may be similar in character,[6] except where there exists a community of interest as to the questions of law and fact and as to the subject matter involved and the variety of actions or suits, if allowed to proceed, will result in a failure of justice and equity.[7]

e. Numerous Suits between Two Parties

Equity will not enjoin numerous actions by one party against another party, involving the same questions of law and fact, unless an injunction is necessary to promote justice and protect plaintiff from vexatious litigation.

Where actions brought or threatened are not in themselves vexatious and the right has not been established at law, to entitle a party to maintain a bill of peace the right claimed must be one affecting many persons, a suitable number of whom must be before the court;[8] if the right is disputed between two persons only, the bill generally will be dismissed, because as between them the first judgment might be used as a bar in all the other actions.[9] However, equity will enjoin numerous actions at law where the actions involve the same questions of fact and law, if justice will thereby be subserved;[10] but a court of equity will interfere on that ground only where it is clearly necessary to protect plaintiff from continued and vexatious litigation.[11]

f. Cause of Action Available as Set-Off or Counterclaim

An action on an independent cause of action in favor of defendant will not be enjoined, although he is entitled to use it as a counterclaim or set-off in another action in which he is sued.

In the exercise of its jurisdiction to prevent a multiplicity of suits or a circuity of actions, a court of equity will not enjoin an action on an independent cause of action at law in favor of a defendant against a plaintiff, even though such defendant may be entitled to make use of his cause of action as a counterclaim or set-off in the action which plaintiff has brought against defendant.[12]

g. Adequate Remedy at Law by Consolidation

Injunction will not be granted to prevent a multiplicity of suits where such multiplicity may be avoided by a consolidation of the actions.

Equity will not interfere by injunction to prevent a multiplicity of suits where it is possible to avoid such multiplicity by a consolidation of the actions at law, since the legal remedy is complete, certain, and adequate.[13] If, however, separate suits

6. Mo.—Insurance Co. of North America v. Cullen, 141 S.W. 626, 237 Mo. 557.
N.Y.—Prospect Park & C. I. R. Co. v. Morey, 140 N.Y.S. 380, 155 App. Div. 347.
32 C.J. p 92 note 57.

7. N.J.—Verdi v. Price, 7 A.2d 173, 125 N.J.Eq. 579, reversed on other grounds 19 A.2d 211, 129 N.J.Eq. 355.

8. N.Y.—Wallack v. New York Soc. for Reformation of Juvenile Delinquents, 67 N.Y. 23, affirming 3 Hun 84, 5 Thomps. & C. 310.
32 C.J. p 93 note 63.
Ascertaining right at law as condition precedent see infra subdivision 1 of this section.

9. U.S.—Travelers Ins. Co. v. Helmer, D.C.Ga., 15 F.Supp. 355.
32 C.J. p 93 note 63.
Fact that judgment would be final does not entitle party to injunction compelling plaintiff in justice's court to prosecute numerous claims in one suit.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Tex. Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S.W.2d 1001.
Former adjudication as ground for injunction generally see infra § 40 h.

10. U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co., Com.App., 53 S.W.2d 1001, reversing, Civ.App., 37 S.W.2d 299—Malone v. U. S. Fidelity & Guaranty Co., Civ.App., 9 S.W.2d 461.
W.Va.—National Life & Accident Ins. Co. v. Thompson, 183 S.E. 863, 117 W.Va. 61.
32 C.J. p 93 note 65.
Numerous actions for repeated or continuing trespasses may be enjoined.
Miss.—Henry v. Mobile & O. R. Co., 142 So. 11, 163 Miss. 354.
Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244—Wheeler v. McIntyre, 175 P. 892, 55 Mont. 295.
Injunction against trespasses to prevent multiplicity of suits see infra §§ 62, 64.

11. U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872.
32 C.J. p 93 note 66.
Single action not sufficient
"Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties."—Boise Artesian Hot & Cold Water Co. v. Boise City, Idaho, 29 S.Ct. 426, 430, 213 U.S. 276, 53 L.Ed. 796.
Vexatious and oppressive suits, see infra § 39.

12. N.Y.—Bradley Salt Co. v. Keating, 16 N.Y.S. 795, 61 Hun 251.
32 C.J. p 93 note 69.
Injunction because of set-off or counterclaim see infra § 40.

13. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
Mich.—City of Grand Rapids v. Central Land Co., 292 N.W. 579, 294 Mich. 103.
Tex.—Malone v. Texas Indemnity Ins. Co., Civ.App., 9 S.W.2d 1055, error refused.
32 C.J. p 93 note 71.
"There is no difference in the end to be reached, namely, the saving of expense, time and inconvenience, between a consolidation of cases for trial in a single equitable action by means of injunction and their trial in a consolidated action or in a single department of the court, where that is feasible, by simple order of court."—Bartholomew v. Bartholomew, 132 P.2d 297, 307, 56 Cal.App. 2d 216.
Stipulation
Multiplicity of suits is not ground for maintaining bill for injunction restraining two defendants from prosecuting separate ejectment actions where one defendant expresses

cannot be consolidated and remain within the jurisdictional limitations of the court in which they are brought, equity may give injunctive relief against the maintaining of the suits in such court,[14] and the interposition of equity to prevent a multiplicity of suits has also been held not to be defeated by the mere fact that in some anticipatory stage of the trial the various suits may eventually be consolidated into one cause of action.[15]

h. Award as Incidental to Jurisdiction on Other Grounds

An injunction to prevent a multiplicity of suits may be awarded as incidental to equity jurisdiction on other grounds.

Where equity has obtained jurisdiction of a case on some special equitable ground, complainant is entitled to an injunction, as incidental to his principal case, to prevent other actions on the same subject matter,[16] and if no right to relief in the principal case is shown the right to an injunction as incidental to the principal case necessarily fails.[17] Equity cannot be invoked to prevent a multiplicity of actions as an independent source of jurisdiction.[18]

i. Ascertaining Right at Law as Condition Precedent

Except where it can be justified on the ground of the great number of persons interested, an injunction to prevent a multiplicity of suits ordinarily will be allowed only where complainant has established his right at law.

Where a bill of peace cannot be justified on the ground of the great number of parties interested in common, see supra subdivisions a–d of this section, equity generally will interfere by injunction to prevent a multiplicity of suits only where complainant has satisfactorily established his right at law.[19] The rule requiring complainant to first ascertain or establish his right at law has been held inapplicable where he could do nothing to prevent the multiplication of suits, being bound by estoppel of a former judgment and at defendant's mercy except for such relief as may be given by a court of equity,[20] or where by reason of the amount in controversy there can be no appeal from a judgment in a court of law,[21] or where the actions are vexatious,[22] or, as has been held, where the systems

willingness to stipulate itself into ejectment action previously instituted by other defendant so that entire controversy can be determined in that action.—City of Grand Rapids v. Central Land Co., 292 N.W. 579, 294 Mich. 103.

Consolidation of actions generally see Actions §§ 107–116.

14. Tex.—Standard Inv. Co. v. Dowdy, Civ.App., 122 S.W.2d 1107, error dismissed, judgment correct.

15. Tenn.—Dixie F. Ins. Co. v. American Confectionery Co., 136 S.W. 915, 124 Tenn. 247, 34 L.R.A., N.S., 897.

Tex.—Standard Inv. Co. v. Dowdy, Civ.App., 122 S.W.2d 1107, error dismissed, judgment correct.

Reason for rule

"This presupposes that they would all be so brought, and likewise that they would all remain in court, when in truth there would be nothing to prevent the dismissal of any of the cases on voluntary motion of the plaintiff therein, and their subsequent renewal at such times and in such ways as would effectually prevent consolidation. . . . Moreover consolidated cases, involving numerous and divers questions affecting different branches of a composite controversy, cannot be so well handled in trials at law as in equity."—Dixie F. Ins. Co. v. American Confectionery Co., 136 S.W. 915, 926, 124 Tenn. 247, 34 L.R.A.,N.S., 897.

16. N.Y.—Boston & M. R. R. v. Delaware & Hudson Co., 197 N.E. 321, 268 N.Y. 382 affirming 273 N.Y.S. 670, 242 App.Div. 714.

32 C.J. p 93 note 74.

Insurer suing for cancellation of policy on ground of fraud in procurement and to avoid vexatious litigation incident to assignment could have law action on policy postponed until after determination of equity case.—Lincoln Nat. Life Ins. Co. v. Pearman, D.C.Mo., 43 F.2d 163, appeal dismissed, C.C.A., Pearman v. Lincoln Nat. Life Ins. Co., 50 F.2d 1080.

Jurisdiction of equity to prevent multiplicity of suits generally see Equity § 42.

17. Cal.—State v. McGlynn, 20 Cal. 233, 81 Am.D. 118.

Tex.—Leary v. International Coal & Wood Co., Civ.App., 185 S.W. 665.

32 C.J. p 94 note 77.

18. N.Y.—Boston & M. R. R. v. Delaware & Hudson Co., 197 N.E. 321, 268 N.Y. 382, affirming 273 N.Y.S. 670, 242 App.Div. 714.

19. U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872—New York Life Ins. Co. v. Marshall, C.C.A.La., 23 F.2d 225.

N.J.—Lehigh Valley R. Co. v. McFarlan, 31 N.J.Eq. 730.

32 C.J. p 94 note 80.

The prevention of a multiplicity of suits is not in itself alone an independent source of jurisdiction in equity, where the complaint presents no cause of action.—Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C.A. 400, 32 L.R.A.,N.S., 940.

Other legal or equitable rights to relief must exist in complainant before equity will enjoin prosecution of numerous actions at law growing out of same transaction.—Squires v. New Amsterdam Casualty Co., 60 S.W.2d 185, 187 Ark. 467—Jones v. Harris, 117 S.W. 1077, 90 Ark. 51.

Establishment of legal right as condition of invoking equitable relief generally see Equity § 17.

20. N.Y.—Norfolk & N. B. Hosiery Co. v. Arnold, 38 N.E. 271, 143 N. Y. 265, distinguishing Eldridge v. Hill, 2 Johns.Ch. 281.

21. Tex.—Galveston, H. & S. A. R. Co. v. Dowe, 7 S.W. 368, 70 Tex. 5—Engleman v. Missouri, K. & T. R. Co., Civ.App., 118 S.W. 1089.

32 C.J. p 94 note 82.

22. Neb.—Shevalier v. Stephenson, 139 N.W. 233, 92 Neb. 675.

Repeated dismissals and recommencements of action

If an action at law has proceeded to judgment and one of the parties brings vexatious suits in equity for new trial, dismissing his case and immediately recommencing it, defendant will not be required to establish legal rights before obtaining on cross petition an injunction restraining the further dismissing and recommencing of such action.—Shevalier v. Stephenson, supra.

Enjoining vexatious suits generally see infra § 39.

of law and equity have been merged.[23]

§ 39. —— Vexatious Suits

Equity generally may enjoin vexatious suits, instituted for annoyance or oppression or to cause unnecessary litigation.

While there is some authority to the contrary,[24] it is generally held, whether the litigation complained of is numerous actions between the same parties or numerous actions brought by many against one, that equity may enjoin vexatious suits, not brought in good faith and instituted for annoyance or oppression or to cause unnecessary litigation.[25] Actions, however, are not necessarily vexatious because they are numerous,[26] and a clear and substantial case must be made out to authorize a court of equity to enjoin suits on the grounds that they are vexatious and oppressive.[27] One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened unnecessarily, not really for the purpose of protecting his rights, but maliciously to vex, annoy, and injure another.[28]

§ 40. Existence of Another and Sufficient Remedy

a. Remedy at law in general
b. Defenses available in actions at law in general
c. Equitable defenses
d. Want or failure of consideration
e. Fraud or mistake
f. Payment, discharge, or settlement
g. Set-off or counterclaim
h. Former adjudication
i. Incompetency of witnesses to establish defense
j. Actions to recover real property
k. Remedy by appeal or certiorari
l. Where court is without jurisdiction

a. Remedy at Law in General

An action at law will not be enjoined where adequate relief can be obtained in the court in which the action is pending, by a plain, adequate, and complete remedy at law.

In accordance with the general rule that an injunction will not be granted for any purpose where the law furnishes an adequate remedy, discussed supra § 25, an action at law will not be enjoined where adequate relief can be obtained in the court where that action is pending, by a plain, adequate, and complete remedy at law,[29] such as by an action

23. Kan.—Rankin v. Eppler, 186 P. 1008, 106 Kan. 131.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.

24. Ark.—Baxley v. Laster, 101 S. W. 755, 82 Ark. 236, 10 L.R.A.,N.S., 983, 12 Ann.Cas. 332.
32 C.J. p 94 note 85.

25. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
D.C.—National Remedy Co. v. Hyde, 50 F.2d 1066, 60 App.D.C. 252.
Ind.—American Lead Corporation v. Davis, 38 N.E.2d 281, 111 Ind.App. 242.
Iowa.—Miller v. Ellis, 5 N.W.2d 828, 830, quoting **Corpus Juris**—Benedict v. Hall Mfg. Co., 236 N.W. 92, 211 Iowa 1312, distinguishing earlier Iowa cases.
Ky.—Calhoun v. Lenahan, 88 S.W.2d 288, 261 Ky. 601.
Mass.—Boyajian v. Hart, 44 N.E.2d 964, 312 Mass. 264—Potter Press v. C. W. Potter, Inc., 22 N.E.2d 68, 303 Mass. 485—Steinberg v. McKay, 3 N.E.2d 23, 295 Mass. 139.
N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518.
Pa.—Sachs v. Ginsburg, 91 Pittsb. Leg.J. 217.
Tex.—Curfman v. Jefferson Standard Life Ins. Co., Civ.App., 126 S.W. 2d 745—Luttring v. American Fruit Growers, Civ.App., 49 S.W.2d 980.
32 C.J. p 94 note 86.

Similar statement of rule
Equity may restrain vexatious litigation, where defendant is repeatedly and wrongfully harassing plaintiff with legal suits without reasonable probability of success, in which one judgment does not bar future suit, and where circumstances and venue of actions sought to be enjoined make defense unnecessarily burdensome, and defendant may obtain unjust advantage and possible improper verdict.—Calhoun v. Lenahan, 88 S.W.2d 288, 261 Ky. 601.

Second action on different theory after nonsuit, although on the same cause of action, is not vexatious.—American Electrotype Co. v. Kerschbaum, 105 F.2d 764, 70 App.D.C. 241.
In courts of another state see infra § 49.
Second action on subject matter decided in a previous action see infra § 40.

26. N.J.—Jackson v. Darcy, 1 N.J. Eq. 194.

Where transactions assailed occurred at different periods, and could not have been adjudicated in earlier actions, further actions cannot be enjoined on the ground of vexatious suits, even though several actions had been dismissed.—Strasburger v. Witousek, Iowa, 211 N.W. 713.

27. U.S.—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 92 F.2d 845.
Iowa.—Miller v. Ellis, 5 N.W.2d 828—Benedict v. Hall Mfg. Co., 236 N.W. 92, 211 Iowa 1312.
Mass.—Steinberg v. McKay, 3 N.E.2d 23, 295 Mass. 139.
N.J.—Driver v. Smith, 104 A. 717, 89 N.J.Eq. 339.
Pa.—Baltimore & Ohio R. R. Co. v. Barry, 87 Pittsb.Leg.J. 351.

Prospect of harassment and vexation by future litigation is not ground for equity's protective remedies, and some special reason, cognizable in equity, other than mere possible prospective litigation, must exist to justify injunction against suit.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.

Permanent injunction not warranted
Neb.—Pathfinder Life Ins. Co. v. Livingston, 299 N.W. 537, 140 Neb. 354.

28. U.S.—General Film Co. v. Sampliner, Ohio, 252 F. 443, 164 C.C.A. 367.
N.Y.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756, appeal dismissed and certified question not answered 23 N. E.2d 15, 281 N.Y. 682.
32 C.J. p 95 note 90.

29. U.S.—Brown v. Pacific Mut. Life Ins. Co., C.C.A.S.C., 62 F.2d 711—Lake Washington Shipyards v. Brueggeman, D.C.Wash., 56 F.2d

for damages;[30] and this rule applies where an injunction is sought by one who is not a party to the action at law, but who may be affected thereby.[31]

Adequacy of remedy at law. The adequacy of the remedy at law depends on whether the matter which complainant relies on as constituting his ground for an injunction can be adequately presented and adjudicated in the action at law,[32] and is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[33]

Court of law more suitable forum for questions involved. An action at law will not ordinarily be enjoined where a court of law is a more suitable forum for a trial of the questions involved,[34] as where the question in the action sought to be enjoined is one properly triable at law,[35] or where the title to land is being tested in an action at law.[36] The proper construction,[37] or the constitutionality[38] of a statute, or the validity of an ordinance,[39] is a

655—Essanay Film Mfg. Co. v. Kane, C.C.A.N.J., 264 F. 959, affirmed 42 S.Ct. 318, 258 U.S. 358, 66 L.Ed. 658.
Cal.—Johnson v. Sun Realty Co., 32 P.2d 393, 138 Cal.App. 296.
Fla.—Isom v. Equitable Life Assur. Soc. of U. S., 189 So. 253, 138 Fla. 260.
Ga.—First Nat. Bank v. Roberts, 166 S.E. 211, 175 Ga. 810—Skinner v. Stewart Plumbing Co., 144 S.E. 261, 166 Ga. 800—Hatcher v. Birch, 123 S.E. 680, 158 Ga. 481.
Ill.—Lindheimer v. Supreme Liberty Life Ins. Co., 263 Ill.App. 524.
Ky.—Hoskins v. Asher, 118 S.W.2d 128, 274 Ky. 107.
Mass.—Cunningham v. Ganley, 166 N.E. 712, 267 Mass. 375.
Mich.—State Mut. Rodded Fire Ins. Co. of Michigan v. Engel, 257 N.W. 839, 269 Mich. 348—MacCrone v. Higbie, 255 N.W. 315, 267 Mich. 647.
Miss.—Craft v. Homochitto Lumber Co., 106 So. 440, 141 Miss. 156—Sunflower Compress Co. v. Staple Cotton Co-op. Ass'n, 103 So. 802, 139 Miss. 200.
Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.
N.J.—Braverman v. Braverman, 33 A.2d 890, 134 N.J.Eq. 4—City of Paterson v. North Jersey Dist. Water Supply Commission, 2 A.2d 42, 124 N.J.Eq. 344—Alliance-Holt Dye Works v. Freund, 143 A. 327, 103 N.J.Eq. 323—Stagg v. McCann, 125 A. 240, 96 N.J.Eq. 327, affirming 122 A. 305, 95 N.J.Eq. 53.
N.Y.—Levine v. Nolan Motors, 8 N.Y.S.2d 311, 169 Misc. 1025.
Ohio.—Royal Indemnity Co. v. McFadden, 29 N.E.2d 181, 65 Ohio App. 15.
Okl.—Howard v. Ketcham, 221 P. 35, 94 Okl. 83.
Pa.—Prudential Ins. Co. of America v. Moore, 14 A.2d 277, 339 Pa. 13—Arkin v. Penn State Building & Loan Ass'n, 48 Dauph.Co. 81.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Tex.—New Amsterdam Casualty Co. v. Harrington, Civ.App., 297 S.W. 307.
32 C.J. p 98 note 37.

It would tend to multiplicity of litigation to grant injunctive relief in such a case.—Essanay Film Mfg. Co. v. Kane, C.C.A.N.J., 264 F. 959, affirmed 42 S.Ct. 318, 258 U.S. 358, 66 L.Ed. 658.

30. U.S.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., Ford v. Huff, 296 F. 652, certiorari denied Huff v. Ford, 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.
32 C.J. p 109 note 67.

31. D.C.—Sachs v. Kinyoun, 47 App. D.C. 561.
Injunction in favor of third party generally see infra § 51.

32. U.S.—Logan v. Crissinger, D.C. Or., 290 F. 415.
Fla.—Town of Palm Beach v. Gottesman, 11 So.2d 337—Garrett v. Phillips, 134 So. 231, 101 Fla. 426, rehearing denied 137 So. 794, 103 Fla. 1227.
Ga.—Haygood v. Improved Order of Samaritans, 195 S.E. 164, 185 Ga. 347—Skinner v. Stewart Plumbing Co., 144 S.E. 261, 166 Ga. 800—Norton v. Graham, 60 S.E. 1049, 130 Ga. 391—House v. Oliver, 51 S.E. 722, 123 Ga. 784.
N.J.—Braverman v. Braverman, 33 A.2d 890, 134 N.J.Eq. 4, affirmed 37 A.2d 57.
N.Y.—Rosenberg v. Mount Carmel Cemetery Ass'n, 155 N.E. 902, 244 N.Y. 573, reversing 216 N.Y.S. 906, 217 App.Div. 780.

Injunction not granted where relief obtainable
(1) By cross bill.—Granada Bank v. Waring, 99 So. 681, 135 Miss. 226.

(2) By demurrer.—Carpenter v. Hanes, 77 S.E. 1101, 162 N.C. 46, Ann. Cas.1915A 832—32 C.J. p 98 note 37 [d].

(3) By intervention.
D.C.—Sachs v. Kinyoun, 47 App.D.C. 561.
Pa.—Prudential Ins. Co. of America v. Moore, 14 A.2d 277, 339 Pa. 13.

(4) By motion to dismiss.—State Mut. Rodded Fire Ins. Co. of Michigan v. Engel, 257 N.W. 839, 269 Mich. 348.

(5) By plea in abatement.—Worcester v. Lakeside Mfg. Co., 54 N.E. 833, 174 Mass. 299.

(6) By subpoena duces tecum.—Church v. Hubbard, C.C.A.Mich., 91 F.2d 406.

33. U.S.—Boyce v. Grundy, Tenn., 3 Pet. 210, 7 L.Ed. 655.

Delay of few weeks in affording relief in the court of law, in a replevin action, is not a defect of an ample and complete remedy.—Glenn v. Fowler, 8 Gill & J., Md., 340.

34. N.J.—Moresh v. O'Regan, 192 A. 831, 122 N.J.Eq. 388, reversing 187 A. 619, 120 N.J.Eq. 534—Moresh v. O'Reagan, 194 A. 156, 122 N.J. Eq. 388—Winslow Tp. v. Hudson, 21 N.J.Eq. 172.

35. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
N.J.—Winslow Tp. v. Hudson, 21 N. J.Eq. 172.
32 C.J. p 99 note 45.

Injunction restraining single bondholder from bringing suit at law on bond secured by trust deed, which provided that no action should be brought on the debt except by trustee or by twenty-five per cent of principal amount of bondholders, should not be granted in absence of reference in bond to the "no action clause" in the trust deed.—Continental Nat. Bank & Trust Co. of Chicago v. Chicago Builders Bldg. Corporation, 283 Ill.App. 64.

36. U.S.—Szymanski v. Zunts, C.C. La., 20 F. 361.
32 C.J. p 99 note 46.
Injunction in actions for the recovery of land generally see infra subdivision j of this section.

37. N.J.—Newkirk v. Morris, 12 N.J. Eq. 62.

38. N.Y.—Balogh v. Lyman, 39 N.Y. S. 780, 6 App.Div. 271—Wallack v. New York Reformation Soc., 67 N. Y. 23—Kip v. New York, etc., R. Co., 6 Hun 24, affirmed 67 N.Y. 227.

39. Ill.—Chicago, B. & Q. R. Co. v. Ottawa, 36 N.E. 85, 148 Ill. 397.
N.Y.—West v. York, 10 Paige 539.

purely legal question, the litigation of which in a court of law will not ordinarily be enjoined.

b. Defenses Available in Actions at Law in General

Matters of defense of which complainant may avail himself in an action at law ordinarily cannot be made the ground of an injunction to restrain proceedings in such action.

Matters that will constitute a defense of which complainant may avail himself in an action pending or threatened against him cannot be made the ground of an injunction to restrain proceedings in such action,[40] unless he alleges and proves special circumstances showing that he may suffer irreparable injury if he is denied the preventive remedy,[41] such as that he was prevented from raising the defense in the action at law by fraud, accident, or mistake unmixed with any fault or negligence on his own part;[42] or unless for any reason the court of equity is a more suitable tribunal for the determination of the matter, or equitable remedies, unavailable in the court of law, are necessary.[43] A

40. U.S.—Logan v. Crissinger, D.C. Or., 290 F. 415.
Cal.—California Thorn Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 541.
Del.—Arcturus Radio Tube Co. v. Radio Corporation of America, 177 A. 899, 20 Del.Ch. 376—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.
Ga.—Peeples v. Peeples, 18 S.E.2d 629, 193 Ga. 358—Ferrell v. Wight, 200 S.E. 271, 187 Ga. 360—Haygood v. Improved Order of Samaritans, 195 S.E. 164, 185 Ga. 347—Hagan v. Asa G. Candler, Inc., 189 S.E. 595, 183 Ga. 739—Clower v. Bryan, 166 S.E. 194, 175 Ga. 790—American Surety Co. v. Sealey, 161 S.E. 253, 173 Ga. 754—Skinner v. Stewart Plumbing Co., 144 S.E. 261, 166 Ga. 800—Calhoun v. Davis, 137 S.E. 236, 163 Ga. 760.
Mass.—Nichinson v. Limon, 45 N.E. 2d 477, 312 Mass. 467—Morin v. Ellis, 189 N.E. 95, 285 Mass. 370—Hooker v. Porter, 171 N.E. 713, 271 Mass. 441—Bancroft Trust Co. v. Canane, 171 N.E. 281, 271 Mass. 191.
Minn.—Tergeon v. Johnson, 209 N.W. 485, 168 Minn. 22—Cary & Co. v. F. E. Satterlee & Co., 208 N.W. 408, 166 Minn. 507.
Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.
N.Y.—Boston & M. R. R. v. Delaware & Hudson Co., 197 N.E. 321, 268 N.Y. 382, affirming 273 N.Y.S. 670, 242 App.Div. 714—Texas Co. v. McGovern, 3 N.Y.S.2d 835, 254 App. Div. 698.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Tex.—Powers v. Temple Trust Co., 78 S.W.2d 951, 952, 124 Tex. 440, quoting **Corpus Juris,** and affirming Temple Trust Co. v. Powers, Civ.App., 50 S.W.2d 362, 363, citing **Corpus Juris,** and followed in Roberts v. Temple Trust Co., 50 S.W.2d 363 and Temple Trust Co. v. Sewell, 50 S.W.2d 364—Pruett v. Trifon, Civ.App., 124 S.W.2d 868, error dismissed, judgment correct—Coker v. Logan, Civ.App., 101 S.W.2d 284, 288, quoting **Corpus Juris**—Cooper v. United Producers Co., Civ.App., 95 S.W.2d 211, 213, quoting **Corpus Juris**—Kirkpatrick v. Southern Thrift Co., Civ.App., 66 S.W.2d 400.
W.Va.—Neal Coal Co. v. Virginian Ry. Co., 132 S.E. 202, 101 W.Va. 147—Moore v. Hamilton, 117 S.E. 229, 93 W.Va. 529.
32 C.J. p 99 note 51.

Abolishment of distinction between action at law and suit in equity does not affect this rule.—Shoemaker v. Axtell, 78 Ind. 561.

"The principle is well established that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of an action upon any mere legal grounds, although it may appear that complainant in equity had a valid legal defense which was not availed of, either through the error of the court in determining the law or the facts, or the omission of himself or his counsel in presenting it.—Chapman v. American Surety Co., 104 N.E. 247, 250, 261 Ill. 594, reversing 181 Ill. App. 146.

Available defenses precluding injunction

(1) That right to maintain action has been lost by assigning the cause of action.—Pena v. Baker, Tex. Civ.App., 207 S.W. 426.

(2) That subject matter is champertous.—Bodine v. Williamson, 119 N.Y.S. 500, 134 App.Div. 688.

(3) That credit on note in suit had not been entered.—Powell v. Chamberlain, 22 Ga. 123—32 C.J. p 101 note 65.

(4) That seller in an action for the price had brought suit before conditions precedent to the maturity of the debt had been complied with.—Pardee & Curtin Lumber Co. v. Odell, 88 S.E. 419, 78 W.Va. 159.

In action on insurance policy

(1) An action at law on a policy will not be enjoined because of matters of defense which may be taken advantage of by the insurer in the action at law.
Ky.—American Life & Accident Ins. Co. v. Henning, 97 S.W.2d 798, 265 Ky. 755.
Mo.—Cooper v. American Cent. Ins. Co., 123 S.W. 497, 139 Mo.App. 570.
Pa.—Prudential Ins. Co. of America v. Moore, 14 A.2d 277, 339 Pa. 13.
S.C.—Prudential Ins. Co. of America v. Wilburn, 166 S.E. 786, 168 S.C. 30.
Tenn.—Ætna Life Ins. Co. v. Bellos, 13 S.W.2d 795, 158 Tenn. 554, rehearing denied 14 S.W.2d 961, 158 Tenn. 554.
38 C.J. p 81 note 61.

(2) Insured's administrator, named as beneficiary, will not be enjoined from bringing action at law on policy after expiration of incontestable period.—Philadelphia Life Ins. Co. v. Burgess, D.C.S.C., 18 F.2d 599.

41. Ill.—Lindheimer v. Supreme Liberty Life Ins. Co., 263 Ill.App. 524.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 395, 61 Nev. 301, citing **Corpus Juris.**
Tex.—Powers v. Temple Trust Co., 78 S.W.2d 951, 952, 124 Tex. 440, quoting **Corpus Juris,** and affirming Temple Trust Co. v. Powers, Civ.App., 50 S.W.2d 362—Coker v. Logan, Civ.App., 101 S.W.2d 284, 288, quoting **Corpus Juris**—Cooper v. United Producers Co., Civ.App., 95 S.W.2d 211, 213, quoting **Corpus Juris.**
32 C.J. p 100 note 52.

42. Ill.—Chapman v. American Surety Co., 104 N.E. 247, 261 Ill. 594, reversing 181 Ill.App. 146.
Fraud, accident, or mistake generally see infra subdivision e of this section.

43. U.S.—Adams v. Western Maryland R. Co., C.C.N.Y., 161 F. 776.
Fla.—Bailey v. Inman, 140 So. 783, 105 Fla. 1.
Mich.—Epstein v. Graff, 264 N.W. 712, 231 Mich. 697.
N.J.—Morgan Realty Co. v. Pazen, 139 A. 712, 102 N.J.Eq. 83—Chase v. Chase, 24 A. 914, 50 N.J.Eq. 143.
N.Y.—Bomeisler v. Forster, 48 N.E. 534, 154 N.Y. 229, 39 L.R.A. 240.
32 C.J. p 101 note 58.

defense, however, is not regarded as adequate, so as to deprive equity of jurisdiction unless it is available in the courts of the state where the injunction is asked.[44]

Under these rules an action will not be enjoined while it is uncertain whether the court of law will entertain a defense;[45] nor will it be enjoined on grounds which constitute no defense either at law or in equity,[46] or which are not necessary to the defense of the action at law;[47] or because an accounting might be involved.[48]

Absence of grounds for action. On the ground that the defense may be made at law, an action at law will not be enjoined on the ground that the claim which it seeks to enforce is not well founded,[49] or is based on an invalid statute or ordinance,[50] or that the action is groundless or frivolous,[51] even though it is prosecuted by irresponsible parties against whom costs could not be collected.[52]

Invalidity of instrument sued on. Ordinarily an action brought on a void or voidable instrument will not be restrained.[53] Injunctive relief, however, may be granted where there is danger that the evidence of the defense may be lost by a lapse of time, inasmuch as the action at law may be terminated by a dismissal or a nonsuit,[54] particularly where the invalidity is not apparent on the face of the instrument;[55] or an injunction may be granted where the defense at law is inadequate because some equitable remedy is necessary.[56]

c. Equitable Defenses

An equitable defense is generally sufficient ground for an injunction to restrain proceedings at law, unless it is available as a defense in such proceedings.

Except where the rule is modified or abrogated by statute,[57] the existence of an equitable defense which cannot be made available as a defense in an action at law is sufficient ground for an injunction to restrain proceedings at law,[58] in which case, the court of equity will enjoin the suit at law, and will itself assume jurisdiction of the entire cause and do complete justice between the parties.[59] However, until stayed by equity the court of law can proceed according to the rules of law and does not have to dismiss the case simply because defendant

44. Conn.—Stanton v. Embry, 46 Conn. 595.
Miss.—Tri-State Transit Co. of Louisiana v. Mondy, 12 So.2d 920.
Contributory negligence, as complete defense in one state, will constitute ground for refusing an injunction in an action in another state, whose courts apply the substantive laws of the former state, including that of contributory negligence.—Tri-State Transit Co. of Louisiana v. Mondy, Miss., 12 So.2d 920.

45. U.S.—Terre Haute & I. R. Co. v. Peoria & P. U. R. Co., C.C.Ill., 82 F. 943.
N.J.—Gibbs v. Ward, Ch., 48 A. 243.

46. Ala.—Daughdrill v. Edwards, 59 Ala. 424.
Ill.—Cook County v. Chicago, 42 N.E. 67, 158 Ill. 524—Peabody v. Hoard, 46 Ill. 242.
Vt.—Iby v. Wrisley, 158 A. 67, 104 Vt. 148.
32 C.J. p 86 note 87.

47. Ga.—Webb-Harris Auto Co. v. Industrial Acceptance Corporation, 137 S.E. 770, 164 Ga. 54.

48. N.J.—City of Paterson v. North Jersey Dist. Water Supply Commission, 2 A.2d 42, 124 N.J.Eq. 344.

49. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
R.I.—Clark v. Clapp, 14 R.I. 248.
32 C.J. p 101 note 62.

50. U.S.—Boise Artesian Hot & Cold Water Co. v. Boise City, Idaho, 29 S.Ct. 426, 213 U.S. 276, 53 L.Ed. 796—Chandler v. Neff, D.C.Tex., 298 F. 515.
Utah.—Holmes v. Salt Lake City, 134 P. 571, 43 Utah 253.
32 C.J. p 108 note 52.

51. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
Ga.—Calhoun v. Davis, 137 S.E. 236, 163 Ga. 760.
N.J.—Long Dock Co. v. Bentley, 37 N.J.Eq. 15, affirmed 37 N.J.Eq. 330.
32 C.J. p 107 note 45.

52. Iowa.—Gray v. Coan, 36 Iowa 296.

53. Cal.—California Thorn Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 541.
Ga.—Calhoun v. Davis, 137 S.E. 236, 163 Ga. 760.
Mass.—Anthony v. Valentine, 130 Mass. 119.
32 C.J. p 107 note 47.

54. Mass.—Anthony v. Valentine, supra—Sweeny v. Williams, 36 N. J.Eq. 627.
32 C.J. p 108 note 48.

55. Mass.—Anthony v. Valentine, 130 Mass. 119, 120.
N.J.—Metler v. Metler, 19 N.J.Eq. 457.
Where replevin bond is void because executed under duress and without consideration, to prevent seizure of property of individual doing business under a trade name under judgment against nonexistent corporation having the same name, the court may properly enjoin proceedings under such bond.—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671.
Pending determination of validity of instrument an action thereon may be enjoined.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, 163 A. 894, 112 N.J.Eq. 179.

56. U.S.—Crampton v. Zabriskie, N. J., 101 U.S. 601, 25 L.Ed. 1070.
N.J.—Metler v. Metler, 19 N.J.Eq. 457.
32 C.J. p 108 note 49.

57. U.S.—Banker v. Ford Motor Co., D.C.Pa., 3 F.Supp. 737, 741, quoting **Corpus Juris.**
32 C.J. p 101 note 70.

58. U.S.—Banker v. Ford Motor Co., supra, quoting **Corpus Juris.**
Ala.—Cadick Milling Co. v. Dothan Bank & Trust Co., 5 So.2d 101, 242 Ala. 132.
Ga.—Arthur Tufts Co. v. De Jarnette Supply Co., 123 S.E. 16, 158 Ga. 85.
Ill.—Lindheimer v. Supreme Liberty Life Ins. Co., 263 Ill.App. 524.
32 C.J. p 101 note 71.
The holder of the equitable title to property may enjoin an action by the holder of the legal title to recover property or its value.—Miles v. Wise, 32 S.C.Eq. 536, 78 Am.D. 461.

59. U.S.—Banker v. Ford Motor Co., D.C.Pa., 3 F.Supp. 737, 741, quoting **Corpus Juris.**
32 C.J. p 102 note 72.

seeks to set up a defense unknown to the rules administered by it;[60] and an injunction may be refused where there exists in reality no equitable defense,[61] or where defendant's own imperfect pleading is responsible for the impossibility of making the equitable defense at law.[62] So, where purely equitable defenses are equally available at law, as discussed in Actions § 57, an injunction generally will not be granted restraining an action at law because of the existence of such a defense,[63] but there is authority to the contrary.[64]

Equitable estoppel. Ordinarily an injunction will be granted on a showing of facts constituting an equitable estoppel against plaintiff in the action at law,[65] unless the facts constituting the ground of the estoppel can be made use of equally well in the action at law.[66]

Laches and statute of limitations. Although delay, along with other circumstances constituting an equitable estoppel, may be ground for an injunction,[67] generally speaking mere delay in bringing an action is no ground for an injunction against its prosecution,[68] particularly where the delay is not due to neglect or procrastination on the part of complainant,[69] or where the time fixed by the statute of limitations has not expired.[70] It has also been held that the fact that the period fixed by the statute has run is no ground for enjoining the action at law, even though the plea of the statute cannot be made available at law.[71]

Both legal and equitable defenses. Where complainant has a purely equitable defense as well as a perfect legal one, equity will usually take jurisdiction of the case, and incidentally enjoin the action at law.[72]

d. Want or Failure of Consideration

Want or failure of consideration for the contract sued on is generally no ground for enjoining the action, unless under the particular circumstances the defense is unavailable or inadequate, or a special equitable remedy is necessary to do complete justice. This rule has been applied in case of a want or failure of consideration because of the insolvency of a grantor, a defect in title, or a deficiency in the quantity of land purchased.

The mere fact that an instrument or obligation sued on at law was without consideration[73] or that the consideration therefor has failed,[74] is generally available as a ground of defense in an action at law thereon and therefore is not a ground for enjoining the action, as where one of the parties to a contract has failed to perform his part, especially in cases where land has been sold with general covenant of warranty, and later it appears that the title is defective, and the defect of title or the nonperformance can be used as a defense in the action at law.[75] Moreover, an injunction demanded on this ground will be refused where there is in fact no actual failure of consideration.[76] Where, however, under the circumstances of the particular case, the defense of want or failure of consideration cannot be availed of in the action at law, or some special equitable remedy is necessary to do complete justice, or the remedy at law is otherwise inadequate, the action at law may be enjoined.[77]

60. Ga.—Callaway v. Martin, 66 S.E. 1101, 7 Ga.App. 357.

61. U.S.—Cabaniss v. Reco Min. Co., Ga., 116 F. 318, 54 C.C.A. 190.
32 C.J. p 102 note 75.

62. N.Y.—Richardson v. Davidson, 5 N.Y.S. 617, 2 Silv.Sup. 194.

63. Ga.—Winter v. Hall, 145 S.E. 865, 167 Ga. 395.
Md.—Machovec v. Shipley, 189 A. 223, 171 Md. 339.
N.J.—Ollendorf v. Hirsch, 181 A. 879, 119 N.J.Eq. 225.
32 C.J. p 102 note 77.

64. Ala.—Ex parte Deaton, 6 So.2d 593, 242 Ala. 474—Cadick Milling Co. v. Dothan Bank & Trust Co., 5 So.2d 101, 242 Ala. 132.
Mass.—Liberty Mut. Ins. Co. v. Hathaway Baking Co., 28 N.E.2d 425, 306 Mass. 428.

65. U.S.—Thorpe v. Wm. Filene's Sons Co., D.C.Mass., 40 F.2d 269.
N.J.—Briscoe v. O'Connor, 182 A. 855, 119 N.J.Eq. 378, reversing 179 A. 253, 118 N.J.Eq. 322.
Wis.—Welfare Building & Loan Ass'n v. Krieger, 275 N.W. 891, 226 Wis. 105.
32 C.J. p 102 note 85.

Misleading conduct by plaintiff, on which defendant relied to his injury, making it unconscionable for plaintiff to maintain claim, is estoppel sufficient to enjoin action at law.—Thorpe v. Wm. Filene's Sons Co., D.C.Mass., 40 F.2d 269.
As ground to enjoin ejectment see infra subdivision j of this section.

66. Ala.—Birmingham Securities Co. v. Hodges, 68 So. 980, 193 Ala. 197.
32 C.J. p 103 note 86.

67. Mass.—Baker v. Langley, 141 N.E. 671, 247 Mass. 127.
Pa.—Maccabees v. Cappas, 91 Pittsb. Leg.J. 88.
R.I.—Capwell v. Spencer, 137 A. 699, 48 R.I. 401.
Vt.—Holman v. Randolph Nat. Bank, 126 A. 500, 98 Vt. 66.
32 C.J. p 103 note 88.

68. Vt.—Holman v. Randolph Nat. Bank, supra.
32 C.J. p 103 note 87.

69. N.Y.—Farin v. Sercarz, 39 N.Y.S.2d 482, 179 Misc. 490.

Delay due to refusal of arbitration tribunal to function
N.Y.—Farin v. Sercarz, supra.

70. Vt.—Holman v. Randolph Nat. Bank, 126 A. 500, 98 Vt. 66.

71. Ill.—Thorndike v. Thorndike, 32 N.E. 510, 142 Ill. 450, 34 Am.S.R. 90, 21 L.R.A. 71.
32 C.J. p 103 note 90.

72. Ala.—Boone v. Byrd, 78 So. 958, 201 Ala. 562.
32 C.J. p 103 note 91.

73. N.Y.—Geer v. Kissam, 3 Edw. 129.
W.Va.—Neal Coal Co. v. Virginian Ry. Co., 132 S.E. 202, 101 W.Va. 147
32 C.J. p 103 note 94.

74. W.Va.—Armentrout v. Armentrout, 74 S.E. 907, 70 W.Va. 661.

75. Ga.—Norton v. Graham, 60 S.E. 1049, 130 Ga. 391.
92 C.J. p 103 note 95.

76. N.J.—Savage v. Ball, 17 N.J.Eq. 142.
32 C.J. p 105 note 22.

77. Ark.—Black v. Bowman, 9 Ark. 501.

An action on a negotiable note will not be enjoined on the ground of want or failure of consideration,[78] unless the circumstances of the particular case require the interposition of equity;[79] and, an injunction will not lie against a bona fide purchaser of the note.[80]

Insolvency of grantor. In case of a breach of warranty of title the vendee must ordinarily rely on his action at law on the covenant and cannot enjoin collection of the purchase price where the grantor is not shown to be insolvent,[81] at least in the absence of fraud or concealment, on the part of the grantor,[82] or a showing that he is not within the jurisdiction of the court,[83] or of some other matter which has been discovered since the contract which would show that it would be inequitable to enforce it.[84]

Eviction under paramount title. Where there is a failure of title to the land sold, and an eviction of the vendee under paramount title and the grantor is insolvent, the vendee is not restricted to his action on the covenant but is entitled to an injunction against the collection of the purchase money;[85] but, notwithstanding breach of a covenant by total failure of title, if the vendee remains in possession he must show some equity entitling him to resort to the extraordinary remedy by injunction and one of the facts that must be shown is the insolvency of the grantor.[86]

Defect in title. A defect in title, in the absence of fraud, is generally not ground for enjoining an action at law for the purchase money where the purchaser had notice of the defect of title or adverse claim at the time of his purchase,[87] or where he has been let into possession and continued so without interruption or eviction by one holding a paramount title.[88] It has also been held that an injunction will not be granted where no suit to enforce the adverse claim has been actually brought;[89] but that the fact that such a suit is actually pending is in itself sufficient ground for an injunction,[90] whether or not the purchaser had notice of the outstanding claim,[91] although there is authority to the contrary.[92] Where, however, the circumstances connected with the acquisition of the defective title call for the application of equitable principles, in order to do justice, the purchaser may be entitled to an injunction,[93] as where the transfer of the defective title was procured by fraud on the part of the vendor,[94] or where the purchaser has taken possession under a conveyance with covenants of general warranty, and the title is questioned by a suit, either prosecuted or threatened, or the purchaser can show clearly that the title is defective, even though no fraud is shown and there has been no eviction.[95] Unless there is a fraud on the part of the vendor an actual eviction is a prerequisite

N.J.—Sweeney v. Williams, 36 N.J. Eq. 459, affirmed 36 N.J.Eq. 627.
N.C.—Richardson v. Williams, 56 N. C. 116.
32 C.J. p 103 note 96.

78. W.Va.—Armentrout v. Armentrout, 74 S.E. 907, 70 W.Va. 661—Mylius v. Massillon Engine, etc., Co., 74 S.E. 728, 70 W.Va. 576.

79. N.J.—Metler v. Metler, 19 N.J. Eq. 457.
Ohio.—Darst v. Brockway, 11 Ohio 462.

80. N.Y.—Bumpus v. Platner, 1 Johns.Ch. 213.
32 C.J. p 104 note 98 [a].

81. Ind.—Crowfoot v. Zink, 26 Ind. 187.
32 C.J. p 104 note 1.

If vendor is shown to be insolvent the action may be enjoined as to so much of the purchase money as will compensate for the injury resulting from the breach.—McLemore v. Mabson, 20 Ala. 137—Cullum v. Mobile Branch Bank, 4 Ala. 21, 37 Am.D. 725.

82. Ky.—McKoy v. Chiles, 5 T.B. Mon. 259.

One who is in undisturbed possession under his deed will not be entitled, in the absence of fraud or misrepresentation, to enjoin enforcement of payment of the purchase money because of a defect in the title in connection with subsequent insolvency of the grantor.—Patton v. Taylor, Ky., 7 How. 132, 12 L.Ed. 637.

83. Ga.—McCauley v. Moses, 43 Ga. 577.
Ind.—Crowfoot v. Zink, 26 Ind. 187.

84. Ga.—McCauley v. Moses, 43 Ga. 577.

85. Ky.—Rawlins v. Timberlake, 6 T.B.Mon. 225.
32 C.J. p 104 note 6.

86. Ind.—Wimberg v. Schwegeman, 97 Ind. 528.
32 C.J. p 104 note 7.

87. Ark.—Worthington v. Curd, 22 Ark. 277.
Ga.—Shields v. Whitehead, 120 S.E. 631, 156 Ga. 834.
32 C.J. p 104 note 9.

88. Ala.—Banks v. Walker, 54 Ala. 117.
N.J.—Hile v. Davison, 20 N.J.Eq. 228.
32 C.J. p 104 note 12.

89. N.J.—Hile v. Davison, 20 N.J. Eq. 228.
32 C.J. p 105 note 16.

90. N.J.—Jaques v. Esler, 4 N.J.Eq. 461.
32 C.J. p 105 note 17.

91. N.J.—Jaques v. Esler, supra.

92. N.Y.—Miller v. Avery, 2 Barb. Ch. 582.
32 C.J. p 105 note 18.

93. Ky.—Taylor v. Lyon, 2 Dana 276.
Tenn.—Ingram v. Morgan, 4 Humphr. 66, 40 Am.D. 626.

94. Ala.—Walton v. Bonham, 24 Ala. 513.

Purchaser entitled to injunction

(1) To restrain a judgment at law on notes given for the purchase money, on alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate. —Walton v. Bonham, 24 Ala. 513.

(2) To enjoin collection proceedings until the title is perfected where a defect in the title was fraudulently concealed by the vendor and by reason of his fraudulent representations the vendee was induced to accept a deed without covenants of warranty.—Houston v. Hurley, 2 Del.Ch. 247.

95. Ind.—Fehrle v. Turner, 77 Ind. 530.
32 C.J. p 105 note 15.

to the obtaining of an injunction, and a mere threat to evict or the mere existence of a defect in the title is not alone sufficient,[96] particularly where the vendee remains in possession and does not offer to return the property.[97] If the contract of sale is unexecuted and the vendor has no title at the time he agreed to convey, equity will enjoin him from proceeding at law for the purchase money.[98]

Deficiency in quantity. Equity may enjoin the recovery of the purchase money for a tract of land on the ground of a deficiency in quantity,[99] except in case of a sale of land in gross; this, being regarded as a contract of hazard on both sides, in consequence of which the vendee is not entitled to relief in case of deficiency.[1]

e. Fraud or Mistake

Fraud or mistake with respect to the subject matter of an action at law ordinarily will not constitute ground for enjoining the action, if it is available as a complete defense thereto.

Ordinarily if an action is brought on any contract or evidence of indebtedness which has been obtained by fraud, defendant can make a good defense at law, and an injunction to restrain the prosecution of that action will not be granted.[2] Equity, however, will give relief and enjoin the action at law, if the cause of action is likely to be transferred to some bona fide purchaser against whom the defense would not avail,[3] or if for any reason the party who is liable to be sued, or who has been sued, cannot, in an action at law, present his defense as fully and effectually as he could in a court of equity, and such disability has been brought about by any fraud.[4]

Mistake. Accident and mistake constitute no ground for enjoining an action at law where, if established, they would constitute a complete defense to the action at law;[5] but an injunction may be granted where the circumstances are such that such a defense would not give adequate relief.[6]

f. Payment, Discharge, or Settlement

The payment, discharge, settlement, or release of a debt or obligation ordinarily is no ground for enjoining an action at law on the debt or obligation.

The fact that a debt or obligation has been paid, discharged, settled, or released is in ordinary cases an adequate defense at law to an action for collection or for the enforcement of the obligation, and such action will not be enjoined.[7] Where, however, the defense at law is not clearly adequate, an

96. U.S.—Patton v. Taylor, Ky., 7 How. 132, 12 L.Ed. 637.
32 C.J. p 104 note 14.

97. Cal.—Jackson v. Norton, 6 Cal. 187.
La.—Shreveport v. Flournoy, 24 La. Ann. 709.

98. U.S.—Galloway v. Finley, Pa., 12 Pet. 264, 9 L.Ed. 1079.
32 C.J. p 105 note 21.

99. Ky.—Moredock v. Rawlings, 3 T.B.Mon. 73.
Va.—Pack v. Whitaker, 65 S.E. 496, 110 Va. 122—Koger v. Kane, 5 Leigh 606, 32 Va. 606.

1. Va.—Keyton v. Brawford, 5 Leigh 39, 32 Va. 39.

2. Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216—Johnson v. Sun Realty Co., 32 P.2d 393, 138 Cal.App. 296.
Del.—Travelers Ins. Co. v. Caravasilis, 182 A. 412, 21 Del.Ch. 164—Flaherty v. Industrial Trust Co., 178 A. 586, 20 Del.Ch. 403.
Mass.—Payson v. Lamson, 134 Mass. 593, 45 Am.R. 348.
N.J.—Savage v. Edgar, 98 A. 407, 86 N.J.Eq. 205, reversing 97 A. 164, 85 N.J.Eq. 420.
32 C.J. p 105 note 23.

Rule applied to

(1) Action on insurance policy.
U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872.
W.Va.—Western & Southern Life Ins. Co. v. Smith, 158 S.E. 912, 110 W.Va. 473.
32 C.J. p 105 note 23 [a] (2).

(2) Action on policy, on ground that insured made excessive and fraudulent claims of loss.—Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., Iowa, 173 F. 888, 97 C.C.A. 400, 32 L.R.A.,N.S., 940.

(3) Action on a voidable note.
Ala.—Williams v. Mitchell, 30 Ala. 299.
Ga.—Armstrong v. American Nat. Bank, 86 S.E. 1087, 144 Ga. 245.
32 C.J. p 105 note 23 [a] (3).
Fraud in transferring defective title see supra subdivision d of this section.

3. U.S.—Phœnix Mut. L. Ins. Co. v. Bailey, D.C., 13 Wall. 616, 20 L. Ed. 501.
Mass.—Payson v. Lamson, 134 Mass. 593, 45 Am.R. 348.
Ohio.—Warner v. Armstrong, 10 Ohio Dec. (Reprint) 426, 21 Cinc.L.Bul. 124.

4. Mass.—Payson v. Lamson, 134 Mass. 593, 45 Am.R. 348.
32 C.J. p 106 note 25.

Fraud relating to the consideration of a sealed instrument is no defense to an action at law thereon, and, therefore, the action may be enjoined on the ground of such fraud.—Esperson v. Fox, 177 Ill.App. 141.

Where the reinstatement of a lapsed insurance policy is procured by fraud, equity may compel the surrender and decree the cancellation thereof, and enjoin an action at law thereon, although the fraud might defeat such action.—John Hancock Mut. Life Ins. Co. v. Dick, 72 N.W. 179, 114 Mich. 337, 43 L.R.A. 566.

5. Mass.—Payson v. Lamson, 134 Mass. 593, 45 Am.R. 348.
W.Va.—Moore v. Hamilton, 117 S.E. 229, 93 W.Va. 529—Smith Pocahontas Coal Co. v. Morrison, 117 S. E. 152, 93 W.Va. 356.
Wis.—Ferson v. Drew, 19 Wis. 225.

6. Ala.—Sims v. Riggins, 77 So. 393, 201 Ala. 99.

Mistake in partition sale

Ejectment by the purchaser at sale for partition for lands included by mistake in the proceedings, where neither he nor the parties knew they were included, the purchaser taking possession only of the lands intended to be included, and two years afterward leasing the lands included by mistake, from the party to whom they had individually belonged, will be enjoined.—Sims v. Riggins, supra.

7. Ill.—Lindheimer v. Supreme Liberty Life Ins. Co., 283 Ill.App. 524.
N.J.—King Mfg. Co. v. Fabian, 195 A. 623, 122 N.J.Eq. 554.
N.Y.—Texas Co. v. McGovern, 3 N. Y.S.2d 835, 254 App.Div. 693.
Ohio.—Royal Indemnity Co. v. McFadden, 29 N.E.2d 181, 65 Ohio App. 15.

injunction may issue,[8] and, of course, an injunction may be proper on other equitable grounds.[9] Where a discharge that is not available at law is also unavailable in equity, no injunction will be granted.[10]

g. Set-Off or Counterclaim

A valid set-off or counterclaim is generally no ground for enjoining an action at law, unless the insolvency of the plaintiff at law or other circumstances render the interposition of equity necessary to prevent a failure of justice.

Where complainant has a valid set-off or counterclaim to the cause of action on which he is sued at law, and it is possible to avail himself of it in the action at law itself, he is not entitled to an injunction because of the set-off or counterclaim.[11] Where, however, the particular circumstances are such as to require the application of equitable principles, as where there are mutual demands between the parties which cannot be set off at law, but which a court of equity may apply in satisfaction of each of the parties, and plaintiff at law is insolvent, or a nonresident, the action at law may be enjoined and the set-off or counterclaim adjudicated in equity;[12] if the amount of the set-off is uncertain, the enforcement of the demand against which it is to be applied may be restrained until the cross demand can be liquidated.[13] It has been held that, even though the set-off is a purely equitable one, the action at law will not be enjoined unless plaintiff therein is insolvent.[14] Where an action is brought in a court of limited jurisdiction which has no jurisdiction of a claim for damages, made by defendant in that suit, the latter is not entitled to enjoin the action,[15] except in case of special circumstances, such as the insolvency or nonresidence of plaintiff.[16] Where, however, defendant in a court of law has a counterclaim exceeding the court's jurisdiction for which he must seek affirmative relief or suffer irreparable injury, he has a remedy by injunction.[17]

h. Former Adjudication

An action based on a question or issue which has been decided in a former adjudication ordinarily will not be enjoined unless it is vexatious.

After a question has once been decided in a court of competent jurisdiction a second action on the same subject matter usually will not be enjoined, because the former adjudication is an adequate defense at law.[18] A subsequent action, however, on the same question or issue which has already been adjudicated may be enjoined where, under the circumstances, it may be regarded as being vexatious,[19] notwithstanding the previous adjudication

Tex.—New Amsterdam Casualty Co. v. Harrington, Civ.App., 297 S.W. 307.
32 C.J. p 106 note 27.

8. Ala.—Kennedy v. Davis, 55 So. 104, 171 Ala. 609, Ann.Cas.1913B 225.
N.J.—Gallagher v. Lembeck & Betz Eagle Brewing Co., 98 A. 461, 86 N.J.Eq. 188.
32 C.J. p 106 note 28.

9. N.Y.—Cantoni v. Forster, 33 N. Y.S. 645, 12 Misc. 376, affirmed 42 N.E. 543, 146 N.Y. 405.
32 C.J. p 106 note 29.

That defense would cause vexation and expense
Tex.—Republic Ins. Co. v. O'Donnell Motor Co., Civ.App., 289 S.W. 1064.
Vt.—American Surety Co. v. Creamery Com'rs, 127 A. 289, 98 Vt. 313.

10. Conn.—Foote v. Percy, 40 Conn. 85.

11. U.S.—Maryland Casualty Co. v. Board of Education of City of Asbury Park, C.C.A.,N.J., 20 F.2d 799.
Ga.—Taylor v. Jordan, 195 S.E. 186, 185 Ga. 325—Osburn v. Dunlap Milling Co., 116 S.E. 538, 155 Ga. 636.
N.J.—Normand v. Lindhaven Homes, 25 A.2d 919, 131 N.J.Eq. 470.
N.Y.—Texas Co. v. McGovern, 3 N.Y. S.2d 835, 254 App.Div. 698.
32 C.J. p 106 note 32.

Unliquidated claim
Equity will not restrain an action at law until a claim of defendant, arising out of an unrelated transaction, can be liquidated so as to be available as a set-off in the law action.—Maryland Casualty Co. v. Board of Education of City of Asbury Park, C.C.A.N.J., 20 F.2d 799.

12. Ga.—Quitman Cooperage Co. v. People's First Nat. Bank, 172 S.E. 17, 178 Ga. 90—Sexton v. MacDougald Const. Co., 168 S.E. 32, 176 Ga. 468.
Tenn.—Kenyon v. Russell, 5 Tenn. App. 401.
32 C.J. p 107 note 33.

13. U.S.—Hoffman v. Gleason, C.C. A.Mich., 107 F.2d 101—Utah Radio Products Co. v. Boudette, D.C. Mass., 8 F.Supp. 5, modified on other grounds, C.C.A., 78 F.2d 793—Central Appalachian Co. v. Buchanan, C.C.A.Ky., 90 F. 454.
Ky.—Forbes v. Cooper, 9 Ky.L. 716.
Mo.—Strong v. Gordon, 221 S.W. 770, 203 Mo.App. 470.

14. Ga.—Hilton v. Rogers, 111 S.E. 33, 152 Ga. 658.
Hawaii.—Gay v. Haiku Fruit & Packing Co., 29 Hawaii 702.
Tenn.—Hough v. Chaffin, 4 Sneed 238.
W.Va.—Farland v. Wood, 14 S.E. 140, 35 W.Va. 458.
32 C.J. p 107 notes 34, 35.

15. Ga.—Standhart v. Hardin, 88 S. E. 565, 145 Ga. 147.

16. Ga.—Hilton v. Rogers, 111 S.E. 33, 152 Ga. 658.
32 C.J. p 107 note 37.

17. Colo.—Nelson v. Meyer, 180 P. 86, 66 Colo. 164.
Ga.—Otis v. Graham Paper Co., 4 S. E.2d 824, 188 Ga. 778, 125 A.L.R. 333.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.

18. U.S.—Plews v. Burrage, C.C.A. Mass., 266 F. 347.
La.—Norton v. Crescent City Ice Mfg. Co., App., 146 So. 753, rehearing denied 147 So. 385, and annulled 150 So. 855 (first case), 178 La. 135.
Ohio.—O'Brien v. Norwood, 29 N.E. 2d 635, 65 Ohio App. 289.
32 C.J. p 107 note 38.

19. Ariz.—Ackerman v. Kaufman, 15 P.2d 966, 41 Ariz. 110.
Cal.—Bartholomew v. Bartholomew, 132 P.2d 297, 56 Cal.App.2d 216.
Iowa.—Benedict v. Hall Mfg. Co., 236 N.W. 92, 211 Iowa 1313.
Ohio.—Laursen v. Lowe, 197 N.E. 597, 50 Ohio App. 103.
Tex.—Gann v. Putman, Civ.App., 159 S.W.2d 931, error refused—National Surety Corporation v. Jones, Civ.App., 158 S.W.2d 112—Farmers & Merchants State Bank of Haskell v. Ferguson, Civ.App., 166

may be pleaded as a defense to the subsequent action.[20] It has also been held that a second suit may be enjoined pending the determination of an appeal from an order vacating the judgment in the first suit, claimed to be res judicata,[21] and that, after a decree in equity, an action at law for the same matter, involving the same issues, will be enjoined because of its vexing another with a double suit for the same cause of action.[22] In any event one who was not a party to the former action will not be enjoined.[23]

i. Incompetency of Witnesses to Establish Defense

The incompetency of witnesses to establish a defense to an action at law may be ground for enjoining such action, if the witnesses will be competent in a suit in equity.

Where a defendant has a perfect legal defense to an action at law, but cannot prove it for the reason that the only possible witnesses are incompetent to testify because of interest or otherwise, equity will enjoin the action at law and allow the defense to be proved in equity, if the witnesses would be competent in a suit in equity;[24] but it must be alleged and shown that the testimony sought is material to the defense and that the defendant in the suit at law is without means of proving the same facts at law.[25] However, there is authority to the effect that one will not be restrained from relying on a defense simply on the ground that those who could have rebutted it are dead or disqualified from testifying,[26] and that the fact that the rules of evidence will not permit defendant at law to avail himself of the only existing proof of his defense will not entitle him to relief in equity.[27]

j. Actions to Recover Real Property

An action relating to the recovery of real property will be enjoined only where there is not an adequate remedy at law and the facts require equitable intervention.

Actions relating to the recovery of real property will not be enjoined where there is a full and adequate remedy, or defense to the action, at law;[28] but, on the other hand, where the remedy at law is not as full, adequate and complete as may be given by a court of equity, and the facts require equitable intervention, an injunction may be obtained.[29] An

S.W.2d 107—Haskell Nat. Bank of Haskell v. Ferguson, Civ.App., 155 S.W.2d 427—Butler v. Wagner, Civ. App., 104 S.W.2d 78, error refused —Ebner v. Nall, Civ.App., 95 S.W. 2d 1004, error dismissed—Ellerd v. White, Civ.App., 251 S.W. 274.

32 C.J. p 107 note 39.

Where title to lands was confirmed in defendants by a judgment in a former suit and again confirmed and quieted by the judgment in the instant suit, the court properly enjoined the institution of further suits by plaintiff contesting defendants' title, further litigation being useless and oppressive.—Ellerd v. White, supra.

Injunction against vexatious suits generally see supra § 39.

20. Iowa.—Benedict v. Hall Mfg. Co., 236 N.W. 92, 211 Iowa 1312.

Ohio.—Laursen v. Lowe, 197 N.E. 597, 50 Ohio App. 103.

21. Tenn.—Storie v. Griffin, 51 S.W. 2d 488, 164 Tenn. 596.

22. N.J.—Hurbanis v. Schultz, 15 A. 2d 886, 128 N.J.Eq. 215, reversing 6 A.2d 402, 126 N.J.Eq. 95—Lane v. Rushmore, 4 A.2d 55, 125 N.J.Eq. 310, affirming 198 A. 872, 123 N.J. Eq. 531, and certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518.

32 C.J. p 107 note 39 [a].

Suit at law treated as contempt of court

N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518.

Permanent injunction

N.J.—Mendel v. Berwyn Estates, 156 A. 324, 109 N.J.Eq. 11.

Successful party in accounting proceedings will be enjoined, if accounting is promptly made, from prosecuting action at law against same defendant, and others for substantially same relief.—Commercial Casualty Ins. Co. v. Bridgeton Nat. Bank, 175 A. 807, 117 N.J.Eq. 383.

23. Ala.—Morgan v. Morgan, 50 Ala. 89.

Idaho.—Ray v. Ray, 1 Idaho 566.

24. Ill.—English v. Landin, 54 N.E. 911, 181 Ill. 614.

32 C.J. p 107 note 41.

25. N.Y.—Morse v. Cloyes, Seld. p 184.

26. Mich.—Dubois v. Campau, 37 Mich. 248.

32 C.J. p 107 note 43.

27. N.J.—Linn v. Neldon, 23 N.J.Eq. 169.

28. Ga.—Wardlaw v. Wardlaw, 184 S.E. 873, 182 Ga. 309—Powell v. Gresham, 179 S.E. 708, 180 Ga. 565.

Mich.—Pine Shores Realty Co. v. Parker, 235 N.W. 163, 253 Mich. 300.

N.Y.—Schenectady Holding Co. v. Ashton, 197 N.Y.S. 737, 204 App. Div. 343, modifying 197 N.Y.S. 476.

32 C.J. p 108 note 56.

Counteraffidavit

Defendant in dispossessory proceeding is not entitled to maintain suit in equity to restrain dispossessory warrant, where remedy at law by filing statutory affidavit is adequate.—Wardlaw v. Wardlaw, 184 S.E. 873, 182 Ga. 209—Kilpatrick v. Coates, 115 S.E. 103, 154 Ga. 643.

Defenses available on vendor's summary proceeding, as precluding injunction of such proceeding.—Pine Shores Realty Co. v. Parker, 235 N. W. 163, 253 Mich. 300.

Enjoining summary proceedings to dispossess tenant see the C.J.S. title Landlord and Tenant § 774, also 36 C.J. p 651 note 75–p 652 note 4.

29. D.C.—Sambataro v. Caffo, 20 F. 2d 276, 57 App.D.C. 260.

Ga.—Smith v. Wilson, 159 S.E. 583, 173 Ga. 103.

La.—Baptiste v. Southall, 100 So. 674, 156 La. 442.

Mass.—Bancroft Trust Co. v. Canane, 171 N.E. 281, 271 Mass. 191.

Where the defense must be made out in part by proof of a lost instrument, the court may regard the defense at law as not adequate and grant an injunction.—Butch v. Lash, 4 Iowa 215—32 C.J. p 109 note 63.

Facts insufficient to show unlawful collusion authorizing injunction against dispossessory proceedings.—Redwine v. Frizzell, 190 S.E. 789, 184 Ga. 230.

action of forcible entry and detainer or of unlawful detainer will not be enjoined when complainant has a full and complete remedy or defense at law,[30] and no question of title in involved, except as it might be inextricably mixed with the right of possession,[31] unless there is fraud or mistake or a showing of manifest irreparable injury,[32] or unless the equity court has acquired jurisdiction for other purposes.[33]

Ejectment. An action of ejectment will not be restrained because of facts which constitute a good defense in that action itself,[34] at least not until the ejectment suit has proceeded to judgment.[35] An ejectment suit, however, may be restrained where the remedy afforded thereby is not as full, adequate, and complete as may be given by a court of equity, and the facts justify equitable intervention.[36] An ejectment suit by one holding the naked legal title to land will be enjoined on the application of a complainant having complete equitable title,[37] until the bill can be heard and the nature of the title declared;[38] and, on the other hand, a defendant in ejectment, holding the legal title, ordinarily cannot maintain a suit to enjoin the ejectment action.[39] An action of ejectment may also be enjoined on the ground that plaintiff in such action by his conduct estopped himself to maintain it.[40]

30. Fla.—Knott v. Smith, 84 So. 660, 79 Fla. 628.
Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189.
Mo.—Heller v. Jentzsch, 260 S.W. 979, 303 Mo. 440.
Tex.—Holcombe v. Lorino, 79 S.W. 307, 124 Tex. 446, reversing Lorino v. Holcombe, Civ.App., 71 S.W.2d 402—Bexar County v. Stewart, Civ.App., 41 S.W.2d 85.
32 C.J. p 108 note 58.

Pending an appeal a forcible entry and detainer action will not be enjoined.—Spann v. Williamson, Tex. Civ.App., 246 S.W. 1063.
Restraining enforcement of judgment in such action see Forcible Entry and Detainer § 75.

31. Tex.—Bexar County v. Stewart, Civ.App., 41 S.W.2d 85, error refused.
Injunction in proceeding for quieting title see the C.J.S. title Quieting Title § 98, also 51 C.J. p 273 notes 74–78.

32. Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189.

33. Tenn.—Mathis v. Campbell, 117 S.W.2d 764, 22 Tenn.App. 40.

Under bill in nature of ejectment
The chancery court, acquiring jurisdiction under supplemental bill in the nature of ejectment to determine rights of parties as respects title to land and consequent right of possession, could enjoin further proceedings under forcible entry and detainer case brought by defendant in circuit court.—Mathis v. Campbell, supra.

34. U.S.—Via v. State Commission on Conservation and Development of State of Virginia, D.C.Va., 9 F. Supp. 556, affirmed 56 S.Ct. 245, 296 U.S. 549, 80 L.Ed. 388.
N.J.—Brengel v. O'Toole, 143 A. 361, 103 N.J.Eq. 339, reversing 139 A. 428, 101 N.J.Eq. 449, and reversing 140 A. 28, 102 N.J.Eq. 178.
N.Y.—Boston & M. R. R. v. Delaware & Hudson Co., 197 N.E. 321, 268 N.Y. 382, affirming 273 N.Y.S. 670, 242 App.Div. 714.
32 C.J. p 108 note 57.

Where legal title to property is involved in suit for injunction to restrain defendants from ejecting complainant, equity does not have jurisdiction.—Higgins v. Linstra, 145 A. 622, 104 N.J.Eq. 355, affirmed 147 A. 909, 105 N.J.Eq. 246.

35. Ark.—Earle v. Hale, 31 Ark. 473.
Enjoining enforcement of ejectment judgment see Ejectment § 58.

36. Conn.—Bowen v. Bowen, 20 Conn. 127.
Ill.—Neil v. Kennedy, 149 N.E. 775, 319 Ill. 75—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196—Ellis v. Orendorff, 249 Ill.App. 55.
Md.—Whitaker v. McDaniel, 78 A. 1, 113 Md. 388.
Mich.—Maes v. Olmsted, 225 N.W. 583, 247 Mich. 180.
N.J.—Heissen v. Bleznak, 149 A. 630, 8 N.J.Misc. 225.

Ejectment will be enjoined
(1) Where the only remedy is an action on a covenant defectively executed.—Segee v. Thomas, C.C.Conn., 21 F.Cas.No.12,633, 3 Blatchf. 11.

(2) Where plaintiff's title is fraudulent, and a release should be decreed or cancellation had to remove a cloud on title.—Lehman v. Shook, 69 Ala. 486—32 C.J. p 109 note 64.

Protection of homestead right
Where a homestead right in land on which a husband entered under a contract of purchase is transmitted on his death to his widow, equity will protect her right to possession by an injunction against an action of ejectment brought against her by the purchaser during the life of the contract.—Burrow v. Clifton, 65 So. 58, 186 Ala. 297.

A bill by several lot owners for the correction of a deed, and to enjoin an action of ejectment brought and one threatened, is maintainable where one of the complainants intended to sell, and defendant intended to buy, the unoccupied part only of a tract of land at the rear of the lots, but the scrivener of the deed, through error, described the tract in the deed so as to include a strip of land at the rear of the lots occupied by sheds and fences, and defendant, taking advantage of such error, brought ejectment for a part of such strip against one of the lot owners, and threatened to bring a similar action against another of them.—Knight v. Herriman, 37 App.D.C. 236.

Temporary injunction
Ejectment suit, wherein it appears that defendant has no defense at law and that plaintiff is in equity and conscience estopped from any claim to recover the premises, may be enjoined in equity suit by defendant until his rights are established or determined to be unfounded.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196.

Permanent injunction
Action of ejectment by vendor or its successor which disturbs enjoyment of legal rights acquired by purchaser will be permanently enjoined.—Schwarz v. Medford Lakes Colony Club, 171 A. 496, 115 N.J.Eq. 465.

37. U.S.—Camp v. Boyd, 33 S.Ct. 785, 229 U.S. 530, 57 L.Ed. 1317, affirming 35 App.D.C. 159.
Ga.—Brown v. Newsom, 24 Ga. 466—Frith v. Roe, 23 Ga. 139.
Ill.—Metzger v. Horn, 143 N.E. 408, 312 Ill. 173.
32 C.J. p 109 note 60.

38. Ill.—Metzger v. Horn, supra.

39. Mich.—Lott v. Lott, 109 N.W. 1126, 146 Mich. 580, 8 L.R.A.,N.S., 748.

40. N.J.—Clement v. Young-McShea Amusement Co., 60 A. 419, 69 N.J. Eq. 347, reversed on other grounds 67 A. 82, 70 N.J.Eq. 677, 118 Am.S. R. 747.
32 C.J. p 109 note 61.

k. Remedy by Appeal or Certiorari

Where there is an adequate remedy by appeal or certiorari, an injunction ordinarily will not lie.

Where complainant has a right of appeal in the suit or proceeding sought to be enjoined, and the injustice complained of can be redressed on such appeal, the action will not be enjoined,[41] especially where a stay of proceedings pending the appeal can be obtained;[42] and this rule applies although complainant, because of lack of funds, is unable to take an appeal.[43] Where there is an adequate remedy by appeal an injunction will not lie to restrain actions pending in different courts merely to avoid possible conflicting decisions.[44] Injunctive relief, however, may be granted where the relief sought cannot be afforded by appeal,[45] as where, in case of several actions, an appeal is impossible without consolidation, and a consolidation cannot be had,[46] or where, under the circumstances, complainant is not called on to avail himself of the right of appeal,[47] or the right to appeal has been lost without any fault on his part.[48]

An injunction will not issue when there is an adequate remedy by certiorari;[49] it is otherwise where the remedy by certiorari is not prompt and efficient.[50]

l. Where Court Is without Jurisdiction

An action or proceeding in which the court or tribunal is proceeding without jurisdiction may generally be enjoined.

It has been held that an action may be enjoined on the ground that the court is without jurisdiction of the case,[51] but not on the ground that it may possibly exceed its jurisdiction.[52] By the weight of authority, however, where a tribunal is proceeding without jurisdiction no injunction will be granted to restrain the action, since the proceeding is void at law as in equity and the law affords an adequate remedy,[53] as where the court is proceeding without proper service of process;[54] and this rule has been held to apply to a case where the complainants in equity are strangers to the actions at law.[55]

§ 41. Actions, Suits, and Proceedings Which May Be Restrained

a. In general
b. Suits in equity in general
c. Infringement suits
d. Judgment as prerequisite to allowance of injunction

a. In General

If proper grounds therefor are present, injunctive relief ordinarily may be granted as to any action, suit, or legal proceeding, even though the court at law and the court in equity have concurrent jurisdiction of the subject-matter.

41. D.C.—Atlantic Greyhound Lines v. Keesee, 111 F.2d 657, 72 App.D.C. 45.
Fla.—Garrett v. Phillips, 137 So. 794, 103 Fla. 1227, denying rehearing 134 So. 231, 101 Fla. 426.
Ill.—Deynzer v. City of Evanston, 149 N.E. 790, 319 Ill. 226.
Ky.—Hoskins v. Asher, 118 S.W.2d 128, 274 Ky. 107.
La.—Robinson v. Weiner, 105 So. 35, 158 La. 979—Thompson v. Crow, 3 La.App. 158.
Okl.—Walker v. Tadder, 140 P.2d 1011.
S.C.—Fidelity Fire Ins. Co. v. Windham, 133 S.E. 35, 134 S.C. 378.
Tex.—Cohran v. Fischer, Civ.App., 61 S.W.2d 577, error dismissed—Mills v. Disney, Civ.App., 54 S.W.2d 596—Mitchell v. Dallas Loan Co., Civ. App., 52 S.W.2d 756—Roberts v. Kirk, Civ.App., 43 S.W.2d 966—Hetkes v. Gehret, Civ.App., 16 S.W.2d 395, affirmed, Com.App., 36 S.W.2d 700—Lubbock Independent School Dist. v. Abernathy, Civ. App., 1 S.W.2d 426—D. F. Connolly Agency, Inc., v. Popejoy, Civ.App., 290 S.W. 831—Texas Co. v. Honaker, Civ.App., 282 S.W. 879, error refused 283 S.W. 1071, 115 Tex. 509.
Wis.—Stahl v. Broeckert, 166 N.W. 653, 167 Wis. 113.
32 C.J. p 109 note 68.

42. Neb.—Vogel v. Rawley, 123 N.W. 1037, 85 Neb. 600.
N.Y.—Wordsworth v. Lyon, 5 How. Pr. 463, Code Rep.,N.S., 163.
Tex.—Spann v. Williamson, Civ.App., 246 S.W. 1063.

43. Mich.—Lapeer County v. Hart, Harr. 157.

44. Tex.—Fulmore v. Benson, Civ. App., 245 S.W. 124.
32 C.J. p 110 note 70.

45. Tex.—Lubbock Independent School Dist. v. Abernathy, Civ. App., 1 S.W.2d 426.

46. Tex.—Galveston, H. & S. A. R. Co. v. Dowe, 7 S.W. 368, 70 Tex. 5.
32 C.J. p 109 note 68 [b].

47. Cal.—Gaylord v. Pasadena, 166 P. 348, 175 Cal. 433.
32 C.J. p 109 note 68 [f].

48. Tex.—Roberts v. Kirk, Civ.App., 43 S.W.2d 966.

49. N.J.—179 Duncan Avenue Co. v. Spoerer, 3 A.2d 604, 124 N.J.Eq. 552.
Tex.—Cochran v. Fischer, Civ.App., 61 S.W.2d 577.
32 C.J. p 110 note 71.

50. Ill.—Collins v. Kinmare, 89 Ill. App. 236.
Iowa.—Gilcrest Co. v. Des Moines, 102 N.W. 831, 128 Iowa 49.
32 C.J. p 110 note 72.

51. Cal.—Golden Gate Tile Co. v. San Francisco Super. Ct., 114 P. 978, 159 Cal. 474.
N.Y.—Sherman v. Wright, 49 N.Y. 227.
32 C.J. p 110 note 73.

52. N.Y.—Conant v. Wright, 48 N.Y.S. 422, 22 App.Div. 216, affirmed 57 N.E. 1107, 162 N.Y. 635.
32 C.J. p 110 note 73 [b].

53. U.S.—Quinton v. Equitable Inv. Co., Cal., 196 F. 314, 116 C.C.A. 134.
Ala.—Birmingham R. & Electric Co. v. Birmingham Tract. Co., 25 So. 777, 121 Ala. 475.
32 C.J. p 110 note 74.

54. U.S.—Walker v. Robbins, Miss., 14 How. 584, 14 L.Ed. 552.
R.I.—American Electrical Works v. Devaney, 79 A. 678, 32 R.I. 292.
32 C.J. p 110 note 74 [b].

55. U.S.—Quinton v. Equitable Inv. Co., Cal., 196 F. 314, 116 C.C.A. 134.

Subject to the rules discussed supra §§ 37–40, with respect to the grounds for injunctive relief, any action or proceeding at law generally may be enjoined where the grounds for such relief exist.[56] In the absence of some special equity, however, a court of equity generally will not enjoin an action or proceeding at law,[57] such as an action for tort, in which the parties are entitled to a trial by jury.[58]

Concurrent jurisdiction as affecting right to relief. In accordance with the rule that in all cases of concurrent jurisdiction the tribunal which first obtains jurisdiction of the subject matter ordinarily will proceed and finally dispose of it, as stated in Equity § 21, a court of equity, although it has concurrent jurisdiction with the court of law, ordinarily will not enjoin an action at law already pending,[59] for in such a case a court of equity will not interfere with the action, unless it can give a more perfect remedy or the case can be better tried by the procedure of that court,[60] or some special cause intervenes which renders the remedy at law inadequate,[61] as where the action involves complicated accounts which cannot be tried in a court of law with certainty and accuracy.[62] Even though the suit in equity is begun first, an injunction may be refused where the question can be tried better before a jury.[63]

An action at law brought by a state has been said not to be enjoinable.[64]

b. Suits in Equity in General

A suit in equity ordinarily will not be enjoined, unless some special equitable ground therefor exists.

As a general rule, a court of equity will refuse to enjoin a party from proceeding with a suit in equity,[65] such as a suit to obtain an injunction,[66] or an accounting,[67] or for a receiver;[68] and the

56. N.J.—Mahaffey v. Evens, 171 A. 315, 115 N.J.Eq. 434.

Injunction may issue to restrain

(1) Action for a deficiency arising from a mortgage foreclosure.—Briscoe v. O'Connor, 182 A. 855, 119 N.J.Eq. 378, reversing 179 A. 253, 118 N.J.Eq. 322—Mahaffey v. Evens, 171 A. 315, 115 N.J.Eq. 434—Briscoe v. O'Connor, 170 A. 884, 115 N.J.Eq. 360—Lurie v. J. J. Hockenjos Co., 170 A. 593, 115 N.J.Eq. 304, affirming 167 A. 766, 113 N.J.Eq. 504.

(2) Action at law on covenant of summary nature, where breach of covenant is waived.—Lincoln Furniture Co. v. Bornstein, 135 A. 83, 100 N.J.Eq. 78, affirmed 138 A. 921, 101 N.J.Eq. 774.

(3) Action on writing preliminary to formal agreement in order to cause the writing to be surrendered and canceled.—Morgan Realty Co. v. Pazen, 139 A. 712, 102 N.J.Eq. 33.

57. Ga.—Ferrell v. Wight, 200 S.E. 271, 187 Ga. 360.

N.J.—Maher v. Usbe Building & Loan Ass'n, 174 A. 159, 116 N.J.Eq. 475.

Actions not enjoined

(1) Action for money due.

Mich.—Wedin v. Atherholt, 298 N.W. 483, 298 Mich. 142.

Tex.—Moran v. Midland Farms Co., Civ.App., 282 S.W. 608.

(2) Action at law by mortgagor-grantor against his assuming grantee for damages for breach of covenant of assumption.—Maher v. Usbe Building & Loan Ass'n, 174 A. 159, 116 N.J.Eq. 475—Bruen v. Tepperman, 174 A. 157, 116 N.J.Eq. 393.

(3) Action for unliquidated damages arising from tort.—Nashville, C. & St. L. Ry. v. Reams, 3 S.W.2d 498, 157 Tenn. 343.

(4) Trover suit for recovery of stock certificate.—Ferrell v. Wight, 200 S.E. 271, 187 Ga. 360.

58. Mich.—Farmers' Mut. Fire Ass'n of Midland, Isabella and Gratiot Counties v. Smith, 222 N.W. 727, 245 Mich. 514.

In insurer's suit to cancel fire policy, equity cannot restrain insured's prosecution of tort action against plaintiff.—Farmers' Mut. Fire Ass'n of Midland, Isabella and Gratiot Counties v. Smith, supra.

59. Ala.—Lee v. City of Birmingham, 135 So. 314, 223 Ala. 196.

Fla.—Isom v. Equitable Life Assur. Soc. of U. S., 189 So. 253, 138 Fla. 260.

W.Va.—Crawford v. Bosworth, 78 S.E. 623, 72 W.Va. 543.

32 C.J. p 112 note 7.

60. N.J.—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J.Eq. 33.

W.Va.—Crawford v. Bosworth, 78 S.E. 623, 72 W.Va. 543.

32 C.J. p 100 note 54.

More adequate remedy in equity as affecting injunctive relief generally see supra § 37.

61. Fla.—Isom v. Equitable Life Assur. Soc. of U. S., 189 So. 253, 138 Fla. 260.

N.J.—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J.Eq. 33.

32 C.J. p 112 note 8.

Action at law to recover seized slot machines may be enjoined in suit to condemn them as contraband gambling devices, as setting forth independent equity.—Lee v. City of Birmingham, 135 So. 314, 223 Ala. 196.

If adequate relief cannot be obtained in the action at law, the court of equity will enjoin the maintenance of such action and grant the relief to which the party is entitled.—Sweeny v. Williams, 36 N.J.Eq. 627.

62. Hawaii.—Gay v. Haiku Fruit & Packing Co., 29 Hawaii 702.

Ill.—Calumet Nat. Bank v. Friendship Building & Loan Ass'n, 259 Ill.App. 322.

N.J.—Borough of Eatontown v. Hendrickson, 157 A. 118, 109 N.J.Eq. 292—Inhabitants of Cranford Tp. v. Watters, 48 A. 316, 61 N.J.Eq. 284—Crane v. Early, 37 N.J.Eq. 564.

63. N.Y.—Mitchell v. Oakley, 7 Paige 68.

64. Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

65. Mont.—State v. Carroll, 279 P. 234, 85 Mont. 439.

Pa.—Trees v. Glenn, 181 A. 579, 580, 319 Pa. 487, quoting **Corpus Juris.**

32 C.J. p 110 note 76.

66. U.S.—Lawson v. Ætna Ins. Co., C.C.A.W.Va., 41 F.2d 316.

Cal.—Donato v. Board of Barber Examiners of State of California, 133 P.2d 490, 56 Cal.App.2d 196.

32 C.J. p 111 note 79.

Injunction suit by state insurance commissioner under statute to enforce his order is improperly restrained.—Lawson v. Ætna Ins. Co., C.C.A.W.Va., 41 F.2d 316.

67. N.Y.—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111—Hall v. Fisher, 1 Barb.Ch. 53.

68. U.S.—Columbia Bldg. & Loan Ass'n v. Grange, C.C.Mont., 77 F. 798.

La.—Reynaud v. Uncle Sam Planting & Mfg. Co., 83 So. 688, 146 La. 400.

32 C.J. p 111 note 81.

rule applies whether the application is made by parties, privies, or a stranger to the litigation.[69] However, a court of equity has "power" to enjoin a party from proceeding with other equitable suits,[70] and an injunction will be granted where complainant's rights cannot be fully protected in the other suit,[71] or where the injunction is necessary to prevent a multiplicity of suits.[72] The court first acquiring jurisdiction of a case will protect that jurisdiction by enjoining an action by the same parties on the same subject matter in another court, even though that other court may also have equity jurisdiction;[73] and in accordance with this rule an injunction may issue to protect and effectuate a prior decree, and prevent the relitigation of questions of law and fact determined thereby.[74]

c. Infringement Suits

Where an infringement suit is pending, or has been decided in favor of defendant, he is entitled to an injunction restraining the prosecution of other infringement suits, with respect to the same article, against him or his customers.

In a suit against a manufacturer for infringement of a patent, the court will, on application, restrain complainant, until the determination of the pending suit, or of a similar suit pending in another court, from instituting or prosecuting oppressive and vexatious infringement suits against customers of defendant.[75] If the manufacturer is successful in the infringement suit against him, he is entitled to an injunction against the prosecution of infringement claims which were available in the earlier suit,[76] and also is entitled to an injunction restraining plaintiff from prosecuting a suit against his customer for infringement, consisting of the use or sale of the article involved in the former suit,[77] notwithstanding such a customer made his purchases indirectly through another customer of the manufacturer;[78] but he is not entitled to injunctive relief against a suit for infringement, caused by his making structural changes in the article, since the prior decree, in the direction of infringement;[79] nor is he entitled to an injunction restraining the

69. N.Y.—Smith v. American Life Ins. & Trust Co., Clarke 307—Lane v. Clark, Clarke, 309.
32 C.J. p 111 note 77.

70. Minn.—Mann v. Flower, 5 N.W. 365, 26 Minn. 479.
N.Y.—Erie R. Co. v. Ramsey, 45 N.Y. 637.
Pa.—Trees v. Glenn, 181 A. 579, 581, 319 Pa. 487, quoting **Corpus Juris.**

Only in extreme cases, should this jurisdiction be exercised.—Erie R. Co. v. Ramsey, 45 N.Y. 637.

71. Minn.—Mann v. Flower, 5 N.W. 365, 26 Minn. 479.
Tex.—Morse v. Scott, Civ.App., 130 S.W.2d 1041.

72. Kan.—Stoddart v. Vanlaningham, 14 Kan. 18.
S.D.—City of Sioux Falls v. Hossack, 5 N.W.2d 880.
32 C.J. p 111 note 90.

Separate actions by riparian owners to enjoin city from causing pollution of river by operation of sewage disposal plant and for damages are of "equitable cognizance" independent of community of interest and question of law and of fact involved, and, city would be granted injunctive relief to prevent a multiplicity of suits, where issues involved in each of the actions were of such a nature that single trial would not prejudice interest of any party; and this rule applies although the lands owned by the riparian owners are in different counties.—City of Sioux Falls v. Hossack, supra.
Multiplicity of suits generally see supra § 38.

73. N.Y.—Conover v. New York, 25 Barb. 513, 5 Abb.Pr. 393, 14 How. Pr. 550.
Pa.—Trees v. Glenn, 181 A. 579, 581, 319 Pa. 487, quoting **Corpus Juris.**

Where equity has undertaken to administer assets of insolvent corporation, as far as they are within its jurisdiction, other equitable suits for the same purpose will be enjoined.—Smith v. St. Louis Mut. Life Ins. Co., 6 Lea., Tenn., 564.

74. U.S.—U. S. v. Aluminum Co. of America, D.C.Pa., 19 F.Supp. 374—Ashwander v. Tennessee Valley Authority, D.C.Ala., 19 F.Supp. 190, reversed on other grounds, C.C.A., Alabama Power Co. v. Tennessee Valley Authority, 92 F.2d 412—Sterling v. Gredig, D.C.Tex., 5 F. Supp. 329.
Former adjudication as affecting injunction generally see supra § 40 f.

75. U.S.—Maytag Co. v. Meadows Mfg. Co., C.C.A.Ill., 35 F.2d 403, certiorari denied 50 S.Ct. 250, 281 U.S. 737, 74 L.Ed. 1151—Thomas French & Sons v. Carleton Venetian Blind Co., D.C.N.Y., 34 F.Supp. 850.
48 C.J. p 371 note 12.

Only in clear case should injunction be granted.—Cold Metal Process Co. v. E. W. Bliss Co., D.C.Del., 21 F.Supp. 509.

Adequate relief available in another court
Injunction against patent infringement suit as having in terrorem purpose was denied, remedy being by applying to court in another district in which twenty-six infringement suits were pending.—Hazeltine Corporation v. Atwater Kent Mfg. Co., D.C.Pa., 34 F.2d 50.
Injunction against threatened suits see infra § 149.

76. U.S.—General Ry. Signal Co. v. Union Simplex Train Control Co., D.C.Del., 26 F.Supp. 325, affirmed, C.C.A., Union Simplex Train Control Co. v. General Ry. Signal Co., 106 F.2d 1018, certiorari denied 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022.

77. U.S.—Kessler v. Eldred, Ind., 27 S.Ct. 611, 206 U.S. 285, 51 L.Ed. 1065—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C.C.A.Del., 138 F.2d 46—Fretwell v. Gillette Safety Razor Co., C.C.A.Va., 106 F.2d 728, certiorari denied 60 S.Ct. 978, 310 U.S. 627, 84 L.Ed. 1398, rehearing denied 61 S.Ct. 55, 311 U.S. 724, 85 L.Ed. 472, and 61 S.Ct. 1106, 313 U.S. 600, 85 L.Ed. 1552—U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., C.C.A.W.Va., 104 F.2d 856, modifying, D.C., Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, 24 F.Supp. 249—Aleograph Co. v. Electrical Research Products, C.C.A.Tex., 82 F.2d 625, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 405, rehearing denied 57 S.Ct. 108, 299 U.S. 620, 81 L.Ed. 457.
48 C.J. p 407 note 50.

78. U.S.—Fretwell v. Gillette Safety Razor Co., C.C.A.Va., 106 F.2d 728, certiorari denied 60 S.Ct. 978, 310 U.S. 627, 84 L.Ed. 1398, rehearing denied 61 S.Ct. 55, 311 U.S. 724, 85 L.Ed. 472, and 61 S.Ct. 1106, 313 U.S. 600, 85 L.Ed. 1552.

79. U.S.—Buckeye Incubator Co. v.

prosecution of a suit against a customer who is a manufacturer and purchases only one part of the manufactured article from defendant in the former suit.[80] An exclusive licensee, under a patent may be enjoined, at the instance of the licensor, from prosecuting suits against infringers in bad faith and for the purpose of having the patent declared invalid, so as to release himself from his agreement as to licensing.[81]

d. Judgment as Prerequisite to Allowance of Injunction

An injunction of an action at law because of an equitable defense not cognizable at law may be refused prior to a judgment therein; and it is the common practice to require defendant to confess judgment as a condition to the allowance of an injunction in such a case.

Where an injunction is asked because of the existence of equitable defenses not cognizable at law, the court may refuse to enjoin the action prior to judgment therein, on the ground that complainant's equitable rights may be fully protected by enjoining execution of the judgment,[82] except in cases where a discovery is asked in order to assist the defense at law.[83] However, in the exercise of its discretion,[84] it is the common practice of a court of equity in granting an injunction against an action at law, to impose the condition that defendant confess judgment in that action,[85] especially where no discovery is sought in aid of the defense at law, and the matters referred to the court of equity for relief against proceedings at law are the sole ground on which the party under such rule claims right, or, in other words, where the party seeking equitable relief has no defense at law;[86] and the rule has been applied whether or not it appears that the party seeking equitable relief had a legal as well as an equitable defense to the action at law.[87] On the other hand, it has been held that, if besides the grounds of relief in equity the party has distinct and substantive grounds of defense at law, not cognizable in equity, he may, without being compelled to waive his legal defense by confessing judgment, have a hearing in a court of chancery on the merits of his case, and a decree for the proper relief.[88]

Where such a confession of judgment is exacted, the order should require execution of the judgment to be stayed and that the judgment itself be dealt with as equity may finally direct.[89] Where a confession of judgment is not exacted, on granting the injunction, the court of equity will ordinarily on dismissal of the bill and dissolution of the injunction proceed to dispose of the matters involved and render the judgment which plaintiff should have confessed,[90] or plaintiff in the action at law may introduce into his suit at law the record and final decree in the injunction suit as res adjudicata of the questions therein involved, and thus prevent defendant from relitigating these questions further in

Boling, C.C.A.Ohio, 46 F.2d 965, reversing, D.C., Boling v. Buckeye Incubator Co., 33 F.2d 347.

80. U.S.—Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., Ohio, 34 S.Ct. 403, 232 U.S. 413, 58 L.Ed. 663, modifying 183 F. 978, 106 C.C.A. 318, and distinguishing Kessler v. Eldred, Ind., 27 S.Ct. 611, 206 U.S. 285, 51 L.Ed. 1065.

81. U.S.—Cold Metal Process Co. v. United Engineering & Foundry Co., C.C.A.Pa., 79 F.2d 666, reversing, D.C., 9 F.Supp. 994.

82. Miss.—Hill v. Billingsly, 53 Miss. 111.
32 C.J. p 112 note 13.
Effect of statute
A Mortgage Moratorium Act authorizing the court to postpone the enforcement of a judgment by execution sale, or to give other relief where a judgment is rendered in an action to collect a debt or obligation secured by a mortgage, the foreclosure of which may be effected under the terms of the act, does not give an equity court power to restrain an action at law, brought by a receiver pursuant to a court order, to collect a mortgage note before a judgment on the note has been obtained.—Rea v. O'Bannon, 158 So. 916, 171 Miss. 824.

In federal courts, under new Rules of Civil Procedure, rule 18 (b), 28 U.S.C.A. following § 723c, court may grant relief by issuing injunction notwithstanding a judgment for debt has not yet been obtained, but in awarding such relief court should be guided largely by considerations which were the basis for the old rule which prohibited issuance of injunctions prior to entry of judgment, and court in proper case may make proceedings which may result in judgment be something more than mere empty form.—Reconstruction Finance Corporation v. Central Republic Trust Co., D.C.Ill., 30 F.Supp. 933.

83. N.Y.—Melick v. Drake, 6 Paige 470.
N.C.—Williams v. Sadler, 57 N.C. 378, 380, 75 Am.D. 424.
32 C.J. p 113 note 14.
Injunction to obtain discovery generally see supra § 37 f.

84. Va.—Henley v. Cottrell Real Estate Ins. & Loan Co., 43 S.E. 191, 101 Va. 70.
32 C.J. p 113 note 15.

85. Tenn.—Reynolds Corp. v. Knoxville Lith. Co., 197 S.W. 897, 138 Tenn. 287—Brier Hill Collieries v. Pile, 9 Tenn.App. 16.
32 C.J. p 113 note 16.
Conditions on granting or refusing injunction generally see infra § 202.

86. Ark.—Conway v. Ellison, 14 Ark. 360.
N.Y.—Ham v. Schuyler, 2 Johns.Ch. 140.
32 C.J. p 113 note 17.

Offer to make defense solely in equity, as substantial compliance with rule requiring confession of judgment.—Ex parte Hodges, 24 Ark. 197.

87. Tenn.—Myers v. Northcutt, 152 S.W. 1034, 127 Tenn. 54.
32 C.J. p 113 note 18.

88. Va.—Dudley v. Miner, 25 S.E. 100, 93 Va. 408.
32 C.J. p 113 note 19.

89. Tenn.—Brier Hill Collieries v. Pile, 9 Tenn.App. 16.
32 C.J. p 113 note 20.

90. Tenn.—Osborne v. Allen, 226 S.W. 221, 143 Tenn. 343—Haynes v. Lebanon Bank, 61 S.W. 775, 106 Tenn. 425.
Order on dissolution of injunction generally see infra § 253.

the suit at law.[91] Where, however, the action at law is based on a contract void for illegality in which both parties participated, a court of equity will not lend its aid to enforce the illegal transaction but will merely dismiss the bill and leave the parties to work out these rights and defenses in the action at law.[92]

§ 42. —— Particular Proceedings or Remedies in Civil Actions

In the absence of special circumstances, equity ordinarily will not interfere by injunction with regular and orderly proceedings or remedies in the course of a civil action.

Except where the circumstances justify or require the granting of injunctive relief,[93] equity ordinarily will not interfere by injunction with regular and orderly proceedings or remedies in the course of an action at law,[94] as in the issuance of writs,[95] such as a writ of scire facias,[96] or in a proceeding to punish for contempt.[97] Injunction will not be granted for the purpose of changing venue,[98] unless it appears that such prejudice exists against defendant that he cannot have a fair and impartial trial in the court in which the action is pending.[99]

Introduction of evidence or taking of depositions. A court of equity may restrain the improper use of written evidence, in an action at law,[1] or the introduction of evidence obtained by fraud or duress, where in justice and good faith it should not be used against complainant.[2] A court of equity, however, is without jurisdiction to enjoin complainant in an-

91. Tenn.—Hartman v. Hartman, 2 Tenn.Cas. 488.

92. Tenn.—Osborne v. Allen, 226 S. W. 221, 143 Tenn. 343.

93. Pa.—Link Building & Loan Ass'n, to Use of Melnick, v. Melnick, 189 A. 470, 325 Pa. 182.
Tex.—Beck v. Priddy, Civ.App., 249 S.W. 1105, reversed on other grounds, Com.App., 252 S.W. 476.

Injunction held proper

(1) To restrain sheriff from ejecting defendant from his occupancy of premises claimed under a lease, pending trespass to try title and to recover possession of land.—Beck v. Priddy, supra.

(2) Where justice, dismissing forcible entry and detainer action after remand by district court, lost jurisdiction, and writ of restitution was nullity, to restrain action of constable and defendant in attempting ouster of plaintiff's tenant under color of such writ of restitution.—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 644.

(3) To restrain an action of constable and defendant in attempting ouster of plaintiff's tenant under color or writ of restitution, where justice, dismissing forcible entry and detainer action after remand by district court, lost jurisdiction, and such writ of restitution was a nullity.—Rasmussen v. Alberts, 246 N. W. 620, 215 Iowa 644.

Supplementary proceeding

Where error consists in permitting supplementary proceeding on judgment from which judgment debtor has been discharged in bankruptcy, bill for injunction will lie if brought before adjudication in supplementary proceeding.—Donnelly v. Montague, 24 N.E.2d 864, 305 Mass. 14.

94. Ark.—Bridgman v. Johnson, 142 S.W.2d 217, 200 Ark. 990.
Okl.—Mundell v. Colony Mercantile Co., 4 P.2d 1059, 153 Okl. 79—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.
Tenn.—Ætna Life Ins. Co. v. Bellos, 14 S.W.2d 961, 158 Tenn. 554, denying rehearing 13 S.W.2d 795, 158 Tenn. 554.

Where court of law has jurisdiction of the parties and subject matter, and is exercising its jurisdiction in a lawful manner, equity will not interfere to control its proceedings on account of errors of law or judgment, if the trial court can properly control the issues.—Bird v. Alexander, Tex.Civ.App., 294 S.W. 305.

Injunction will not lie to restrain

(1) Levy of attachment on property belonging to another.—Summers v. Besterman, 71 S.W.2d 450, 254 Ky. 231.

(2) Order of justice of peace erroneously taxing costs.—Caldwell v. Traub, 43 P.2d 1047, 172 Okl. 12.

Objection to petition for new trial that it does not set forth the reasons with sufficient definiteness to comply with the statutory requirements is not ground to enjoin taking a deposition to which a party is entitled.—Boston & M. R. Co. v. Watkins, 113 A. 796, 80 N.H. 102.

95. N.C.—Davis v. Federal Land Bank of Columbia, 7 S.E.2d 373, 217 N.C. 145.

Writ of assistance

Mortgagors are not entitled to injunction to restrain issuance of writ of assistance in action wherein mortgagee obtained judgment, so that mortgagors' mineral rights might be determined, where petition for injunction referred to mortgage foreclosure judgment which did not determine mortgagors' mineral rights which were not involved in action.—Davis v. Federal Land Bank of Columbia, supra.

96. Ga.—Bell v. Verdel, 79 S.E. 849, 140 Ga. 768.
Md.—Starr v. Heckart, 32 Md. 267.

Where one has good defense to scire facias, which without any laches or fault on his part he has no opportunity to make, and is without a full and adequate remedy at law, he is entitled to an injunction restraining execution.—Starr v. Heckart, supra.

Scire facias will not be enjoined because of the invalidity of the judgment sought to be revived thereby, as such invalidity may be set up as a defense in the scire facias proceeding.—Bell v. Verdel, 79 S.E. 849, 140 Ga. 768.

97. Ga.—Jones v. Head, 196 S.E. 725, 185 Ga. 857.

For failure to pay costs

Ga.—Jones v. Head, 196 S.E. 725, 185 Ga. 857.

Injunction granted

Tex.—Cooper v. Decker, Civ.App., 21 S.W.2d 70.

98. N.Y.—Colson v. Pelgram, 182 N. E. 19, 259 N.Y. 370—Reis v. Graham, 106 N.Y.S. 645, 122 App.Div. 312—Cheney v. Schuyler, 20 N.Y.S. 546.
67 C.J. p 167 note 94.

99. Va.—Darmsdatt v. Wolfe, 4 Hen. & M. 246, 14 Va. 246.

1. N.J.—Colton Manor Co. v. Davis, 150 A. 10, 106 N.J.Eq. 76.
W.Va.—Rogers v. Rogers, 16 S.E. 633, 37 W.Va. 407, 420.

Improper use of written lease will be restrained in an action of ejectment.—Colton Manor Co. v. Davis, 150 A. 10, 106 N.J.Eq. 76—Colton Manor Co. v. Davis, 146 A. 207, 104 N.J.Eq. 452.

2. Mich.—Rosenthal v. Muskegon Circuit Judge, 57 N.W. 112, 98 Mich. 208, 39 Am.S.R. 535, 22 L.R. A. 693.

other suit from exercising the statutory privilege of taking depositions in support of his complaint where there is no showing of irreparable injury;[3] and it will not enjoin an officer or party from taking depositions of the adverse party and his attorney unless it clearly appears that the officer is acting without jurisdiction or is exceeding his lawful authority,[4] or restrain him from punishing for contempt in the course of taking depositions.[5]

Appeals and writs of error. While it has been held that a court of equity has the power to grant injunctive relief in such cases,[6] as a general rule, a party will not be enjoined from prosecuting an appeal from or suing out a writ of error to a judgment rendered against him.[7]

§ 43. —— Special Proceedings Other than Actions

Injunctive relief may be granted against a special proceeding other than an action, where proper grounds therefor are present.

In accordance with the rules discussed supra §§ 37–40, where proper grounds for injunctive relief are present, an injunction may be granted to restrain special proceedings other than actions,[8] and proceedings before a judicial officer or court of an inferior nature[9] such as a municipal court,[10] a commissioners' court,[11] a police court,[12] or a workmen's compensation court.[13] Unless proper grounds therefor exist, an injunction ordinarily will not be granted to restrain the prosecution of proceedings before an administrative board or commission,[14]

N.Y.—Matthews v. Carman, 107 N.Y.S. 694, 122 App.Div. 582.
32 C.J. p 111 note 91.

3. Miss.—Peyton v. Vardaman, 60 So. 129, 103 Miss. 164.

4. Neb.—Old Line Bankers' Life Ins. Co. v. Witt, 139 N.W. 641, 92 Neb. 743.

5. Ohio.—State ex rel. Bechtel v. McCabe, 20 N.E.2d 381, 60 Ohio App. 233.

A notary public taking depositions for a case pending in court is not an "officer of the court," and his power to take depositions and punish for contempt is independent of the court, and hence it has no jurisdiction to issue an order restraining him from punishing for contempt.—State ex rel. Bechtel v. McCabe, supra.

6. Ga.—Reynolds v. Ingraham, 175 S.E. 918, 179 Ga. 398.
Tenn.—Perkins v. Woodfolk, 8 Baxt. 411.
32 C.J. p 111 note 96.

7. Miss.—Scranton Lumber Co. v. Knox, 109 So. 721, 143 Miss. 643.
Tex.—Yett v. Cook, 268 S.W. 715, 115 Tex. 175.
32 C.J. p 111 note 96.

Suit to correct filing date

That appeal was barred may be shown on appeal in the case, so suit to correct filing date of petition for appeal, to show it was filed too late, and enjoin prosecution of appeal, will not lie.—Scranton Lumber Co. v. Knox, 109 So. 721, 143 Miss. 643.

8. N.H.—Wormwood v. Alton May Camp Meeting Ass'n, 175 A. 233, 87 N.H. 136.

Injunction granted to restrain summary warrant proceeding

(1) To recover gaming paraphernalia seized by sheriff.—Elder v. Camp, 18 S.E.2d 622, 193 Ga. 320.

(2) To recover personal property, where defendant answered interpleader and set up right to possession of property, and by cross action sought to recover the value of the property.—Gaylor v. Citizens' Automobile Co., 152 S.E. 110, 170 Ga. 91.

Application for year's support

(1) Generally a widow's application for a year's support will not be restrained.—Smith v. Pitchford, 5 S.E.2d 766, 189 Ga. 307—Kerr v. McAnally, 188 S.E. 687, 183 Ga. 365—Burks v. Beall, 3 S.E. 155, 77 Ga. 271.

(2) Executors are not entitled to enjoin prosecution of such application on ground that widow had accepted legacy in lieu of year's support or that estate had been fully administered.—Kerr v. McAnally, supra.

Settlement of estate will not be interfered with where there is a remedy at law.—Gillespie v. Schram, C.C.A.Mich., 108 F.2d 39.

9. Ga.—Burgess v. Friar, 188 S.E. 526, 183 Ga. 386.

10. N.Y.—Lauterstein v. Dime Sav. Bank, 216 N.Y.S. 861, 216 App.Div. 848.

Where municipal court is without jurisdiction to entertain a certain summary proceeding, an injunction will issue restraining its prosecution.—Lauterstein v. Dime Sav. Bank, supra.

11. Tex.—Harris County v. Bassett, Civ.App., 139 S.W.2d 180.

Temporary injunction restraining issuance of commitment on an order of the commissioners' court committing taxpayer to jail for contempt because of his refusal to answer certain questions on hearing before commissioners' court sitting as a board of equalization.—Harris County v. Bassett, supra.

12. Ky.—Burden v. Hendrix, 265 S.W. 493, 205 Ky. 167.

13. Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.

Injunction will not be granted where the controversy is such as would be decided by equity court on grounds equally available at law or before workmen's compensation court, and therefore an employer is not entitled to injunction, restraining workmen's compensation court from proceeding with rehearing in dismissed compensation proceeding or hearing in second proceeding by claimant, as such court, in action before it, has power to do as full justice to parties and matter in dispute as can be done in equity and every matter relied on to support equitable action may be properly considered as defense in proceeding before compensation court.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, supra.

14. D.C.—Utah Fuel Co. v. National Bituminous Commission, 101 F.2d 426, 69 App.D.C. 333.
Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Meredith v. Crowder, 142 N.E. 876, 81 Ind.App. 221.

Injunction not granted to restrain

(1) Employees or agents of securities and exchange commission from enforcing subpœnas duces tecum requiring telegraph companies to produce telegrams respecting matters under investigation.—Newfield v. Ryan, C.C.A.Fla., 91 F.2d 700, certiorari denied Ryan v. Newfield, 58 S.Ct. 54, two cases, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 86 L.Ed. 601, and 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, two cases, 302 U.S. 650, 82 L.Ed. 504—Ballentine v. Florida Tex. Oil Co., C.C.A.Fla., 91 F.2d 700, certiorari denied 58 S.Ct. 54, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, 302 U.S. 650, 82 L.Ed. 504.

or to restrain the enforcement of an order or ruling of such a board or commission,[15] particularly where there is an adequate remedy by appeal from such order or decree.[16] An appeal from a tax assessment will not be enjoined, if the relief sought is defensive merely and equally available in a suit at law.[17]

Arbitration and award. Arbitration proceedings, under an agreement for arbitration, may be enjoined where proper grounds therefor are present.[18] Such proceedings, however, ordinarily will not be enjoined, unless the conduct of the arbitrators or of the parties is manifestly unlawful.[19] They will not be enjoined on the ground that some of the matters presented by one of the parties for determination are not within the contract of submission,[20] or because one of the things that the arbitrators will decide is, whether the case is one of which they should take cognizance;[21] nor will an injunction issue for the purpose of controlling the action of an arbitration board, under legislative authority, unless irreparable injury is evident.[22] Arbitration proceedings will not be enjoined at the instance of a party, to the arbitration agreement, who has, by his conduct, estopped himself from asking such relief.[23]

(2) Prosecution of appeal from award of industrial board.—Liberty Mut. Ins. Co. v. Ragan, 14 S.E.2d 88, 191 Ga. 811.

15. D.C.—Chastleton Corporation v. Sinclair, 290 F. 348, 53 App.D.C. 373, reversed on other grounds 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841.

Reason for rule

"To permit judicial review . . . by injunction . . . of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies."

U.S.—Miles Laboratories v. Federal Trade Commission, D.C.D.C., 50 F. Supp. 434, 437, affirmed, C.C.A., 140 F.2d 683, certiorari denied 64 S. Ct. 1263.

D.C.—Utah Fuel Co. v. National Bituminous Coal Commission, 101 F. 2d 426, 432, 69 App.D.C. 333.

Remedy at law inadequate

Where statutory provision that county commissioners' judgment or order against tax collector cited to account shall be conclusive, unless appeal is taken as therein provided, is so indefinite and uncertain or incomplete as to be nugatory and unenforceable, in absence of provision by statute for appeal, such order or judgment would not be judicial determination reviewable by certiorari, so that collector's right to appear and be heard before board in response to citation would not constitute remedy at law excluding equitable jurisdiction to enjoin commissioners from proceeding further under citation.—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860.

16. D.C.—Chastleton Corporation v. Sinclair, 290 F. 348, 53 App.D.C. 373, reversed on other grounds 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841.

Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Meredith v. Crowder, 142 N. E. 876, 81 Ind.App. 221.

Rent commission

A bill to restrain the enforcement of an order of the rent commission was properly dismissed for want of equity, where complainants had duly perfected their appeal and all questions which they urged in support of their right to injunction could be preserved and presented on appeal. —Chastleton Corporation v. Sinclair, 290 F. 348, 53 App.D.C. 373, reversed on other grounds 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841.

17. Miss.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.

Grounds for enjoining appeal by attorney general not presented

(1) By the contention that the appeal is a nullity because not signed by attorney general or assistants and because not taken within prescribed time, since it may be determined in proceeding at law.—Edward Hines Yellow Pine Trustees v. Knox, supra.

(2) By the alleged intention of attorney general in such appeal to secure one hundred per cent assessment as against assessment of sixty per cent as to other property, since it will be assumed that the court will proceed in accordance with state and federal constitutions requiring equality and uniformity.—Edward Hines Yellow Pine Trustees v. Knox, supra.

(3) By the mere fact that preparation and presentation of defense to appeal from tax assessment will entail expense.—Edward Hines Yellow Pine Trustees v. Knox, supra.

18. N.Y.—Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N.Y. 153.

Injunction at instance of foreign corporation, party to the arbitration agreement, is improperly refused on ground that court had no jurisdiction.—Direct U. S. Cable Co. v. Dominion Tel. Co., supra.—5 C.J. p 105 note 41 [a].

Injunction:

Against entry of judgment on award see Arbitration and Award § 129.

On setting aside award see Arbitration and Award § 109.

19. Pa.—West Jersey R. Co. v. Thomas, 7 Phila. 635.

20. Ohio.—City of Cincinnati v. Trustees of Cincinnati Southern Ry., 6 Ohio Cir.Ct. 247, 3 Ohio Cir.Dec. 438, affirmed City of Cincinnati v. Bishop, 44 N.E. 1132, 52 Ohio St. 637.

5 C.J. p 104 note 38.

21. Ohio.—White v. Mann, 9 Ohio S. & C. P. 407, 5 Ohio N.P. 376.

Questions solely for arbitrators

Where there is no question as to making of, or compliance with, contract to arbitrate, questions raised on motion for stay of arbitration are determinable solely by arbitrators, and order staying arbitration is erroneous.—Pierce v. Brown Buick Co., 17 N.Y.S.2d 889, 258 App.Div. 679, affirmed 28 N.E.2d 400, 283 N. Y. 669.

22. La.—New Orleans City & L. R. Co. v. State Board of Arbitration, 17 So. 418, 47 La.Ann. 874.

5 C.J. p 104 note 36 [a].

23. Del.—Vitaphone Corporation v. Electrical Research Products, 167 A. 845, 19 Del.Ch. 354.

Mass.—Dana v. Dana, 157 N.E. 623, 260 Mass. 460.

Neglect to summon witnesses

Under a statutory provision that witnesses may be summoned to attend hearings before an arbitration committee, the neglect of one party to the arbitration agreement to summon witnesses is not a cause, after the hearing and before argument before the arbitrators, for enjoining the other party from proceeding further with the arbitration.—Dana v. Dana, 157 N.E. 623, 260 Mass. 460.

Garnishment proceedings. A garnishment proceeding may be enjoined where there are equitable grounds therefor, and there is no adequate remedy at law,[24] or it is necessary to prevent a multiplicity of suits,[25] but not merely because of annoyance by repetition.[26]

Designation of tribunal by statute as affecting right to relief. Where the legislature has specified a particular tribunal for determining a question, in the absence of some special equity, that tribunal ought not in general to be prevented by injunction from proceeding with the action or proceeding before it.[27] This rule has been applied to proceedings in courts of probate,[28] and of insolvency.[29]

§ 44. —— Mandamus, Prohibition, and Supersedeas

Injunction ordinarily will not lie to stay proceedings by mandamus or writ of prohibition, or to control the effect of a supersedeas.

While there is some authority to the contrary,[30] it is generally held that a court of equity has no jurisdiction to grant an injunction to stay proceedings by mandamus or a writ of prohibition,[31] and the effect of a supersedeas generally cannot be controlled or destroyed by injunction.[32]

§ 45. —— Discontinuance of Action or Proceeding

An injunction may be granted to restrain plaintiff from discontinuing his action or proceeding.

Under proper circumstances a plaintiff will be enjoined from dismissing his action,[33] as where an assignor attempts to dismiss an action at law brought in his name for the benefit of the assignee,[34] or where one has given a power of attorney to another authorizing the use of his name in a suit for the other's benefit,[35] and especially where such a dismissal would work irreparable injury because complainant would be barred by the statute of limitations from commencing a subsequent action.[36] However, the settlement of a suit will not be enjoined merely because creditors of plaintiff would be benefited in case its prosecution was continued.[37]

24. Ga.—Huling v. Huling, 22 S.E. 2d 832, 194 Ga. 819—McGinnis v. Scheer, 186 S.E. 804, 182 Ga. 684.

Garnishment on dormant judgment may be enjoined, but this remedy is not exclusive.—Continental Supply Co. v. Carter, Tex.Civ.App., 13 S.W.2d 927—Carlton v. Hoff, Tex.Civ.App., 292 S.W. 642.

Remedy at law held adequate to prevent injunction.—Nash Loan Co. v. Yonge, 186 S.E. 811, 182 Ga. 672—Straub v. First Mut. Building & Loan Ass'n, 173 S.E. 714, 178 Ga. 672.

Annoyance to witnesses insufficient equity

Ala.—Woods v. Thompson, 175 So. 262, 234 Ala. 523.

25. Ill.—Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236.

Necessity of establishing defense at law

Equity will not enjoin the prosecution of numerous garnishment proceedings against a garnishee as the debtor of a single defendant on the ground of multiplicity of actions, unless the garnishee has first established a defense at law, when equity will interfere to prevent further vexatious litigation.—Imperial Fire Ins. Co. v. Gunning, supra.

26. Ga.—Huling v. Huling, 22 S.E. 2d 832, 194 Ga. 819—Banda v. Banda, 14 S.E.2d 479, 192 Ga. 5.

27. N.Y.—Griffith v. Dodgson, 93 N. Y.S. 185, 103 App.Div. 542.
32 C.J. p 113 note 25.

Under statute giving right of appeal to the state, county, or municipality from a tax assessment to a designated court, a chancery court may not enjoin the appeal.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.

28. Iowa.—McIntosh v. Brown, 139 N.W. 926, 159 Iowa 41.
32 C.J. p 114 note 26, p 112 note 7 [b].

29. Mass.—Fellows v. Spaulding, 6 N.E. 548, 141 Mass. 89.

30. Ill.—Hladovec v. Paul, 78 N.E. 619, 222 Ill. 254.
Miss.—Humphreys County v. Cashin, 101 So. 571, 136 Miss. 476.

Prior to judgment therein the prosecution of mandamus proceedings may be restrained by injunction.—Humphreys County v. Cashin, supra.

Equity has jurisdiction, where appellant assigned to sureties a judgment in his favor against a county, and, on reversal of such judgment and recovery of another judgment, assigned it to his wife, of county's action to enjoin wife from prosecuting mandamus suit to compel payment, and in alternative for relief against sureties to whom it had paid judgment on their indemnity bond, in which sureties filed cross bill, claiming proceeds of such judgment, the entire controversy involving proceeds of such judgment.—Humphreys County v. Cashin, supra.

31. Wash.—State v. Wallace, 172 P. 581, 101 Wash. 410.
32 C.J. p 112 note 5.
Injunction against performance of peremptory writ of mandamus see the C.J.S. title Mandamus § 358, also 38 C.J. p 938 notes 19–22.

32. Fla.—Burns v. Sanderson, 13 Fla. 381.
Ga.—Fairview Cemetery Co. v. Wood, 137 S.E. 761, 164 Ga. 85.
Tex.—Yett v. Cook, 268 S.W. 715, 115 Tex. 175.
Wash.—State v. Wallace, 172 P. 581, 101 Wash. 410.

33. Iowa.—Dubuque Branch State Bank v. Rhomberg, 37 Iowa 664.

Effect of injunction

Where the parties to an action move for a dismissal thereof, and, at the instance of a third party, they are enjoined from further prosecuting the motion, and thereupon the court refuses to dismiss the action, from which the moving parties appeal, they will not be allowed in the appellate court to have a judgment entered by agreement, reversing the judgment of the lower court, thus ignoring the injunction and avoiding its effect.—Dubuque Branch State Bank v. Rhomberg, supra.

34. N.C.—Deaver v. Eller, 42 N.C. 24.

35. N.C.—Monroe v. McIntyre, 41 N. C. 65.

36. R.I.—Miller v. Coffin, 36 A. 6, 19 R.I. 164.

37. N.Y.—Boughton v. Smith, 26 Barb. 635.
Settlement of claim as ground for injunction see supra § 40 f.

§ 46. —— Defenses

The setting up of the statute of limitations, or other matter, as a defense may be enjoined where it would be inequitable or unconscionable to permit it to be pleaded as a defense.

An injunction may be granted for the purpose of preventing a defendant in an action at law from setting up unconscionable and inequitable defenses.[38] However, a defense that would not be sustained in a court of law will not be enjoined, as the remedy at law is adequate;[39] nor will a defense be enjoined merely because plaintiff is no longer in a position to rebut it because his witnesses are dead or incompetent.[40] Moreover, it has been held that equity will not enjoin a defendant from making his defense and yet allow plaintiff to proceed in the action at law.[41]

Statute of limitations. An injunction will issue to restrain the use of the statute of limitations as a defense where it would be inequitable or unconscionable to permit it to be so pleaded,[42] as where plaintiff's failure to bring his action within the statutory period clearly appears to have been caused by wrongful or fraudulent acts or concealment on the part of defendant,[43] whether the concealment or fraud arises from the same act as the cause of action or is found in subsequent acts or failure to act.[44] A plea of the statute may also be enjoined where the delay in bringing the action was caused by defendant's procuring an injunction restraining the prosecution of the action at law,[45] or by his apparently waiving, by promise or otherwise, the benefits of the statute as a defense.[46] An injunction may be granted, although the party whom it seeks to restrain has not pleaded the statute or even stated that he intended to do so.[47] A defendant, however, will not be enjoined from pleading the statute of limitations when the delay in bringing the action was not caused by any wrongful act, artifice, or fraud on his part,[48] or by an injunction

38. Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 197 So. 540, 542, 143 Fla. 788, quoting **Corpus Juris.**
N.J.—Brooks-Wright, Inc., v. Maryland Casualty Co., 29 A.2d 882, 133 N.J.Eq. 15.
32 C.J. p 97 note 20.

Fraudulent instrument
Equity has jurisdiction to restrain use or assertion of an instrument purporting on its face to have a certain legal effect when the intention of parties was to the contrary and where no equities intervene to prevent equity from directing that the document be considered a nullity.—Brooks-Wright, Inc., v. Maryland Casualty Co., supra.

Wrongful use of instrument
(1) Where defendant was attempting wrongfully to assert a liability against plaintiff under a written contract, which complainant intended to sign only as agent for another, the court was not limited to affording complainant relief by reformation of the contract, but might restrain defendant from making a wrongful use of the instrument to complainant's prejudice.—Eustis Mfg. Co. v. Saco Brick Co., 84 N.E. 449, 198 Mass. 212.

(2) Where there is clear proof of a previous oral contract to which written contract can be made to conform and mistake has been made in reducing the oral contract to writing, the party prejudiced by the mistake is entitled to equitable relief, by reformation or by injunction restraining the other party from proceeding under or using the contract until the mistake has been corrected.—De Tweede Northwestern & Pacific Hypotheekbank v. W. M. Barnett Estate, 65 P.2d 361, 160 Or. 406.

39. Fla.—Proodian v. Plymouth Citrus Growers Ass'n, 197 So. 540, 542, 143 Fla. 788, quoting **Corpus Juris.**
N.J.—West Jersey & S. S. R. Co. v. Atlantic City Electric Co., 153 A. 254, 107 N.J.Eq. 457.
Tenn.—Ætna Life Ins. Co. v. Bellos, 13 S.W.2d 795, 158 Tenn. 554, rehearing denied 14 S.W.2d 961, 158 Tenn. 554.
32 C.J. p 97 note 21.

40. Mich.—Dubois v. Campau, 37 Mich. 248, 252.
32 C.J. p 97 note 23.

41. Ill.—Jones v. Ramsey, 3 Ill.App. 303.

42. N.J.—Ketcham v. Ketcham, 94 A. 813, 84 N.J.Eq. 577.

43. U.S.—La Porte v. U. S. Radium Corporation, D.C.N.J., 13 F.Supp. 263.
N.J.—Stein v. Elizabeth Trust Co., 22 A.2d 872, 131 N.J.Eq. 35—Teas v. Third Nat. Bank & Trust Co., 4 A.2d 64, 125 N.J.Eq. 224—Russell v. Hanan, 181 A. 58, 119 N.J.Eq. 99—Howard v. West Jersey & S. S. R. Co., 141 A. 755, 102 N.J.Eq. 517, affirmed 144 A. 919, 104 N.J.Eq. 201—Clark v. Augustine, 51 A. 68, 62 N.J.Eq. 689—Holloway v. Appelget, 40 A. 27, 55 N.J.Eq. 583.
N.Y.—Dodds v. McColgan, 241 N.Y.S. 584, 229 App.Div. 273, affirming 235 N.Y.S. 492, 134 Misc. 518.

"Fraudulent concealment," within the meaning of this rule, explained.—La Porte v. U. S. Radium Corporation, D.C.N.J., 13 F.Supp. 263.
Fraudulent concealment generally see Fraud § 15.

Conduct or acts which are fraudulent or unconscionable are essential, and mere silence, or mere negligence will not constitute equitable fraud even if plaintiff has no knowledge of cause of action.—La Porte v. U. S. Radium Corporation, supra.

Reasonable diligence in suing
Plaintiff seeking to enjoin plea of limitation on ground of fraudulent concealment of cause of action, must show reasonable diligence in bringing suit after estoppel has expired.—La Porte v. U. S. Radium Corporation, supra.

44. U.S.—La Porte v. U. S. Radium Corporation, supra.
N.J.—Holloway v. Appelget, 40 A. 27, 55 N.J.Eq. 583, 62 Am.S.R. 827.

45. N.J.—Clark v. Augustine, 51 A. 68, 62 N.J.Eq. 689—Lamb v. Martin, 9 A. 747, 43 N.J.Eq. 34.
32 C.J. p 98 note 28.
Injunction as not suspending running of statute see the C.J.S. title Limitations of Actions § 253, also 37 C.J. p 1045 note 33–p 1047 note 56.

46. N.J.—Clark v. Augustine, 51 A. 68, 62 N.J.Eq. 689.

47. N.J.—Lamb v. Ryan, 40 N.J.Eq. 67, reversed on other grounds 5 A. 153, 40 N.J.Eq. 669.

48. N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J. Eq. 500, affirmed 31 A.2d 809, 133 N.J.Eq. 283—Stein v. Elizabeth Trust Co., 22 A.2d 872, 131 N.J.Eq. 35—Teas v. Third Nat. Bank & Trust Co., 4 A.2d 64, 125 N.J.Eq. 224—Township of Waterford v. Maryland Casualty Co. of Baltimore, Md., 181 A. 66, 119 N.J.Eq. 92.
32 C.J. p 98 note 31.

Rule applied in action for wrongful death.

since dissolved.[49]

The filing of a claim under the Workmen's Compensation Act, within the statutory period, is a jurisdictional fact, and the period is not one of limitations, the pleading of which may be enjoined.[50]

§ 47. Actions or Proceedings in Same Court

An injunction ordinarily will not be granted in one action to restrain proceedings in another action in the same court, unless full justice and relief cannot be obtained in the prior pending action.

An injunction ordinarily will not be granted in one action to restrain proceedings in the same court in another action,[51] whether at law or in equity,[52] unless it appears clearly that the full justice and relief to which complainant is entitled cannot be obtained in the prior pending action.[53]

§ 48. Actions or Proceedings in Other Courts

An action or proceeding in another court may be enjoined where the circumstances warrant such relief.

As explained in Courts § 498, one court may restrain parties from proceeding further in another court in the same state, as where the former, but not the latter, court possesses the requisite jurisdiction, or where the courts have concurrent jurisdiction but the exercise of jurisdiction by the former is prior in time. On the other hand, proceedings in one court should not be enjoined by another court in the same state, where there is want of power or jurisdiction to grant the injunction, as where the proceedings sought to be enjoined are in a court having exclusive jurisdiction thereof, or where the courts have concurrent jurisdiction but the court whose proceedings are sought to be enjoined has previously acquired jurisdiction, or where there is lack of grounds for granting the injunction. In accordance with these principles, and subject to the rules regulating the grounds for an injunction of an action or legal proceeding, as discussed supra §§ 37-40, an action or proceeding in another court in the same state may be enjoined only where the circumstances justify an injunction,[54] as where the suit or proceeding in the other

U.S.—La Porte v. U. S. Radium Corporation, D.C.N.J., 13 F.Supp. 263.
N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J. Eq. 283.

Surgeon, sued for leaving drainage tissue in wound seven years before, could not be enjoined from pleading limitation because delay was caused by patient's ignorance of existence of tissue, where surgeon was also ignorant that tissue had been left in wound and did nothing to delay bringing of action.—Russell v. Hanan, 181 A. 58, 119 N.J.Eq. 99.

When a demand, purely legal, has been barred by lapse of time, the court of equity has no power on account of any supposed inequity to enjoin the party from pleading or relying on the statute of limitations in an action at law brought for its recovery.—Walker v. Smith, 8 Yerg., Tenn., 238.

49. N.J.—Lamb v. Martin, 9 A. 747, 43 N.J.Eq. 34—Martin v. Lamb, 5 A. 153, 40 N.J.Eq. 669.

50. N.J.—Miller v. Beller Electric Supply Co., 136 A. 342, 100 N.J. Eq. 444.

Employee taking no action, although aware of award, is not entitled to injunction against setting up time limit for filing claim.—Miller v. Beller Electric Supply Co., supra.

51. Miss.—Grenada Bank v. Waring, 99 So. 681, 135 Miss. 226.

N.M.—Hobbs v. Town of Hot Springs, 106 P.2d 856, 858, 44 N.M. 592, quoting **Corpus Juris.**
N.Y.—Colson v. Pelgram, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App.Div. 137—Pond v. Harwood, 34 N.E. 768, 139 N.Y. 111—Savage v. Allen, 54 N. Y. 458—Boyajian v. Boyajian, 43 N.Y.S.2d 643.
32 C.J. p 114 note 32.

52. Ill.—Farwell v. Great Western Tel. Co., 44 N.E. 891, 161 Ill. 522.
32 C.J. p 114 note 33.

Proceedings in the same equity court will not be enjoined either on the application of parties to the proceedings or of others.—Texas Co. v. Honaker, 283 S.W. 1071, 115 Tex. 509, refusing error, Civ.App., 282 S.W. 879.

The prosecution of a creditor's bill, attacking a conveyance as fraudulent and asking decree for amount due, cannot be enjoined by a subsequent action, where all equitable rights of defendant in original action, growing out of the issues involved therein, can be fully protected by cross bill therein.—Grenada Bank v. Waring, 99 So. 681, 135 Miss. 226.

53. Miss.—Grenada Bank v. Waring, supra.
N.Y.—Colson v. Pelgram, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App.Div. 137—Travelers Indemnity Co. v. Burg, 1 N.Y.S.2d 172, 253 App.Div. 43.
32 C.J. p 114 note 33.

Where the orderly administrative functions of the court will be promoted, this rule may be applied.—Boyajian v. Boyajian, 43 N.Y.S.2d 643.

Under code practice permitting equitable defenses in law actions, jurisdiction to enjoin prosecution of prior suit in same court is exercised only under special circumstances to prevent failure of justice.—Colson v. Pelgram, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App. Div. 137.

54. Pa.—Trees v. Glenn, 181 A. 579, 319 Pa. 487, 102 A.L.R. 304.
Tex.—Dickerson v. Hopkins, Civ. App., 288 S.W. 1103.
32 C.J. p 114 note 35½.

In extraordinary cases
An injunction restraining proceedings in another court, however, should not be granted except in extraordinary cases.—Prairie Oil & Gas Co. v. State, Tex.Civ.App., 214 S.W. 363—32 C.J. p 114 note 36.

Injunction:
Against:
Enforcement of judgment of another court see Courts § 499.
Issuance of execution from another court see Courts § 500.
By:
Federal court against action or proceedings in state court see Courts § 543.
One federal court against proceedings in another federal court see Federal Courts § 358.
State court against actions or proceedings in federal court see Courts § 542.

court is subsequent in time and is for substantially the same relief,[55] or where the claim or controversy has been finally determined by the court issuing the injunction,[56] or where the action or proceedings in the other court involve an adjudication of the same subject matter,[57] although it also involves parties not common to both actions[58] or a different cause of action which the injunction does not purport to affect.[59] Where the proper grounds therefor exist, an injunction may issue to restrain proceedings in a court in another county,[60] or from a higher court to restrain proceedings in a lower or inferior court,[61] even though such proceedings are prior in time,[62] as where the lower court has only partial jurisdiction of the claim or controversy the proceedings therein may be enjoined in order that the entire controversy may be tried in a higher court which has jurisdiction thereof.[63]

§ 49. Actions and Proceedings in Other States or Countries

An action or proceeding in another state or country generally may be enjoined on the ground that it interferes inequitably with local litigation affecting local citizens or residents, evades the law of the local state, or otherwise requires the interposition of equity to prevent manifest wrong or injustice.

A court of one state or country, which has acquired jurisdiction of the parties, has power, on proper cause shown, as discussed in Courts § 554, to enjoin them from proceeding with an action in another state or country, particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court; but this power should be exercised sparingly, and not unless a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice.

In accordance with these principles, and subject to the rules relating to grounds for restraining an action or proceeding generally as discussed supra §§ 37–40, an action or proceeding in another state will be enjoined, even though complainant has made a general appearance therein,[64] where it is made to appear that its prosecution will interfere unduly and inequitably with the progress of local litigation or with the establishment of rights properly justiciable in the local court,[65] will subject complainant to fraud, gross wrong, or oppression,[66] to

55. N.J.—Brengel v. O'Toole, 139 A. 428, 101 N.J.Eq. 449, reversed on other grounds 143 A. 361, 103 N.J. Eq. 339, reversing 140 A. 28, 102 N. J.Eq. 178.

56. Pa.—Trees v. Glenn, 181 A. 579, 319 Pa. 487, 102 A.L.R. 304.

57. Ark.—American Co. of Arkansas v. Wheeler, 26 S.W.2d 115, 181 Ark. 444.

Mo.—State ex rel. St. Charles Sav. Bank v. Hall, 12 S.W.2d 91, 321 Mo. 624.

N.J.—Brengel v. O'Toole, 139 A. 428, 101 N.J.Eq. 449, reversed on other grounds 143 A. 361, 103 N.J.Eq. 339, reversing 140 A. 28, 102 N.J. Eq. 178.

Tex.—Dickerson v. Hopkins, Civ. App., 288 S.W. 1103.

58. Tex.—Dickerson v. Hopkins, supra.

59. Tex.—Dickerson v. Hopkins, supra.

60. N.Y.—Boyajian v. Boyajian, 43 N.Y.S.2d 643.

Injunction not granted

(1) In general.

Ill.—Brinkerhoff v. Huntley, 223 Ill. App. 591.

Tex.—Coker v. Logan, Civ.App., 101 S.W.2d 284, error refused—Richardson v. Kent, Civ.App., 21 S.W.2d 72, error refused.

(2) Against prosecuting suit in another county in proceeding independent of case pending in court wherein writ is sought.—State ex rel. St. Charles Sav. Bank v. Hall, 12 S.W.2d 91, 321 Mo. 624.

61. Ga.—Smith v. Wood, 146 S.E. 441, 167 Ga. 630.

Ky.—Roediger v. Caldwell, 246 S.W. 451, 197 Ky. 164.

62. Ga.—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203.

Ohio.—Allamong v. Falkenhof, 177 N. E. 789, 39 Ohio App. 515.

Common pleas court wherein action is brought for personal injuries and damage to automobile may enjoin prior action by defendant in municipal court for property damage only.—Allamong v. Falkenhof, supra.

63. Cal.—Kaloutsis v. Maltos, 71 P. 2d 68, 9 Cal.2d 493—Gregory v. Diggs, 45 P. 261, 113 Cal. 196—Engleman v. Superior Court in and for Fresno County, 288 P. 723, 105 Cal.App. 754.

Ga.—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203.

Habeas corpus

Superior court hearing suit for divorce, alimony, and custody of minor child can enjoin habeas corpus proceeding previously filed in court of ordinary to obtain custody of minor child, and determine all issues in the one suit.—Duke v. Duke, 181 S.E. 161, 181 Ga. 21.

64. Tex.—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562.

65. Ind.—Alspaugh v. New York, C. & St. L. R. Co., 188 N.E. 869, 98 Ind.App. 280.

Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 9 N.E.2d 573, 298 Mass. 53.

32 C.J. p 116 note 64.

66. Ill.—Wabash Ry. Co. v. Lindsey, 269 Ill.App. 152—Mobile & O. R. Co. v. Parrent, 260 Ill.App. 284.

Iowa.—Reed v. Hollingsworth, 135 N.W. 37, 157 Iowa 94.

La.—New Orleans Brewing Co. v. Cahall, 178 So. 339, 188 La. 749, 115 A.L.R. 231—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 4, 158 La. 889, citing **Corpus Juris.**

N.Y.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756, appeal dismissed and certified question not answered 23 N. E.2d 15, 281 N.Y. 682—Field v. Holbrook, 3 Abb.Pr. 377.

Pa.—Pennsylvania Coal Co. v. Hurney, 97 A. 736, 252 Pa. 564—Meng v. Meng, 47 Pa.Dist. & Co. 429, 44 Lack.Jur. 193—New York Cent. R. Co. v. Marz, 13 Pa.Dist. & Co. 29, 10 Erie Co. 314.

32 C.J. p 117 note 73.

Injunction of suit under federal Employers' Liability Act

U.S.—Miles v. Illinois Cent. R. Co., 62 S.Ct. 827, 315 U.S. 698, 86 L.Ed. 1129, rehearing denied 62 S.Ct. 1037, 316 U.S. 708, 86 L.Ed. 1775.

Kan.—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745.

Wis.—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

irreparable injury,[67] or to great hardship, inconvenience, or expense,[68] such as in transporting witnesses and documentary evidence;[69] that the action was instituted for the purpose of, or will result in, securing to plaintiff therein some unfair, unconscionable or inequitable advantage,[70] arising either under the law or the facts;[71] that it is unduly annoying, vexatious, and harrassing[72] or is contrary to equity and good conscience;[73] or that the matters in controversy can be more fairly, impartially, and expeditiously adjusted and the ends of justice better attained in the jurisdiction where the parties then are than in the foreign court[74] or have already been determined in the local court.[75] The foreign action or suit will also be enjoined where it appears that the party instituting the suit had not acquired the necessary residence to prosecute it,[76] that he has no right of action against com-

67. Iowa.—Oates v. Morningside College, 252 N.W. 783, 217 Iowa 1059, 91 A.L.R. 563—Wabash R. Co. v. Peterson, 175 N.W. 523, 187 Iowa 1331.
La.—New Orleans Brewing Co. v. Cahall, 178 So. 339, 188 La. 749, 115 A.L.R. 231.
Mich.—Pere Marquette Ry. Co. v. Slutz, 256 N.W. 458, 269 Mich. 388.
Pa.—Meng v. Meng, 47 Pa.Dist. & Co. 429, 44 Lack.Jur. 193.
Tex.—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562.
32 C.J. p 117 note 74.

68. Ind.—Kern v. Cleveland, C., C. & St. L. Ry. Co., 185 N.E. 446, 447, 204 Ind. 595, citing **Corpus Juris**—Cleveland, C., C. & St. L. Ry. Co. v. Shelly, 170 N.E. 328, 96 Ind.App. 273.
Ky.—Keisker v. Bush, 276 S.W. 815, 210 Ky. 718.

69. U.S.—Ex parte Crandall, D.C. Ind., 52 F.2d 650, affirmed, C.C.A., 53 F.2d 969, certiorari denied Crandall v. Habbe, 52 S.Ct. 312, 285 U. S. 540, 76 L.Ed. 933.
Iowa.—Bankers' Life Co. v. Loring, 250 N.W. 8, 217 Iowa 534.
Wash.—Northern Pac. Ry. Co. v. Richey & Gilbert Co., 232 P. 355, 132 Wash. 526.
In action under federal Employers' Liability Act against railroad.
Ind.—Kern v. Cleveland, C., C. & St. L. Ry. Co., 185 N.E. 446, 204 Ind. 595—Cleveland, C., C. & St. L. Ry. Co. v. Shelly, 170 N.E. 328, 96 Ind. App. 273.
Tenn.—Illinois Cent. R. Co. v. Miles, 130 S.W.2d 111, 174 Tenn. 676—Louisville & N. R. Co. v. Ragan, 113 S.W.2d 743, 172 Tenn. 593.

70. U.S.—Baltimore & O. R. Co. v. Bole, D.C.W.Va., 31 F.Supp. 221.
Ky.—Keisker v. Bush, 276 S.W. 815, 210 Ky. 718.
Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 9 N.E.2d 573, 298 Mass. 53.
Mich.—Pere Marquette Ry. Co. v. Slutz, 256 N.W. 458, 268 Mich. 388.
Minn.—Child v. Henry, 238 N.W. 202, 183 Minn. 170.
N.J.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, 183 A. 894, 112 N.J.Eq. 179.
N.Y.—Cotnareanu v. Woods, 278 N.Y. S. 589, 155 Misc. 95.
Ohio.—New York C. & St. L. R. Co. v. Matzinger, 25 N.E.2d 349, 350, 136 Ohio St. 271, citing **Corpus Juris**.
Pa.—New York Cent. R. Co. v. Marz, 13 Pa.Dist. & Co. 29, 10 Erie Co. 314.
32 C.J. p 116 notes 66, 71.

Resident of state cannot be enjoined from suing another resident of same state in courts of another state unless unconscionable disadvantage would thereby result to party sued because laws properly to be applied in resolving controversy are those of state of parties' common residence.—Hartford Accident & Indemnity Co. v. Bernblum, 191 A. 542, 122 Conn. 583.

A legatee will be enjoined from proceeding in a foreign tribunal to enforce payment of money by an executor to the prejudice of other legatees.—Hutton v. Hutton, 2 A. 280, 40 N.J.Eq. 461.

71. Ky.—Reed v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.

72. U.S.—Baltimore & O. R. Co. v. Bole, D.C.W.Va., 31 F.Supp. 221.
N.Y.—Goldstein v. Goldstein, 15 N. Y.S.2d 782, 258 App.Div. 211, appeal granted 17 N.Y.S.2d 867, 258 App.Div. 867, reversed on other grounds 27 N.E.2d 969, 283 N.Y. 146—Jones v. Jones, 42 N.Y.S.2d 268, 180 Misc. 703—Adams v. Adams, 42 N.Y.S.2d 266, 180 Misc. 573—Smart v. Smart, 253 N.Y.S. 92, 142 Misc. 121.
Ohio.—New York, C. & St. L. R. Co. v. Matzinger, 25 N.E.2d 349, 136 Ohio St. 271.
Pa.—New York Cent. R. Co. v. Marz, 13 Pa.Dist. & Co. 29, 10 Erie Co. 314.
32 C.J. p 116 note 68, p 117, note 77.
Reason for rule
Jurisdiction of equity court to enjoin prosecution of foreign suit which is calculated to injure or harass resident of state is founded not only on fact that defendant is found within state but that plaintiff is resident entitled to its protection.—Goldstein v. Goldstein, 15 N.Y.S.2d 782, 258 App.Div. 211, appeal granted 17 N.Y.S.2d 867, 258 App.Div. 867, reversed on other grounds 27 N.E.2d 969, 283 N.Y. 146—Jones v. Jones, 42 N.Y.S.2d 268, 180 Misc. 703.

73. Ind.—Pitcairn v. Drummond, 23 N.E.2d 21, 216 Ind. 54.
Mass.—Columbian Nat. Life Ins. Co. v. Cross, 9 N.E.2d 402, 298 Mass. 47.
Mo.—State ex rel. New York, C. & St. L. R. Co. v. Nortoni, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345.
N.Y.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756, appeal dismissed and certified questions not answered 23 N. E.2d 15, 281 N.Y. 682.
32 C.J. p 117 note 76.

74. Ark.—Standard Oil Co. of Louisiana v. Reddick, 150 S.W.2d 612, 202 Ark. 393.
Iowa.—Bankers' Life Co. v. Loring, 250 N.W. 8, 217 Iowa 534—Wabash R. Co. v. Peterson, 175 N.W. 523, 187 Iowa 1331.
Miss.—Sharp v. Learned, 14 So.2d 218.
Ohio.—New York, C. & St. L. R. Co. v. Matzinger, 25 N.E.2d 349, 136 Ohio St. 271.
Tenn.—American Nat. Bank of Nashville v. Guardian Life Ins. Co. of America, 113 S.W.2d 401, 172 Tenn. 547.

75. Iowa.—Oates v. Morningside College, 252 N.W. 783, 217 Iowa 1059, 91 A.L.R. 563.
As to parties temporarily in sister state
Where a controversy between residents has been determined by the courts of a state, and, while one of the parties is temporarily in a sister state, an action is commenced against him there by the adverse party, involving matter previously determined, an injunction will be granted restraining the adverse party from prosecuting the suit in the sister state.—Oates v. Morningside College, 252 N.W. 783, 786, 217 Iowa 1059, 91 A.L.R. 563, quoting **Corpus Juris**—32 C.J. p 117 note 80.
Claim against ancillary estate
Where local court finally determined that claim of local resident against local executor was barred, executor was entitled to have prosecution of same claim against ancillary estate in foreign jurisdiction restrained.—Oates v. Morningside College, 252 N.W. 783, 217 Iowa 1059, 91 A.L.R. 563.

76. N.Y.—Gwathmey v. Gwathmey, 190 N.Y.S. 139, 116 Misc. 85.

plainant in either state,[77] that the case involves some equitable element which the courts of the state where the suit is brought cannot apply,[78] that the action or suit is contrary to the statutes[79] or the public policy[80] of the state in whose courts the injunction is sought, or that the injunction is necessary to prevent a multiplicity of suits.[81]

Evasion of law of domicile. An injunction of this character may be granted to prevent a citizen of one state from prosecuting an action against another citizen of the same state in a foreign jurisdiction, for the purpose of avoiding the laws of his own state,[82] whether the law sought to be evaded is one of legislative enactment[83] or of judicial decision,[84] and whether plaintiff has other legal defenses available in the court in which the action is brought.[85] An injunction may be granted to restrain an action brought by a creditor in another state for the purpose of securing a preference and to evade the insolvency law of the domicile[86] or to restrain him from resorting to a foreign administration for the purpose of evading the distribution of the property of the estate through a local administration.[87]

Insufficient grounds for injunction. The courts of one state will not enjoin the bringing or prosecution of an action in another state where the parties seeking the injunction can obtain full and adequate relief in the court in which the action is brought;[88] where, on balancing the convenience and inconvenience likely to result to the different parties, it appears that the questions involved can be more conveniently litigated in the courts of the other state[89] or the injunction would operate oppressively, inequitably, or contrary to the real justice of the case;[90] where the court in which the

77. Miss.—Sharp v. Learned, 14 So. 2d 218.

78. N.J.—Lehigh Valley R. Co. v. Andrus, 109 A. 746, 91 N.J.Eq. 225—Standard Roller Bearing Co. v. Crucible Steel Co. of America, 63 A. 546, 71 N.J.Eq. 61.

79. Mich.—Pere Marquette Ry. Co. v. Slutz, 256 N.W. 458, 268 Mich. 388.

Venue statute

Where a resident of a state is injured in a railroad accident in such state, sues the railroad in another state, in violation of his duty to comply with the local venue statute, the railroad is entitled to an injunction to restrain the action, although the railroad's line extends into such other state.—Pere Marquette Ry. Co. v. Slutz, supra.

80. Iowa.—Wabash R. Co. v. Peterson, 175 N.W. 523, 187 Iowa 1331.

81. Ala.—McWhorter v. Williams, 155 So. 309, 228 Ala. 632.
Tenn.—American Nat. Bank of Nashville v. Guardian Life Ins. Co. of America, 113 S.W.2d 401, 172 Tenn. 547.
Multiplicity of suits as ground for enjoining action generally see supra § 38.

82. Ala.—McWhorter v. Williams, 155 So. 309, 228 Ala. 632.
Iowa.—Oates v. Morningside College, 252 N.W. 783, 217 Iowa 1059, 91 A.L.R. 563.
La.—Lancaster v. Dunn, 95 So. 385, 153 La. 15.
Mich.—Pere Marquette Ry. Co. v. Slutz, 256 N.W. 458, 268 Mich. 388.
Miss.—Sharp v. Learned, 188 So. 302, 185 Miss. 872—Davis v. Natchez Hotel Co., 128 So. 871, 158 Miss. 43.
N.Y.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756, appeal dismissed and certified questions not answered 23 N.E.2d 15, 281 N.Y. 682—Morad v. Williams, 32 N.Y.S.2d 463, 177 Misc. 933—Cotnareanu v. Woods, 278 N.Y.S. 589, 592, 155 Misc. 95, citing **Corpus Juris**—Johnson v. Johnson, 261 N.Y.S. 523, 527, 146 Misc. 93, quoting **Corpus Juris.**
Pa.—Meng v. Meng, 47 Pa.Dist. & Co. 429, 44 Lack.Jur. 193—Young v. Young, 16 Pa.Dist. & Co. 287.
32 C.J. p 117 note 81.

This rule refers particularly, if not solely, to substantive laws.—Lancaster v. Dunn, 95 So. 385, 153 La. 15.

Law of foreign state oppressively different

Pa.—Young v. Young, 16 Pa.Dist. & Co. 287.

83. Ala.—Weaver v. Alabama Great Southern R. Co., 76 So. 364, 200 Ala. 432—Allen v. Buchanan, 11 So. 777, 97 Ala. 399, 38 Am.S.R. 187.

84. Ala.—Weaver v. Alabama Great Southern R. Co., 76 So. 364, 200 Ala. 432.

85. Ind.—Sandage v. Studabaker Bros. Mfg. Co., 41 N.E. 380, 142 Ind. 148, 51 Am.S.R. 165, 34 L.R.A. 363.

86. U.S.—Cole v. Cunningham, Mass., 10 S.Ct. 269, 133 U.S. 107, 33 L.Ed. 538.
Mass.—Carson v. Dunham, 20 N.E. 312, 149 Mass. 52, 14 Am.S.R. 397, 3 L.R.A. 202—Cunningham v. Butler, 6 N.E. 782, 142 Mass. 47, 56 Am.R. 657—Dehon v. Foster, 7 Allen 57.

87. Iowa.—O'Connor v. Root, 107 N.W. 608, 130 Iowa 553.

88. Del.—Bank of Pittsburgh, National Ass'n, v. United Electric Coal Co., 142 A. 368, 16 Del.Ch. 151.
Miss.—E. J. Platte Fisheries v. Wadford, 155 So. 161, 170 Miss. 617.
Tex.—Brand v. Eubank, Civ.App., 81 S.W.2d 1023, 1027, error dismissed citing **Corpus Juris.**
32 C.J. p 118 note 93.

Failure to intervene

An injunction will not issue to restrain the prosecution of an action pending in the court of another state to nullify or set aside a judgment rendered in that state, in the absence of a showing by complainant that he has been denied the right by the foreign court, to intervene in the action, or that justice will not be done therein.—Guggenheim v. Wahl, 96 N.E. 726, 203 N.Y. 390, Ann.Cas. 1913B 201.

89. Iowa.—Wabash R. Co. v. Peterson, 175 N.W. 523, 187 Iowa 1331.
Miss.—Sharp v. Learned, 181 So. 142, 182 Miss. 333, suggestion of error overruled 182 So. 122, 182 Miss. 333.
Va.—U. S. Fire Ins. Co. v. Fleenor, 18 S.E.2d 901, 179 Va. 268.

Plaintiff's witnesses all residents of foreign jurisdiction

La.—New Orleans Brewing Co. v. Cahall, 178 So. 339, 188 La. 749, 115 A.L.R. 231.

An action in another state for trespass committed there will not be enjoined where it would be for the best interests of the parties that the action be brought where the trespass was committed.—Sharp v. Learned, 181 So. 142, 182 Miss. 33, suggestion of error overruled 182 So. 122, 182 Miss. 333.

90. Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 9 N.E.2d 573, 298 Mass. 53.
Miss.—Sharp v. Learned, 181 So. 142, 182 Miss. 333, suggestion of error overruled 182 So. 122, 182 Miss. 333.

injunction is asked would be unable to enforce the writ if granted;[91] or where the right to relief is at most doubtful.[92] An injunction will not be granted merely because complainant prefers to have the matter adjudicated by his own courts,[93] or there is some distrust of the courts of the sister state,[94] or from considerations of mere inconvenience or expense,[95] particularly where the action in the foreign state is first commenced, and the court has jurisdiction of all the parties;[96] nor will it be granted on the ground that complainant will be deprived of the privilege of examining an adverse party before trial[97] or that a large number of witnesses reside in the state in which the injunction is asked, making it necessary to take their depositions.[98]

It also is not ground for an injunction of an action in another state that the court in which the injunction is asked recognizes different rules of law and practice and procedure from those which obtain in the state where the action is brought;[99] that the decision of the court in which the action is brought may differ from that of the court of the domestic state[1] or from those of other courts of equal authority;[2] that the party bringing the action in the other state might obtain some advantage by so doing;[3] that the party asking the in-

Va.—U. S. Fire Ins. Co. v. Fleenor, 18 S.E.2d 901, 179 Va. 268.

91. N.J.—Federal Trust Co. v. Conklin, 99 A. 109, 87 N.J.Eq. 185.
32 C.J. p 118 note 95.

92. Iowa.—Payne v. Knapp, 198 N. W. 62, 197 Iowa 737.
N.J.—Grover v. Woodward, 109 A. 822, 91 N.J.Eq. 250.

Removal to federal court
Equity does not require a state court to enforce its jurisdiction over its own citizens, by enjoining them from suing elsewhere, merely to enable a nonresident corporation to remove the suit to a federal court.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.

93. Kan.—Cole v. Young, 24 Kan. 435.
Tenn.—American Express Co. v. Fox, 187 S.W. 1117, 135 Tenn. 489, Ann. Cas.1918B 1148.
Vt.—Bank of Bellows Falls v. Rutland & B. R. Co., 28 Vt. 470.

94. Del.—Bank of Pittsburgh, National Ass'n, v. United Electric Coal Co., 142 A. 368, 16 Del.Ch. 151.
Kan.—Cole v. Young, 24 Kan. 435.
La.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.
Mass.—Columbian Nat. Life Ins. Co. v. Cross, 9 N.E.2d 402, 298 Mass. 47.
N.J.—Federal Trust Co. v. Conklin, 99 A. 109, 87 N.J.Eq. 185.
Va.—U. S. Fire Ins. Co. v. Fleenor, 18 S.E.2d 901, 179 Va. 268.

95. U.S.—Chicago, M. & St. P. Ry. Co. v. Schendel, C.C.A.Minn., 292 F. 326.
Ala.—McWhorter v. Williams, 155 So. 309, 311, 228 Ala. 632, citing **Corpus Juris.**
Ark.—Standard Oil Co. of Louisiana v. Reddick, 150 S.W.2d 612, 202 Ark. 612.
Kan.—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745—Bank Sav. Life Ins. Co. v. Wood, 253 P. 431, 122 Kan. 831.
La.—New Orleans Brewing Co. v. Cahall, 178 So. 339, 188 La. 749, 115 A.L.R. 231—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889—Lancaster v. Dunn, 95 So. 385, 153 La. 15.
Mass.—Boston & M. R. R. v. Whitehead, 29 N.E.2d 916, 307 Mass. 106.
N.M.—Southern Pac. Co. v. Baum, 38 P.2d 1106, 39 N.M. 22.
32 C.J. p 119 note 98.

Additional expense and trouble in defending suit brought in foreign jurisdiction does not justify equity court in interfering with prosecution thereof by injunction.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App.Div. 756, appeal dismissed and certified question not answered 23 N.E.2d 15, 281 N.Y. 682.

96. Kan.—Bank Sav. Life Ins. Co. v. Wood, 253 P. 431, 122 Kan. 831.

97. Wis.—Chicago, M. & St. P. R. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.
32 C.J. p 119 note 99.

98. Ala.—McWhorter v. Williams, 155 So. 309, 311, 228 Ala. 632, citing **Corpus Juris.**
Kan.—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745.
Miss.—Tri-State Transit Co. of Louisiana v. Mondy, 12 So.2d 920.
Wis.—Chicago, M. & St. P. R. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

99. Ark.—Standard Oil Co. of Louisiana v. Reddick, 150 S.W.2d 612, 202 Ark. 393.
La.—New Orleans Brewing Co. v. Cahall, 178 So. 339, 188 La. 749, 115 A.L.R. 231.
Mass.—Boston & M. R. Co. v. Whitehead, 29 N.E.2d 916, 307 Mass. 106.
Miss.—Tri-State Transit Co. of Louisiana v. Mondy, 12 So.2d 920—E. J. Platte Fisheries v. Wadford, 155 So. 161, 170 Miss. 617.
Pa.—Delaware, L. & W. R. Co. v. Ashelman, 150 A. 475, 300 Pa. 291, 69 A.L.R. 588.
32 C.J. p 119 note 2.

Differences held insufficient for injunction
(1) That the foreign state does not require a verdict to be unanimous.
Kan.—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745.
Wis.—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

(2) That in other state a verdict is final on questions of fact while in the local state the appellate court may reverse the verdict on a question of fact.—Lancaster v. Dunn, 95 So. 385, 153 La. 15.

(3) That punitive damages were not allowable in local state but may be imposed in the foreign state, where action sought only actual damages.—Tri-State Transit Co. of Louisiana v. Mondy, Miss., 12 So.2d 920.

Different rules of evidence
Ark.—Standard Oil Co. of Louisiana v. Reddick, 150 S.W.2d 612, 202 Ark. 393.
Miss.—Tri-State Transit Co. of Louisiana v. Mondy, 12 So.2d 920.

1. Mass.—Carson v. Dunham, 20 N. E. 312, 149 Mass. 52, 14 Am.S.R. 397, 3 L.R.A. 202.

2. Mass.—Carson v. Dunham, supra.

3. Conn.—Hartford Accident & Indemnity Co. v. Bernblum, 191 A. 542, 122 Conn. 583.
Iowa.—Jones v. Hughes, 137 N.W. 1023, 156 Iowa 684, 42 L.R.A.,N.S., 502.

Hope of larger verdict
In suit to enjoin defendant from prosecuting action brought against plaintiff in New York under federal Employers' Liability Act, the fact that defendant brought her action in New York rather than in Massachusetts, where accident occurred and defendant resided, merely because of the hope of a larger verdict, was not a "fraud" on plaintiff and did not indicate an intent merely to harass or annoy plaintiff for purpose of forcing a settlement, and the difference in procedure and the possibility of a larger verdict in New York did not warrant an injunction.—Boston & M.

junction has good reason to apprehend a less favorable result for himself in the court where suit is brought;[4] that plaintiff in the action sought to be enjoined might fail because there is no merit in his case;[5] that it would be impossible to take the jury to view the premises where an accident occurred;[6] or that the attorney of plaintiff in the action sought to be enjoined procured his employment by unprofessional methods which would call for a disbarment in the state where the injunction is asked,[7] although such conduct may be considered with other circumstances in support of the injunction.[8]

§ 50. Restrains Litigants, Not Courts

An injunction against an action or legal proceeding operates only in restraint of the parties thereto, and is in no sense a restraint on the court itself, and does not prevent it from proceeding with the action or proceedings.

An injunction granted to stay proceedings in a court of law operates only in restraint of the parties to the proceedings, and is in no sense a prohibition on the action of the court or tribunal itself,[9] since the court of equity asserts no supremacy over the court of law, but the injunction virtually admits and assumes the jurisdiction of the latter.[10] Likewise an injunction granted at the instance of a private citizen, restraining a judge, duly commissioned by the governor of the state, from discharging his judicial functions, is wholly unwarranted,[11] unless he is disqualified, as for bias.[12] A proceeding to enjoin a prosecution for contempt in another court,[13] or to prevent the execution of an order of such court punishing for contempt, will not be entertained.[14]

While there are some decisions which maintain the contrary doctrine,[15] the better opinion is that the court in which the action sought to be enjoined

R. R. v. Whitehead, 29 N.E.2d 916, 307 Mass. 106.

4. Ga.—McDaniel v. Alford, 97 S.E. 673, 148 Ga. 609.
La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.
N.Y.—Merritt-Chapman & Scott Corporation v. Mutual Ben. Life Ins. Co., 260 N.Y.S. 374, 236 App.Div. 70, followed in Merritt-Chapman & Scott Corporation v. New England Mut. Life Ins. Co. of Boston, Mass., 260 N.Y.S. 381, 236 App.Div. 833, Merritt-Chapman & Scott Corporation v. Prudential Ins. Co. of America, 260 N.Y.S. 381, 236 App. Div. 833, Merritt-Chapman & Scott Corporation v. Berkshire Life Ins. Co., 260 N.Y.S. 382, 236 App.Div. 833, Merritt-Chapman & Scott Corporation v. Mutual Life Ins. Co. of New York, 260 N.Y.S. 382, 236 App. Div. 834, Merritt-Chapman & Scott Corporation v. Provident Mut. Life Ins. Co. of Philadelphia, 260 N.Y. S. 383, 236 App.Div. 834, Merritt-Chapman & Scott Corporation v. Penn Mut. Life Ins. Co. of Philadelphia, 260 N.Y.S. 383, 236 App. Div. 834, Merritt-Chapman & Scott Corporation v. Guardian Life Ins. Co. of America, 260 N.Y.S. 384, 236 App.Div. 834, Merritt-Chapman & Scott Corporation v. Massachusetts Mut. Life Ins. Co., 260 N.Y.S. 384, 236 App.Div. 834, and Merritt-Chapman & Scott Corporation v. Ætna Life Ins. Co., 260 N.Y.S. 385.

5. Ky.—Reed v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.

6. Kan.—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745.
Pa.—Pittsburgh & Lake Erie R. Co. v. Grimm, 28 Pa.Dist. 419.
Wis.—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

7. Ky.—Reed v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.
Wis.—Chicago, M., St. P. & P. Ry. Co. v. Wolf, 226 N.W. 297, 199 Wis. 278—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.
32 C.J. p 119 note 9.

8. Ky.—Reed v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.

9. U.S.—Steelman v. All Continent Corporation, N.J., 57 S.Ct. 705, 301 U.S. 278, 81 L.Ed. 1085, reversing, C.C.A., All Continent Corporation v. Steelman, 86 F.2d 913, reversing, D.C., In re Fox, 16 F.Supp. 949, motion granted Steelman v. All Continent Corporation, 57 S.Ct. 823, 299 U.S. 522, 81 L.Ed. 385, certiorari granted 57 S.Ct. 492, 300 U.S. 648, 81 L.Ed. 860.
Cal.—Leet v. Union Pac. R. Co., App., 144 P.2d 64, 68, citing **Corpus Juris.**
Ga.—Askew v. Bassett Furniture Co., 158 S.E. 577, 172 Ga. 700.
Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722.
Or.—Daniels v. City of Portland, 265 P. 790, 124 Or. 677, 59 A.L.R. 512.
Tex.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Steger v. Shofner, Civ.App., 54 S.W.2d 1013—Duncan v. National Union Fire Ins. Co., Civ.App., 4 S.W.2d 278—Home Nat. Bank of Cleburne v. Wilson, Civ.App., 265 S.W. 732—Wardlaw v. Savage, Civ.App., 191 S.W. 1176.
W.Va.—Rodney v. Drane, 5 S.E.2d 818, 121 W.Va. 666, citing **Corpus Juris**—National Life & Accident Ins. Co. v. Thompson, 183 S.E. 863, 864, 117 W.Va. 61, citing **Corpus Juris.**
32 C.J. p 84 note 63.

Reason for rule

In injunction suit, equity court acts in personam and, in exercising its power to restrain judicial proceedings in other courts or tribunals, proceeds, not on any claim of right to interfere with or control courts in such proceedings or prevent them from adjudicating parties' rights duly presented for their determination, but on theory that equity court, having jurisdiction of persons of those involved, may compel them to do or refrain from doing whatever equities of case require.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.

10. Ill.—Chapman v. American Surety Co., 104 N.E. 247, 261 Ill. 594.
W.Va.—Rodney v. Drane, 5 S.E.2d 818, 121 W.Va. 666.
32 C.J. p 84 note 64.

11. Ga.—Shaw v. Goodman, 69 S.E. 173, 135 Ga. 230.
Tenn.—Sanders v. Metcalf, 1 Tenn.Ch. 419.

12. Tex.—Lyle v. Collier, Civ.App., 62 S.W.2d 1112.

13. N.Y.—Johnstown Min. Co. v. Morse, 90 N.Y.S. 107, 44 Misc. 504.
32 C.J. p 84 note 66.

14. Conn.—Tyler v. Hamersley, 44 Conn. 419, 26 Am.R. 479.

15. Ark.—Chicago, R. I. & P. R. Co. v. Moore, 123 S.W. 233, 92 Ark. 446.
32 C.J. p 85 note 69.

is pending may proceed despite the injunction, in case the enjoined party chooses to brave the consequences of committing a contempt by disobeying the order,[16] and the judgment of the court of law will be valid just as though no injunction had ever been issued.[17] However, if the attention of the court is properly called to the fact that a party has been enjoined from proceeding, it will usually not permit the party to disobey the injunction, and will stay the proceeding out of respect for the court issuing the injunction.[18]

As against attorney. An injunction restraining the prosecution of an action states no substantial relief against the attorney bringing the action, since the action remains, although the attorney is enjoined.[19]

§ 51. Persons Entitled

An injunction to restrain the prosecution of an action or legal proceeding ordinarily may issue only at the instance of a person who has such a right or interest in the subject matter of the litigation as will entitle him to the relief sought.

An injunction to restrain the prosecution of an action or legal proceeding ordinarily will issue only at the instance of a person who has such a right or interest in the subject matter of the litigation as will entitle him to the relief sought,[20] as where he is likely to suffer irreparable injury,[21] or where the continuation of the action will result in causing a multiplicity of suits or other unnecessary difficulty,[22] and only where complainant comes into equity with clean hands.[23] An action ordinarily will not be enjoined at the instance of one not a party thereto,[24] particularly where he is not interested in

16. W.Va.—Rodney v. Drane, 5 S.E. 2d 818, 819, 121 W.Va. 666, citing **Corpus Juris.**
32 C.J. p 85 note 70.

Question whether the injunction is disobeyed concerns only the court which issued the injunction.—Gross v. R. & S. Outfitting Co., 140 N.Y.S. 115.

17. Ala.—Hall v. Milligan, 128 So. 438, 440, 221 Ala. 233, 69 A.L.R. 618, citing **Corpus Juris.**
W.Va.—Rodney v. Drane, 5 S.E.2d 818, 121 W.Va. 666.
32 C.J. p 85 note 71.

18. Miss.—Fisher v. Pacific Mut. L. Ins. Co., 72 So. 646, 112 Miss. 30.
N.Y.—Platt v. Woodruff, 61 N.Y. 378.
32 C.J. p 85 note 73.

19. Ga.—Askew v. Bassett Furniture Co., 158 S.E. 577, 172 Ga. 700.

20. Ga.—Lindsay v. Cannon, 8 S.E. 2d 80, 189 Ga. 834.
Ill.—Holmes v. First Union Trust & Savings Bank, 198 N.E. 671, 362 Ill. 44—Fagan v. Rootberg, 151 N. E. 491, 320 Ill. 586.
Mass.—Haller v. Kabler, 169 N.E. 504, 269 Mass. 567—New York Cent. R. Co. v. Wm. Culkeen & Sons Co., 144 N.E. 96, 249 Mass. 71.
N.J.—Maryland Casualty Co. v. Thompson, 12 A.2d 356, 127 N.J. Eq. 240, affirmed 17 A.2d 815, 129 N.J.Eq. 12—Maher v. Usbe Building & Loan Ass'n, 174 A. 159, 116 N.J.Eq. 475.
Pa.—Haytock v. Nickel, 19 Dist. & Co. 671, 34 North.Co. 96.
Tex.—Johnston v. Wright, Civ.App., 85 S.W.2d 361, error refused.
W.Va.—Maryland Casualty Co. v. Tressell, 195 S.E. 268, 119 W.Va. 576.

Persons entitled to injunction

(1) Person having the beneficial interest in the property which is the subject of the action at law.—Adams v. Harris, 47 Miss. 144—32 C.J. p 295 note 7.

(2) Surety on bond of temporary administrator, to restrain prosecution of suit by administrator de bonis non against temporary administrator to circumvent the effect of prior orders, writs, and judgments.—National Surety Corporation v. Jones, Tex.Civ.App., 158 S.W.2d 112.

(3) Transferee of land given to a beneficiary under arbitration award, to restrain further probate proceedings by an administrator de bonis non on alleged claim of such beneficiary which involved the subject matter determined in the prior judgments.—Farmers & Merchants State Bank of Haskell v. Ferguson, Tex. Civ.App., 158 S.W.2d 107.

Persons not entitled to injunction

(1) Assignee of assets of one of two corporate plaintiffs in a suit over validity of defendant's patent, which court declared to be invalid, to enjoin prosecution of infringement suits involving same patent against assignee's customers.—Mantle Lamp Co. of America v. Knapp-Monarch Co., C.C.A.Ill., 81 F.2d 428.

(2) Person having only doubtful rights.—Braverman v. Braverman, 33 A.2d 890, 134 N.J.Eq. 4, affirmed 37 A.2d 57.

(3) Defaulting purchaser of personalty to restrain recapture of property by action of replevin.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.

As respects rights of beneficiaries under a will to enjoin a will contest which was based on undue influence and insanity of testator, motive of guardian of sole heir in filing the contest and fact that the heir had in his own right or otherwise ample funds to support himself and fact that collateral kin agitated the filing of the suit are immaterial.—Campbell v. St. Louis Union Trust Co., 124 S.W.2d 1068, 343 Mo. 1041.

21. U.S.—Stebler v. Riverside Heights Orange Growers' Assoc., Cal., 214 Fed. 550, 131 C.C.A. 96, L. R.A.1915F 1101.
N.J.—Hoops v. Leddy, 182 A. 271, 119 N.J.Eq. 296.
32 C.J. p 85 note 80.
Irreparable injury as ground for injunction generally see supra § 37.

22. N.J.—McCullough v. Absecom Land Impr. Co., Ch., 10 A. 606.
32 C.J. p 85 note 81.
Multiplicity of suits as ground for injunction generally see supra § 38.

23. Ala.—Chesapeake Guano Co. v. Montgomery, 22 So. 497, 116 Ala. 384.
Ind.—Hopkins v. Myers, 8 Blackf. 498.
N.Y.—Von Prochazka v. Von Prochazka, 3 N.Y.S. 301.

A trespasser who goes onto property with notice that he has no right thereon has no equitable right to enjoin an ejectment action against him because of his maintaining poles and electric wires on the premises.—Public Service Co. of Northern Illinois v. McCloskey, 235 Ill.App. 387.

24. Fla.—Stuart v. Hatch, 146 So. 557, 106 Fla. 443.
Tex.—Corzelius v. Cosby Producing & Royalty Co., Civ.App., 52 S.W.2d 270.
32 C.J. p 85 note 75.

Party to earlier of two suits in personam pending at same time cannot enjoin prosecution of later suit because judgment in that suit is likely to be rendered sooner.—Graves v. Mount Vernon Trust Co., C.C.A. N.Y., 69 F.2d 101.

the decision of that action,[25] where the judgment in that action will not conclude the rights of complainant and he will suffer no injury,[26] or where he may become a party to that action and protect his rights therein.[27] The fact that a defendant has appeared in an action at law and pleaded thereto does not deprive him of his right to an injunction against the prosecution of that action.[28] When an injunction is sought as ancillary to an action at law, suit must be brought by the same plaintiff in the same capacity.[29]

B. PROPERTY, CONVEYANCES AND INCUMBRANCES

§ 52. In General

Property rights are appropriate subjects of injunctive relief, subject to the general rules as to the necessity of irreparable injury and inadequacy of a legal remedy. As in other injunction suits, grant or refusal of relief rests in the sound discretion of the court and cannot be based on conjecture or doubtful facts. Injunction however is not as a rule a proper remedy for the recovery of possession.

Injunctions may be properly employed to protect rights of property,[30] however great or small, complicated or simple,[31] and no matter by whom

25. U.S.—New York v. Connecticut, 4 Dall. 1, 1 L.Ed. 715.
Tex.—Ex parte Hughes, 129 S.W.2d 270, 273, 133 Tex. 505, citing **Corpus Juris.**

26. Ga.—Pattison v. Farkas, 180 S.E. 831, 180 Ga. 798—Smith v. Cuyler, 3 S.E. 406, 78 Ga. 654—Turk v. Ross, 59 Ga. 378.
Pa.—Beatty's Appeal, 15 A. 861, 122 Pa. 428.

As against widow's application for support

Persons claiming, by virtue of title under wills of third persons, real estate which widow sought to have set apart for her year's support, could not enjoin prosecution of the application for year's support, since such persons would not be bound by the year's support procedure as respects any subsequent claim of title by widow or her assignees.—Smith v. Pitchford, 5 S.E.2d 766, 189 Ga. 307.

27. U.S.—Eureka & K. R. R. Co. v. California & N. R. Co., Cal., 109 F. 509, 48 C.C.A. 517.
32 C.J. p 85 note 78.

28. N.J.—Simon v. Townsend, 27 N. J.Eq. 302.
Tex.—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562.

29. Ohio.—Morgan v. Hayes, 1 Ohio Dec. (Reprint) 454, 10 West.L.J. 83.

30. U.S.—Schwartzman Service v. Stahl, D.C.W.D.Mo., 60 F.2d 1034—Mills Novelty Co. v. Farrell, D.C. Conn., 3 F.Supp. 555, affirmed, C.C.A., 64 F.2d 476.
Cal.—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 129.
Ky.—City of Louisville v. Lougher, 272 S.W. 748, 209 Ky. 299.
N.J.—Rockaway Rolling Mill Corporation v. Delaware, L. & W. R. Co., 137 A. 650, 101 N.J.Eq. 192, affirmed 143 A. 334, 103 N.J.Eq. 297.
N.Y.—Miranda v. Buffalo General Electric Co., 251 N.Y.S. 510, 140 Misc. 267.
32 C.J. p 119 note 14.

Injunctive relief:
To protect easement see Easements § 107 b.
Against sale of decedent's property see Executors and Administrators § 535.
As to fraudulent conveyance see Fraudulent Conveyances §§ 460–463.
As to party wall see the C.J.S. title Party Walls § 23, also 47 C. J. p 1364 note 61–p 1367 note 37.
In suit to quiet title see the C.J.S. title Quieting Title §§ 15, 51, 98 also 51 C.J. p 166 note 15–p 168 note 70, p 214 notes 47–55, p 273 notes 73–78.

Injunction held proper

(1) To protect musician's performance by restraining the broadcast of phonograph records made thereof.—Waring v. WDAS Broadcasting Station, Inc., 27 Pa.Dist. & Co. 297, affirmed 194 A. 631, 327 Pa. 433.

(2) To restrain installation and operation of gasoline tank at instance of nearby property owner whose consent, although required by ordinance, had not been obtained.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108, affirming 262 Ill.App. 189.

(3) To protect sponge plants and other property placed in tidal waters, when rights of others would not thereby be violated.—Perky Properties v. Felton, 151 So. 892, 113 Fla. 432.

(4) To enjoin the digging of clams on public property to which clams had been shifted by a severe storm from adjoining property on which the clams had been planted by a private corporation.—Robins Island Clam Co. v. Gaffga, 8 N.Y.S.2d 969, 170 Misc. 862.

(5) To protect property rights with respect to the handling of cotton.—Anderson, Clayton & Co. v. State ex rel. Allred, 62 S.W.2d 107, 122 Tex. 530.

(6) To enjoin mortgagor from changing status of mortgaged property and from withdrawing funds deposited with clerk of court as security for certiorari bonds.—Butters Mfg. Co. v. Sims, 174 S.E. 623, 178 Ga. 775.

(7) To protect other property rights.—Pickron v. Phillips, 160 S.E. 615, 173 Ga. 407.

Rights not protected by injunction

(1) The right of an automobile driver to use the streets of a city is not a property right of such importance as to warrant a court of equity in interfering to preserve it against enforcement of a valid statute, ordinance, or police regulation.—Godfrey v. Ray, 124 So. 151, 169 La. 77.

(2) Passengers using jitneys acquire no vested property right in such method of transportation entitling them to enjoin the city from discontinuing granting jitney licenses.—Davis v. City of Houston, Tex. Civ.App., 264 S.W. 625.

(3) A retail liquor license is not property within the rule that equity can issue restraining orders to protect property rights, since if license is validly revoked the privilege of selling expires and if the order of revocation is invalid, the privilege of selling continues, and if criminal proceedings are brought on ground of legal revocation, defendant has an adequate remedy at law in a defense that he was selling under a license which was in legal effect.—State ex rel. Indiana Alcoholic Beverages Commission v. Circuit Court of Marion County, Ind., 49 N.E.2d 538.

31. U.S.—Daniels v. Portland Gold Min. Co., Colo., 202 F. 637, 121 C.C.A. 47, 45 L.R.A.,N.S., 827, certiorari denied 33 S.Ct. 771, 229 U.S. 611, 57 L.Ed. 1351.
32 C.J. p 119 note 14.

Scope of protection generally

Property rights subject to protection by injunction include not only ownership and possession of property, but also the right to its use, enjoyment, and disposition.—Dallas Land & Loan Co. v. Garrett, Tex.Civ. App., 276 S.W. 471.

invasion of such rights is attempted.[32] Property rights will be protected by injunction against acts which will result in great or irreparable injury,[33] or which are continuous or repeated,[34] and against which relief could otherwise be had only by a multiplicity of suits.[35] Particularly will injunction issue against unlawful interference with property by acts which are intentional[36] or tortious,[37] and which are accompanied by malice[38] or by coercion and intimidation.[39] The owner of property may have injunctive relief to restrain officers from seizing the property, without a search warrant, on the ground that it may contain evidence to be used against a third person accused of an offense.[40]

The grant of an injunction to protect property rights rests in the sound discretion of the court,[41] and the facts on which the court is called to act should not be of doubtful or uncertain nature, or based on conjecture.[42] The applicant for relief must show not only the existence of his property right but also that the acts sought to be restrained will violate such right,[43] and as in other cases, considered supra § 26, he must be willing to do equity.[44] Injunction should not be made a vehicle for invading the legitimate province of government or a means of establishing a system of rules for the regulation of the business of a community.[45]

Adequate legal remedy. The jurisdiction of equity to protect by injunction legal rights and interests in property is based on the inadequacy of the remedy at law and the jurisdiction is never exercised where the remedy at law is ample and complete.[46] On the other hand, equity will intervene by injunction to protect property rights where no

"Land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value."—Hood v. Foster, Miss., 13 So.2d 652, 654—Moss v. Jourdan, 92 So. 689, 129 Miss. 598.

32. Tex.—Commissioners' Court of Harris County v. Kaiser, Civ.App., 23 S.W.2d 840, error refused.

33. U.S.—Denver & R. G. W. Ry. Co. v. Linck, C.C.A.Utah, 56 F.2d 957—United Chain Theatres v. Philadelphia Moving Picture Machine Operators Union, Local No. 307, D.C.Pa., 50 F.2d 189.
Tex.—Gurtov v. Williams, Civ.App., 105 S.W.2d 328, error dismissed.
Irreparable injury in general see supra § 23.

34. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.
Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.

35. Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., supra.
Prevention of multiplicity of suits in general see supra § 24.

36. U.S.—United Chain Theatres v. Philadelphia Moving Picture Machine Operators Union, Local No. 307, D.C.Pa., 50 F.2d 189.

37. Wis.—Gitlitz v. Plankinton Bldg. Properties, 280 N.W. 415, 228 Wis. 334.

38. Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 868, 247 N.Y. 65, 63 A.L.R. 198, reversing 222 N.Y.S. 835, 220 App.Div. 830.

39. Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

40. Ga.—Owens v. Way, 82 S.E. 132, 141 Ga. 796, L.R.A.1915E 399, Ann. Cas.1915C 963.
56 C.J. p 1260 note 14.

41. Conn.—Carter v. Spring Perch Co., 155 A. 832, 113 Conn. 636.
Discretion of court generally see supra § 14.

42. Tex.—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471.

43. Okl.—Payne v. Ramsey, 120 P. 595, 30 Okl. 356.
Violation of right as necessary generally see supra § 19.

Purchase and foreclosure of mortgage

Bill alleging that plaintiff purchased from defendants realty subject to mortgage created by defendants, relying on false assurances of defendants that realty was in good condition, that plaintiff spent money to make repairs which defendants had agreed to make, that mortgagee was threatening to foreclose the mortgage, and that defendants were endeavoring to purchase the mortgage in order to obtain possession of the realty, presents no facts sufficient to warrant injunction against defendants to restrain them from purchasing the mortgage and from obtaining the realty by foreclosure, or relief from foreclosure under statute.—Herriman v. Wilson, 18 A.2d 670, 341 Pa. 126.

44. Ga.—Holland Furnace Co. v. Lowe, 159 S.E. 277, 172 Ga. 815.

Payment of purchase price

Where a tenant in common had paid only a very small part of the purchase price of a furnace, a cotenant in common was held not entitled to enjoin the removal of the furnace by the seller, under a retention of title contract, without first doing equity and paying the purchase price.—Holland Furnace Co. v. Lowe, supra.

Payment of rent

Injunction has been refused at the instance of a tenant to restrain the landlord from causing the issuance and execution of a writ of restitution in possessory proceedings, the injunction being sought on the ground that the tenant had acquired paramount title, where the tenant made no offer to pay rent for the period prior to the time he acquired paramount title.—Clark v. Holcomb, 253 P. 897, 31 Ariz. 378.

45. U.S.—Daniels v. Portland Gold Min. Co., Colo., 202 F. 637, 121 C.C.A. 47, 45 L.R.A.,N.S., 827, certiorari denied 33 S.Ct. 771, 229 U.S. 611, 57 L.Ed. 1351.
32 C.J. p 119 note 15.

46. Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.
La.—Leidenheimer v. Schutten, 194 So. 32, 34, 194 La. 598, citing **Corpus Juris**—Minden Syrup Co. v. Applegate, App., 150 So. 421, 424, quoting **Corpus Juris.**
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.
32 C.J. p 119 note 16.
Adequacy of other remedies as affecting:
Injunction suits generally see supra § 25.
Injunctive relief as to personal property see infra § 71.

Remedy on forthcoming bond

Plaintiff in bail-trover suit was held not entitled to enjoin defendants and sheriff from interfering with plaintiff's possession of lumber involved, where defendants gave forthcoming bond, since plaintiff had adequate remedy at law.—Bright-Brooks Lumber Co. v. William C. Meredith Co., 166 S.E. 858, 176 Ga. 77.

adequate remedy at law is available.[47]

Injunction for recovery of possession. Injunction is not a possessory remedy,[48] and is not a proper substitute for an action of ejectment[49] or forcible entry and detainer.[50] In the absence of some statutory provision to the contrary,[51] injunction may not be used to recover realty from a defendant himself in possession thereof.[52] So, where the effect of the remedy by injunction is to obtain possession of real property, it is not available unless the facts and circumstances are such that the ordinary legal remedies are inadequate;[53] and an injunction will not be granted against a defendant who is claimed to be in wrongful possession of property who is not doing irreparable damage, since the remedy at law is ample and complete.[54] Subject to some limitations and exceptions,[55] such as in the case of fraud or force in obtaining posses-

47. Conn.—Carter v. Spring Perch Co., 155 A. 832, 113 Conn. 636.
Ind.—State ex rel. Feeney v. Superior Court of Marion County, 188 N. E. 486, 206 Ind. 78.
Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873—Atlantic Refining Co. v. Colley, 32 Luz.L.Reg. 193, 33 Pa.Dist. & Co. 389.
Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

Selection of football team

A high school which showed that the executive committee of an interscholastic league had made a void resolution with respect to selection of the team to represent the district in inter-district football games, the effect of which would be to prevent plaintiff high school from representing the district and thereby cause it to lose a large sum of money, was held entitled to injunctive relief, there being no adequate remedy at law.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605.

48. Ga.—Smith v. Wood, 197 S.E. 246, 186 Ga. 214.
Iowa.—Sinclair Refining Co. v. Cole, 294 N.W. 884, 229 Iowa 763.
32 C.J. p 131 note 47.
Injunction as original and independent proceeding to determine title to land see infra § 54.

49. W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 249, quoting **Corpus Juris.**
32 C.J. p 134 note 71.

50. W.Va.—Phillips v. Hunter, supra quoting **Corpus Juris.**
32 C.J. p 134 note 72.

51. U.S.—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 38 F. Supp. 76.
Ky.—Dixon v. Driskill, 122 S.W. 204.
W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 249, quoting **Corpus Juris.**
32 C.J. p 131 note 50.

In Puerto Rico, under statute, an action of injunction will lie to recover possession of land when plaintiff has been deprived of the possession thereof by fraudulent or forcible acts.—Del Valle v. Rivera, 23 Puerto Rico 587—32 C.J. p 134 note 73 [a].

52. U.S.—J. C. McFarland Co. v. O'Brien, D.C.Ohio, 6 F.2d 1016.
Ga.—Wood v. Hayes, 7 S.E.2d 256, 189 Ga. 658—Wheeler v. Layman Foundation, 3 S.E.2d 645, 188 Ga. 267—Nelson v. Billingslea, 1 S.E. 2d 659, 187 Ga. 492—Smith v. Wood, 197 S.E. 246, 186 Ga. 214—Cannon v. Montgomery, 192 S.E. 206, 184 Ga. 588—Lathem v. Odell, 142 S.E. 558, 166 Ga. 187—English v. Little, 139 S.E. 678, 164 Ga. 805—Beck v. Kah, 136 S.E. 160, 163 Ga. 365—Byrd v. Vance, 124 S.E. 705, 158 Ga. 787.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 764, 213 Ind. 339, citing **Corpus Juris.**
Iowa.—Sinclair Refining Co. v. Cole, 294 N.W. 884, 229 Iowa 763.
La.—Police Jury of St. Martin Parish v. Kidder, 4 La.App. 296.
Mo.—Mexico Refractories Co. v. Pignet's Estate, 161 S.W.2d 417—Walker v. Norris, App., 145 S.W. 2d 972—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 233 Mo.App. 26.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562.
N.J.—Fraxam Amusement Corporation v. Skouras Theatre Corporation, 167 A. 672, 113 N.J.Eq. 509.
N.Y.—Rockefeller Purchasing Corporation v. Rockefeller Center, 283 N. Y.S. 817, 245 App.Div. 629, affirmed 1 N.E.2d 842, 270 N.Y. 447.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.
N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 320, 71 N.D. 199, quoting **Corpus Juris.**
Okl.—Montgomery v. Coleman-Nelson Gasoline Co., 264 P. 895, 130 Okl. 14.
S.C.—Queen v. Swink, 131 S.E. 324, 134 S.C. 21.
Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619.
Tex.—Marchiondo v. Wacasey, Civ. App., 114 S.W.2d 288—Lewis v. Hoerster, Civ.App., 92 S.W.2d 537—Houston Funeral Home v. Boe, Civ. App., 78 S.W.2d 1091—Jowell v. Carbine, Civ.App., 20 S.W.2d 1087, error refused—Schroeder v. Rosenbaum, Civ.App., 16 S.W.2d 328—City Nat. Bank of Dallas v. Folsom, Civ.App., 247 S.W. 591.
W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 249, quoting **Corpus Juris.**
Wyo.—Casper Wyoming Theaters Co. v. Rex Inv. Co., 261 P. 908, 37 Wyo. 357.
32 C.J. p 131 note 51, p 134 note 74.

"It is a well and long established principle that equity will not take the possession of real estate from one party to give it to another by mandatory injunction."—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 956, 173 Misc. 413.

"It is a rule of almost universal application that an injunction will not issue for the taking of property out of the possession of one party and placing it in the possession of another."—Stevens v. Myers, Mo. App., 73 S.W.2d 334, 336.

Ouster will not be relieved against.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.

Preliminary injunction cannot be used to take property from one party's possession to give it to another.—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108.

Sufficiency of defendant's possession

Working trees for turpentine purposes does not as a matter of law show possession within the text rule.—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536.

53. Neb.—Vance v. Henderson, 4 N. W.2d 833, 141 Neb. 758—Standard Oil Co. v. O'Hare, 252 N.W. 398, 126 Neb. 11—Hollinrake v. Neeland, 143 N.W. 809, 94 Neb. 530.

54. U.S.—In re Ward, C.C.A.Hawaii, 61 F.2d 896.
Tex.—Morgan v. Brannon, Civ.App., 95 S.W.2d 509—Lewis v. Hoerster, Civ.App., 92 S.W.2d 537.
32 C.J. p 135 note 76.
Adequacy of legal remedy as barring injunctive relief generally see infra § 60.

55. Mo.—Real Estate Inv. Co. v. Winn, App., 116 S.W.2d 550, 555, quoting **Corpus Juris.**
Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5

sion,[56] it is very generally held improper to issue a preliminary injunction, the effect of which will be to compel the transfer of property from one litigant to another.[57] Where defendant has taken forcible or fraudulent possession of property, or suddenly and secretly changed an existing status to secure an unfair advantage pending a dispute, a preliminary or temporary injunction of mandatory character may issue for the protection of plaintiff's rights.[58]

One who is out of possession cannot as a general rule obtain a mandatory injunction to dispossess another in peaceable possession of the property, pending an adjudication of the relative equities of the parties as to the right of possession.[59] As otherwise expressed, it is not the function of an injunction to transfer the possession of property, particularly lands, from one person to another pending an adjudication of title or the right of possession.[60] This rule, however, has exceptions,[61] and injunction is granted in extreme cases of pressing necessity where complainant shows himself entitled to the interference of a court of equity and is without adequate and practical remedy at law,[62] or in cases where the possession has been forcibly or fraudulently obtained by defendant and the equities require that the possession thus wrongfully invaded be restored and the original status preserved pending the decision on the issue as to title or right of possession.[63]

Tenn.App. 619, 626, quoting **Corpus Juris.**

32 C.J. p 26 note 57.

"The rule is not so inflexible as to exclude all exceptions, for it has been relaxed so as to permit such injunctions in extreme cases of pressing necessity, and where the complaining party shows himself entitled to the interference of a court of equity and is without adequate and practical remedy at law."—Pearce v. Atlantic Life Ins. Co., Tex.Civ.App., 36 S.W.2d 553, 554—Hudspeth v. Gugenheim, Tex.Civ.App., 278 S.W. 952, 953.

56. Tex.—San Jacinto Const. Co. v. Scanlan, Tex.Civ.App., 300 S.W. 220.

Injunction where title or right is in dispute generally see supra § 54.

57. Ind.—Hutton v. School City of Hammond, 142 N.E. 427, 194 Ind. 212, 32 A.L.R. 888.

Mo.—Real Estate Inv. Co. v. Winn, App., 116 S.W.2d 550, 555, quoting **Corpus Juris.**

Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619, 625, citing **Corpus Juris.**

Tex.—Texas Co. v. Watkins, Civ. App., 82 S.W.2d 1079, 1080, citing **Corpus Juris**—Pearce v. Atlantic Life Ins. Co., Civ.App., 36 S.W.2d 553—Corpus Christi Book & Stationery Co. v. Corpus Christi Nat. Bank, Civ.App., 8 S.W.2d 955.

32 C.J. p 26 note 58.

58. U.S.—Mutual Oil Co. v. Empire Petroleum Co., C.C.A.Ohio, 5 F.2d 500.

Tex.—Hartley v. Brady, Civ.App., 114 S.W.2d 406—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454.

Regardless of solvency

Where defendant forcibly ousts complainant from his possession of land, wresting possession from complainant by taking the law into his own hands, equity will grant an injunction to restore the possession of complainant, and in such a situation injunctive relief will be granted irrespective of the solvency of defendant.—Sunderland v. Bishop, 227 P. 398, 100 Okl. 54.

Insolvency of trespasser as ground for injunctive relief see infra § 63.

59. Tex.—Hudspeth v. Gugenheim, Civ.App., 278 S.W. 952.

60. Tex.—Hodge v. Hendrick, Civ. App., 97 S.W.2d 722—Morgan v. Smart, Civ.App., 88 S.W.2d 769—Houston Funeral Home v. Boe, Civ. App., 78 S.W.2d 1091—Rogers v. Day, Civ.App., 20 S.W.2d 104, error dismissed—Hodges v. Christmas, Civ.App., 212 S.W. 825—Simms v. Reisner, Civ.App., 134 S.W. 278.

Injury not irreparable

That machines are of such special design that it would be impossible to replace them for a long time does not warrant preliminary injunction for immediate delivery of machines.—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108.

Possession under oil and gas lease

Where assignee of oil and gas lease entered into possession of property and developed leasehold peaceably under lease, and there was no claim that property was obtained by force or fraud, lessors' application for temporary injunction to restrain assignee from use of land was denied pending suit to adjudicate title and possession of land, where granting of temporary injunction would have ejected assignee and given lessors exclusive possession in advance of hearing on merits.—Williams v. Sinclair Prairie Oil Co., Tex.Civ.App., 87 S.W.2d 892.

61. Tex.—Hudspeth v. Gugenheim, Civ.App., 278 S.W. 952.

62. Fla.—Price v. Gordon, 177 So. 276, 129 Fla. 715.

Tex.—Hudspeth v. Gugenheim, Civ. App., 278 S.W. 952.

63. Ind.—Huegel v. Townsley, 12 N. E.2d 761, 764, 213 Ind. 339, citing **Corpus Juris.**

Tex.—Hartley v. Brady, Civ.App., 114 S.W.2d 406—Hodge v. Hendrick, Civ.App., 97 S.W.2d 722—Williams v. Sinclair Prairie Oil Co., Civ.App., 87 S.W.2d 892—Houston Funeral Home v. Boe, Civ.App., 78 S.W.2d 1091—Rogers v. Day, Civ.App., 20 S.W.2d 104, error dismissed.

32 C.J. p 135 note 77.

Wrongful seizure of corporate records

Persons who, claiming to be duly elected officers of funeral corporation, were in possession and management of funeral home when others under claim of authority as officers unlawfully entered home, took corporation's records, and withheld them by force and threats, were entitled to temporary injunction to require disturbers of possession to restore status quo of business and property pending trial.—Houston Funeral Home v. Boe, Tex.Civ.App., 78 S.W.2d 1091.

Possession of decedent's estate acquired by trespass

Where widow took possession of property in possession of administrator of deceased's estate, through his tenant, under circumstances that constituted a trespass, a temporary injunction mandatorily requiring widow to restore property to administrator, and, pending final deposition, to desist from intruding into any other property belonging to the estate, was proper as maintaining, rather than disturbing, the status quo pending trial.—Story v. Story, Tex.Civ.App., 172 S.W.2d 753, reversed on other grounds, Sup., 176 S.W. 2d 925.

§ 53. Complainant's Right or Title

a. Necessity
b. Sufficiency
c. Deraignment of title

a. Necessity

Injunctive relief as to property is not available to one who has no title to, or interest in, the property, plaintiff being required in this respect to stand on the strength of his own right rather than on the weakness of his opponent's.

Injunctive relief with respect to property will not be granted to one who does not have title to, or possession of, the property, or some interest therein, such as a right of possession,[64] and the party seeking the injunction must stand on the strength of his own right or title rather than on the weakness of the right or title claimed by his opponent.[65] Complainant must show at least a fair prima facie case in support of the right or title he asserts,[66] and clearly a party who holds the legal title to property and is entitled to its possession will not be enjoined at the instance of one who has neither title nor the right of possession.[67]

64. Ala.—Hancock v. Watt, 169 So. 704, 233 Ala. 29.
Ga.—First Nat. Bank v. Harmon, 199 S.E. 223, 186 Ga. 847—Mayor and Council of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78—Whelchel v. Hall County, 133 S.E. 865, 162 Ga. 394.
Ky.—Turner v. Deaton, 294 S.W. 1063, 220 Ky. 154—Cornett v. Swift Coal & Timber Co., 273 S.W. 41, 209 Ky. 482.
Ohio.—Rice v. Campbell, 50 N.E.2d 430, 71 Ohio App. 477.
Okl.—Poarch v. Finkelstein, 99 P.2d 871, 872, 186 Okl. 523, citing **Corpus Juris**—Jacobs v. American Bank & Trust Co., 68 P.2d 801, 180 Okl. 225—Thomas v. Morgan, 240 P. 735, 736, 113 Okl. 212, 43 A.L.R. 934, quoting **Corpus Juris.**
Tenn.—Union Tanning Co. v. Lowe, 255 S.W. 712, 148 Tenn. 407.
Tex.—Pena v. Le Comte, Civ.App., 35 S.W.2d 252—Harper v. Ledbetter, Civ.App., 271 S.W. 213.
32 C.J. p 120 note 20.
Right of purchaser at execution sale to prevent waste see Executions § 305.

Possession incident to employment
The asserted right of an individual to maintain his office and home on college premises as incident to his position as president of the college is not an interest in realty subject, as such, to equitable protection. —Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.

General creditor
The fact that defendant is indebted to plaintiff in some undisclosed amount and has some articles in stock and some funds against which plaintiff, although asserting some sort of claim, in fact has no claim, does not warrant an injunction prohibiting defendant from exercising control over the stock and funds.—Junkin v. Sterchi Furniture Co., Tex. Civ.App., 92 S.W.2d 1098.

Defendants' right shown in complainant's chain of title
Complainant could not restrain defendants from removing shrubbery and the like from strip of land where evidence showed defendants' title to use of strip was recognized in deed to complainant's grantor.—Campeggi v. Wakefield, 145 A. 546, 157 Md. 229.

Prior unabandoned possession
To put defendant on proof of his own title or require him to negative any unlawful character of his possession, a plaintiff seeking to enjoin cutting and removal of timber must show either a prior unabandoned possession in himself or such prior possession of a predecessor in title; and in the latter event he must show prior possession of such predecessor and a deed from him to plaintiff or to some one under whom plaintiff claims while the grantor was in actual possession.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4.

65. Ark.—Frizzell v. Lowe, 294 S.W. 996, 174 Ark. 287.
Ga.—First Nat. Bank v. Harmon, 199 S.E. 223, 186 Ga. 847.
Ky.—Campbell v. Schorr, 5 S.W.2d 278, 224 Ky. 1—Fordson Coal Co. v. Marcum, 268 S.W. 289, 206 Ky. 624.
Mass.—Quincy Oil Co. v. New England Road Machinery Co., 174 N.E. 670, 274 Mass. 419.
Okl.—Jacobs v. American Bank & Trust Co., 68 P.2d 801, 180 Okl. 225—Thomas v. Morgan, 240 P. 735, 736, 113 Okl. 212, 43 A.L.R. 934, quoting **Corpus Juris.**
32 C.J. p 120 note 21.

Comparative good faith immaterial
Plaintiff's right to an injunction does not depend on the good faith of his claim as compared with that of defendant, or on the fact that there is no merit in defendant's claim of title, but on the validity of his own title.—Phillips v. Alma Coal Co., C.C.A.Ky., 7 F.2d 42, certiorari denied Alma Coal Co. v. Phillips, 46 S.Ct. 483, 271 U.S. 669, 70 L.Ed. 1142.

Ownership by third person
One seeking to enjoin defendant from procuring a patent to land can succeed only by establishing his own title to the land, and not by showing that the land was appropriated and owned by some third person.—Ramsey v. Hughes, 280 S.W. 99, 212 Ky. 715.

Use of land to park automobiles
An automobile dealer was not entitled to an injunction preventing a village from interfering with his practice of parking automobiles on strip of land between improved portion of street and railroad right of way where he did not claim or show any right, title, or interest in the strip, since he could not prevail by virtue of the weakness of title of the village.—Plummer v. Village of Swanton, 15 N.E.2d 349, 133 Ohio St. 623.

66. Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412—Campeggi v. Wakefield, 145 A. 546, 157 Md. 229.
S.D.—Hillebrand v. Knapp, 274 N.W. 821, 65 S.D. 414, 112 A.L.R. 1104.

67. N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 71 N.D. 199.

Vendor retaining title and possession under contract
Where vendor and purchaser entered into written contract for sale of realty on which oil and gasoline station was located, and vendor was to retain title and to operate the station for the purchaser until the purchase price was paid, purchaser, before payment of purchase price, could not enjoin the vendor from going on the premises and exercising control over the premises merely because the purchaser was dissatisfied with the way that the vendor was conducting the business.—Farmers Union Oil Co. of Epping v. Kilgore, supra.

Devisee entitled to property pursuant to a decree in equity will not be enjoined, at the instance of a person in possession of the property, from enforcing an execution for possession, where there are no facts requiring a review of the equity decree or showing that the devisee is not entitled to possession.—Frechette v. Thibodeau, 200 N.E. 538, 294 Mass. 51.

b. Sufficiency

Injunctive relief as to property is not limited to persons having title or sole ownership; and lawful possession or a right of possession may be protected under the circumstances. Such relief may be granted to a life tenant, remainderman, reversioner, mortgagee, lessee, licensee, or one holding an equitable interest.

Subject to the rule denying injunction where the respective rights of the parties are doubtful or in dispute, as considered infra § 54, injunctive relief to restrain injury to, or interference with, property will ordinarily be granted to plaintiff whose right or title is superior to that of defendant,[68] even though plaintiff is out of possession;[69] a fortiori, injunction will lie at the instance of one who not only has a clear legal title but who also is in actual possession of the property involved.[70] It is not indispensable, however, that complainant show title,[71] and one in possession of land, although not having title, may as a rule maintain injunction to restrain interference with the property,[72] at least if such possession is rightful[73] or is bona fide and under claim or color of right or title.[74] On the other hand, unauthorized possession of property, without any title or right of possession, will not be protected by injunction,[75] and thus one who is in effect a mere trespasser will not be aided by an injunction in preserving the fruits of his wrongdoing,[76] as by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespasser;[77] and

68. Ga.—Mitchell v. Bale, 165 S.E. 5, 175 Ga. 52—Durden v. Phillips, 144 S.E. 313, 166 Ga. 689, followed in Cadwell v. Phillips, 146 S.E. 637, 168 Ga. 40.

Assignee of vendee's interest in lands who at the time of trial has made full payment therefor has sufficient interest to entitle him to maintain a suit to enjoin a trespass. —Pleasant Lake Hills Corporation v. Eppinger, 209 N.W. 152, 235 Mich. 174.

Employer

Injunction may be had to put an employer owner in possession of land as against one who is his mere employee, and not a technical lessee. —Lathem v. Odell, 142 S.E. 558, 166 Ga. 187—English v. Little, 139 S.E. 678, 164 Ga. 805.

One in possession of realty who has constructed improvements thereon may enjoin interference by a rival claimant who shows no better title, notwithstanding both parties fail to prove ownership by their muniments of title.—Meyer v. Pockros, 18 Ohio App. 506.

Owner under federal patents

Plaintiffs establishing legal title to land under federal patents were entitled to an injunction against trespasses against defendants who claimed ownership based on squatters' possession, where thirty years had not elapsed from the time the land left the public domain to the date of the filing of the injunction suit.—Pavell v. Berwick, D.C.La., 48 F.Supp. 246.

Purchaser under oral contract

Injunctive relief against the cutting and carrying away of timber from land can be had by one who has contracted orally for the purchase of the land, where the vendor has never attempted to rely on the statute of frauds but has, on the contrary, executed a deed in accordance with the oral contract.—Bodkin v. Merhew, 7 Ky.Op. 547.

69. Ga.—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.

Possession as essential to restrain trespass or other injury to real property generally see infra § 58.

Injunction allowed against cutting of timber

Ga.—Hines v. Lavant, supra.

32 C.J. p 143 note 45.

70. Ga.—Allen v. Smith, 150 S.E. 584, 169 Ga. 395.

32 C.J. p 130 note 40.

Vendor's possession under agreement of sale

An agreement for the sale of property on installment payments, providing that the vendor should retain title to the property, improvements, and crops, that purchaser's possession should be deemed that of the vendor, and that purchaser would surrender possession on default in making payments, gives the vendor a sufficient possession and right of possession to entitle him to injunctive relief after default by the purchaser, the purchaser's status under the agreement being merely that of cropper.—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A.L.R. 571.

Grant of land and "appurtenances"

One who has received a grant of land "with the rights and appurtenances thereto," and who has taken possession of and used a pipe line on the land, has a sufficient interest therein to enjoin its removal by one who has no title.—Westbrook v. Hagaman Refining Corporation, Tex. Civ.App., 282 S.W. 826.

71. Ill.—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318.

Tax lienor

The lien of the holder of a certificate of purchase at a tax sale will support an action to restrain the removal of buildings from the land; but the remedy is waived as to buildings where, after their removal, the tax purchaser obtains a judgment for their value against those who removed them, which is declared a lien on the buildings.—Phillips v. Myers, 7 N.W. 580, 55 Iowa 265.

72. U.S.—Pioneer Coal Co. v. Taylor & Crate, C.C.A.Ky., 5 F.2d 770.

Title immaterial as concerns trespasser

Where complainant is in peaceable possession of the property, it is immaterial, so far as concerns a trespasser who interferes with such possession, in whom the title is vested. —Zierath v. McCann, 129 P. 808, 20 Cal.App. 561—32 C.J. p 131 note 44.

Uninterrupted possession for long time

School district in uninterrupted possession of an athletic field or playground for thirty years could enjoin a continued trespass although it did not have title to the property. —Frailey Tp. School Dist. v. Wetzel, 29 Pa.Dist. & Co. 607.

73. Ind.—Tague v. Board of Com'rs of Sullivan County, 26 N.E.2d 562, 107 Ind.App. 676.

32 C.J. p 130 note 41.

Mortgagee placed in possession by mortgagor has been held entitled to enjoin interference with such possession by a grantee of the mortgagor.—Capitol Building & Loan Ass'n v. Dobson, 7 P.2d 64, 134 Kan. 518.

74. Ill.—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318, 331, citing **Corpus Juris.**

Kan.—Hill v. Browning, 273 P. 443, 127 Kan. 216.

Mich.—Ribble v. Burnham, 235 N.W. 175, 253 Mich. 338.

Tex.—Schroeder v. Rosenbaum, Civ. App., 16 S.W.2d 328.

32 C.J. p 120 note 24, p 130 note 42.

75. Ga.—Stanley v. Laurens County Board of Education, 4 S.E.2d 164, 188 Ga. 681.

76. Mont.—Postal Tel.-Cable Co. v. Nolan, 162 P. 169, 53 Mont. 129.

32 C.J. p 121 note 35.

77. Ill.—Public Service Co. of Northern Illinois v. McCloskey, 215

the fact that the interests and operations of the trespasser are large and the damage to the owner is small is of no importance.[78] A mere technical right to the possession of property has been held insufficient to warrant an injunction against the owner of the beneficial interest in the property who was in actual possession.[79]

Under some statutory provisions, one possessing real property for more than a year, whether he may be the real owner or not, may protect that possession by injunction.[80] Under statutes of this character the sole question involved is that of possession, as considered infra § 58, and title is not in issue.[81] Protection is afforded under this statute to one who has been in possession for the required period, notwithstanding such possession has been disturbed, although not lost.[82]

Sole ownership is not essential to entitle complainant to an injunction to restrain injuries to property,[83] or to restrain a total dispossession of him from the property.[84] On the other hand, a right held in common with the public is not sufficient to justify the issuance of an injunction.[85]

Life estate. One who owns a life estate in land is entitled to an injunction against unlawful interference with his possession through unfounded claims.[86]

Remainder or reversion. A reversionary or remainder interest is in general sufficient to entitle complainant to an injunction against injury to the inheritance.[87] However, an injunction will not be granted where plaintiff's interest to be protected is a contingent remainder, very remote and almost beyond the realm of possibility, and to grant relief would inflict great hardship on the parties against whom it is sought;[88] nor will it be granted to enjoin the use of real estate by the owner thereof, at the instance of one whose contingent interest in the property can never defeat the fee.[89]

Mortgage. A mortgagee has sufficient interest to enjoin the removal of timber from land where it constitutes the principal value of the land.[90]

Lease. A lessee, or his assignees or successors, has such an interest as entitles him to an injunction to prevent irreparable injury to his leasehold estate.[91] This rule applies only in favor of those who have valid leases,[92] and a subtenant who seeks equitable relief to protect his rights to the leased premises must clearly show that he is in lawful possession of such rights.[93]

An easement may be protected by injunction at the instance of the owner thereof, as is considered in Easements § 107 b.

License. A licensee is entitled to protection by injunction against irreparable injury to, or continuous trespass on, its property on the premises, by

Ill.App. 387, 394, citing **Corpus Juris.**
32 C.J. p 121 note 36.

78. Ill.—Public Service Co. of Northern Illinois v. McCloskey, supra, citing **Corpus Juris.**
Mich.—Garth Lumber & Shingle Co. v. Johnson, 115 N.W. 52, 151 Mich. 205, 123 Am.S.R. 262.

79. Wis.—Converse v. Ketchum, 18 Wis. 202.

80. La.—Churchill Farms v. Gaudet, 168 So. 123, 184 La. 984.
32 C.J. p 121 note 45.

81. La.—Bonnabel v. Police Jury for Parish of Jefferson, App., 3 So.2d 183.

Conveyances considered only on issue of possession
Only the matter of possession can be passed on, and instruments of conveyance filed in evidence can be considered only for that restricted purpose.—Collins v. McLemore, La. App., 177 So. 502, followed in McLemore v. Collins, 177 So. 506.

82. La.—Slack v. Coffey, 6 La.App. 312.

Possession held not lost
Where a person disturbs such possession and brings suit involving the property, a reconventional demand, showing that defendant has had possession of the land for more than a year, and that he had been disturbed in that possession less than a year previous, is in effect a possessory action and constitutes notice to the disturber that possession of the other was not lost but merely disturbed.—Slack v. Coffey, supra.

83. Mass.—Preston v. West's Beach Corp., 81 N.E. 253, 195 Mass. 482.
32 C.J. p 120 note 26.

84. Ill.—Williamson v. Fleeger, 137 Ill.App. 42.

85. Ga.—Harrell v. Hannum, 56 Ga. 508.
La.—Municipality No. 1 v. Municipality No. 2, 12 La. 49.

86. Mo.—Whitworth v. Barnes, 153 S.W. 538, 168 Mo.App. 269.
S.C.—Nicholson v. Drennan, 14 S.E. 719, 35 S.C. 333.

87. N.Y.—Thompson v. Manhattan R. Co., 29 N.E. 264, 130 N.Y. 360, affirming 8 N.Y.S. 641, 16 Daly 64.
32 C.J. p 121 note 38.

Reversion in land conveyed for church purposes
One who has conveyed land to a church subject to a reservation of oil and mineral rights, and also subject to a reversion in the event that the land should cease to be used for church purposes, has such an interest in the premises as to be entitled to an injunction restraining trustees of the church from using the premises as a burial ground.—Phipps v. Frances, 101 S.W.2d 924, 267 Ky. 203.

88. W.Va.—Brown v. Brown, 109 S. E. 815, 89 W.Va. 339.

89. W.Va.—Garrett v. Board of Education of Chapmansville Dist., 156 S.E. 115, 109 W.Va. 714.

90. U.S.—Terry v. Robbins, C.C.N. C., 122 F. 725.

91. Kan.—Hill v. Browning, 273 P. 443, 127 Kan. 216.
Mo.—National Refining Co. v. Cox, 57 S.W.2d 778, 783, 227 Mo.App. 778, citing **Corpus Juris.**
Pa.—Atlantic Refining Co. v. Colley, 32 Luz.Leg.Reg. 193, 33 Pa.Dist. & Co. 389.
32 C.J. p 121 notes 47, 48, p 130 note 41 [a].

92. S.D.—Wordehoff v. Nepper, 170 N.W. 657, 41 S.D. 396.

93. Ill.—Wilson-Broadway Building Corporation v. Northwestern Elevated R. Co., 235 Ill.App. 306.

a third party.[94] However, persons given a license to enter on lands to cut and remove timber have been held not owners in acreage of such lands, within the meaning of statutes relating to the formation of drainage districts so as to permit them to maintain an action to restrain a drainage district from cutting and destroying the timber.[95]

An equitable interest in property is in general sufficient on which to base a suit for an injunction.[96] This doctrine has been applied in proceedings to enjoin waste,[97] trespass,[98] or a wrongful sale,[99] and in proceedings to quiet title.[1] Where the right of a tenant to a crop maturing after the expiration of his lease is equitable and rests on an equitable estoppel, a court of equity has jurisdiction to protect by injunction the equitable interest of the tenant.[2]

A warrantor of title who has no other interest in land cannot maintain a bill for injunction to quiet possession, unless he seeks also an account and other equitable relief.[3]

Trustees and other representatives. Provided a trustee or other representative has qualified and is properly acting as such,[4] he may sue to enjoin acts prejudicial to the estate which he represents.[5]

c. Deraignment of Title

There is some conflict as to whether an applicant for injunction must deraign title from the state; but it has been held unnecessary to show title back of a common grantor under whom all parties claim. Relief may be based on a title acquired by adverse possession, although under some statutes an applicant who lacks a perfect paper title must establish certain facts which a party having a perfect title need not.

There is authority for the view that one relying on legal title as a basis for injunction must deraign title from the state;[6] but deraignment of title back to the sovereign has been held unnecessary in the case of one holding conveyances, and possession thereunder, for a great many years.[7] Where both parties claim under a common grantor, it is not necessary to show title back of such common grantor,[8] although the mere fact that both parties claim under a common grantor does not dispense with the necessity of showing that plaintiff has acquired title or an interest from the common grantor.[9] By virtue of statute, the nature of plaintiff's title, as to whether or not it is a perfect paper title, may affect the necessity of establishing the insolvency of defendant or the irreparable character of the injury.[10]

94. W.Va.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217, 124 W.Va. 118, 139 A.L.R. 1199.

95. Fla.—Roux v. Houk, 133 So. 853, 101 Fla. 64.

96. Ga.—Bass v. African M. E. Church, 104 S.E. 437, 150 Ga. 452. 32 C.J. p 121 note 40.

97. Va.—Garrison v. Hall, 75 Va. 150. 32 C.J. p 121 note 41.

98. Ga.—Bass v. African M. E. Church, 104 S.E. 437, 150 Ga. 452. 32 C.J. p 121 note 42.

99. Kan.—Holland v. Holland, 155 P. 5, 97 Kan. 169. 32 C.J. p 121 note 43.

1. Ga.—Webb v. Harp, 38 Ga. 641. Pa.—Walsh v. Rice, 1 Lack.Leg.Rec. 62.

2. Md.—Carmine v. Bowen, 64 A. 932, 104 Md. 198, 9 Ann.Cas. 1135.

3. N.H.—Brooks v. Fowle, 14 N.H. 248.

4. Pa.—Holde v. Mudlem, 4 Lanc.L. Rev. 347.

5. U.S.—Murdock v. Woodson, C.C. Mo., 17 F.Cas.No.9,942, 2 Dill. 188, affirmed 22 Wall. 351, 22 L.Ed. 716. N.C.—Simpson v. King, 36 N.C. 11.

6. Tenn.—Union Tanning Co. v. Lowe, 255 S.W. 712, 148 Tenn. 407.

Boundary line statute held inapplicable

A statute making it unnecessary for complainant to deraign title back to state in cases brought in the chancery courts "to locate and establish boundary lines of adjoining or contiguous tracts of land," is inapplicable to an action to enjoin defendant from cutting wood on certain land involving an issue as to the title to a strip of land between adjoining owners.—Union Tanning Co. v. Lowe, supra.

7. N.H.—Merrill v. Publishers' Paper Co., 90 A. 786, 77 N.H. 285. 32 C.J. p 120 note 24 [a].

8. Ga.—First Nat. Bank v. Harmon, 199 S.E. 223, 186 Ga. 847.

9. Ga.—First Nat. Bank v. Harmon, supra.

10. **In Georgia**

(1) Where plaintiff shows a perfect title, an injunction may be granted against the cutting of timber or boxing or working it for turpentine without proof that defendant is insolvent or that the damages would be irreparable.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—32 C.J. p 144 note 58 [b] (1).

(2) Where plaintiff has not a perfect title, insolvency or irreparable injury must be alleged.—Wiggins v. Middleton, 43 S.E. 432, 117 Ga. 162—32 C.J. p 144 note 58 [b] (2), (3).

(3) Although plaintiff may not have perfect title, an injunction may nevertheless issue to restrain the cutting of timber where damages would be irreparable or where the trespass is a continuing one.—Anderson v. Thompson, 15 S.E.2d 890, 192 Ga. 570.

(4) If plaintiff, although failing to show a perfect paper title, shows a good title, he may be entitled to an injunction not only if the injury is irreparable or defendant insolvent, but also if other circumstances exist which, in the discretion of the court, render the injunction necessary and proper, such as the avoidance of circuity and multiplicity of actions or the impossibility of proving the amount of damages growing out of the trespass.—Payne v. Nix, supra—32 C.J. p 144 note 58 [b] (3)-(5).

(5) A perfect title within the meaning of the foregoing rules means a title based entirely on papers capable of being recorded and requiring no extraneous evidence to supply or cure defects.—Payne v. Nix, supra—32 C.J. p 144 note 58 [b] (6), (7).

(6) Plaintiff seeking to enjoin cutting and removal of timber failed to make out his case on the theory of a perfect paper title and thus was not relieved from showing that defendants were insolvent, where one of the deeds in his alleged and proved chain of title was from an alleged "sole heir at law" of deceased predecessor in title, since parol evidence was necessary to prove that essential fact.—Payne v. Nix, supra.

Adverse possession. One who has acquired title by adverse possession may protect his possession by injunction against the commission of trespass es thereon.[11] Injunctive relief against interference with possession will not be afforded to one who has no title to the property and whose only relationship to the property is possession acquired under circumstances such that no prescription could arise therefrom;[12] but one claiming under a purchase of land from the holder of the legal title, with full payment of the purchase money, is not required to show such paper title and possession thereunder as would ripen into prescriptive title to defeat another's suit for injunction against interference with the land.[13]

A complainant holding possession of land adversely to defendant has been held entitled to enjoin defendant from trespassing where defendant did not file a cross bill in ejectment to recover on the strength of his legal title.[14]

§ 54. —— Title or Right Doubtful or in Dispute

The right or title to property must ordinarily be clear to warrant its protection by injunction, since this remedy is not appropriate to determine a disputed title or right of possession of property, particularly where an adequate remedy at law is available, as, in the case of realty, by ejectment or trespass to try title, or, in the case of personalty, by replevin.

Ordinarily, injunction is not a proper remedy, as an original and independent proceeding, for the trial and establishment of a disputed title to, or right of, possession of property,[15] real[16] or person-

11. Neb.—Schock v. Falls City, 48 N.W. 468, 31 Neb. 599.
32 C.J. p 120 note 29.
"Statutes of repose may be invoked in equity in behalf of title and possession thereunder, and the court may, in protection thereof, enjoin acts of trespass."—Beaver v. Zwonack, 229 N.W. 598, 250 Mich. 96.

12. Ga.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78.

13. Ga.—May v. Sorrell, 111 S.E. 810, 153 Ga. 47.

14. Tenn.—May v. Abernathy, 130 S.W.2d 135, 23 Tenn.App. 236.

15. Colo.—Barrios v. Pleasant Valley & Lake Canal Co., 17 P.2d 301, 91 Colo. 563.
Mo.—Mexico Refractories Co. v. Pignet's Estate, 161 S.W.2d 417—Eaton v. Milbourn, App., 135 S.W.2d 387—Steele v. Allison, 73 S.W.2d 842, 228 Mo.App. 656.
N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 71 N.D. 199.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417.
Tex.—Morgan v. Brannon, Civ.App., 95 S.W.2d 509—Houston Funeral Home v. Boe, Civ.App., 78 S.W.2d 1091.
"In the absence of some emergency . . . an injunction suit cannot be used to determine title to property or property rights."—Modrell v. Crews, 67 P.2d 1036, 100 Colo. 415.

16. Ala.—Hancock v. Watt, 169 So. 704, 233 Ala. 29.
Conn.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386.
Colo.—Modrell v. Crews, 67 P.2d 1036, 100 Colo. 415.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 764, 213 Ind. 339, citing **Corpus Juris.**
La.—Adams v. Town of Ruston, 3 La. App. 188.
Mo.—Bowzer v. State Highway Commission, 170 S.W.2d 399—Mexico Refractories Co. v. Pignet's Estate, 161 S.W.2d 417—Eaton v. Milbourn, App., 135 S.W.2d 387—Steele v. Allison, 73 S.W.2d 842, 228 Mo.App. 656.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562—Union Central Life Insurance Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A.L.R. 571—National Bank of Montana v. Bingham, 269 P. 162, 83 Mont. 21.
N.J.—Sayre & Fisher Land Co. v. R. U. Rue Co., 128 A. 862, 2 N.J.Misc. 1081.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.
N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 71 N.D. 199.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 52 R.I. 280.
S.C.—Intendant and Wardens of Town of Port Royal v. Charleston & W. C. Ry. Co., 134 S.E. 497, 136 S.C. 525.
Tenn.—Union Tanning Co. v. Lowe, 255 S.W. 712, 148 Tenn. 407.
Tex.—Svrcek v. Hahn, Civ.App., 103 S.W.2d 840, error dismissed—Morgan v. Brannon, Civ.App., 95 S.W. 2d 509—Lewis v. Hoerster, Civ. App., 92 S.W.2d 537.
W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 307, quoting **Corpus Juris.**
32 C.J. p 124 notes 83, 84, p 131 note 47, p 134 note 70.

Boundary fence
Suit will not lie to enjoin interference with the construction of a fence where the real issue concerns a disputed boundary line.—Kateiva v. Snyder, 254 P. 857, 143 Wash. 172.

Logging
Injunction will not lie to restrain the operation of a logging railroad where there is a controversy founded in good faith as to plaintiff's title to the land on which the railroad is situated and the alleged injury is not irreparable, it being against the policy of the law to interfere by preliminary injunction with industries and enterprises that tend to develop the country and its resources.—John L. Roper Lumber Co. v. Coppersmith, 131 S.E. 575, 191 N.C. 217.

Interference with driveway
Title cannot be tried in a suit to enjoin a neighbor from extending a building over that part of a driveway which lies on his land, thereby destroying the use of the driveway for automobiles.—Charles Market v. Heinockowitz, 137 A. 96, 5 N.J.Misc. 463.

Disputed rights under lease
(1) Where lease by plaintiff was not for exact quantity of land, and had no definite boundaries, and evidence conflicted as to boundaries and whether defendant's cultivation would include any part of leased premises, there was no error in refusing temporary injunction to prevent defendant from cultivating land adjacent to houses on lease.—Trudie Turpentine Co. v. Pearson, 125 S.E. 862, 159 Ga. 387.

(2) Subtenants seeking an injunction to protect their rights to the leased premises were not entitled to relief where it appeared that the landlord, a railroad company, under the terms of the original top lease, had the right to terminate the lease when it desired possession of the premises for railroad, and the showing on affidavits and counter affidavits was insufficient to establish that the railroad did not want to use the premises for railroad purposes.—Wilson-Broadway Building Corpora-

al,[17] and hence the right or title of one seeking equitable relief by injunction to protect his property must ordinarily be clear or admitted.[18] Thus, where title or the right of possession is in dispute between two parties, one of whom is in actual possession under a claim or color of right, injunction will not, as a rule, lie to transfer possession to the other party.[19] Particularly will injunction be refused to determine an issue as to ownership or the right of possession of land where an adequate remedy at law is available, as by ejectment or trespass to try title;[20] and similarly with respect to personalty, the general rule is that, when the right or title to personal property of ordinary character is in dispute and such right or title is a strictly legal one, the remedy of the party out of possession is not by suit in equity for injunction but by an action at law, such as replevin, in which he establishes his ownership or right of possession.[21]

tion v. Northwestern Elevated R. Co., 225 Ill.App. 306.

Use of hospital rooms

A county having possession of all except two rooms of a hospital building has been held not entitled to an injunction giving it possession of the two rooms as against a physician claiming the right to possession of such rooms under a contract with the county.—Head v. Commissioners' Court of Hutchinson County, Tex. Civ.App., 14 S.W.2d 86.

Abandonment and nonuser

Injunction will not lie to restrain an employee of a state department from occupying property, possession of which was legally obtained by the department under a lease with plaintiff's predecessor in title, where plaintiff claims, and the department denies, that it has abandoned the premises and lost its rights by nonuser.—Cannon v. Montgomery, 192 S.E. 206, 184 Ga. 588.

Pendency of proceedings before federal agency

(1) Court had no jurisdiction to enjoin alleged trespass on real property during pendency of proceedings before United States General Land Office for determination of character of land in controversy, in absence of showing that party asking for injunction was in undisputed or rightful possession of land.—Steele v. Allison, 73 S.W.2d 842, 228 Mo.App. 656.

(2) A corporation claiming a right to possession of government land has been held not entitled to a permanent injunction against a party asserting a conflicting claim, pending final action on an application under a prospecting permit for the issuance of an oil and gas lease by the department of interior.—Alaska Development Co. v. Brannan, 275 P. 115, 40 Wyo. 106.

17. Tex.—State v. Houston Nat. Bank, Civ.App., 259 S.W. 175.
32 C.J. p 124 note 85.

18. Fla.—Atlantic Coast Line R. Co. v. Feagin, 105 So. 141, 90 Fla. 62.
Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.
Tenn.—Earhart v. Young, 124 S.W. 2d 698, 174 Tenn. 196.

Chattel interests in land

In the case of chattel interests in land, plaintiff must show a clear right to possession before an injunction will be granted to restrain injuries thereto.—Ellsworth v. Hale, 33 Ark. 633.

19. Ga.—American Oil Co. v. Hulme, 180 S.E. 768, 180 Ga. 768—Vaughn v. Yawn, 103 Ga. 557, 29 S.E. 759.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Mo.—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 233 Mo.App. 26—Stevens v. Myers, App., 73 S.W.2d 334.
N.J.—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108.
Ohio.—Langenderfer v. Dangler, 31 N.E.2d 175, 65 Ohio App. 528.
Philippine.—Gordillo v. Del Rosario, 39 Philippine 829.
Tex.—City of Beaumont v. Gibbs, Civ.App., 130 S.W.2d 872—Morgan v. Brannon, Civ.App., 95 S.W.2d 509—Head v. Commissioners' Court of Hutchinson County, Civ.App., 14 S.W.2d 86.
32 C.J. p 131 note 51.
Injunction as unavailable to transfer possession of realty generally see supra § 52.

Lessee seeking possession

(1) Injunction will not be granted to a lessee who is out of possession in order to permit him to obtain possession from the owners of the property who have obtained possession peaceably and under claim of their right of ownership.—Sinclair Refining Co. v. Cole, 294 N.W. 884, 229 Iowa 763.

(2) A lessee who is not in possession and whose right to possession has not yet matured is not entitled to a temporary injunction restraining the lessor from leasing the property to someone else or putting someone else in possession, where the lessor has already entered into a lease with a third party who is in possession and the lessee is thus seeking to alter, and not maintain, the status quo.—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413.

Possession under prior injunction

Injunction will not be granted against one in possession of land under a prior injunction, which was concededly proper, while such prior injunction continues in force, since the new injunction, if granted, would have the effect of transferring possession.—Queen v. Swink, 131 S.E. 324, 134 S.C. 21.

20. Hawaii.—Ward v. City and County of Honolulu, 31 Hawaii 787.
N.Y.—Wolfe v. Schalkenbach, 243 N.Y.S. 244, 229 App.Div. 422.
Tex.—Culpepper v. West, Civ.App., 110 S.W.2d 231, cause dismissed West v. Culpepper, 140 S.W.2d 166, 135 Tex. 156—Marshall v. Smith, Civ.App., 55 S.W.2d 872, error dismissed—Rogers v. Day, Civ.App., 20 S.W.2d 104, error dismissed.
32 C.J. p 134 notes 71, 72.

Other remedy available to landlord

Injunction will not lie by a landlord to oust a tenant from possession of the leased premises where the landlord has an adequate legal remedy under unlawful detainer statutes or otherwise.

Mo.—Walker v. Norris, App., 145 S.W.2d 972—Stevens v. Myers, App., 73 S.W.2d 334.
Tex.—Clements v. Murphy, Civ.App., 54 S.W.2d 1047.

Administration of realty by administrator

One claiming title to realty sought to be administered by an administrator cannot test his title to the land by a suit to enjoin the administrator from administering the realty as the estate of decedent, an action for land or a suit in ejectment being the appropriate remedy.—O'Quinn v. McClelland, 199 S.E. 128, 186 Ga. 750.

21. Mo.—Latshaw v. Simpson, App., 162 S.W.2d 635—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 233 Mo.App. 26.
N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 320, 71 N.D. 199, quoting **Corpus Juris.**
W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 307, quoting **Corpus Juris.**
Wyo.—Alaska Development Co. v. Brannan, 275 P. 115, 122, 40 Wyo. 106, citing **Corpus Juris.**
32 C.J. p 135 note 83.

Personalty held by sheriff

An injunction is properly denied the state to recover title and posses-

§ 55. —— Establishment of Title or Right

a. General rules
b. Limitations and exceptions

a. General Rules

The general rule is that a disputed right or title must first be established at law before it can be made the basis of injunctive relief, particularly where the acts sought to be enjoined would not cause irreparable injury and there is no emergency.

Since injunction is not a proper remedy for the trial of issues as to title or right of possession, as considered supra § 54, equity will not, as a general rule, interfere to protect legal rights in property or to transfer possession from defendant to complainant until complainant has established his title or right by an action at law,[22] at least where such title or right is in doubt or is disputed.[23] Particularly will injunction be refused before complainant's right or title as to the property has been established at law, where such right or title is not clear or established prima facie, or has not been long enjoyed, and the injury threatened is not irreparable or the remedy at law inadequate.[24] In any event, equity will not interfere before the disputed right or title has been established at law in the absence of some emergency.[25] Injunction will not lie where the principles of law on which the right depends are doubtful and have not been adjudicated by a court of law;[26] nor will it lie where complainant has previously attempted and failed

sion of personal property held by a sheriff under writ of sequestration in a suit involving its title and possession, since, if the state owns the property, it can, through its officers charged with its possession and custody, recover it by using the statutory remedy of a trial of the right of property, or possibly by bringing an independent suit for its recovery.—State v. Houston Nat. Bank, Tex.Civ.App., 259 S.W. 175.

22. Colo.—Modrell v. Crews, 67 P.2d 1036, 1037, 100 Colo. 415, citing **Corpus Juris.**
Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.
N.D.—Farmers Union Oil Co. of Epping v. Kilgore, 299 N.W. 318, 320, 71 N.D. 199, quoting **Corpus Juris.**
Tex.—Schroeder v. Rosenbaum, Civ. App., 16 S.W.2d 328.
W.Va.—Phillips v. Hunter, 175 S.E. 69, 70, 115 W.Va. 307, quoting **Corpus Juris.**
32 C.J. p 122 note 53, p 135 note 75.

Suspension of injunction until decision at law

Where defendant is in possession of land and claims adverse title under verified allegations sufficient to show a colorable claim, he has a right to have the injunction case suspended until the decision of paramount title is had at law, particularly if the alleged encroachment constituting irreparable injury has been completed before the application for injunction.—Southern Ry. Co. v. City of Greenwood, D.C.S.C., 40 F.2d 679.

Who must prosecute at law

In a suit to enjoin the erection of a building on an alleyway over which plaintiff claims an easement, where plaintiff's rights are in dispute, the proper practice is to require that plaintiff, not defendant, prosecute a suit at law to test title.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.

In New Jersey

(1) Where the fundamental right under which the complainant prays equitable relief is based on the alleged existence of an easement in lands of another, and the existence thereof is in substantial dispute between the parties, the establishment of the right at law is necessary to justify the interference of a court of equity.—Rockaway Rolling Mill v. Delaware, L. & W. R. Co., 143 A. 334, 103 N.J.Eq. 297, affirming Rockaway Rolling Mill Corporation v. Delaware, L. & W. R. Co., 137 A. 650, 101 N.J.Eq. 192—Borough of West Long Branch v. Hoch, 131 A. 889, 99 N.J.Eq. 356, reversing 138 A. 106, 99 N.J.Eq. 103.

(2) Under the Chancery Act of 1915, P.L. p 184, where complainant's right or title is raised in an injunction suit equity sends the parties to the law court for the determination of the question of title but meanwhile retains, and does not dismiss, the bill.—Rockaway Rolling Mill Corporation v. Delaware, L. & W. R. Co., 137 A. 650, 101 N.J.Eq. 192, affirmed 143 A. 334, 103 N.J.Eq. 297—Sayre & Fisher Land Co. v. R. U. Rue Co., 128 A. 862, 2 N.J.Misc. 1081.

(3) However, it has been held, without reference to the statute, that where equity has no jurisdiction of a suit to restrain the obstruction of a roadway because the question of the existence of an easement has not been settled at law, it is proper to dismiss the bill for lack of equity if a motion is made therefor, although if such motion has not been made the proper course for equity is to retain the bill until complainant has had a reasonable opportunity to establish his title by a suit at law.—Borough of West Long Branch v. Hoch, 131 A. 889, 99 N.J.Eq. 356, reversing 138 A. 106, 99 N.J.Eq. 103.

23. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331, 334, citing **Corpus Juris**—Southern Ry. Co. v. City of Greenwood, D.C.S.C., 40 F.2d 679—Santee River Hardwood Co. v. Hyman, D.C.S.C., 44 F. Supp. 857—U. S. v. Sandlass, D.C. N.J., 34 F.Supp. 81.
Del.—Evans v. Joseph, 132 A. 891, 15 Del.Ch. 168.
Md.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.
Mo.—Real Estate Inv. Co. v. Winn, 116 S.W.2d 550, 233 Mo.App. 26.
N.J.—Dvorin v. City of Bayonne, 161 A. 654, 111 N.J.Eq. 52—Garrison v. Engle, 193 A. 820, 15 N.J.Misc. 592.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417—Drum v. Dinkelacker, 79 Pa.Super. 91.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 467, 52 R.I. 280, citing **Corpus Juris.**
Wash.—Kateiva v. Snyder, 254 P. 857, 143 Wash. 172.
32 C.J. p 122 note 54, p 134 notes 83-85, p 132 note 59.

Pending or contemplated action at law

Injunction will not lie where title is in dispute unless an action at law to establish title has been brought or is about to be brought.—Gamble v. Kennedy, 93 S.E. 807, 80 W.Va. 694—32 C.J. p 132 note 60.

24. Ill.—McRaven v. Culley, 155 N.E. 282, 324 Ill. 451.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412—Finglass v. George Franke Sons Co., 190 A. 752, 172 Md. 135—Mullikin v. Hughlett, 121 A. 244, 142 Md. 539.
32 C.J. p 122 note 56, p 132 note 61.

25. Colo.—Modrell v. Crews, 67 P.2d 1036, 1037, 100 Colo. 415, citing **Corpus Juris.**
32 C.J. p 123 note 57.

26. Tenn.—Caldwell v. Knott, 10 Yerg. 209.
32 C.J. p 123 note 61.

in an action at law to establish his title.[27]

Ordinarily equity will interfere by injunction to restrain continuing trespasses where complainant's title has been settled at law;[28] but the mere fact that complainant's right has been established at law is not always sufficient to warrant an injunction against repeated trespasses, the application being addressed to the court's discretion and its grant or refusal depending on the circumstances and character of the threatened injury.[29]

b. Limitations and Exceptions

(1) In general
(2) Clear or prima facie right or title
(3) Irreparable injury

(1) In General

Injunctive relief is sometimes granted, in the discretion of the court, before establishment of the right or title at law, as, for example, where a multiplicity of suits is thereby avoided, or where title is involved only collaterally or incidentally, or where the parties without objection form issues to try title in the injunction suit; and the necessity of first establishing title at law is obviated by the statutes in some jurisdictions.

A dispute as to a legal right to property does not in every case defeat the jurisdiction of equity to grant injunctive relief without a prior adjudication at law,[30] for notwithstanding some dispute as to the asserted right, it is within the discretion of the court whether it will entertain a bill to enjoin a continuing trespass before the right has been established at law.[31] A court of equity may proceed and define the right without remitting the case to a court of law where a multiplicity of suits will thereby be avoided.[32] Injunction is sometimes granted when title is only collaterally involved or is merely incidental to the main action,[33] although, conversely, it will not be granted where ownership and the right to possession are the real issues and the equitable issues are merely incidental.[34] Title to real property may be tried in suit for injunction where the parties frame the issue for that purpose and no objection is made.[35] It has been held that as the owner of a merely equitable title to real estate cannot sue in a court of law for vindication thereof or redress of wrongs done to it, he may resort to equity for injunctive relief, under circumstances warranting such relief, even though his title is disputed.[36]

Public domain will be protected at the instance of the government without the title being first established at law.[37]

Right or title dependent on construction of written instrument. It has been considered that injunction will lie to restrain an encroachment without first going to law, notwithstanding some dispute as to title, where the determination of title

27. Pa.—Mowday v. Moore, 19 A. 636, 133 Pa. 598.
43 C.J. p 133 note 62.

28. N.J.—Loeser v. Wosnitzer, 148 A. 202, 105 N.J.Eq. 460.

29. Ill.—Cragg v. Levinson, 87 N.E. 121, 238 Ill. 69, 21 L.R.A.,N.S., 417, 15 Ann.Cas. 1229.

30. N.J.—Man v. Vockroth, 121 A. 599, 94 N.J.Eq. 511.
32 C.J. p 131 note 47 [b].

31. N.Y.—Wheelock v. Noonan, 15 N.E. 67, 108 N.Y. 179, 2 Am.S.R. 405, affirming 53 N.Y.Super. 286.

Refusal of injunction for absence of power held error

In a suit to restrain a former county employee from entering on county property and residing in a dwelling thereon which he formerly occupied in connection with his employment, it was held error to refuse an interlocutory injunction solely on the ground that the chancellor could not grant such injunction until a jury decided the issues of fact made by the petition and answer.—Marion County v. McCorkle, 200 S.E. 285, 187 Ga. 312.

32. Md.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.
32 C.J. p 134 note 76.

Avoidance of five separate suits

Where five landowners adjoining a railroad right of way all claimed title to rails and other property which railroad's assignee intended to remove, a separate suit at law against each landowner solely to determine the issue of law involved, no facts being in dispute, was an inadequate remedy, and assignee was entitled to an injunction restraining landowners from interfering with removal.—American Steel & Iron Co. v. Taft, 199 A. 261, 109 Vt. 469.

33. Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Mo.—Eaton v. Milbourn, App., 135 S.W.2d 887.

Ground for equitable jurisdiction

Where there is some stated ground for equitable jurisdiction to restrain trespasses, the mere fact that there is involved in the case a controversy as to boundary lines will not oust the court of jurisdiction.—Cullen v. Ksiaskiewicz, 118 N.W. 496, 154 Mich. 627.

Ancillary proceeding

A husband who had homestead rights in property of his deceased wife, and brought suit in trespass to try title to the property, could resort to immediate relief of mandatory injunction in a proceeding ancillary to the suit to try title, as a method of obtaining possession from a claimant to the premises, the husband's legal remedy being inadequate to protect his homestead rights.—White v. Sparks, Tex.Civ.App., 118 S.W.2d 649, opinion supplemented 119 S.W.2d 114.

34. N.Y.—Wolfe v. Schalkenbach, 243 N.Y.S. 244, 229 App.Div. 422.

35. Kan.—Shafer v. Leigh, 209 P. 830, 112 Kan. 14.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 467, 52 R.I. 280, citing Corpus Juris.

Reason for rule

"Perhaps one reason why equity courts have in such cases consented to take jurisdiction where the dispute between the parties involves title to real estate is because the respondent has not been deprived of a trial by jury, by requiring him, over his objection, to litigate the dispute in a court of equity."—Talbot v. Town of Little Compton, 160 A. 466, 467, 52 R.I. 280.

36. W.Va.—Grove v. Long, 109 S.E. 817, 89 W.Va. 652.

37. U.S.—U. S. v. Cleveland & Colo. Cattle Co., C.C.Colo., 36 F. 322.
32 C.J. p 124 note 78.

depends entirely on the construction of instruments of title which would not lend itself to submission to a jury.[38] On the other hand, a prior adjudication at law has been held required where the right sought to be protected depends on the meaning of an ambiguous and uncertain contract,[39] deed,[40] or will.[41]

Statutory exceptions. Under the statutes of some states an injunction may be issued without the title of the party being first established in a suit at law.[42] Thus, under some provisions parties in possession may be relieved of establishing their title at law before bringing suit to restrain waste and trespass.[43] The title, if in dispute, and the equitable remedy may be determined in the same action.[44]

(2) Clear or Prima Facie Right or Title

A right or title to property may be protected by injunction without its prior establishment at law where such right or title is admitted or where, notwithstanding a formal denial, it is clear from the facts; and such relief may also be afforded where complainant makes out a strong prima facie case of right or title, or a right enjoyed over a long period of time without interruption.

The establishment at law of a right or title to property is not a prerequisite to injunctive relief where such right or title, or the material facts on which it is based, is admitted;[45] nor is prior adjudication at law necessary where it appears from the pleadings, evidence, or otherwise, that the right is in fact clear and certain,[46] notwithstanding a formal denial of complainant's right or title.[47] As otherwise expressed, where the legal right, although formally disputed, is clear on facts which are not denied and legal rulings which are well settled, equity will protect such right by injunction.[48] The interposition of a court of equity in such cases must be based on a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which on just and equitable grounds ought to be prevented.[49]

It has been held in a number of decisions that where complainant makes out a strong prima facie case of right or title, the injunction will be granted without a previous trial at law.[50] Thus where right has been enjoyed by complainant for a long period of years, its violation will be enjoined without the right being first established at law;[51] and where defendant's possession is not exclusive and is but an interruption of the prior open and notorious peaceful possession of complainant, an injunction will be allowed before the right is determined at law.[52] Equity has jurisdiction, without a prior adjudication at law, to enjoin and restrain defendant from the cutting and moving of timber from the land or otherwise trespassing thereon where both

38. U.S.—U. S. v. Sandlass, D.C.N. J., 34 F.Supp. 81.
39. Mich.—Bennett v. Seligman, 32 Mich. 500.
32 C.J. p 123 note 58.
Doubtful contract rights as basis for injunction see infra § 80.
40. Pa.—Booher v. Browning, 32 A. 85, 169 Pa. 18.
32 C.J. p 123 note 59.
41. Pa.—Duncan v. Hollidaysburg & Gap Iron-Works, 20 A. 647, 136 Pa. 478.
42. N.Y.—Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co., 82 N.Y. 476.
32 C.J. p 124 note 80.
In Maryland, a court of equity has express statutory authority, whenever a question of law appears which might conveniently be decided before evidence is offered, to pass an order directing the question to be raised for the opinion of the court, and hence, while it is proper for the chancellor to send questions of title to a court of law for trial, a permanent injunction may be granted at once if complainant's title is clear.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.
43. Or.—Allen v. Dunlap, 33 P. 675, 24 Or. 229.
44. N.Y.—Hinckel v. Stevens, 45 N. Y.S. 678, 17 App.Div. 279.
Tex.—Butler v. Borroum, Civ.App., 218 S.W. 1115.
45. Ala.—Howell v. City of Dothan, 174 So. 624, 234 Ala. 158—Town of York v. McAlpin, 167 So. 539, 232 Ala. 158.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417.
32 C.J. p 123 note 63.
46. Ala.—Town of York v. McAlpin, 167 So. 539, 232 Ala. 158.
Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.
Pa.—Hartman v. Pennsylvania Water & Power Co., 176 A. 437, 317 Pa. 417—Petition of Lehigh Paper Mills, Inc., 5 Pa.Dist. & Co. 119, 122, 19 North.Co. 177.
32 C.J. p 123 note 64.
47. U.S.—Munoz v. Porto Rico Ry., Light & Power Co., C.C.A.Puerto Rico, 74 F.2d 816, certiorari denied 56 S.Ct. 88, 296 U.S. 577, 80 L.Ed. 408.
Mo.—National Refining Co. v. Cox, 57 S.W.2d 778, 783, 227 Mo.App. 778, citing **Corpus Juris.**
32 C.J. p 123 note 65.
"Even though the pleadings present conflicting contentions of the parties as to title, and evidence is adduced to support both contentions, nevertheless if it appears that there is no reasonable ground for the dispute, the Chancellor has the right to determine the question of title and grant a decree of injunction without waiting for a decision on the question of title by a court of law."—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.
48. N.J.—Man v. Vockroth, 121 A. 599, 94 N.J.Eq. 511—Garrison v. Engle, 193 A. 820, 15 N.J.Misc. 592.
49. S.C.—Atlanta & C. Air Line R. Co. v. Spartanburg R. Gas & Electric Co., 83 S.E. 635, 99 S.C. 299.
32 C.J. p 123 note 66.
Corpus Juris cited to show that injunction to prevent waste issues only where plaintiff has a clear title. —Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 1044, 161 Tenn. 592.
50. Va.—Ely v. Johnson, 75 S.E. 748, 114 Va. 31.
32 C.J. p 123 note 67.
51. Neb.—Williams v. Riley, 113 N. W. 136, 79 Neb. 554.
32 C.J. p 124 note 72.
52. Okl.—Collier v. Bartlett, 175 P. 247, 71 Okl. 133.

parties claim title and have exercised acts of ownership for a long time, but defendant bases his alleged right on adverse possession and fails to make out even a prima facie case.[53]

(3) Irreparable Injury

It is generally considered that injunctive relief is proper to protect property before right or title thereto has been established at law where the threatened injury would cause irreparable damage and destroy the inheritance or the substance of the estate.

An exception to the general rule requiring a disputed right or title to be settled at law before injunction will issue occurs where the threatened trespass goes to destroy the inheritance or the substance of the estate,[54] as in mining coal or other minerals, or cutting trees,[55] or where the damage would be otherwise irreparable;[56] at least injunctive protection in such cases is afforded to one in rightful possession of the property,[57] although with respect to a complainant out of possession seeking injunctive relief against mining or the cutting of timber it has been held that there must first be an adjudication of his title at law[58] or an action at law for that purpose either pending or contemplated and ancillary thereto.[59]

§ 56. —— Protection pending Litigation as to Title or Right

a. In general
b. Possession and use of property
c. Sale, transfer, or removal of property or funds

a. In General

Injunction may be granted to preserve property in statu quo pending establishment of the right or title thereto at law, in equity, or by special proceedings. Relief of this nature rests in the discretion of the court, the relative inconvenience to the parties being the important factor; and the party seeking relief must show some probability of success in the main action.

The protection of property from damage or destruction pending litigation is an established head of equity,[60] and injunction may be granted to preserve property and property rights in statu quo until a final adjudication of the right or title to the property,[61] relief of this nature being available pending a suit in equity,[62] an action at law,[63] or

53. Va.—Cumbee v. Ritter, 96 S.E. 747, 123 Va. 448.
32 C.J. p 124 note 74.

54. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.
Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 155 Va. 249.
32 C.J. p 132 note 57.

55. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331.
32 C.J. p 132 note 57 [a].

In Missouri, under statutes, injunction lies to restrain timber cutting under a timber deed executed by a former owner of the land, as against the objection that title to the timber is in dispute, the nature of the property and the inconvenience of suing for continuous trespasses constituting a basis for equitable relief.—Sikes v. Turner, 247 S.W. 803, 212 Mo.App. 419, transferred, see, Sup., 242 S.W. 940.

56. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331.
Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 155 Va. 249.
32 C.J. p 132 note 57 [a].

57. Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.
Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339—Wabash Railroad Company v. Engleman, 66 N.E. 892, 160 Ind. 629.

58. U.S.—Buchanan Co. v. Adkins, Va., 175 F. 692, 99 C.C.A. 246.
32 C.J. p 132 note 54.

59. U.S.—Buchanan Co. v. Adkins, supra.
32 C.J. p 132 note 55.

60. Va.—Manchester Cotton Mills v. Manchester, 25 Gratt. 825, 66 Va. 825.

61. U.S.—Park & Tilford Import Corporation v. Hunter Baltimore Rye, D.C.N.Y., 5 F.Supp. 688.
Ala.—Russell v. Thornton, 112 So. 347, 216 Ala. 60.
Cal.—Steele v. Marlborough Hall Corporation, 280 P. 380, 100 Cal. App. 491.
Ga.—Chapple v. Hight, 131 S.E. 505, 161 Ga. 629.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.
Tex.—White v. Sparks, Civ.App., 118 S.W.2d 649, opinion supplemented 119 S.W.2d 114—Hartley v. Brady, Civ.App., 114 S.W.2d 406—Rogers v. Daniel Oil & Royalty Co., Civ. App., 105 S.W.2d 476, affirmed 110 S.W.2d 891, 130 Tex. 386—Bargaimes v. Lemons, Civ.App., 97 S.W.2d 511.
"Status quo" defined see supra § 19.
"There is no doubt that, where there is a real dispute as to the title to real property based upon substantial grounds, a court of equity will restrain any acts or conduct which may damage or waste the property until that dispute can be adjudicated."—Campeggi v. Wakefield, 145 A. 546, 549, 157 Md. 229.

Purpose of injunction
Injunction is granted in such cases in order either that the property may still remain subject to the orders of the court or that some wrongful act that would tend to render the court's final judgment ineffectual may be prevented.—Rogers v. Daniel Oil & Royalty Co., Civ.App., 105 S.W.2d 476, affirmed 110 S.W.2d 891, 130 Tex. 386.

Relief obtainable elsewhere
A showing that the same relief might be obtained in some other forum will not prevent the grant of an injunction where the granting of the injunction is merely ancillary to the main action and is for the purpose of protecting property later to be disposed of by the court.—Smith v. Monroe, Tex.Civ.App., 1 S.W.2d 858, error dismissed.

Corpus Juris quoted but held inapplicable where plaintiff never had title or claim of title.—Public Service Co. of Northern Illinois v. McCloskey, 235 Ill.App. 387.

62. Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 184, 235 Ala. 394, citing **Corpus Juris**—Windham v. Elba Bank & Trust Co., 116 So. 704, 217 Ala. 516—Russell v. Thornton, 112 So. 347, 216 Ala. 60.
D.C.—Fletcher v. Kellogg, 2 F.2d 315, 55 App.D.C. 97.
N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.
Tex.—Hartley v. Brady, Civ.App., 114 S.W.2d 406.
32 C.J. p 125 note 90.

63. Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 184, 235 Ala. 394, citing **Corpus Juris.**
Ky.—Richardson v. Commonwealth, by Meredith, 122 S.W.2d 156, 275 Ky. 486.

special proceedings,[64] such as quo warranto,[65] condemnation proceedings,[66] or a contest before the land department.[67] The court does not undertake to settle the right, but merely to preserve the property until the right is settled at law,[68] or until the main case is disposed of on the merits;[69] and the injunction should not give either party an undue advantage.[70]

The party seeking the protection of equity for his property must show that irreparable injury will result from the invasion of his legal right, and that such irreparable injury is likely to be sustained before the legal right on which the application for injunction is founded can be fully vindicated in the proper forum.[71] The injunction sought must be in protection of some right being litigated in the main action and will not be granted where it is not germane to the subject of such action.[72] A court of chancery will decree an adverse claimant to deliver possession to the owner only when such relief is incidental to the main object of the bill, and when the power of the court has been called into action for some purpose that belongs to its legitimate jurisdiction.[73] A perpetual injunction against trespass cannot be granted in aid of an ejectment suit where it appears that the ejectment suit has been terminated and, according to the judgment entry in the suit, determined adversely to the party seeking the injunction.[74]

Discretion of court. The right to injunction to preserve the status quo in property pending litigation as to title or right is for the trial court to determine in its discretion,[75] although, where a proper case is made for the allowance of such an injunction, it is an abuse of discretion to refuse it.[76] The court, in exercising its discretion will be largely guided by the relative inconvenience which would result from granting or refusing the relief.[77]

Probability of success. An injunction to preserve the status quo will ordinarily be granted where there appears to be a substantial question between the parties and a reasonable ground to believe that complainant may ultimately be successful in his claim;[78] but it need not clearly appear that complainant will ultimately succeed, it being sufficient if he makes out a prima facie right.[79] However,

Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412—Mullikin v. Hughlett, 121 A. 244, 142 Md. 539.

N.J.—McCran v. Western Union Telegraph Co., 120 A. 515, 94 N.J.Eq. 281.

32 C.J. p 125 note 91.

Injunction against waste pending action to determine complainant's right or title see the C.J.S. title Waste § 16, also 67 C.J. p 631 notes 44, 45.

Relief pending action for damages

Farm owner, whose premises were occupied by cropper as a trespasser subsequent to notice to quit at termination of contract period, was entitled to an order restraining cropper from farming the premises, or interfering with anyone sent there by the court to farm the premises, pending owner's action for damages for occupation and unlawful detention.—Gibbons v. Huntsinger, 74 P.2d 443, 105 Mont. 562.

64. **Issuance of a distress warrant** for past-due rent does not preclude the landlord from seeking an injunction in aid of the warrant to enjoin the tenant from removing from the leased premises property pledged for the rent and from interfering with the landlord's possession of the leased premises.—Ellis v. Millen Hotel Co., 14 S.E.2d 565, 192 Ga. 66.

65. Mo.—State v. Assurance Co. of America, 158 S.W. 640, 251 Mo. 278, 46 L.R.A.,N.S., 955, Ann.Cas.1915A 247.

32 C.J. p 125 note 93.

66. U.S.—Western Union Tel. Co. v. Louisville & N. R. Co., D.C.Ky., 201 F. 946, affirmed 207 F. 1, 124 C.C.A. 573.

32 C.J. p 125 note 94.

67. Mo.—Steele v. Allison, 73 S.W. 2d 842, 228 Mo.App. 656.

32 C.J. p 125 note 95.

68. U.S.—Northern Pac. R. Co. v. City of Spokane, C.C.Wash., 52 F. 428.

Va.—Manchester Cotton Mills v. Manchester, 25 Gratt. 825, 66 Va. 825.

69. N.C.—Hayes v. Pace, 78 S.E. 290, 162 N.C. 288.

70. U.S.—Northern Pac. R. Co. v. City of Spokane, C.C.Wash., 52 F. 428.

32 C.J. p 125 note 97.

Same effect as final adjudication

Temporary mandatory injunction in action by adjoining landowner to compel removal of alleged encroachment was properly refused where granting of it would have finally adjudicated rights of parties.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

71. Md.—Smith v. Shiebeck, 24 A.2d 795, 799, 180 Md. 412.

72. N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.

Protection pending processioning proceeding

Injunction will not issue as an auxiliary remedy to protect property and possessory rights pending final determination of a processioning proceeding, since such a proceeding involves neither title to land nor its possession but is merely a proceeding for the speedy and inexpensive settlement of disputes over dividing lines where title is not in controversy.—Jackson v. Jernigan, supra.

73. Ill.—Cleland v. Fish, 43 Ill. 282—Mitchell v. Hannah, 121 Ill.App. 597, 599.

74. Ala.—Donovan v. McCord, 85 So. 262, 204 Ala. 292.

75. Tex.—Hudspeth v. Gugenheim, Civ.App., 278 S.W. 952.

Abuse of discretion held not shown

(1) In enjoining husband from asserting right to properties of wife.—Smith v. Monroe, Tex.Civ.App., 1 S.W.2d 358, error dismissed.

(2) In prohibiting use of premises and interference with owner and new lessee, and mandatorily enjoining defendants to vacate.—Hudspeth v. Gugenheim, Tex.Civ.App., 278 S.W. 952.

76. Ga.—Brown Loan & Abstract Co. v. Willis, 102 S.E. 814, 150 Ga. 122.

77. U.S.—Park & Tilford Import Corporation v. Hunter Baltimore Rye, D.C.N.Y., 5 F.Supp. 888.

32 C.J. p 126 note 3.

Relative convenience generally see supra § 30.

78. U.S.—Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, C.C.Nev., 159 F. 500.

32 C.J. p 126 note 1.

79. U.S.—Western Union Tel. Co. v.

the dispute must be based on something more than a mere unsupported claim asserted by plaintiff,[80] and an injunction should not be granted where a reasonable possibility of success is not shown.[81]

Pending appeal. The unsuccessful party in an action at law may be granted an injunction where it appears that otherwise there will be such a change in the status of the subject matter of the controversy as may render nugatory the judgment of the court of review, when announced.[82] On the other hand an injunction will be denied if the injury will be insignificant,[83] or the remedy at law adequate,[84] or if it does not appear that irremediable mischief, going to the destruction of the substance of the estate, is being done or threatened,[85] or if complainant has seemingly acquiesced in defendant's right and allowed him to make great expenditures,[86] or if appellant fails to show a prima facie right,[87] or if the statutes provide a remedy.[88] Pending an appeal from a decision dismissing a bill for an injunction an injunction will not be granted or revived.[89]

b. Possession and Use of Property

One in possession of property under a claim of right may protect such possession by injunction pending litigation as to his right, particularly where transfer of possession would cause irreparable injury. Conversely, a complainant out of possession may not have possession pending adjudication of the rights of the parties except in unusual cases, such as those in which possession was taken from him forcibly or fraudulently.

One in possession of land under a claim of right or title which is not merely colorable may maintain a suit for an injunction to protect his possession pending litigation as to the right or title to the property,[90] at least when dispossession would result in irreparable injury, or where the remedy at law is inadequate;[91] and, as ancillary to a suit in equity, an injunction may be granted to protect possession, in cases in which complainant would be entitled to the relief if ultimately successful.[92] Ordinarily a defendant in possession will not be enjoined from the use of the property in controversy, or the exercise of acts of ownership or acts which are the ordinary incidents of possession, at least where it does not appear that complainant will thus lose the fruits of his pending action if he establishes title.[93]

c. Sale, Transfer, or Removal of Property or Funds

Injunction may be had to restrain the sale or removal of property, or the disposition of funds, during the pendency of litigation as to the right or title thereto, where there is danger that the litigation would otherwise be rendered futile.

Where the main suit is pending in equity, the court, as ancillary thereto, will grant an injunction to prevent the sale, transfer, or any change in the status of the property which will interfere with the equitable adjustment of the rights of the parties on final decree.[94] Also, pending an action

City of New York, C.C.N.Y., 38 F. 552, 3 L.R.A. 449.
32 C.J. p 126 note 2.

80. Md.—Campeggi v. Wakefield, 145 A. 546, 157 Md. 229.

81. Md.—Campeggi v. Wakefield, 145 A. 546, 549, 157 Md. 229, citing **Corpus Juris.**
32 C.J. p 126 note 99.

82. Ala.—Bowdoin v. Bowdoin, 144 So. 819, 822, 225 Ala. 618, quoting **Corpus Juris.**
32 C.J. p 129 note 23.

83. Ala.—Bowdoin v. Bowdoin, supra, quoting **Corpus Juris.**
Mont.—Maloney v. King, 71 P. 469, 27 Mont. 428.

84. Ala.—Bowdoin v. Bowdoin, 144 So. 819, 822, 225 Ala. 618, quoting **Corpus Juris.**
32 C.J. p 129 note 25.

85. Ala.—Bowdoin v. Bowdoin, 144 So. 819, 225 Ala. 618.

86. Kan.—Reisner v. Strong, 24 Kan. 419.

87. Md.—Callaway v. Baltimore, 57 A. 661, 99 Md. 315.
Philippine.—Teco v. Ventura, 1 Philippine 497.

88. N.Y. Fellows v. Heermans, 13 Abb.Pr.,N.S., 1.

89. N.Y.—Webster v. Hawley, 4 Ch. Sent. 75.
32 C.J. p 129 note 30.

90. Tex.—White v. Sparks, Civ.App., 118 S.W.2d 649, opinion supplemented 119 S.W.2d 114—Rogers v. Day, Civ.App., 20 S.W.2d 104, error dismissed.
32 C.J. p 126 note 6.

"Actual possession"

In order to constitute "actual possession" of land, so as to justify granting of preliminary injunction pending final determination of controversy as to title, there must be such an appropriation of land by claimant as will convey in the community where it is situated visible notice that the land is in his exclusive use and enjoyment; an appropriation manifested by either inclosing, cultivating, improving, or adapting it to such use as it is capable of. —Humble Oil & Refining Co. v. Manziel, Tex.Civ.App., 165 S.W.2d 909.

91. Pa.—Nittany Valley R. Co. v. Empire Steel & Iron Co., 67 A. 349, 218 Pa. 224.
32 C.J. p 126 note 8.

92. Ga.—Comer v. Comer, 18 S.E. 417, 92 Ga. 569.
32 C.J. p 127 note 9.

93. Tex.—Morgan v. Smart, Civ. App., 88 S.W.2d 769.
32 C.J. p 126 note 6.

Conducting business

In suit by vendor of realty to recover possession of the property, a court of equity will not restrain vendee from conducting its business on the premises in dispute, where it is not shown that the property is deteriorating and that acts of waste are being committed by vendee, and it does not otherwise appear that it is necessary in order to protect the rights of vendor that such injunction be granted.—Wheeler v. Layman Foundation, 3 S.E.2d 645, 188 Ga. 267.
Recovery or transfer of possession pending adjudication of the title or right is discussed supra § 52.

94. Cal.—Steele v. Marlborough Hall Corporation, 280 P. 380, 100 Cal.App. 491.
Ga.—Goodin v. McRae, 135 S.E. 911, 163 Ga. 293.
N.Y.—Ohio Match Sales Co. v. Everhard, 211 N.Y.S. 858, 126 Misc. 23, affirmed 215 N.Y.S. 893, 216 App. Div. 795—Broder v. Broudarge, 38 N.Y.S.2d 282.
32 C.J. p 127 note 15.
Injunction against conveyance or

at law an injunction will be granted against a sale or disposition of the property in controversy where it is necessary to prevent irreparable injury,[95] or a multiplicity of suits.[96] The cutting and removal of timber on land may be restrained pending litigation as to the right to the land and timber;[97] and thus creditors may restrain heirs from cutting and carrying away timber pending a creditors' bill to subject the real estate of deceased debtor.[98] An injunction restraining the removal of property should not be granted where the injunction would operate to enforce a penalty or forfeiture.[99]

The effect of the doctrine of lis pendens does not prevent the granting of an injunction restraining the alienation of property pending litigation,[1] although it has been frequently held that such an injunction is not necessary or proper where property is affected by lis pendens,[2] and the courts have required other grounds for the granting of an injunction, such as a showing of irreparable injury.[3]

Protection of funds. Equity may by a restraining order protect a fund in controversy, pending the determination of the controversy, where there is danger that the fund will be lost or dissipated and that complainant will lose the fruit of his action,[4] or where the fund is in the court's possession.[5] In these circumstances, an injunction may be granted to preserve the fund and secure it for the party to whom it may be adjudged to belong on final decree.[6] In an action against a corporation and individual defendants, an injunction to restrain distribution of the corporate assets pending the determination of the action, on the ground of the insolvency of the corporation, will not be granted where it does not appear that the individual defendants are insolvent and that a judgment against them could not be enforced.[7]

§ 57. Trespass or Other Injury to Real Property

While the jurisdiction of equity to restrain trespass is well settled, it should be exercised sparingly and ordinarily is confined to cases where the nature of the property or the frequent repetition of the trespass precludes recovery of remediable damages at law. Lawful acts may not be enjoined even if they cause injury to complainant's realty.

The jurisdiction of equity, in a proper case, to restrain trespasses is now well settled,[8] and privity of title is no longer essential to the right to an injunction.[9] Any unauthorized entry on the lands of another may be such as to evoke the equitable

disposition of property generally see infra §§ 72–74.

Pending accounting by executrix

Surrogate is empowered to enjoin executrix from disposing of property claimed to be part of decedent's estate, pending final accounting proceeding.—In re Ashner's Estate, 246 N.Y.S. 129, 231 App.Div. 127.

Pending suit to set off cross judgments

In a suit by the United States to set off cross judgments, there is no necessity for an injunction to prevent the transfer by defendant of his judgment against the United States since, under 18 U.S.St. at L. p 481, any transferee will take subject to the government's right to set-off.—Teller v. U. S., Wyo., 113 F. 463, 51 C.C.A. 297.

95. Iowa.—Tony Amodeo Co. v. Woodward, 174 N.W. 341, 187 Iowa 569.
32 C.J. p 128 note 16.

96. Puerto Rico.—Sabat v. Valera, 24 Puerto Rico 133.

97. Ga.—Chapple v. Hight, 131 S.E. 505, 161 Ga. 629.
32 C.J. p 144 note 58 [c].
Injunction against cutting timber generally see infra § 66.

98. Md.—Tessier v. Wise, 3 Bland 28.

99. Mich.—Crane v. Dwyer, 9 Mich. 450, 80 Am.D. 87.
32 C.J. p 128 note 19.

1. U.S.—Zander v. Phillips, La., 213 F. 29, 129 C.C.A. 615.
38 C.J. p 63 note 83.

2. Colo.—Belmont Mining & Milling Co. v. Costigan, 42 P. 647, 21 Colo. 471.
38 C.J. p 63 note 84.

3. Ga.—Etheredge v. Slayton, 19 S. E. 818, 94 Ga. 496.

4. Kan.—Tivis v. Hulsey, 73 P.2d 1111, 146 Kan. 851.
32 C.J. p 127 note 10.

Legacy

Injunction may be granted to restrain payment of funds to a legatee until the decision of a suit then pending between the legatee and his former counsel.—Fletcher v. Kellogg, 2 F.2d 315, 55 App.D.C. 97.

Purchase price of property

Where an insolvent debtor had conveyed his only property to a nonresident trustee, who had contracted to sell it to resident purchasers, a creditor, on filing a creditors' bill, was held entitled to a temporary injunction to restrain the purchasers from paying to the trustee the purchase price.—Murray v. Sioux Alaska Min. Co., Alaska, 239 F. 818, 152 C.C.A. 604.

5. Minn.—Mann v. Flower, 5 N.W. 365, 26 Minn. 479.
32 C.J. p 127 note 11.

6. U.S.—American Can Co. v. Williams, N.Y., 153 F. 882, 82 C.C.A. 628.
32 C.J. p 127 note 14.

7. Tex.—Security State Bank v. Spinnler, Civ.App., 55 S.W.2d 128, error dismissed.

8. Ala.—Brown v. Ashworth, 185 So. 754, 237 Ala. 160.
Ill.—Gage v. Village of Wilmette, 233 Ill.App. 30.
Mo.—Latshaw v. Simpson, App., 162 S.W.2d 635—Special Road Dist. No. 4 of Bolinger County v. Stepp, 4 S.W.2d 480, 481, 222 Mo.App. 1216, citing **Corpus Juris.**
Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244.
Pa.—Rush Tp. School Dist. v. Titus, 7 Pa.Dist. & Co. 565.
Tex.—Perry v. Stringfellow, Civ. App., 113 S.W.2d 1012, reversed on other ground 134 S.W.2d 1031, 134 Tex. 328.
Utah.—Ercanbrack v. Clark, 8 P.2d 1093, 79 Utah 233.
W.Va.—Hansford v. Rust, 150 S.E. 223, 107 W.Va. 624.
Wis.—Gitlitz v. Plankinton Bldg. Properties, 280 N.W. 415, 417, 228 Wis. 334, citing **Corpus Juris**—Klagus v. City of Baraboo, 196 N. W. 772, 182 Wis. 503.
32 C.J. p 129 note 32—63 C.J. p 964 notes 82, 83.
Trespass by airplanes see Aerial Navigation § 31.

9. Ala.—H. H. Hitt Lumber Co. v. Cullman Property Co., 66 So. 720, 189 Ala. 13, 16.
32 C.J. p 130 note 38.
Complainant's right or title generally see supra §§ 53–56.

jurisdiction of the courts,[10] and injunction will lie in an otherwise proper case to prevent a threatened trespass.[11] However, injunctions to restrain trespass do not issue as a matter of course;[12] there may be inconsequential trespasses which a court of equity will not enjoin,[13] and the jurisdiction is to be exercised sparingly,[14] and ordinarily is confined to cases where from the very nature of the property affected or the frequent repetition of the trespass the injury sustained is not susceptible of remediable damages.[15] As against a mere trespasser, an outstanding equitable interest will not defeat the right to an injunction.[16]

Lawful acts. The lawful act of a defendant may not be enjoined merely because it results in injury to complainant's realty.[17] An entry made under authority of law may not be enjoined as a trespass.[18]

§ 58. —— Persons Entitled

Ordinarily possession is essential to injunctive relief for trespass or other injury to real estate, but some authorities permit such relief in an otherwise proper case where complainant is out of possession but the injury threatened is irreparable.

Subject to requirements affecting right or title, as discussed supra §§ 53–56, it may be stated generally that in an otherwise proper case injunction lies to protect the rights of one in possession of real estate,[19] but that a suit to enjoin trespass or other injury to realty may not as a rule be maintained by one lacking actual or constructive possession thereof.[20] So, in the absence of statute per-

10. N.C.—Kinsland v. Kinsland, 125 S.E. 625, 188 N.C. 810.

11. U.S.—North Pacific S. S. Co. v. Industrial Accident Commission, D.C.Cal., 23 F.2d 109.
Conn.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386.
Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.
Mass.—Loughlin v. Wright Mach. Co., 173 N.E. 534, 273 Mass. 310.
Mich.—Hasselbring v. Koepke, 248 N. W. 869, 263 Mich. 466, 93 A.L.R. 1170.

12. Md.—Richfield Oil Corporation of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 580—Long v. Ragan, 51 A. 181, 94 Md. 462.
Mo.—Latshaw v. Simpson, App., 162 S.W.2d 635.
Wis.—Gitlitz v. Plankinton Bldg. Properties, 280 N.W. 415, 228 Wis. 334.

13. Wis.—Klagus v. City of Baraboo, 196 N.W. 772, 182 Wis. 503.

14. Mo.—Latshaw v. Simpson, App., 162 S.W.2d 635—Special Road Dist. No. 4 of Bolinger County v. Stepp, 4 S.W.2d 480, 481, 222 Mo.App. 1216, citing **Corpus Juris.**
W.Va.—Mullins Realty Co. v. Klein, 102 S.E. 677, 85 W.Va. 712.
Wis.—Gitlitz v. Plankinton Bldg. Properties, 280 N.W. 415, 418, 228 Wis. 334, quoting **Corpus Juris.**

15. Ga.—City of Blue Ridge v. Kiker, 9 S.E.2d 253, 190 Ga. 206—Nalley Land & Investment Co. v. Shaddix, 157 S.E. 291, 172 Ga. 171—Crockett v. Wofford, 144 S.E. 27, 166 Ga. 630.
Mo.—Latshaw v. Simpson, App., 162 S.W.2d 635—Special Road Dist. No. 4 of Bolinger County v. Stepp, 4 S.W.2d 480, 481, 222 Mo.App. 1216, citing **Corpus Juris.**
W.Va.—Mullens Realty, etc., Co. v. Klein, 102 S.E. 677, 85 W.Va. 712.
Wis.—Gitlitz v. Plankinton Bldg. Properties, 280 N.W. 415, 418, 228 Wis. 334, quoting **Corpus Juris.**

16. Neb.—Munger v. Yeiser, 114 N. W. 166, 80 Neb. 285.

17. Del.—Gibson v. Main, 122 A. 188, 14 Del.Ch. 112, affirmed 129 A. 259, 14 Del.Ch. 449.
N.Y.—Stoneburner v. O-Gas-Co Sales Corporation, 237 N.Y.S. 339, 135 Misc. 216.
Tex.—Woods v. Kiersky, Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471.

Entry as agent
Agent of commission company, dealing in live stock on premises of stockyards company, was held not trespasser in going on premises to perform his duties as agent.—Nashville Union Stockyards v. Grissim, 280 S.W. 1015, 153 Tenn. 225.

Fire hazard
Fact that house may be subjected to greater fire hazard, demanding greater insurance premium, by erection and maintenance of garage on adjoining lot, is no reason for injunctive relief.—Dallas Land & Loan Co. v. Garrett, Tex.Civ.App., 276 S.W. 471.

Unsightly structures
Construction of unsightly structures depreciating value of adjoining property does not give adjoining owners right to injunctive relief.—Stoneburner v. O-Gas-Co Sales Corporation, 237 N.Y.S. 339, 135 Misc. 216.

18. U.S.—Hawthorne v. Fisher, D.C. Tex., 33 F.Supp. 891.

19. U.S.—United Porto Rican Sugar Co. v. Saldana, C.C.A.Puerto Rico, 41 F.2d 32—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76.
Ala.—Birmingham Trust & Savings Co. v. Mason, 180 So. 559, 222 Ala. 38—Windham v. Elba Bank & Trust Co., 116 So. 704, 217 Ala. 516.
Conn.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386.
Ind.—Tague v. Board of Com'rs of Sullivan County, 26 N.E.2d 562, 107 Ind.App. 676.
La.—Brunning v. City of New Orleans, 94 So. 909, 152 La. 989—Dillard v. Hart, 6 La.App. 128.
Mich.—Ribble v. Burnham, 235 N.W. 175, 176, 253 Mich. 338, citing **Corpus Juris.**
Mo.—National Refining Co. v. Cox, 57 S.W.2d 778, 783, 227 Mo.App. 778, citing **Corpus Juris.**
Ohio.—Meyer v. Pockros, 18 Ohio App. 506.
Tenn.—May v. Abernathy, 130 S.W. 2d 135, 23 Tenn.App. 236.
Tex.—Schroeder v. Rosenbaum, Civ. App., 16 S.W.2d 328—City Nat. Bank of Dallas v. Folsom, Civ. App., 247 S.W. 591.
32 C.J. p 130 notes 40–42, p 131 note 45.
Injunction to recover possession see supra § 52.

Constructive possession
Where land claimed by plaintiff was on steep hillside which was little used, plaintiff's constructive possession of land by virtue of title in absence of actual exclusive possession by defendant was sufficient to maintain action to enjoin trespass.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386.

Permissive use by public
Railroad in fact in possession, although permitting public to use right of way, may maintain bill to enjoin paving street thereon.—Williams v. Atlantic Coast Line R. Co., C.C.A.S.C., 17 F.2d 17.

20. Ga.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78.
La.—Collins v. McLemore, App., 177

mitting it, ordinarily an injunction will not lie to prevent interference with realty by defendant in possession.[21] Relief may, however, be granted in an otherwise proper case where by reason of the trespasses or other injuries the damage will be irreparable and recovery of damages would be an inadequate remedy,[22] although even under such circumstances some authorities have held that a complainant out of possession must first have his title adjudicated, as discussed supra § 55 b (3). Where trespasses are continuous and create irreparable injury, the court will allow a temporary injunction whether complainant or defendant is in possession, the object being to preserve the property until the rights of the parties can be determined.[23] Certain other exceptions to the rule may also arise where questions of right and title are involved, as discussed supra §§ 53–56.

Where no one is in possession of land, it has been held that plaintiff's lack of possession will not bar his securing injunctive relief against a defendant entering on the land for unauthorized purposes.[24]

Statutory provisions. Under statutes providing that one in actual and real possession of property for more than a year may protect the property by injunction, one fulfilling such statutory requirement may enjoin trespass or other injury.[25] Under a statute providing that one in actual and material possession of realty within a year preceding the filing of suit may by injunction retain or recover possession from another, a complainant put into possession within the year by writ of execution may maintain suit for injunction.[26]

§ 59. —— Establishment of Title

The necessity for establishing title or right as a basis for seeking injunctive relief has been considered supra § 54.

Examine Pocket Parts for later cases.

§ 60. —— Adequate Remedy at Law

Injunctive relief against trespass or other injury to land will not be granted where the plaintiff has an adequate remedy at law.

The inadequacy of the remedy at law is the basis of the jurisdiction in cases of trespass,[27] and it is elementary law that equity will not interfere to prevent the commission or continuing of trespasses where full and ample relief can be obtained at law.[28] Where the resulting injury is susceptible of

So. 502, followed in McLemore v. Collins, 177 So. 506.

Mo.—Steele v. Allison, 73 S.W.2d 842, 228 Mo.App. 656.

N.Y.—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413.

Tex.—Harper v. Ledbetter, Civ.App., 271 S.W. 213.

Wyo.—Casper Wyoming Theaters Co. v. Rex Inv. Co., 261 P. 908, 37 Wyo. 357.

32 C.J. p 130 note 33.

Possession under circumstances precluding prescription will not support injunction against trespass.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 734, 182 Ga. 78.

"Scrambling possession" is not sufficient.

Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 19 Tenn.App. 327.

Wyo.—Casper Wyoming Theaters Co. v. Rex Inv. Co., 261 P. 908, 37 Wyo. 357.

21. Ga.—Slaughter v. Land, 9 S.E. 2d 754, 190 Ga. 491—Braswell v. Palmer, 11 S.E.2d 889, 191 Ga. 262—Cannon v. Montgomery, 192 S.E. 206, 184 Ga. 588—Beck v. Kah, 136 S.E. 160, 163 Ga. 365.

Ind.—Paetz v. Mix, 141 N.E. 248, 80 Ind.App. 449.

Mandatory injunction improper

Ga.—Fender v. Hendley, 24 S.E.2d 654, 195 Ga. 498.

Possession held not to warrant application of rule

(1) Defendant held not in such possession of subaqueous lands as to preclude plaintiff from maintaining injunction to prevent trespass of defendant on lake.—Pleasant Lake Hills Corporation v. Eppinger, 209 N. W. 152, 235 Mich. 174.

(2) Purchasers of land in possession under an agreement giving them nothing more than the status of mere croppers do not have such a possession as to preclude the seller and owner of the property from securing equitable relief against them by way of injunction, as the purchaser's possession is deemed that of the seller by virtue of the agreement.—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A. L.R. 571.

22. Miss.—Pitts v. Carothers, 120 So. 830, 152 Miss. 694.

Mo.—Sheetz v. Price, 136 S.W. 733, 154 Mo.App. 574.

W.Va.—Waldron v. W. M. Ritter Lumber Co., 74 S.E. 687, 70 W.Va. 470.

32 C.J. p 132 note 53.

23. Ala.—Driver v. New, 57 So. 437, 175 Ala. 655.

24. Mo.—Sikes v. Turner, 247 S.W. 803, 212 Mo.App. 419, transferred, see, Sup., 242 S.W. 940.

Cutting or removal of timber see infra § 66.

25. La.—Collins v. McLemore, App., 177 So. 502, followed in McLemore v. Collins, 177 So. 506—Dillard v. Hart, 6 La.App. 128.

Mandatory requirement that injunction issue in proper case.—Brunning v. City of New Orleans, 94 So. 909, 152 La. 989.

Possession not title is issue.—Bonnabel v. Police Jury for Parish of Jefferson, La.App., 3 So.2d 183.

Possession contemplated is that next preceding time of suit.—Bonnabel v. Police Jury for Parish of Jefferson, supra.

26. U.S.—United Porto Rican Sugar Co. v. Saldana, C.C.A.Puerto Rico, 41 F.2d 32.

27. Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698—Atlantic Coast Line R. Co. v. Feagin, 105 So. 141, 90 Fla. 62.

Ill.—McRaven v. Culley, 155 N.E. 282, 324 Ill. 451.

Adequacy of legal remedy as test

"Whether an injunction should be issued to enjoin trespass should be tested in the light of the adequacy of the legal remedy."—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 56, 94 Mont. 79, 92 A.L.R. 571.

28. U.S.—In re Ward, C.C.A.Hawaii, 61 F.2d 896.

Del.—Donoho v. Carvell, 136 A. 630, 15 Del.Ch. 379.

Ill.—Gage v. Village of Wilmette, 232 Ill.App. 80.

perfect pecuniary compensation, the remedy by injunction will be denied in the absence of other grounds calling for equitable interference.[29]

Naked trespass. Equity will not restrain by injunction the commission of a mere ordinary or naked trespass; the nature of the trespass or the injury resulting therefrom must be such as to require equitable interference.[30] Where the trespass is single, fugitive, and temporary, adequate compensation can be obtained by an action at law, and there is no ground to justify the interposition of a court of equity;[31] and it has been held that, in case of a mere naked trespass, jurisdiction is not conferred by the mere fact that defendant is insolvent.[32] However, a very important limitation of this rule is recognized by some decisions in which it is held that, regardless of the inadequacy of the remedy at law, equity will restrain a trespass by one admittedly without right who proposes to take the law into his own hands to accomplish his purpose.[33] It has been held that a mandatory injunction will issue to compel one to remove from land where he is admittedly without claim or right thereto either in law or in equity,[34] and this is true even though the injury is not serious or oppressive and is readily compensable in damages.[35]

§ 61. —— Inadequate Remedy at Law

An injunction will lie, as a rule, in cases where the legal remedy is inadequate, as where the injury cannot be measured by pecuniary standards or where damages will not fully compensate the complainant for trespass or other injury to his realty.

Where a trespass or other injury to land is of such a nature that there is no adequate legal remedy, it may be enjoined,[36] as where the injury is of such a nature that it cannot be fully compensated in damages,[37] or cannot be measured by any certain pecuniary standard.[38]

Ind.—Paetz v. Mix, 141 N.E. 248, 80 Ind.App. 449.
Mich.—Cook v. Palma Const. Co., 201 N.W. 225, 229 Mich. 54.
Mo.—Laishaw v. Simpson, App., 162 S.W.2d 635.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.
Neb.—Vance v. Henderson, 4 N.W.2d 833, 141 Neb. 758.
N.Y.—Stoneburner v. O-Gas-Co Sales Corporation, 237 N.Y.S. 339, 135 Misc. 216.
32 C.J. p 132 note 65.

When legal remedy deemed adequate within rule

Legal remedy is adequate only where injured person by one action at law can recover damages constituting complete and certain relief for whole wrong.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.

Legal remedy deemed inadequate

Tex.—Fort Worth Stockyards Co. v. Brown, Civ.App., 161 S.W.2d 549.

In Texas

(1) The text rule has been followed.—Servtex Materials Co. v. Kelly, Civ.App., 171 S.W.2d 181—Henderson v. City of Longview, Civ.App., 111 S.W.2d 740—Sterling Mut. Life Ins. Co. v. Blume, Civ.App., 95 S.W. 2d 1325, error refused—Head v. Commissioners' Court of Hutchinson County, Civ.App., 14 S.W.2d 86—Allen & Yarbrough v. Texas & P. Ry. Co., Civ.App., 7 S.W.2d 1102.

(2) However, in holding that an injunction restraining construction of a fence should not be denied merely because plaintiff had a remedy at law by suit of trespass to try title and sequestration, the court said: "The rules denying an injunction where there is an adequate remedy at law are not by the courts of this state administering both law and equity applied rigidly. Such courts incline to hold such injunctions maintainable under our statutes, though the remedy at law should be held adequate."—Nagy v. Bennett, Civ.App., 24 S.W.2d 778, 780, error refused.

29. Ohio.—Rueckert v. Sicking, 153 N.E. 129, 20 Ohio App. 162.
32 C.J. p 135 note 84.
30. Colo.—Morris v. Cheney, 255 P. 937, 81 Colo. 393.
Ga.—Nalley Land & Investment Co. v. Shaddix, 157 S.E. 291, 172 Ga. 171.
32 C.J. p 133 note 66.
31. N.H.—Hoban v. Bucklin, 184 A. 362, 88 N.H. 73, modified on other grounds 186 A. 8, 88 N.H. 73.
32 C.J. p 134 note 67.
32. Cal.—Church of Christ of Long Beach v. Harper, 256 P. 476, 83 Cal.App. 41.
32 C.J. p 134 note 68.
33. Ill.—O'Donnell v. Gearing, 126 N.E. 170, 291 Ill. 278.
32 C.J. p 134 note 69.
34. Pa.—Baugh v. Bergdoll, 76 A. 207, 227 Pa. 420.
32 C.J. p 135 note 78.
35. Pa.—Dodson v. Brown, 70 Pa. Super. 359.
36. U.S.—Southwest Pipe Line Co. v. Empire Natural Gas Co., C.C.A. Okl., 33 F.2d 248, 64 A.L.R. 1229, affirming, D.C., Empire Natural Gas Co. v. Southwest Pipe Line Co., 25 F.2d 742.
Cal.—Reitz v. Wollwert, 19 P.2d 3, 217 Cal. 406—Tristram v. Marques, 3 P.2d 947, 117 Cal.App. 393.
Ga.—City of Atlanta v. McJenkin, 135 S.E. 498, 163 Ga. 131.
Ind.—Harris v. Krekler, 46 N.E.2d 267, 113 Ind.App. 190.
Md.—Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co., 17 A.2d 130, 179 Md. 117.
Mass.—Loughlin v. Wright Machine Co., 173 N.E. 534, 273 Mass. 310—Pease v. Parsons, 156 N.E. 4, 259 Mass. 86.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562.
N.J.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J. Eq. 207, affirmed 4 A.2d 281, 125 N. J.Eq. 91.
Tex.—Kibbin v. McFaddin, Civ.App., 259 S.W. 232.

Remedy against public authorities

Contractor and railroad eliminating grade crossing might restrain adjacent property owners from interfering with the work, although charges might be preferred against the police for failing to curb the disorderly conduct of the adjacent owners.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J.Eq. 91.

Use of spur track

Shipper may enjoin railroad from using spur track to its plant as side track extending to plants of competing shippers.—F. W. Stock & Sons v. Litchfield Co-op. Shippers' Ass'n, 232 N.W. 395, 251 Mich. 488.

37. Ala.—Bailey v. Washington, 185 So. 172, 236 Ala. 674.
Mo.—National Refining Co. v. Cox, 57 S.W.2d 778, 783, 227 Mo.App. 778, citing **Corpus Juris.**
Mont.—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A.L.R. 571.
32 C.J. p 136 note 86.
38. Md.—Baker v. Howard County Hunt, 188 A. 223, 171 Md. 159, 107 A.L.R. 1312.
Mo.—National Refining Co. v. Cox, 57

Criminal trespass. The fact that a trespass to real property may also constitute a crime does not affect the power of the court to grant an injunction.[39]

§ 62. —— Multiplicity of Suits

Equity may enjoin trespass on land where necessary to avoid multiplicity of suits.

In the exercise of its jurisdiction to prevent a multiplicity of suits, as discussed generally supra §§ 24, 38, a court of equity will in a proper case enjoin a trespass where a multiplicity of suits would be required to compensate the injured person in damages.[40] If the injury is continuous, and remediable at law only by a multiplicity of suits, it can well be regarded as an irreparable one calling for the interference of equity by the exercise of its restraining powers;[41] and in these circumstances it is not essential to the jurisdiction of a court of equity that defendant should be insolvent.[42]

§ 63. —— Insolvency of Trespasser

Insolvency of the defendant is not alone a ground for granting an injunction to prevent trespass or other injury to real estate of the complainant, but it is a factor for consideration and may, in combination with other factors, afford ground for injunctive relief.

Insolvency of the trespasser may afford an additional ground for the granting of an injunction to restrain a trespass,[43] particularly in cases of repeated or continuing trespasses.[44] For instance, an insolvent trespasser may be enjoined from removing a growing crop[45] or from cutting timber.[46] Insolvency of the trespasser, however, will not of itself give chancery jurisdiction to enjoin a trespass.[47] It is one element to be weighed but it is not of itself decisive.[48] If there are other sufficient means of preventing the commission of the threatened trespass,[49] or no such pressing injury or danger in delay as calls for an injunction,[50] none will issue. Where the main object of suit is to settle title, an injunction to restrain a trespass will not be granted merely because of the insolvency of defendant.[51]

§ 64. —— Repeated or Continuing Trespasses

a. In general
b. Basis of jurisdiction

a. In General

The general rule permits injunctive relief for repeated or continuing trespasses, even in cases where the damage is nominal and no single trespass causes irreparable injury.

Although the interference of courts of equity by injunction to prevent repeated trespasses is of comparatively modern origin and was formerly confined to cases of waste by parties with privity of title,[52] it is now well settled that an injunction will lie to restrain acts of trespass which are continuous or constantly recurring where irreparable injury will result, unless they are restrained,[53] and the court will award all the relief that the nature of the ac-

S.W.2d 778, 783, 227 Mo.App. 778, citing **Corpus Juris.**
32 C.J. p 137 note 87.

39. N.J.—Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assoc., 46 A. 208, 59 N.J.Eq. 49.

40. N.J.—Fidelity Union Trust Co. v. Cochrane, 172 A. 800, 116 N.J. Eq. 190.
32 C.J. p 138 note 96.
Threatened multiplicity of suits not shown
Wyo.—Alaska Development Co. v. Brannan, 275 P. 115, 40 Wyo. 106.

41. Pa.—Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065, 208 Pa. 540, 66 L.R.A. 712—Pennsylvania Lead Co.'s App., 96 Pa. 116, 42 Am. R. 534.
Continuing trespasses see infra § 64.

42. Mo.—Lambert v. St. Louis & G. R. Co., 111 S.W. 550, 212 Mo. 692.
Insolvency of trespasser see infra § 63.

43. Ga.—Mitchell v. Bale, 165 S.E. 5, 175 Ga. 52.
Ind.—Harris v. Krekler, 46 N.E.2d 267, 113 Ind.App. 190.
Mo.—National Refining Co. v. Cox, 57 S.W.2d 778, 227 Mo.App. 778.
32 C.J. p 138 note 99.
Insolvency not shown
Wyo.—Alaska Development Co. v. Brannan, 275 P. 115, 40 Wyo. 106.
Injunction to prevent destruction of inheritance see infra § 65.

44. Ala.—Alexander v. Hill, 141 So. 638, 224 Ala. 671.
Kan.—Tharp v. Sieverling, 276 P. 821, 128 Kan. 235.
Mont.—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A.L.R. 571.
32 C.J. p 138 note 1.

45. Cal.—Paige v. Akins, 44 P. 666, 112 Cal. 401.
32 C.J. p 138 note 2.
Harvesting or removal generally see infra § 70.

46. U.S.—Savannah Timber Co. v. Deer Island Lumber Co., D.C.S.C., 258 F. 777.
32 C.J. p 138 note 3.
Cutting or removal of timber generally see infra § 66.

47. Or.—Stewart v. Erpelding, 148 P. 1129, 76 Or. 309.
32 C.J. p 138 notes 4, 5.

48. Ala.—Woodstock Operating Corp. v. Quinn, 79 So. 253, 201 Ala. 681.
32 C.J. p 138 note 5.
Acts of trespass not continuous or repeated
Ky.—Wunderlich v. Scott, 46 S.W. 2d 753, 242 Ky. 481.

49. Cal.—Mechanics' Foundry of San Francisco v. Ryall, 17 P. 703, 75 Cal. 601.
32 C.J. p 139 note 6.

50. N.Y.—Murray v. Knapp, 62 Barb. 566, 42 How.Pr. 462.

51. N.H.—Morgan v. Palmer, 48 N. H. 336.

52. Pa.—Commonwealth v. Bloom, 37 Pa.Co. 310.

53. U.S.—U. S. v. Colvard, C.C.A.N. C., 89 F.2d 312, 314, citing **Corpus Juris**—Swan Island Club v. Ansell, C.C.A.N.C., 51 F.2d 337—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76—Winola Lake & Land Co. v. Gorham, D.C.Pa., 13 F.Supp. 721, 722, citing **Corpus Juris.**

tion and the facts demand.[54] In the case of repeated or continuous trespasses injunctive relief may be granted even though each individual act of trespass is in itself trivial,[55] or the damage is trifling, nominal, or insubstantial,[56] and despite the fact that no one trespass causes irreparable injury,[57] or that the land on which the trespass was made was rough and unimproved,[58] and the financial solvency of the trespasser will not preclude injunctive relief.[59]

Where the injury occasioned by a repeated or continuous trespass is not susceptible of complete pecuniary compensation and cannot be estimated in money, the injury may be deemed irreparable[60]

Ala.—Birmingham Trust & Savings Co. v. Mason, 130 So. 559, 222 Ala. 38—Jones v. King, 128 So. 378, 221 Ala. 179—Windham v. Elba Bank & Trust Co., 116 So. 704, 217 Ala. 516.

Ariz.—Champie v. Castle Hot Springs Co., 233 P. 1107, 27 Ariz. 463.

Ark.—Missouri Pac. R. Co. v. Hobbs, 13 S.W.2d 610, 178 Ark. 1146.

Cal.—Slater v. Pacific American Oil Co., 300 P. 31, 212 Cal. 648.

Ga.—Lockwood v. Daniel, 17 S.E.2d 542, 193 Ga. 122—Sullivan v. Farlow, 5 S.E.2d 641, 189 Ga. 186—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536—Elliott v. Adams, 160 S.E. 336, 173 Ga. 312—Burns v. Hale, 133 S. E. 857, 162 Ga. 336—Phinizy v. Gardner, 125 S.E. 195, 159 Ga. 136.

Ill.—McRaven v. Culley, 155 N.E. 282, 324 Ill. 451—Vondrasek v. Yale, 29 N.E.2d 680, 307 Ill.App. 234—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318—Illinois Cent. R. Co. v. Queen City Building Corporation, 237 Ill.App. 129.

Ind.—Harris v. Krekler, 46 N.E.2d 267, 113 Ind.App. 190—Evans v. Shephard, 142 N.E. 730, 81 Ind.App. 147.

Iowa.—Casteel v. Town of Afton, 287 N.W. 245, 227 Iowa 61—Usaillis v. Jasper, 271 N.W. 524, 222 Iowa 1360.

Kan.—Provident Mut. Life Ins. Co. v. State Highway Commission, 125 P.2d 346, 155 Kan. 351.

Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.

Mass.—Suburban Land Co. v. Town of Billerica, 49 N.E.2d 1012, 314 Mass. 184—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Hennessy v. City of Boston, 164 N.E. 470, 265 Mass. 559, 62 A.L.R. 780—London v. Tebo, 141 N.E. 234, 246 Mass. 360, 29 A.L.R. 1037.

Mich.—Bushman v. Estleman, 239 N. W. 262, 256 Mich. 243.

Mo.—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 572, 229 Mo.App. 622, citing **Corpus Juris.**

Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562—Union Central Life Ins. Co. v. Audet, 21 P. 2d 53, 94 Mont. 79, 92 A.L.R. 571.

Neb.—Hagadone v. Dawson County Irr. Co., 285 N.W. 600, 136 Neb. 258.

N.J.—Rayhertz Amusement Corporation v. Fulton Improvement Co., 200 A. 557, 124 N.J.Eq. 121—Capone v. Ranzulli, 134 A. 553, 99 N.J.Eq. 627.

N.Y.—Silver Beach Realty Corporation v. Geelan, 204 N.Y.S. 701, 122 Misc. 644, affirmed 206 N.Y.S. 961, 210 App.Div. 829.

Ohio.—Rueckert v. Sickling, 153 N. E. 129, 20 Ohio App. 162—Ohio Water Service Co. v. Newman, 31 Ohio N.P.,N.S., 75.

Or.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 160 Or. 654.

Pa.—Tri-Cities Water Co. v. City of Monessen, 169 A. 159, 313 Pa. 83—Drum v. Dinkelacker, 79 Pa.Super. 91—Frailey Tp. School Dist. v. Wetzel, 29 Pa.Dist. & Co. 607, 4 Sch.Reg. 353—Scranton Electric Co. v. Black Ridge Coal Co., 7 Pa. Dist. & Co. 33, 23 Luz.Leg.Reg. 395 —Schumacher v. Plopiis, 7 Pa.Dist. & Co. 8—Petition of Lehigh Paper Mills, Inc., 5 Pa.Dist. & Co. 119, 19 North.Co. 177—Schultz v. Lechtner, 25 Erie Co. 105—Gilligan v. Rouker, 42 Lack.Jur. 47—Copeland v. Bifano, 41 Lack.Jur. 160—Westmoreland Coal Co. v. Sturgeon, 25 West.Co.L.J. 75—Miller v. Zinn, 53 York Leg.Rec. 189.

Vt.—Kennedy v. Robinson, 160 A. 170, 104 Vt. 374.

W.Va.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217, 139 A.L.R. 1199—Dorsey v. Dorsey, 153 S.E. 146, 109 W.Va. 111.

32 C.J. p 139 note 10.

Available as independent or ancillary remedy

N.C.—Jackson v. Jernigan, 5 S.E.2d 143, 216 N.C. 401.

Committed or threatened acts

Ga.—Durrence v. Groover, 129 S.E. 29, 160 Ga. 680.

Pursuance of single plan

Md.—Baker v. Howard County Hunt, 138 A. 223, 171 Md. 159, 107 A.L.R. 1312.

Particular trespasses:

Cutting or removal of timber see infra § 66.

Encroachments see infra § 67.

Removal or destruction of buildings see infra § 68.

Trespass by animals see infra § 69.

Other and miscellaneous trespasses see infra § 70.

54. Mich.—Rhoades v. McNamara, 98 N.W. 392, 135 Mich. 644.

N.Y.—Sadlier v. New York, 78 N.E. 272, 185 N.Y. 408.

Past damages

N.Y.—Alotto v. City of Corning, 16 N.Y.S.2d 575, 258 App.Div. 932.

55. Wash.—Vander Vate v. Watson, 140 P.2d 964.

56. N.J.—Loeser v. Wosnitzer, 148 A. 202, 105 N.J.Eq. 460.

32 C.J. p 140 notes 13, 14.

Intermittent but threatened continuing trespasses on land will be enjoined, even though the damage is trivial, since equity intervenes to prevent a multiplicity of legal actions and to stop the annoyance and nuisance of such intermittent but continued trespassing.—Loeser v. Wosnitzer, supra.

57. Mass.—Nelson v. American Telephone & Telegraph Co., 170 N.E. 416, 270 Mass. 471—Pease v. Parsons, 156 N.E. 4, 259 Mass. 86.

Miss.—Hood v. Foster, 13 So.2d 652 —Ham v. Kings Daughters Circle No. 4 of Greenville, Miss., 155 So. 164, 170 Miss. 490—Moss v. Jourdan, 92 So. 689, 129 Miss. 598.

32 C.J. p 140 note 15.

58. N.Y.—Laroy v. Andstein Bldg. Corporation, 205 N.Y.S. 400, 209 App.Div. 895.

Although land is without value for cultivation at the time of continuing trespasses, equity may grant injunctive relief, where it does not appear that damage is too trivial to warrant equitable interference.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 120 Or. 202.

59. Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—Durden v. Phillips, 144 S.E. 313, 166 Ga. 689, followed in Cadwell v. Phillips, 146 S.E. 637, 168 Ga. 40—Kirkland v. Odum, 118 S.E. 706, 156 Ga. 131.

N.C.—Norfolk Southern R. Co. v. Rapid Transit Co., 141 S.E. 882, 195 N.C. 305.

Okl.—Bradley v. Renfrow, 84 P.2d 430, 184 Okl. 25.

Ability to pay damages not adequate legal remedy

Tex.—Fort Worth Stockyards Co. v. Brown, Civ.App., 161 S.W.2d 549.

Continuing trespass by insolvent defendant see supra § 63.

60. Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244.

and the owner of property will be protected in its enjoyment whether that enjoyment is one of sentiment or a pecuniary one.[61] Except in the special cases provided for by law, one person cannot take the property of another without his consent or continually trespass on it and compel the owner to accept payment of money in satisfaction, especially where the threatened trespass will result in depriving complainant of the enjoyment of a property right.[62]

Where the continuous character of the trespass is not sufficiently shown, injunctive relief may be denied,[63] and the rule that equity will interpose to prevent a continuing trespass or to enjoin parties who are disturbing the peaceful possession and quiet enjoyment of the owner of land has no application in favor of one who has acquired his possession by force and entering upon the prior possession of another.[64]

Trespass not one ab initio. A court of equity may restrain a continuing trespass notwithstanding it was not a trespass ab initio.[65]

Consideration of equities between parties. Where a mandatory injunction is asked requiring restitution of the property to its former condition, the right to it must depend on a consideration of the equities between the parties.[66]

Consideration of comparative injury. In determining whether an injunction shall issue in case of a continuing trespass the courts ordinarily will not apply the rule of comparative injury;[67] but, as is shown infra § 67, circumstances may be such that the application of this principle is proper.

b. Basis of Jurisdiction

Aside from the irreparable character of the injury, an injunction to restrain repeated or continuing trespasses may be based on inadequacy of legal remedy, avoidance of multiplicity of suits, or prevention of acquisition of an easement by continued trespass.

As stated supra subdivision a of this section, continuous trespasses occasioning irreparable injury may be enjoined. The principal reason, other than the prevention of such injury, assigned as a basis for an injunction is that the remedy at law for damages is inadequate.[68] An action for damages is inadequate where the damages can be estimated only by conjecture and not by any actual standard,[69] or where the amount cannot be adequately established, as discussed supra § 25, or where, if the damages may be readily assessed, the expense of a recovery will exceed the nominal amounts recoverable for each of the successive trespasses.[70] It has been said that, where the damages from a continuing trespass are substantial, the injured person may obtain an injunction as a matter of right.[71] The fact that the legal remedy may be adequate for each individual trespass, when considered by itself, does not make such remedy adequate for the continuous course of trespasses and the entire wrong may be enjoined.[72] In this connection it has been said that while a remedy at law might be adequate for each single act, if it stood alone, yet where repeated acts are done or threatened an injunction

Constant driving over another's property

Mont.—Williams v. Neal, supra.

61. Tex.—Acme Cement Plaster Co. v. American Cement Plaster Co., Civ.App., 167 S.W. 183.

62. U.S.—West Virginia Pulp & Paper Co. v. Cheat Mountain Club, W. Va., 212 F. 373, 129 C.C.A. 49, affirming, D.C., Cheat Mountain Club v. West Virginia Pulp & Paper Co., 205 F. 195.

63. Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.

Completed trespass without threat of further injury

Mich.—Cook v. Palma Const. Co., 201 N.W. 225, 229 Mich. 54.

64. Neb.—Stone v. Snell, 94 N.W. 525, 4 Neb. (Unoff.) 430.

65. N.Y.—Wheelock v. Noonan, 15 N.E. 67, 108 N.Y. 179, 2 Am.S.R. 405.

32 C.J. p 140 note 17.

66. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.

67. Or.—Hansen v. Crouch, 193 P. 454, 98 Or. 141.

Relative convenience

In suit to enjoin continuous trespass, the court does not consider the inconvenience or damage which may result to defendants from putting complainant in possession of its property, but will issue injunction according to rights of the parties regardless of inconveniences.—Rayhertz Amusement Corporation v. Fulton Improvement Co., 200 A. 557, 124 N.J.Eq. 121.

68. U.S.—U. S. v. Colvard, C.C.A.N.C., 89 F.2d 312.

Ala.—Howell v. City of Dothan, 174 So. 624, 234 Ala. 158.

Ark.—Brown v. Myers, 139 S.W.2d 398, 400, 200 Ark. 511, citing **Corpus Juris**—Missouri Pac. R. Co. v. Hobbs, 13 S.W.2d 610, 611, 178 Ark. 1146, citing **Corpus Juris.**

Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.

Kan.—Provident Mut. Life Ins. Co. of Philadelphia v. State Highway Commission, 125 P.2d 346, 155 Kan. 351.

Md.—Baker v. Howard County Hunt, 188 A. 223, 171 Md. 159, 107 A.L.R. 1312.

N.J.—Loeser v. Wosnitzer, 148 A. 202, 105 N.J.Eq. 460.

Ohio.—Henicle v. Pennsylvania R. Co., 197 N.E. 360, 49 Ohio App. 447.

Or.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 120 Or. 202.

32 C.J. p 140 note 28.

Where the nature of the injury renders the legal remedy inadequate, equity will enjoin a repeated or continuous trespass.—Town of York v. McAlpin, 167 So. 539, 232 Ala. 158.

69. Pa.—Rockafellow v. Hanover Coal Co., 2 Pa.Dist. 108, 12 Pa.Co. 241, 6 Kulp 507.

70. Ariz.—Champie v. Castle Hot Springs Co., 233 P. 1107, 27 Ariz. 463.

Pa.—Walters v. McElroy, 35 A. 135, 151 Pa. 549.

71. N.Y.—Little Falls Fibre Co. v. Henry Ford & Son, 212 N.Y.S. 630, 126 Misc. 126.

Issuance of injunction as matter of discretion generally see supra § 14.

72. Miss.—Hood v. Foster, 13 So.2d 652.

will lie to prevent a multiplicity of suits,[73] and many decisions base the right to injunctive relief for continuing trespass on the ground of avoidance of multiplicity of actions.[74] However, it has been held that the court will not interfere on the ground of avoidance of a multiplicity of suits where the bringing of one or many suits is a matter for complainant's election and there is no necessity for a multiplicity;[75] and there are decisions to the effect that a multiplicity of suits within the meaning of this rule arises only when different persons assail the same right and not when repeated trespasses are committed by the same person.[76]

Preventing acquisition of easement. The general rule is that an injunction may be granted to restrain a continuous trespass which, if persisted in, would ripen into an easement,[77] or to restrain a use in excess of an existing easement,[78] and this is true although the immediate damage inflicted is not appreciable.[79] The court will generally interfere even by mandatory injunction to compel the trespasser to undo as far as possible what he has wrongfully done;[80] but this rule is not rigid and there are some exceptions to it.[81] Injunctive relief has been denied for a continuing trespass which might ripen into an easement where the threatened injury was deemed remote and contingent because of the extended period of time which would have to elapse before the trespass could ripen into an easement, and where there was a statutory legal remedy available to protect complainant's rights.[82] The grant of injunctive relief to protect the owner of the servient estate against acquisition or excessive use of an easement is discussed in Easements §§ 103, 107, and the issuance of injunctions to protect the owner of an easement is considered in Easements § 107.

§ 65. —— Permanent Occupation or Injury

The authorities agree that irreparable injury, such as destruction of the inheritance, affords a basis for issuance of an injunction restraining trespass or other injury to real estate; but they disagree as to whether or not irreparable injury is an essential factor to support such an injunction.

It is well settled that if the bill shows that irreparable injury will result from a trespass a sufficient ground for the interference of equity by injunction to restrain its commission or continuance is made out.[83] Some authorities state broadly that a showing of irreparable damage is essential to the grant of an injunction for trespass to realty,[84] but other authorities state that it is not necessary to

73. Vt.—Kennedy v. Robinson, 160 A. 170, 104 Vt. 374.

Multiplicity as rendering legal remedy inadequate

"Repetition of the trespass, necessitating a multiplicity of actions, in itself may render the legal remedy inadequate."—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 56, 94 Mont. 79, 92 A.L.R. 571.

74. U.S.—U. S. v. Colvard, C.C.A.N.C., 89 F.2d 312.
Ala.—Howell v. City of Dothan, 174 So. 624, 234 Ala. 158—Town of York v. McAlpin, 167 So. 539, 232 Ala. 158.
Ark.—Brown v. Myers, 139 S.W.2d 398, 400, 200 Ark. 511, citing **Corpus Juris**—Missouri Pac. R. Co. v. Hobbs, 13 S.W.2d 610, 611, 178 Ark. 1146, citing **Corpus Juris.**
Iowa.—Casteel v. Town of Afton, 287 N.W. 245, 227 Iowa 61.
Md.—Baker v. Howard County Hunt, 188 A. 223, 171 Md. 159, 107 A.L.R. 1312—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.
N.J.—Loeser v. Wosnitzer, 148 A. 302, 105 N.J.Eq. 460.
N.Y.—Little Falls Fibre Co. v. Henry Ford & Son, 212 N.Y.S. 630, 126 Misc. 136.
Ohio.—Henigle v. Pennsylvania R. Co., 197 N.E. 360, 49 Ohio App. 447.
W.Va.—Lilly v. Bowling, 197 S.E. 299, 120 W.Va. 169.
32 C.J. p 141 note 32.

75. Pa.—Kramer v. Slattery, 103 A. 610, 260 Pa. 234.
76. Fla.—Carney v. Hadley, 14 So. 4, 32 Fla. 344, 37 Am.S.R. 101, 22 L.R.A. 233.
32 C.J. p 141 note 34.
77. Ala.—East v. Saks, 106 So. 185, 188, 214 Ala. 58, citing **Corpus Juris.**
Cal.—San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n, 93 P.2d 582, 34 Cal.App.2d 159.
Ind.—Evans v. Shephard, 142 N.E. 730, 81 Ind.App. 147.
Mass.—Tyler v. City of Haverhill, 172 N.E. 342, 272 Mass. 313.
Vt.—Kasuba v. Graves, 194 A. 455, 109 Vt. 191—Kennedy v. Robinson, 160 A. 170, 104 Vt. 374.
32 C.J. p 142 note 36.
78. Tenn.—Henry v. Tennessee Electric Power Co., 5 Tenn.App. 205.
79. Cal.—Lindsay-Strathmore Irr. Dist. v. Tulare County Super. Ct., 187 P. 1056, 182 Cal. 315.
80. Mass.—Marcus v. Brody, 149 N. E. 673, 254 Mass. 152.
32 C.J. p 142 note 38.
81. Cal.—McCann v. Chasm Power Co., 84 P. 679, 3 Cal.App. 171.
32 C.J. p 142 note 39.
82. Ind.—Hart v. Hildebrandt, 66 N. E. 173, 30 Ind.App. 415.

Giving notice

Where it appeared that defendant had used a private alley of complainant's continuously for eight years, and that if he continued so to use it without interruption for another twelve years the trespass would ripen into an easement, the court denied injunctive relief because the danger of acquisition of an easement was both remote and contingent, and because under an existing statute relating to easements complainant could prevent such acquisition by giving a notice provided for by the statute. It also appeared that the use occasioned no present, applicable damage.—Hart v. Hildebrandt, supra.

83. Ga.—Crockett v. Wofford, 144 S. E. 27, 166 Ga. 630.
Ind.—Harris v. Krekler, 46 N.E.2d 267, 113 Ind.App. 190.
W.Va.—McClung v. Sewall Valley R. Co., 127 S.E. 53, 97 W.Va. 685.
32 C.J. p 136 note 85.

Taking or destroying real property

is always regarded as irreparable injury, giving right to injunction.—Kane v. Porter, 235 P. 561, 77 Colo. 257, 44 A.L.R. 165.

Irreparable damage not shown

Tex.—Servtex Materials Co. v. Kelly, Civ.App., 171 S.W.2d 181.

84. Conn.—McNamara v. Town of Watertown, 124 A. 244, 100 Conn. 575.
Fla.—Atlantic Coast Line R. Co. v. Feagin, 105 So. 141, 90 Fla. 62.

find that plaintiff will suffer irreparable injury as a basis for the issuance of such an injunction.[85] A remote possibility of damage is, however, insufficient basis for injunctive relief;[86] and it has been held that equity may refuse to enjoin defendant's use of land where damage is avoidable only at a cost so prohibitive as practically to deprive defendant of the use of his own property.[87]

Destruction of the inheritance. The rule is well settled that when the injury goes to the destruction of the inheritance, it is irreparable, and the trespass will be enjoined,[88] and this is so regardless of defendant's solvency,[89] or of the small value of the property,[90] and even though, as discussed supra § 55 b (3), the title to the premises may be in dispute. Furthermore, it has been held, in limitation of the general rule stated supra § 58, that a plaintiff out of possession will be denied injunctive relief against a defendant in possession, and that one out of possession claiming title may seek the aid of equity to enjoin acts which will work a destruction of the inheritance.[91] The injury may consist in the destruction of that on which the value of the estate depends, or in the destruction of the estate in the character in which it has been enjoyed.[92]

§ 66. —— Cutting or Removal of Timber

a. In general
b. Rights of purchaser of standing timber

a. In General

Ordinarily injunction will issue against the continuous cutting or removal of timber, as in the case of ornamental or other trees especially valuable under the facts of the case, and the basis of equitable jurisdiction has been placed on the grounds of irreparable injury, inadequacy of legal remedy, and avoidance of multiple actions. Insolvency of the defendant is not essential to maintenance of suit for injunction in such cases, and possession of plaintiff, while ordinarily necessary, is not always required.

The rule has been laid down broadly in many decisions that continuous cutting of timber is a trespass of such character as will be enjoined by a court of equity;[93] and the right to an injunction is not affected by the solvency of defendant.[94]

Applying the general rule that continuous cutting of timber is an enjoinable trespass, it has been held that the destruction of ornamental, shade, and fruit trees, and ornamental shrubbery, is an injury going to the destruction of the inheritance which may be enjoined;[95] and injunctions have frequent-

Hawaii.—Yoshimasu v. Venhuizen, 27 Hawaii 292.
Ky.—Wunderlich v. Scott, 46 S.W.2d 753, 242 Ky. 481.
Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387.
Or.—Oldenburg v. Claggett, 20 P.2d 234, 142 Or. 238.
Pa.—Plummer v. Hillside Coal & Iron Co., 96 Pa.Super. 180.
Tenn.—Collier v. City of Memphis, 4 Tenn.App. 322.

85. Ind.—Tague v. Board of Com'rs of Sullivan County, 26 N.E.2d 562, 107 Ind.App. 676.
"Great injury" is sufficient ground for injunctive relief.—Tague v. Board of Com'rs of Sullivan County, supra.
Material lessening of enjoyment
Injunction will issue to restrain continuance of injury materially lessening enjoyment of real property by owner.—F. W. Stock & Sons v. Litchfield Co-op. Shippers' Ass'n, 232 N.W. 395, 251 Mich. 488.
Enjoining cutting of timber without proof of irreparable injury see infra § 66.

86. La.—Loesch v. R. P. Farnsworth & Co., App., 12 So.2d 222.

87. N.M.—Hale v. Farmers Electric Membership Corporation, 99 P.2d 454, 44 N.M. 131.

88. Ala.—Birmingham Trust & Savings Co. v. Mason, 130 So. 559, 222 Ala. 38.
Md.—Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co., 17 A.2d 130, 179 Md. 117.
32 C.J. p 137 note 88.

89. N.J.—Roseberg v. American Hotel & Garden Co., Ch., 121 A. 9, affirmed 123 A. 717, 95 N.J.Eq. 640.
W.Va.—Kunst v. Mable, 77 S.E. 987, 72 W.Va. 202.
Insolvency of trespasser as ground for injunction see infra § 63.

90. Ohio.—McCord v. Iker, 12 Ohio 387.

91. U.S.—Wallula Pac. R. Co. v. Portland & S. R. Co., C.C.Wash., 154 F. 902.

92. Mo.—Eschelkamp v. Schrader, 45 Mo. 505.
Neb.—Peterson v. Hopewell, 76 N.W. 451, 55 Neb. 670.

93. U.S.—F. Burkart Mfg. Co. v. Case, C.C.A.Ark., 39 F.2d 5.
Ala.—Bradley v. Rumph, 196 So. 500, 239 Ala. 603—May v. Lowery, 107 So. 67, 214 Ala. 230.
Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—Anderson v. Thompson, 15 S.E.2d 890, 192 Ga. 570—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491—McRae v. Smith, 137 S.E. 390, 164 Ga. 23.
Okl.—Choctaw Lumber Co. v. McKeever, 249 P. 712, 119 Okl. 282.
Puerto Rico.—Caloca v. Vilaseca, 6 Puerto Rico 112.
32 C.J. p 142 note 41.
Absence of estoppel
Tendency to protect owner of timbered land by injunction does not preclude estoppel when facts warrant.—Federal Land Bank of New Orleans v. Southmont Mfg. Co., 122 So. 426, 219 Ala. 447.
Cutting in disregard of contract
Ala.—Williams v. Johns-Carroll Lumber Co., 192 So. 278, 238 Ala. 536.
Unauthorized use of road in connection with timber cutting
Ga.—Tippins v. Howard, 5 S.E.2d 750, 189 Ga. 193.
Injunction:
Against removal of timber already cut see infra § 71.
To restrain cutting of tree on boundary line see Adjoining Landowners § 40.
Working trees for turpentine see infra § 70.

94. U.S.—F. Burkart Mfg. Co. v. Case, C.C.A.Ark., 39 F.2d 5, 7, citing **Corpus Juris.**
Ala.—Williams v. Johns-Carroll Lumber Co., 192 So. 278, 238 Ala. 536.
Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4.
Okl.—Choctaw Lumber Co. v. McKeever, 249 P. 712, 119 Okl. 282.
32 C.J. p 143 note 42.
Cutting of timber by insolvent trespasser see supra § 63.

95. Cal.—Daubenspeck v. Grear, 18 Cal. 443.
32 C.J. p 143 note 47.

ly been granted where it appears that the trees are necessary to the enjoyment of the property in the particular character in which it has been used,[96] or that the cutting defeats the purpose for which the trees are being grown,[97] or that the chief value of the land consists in the trees, the cutting of which is sought to be prevented,[98] although there is also authority to the contrary of this proposition.[99] The injunction has, however, been refused in some cases on the ground that it did not appear that the trees had any particular value;[1] but there is likewise contrary authority.[2]

Possession as prerequisite to injunction. A plaintiff in possession of the land may enjoin the trespass of another engaged in cutting timber thereon.[3] In accordance with the general rule stated supra § 58, ordinarily it is necessary for plaintiff to be in possession and defendant out of possession in order to warrant the issuance of an injunction to restrain defendant from the cutting and removal of timber;[4] but special circumstances may arise under which a plaintiff out of possession may seek the aid of equity to enjoin defendant from such action.[5]

Basis of jurisdiction. The basis of the jurisdiction according to many decisions is that trespasses of this character amount to a destruction of the inheritance,[6] within the rule stated supra § 65, and that irreparable injury results from destruction of the property right incident to unauthorized cutting of timber,[7] so that pecuniary compensation for damages is not deemed an adequate remedy.[8] As a general rule irreparable damage must appear as a ground for an injunction against the cutting or removal of timber,[9] but under some circumstances such an injunction may be granted without proof of irreparable injury.[10] The nature of the property involved and the inconvenience of suing for continuing trespasses also constitute a basis for equitable relief,[11] as well as avoidance of multiplicity of actions.[12]

96. Ga.—Camp v. Dixon, 38 S.E. 71, 112 Ga. 872, 52 L.R.A. 755.
32 C.J. p 143 note 48.

97. Ind.—Clendening v. Ohl, 20 N. E. 639, 118 Ind. 46.
32 C.J. p 144 note 49.

98. U.S.—F. Burkart Mfg. Co. v. Case, C.C.A.Ark., 39 F.2d 5.
32 C.J. p 144 note 50.

99. N.J.—West v. Walker, 3 N.J.Eq. 279.
32 C.J. p 144 note 51.

1. Ga.—Hatcher v. Hampton, 7 Ga. 49.
Md.—Powell v. Rawlings, 38 Md. 239.

2. Del.—Dill v. Dill, 91 A. 450, 10 Del.Ch. 257.

3. U.S.—Taylor & Crate v. Asher, D.C.Ky., 286 F. 721.
Ala.—Bradley v. Rumph, 196 So. 500, 239 Ala. 603.

Facts showing sufficiency of complainant's possession
Ala.—Bradley v. Rumph, supra.

4. Miss.—North Lumber Co. v. Gary, 36 So. 2, 83 Miss. 640.
32 C.J. p 143 note 44.

Prior possession of predecessor
In suit to enjoin cutting and removal of timber and for other relief, plaintiff could not recover on his mere prior possession where the only possession proved was that of an alleged predecessor in title, and that was long before the execution of the deed from that predecessor.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4.

Possession within rule
(1) A respondent in a suit to enjoin his removal of timber who had gone into possession under a contract purporting to give him the right to cut the timber as well as the right of ingress and egress on the land, together with a lease of a mill site, who had established and operated a mill and cut and removed timber continuously for a number of years, etc., is in such possession of the timber as to remit complainant seeking injunction to her remedy at law by action of ejectment, there being a dispute as to title to the timber.—Irwin v. Shoemaker, 88 So. 129, 205 Ala. 13.

(2) But a bill to enjoin cutting of timber, not included in sale and for accounting, was held not subject to objection that proper remedy was in ejectment with injunctive relief, since the doctrine of Irwin v. Shoemaker, supra (1), was inapplicable because no issue of title was presented and defendant rightfully in possession was abusing his privileges by wrongful cutting of timber, so that ejectment would not lie to oust him and plaintiff's only remedy was injunction to prevent the wrongful cutting of timber.—May v. Lowery, 107 So. 67, 214 Ala. 230.

5. Ala.—May v. Lowery, supra.
Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336.
32 C.J. p 143 note 45, p 144 note 58 [b].

Wild land
A landowner's lack of possession will not bar injunctive relief against timber cutting by one entering on unfenced, wild, and uncultivated land, under a timber deed executed by a former owner, but claiming no rights except that of entering to remove the timber.—Sikes v. Turner, 247 S.W. 803, 212 Mo.App. 419, transferred, see, Sup., 242 S.W. 940.

In Florida
(1) Actual possession, or pedis possessio, of the land is not essential to maintain the equitable jurisdiction given by the act of June 4, 1889, Rev.St. § 1469, to persons claiming to own timbered lands, to enjoin trespasses by cutting trees thereon, or removing logs therefrom, or other stated trespasses.—Reddick v. Meffert, 13 So. 894, 32 Fla. 409.

(2) Other decisions under this statute see 32 C.J. p 144 note 58 [a].

6. Ga.—McRae v. Smith, 137 S.E. 390, 164 Ga. 23.
32 C.J. p 144 note 55.

7. Ala.—Bradley v. Rumph, 196 So. 500, 239 Ala. 603.

8. U.S.—Taylor & Crate v. Asher, D. C.Ky., 286 F. 721.
Ala.—Bradley v. Rumph, 196 So. 500, 239 Ala. 603.

9. Ga.—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491.
32 C.J. p 144 note 54.

Peculiar value and importance of trees must appear
Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.

10. Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4.
Necessity of proving irreparable injury to enjoin trespass on land generally see supra § 65.

11. Mo.—Teachout v. Clough, 127 S. W. 672, 143 Mo.App. 474—Palmer v. Crisle, 92 Mo.App. 510.

12. Cal.—Eames v. Philpot, 236 P. 373, 72 Cal.App. 151.
32 C.J. p 144 note 57 [a].

b. Rights of Purchaser of Standing Timber

The purchaser of standing timber may not be enjoined from cutting and removal thereof in compliance with his rights, and may himself enjoin the owner or others from interference with his right to cut and remove.

Where it appears that one cutting and removing timber is a bona fide purchaser of the standing timber, the court should refuse to enjoin him from such activities.[13] Further, one purchasing standing timber may seek the aid of equity to restrain others from interfering with his cutting and removal thereof,[14] his rights in this respect being limited to such timber as may have been covered by the terms of the grant.[15] One who has purchased standing timber with the license to cut and remove it within a designated time is entitled to an injunction against continuous interference of the owner of the land whereby removal within the time limited might be prevented,[16] but loses his right to injunctive relief on expiration of the time limited.[17] Where one purchases standing timber, with unlimited time for removal, thereby acquiring an estate in fee in timber, he may enjoin the owner of the fee in the land from cutting and appropriating timber when necessary to preserve his property.[18] It has been held that the grantee of a prior grantee of standing timber is entitled to maintain a suit in equity to enjoin the cutting of the timber by another.[19] It has also been held that where a grant conveyed, for a designated period, all the pine, cypress, and other timber whatsoever on the land for all uses and purposes, to be removed and taken off within the time stated, excepting the right of the second party to cut or box living pine trees for turpentine purposes, the grantees had such an interest in the trees as would support an action to enjoin an insolvent trespasser from cutting and boxing the trees for turpentine purposes.[20]

§ 67. —— Encroachments by Buildings or Other Structures

a. In general
b. Mandatory injunctions

a. In General

Injunction may issue to restrain threatened encroachment on the complainant's realty by buildings or other structures, the right to injunctive relief being based on the permanent character of the injury and the inadequacy of the legal remedy. Where, however, it appears that no irreparable injury would be sustained and that legal remedies would suffice, the court may refuse an injunction.

Equity has jurisdiction by injunctive process to stay or prevent the erection of permanent buildings or structures on the land of another;[21] and this is especially true where the building cannot by any possibility be mutually beneficial to the parties.[22] The grounds commonly assigned for awarding an injunction in these circumstances are that the trespass complained of would amount to a destruction of the estate,[23] and that the resulting in-

13. Ga.—Robinson v. Smith, 125 S. E. 593, 159 Ga. 269.

After expiration of right

A provision, in deed to all sawmill timber, that grantee agreed to cut timber on "pond site" within six months constituted, not mere covenant remediable in damages, but limitation on estate granted, so that, on failure of grantee to cut all timber on "pond site" within six months, grantee's interest in remaining timber on "pond site" ceased and further cutting thereof was enjoinable. —A. C. Alexander Lumber Co. v. Bagley, 191 S.E. 446, 184 Ga. 352.

14. La.—Kajfes v. Ellis, 101 So. 393, 156 La. 993.
Tex.—Houston Oil Co. of Texas v. Bunn, Com.App., 256 S.W. 259, reversing, Civ.App., 209 S.W. 830.

Adjustment of homestead rights

The purchaser of timber on land including vendor's homestead was properly enjoined from cutting timber on the land assigned as a homestead, and was entitled to enjoin the vendor from interfering with cutting of timber on the other land.—Robert G. Bruce Co. v. Spears, 187 So. 756, 187 Miss. 495.

15. Miss.—Overby v. Burnham, 200 So. 591, 190 Miss. 435.

"Down, standing, or growing"

Under a deed to all timber down, standing, or growing on certain land, the grantee of the timber suing to enjoin his grantor from cutting or removing timber at a later date was limited in his rights to such timber as may have been down, standing, or growing at the time of the timber deed.—Overby v. Burnham, supra.

16. U.S.—United Timber Corp. v. Bivens, D.C.S.C., 248 F. 554, 562.

17. La.—Smith v. Baucum, 101 So. 394, 156 La. 996.

Failure to secure extension

Where purchaser of timber was entitled to extension of time for its removal by payment of annual sum after expiration of time originally provided for, no definite date being fixed for such payment, and did not make such payment on demand, seller could thereafter enjoin removal, in view of Civ.Code arts 1907, 2023, 2033, providing that party may perform condition for which a contract fixes no time at any time before being put in default by demand.—Smith v. Baucum, supra.

18. Tex.—Houston Oil Co. v. Hamilton, 206 S.W. 817, 109 Tex. 270.

19. Ga.—Brown v. Thompson, 188 S. E. 821, 183 Ga. 495.
32 C.J. p 145 note 68.

Enjoining grantor's successor

Timber grantee's successor was entitled to injunction against conversion of timber into lumber and disposition thereof by grantor's successor in title to land.—Wisconsin-Alabama Lumber Co. v. Sewell, 134 So. 9, 222 Ala. 696.

20. Ga.—King v. Moniac Turpentine Co., 68 S.E. 73, 134 Ga. 496.
32 C.J. p 145 note 69.
Injunction against working trees for turpentine generally see infra § 70.

21. Tex.—Miguez v. Blake, Civ.App., 37 S.W.2d 234, error dismissed—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471.
32 C.J. p 145 note 71.

22. Pa.—Wyoming Nat. Bank v. Avery, 7 Pa.Co. 255.

23. Md.—Long v. Ragan, 51 A. 181, 94 Md. 462.
32 C.J. p 146 note 72.

jury would be of a permanent[24] and continuous nature,[25] to recover for which would require a multiplicity of suits which would furnish no adequate remedy.[26] Nevertheless, it has been recognized that not all buildings or structures on the land of another are of such a nature as to require injunctive relief, and an injunction will be denied where the threatened injury is not irreparable and destructive of plaintiff's property but is or will be susceptible of pecuniary compensation and such that the party may obtain adequate satisfaction in the ordinary course of law,[27] and it has been held that in the absence of a showing of irreparable injury an injunction will not issue to restrain the construction of a ditch across barren and uncultivated land.[28] An injunction should not be granted where the person injured will obtain but small benefit and the injunction will operate oppressively and to the great annoyance and injury of the other party unless the wrong is warranted and unprovoked.[29]

The matter of injunctive relief against encroachments by party walls is considered in the C.J.S. title Party Walls § 23, also 47 C.J. p 1364 note 75–p 1365 note 85.

b. Mandatory Injunctions

The general rule permits a mandatory injunction to remove encroaching buildings or other structures in the absence of an estoppel against the complainant, but its issuance ordinarily is in the discretion of the court and may be denied where inequitable.

The rule permitting use of injunctive process to restrain a threatened encroachment, as discussed supra subdivision a of this section, has been extended in a great number of cases by a recognition of the power of courts of equity to issue mandatory injunctions compelling the removal of buildings or other structures wrongfully placed on the land of another,[30] on grounds, discussed generally supra subdivision a of this section, such as inadequacy of legal remedy.[31]

24. Mass.—Creely v. Bay State Brick Co., 103 Mass. 514.
32 C.J. p 146 note 74.

25. Mass.—Creely v. Bay State Brick Co., supra.
32 C.J. p 146 note 75.

26. Pa.—Masson's Appeal, 70 Pa. 26.
32 C.J. p 146 note 76.

27. Md.—Easter v. Overlea Land Co., 99 A. 893, 129 Md. 627.
Pa.—Steckert v. Jacobs, 31 Luz.Leg. Reg. 290.
32 C.J. p 146 note 77.

28. Cal.—Waldron v. Marsh, 5 Cal. 119.
Nev.—Thorn v. Sweeney, 12 Nev. 251.

29. N.J.—Morris & E., R. Co., v. Prudden, 20 N.J.Eq. 530.

30. Ala.—Wells Amusement Co. v. Eros, 85 So. 692, 204 Ala. 239.
Cal.—Barnes v. Berendes, 69 P. 491, 72 P. 406, 139 Cal. 32—Case v. Sisich, 275 P. 492, 97 Cal.App. 106—Agmar v. Solomon, 261 P. 1029, 87 Cal.App. 127.
Conn.—Bland v. Bregman, 192 A. 703, 123 Conn. 61.
Fla.—McCreary v. Lake Boulevard Sponge Exchange Co., 183 So. 7, 133 Fla. 740.
Ill.—Jobst v. Mayer, 158 N.E. 745, 327 Ill. 423.
Iowa.—Miller v. McClelland, 173 N. W. 910, 10 A.L.R. 1317.
Mass.—Beaudoin v. Sinodinos, 48 N. E.2d 19, 313 Mass. 511—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—McCarthy v. Lane, 16 N.E.2d 683, 301 Mass. 125—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282—Tramonte v. Colarusso, 152 N.E. 90, 256 Mass. 299—Boston & A. R. Co. v. Terminal Realty Corporation, 147 N.E. 556, 252 Mass. 165.
Neb.—Weisel v. Hobbs, 294 N.W. 448, 138 Neb. 656—Resnick v. Kazaakes, 240 N.W. 585, 122 Neb. 489, reversed on other grounds 243 N.W. 861, 123 Neb. 654.
N.J.—Cutrona v. Columbus Theater, 151 A. 467, 107 N.J.Eq. 281—Capone v. Ranzulli, 134 A. 553, 99 N. J.Eq. 627.
N.Y.—Children's Hospital of Buffalo v. Bell, 30 N.Y.S.2d 266, 262 App. Div. 1066, reargument denied 32 N.Y.S.2d 376, 263 App.Div. 791, appeal denied 33 N.Y.S.2d 104, 263 App.Div. 931—Moran v. Gray, 13 N. Y.S.2d 581, 257 App.Div. 999—Bouvier v. Segardi, 188 N.Y.S. 814, 112 Misc. 689—Blake v. McCarthy, 115 N.Y.S. 1014.
Ohio.—Neithamer v. Heyer, 177 N.E. 925, 39 Ohio App. 532.
Pa.—Wilson v. Lewis, 5 Monroe L.R. 8.
Tex.—Miguez v. Blake, Civ.App., 37 S.W.2d 234, error refused.
Utah.—Lewis v. Pingree Nat. Bank, 151 P. 558, 47 Utah 35, L.R.A.1916C 1260—Mayer v. Flynn, 150 P. 962, 46 Utah 593.
Wis.—Fisher v. Goodman, 237 N.W. 93, 94, 205 Wis. 286, citing **Corpus Juris**—Wahl v. Kelly, 217 N.W. 307, 194 Wis. 559.
32 C.J. p 146 note 81—1 C.J. p 1208 note 61.

Bay windows
Ohio.—Neithamer v. Heyer, 177 N.E. 925, 39 Ohio App. 532.
32 C.J. p 146 note 81 [a].

Cornices and window sills
N.Y.—Harrington v. McCarthy, 48 N. E. 273, 160 Mass. 492, 61 Am.S.R. 298.
32 C.J. p 146 note 81 [c].

Drains
Mass.—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282.

Eaves
Pa.—Roan v. Carl, 5 Pa.Dist. & Co. 475, 4 Pa.Dist. & Co. 370, 37 York Leg.Rec. 206.

Fences
U.S.—United Porto Rican Sugar Co. v. Saldana, C.C.A.Puerto Rico, 41 F.2d 32.
Ga.—Lockwood v. Daniel, 17 S.E.2d 542, 193 Ga. 122.
Pa.—Roan v. Carl, 5 Pa.Dist. & Co. 475, 4 Pa.Dist. & Co. 370, 37 York Leg.Rec. 206—Applegate v. Coleman, 36 Luz.L.Reg. 25.
32 C.J. p 146 note 81 [e].

Fire escapes
Ill.—Jobst v. Mayer, 158 N.E. 745, 327 Ill. 423.
Mass.—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282.
32 C.J. p 146 note 81 [f].

Foundations
Mass.—Brooks v. Rosenbaum, 104 N. E. 469, 217 Mass. 172.
Wis.—Fisher v. Goodman, 237 N.W. 93, 205 Wis. 286.

Affording complete relief
In a proper case the decree may be so modified as to permit complainant either to use or remove portions of an encroachment not removed by defendant.—First M. E. Church of Pace v. Barr, 212 P. 546, 123 Wash. 425.

31. Ill.—Antillia Protective Ass'n of Chicago v. Wolfsohn, 244 Ill.App. 71.
Wis.—Fisher v. Goodman, 237 N.W. 93, 205 Wis. 286.

Adequate remedy at law not shown
(1) Generally.—McNamamy v.

The power of the court to issue this class of injunctions ordinarily will be exercised where there is a plain and intentional violation of plaintiff's rights,[32] or an encroachment against the known opposition of plaintiff,[33] or where defendant proceeded with the construction of a building without exercising due care to ascertain the precise location of the boundary line.[34] In these circumstances the injunction should be granted irrespective of whether such relief will impose on defendant an expense disproportionate to the benefit of plaintiff.[35] Complainant is not compelled to part with his property at a valuation, even though it would be much cheaper for defendant to pay the damages in money than to restore the property.[36] Plaintiff cannot be required to part with his property against his will nor should defendant be enabled to acquire an estate which he was unable to buy.[37] Injunctive relief will not be denied because of mere inconvenience attendant to removal,[38] or because plaintiff declines to sell the strip of land on which the encroachment exists,[39] or because the encroachment was in existence when plaintiff acquired the land,[40] or because plaintiff could not make immediate use of the land even if the encroachment were removed,[41] or because the land encroached upon is of little value,[42] or because plaintiff was contributorily negligent in bringing about the encroachment, if the question of damages is waived.[43] Generally speaking, and in the absence of special equities favoring defendant, a mandatory injunction for the removal of encroaching structures may be granted despite the fact that the complainant suffers little or no actual damage from the trespass,[44] or that the encroachment was made merely to provoke legal proceedings to determine defendant's right to make such encroachment,[45] or that the wrongdoer acted in good faith[46] or would be caused great inconvenience or damage by compulsory removal of the offending structure,[47] or that neighborly conduct[48] or business judgment[49] would dictate acceptance of pecuniary compensation in place of injunctive relief, and an injunction ordinarily will be refused only when there is some estoppel or laches on the part of plaintiff.[50]

Firestone Tire & Rubber Co., 173 A. 492, 114 Pa.Super. 287.

(2) As compared with mandatory injunction, ejectment is inadequate remedy to compel removal of alleged encroachment of building.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

Nuisance or acquisition of easement

(1) Mandatory injunction to remove encroachments rests on nuisance or likelihood of ripening into easement.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) Right to relief not shown.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., supra.

32. Cal.—Agmar v. Solomon, 261 P. 1029, 87 Cal.App. 127.
32 C.J. p 147 note 83.

Willful encroachment after notice

N.Y.—Duncan v. Cuozzo, 219 N.Y.S. 802, 219 App.Div. 719.

33. Mass.—Curtis Mfg. Co. v. Spencer Wire Co., 89 N.E. 534, 203 Mass. 448, 133 Am.S.R. 307.
32 C.J. p 147 note 84.

Notice soon after start of construction

(1) Where defendant, building wall encroaching on plaintiff's land, believed it was not trespassing, but plaintiff gave notice of claim promptly, and defendant nevertheless continued, plaintiff was entitled to decree directing removal.—Tyler v. City of Haverhill, 172 N.E. 342, 272 Mass. 313.

(2) One knowing claims to land proceeds at his peril in placing structures thereon.—Tyler v. City of Haverhill, supra.

34. Mass.—Kershishian v. Johnson, 96 N.E. 56, 210 Mass. 135, 36 L.R.A.,N.S., 402.
Or.—Trunnell v. Tonole, 208 P. 583, 104 Or. 628.

35. Mass.—Beaudoin v. Sinodinos, 48 N.E.2d 19, 313 Mass. 511—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282—Crosby v. Blomerth, 154 N.E. 763, 258 Mass. 221—Marcus v. Brody, 149 N.E. 673, 254 Mass. 152.
32 C.J. p 147 note 86.
Disproportionate expense as ground for denial of injunction see infra note 61.

36. Mass.—Lynch v. Union Sav. Inst., 34 N.E. 364, 159 Mass. 306, 20 L.R.A. 842.
32 C.J. p 147 note 87.

37. Mass.—Kershishian v. Johnson, 96 N.E. 56, 210 Mass. 135, 36 L.R.A.,N.S., 402.

38. Wash.—Wells v. Parks, 268 P. 889, 148 Wash. 328.

39. Mass.—Hodgkins v. Farrington, 22 N.E. 73, 150 Mass. 19, 15 Am.S.R. 168, 5 L.R.A. 209—Tucker v. Howard, 128 Mass. 361.

40. Del.—Haitsch v. Duffy, 92 A. 249, 10 Del.Ch. 280.

41. Cal.—Case v. Sisich, 275 P. 492, 97 Cal.App. 106.

42. Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.

43. Cal.—Kafka v. Bozio, 218 P. 753, 191 Cal. 746, 29 A.L.R. 833.

44. Ill.—Antillia Protective Ass'n of Chicago v. Wolfsohn, 244 Ill.App. 71.

Mass.—Beaudoin v. Sinodinos, 48 N.E.2d 19, 313 Mass. 511—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282—Harrington v. McCarthy, 48 N.E. 278, 169 Mass. 492, 61 Am.S.R. 298.
N.Y.—St. Vincent's Orphan Asylum v. Madison-Warren Corporation, 233 N.Y.S. 364, 225 App.Div. 379.

45. Conn.—Norwalk Heating & Lighting Co. v. Vernam, 55 A. 168, 75 Conn. 662, 664, 96 Am.S.R. 246.

46. Mass.—Beaudoin v. Sinodinos, 48 N.E.2d 19, 313 Mass. 511—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282—Marcus v. Brody, 149 N.E. 673, 254 Mass. 152.

47. N.J.—Cutrona v. Columbus Theater, 151 A. 467, 107 N.J.Eq. 281.

One whose rights in realty have been willfully invaded by an encroachment is entitled to have the original condition restored by mandatory injunction, even though the wrongdoer would thereby suffer great loss.—Waterbury Trust Co. v. G. L. D. Realty Co., 199 A. 106, 124 Conn. 191.

48. Mass.—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282.

49. Mass.—Beaudoin v. Sinodinos, 48 N.E.2d 19, 313 Mass. 511—Geragosian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282.

50. Mass.—Beaudoin v. Sinodinos, 48 N.E.2d 19, 313 Mass. 511—Gerago-

Acquiescence of a landowner in the building of an encroaching structure may preclude him from subsequently securing a mandatory injunction for its removal,[51] but his consent to the building of one encroaching structure will not operate to bar future injunctive relief against other and distinct trespasses arising from construction of other structures on his land.[52] Where the landowner is aware of, or consents to, an encroachment at a time when it can be removed at small cost, he will not be allowed a mandatory injunction decreeing removal at a later time when the cost of removal would be comparatively great,[53] as where plaintiff stands by and makes no objection until the greater part of the work has been completed, and is endeavoring only to secure the amount of damage occasioned to his property before the work was completed, and disclaims any intention of perpetually enjoining the construction of the work,[54] and mandatory injunction may be denied where the owner or one who afterward becomes the owner is actively responsible for the encroachment.[55] In accordance with principles considered supra § 23, the injury suffered by plaintiff must be irreparable,[56] that is to say, of such a nature that it cannot be repaired, restored, or adequately compensated in money or that the compensation cannot be safely measured.[57] The granting of a mandatory injunction is largely a matter of discretion with the court,[58] and depends on a consideration of all the equities between the parties.[59] An injunction will not be granted when it will operate inequitably or oppressively;[60] or where the encroachment is trifling and the result of an innocent mistake and the damage caused to defendant by removal would be greatly disproportionate to the interest which plaintiff claims;[61]

sian v. Union Realty Co., 193 N.E. 726, 289 Mass. 104, 96 A.L.R. 1282.

Duty as to investigation

(1) Landowner owes no duty to investigate to determine whether adjoining owner is trespassing, as in construction of new building, as regards mandatory injunction for removal of encroachments.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) Plaintiffs who lived near and observed the construction of a cellar wall which they had reason to think might encroach on their property were under no duty to investigate to find out whether or not it did, and where encroachment was made could secure a mandatory injunction for removal of the wall.—Crosby v. Blomerth, 154 N.E. 763, 258 Mass. 221.

Estoppel not shown

Mass.—Marcus v. Brody, 149 N.E. 673, 254 Mass. 152.

N.Y.—Mulrein v. Weisbecker, 56 N.Y.S. 240, 37 App.Div. 545.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

51. Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.

Acquiescence shown

Mass.—Ferrone v. Rossi, supra.

Relief on termination of license see infra note 66.

52. Mass.—Ferrone v. Rossi, supra.

53. D.C.—Schwartz v. Atlantic Building Co., 41 App.D.C. 103.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

Ky.—Jarvis v. Satterwhite, 11 Ky.Op. 167.

54. Cal.—Bigelow v. Los Angeles, 24 P. 778, 85 Cal. 614.

55. Pa.—Glinn v. Silver, 64 Pa.Super. 383.

32 C.J. p 147 note 95.

56. Ill.—Pradelt v. Lewis, 130 N.E. 785, 297 Ill. 374.

N.J.—Central Railroad Co. of New Jersey v. Standard Oil Co., 33 N.J. Eq. 127.

57. Ill.—Pradelt v. Lewis, 130 N.E. 785, 297 Ill. 374.

58. Cal.—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 166, 128 Cal.App. 348, quoting **Corpus Juris.**

Pa.—Glinn v. Silver, 64 Pa.Super. 383.

Not matter of right

Where a party through innocent mistake so constructs a wall that it encroaches slightly on adjoining property, a mandatory injunction will not issue as a matter of right to compel removal.—Owenson v. Bradley, 197 N.W. 885, 50 N.D. 741, 31 A.L.R. 1296.

Effect of plaintiff's failure to protest

Plaintiff's failure to protest against subsurface encroachments and other means used to support plaintiff's building during adjoining landowner's building operations might properly influence chancellor not to use injunctive powers.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

59. Cal.—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 166, 128 Cal.App. 348, quoting **Corpus Juris.**

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

32 C.J. p 147 note 93.

60. Cal.—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 166, 128 Cal.App. 348, quoting **Corpus Juris.**

Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591—Triulzi v. Costa, 4 N.E.2d 617, 296 Mass. 24.

32 C.J. p 147 note 94.

61. Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682—Blackfield v. Thomas Allec Corporation, 17 P.2d 165, 166, 128 Cal.App. 348, quoting **Corpus Juris**—Case v. Sisich, 275 P. 492, 97 Cal.App. 106.

Conn.—Waterbury Trust Co. v. G. L. D. Realty Co., 199 A. 106, 124 Conn. 191.

Del.—Maisano v. Spain, 150 A. 20, 17 Del.Ch. 133.

Ind.—Weis v. Cox, 185 N.E. 631, 205 Ind. 43.

Kan.—Cave v. Henley, 264 P. 25, 125 Kan. 214.

Mass.—Triulzi v. Costa, 4 N.E.2d 617, 296 Mass. 24—Loughlin v. Wright Mach. Co., 173 N.E. 534, 273 Mass. 310—Tramonte v. Colarusso, 152 N.E. 90, 256 Mass. 299.

N.D.—Owenson v. Bradley, 197 N.W. 885, 50 N.D. 741, 31 A.L.R. 1296.

Pa.—Foley v. School Dist. of City of Connellsville, 2 Fay.L.J. 205.

Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

32 C.J. p 147 note 96—1 C.J. p 1209 note 67.

Future nuisance

The fact that trifling encroachments which do not constitute a nuisance may become a nuisance or ripen into an easement if plaintiff desires to construct a building higher than its existing building will not alter the text rule.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., supra.

Rule held inapplicable under facts.—Morris v. George, 135 P.2d 195, 57 Cal.App.2d 665.

Grant of injunction despite disproportionate expense see supra note 35.

or where the encroachment is so small that by statute an action for recovery of the land will not lie;[62] or where the encroachment involves the public interest and there is no doubt of defendant's ability to respond in damages;[63] or where some other incident is present that would render inequitable the issuance of a mandatory injunction.[64]

Encroachment under license. Where plaintiff is willing to give a revocable license, the decree should permit the encroachment to remain until the license is revoked;[65] and on termination of a license mandatory injunction may lie to compel removal of an encroachment wrongfully retained on the land.[66]

§ 68. —— Removal or Destruction of Buildings or Other Structures

a. In general
b. Fences and hedges

a. In General

Injunction lies to restrain the wrongful removal or destruction of buildings or other structures unless there is an adequate legal remedy; but the complainant may not enjoin removal of a structure improperly on another's land. Where the complainant desires himself to effect the removal of an encroaching structure he may enjoin the defendant from interfering with his efforts in this respect.

An injunction may issue to restrain removal or destruction of buildings or other structures which have become in legal contemplation a part of complainant's realty,[67] as in the case of fixtures under principles discussed in Fixtures § 60, and equity will restrain a removal constituting a trespass which goes to the destruction of the property in the character in which it is used.[68] It is not necessary to show the insolvency of defendant as a basis for injunctions of this nature.[69]

On the other hand, an injunction restraining removal or destruction of structures may be denied where the legal remedy is adequate,[70] and it has been held that a mere trespass, such as the removal of a church building from one point on land to another, cannot be made the basis for relief by injunction.[71]

A complainant whose structure wrongfully rests on the land of another may not enjoin such other from its removal or destruction.[72]

Enjoining interference with removal. Where complainant is entitled to the removal of structures as encroachments he may, in a proper case, secure an injunction to prevent defendant from interfering with their removal by the complainant, even though the circumstances are such as to preclude issuance of a mandatory injunction to compel defendant himself to effect the removal,[73] or

62. N.Y.—Carroll v. Bullock, 101 N. E. 438, 207 N.Y. 567.

63. Cal.—Bigelow v. Los Angeles, 24 P. 778, 85 Cal. 614.

Reservoir

Plaintiffs were not entitled to restrain water company from maintaining reservoir, which with its appurtenances constituted sole source of water supply for five hundred people, which had been inadvertently constructed so as to encroach upon fifteen hundredths of an acre of plaintiffs' unimproved land, since plaintiffs could be fully compensated by damages.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal. App.2d 726.

64. Mass.—Szathmary v. Boston & A. R. Co., 100 N.E. 1107, 214 Mass. 42.

65. R.I.—Caliri v. Corvese, 153 A. 795.

66. Conn.—Bland v. Bregman, 192 A. 703, 123 Conn. 61.

Prior acquiescence as not precluding relief

Plaintiff, after terminating license given telephone company by his predecessor, was entitled to mandatory relief to require removal of line, notwithstanding prior acquiescence in operation thereof.—Nelson v. American Telephone & Telegraph Co., 170 N.E. 416, 270 Mass. 471.

67. Iowa.—Mathews v. Silsby Bros., 201 N.W. 94, 198 Iowa 1392, 37 A.L. R. 1116.
Ohio.—Martin v. Pilaczynski, 25 N. E.2d 362, 63 Ohio App. 101.
Okl.—Hinkle v. Bass Furniture & Carpet Co., 246 P. 228, 117 Okl. 207.
Tex.—Smith v. Brown, Civ.App., 32 S.W.2d 388.
Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 155 Va. 249.
32 C.J. p 148 note 2.

Underground gasoline tank

Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., supra.

68. U.S.—Southern Pacific R. Co. v. City of Oakland, C.C.Cal., 58 F. 50.

Railroad tracks

U.S.—Southern Pacific R. Co. v. City of Oakland, supra.

69. Wis.—Taylor v. Collins, 8 N.W. 22, 51 Wis. 123.
32 C.J. p 148 note 5.

70. Fla.—Edason v. Denison, 194 So. 342, 142 Fla. 101.

Where plaintiff has no title whatever to the land in question and the building itself is personal property, the value of which is easily determinable, the remedy at law is adequate and an injunction will be denied.—Kaufman v. Butte, 138 P. 770, 48 Mont. 400.

Dams

An injunction will not lie to restrain entry upon plaintiff's land and tearing down his dams built for protection of plaintiff's land, since there is an adequate remedy at law.—Edason v. Denison, 194 So. 342, 142 Fla. 101.

71. Neb.—Tigard v. Moffitt, 14 N.W. 534, 13 Neb. 565.

72. Ga.—Randolph v. Merchants & Mechanics Banking & Loan Co., 183 S.E. 801, 181 Ga. 671.

House resting on land improperly included in deed

Mortgagee acquiring title by foreclosure deed which improperly covered portion of another's lot on which mortgaged house had been constructed was held not entitled to injunction restraining lot owner from removing obstructions, and equity court could not fix and permit mortgagee to pay fair market value of land on which house rested. —Randolph v. Merchants & Mechanics Banking & Loan Co., supra.

73. Tex.—White v. State, Civ.App., 122 S.W.2d 714.

Where expense not chargeable to defendant

Purchaser at mortgage foreclosure, who did not erect building encroach-

where the financial condition of defendant indicates that he will be unable to comply with the order for removal.[74]

An excavation threatening irreparable injury to the land and buildings of complainant may be enjoined.[75]

b. Fences and Hedges

An injunction to prevent the removal or destruction of a fence or hedge will be granted or refused under principles applicable in other cases of trespass or injury to realty, except as controlled by statute.

An injunction may lie to prevent the removal or destruction of a fence by a trespasser threatening continuous injury in such respect,[76] as in the case of repeated destruction,[77] and in such cases it is immaterial that defendant is solvent,[78] or that the boundary along which the fence is built is in dispute.[79] Also the removal of a fence may be enjoined where there are other acts of trespass which all taken together amount to a destruction of the property and the character in which it is enjoyed.[80]

Injunctive relief will be denied where the removal or destruction of a fence is a mere trespass remediable at law by an action for damages,[81] unless the objection of an adequate remedy at law has been waived so as to warrant the granting of an injunction.[82] An injunction to restrain removal of a fence will be denied where the fence is wrongfully placed,[83] and where one enters on land in the peaceable possession of another and constructs a fence on a disputed division line he becomes a trespasser and is not entitled to an injunction restraining the other from removing the fence.[84]

Hedges. In Nebraska it has been held that, although a hedge fence forming a boundary line which has been divided may have grown so as to interfere with the use of the adjoining land, the owner thereof will be enjoined from destroying it where it does not appear that he has observed the fence law by obtaining an order from the fence viewers requiring the hedge to be trimmed and maintained within proper dimensions, and where it does not appear that he did not intend immediately to construct a legal fence in place of the hedge as provided by the fence law, although the hedge may have grown so as to interfere with the use of his adjoining land.[85]

In Texas it has been held that a "hedge" is not a "fence" within a statute providing that any person who is owner or part owner of any fence connected with or adjoining any fences owned in part or in whole by any other person shall have the right to withdraw or separate his fence or part of fence after having given sufficient notice to the other party, and where a hedge constitutes the boundary line between two tracts an injunction will lie to prevent either from destroying the hedge.[86]

§ 69. —— Trespass by Animals

Where the owner of animals is under a legal duty to prevent their running at large, a landowner on whose property such animals trespass continuously or repeatedly may secure injunctive relief; but where no such duty rests on the animal owner injunctive relief will be denied in the absence of willful trespass.

Where the common-law rule, discussed in Animals § 185, requiring the owner of animals to confine them and, in default thereof, to answer for any damages occasioned by their trespass upon the land of another, prevails, it has been held that one may be restrained from permitting his animals to enter upon the unfenced lands of another where the repeated trespasses of the animals, if permitted to

ing upon complainants' land and has not injured complainants, cannot be compelled to undergo expense of removing encroachment, but complainant may have an injunction to prevent interference with his own removal of the building.—Cutrona v. Columbus Theater, 151 A. 467, 107 N.J.Eq. 281.

74. N.J.—Cutrona v. Columbus Theater, supra.

75. Ga.—Massell Realty Improvement Co. v. MacMillan Co., 147 S.E. 38, 168 Ga. 164.

76. Mich.—Beaver v. Zwonack, 229 N.W. 598, 250 Mich. 96.
32 C.J. p 148 note 12.
Line fence
Mich.—Beaver v. Zwonack, supra.
Injunction to prevent or remove fencing see supra § 67.

77. N.Y.—Carpenter v. Gwynn, 35 Barb. 395.
32 C.J. p 148 note 11.

78. Mo.—McPike v. West, 71 Mo. 199.
Neb.—Lynch v. Egan, 93 N.W. 775, 67 Neb. 541—Pohlman v. Evangelical Lutheran Trinity Church, 83 N.W. 201, 60 Neb. 364.

79. Neb.—Wallace v. Kruzer, 146 N.W. 984, 95 Neb. 615.
N.Y.—Carpenter v. Gwynn, 35 Barb. 395.

80. U.S.—Southern Pac. R. Co. v. Oakland, C.C.Cal., 58 F. 50.
32 C.J. p 148 note 15.

81. Wis.—Smith v. O'Conowoc, 6 N.W. 329, 49 Wis. 694.
32 C.J. p 148 note 9.
Injunction to compel restoration of removed fence denied because plaintiff, disputing boundary, had a clear, adequate, and complete remedy in law action of trespass to try title.—Woman's Club of Ysleta v. Hutchins, Tex.Civ.App., 40 S.W.2d 960.

82. Wis.—Hoff v. Olson, 76 N.W. 1121, 101 Wis. 118, 70 Am.S.R. 903.
32 C.J. p 148 note 8.

83. Iowa.—Richardson v. Derry, 284 N.W. 82, 226 Iowa 178.

84. Iowa.—Currier v. Jones, 96 N.W. 766, 121 Iowa 160.
32 C.J. p 148 note 10.

85. Neb.—Meyer v. Perkins, 130 N.W. 986, 89 Neb. 59, Ann.Cas.1912C 468.

86. Tex.—Brown v. Johnson, Civ. App., 73 S.W. 49.

continue, would require the bringing of numerous suits;[87] and a fortiori is this so where the trespassing animals repeatedly break into inclosed lands,[88] or where defendant threatens to continue to permit his cattle to go on complainant's premises and destroy his crops.[89] Under stock laws prohibiting the running at large of animals, as discussed in Animals § 185 b (2) (d), a landowner may secure injunctive relief against the trespassing of cattle where it is continuous or repeated in character and the statutory remedy afforded by the stock laws is inadequate.[90] On the other hand, where the common-law rule has been abrogated by statute and one is not liable in damages for permitting his animals to go and graze on the uninclosed lands of another, as considered in Animals § 185 b, the latter is not entitled to an injunction because of repeated or continuous trespasses of these animals.[91] Nevertheless, even where the common-law rule has been abrogated, in proper cases where the other necessary elements of equity jurisdiction are present, injunction will lie to restrain a live stock owner from willfully and knowingly driving or turning his stock upon the uninclosed premises of a private owner,[92] and the other necessary elements of equity jurisdiction are present when these trespasses are continuous or threatened to be repeated,[93] in which instance the impossibility of accurately estimating the damages in money and the prevention of a multiplicity of suits justify the enjoining of trespasses.[94] Where the trespass is willful, injunctive relief is not dependent on existence of a statutory fence,[95] and the fact that complainant unlawfully inclosed government lands within his fence will not, where the record fails to show resultant damage to defendants, operate to preclude complainant from securing injunctive relief against a defendant willfully driving his cattle within such inclosure, where they trespass on both the government and other lands claimed by complainant.[96] An injunction should be granted where defendant repeatedly drives his cattle on plaintiff's premises by opening his gates,[97] or tearing down his fences,[98] although there is authority to the effect that the injury is susceptible of perfect pecuniary compensation.[99] The driving of cattle across complainant's premises may be enjoined where any legal remedy that might be had against defendant would not be equal to the cost of procuring it.[1] Where there is nothing to show that the trespassing of defendant's animals will become continuous, and the only injury complained of is an act or acts already committed, for which plaintiff has adequate legal remedy, the court will refuse to issue an injunction.[2]

Dogs. Despite the common-law rule that an owner is not responsible for the trespasses of his dog made of its own volition, as set forth in Animals § 211, where the owner knowingly encourages or participates in a continuous or repeated trespass by his dogs he may be enjoined, there being no adequate remedy at law,[3] and the fact that the complaining owner shot some of the trespassing dogs in defense of his property does not preclude equitable relief on the theory that he did not come into court with clean hands.[4]

87. Cal.—Montezuma Impr. Co. v. Simmerly, 189 P. 100, 181 Cal. 722.
Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.
32 C.J. p 149 note 33.

88. N.Y.—Barnes v. Hagar, 148 N.Y.S. 395, affirmed 151 N.Y.S. 1103, 166 App.Div. 952.
Tenn.—Folkner v. Whitehurst, 229 S.W. 146, 144 Tenn. 62.

89. Cal.—Huffman v. Coulter, 203 P. 125, 55 Cal.App. 173.

90. Miss.—Rosenblatt v. Escher, 185 So. 551, 184 Miss. 274.

Injunction denied where stock law not in effect
Ga.—York v. Chastain, 2 S.E.2d 67, 187 Ga. 664.

In Louisiana, it has been said that the matter of the duty of an owner of animals to keep them from going on the lands of another, whether fenced or not, has been relegated to the discretion of the police juries, and that if the law does not require the fencing of stock their owner is free from fault in permitting them to roam at large, so that a complainant is not entitled to an injunction against their trespassing.—Nugent v. Jordon, 1 La.App. 453.

91. Colo.—Richards v. Sanderson, 89 P. 769, 39 Colo. 270, 121 Am.S.R. 167.
Wyo.—Martin v. Platte Valley Sheep Co., 76 P. 571, 12 Wyo. 432, rehearing denied 78 P. 1093, 12 Wyo. 432.

92. Mont.—Musselshell Cattle Co. v. Woolfolk, 85 P. 874, 34 Mont. 126.
32 C.J. p 150 note 38.

93. Mont.—Musselshell Cattle Co. v. Woolfolk, supra.
Wyo.—Martin v. Platte Valley Sheep Co., 76 P. 571, 12 Wyo. 432, rehearing denied 78 P. 1093, 12 Wyo. 432.

94. Mont.—Musselshell Cattle Co. v. Woolfolk, 85 P. 874, 34 Mont. 126.

95. N.M.—Wright v. Atkinson, 46 P. 2d 667, 39 N.M. 307.

96. N.M.—Wright v. Atkinson, supra.

97. Iowa.—Tantlinger v. Sullivan, 45 N.W. 765, 80 Iowa 218.

98. Iowa.—Tantlinger v. Sullivan, supra.
Tex.—Hoskins v. Cauble, Civ.App., 198 S.W. 629.

99. Ga.—Catching v. Terrell, 10 Ga. 576.

1. Ill.—McIntyre v. McIntyre, 122 N.E. 824, 287 Ill. 544.

2. Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.

Occasional trespass by turkeys seeking insects on another's land is not enjoinable.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.

3. Md.—Baker v. Howard County Hunt, 188 A. 223, 171 Md. 159, 107 A.L.R. 1312.

Hounds used in hunting
Md.—Baker v. Howard County Hunt, supra.

4. Md.—Baker v. Howard County Hunt, supra.

Hounds killing chickens
Owner of farm who shot several foxhounds while they were in his chicken yard killing chickens did not

§ 70. —— Other Trespasses and Injuries

Under rules of general application injunctions have been granted or denied with respect to trespasses and injuries to realty of miscellaneous character.

In determining whether injunctive relief should be granted with respect to a trespasser or other injury to realty, each case will stand on its own facts,[5] and under general principles which have been discussed supra §§ 57–65 an injunction has been granted in cases of widely variant nature.[6]

thereby place himself beyond pale of equitable relief of injunction to restrain trespass of hounds.—Baker v. Howard County Hunt, supra.

5. Cal.—Union Oil Co. of California v. Domengeaux, 86 P.2d 127, 30 Cal.App.3d 266.

6. Injunction granted to prevent

(1) Blasting on adjoining or neighboring premises.

Ala.—East v. Saks, 106 So. 185, 214 Ala. 58.

Pa.—Miller v. Zinn, 53 York Leg.Rec. 189.

32 C.J. p 150 note 51, p 151 note 78.

(2) Connection with private sewer.—Kittrell v. Angelo, 282 S.W. 363, 170 Ark. 982.

(3) Cutting and removal of ice.

Ind.—Knickerbocker Ice Co. v. Surprise, 97 N.E. 357, 99 N.E. 58, 53 Ind.App. 286.

Me.—Wilson v. Harrisburg, 77 A. 787, 107 Me. 207.

(4) Defendants going on a lake over subaqueous lands owned by plaintiff for fishing, boating, bathing, and other such purposes.—Pleasant Lake Hills Corporation v. Eppinger, 209 N.W. 152, 235 Mich. 174.

(5) Deposit of material on defendant's land, tending to encroach on complainant's land.—Empire Steel & Iron Co. v. Lawrence, 23 Pa.Dist. 744—Keppel & Boyer v. Lehigh Coal & Navigation Co., 23 Pa.Co. 433.

(6) Deposit of refuse in a stream.—Warren v. Parkhurst, 93 N.Y.S. 1009, 105 App.Div. 239, affirmed 78 N.E. 579, 186 N.Y. 45, 6 L.R.A.,N.S., 1149, 9 Ann.Cas. 512.

(7) Deposit of snow and ice to the damage of adjoining owner.—Hollenbeck v. St. Mark's Lutheran Church, 138 N.Y.S. 1063, 154 App.Div. 328.

(8) Driving of baseballs from adjoining playground on plaintiff's premises and the entry of boys to reclaim them.—Hennessy v. City of Boston, 164 N.E. 470, 265 Mass. 559, 62 A.L.R. 780.

(9) Dumping of earth or other material on complainant's land.

Ala.—Woodstock Operating Corp. v. Quinn, 79 So. 253, 201 Ala. 681.

N.Y.—Wheelock v. Noonan, 15 N.E. 67, 108 N.Y. 179, 2 Am.S.R. 405—Eno v. Christ, 54 N.Y.S. 400, 25 Misc. 24.

Pa.—Harvey v. Lance, 2 Walk. 548.

32 C.J. p 150 note 60.

(10) Erection of log slide over complainant's land.—Proctor v. Campbell, 1 Wilcox, Pa., 207.

(11) Erection of telephone line over complainant's property.—Acme Cement Plaster Co. v. American Cement Plaster Co., Tex.Civ.App., 167 S.W. 183—32 C.J. p 150 note 67, p 151 notes 74, 81.

(12) Golf club members from continuously crossing railroad.—Pennsylvania R. Co. v. Bala Golf Club, 16 Pa.Dist. 357.

(13) Interference by nonmembers of a church with church property.—Christian Church v. Sommer, 43 So. 8, 149 Ala. 145, 123 Am.S.R. 27, 8 L.R.A.,N.S., 1031.

(14) Interference with complainant's reservoir.—Koch v. Story, 107 P. 1093, 47 Colo. 335.

(15) Interference with the planting, cultivation, and harvesting of crops.

Colo.—Nazarenus v. Wigle, 212 P. 826, 72 Colo. 538.

Iowa.—Tantlinger v. Sullivan, 45 N.W. 765, 80 Iowa 218.

Mont.—Union Central Life Ins. Co. v. Audet, 21 P.2d 53, 94 Mont. 79, 92 A.L.R. 571.

Wash.—Edwall Bank v. Bateman, 167 P. 1102, 98 Wash. 447, L.R.A.1918B 410.

32 C.J. p 151 notes 71, 72.

(16) Landing of boats on complainant's land without his consent.—Bryant v. West, Mo., 219 S.W. 355—32 C.J. p 151 note 73.

(17) Leaving of railroad crossing gates open.—Axthelm v. Chicago, R. I. & P. R. Co., 89 N.W. 313, 2 Neb., Unoff. 444—32 C.J. p 151 note 83.

(18) Maintenance and operation of railroad over plaintiff's land.—Coatsworth v. Lehigh Valley R. Co., 51 N.E. 301, 156 N.Y. 451—32 C.J. p 151 note 87.

(19) Maintenance of advertising sign on roof of adjoining building.—Alfred Peats Co. v. Bradley, 149 N.Y.S. 613, reversed on other grounds 151 N.Y.S. 602, 166 App.Div. 267.

(20) Maintenance of an unauthorized sewer over complainant's land.

Mass.—Aronson v. Orlov, 116 N.E. 951, 228 Mass. 1.

Or.—Fraser v. Portland, 158 P. 514, 81 Or. 92.

(21) Maintenance of embankment causing sand and material to accumulate on complainant's land.—Heath v. Minneapolis, St. P. & S. S. M. R. Co., 148 N.W. 311, 126 Minn. 470, L.R.A.1916E 977.

(22) Maintenance of state highway over land to which state highway had no right or title.—Provident Mut. Life Ins. Co. of Philadelphia v. State Highway Commission, 125 P. 2d 346, 155 Kan. 351.

(23) Maintenance of stone crusher on private property by sewer contractor.—Summerville Fruit Farms v. John Petrossi Co., 209 N.Y.S. 367, 124 Misc. 826, affirmed 216 N.Y.S 924, 217 App.Div. 722.

(24) Mining operations.

Cal.—Union Oil Co. of California v. Domengeaux, 86 P.2d 127, 30 Cal. App.2d 266.

Va.—Clayborn v. Camilla Red Ash Coal Co., 105 S.E. 117, 128 Va. 383, 15 A.L.R. 946.

32 C.J. p 150 notes 46, 48, 49, 69, p 151 note 85.

(25) Obstruction of alley by poles and wires for electric lights.—Carpenter v. Capital Electric Co., 52 N. E. 973, 178 Ill. 29, 69 Am.S.R. 286, 43 L.R.A. 645.

(26) Obstruction of driveway by adjoining lot owners.—German v. Wilkin, 37 N.E.2d 155, 377 Ill. 515.

(27) Obstruction of street railroad —Henderson v. Ogden City R. Co., 26 P. 286, 7 Utah 199.

(28) Paving of railroad right of way, clouding title.—Williams v. Atlantic Coast Line R. Co., C.C.A.S.C., 17 F.2d 17.

(29) Pulling or poling small boats through artificial drainage ditch to lake on plaintiff's land.—Bushman v. Estleman, 239 N.W. 262, 256 Mich. 243.

(30) Refusal to allow inspection of premises to ascertain source of pollution of artesian well.—Rogers v. Bond Bros., 130 S.W.2d 22, 279 Ky. 239.

(31) Removal of culm from complainant's land.—Holden v. Llewellyn, 105 A. 639, 262 Pa. 400.

(32) Removal of sand and gravel. —Micelli v. Andrus, 120 P. 737, 61 Or. 78—32 C.J. p 150 note 56.

(33) Solicitation of business on complainant's premises.

Mass.—Boston & M. R. Co. v. Sullivan, 58 N.E. 689, 177 Mass. 230, 83 Am.S.R. 275.

N.Y.—Borland v. Curto, 201 N.Y.S. 236, 121 Misc. 336.

Tex.—Fort Worth Stockyards Co. v. Brown, Civ.App., 161 S.W.2d 549.

(34) Storing of personal property on complainant's land.—Bishop v. Hughes, 102 N.Y.S. 595, 117 App.Div. 425, 38 N.Y.Civ.Proc. 379.

(35) Trespass on a private road.—

On the other hand, where a trespass or other injury alleged to complainant's realty is not within the principles heretofore discussed supra §§ 57–65, injunctive relief has been denied.[7]

Revocation or interference with license. Under proper circumstances a mandatory injunction may issue to protect a license over the land of another.[8] So where, under the views considered in the C.J.S. title Licenses §§ 88–92, also 37 C.J. p 290 note 36–p 296 note 2, it is not subject to termination at will of the licensor an injunction may be granted to prevent its revocation,[9] and, in a jurisdiction in which the legal right to revoke a parol license is as a rule recognized, the exercise of such right may be restrained where the licensor's conduct has been such that to permit a revocation would operate as a fraud on the licensee[10] or where the entry has been made under an agreement for a conveyance,[11] or the license is subsidiary to a valid grant.[12] Likewise, where a parol license has been granted to use land in a certain way, and improvements have been made on the faith of it, the licensor may be restrained by injunction from revoking the license to the irreparable injury of the licensee,[13] but where the license is revocable at the pleasure of the licensor the licensee cannot maintain a bill to enjoin its revocation or obstruction.[14] Where the right to the license has been lost by the licensee an injunction will no longer issue in his behalf to protect it.[15]

Obstruction of light, air, and view. In the absense of a covenant or statute to the contrary, an injunction will not lie to restrain the erection or maintenance of a structure by a landowner on his own land near the land of the adjoining owner although the structure has resulted or will result in cutting off light and air coming laterally from land on which the structure is erected.[16] However, where a property owner's business is damaged through the erection of a wall for advertising purposes on adjoining property which interfered with the view of his garage and filling station and which in no physical way benefited the filling station business of the adjoining owner, he may be entitled to an injunction requiring its removal where the wall was more valuable for advertising purposes after removal and relocation at the rear of the adjoining owner's property.[17]

Zoning ordinances. The violation of zoning ordinances may in a proper case be enjoined,[18] although

Sunderland v. Whitesides, 7 Phila., Pa., 335.

(36) Trespass on inland lake surrounded entirely by plaintiff's land.—Putnam v. Kinney, 227 N.W. 741, 248 Mich. 410.

(37) Unauthorized use of stairway.—Parham v. Bradberry, 188 So. 298, 185 Miss. 402.

(38) Use of highway for purpose other than travel.—Ohio Water Service Co. v. Newman, 31 Ohio N.P.,N.S., 75.

(39) Working of pine trees for turpentine.

Ga.—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536.

Miss.—Ladnier v. Ingram Day Lumber Co., 100 So. 369, 135 Miss. 632.

(40) Wrongful discharge and draining of water over and on complainant's land.

Ohio.—Rueckert v. Sicking, 153 N.E. 129, 20 Ohio App. 162.

S.D.—Boll v. Ostroot, 127 N.W. 577, 25 S.D. 513.

(41) Wrongful diversion of water from complainant's land.—Cobia v. Ellis, 42 So. 751, 149 Ala. 108.

(42) Wrongful interference with drainage from plaintiff's land.—White v. N. C. & St. L. Ry., 1 Tenn. App. 467—32 C.J. p 151 notes 88, 90.

Injunctions with reference to:

Aviation see Aerial Navigation § 31.

Boundaries see Boundaries § 126.

Fishing rights see Fish § 24.

Hunting and trapping rights see see Game § 6.

Rights of owners of cemetery lots see Cemeteries § 34.

7. Mo.—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 229 Mo.App. 622.

Injunction denied to prevent

(1) Advertising that property was for sale or rent to colored people.—Addesleigh Park Homes v. Bouchey, 13 N.Y.S.2d 208.

(2) Laying steam pipe across complainant's lot under permission of town.—Jacobs v. Lakeside Lumber Co., 114 N.W. 443, 134 Wis. 179.

(3) Solicitation of business by competitors on land to which it has conveyed easement.—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 229 Mo.App. 622.

(4) Violation of ordinance where act is not nuisance.—Srager v. Mintz, 158 A. 471, 109 N.J.Eq. 544.

Injunctions with reference to:

Aviation see Aerial Navigation § 31.

Boundaries see Boundaries § 126.

Fishing rights see Fish § 24.

Hunting and trapping rights see Game § 6.

Rights of owners of cemetery lots see Cemeteries § 34.

8. Iowa.—Robbins v. Archer, 126 N. W. 936, 147 Iowa 743—Brown v. Honeyfield, 116 N.W. 731, 139 Iowa 414.

9. Iowa.—Robbins v. Archer, 126 N. W. 936, 147 Iowa 743.

10. Ill.—Baird v. Westberg, 173 N. E. 820, 341 Ill. 616—Girard v. Lehigh Stone Co., 117 N.E. 698, 280 Ill. 479—Hunt v. Sain, 54 N.E. 970, 181 Ill. 372.

Ky.—Gibbs v. Anderson, 156 S.W.2d 876, 288 Ky. 488.

11. Ill.—Streeter Independent Telephone Co. v. Interstate Independent Telephone Co., 142 Ill.App. 183.

Mont.—Lewis v. Patton, 113 P. 745, 42 Mont. 528.

12. Minn.—Minneapolis Mill Co. v. Minneapolis & St. L. R. Co., 53 N. W. 639, 51 Minn. 304.

13. N.J.—Raritan Water-Power Co. v. Veghte, 21 N.J.Eq. 463.

32 C.J. p 205 note 56.

14. W.Va.—Dickinson v. Foster, 95 S.E. 196, 81 W.Va. 739.

15. Tex.—Settegast v. Foley Bros. Dry Goods Co., 270 S.W. 1014, 114 Tex. 452.

16. D.C.—Ash v. Tate, 73 F.2d 518, 64 App.D.C. 9.

Interference with light and air see Adjoining Landowners §§ 50–52.

17. La.—Parker v. Harvey, App., 164 So. 507.

18. Cal.—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180—Sapiro v. Frisbie, 270 P. 280, 93 Cal.App. 299.

Ga.—Morris v. Lunsford, 167 S.E. 297, 176 Ga. 49.

it will likewise be denied where facts justifying the issuance of an injunction do not appear.[19]

§ 71. Injury to Personal Property

Generally equity will not issue an injunction to prevent an injury to, or an interference with, personal property unless there is no adequate remedy at law.

In the absence of special circumstances,[20] injunction will not be granted to protect personal property[21] or to prevent a trespass with reference thereto[22] or a wrongful conversion thereof,[23] since the remedy at law is as a rule adequate.[24] Hence an action ordinarily will not lie to prevent the removal[25] or conversion[26] of personal property where the injury may be fully redressed by an action at law for damages, and, more particularly, where the taking may also be punished as a crime.[27] However, even where there is an existing legal remedy, where such remedy is not plain, complete, or adequate, equity may enjoin an injury to, or an interference with, personal property.[28] For the purpose of protecting specific chattels of such peculiar value that they cannot be the subject of adequate compensation by way of damages, injunctions may be granted;[29] and the question of the peculiar value of the personalty and the inadequacy of the legal remedy, as respects the right to an injunction, are to be determined by the chancellor.[30]

Removal of timber already cut. While there is some authority to the contrary,[31] it has very generally been held that the removal of timber already cut will not ordinarily be enjoined,[32] at least

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.
N.Y.—Rice v. Van Vranken, 229 N.Y.S. 32, 132 Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.
Ohio.—Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287.
Pa.—Willis v. Baldwin, 24 Erie Co. 18—Rodgers v. Bennett Bldg. Co., 89 Pittsb.Leg.J. 359.

Set-back regulations
Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

Undertaking establishment in dwelling zone
Cal.—Sapiro v. Frisbie, 270 P. 280, 93 Cal.App. 299.

Defenses
(1) City's issuance of permit is no defense, in action to enjoin construction of private garage in violation of ordinance.—Woods v. Kiersky, Tex.Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518.

(2) Good faith not shown.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F.2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

19. Ill.—Hurt v. Hejhal, 259 Ill.App. 221.
Mass.—Building Com'r of Medford v. McGrath, 45 N.E.2d 265, 312 Mass. 461.
N.J.—Srager v. Mintz, 158 A. 471, 109 N.J.Eq. 544.
N.Y.—Pilling v. Davison, 30 N.Y.S.2d 97, affirmed 35 N.Y.S.2d 163, 264 App.Div. 737, appeal denied 36 N.Y.S.2d 240, 264 App.Div. 781.
Tex.—Sisk v. Richards, Civ.App., 130 S.W.2d 1076.

20. Fla.—State ex rel. Meredith v. Board of Trustees of Salvation Army, 135 So. 781, 102 Fla. 219.

21. Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.
N.J.—U. S. Fidelity & Guaranty Co. v. United Steel Const. Co., 142 A. 309, 103 N.J.Eq. 96, appeal dismissed 150 A. 421, 106 N.J.Eq. 232.

22. Fla.—State ex rel. Meredith v. Board of Trustees of Salvation Army, 135 So. 781, 102 Fla. 219—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

23. Fla.—Pepper v. Beville, supra.

24. Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.
Del.—Donoho v. Carvell, 138 A. 630, 15 Del.Ch. 379.
32 C.J. p 120 note 17, p 135 note 82.
Adequate remedy at law as:
Affecting jurisdiction to grant generally see supra § 25.
Limitation on equitable jurisdiction generally see Equity §§ 19–38.
Dispute as to title see supra § 25.
Injunction to recover possession see supra § 52.

Statutory remedy
A decree dismissing bill and dissolving temporary injunction restraining sheriff from interfering with operating of mint-vending machines operated by placing coin in slot was proper where statute under which sheriff was acting provided remedy for protection of complainant's property rights and an adjudication in respect thereof.—Kennedy v. Shamblin, 174 So. 773, 234 Ala. 230, followed in Kropp v. Shamblin, 174 So. 774, 234 Ala. 231.

25. Del.—Donoho v. Carvell, 138 A. 630, 15 Del.Ch. 379.

An injunction against a continuing trespass not arising from an intrusion on realty but from the removal of personal property therefrom will not be granted where there is an adequate remedy at law.—Kramer v. Slattery, 103 A. 610, 260 Pa. 234.

26. Fla.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

27. Pa.—Kramer v. Slattery, 103 A. 610, 260 Pa. 234.

28. Fla.—State ex rel. Meredith v. Board of Trustees of Salvation Army, 135 So. 781, 102 Fla. 219—Pepper v. Beville, 129 So. 334, 100 Fla. 97.
Tenn.—Earhart v. Young, 124 S.W.2d 693, 174 Tenn. 198.

Enforcement of administrative order
On refusal of a distillery warehouseman to deliver whisky for removal to another warehouse on order of the commissioner of internal revenue, the fact that the owner might maintain an action at law for conversion does not afford him an adequate remedy, which excludes his remedy in equity to enforce compliance with the order.—Stiles v. Simon, C.C.A.Ky., 290 F. 865.

Purchaser at judicial sale
Purchaser of personal property at judicial sale is entitled to injunction restraining parties to suit from interfering with right of possession.—Vermillion Coal Co. v. Powell, 148 S.E. 376, 107 W.Va. 409.

Trespasser's interference with personalty
Defendants who had no interest in realty had no right to personalty located thereon, and would be enjoined from interfering with plaintiff's use and possession of such personalty.—Nott v. Beightel, 122 P.2d 747, 155 Kan. 94.

29. Mo.—Hill v. Brothers, App., 217 S.W. 581.
32 C.J. p 120 note 18.

Mandatory injunction
Fla.—Price v. Gordon, 177 So. 276, 129 Fla. 715.

30. Fla.—Price v. Gordon, supra.

31. Idaho.—Staples v. Rossi, 65 P. 67, 7 Idaho 618.
32 C.J. p 145 note 59.

32. S.C.—Marion County Lumber Co. v. Hodges, 79 S.E. 1096, 96 S.C. 140.
32 C.J. p 145 note 60.

in the absence of an allegation of the insolvency of defendant.[33] If already severed, the timber is personal property,[34] and complainant has a plain and adequate relief by action at law.[35] It has been held, however, that, if the timber has been cut after issuance of a restraining order, but before service thereof, its removal will be enjoined.[36]

§ 72. Conveyance or Disposition of Property

In a proper case equity will enjoin a conveyance, transfer, removal, or other disposition of property where the remedy at law is inadequate; a claimant or creditor who has not reduced his claim to judgment and is without a lien, title, or interest in the property of his debtor is not entitled to such an injunction.

In the absence of an adequate remedy at law, equity may restrain the sale, conveyance, or other disposition of either real[37] or personal[38] property, as where it is necessary to prevent irreparable injury[39] and the threatened or contemplated transfer is in violation of complainant's rights.[40] Under these rules, among other instances, an injunction has been held properly granted to restrain a sale of pledged property,[41] to prevent a sale on execution by one claiming under an allegedly void transfer of the execution,[42] to restrain the disposal, or encumbering, of a judgment rendering an equitable set-off against it ineffective,[43] or to restrain a sale under a note and trust deed on the ground that the payee has been changed.[44] An injunction to compel the surrender of a bill of sale unlawfully pledged by the pledgor may be granted where the pledgor is insolvent;[45] in such case the remedy against the pledgee in replevin and for damages for withholding the bill of sale is not so clear as to require a dismissal of the bill for an injunction.[46] Creditors having a lien,[47] such as mort-

Injunction against cutting timber see supra § 66.

33. N.C.—Kistler v. Weaver, 47 S. E. 478, 135 N.C. 388.

34. N.J.—Worthington v. Moon, 30 A. 251, 53 N.J.Eq. 46.

35. N.J.—Worthington v. Moon, supra.
N.C.—Kistler v. Weaver, 47 S.E. 478, 135 N.C. 388.

36. U.S.—King v. Campbell, C.C.Va., 85 F. 814.

37. **Injunction held proper**
(1) To restrain conveyance by grantee pending determination of rights under inconsistent deeds.—Poinsard v. Poinsard, 178 A. 308, 117 Pa.Super. 313.

(2) To prevent sale of surface, timber, etc., to which lessee under coal lease is entitled.—Hagan Co. v. Norton Coal Co., 119 S.E. 153, 137 Va. 140.

(3) To prevent removal of fixtures the ownership of which is in dispute. —Ashby v. Ashby, 46 A. 528, 59 N. J.Eq. 536.

Injunction properly denied
(1) A surviving partner could not enjoin sale, encumbrance, or disposition of realty allegedly purchased with partnership funds, which was in possession of deceased partner's widow as administratrix, in absence of allegation of insolvency or of danger of irreparable injury, since surviving partner would have adequate remedy by filing notice of lis pendens.—Wright v. Edmondson, 5 S.E. 2d 769, 189 Ga. 310.

(2) Other cases.—Baker v. Central Trust Co., 51 Dauph.Co.,Pa., 260.

Property dedicated by state
The state, through its attorney general, could enjoin a threatened diversion by religious association and its mortgagee of realty which had been dedicated to the association by the state for church purposes only.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N. W. 287, 139 Neb. 867—State ex rel. Hunter v. Home Savings & Loan Ass'n of Lincoln, 288 N.W. 691, 137 Neb. 231.

38. **Injunction held proper**
(1) To prevent assignee of life policy from removing or transferring policy.—Whetstone v. New York Life Ins. Co., 169 S.E. 382, 177 Ga. 24.

(2) To prevent sale by mortgagee of mortgaged property which he had gained possession of by replevin from storage company, the mortgagor not having been made a party.—Steele v. Marlborough Hall Corporation, 280 P. 380, 100 Cal.App. 491.

Injunction properly denied
Pa.—Citizens Nat. Bank of Washington v. Wood, 191 A. 602, 326 Pa. 176—Ross v. Waite, 85 Pa.Super. 103—Manolatos v. Gianoutsos, 90 Pittsb.Leg.J. 299.

39. Ala.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A.L.R. 1413.
Ark.—L. G. Everist, Inc., v. Wood, 161 S.W.2d 18, 204 Ark. 124.
Wash.—Burke & Farrar v. Campbell, 224 P. 9, 128 Wash. 646.

Complainant must show the probability of injury if the injunction is refused.—Harvey v. Greenfield, 197 S. E. 276, 186 Ga. 192.

40. Ga.—Marshall v. Marthin, 22 S. E.2d 70, 194 Ga. 496—Reid v. Mangham, 125 S.E. 50, 159 Ga. 131.
Mass.—Frechette v. Thibodeau, 200 N.E. 538, 294 Mass. 51.
N.J.—Feld v. Kantrowitz, 130 A. 6, 98 N.J.Eq. 167, affirmed 132 A. 657, 99 N.J.Eq., 847.
Ohio.—Lange v. Winkler, App., 37 N. E.2d 552.
Pa.—Citizens Nat. Bank of Washington v. Wood, 191 A. 602, 326 Pa. 176—Pearson v. Nelley, 44 Dauph. Co. 146.

41. Fla.—Pepper v. Beville, 129 So. 334, 100 Fla. 97.

Statute authorizing injunctive relief against sale of pledged property provides provisional remedy.—First Nat. Bank v. Duncan, 285 P. 957, 142 Okl. 121.

Depreciation in the value of securities pledged by a stipulation to insure the payment of a judgment is not a ground for restraining the sale of such securities.—Harrington v. Denny, D.C.Mo., 3 F.Supp. 584.

Allegations held insufficient to warrant issuance of injunction.—Fetherston v. National Republic Bancorporation, 272 Ill.App. 500.

42. Ga.—Colter v. Livingston, 114 S. E. 430, 154 Ga. 401.

43. Cal.—Security Inv. Co. of Riverside v. Bleg-Hoffine Co., 59 P.2d 586, 15 Cal.App.2d 230.

44. Miss.—Holmes v. Ford, 176 So. 524, 179 Miss. 673.

Necessity of tender
In a suit to restrain a sale under a note and trust deed on the ground that the name of a new payee has been inserted, which is denied by the original payee, a payment need not be made to either the original or the substituted payee.—Holmes v. Ford, supra.

45. N.J.—Buttinghausen v. Rappeport, 24 A.2d 877, 131 N.J.Eq. 252.

46. N.J.—Buttinghausen v. Rappeport, supra.

47. Ky.—Shepherd v. Laviers, 209 S. W. 17, 183 Ky. 246.
32 C.J. p 151 note 96.

Even after judgment, there must be some special circumstance to authorize equitable interference by in-

gages,[48] chattel mortgagees,[49] or mechanic's lienors,[50] are in general entitled to an injunction to restrain the removal, disposal, or destruction of the property subject to their encumbrances; but ordinarily the rule is otherwise in the case of a creditor who has no lien,[51] even though defendant was preparing to leave the state or to remove his property beyond its jurisdictional limits.[52] Where a creditor has a lien or title or interest attaching to the property of his debtor, he may invoke the equitable power of the court to prevent by injunction interference by another therewith in a case where the facts would render the grant of such relief appropriate.[53]

In the absence of a statute or rule of court[54] the commencement of an action at law does not of itself entitle plaintiff to an injunction restraining defendant from disposing of his property,[55] even though such disposition of the property might prevent the collection of a judgment in the event that plaintiff should recover one.[56]

Enjoining spouse's transfers. The law does not ordinarily restrict transfers of property by the husband during his lifetime.[57] Accordingly, a wife collecting alimony is not entitled to an injunction restraining her husband from transferring any part of his assets where she does not allege that her husband was in default in payment of alimony or that such transfers would make him insolvent;[58] nor may a spouse obtain an order restraining her husband from making gifts to others until it is shown that it is likely that the husband would make such gifts.[59]

§ 73. —— Transfer or Pledge of Corporate Stock

Equity will restrain or compel the sale or transfer of stock in a proper case where the remedy at law is inadequate at least until the rights of the parties may be adjudicated.

Although an injunction will not issue to restrain the sale or transfer of shares of stock under circumstances where complainant's right to an injunction does not appear,[60] in a proper case equity will restrain or compel the sale or transfer of stock where the remedy at law is inadequate,[61] at least until the rights of the parties may be adjudi-

junction in behalf of the creditor seeking to collect his debt.—Baggerly v. Bainbridge State Bank, 128 S.E. 766, 160 Ga. 556.

Holder of purchase-money notes

Transferee of purchase-money notes secured by retention of legal title was held entitled to injunction and receivership, where building containing oil mill constituting chief value of the property had been destroyed by fire, and there was danger of loss or deterioration, and purchaser was insolvent and value of other property insufficient in connection with insurance money to pay the notes.—Carter v. Johnson, 119 S.E. 22, 156 Ga. 207.

Injunction:

In aid of creditor's bills see Creditors' Suits § 62.

To restrain conveyance in fraud of creditors see Fraudulent Conveyances §§ 460–464.

48. Md.—Baltimore City Brick Co. v. Robinson, 55 Md. 410.

49. Wash.—Schoonover v. Condon, 41 P. 195, 12 Wash. 475.
32 C.J. p 152 note 98.

50. Cal.—Barber v. Reynolds, 33 Cal. 497.

51. Ga.—Flanders v. Carter, 133 S.E. 336, 183 Ga. 360—Carter v. Johnson, 119 S.E. 22, 156 Ga. 207—Smith v. Manning, 16 S.E. 813, 155 Ga. 209.
Tex.—Youngblood v. Youngblood, Civ.App., 163 S.W.2d 731.
32 C.J. p 152 note 1.

52. Ga.—Dennard v. Farmers' & Merchants' Bank, 101 S.E. 672, 149 Ga. 590.

53. Ga.—Baggerly v. Bainbridge State Bank, 128 S.E. 766, 160 Ga. 556.

54. **Transfer of bill of lading**

Under Gen.L. c 223 § 72, and c 108 §§ 23–25, creditor seeking to subject property covered by bills of lading to payment of his debt can have negotiation of the bill of lading enjoined.—Boston Sheridan Co. v. Sheridan Motor Car Co., 138 N.E. 806, 244 Mass. 425.

55. U.S.—Martin v. James B. Berry Sons' Co., C.C.A.R.I., 83 F.2d 857.
Tex.—Youngblood v. Youngblood, Civ.App., 163 S.W.2d 731.

56. Tex.—Youngblood v. Youngblood, supra.

Allegations held insufficient to show that judgment would be uncollectable.—Security State Bank v. Spinnler, Tex.Civ.App., 55 S.W.2d 128, error dismissed.

Mortgagor's disposition of nonmortgaged property

Mortgagee's belief that deficiency judgment will be entered does not entitle him to injunction against mortgagor's disposal of other property, in absence of showing warranting attachment.—Palmetto Guano Corporation v. Green, 136 S.E. 132, 138 S.C. 106.

57. N.Y.—Marquis v. Marquis, 35 N.Y.S.2d 675, 178 Misc. 702.

58. N.Y.—Marquis v. Marquis, supra.
Fraudulent conveyances by husband to prevent recovery of alimony see Divorce § 273.

59. Wash.—Hanley v. Most, 115 P. 2d 933, 9 Wash.2d 429.

60. N.Y.—In re State Title & Mortgage Co., 287 N.Y.S. 1019, 158 Misc. 718.
Tex.—Owens v. Dallas Bank & Trust Co., Civ.App., 68 S.W.2d 275.

Tender of payment as condition precedent

Where, at the time receiver was appointed for corporation, it was in default under contract for purchase of stock and sellers had forfeited contract and retaken stock from escrow holder, and there was no showing that they were insolvent or that damages would not be complete and adequate, receiver could not, without tender of overdue payments, have sellers enjoined from exercising their rights as owners until he could determine whether it would be profitable to perform the contract.—Chapman v. First Nat. Bank, D.C.Wash., 37 F.2d 105.

61. Ala.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A.L.R. 1413.
Ill.—Wanner v. Powell, 75 Ill.App. 297.
32 C.J. p 152 note 11.

Issuance of new certificates

An owner of stock held by another as trustee may be entitled to restrain the corporation from issuing new certificates to the trustee personally, in lieu of the stock held in trust and in the possession of the trustee.—Martel v. Block, 98 So. 398, 154 La. 863.

cated.[62] The transfer of stock on the corporate books will be enjoined where it is claimed that there was a failure of consideration for the transfer or that the certificates of stock were delivered without authority[63] or that the person holding the stock sold it in violation of his duty.[64]

In accordance with the rule that equity will refuse an injunction which would be ineffectual or where the circumstances are such that the injunction cannot be enforced, as considered supra § 29, an injunction to restrain a transfer of stock which has already been completed will not be awarded since the granting thereof would be useless;[65] nor will an injunction issue to restrain a corporation from transferring on its books a shareholder's stock where the court had no jurisdiction over the shareholder and was without power to restrain him from selling and transferring his stock.[66] Under some circumstances, however, a nonresident shareholder of a domestic corporation, his pledgee, or the corporation itself may be enjoined from transferring such shareholder's certificate of stock.[67]

Where the transfer and assignment of stock in a corporation by way of a pledge as security for a debt pass title thereto to the pledgee, as discussed in Corporations § 426, the pledgee may compel the corporation to make the transfer of the shares of stock on its books and to recognize the pledgee as owner.[68]

§ 74. —— Transfer or Pledge of Instruments or Securities for Payment of Money

An injunction may issue to prevent the transfer of a negotiable instrument or security for the payment of money where it is necessary to avoid an injury for which there is no adequate remedy at law, as, for example, the rendering unavailing of a defense against the instrument in the hands of an innocent transferee, as in other cases an injunction will not as a rule issue where there is an adequate remedy at law.

In general a court of equity will, at the instance of the maker of a negotiable note having a defense against the payee, enjoin a transfer of the note which would result in destroying such defense,[69] or, as the rule is sometimes otherwise stated, equity will enjoin the transfer of a negotiable note or other negotiable instrument on grounds which, as between the maker and the payee, would prevent the payee from enforcing it,[70] and on a proper showing the court will order the instrument delivered up to the maker,[71] or canceled.[72] An injunc-

Transfer on corporate books

However, corporation could not be compelled by mandatory injunction to transfer stock subject to inheritance transfer tax in another state, where such tax was not paid.—Northern Cent. Ry. Co. v. Fidelity Trust Co., 136 A. 66, 152 Md. 94, 60 A.L.R. 558.

Stock transfer statute

(1) Provisions in stock transfer statute relating to enjoining of transfer of stock certificates by holder prevent blanket injunction restraining corporation from making any transfer of certificates on its books.—Bloch-Daneman Co. v. J. Mandelker & Son, 238 N.W. 831, 205 Wis. 641.

(2) Where only stock dividend was involved in action to enjoin the transfer of stock issued to officer of corporation, statute relating to paying dividends out of funds received for sale of stock would not apply.—Wabash Valley Coach Co. v. Turner, Ind., 46 N.E.2d 212, certiorari denied 63 S.Ct. 1167, 319 U.S. 754, 87 L.Ed. 1707.

62. Ala.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A.L.R. 1413.

63. Ala.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A.L.R. 1413.

64. N.Y.—Gray v. Gill, 210 N.Y.S. 658, 125 Misc. 70, affirmed 211 N.Y.S. 915, 214 App.Div. 833.

65. Ind.—Doss v. Yingling, 9 N.E.2d 139, 103 Ind.App. 655.

66. Del.—Skinner v. Educational Pictures Securities Corporation, 129 A. 857, 14 Del.Ch. 417.

Nonresident officer not served

In bill for accounting of nonresident officer of corporation brought by stockholder, seeking purely a personal decree for payment of money with no service on officer, injunction seeking to hold officer's shares in corporation where they then were in his name for satisfaction of a possible decree would be denied.—Skinner v. Educational Pictures Securities Corporation, supra.

67. N.J.—Warren v. New Jersey Zinc Co., 173 A. 128, 116 N.J.Eq. 315.

68. Ga.—Scott v. Flint River Pecan Co., 126 S.E. 769, 159 Ga. 668.

69. Ala.—Meredith v. Drennen Motor Car Co., 139 So. 267, 224 Ala. 84—McCormick v. Fallier, 134 So. 471, 223 Ala. 80.

Mo.—Magee v. Pope, 112 S.W.2d 891, 900, 234 Mo.App. 191, citing **Corpus Juris.**

Usurious notes

(1) Negotiation of usurious unmatured note may be restrained since it might be transferred to an innocent holder for value or to a state or national bank against whom the defense of usury would be unavailing.

U.S.—Topping v. Trade Bank of New York, C.C.A.N.Y., 86 F.2d 116.

N.Y.—Weissman v. Naitove, 211 N.Y.S. 740, 125 Misc. 647, followed in Paolillo v. Atlantic Macaroni Co., 261 N.Y.S. 919.

(2) However, if the maker of a note that is usurious has an adequate remedy at law against a holder in due course, then he has no right to an injunction restraining the negotiation of the note.—McCormick v. Fallier, 134 So. 471, 223 Ala. 80.

70. Ala.—Meredith v. Drennen Motor Car Co., 139 So. 267, 268, 224 Ala. 84, citing **Corpus Juris**—McCormick v. Fallier, 134 So. 471, 472, 223 Ala. 80, citing **Corpus Juris.**

Mo.—Magee v. Pope, 112 S.W.2d 891, 900, 234 Mo.App. 191, citing **Corpus Juris.**

32 C.J. p 152 note 6.

Limitation of rule

It has been held that an injunction is available to restrain negotiation of a note only where obtained by fraud or duress or undue influence without valid consideration.—Pappas v. D'Clonis, Tex.Civ.App., 254 S.W. 588.

71. Pa.—Dietrich v. Wilde, 25 Pa. Dist. 53.

72. Ala.—McCormick v. Fallier, 134 So. 471, 472, 223 Ala. 80, citing **Corpus Juris.**

Mo.—Magee v. Pope, 112 S.W.2d 891, 900, 234 Mo.App. 191, citing **Corpus Juris.**

Va.—Dickinson v. Bankers' Loan & Investment Co., 25 S.E. 548, 93 Va. 498.

tion will be awarded in a proper case regardless of whether the court is able to enforce its order.[73] However, an injunction will not be allowed restraining the transfer of a promissory note on a mere claim of indebtedness.[74] It has also been held proper in cases where the remedy at law was inadequate to enjoin the transfer of other instruments for the payment of money, such as bonds,[75] chattel mortgages,[76] or vendor's lien note.[77]

An injunction will not issue to enjoin the transfer of a negotiable note or other negotiable instrument where there is an adequate and complete remedy at law.[78]

Fraud, duress, or undue influence. The negotiation or transfer of negotiable securities by a holder who has obtained them fraudulently[79] or by duress[80] or undue influence[81] will be enjoined.

Failure of consideration. Complete or partial failure of consideration or want of consideration constitutes ground for restraining the transfer of negotiable securities to prevent their falling into the hands of a bona fide purchaser.[82]

Defense available at law. Ordinarily if complainant's defense can be presented in a suit at law, an injunction against the negotiation of the securities will not be granted.[83] This rule applies inter alia to defenses on past-due notes,[84] to the defense that the note was altered,[85] or where the instrument is invalid on its face[86] or its invalidity will appear on the proofs of the party claiming under it.[87] However, in accordance with the general rule considered supra §25, it is essential that the remedy at law should be as practical and as efficient as the equitable remedy in rendering justice and as prompt in its administration.[88]

Indorsement and delivery of check. Where a check is made to an agent and delivered to him for indorsement and delivery to his principal, the agent may be compelled to perform his duty by injunction where the principal has no speedy and adequate remedy at law,[89] the remedies of garnishment and attachment being inadequate.[90]

The entry of credits on unmatured negotiable instruments may be enforced by injunction where the danger of their passing into the hands of bona fide purchasers before maturity is established.[91]

§ 75. Dealing in Tickets of Carriers

Where a carrier makes its tickets nontransferable, it may enjoin persons from buying and reselling such tickets.

Railroad companies which have issued, in consideration of a reduced rate, tickets which are nontransferable and subject to forfeiture if any person other than the original purchaser attempts to use them are entitled to an injunction against brokers who are engaged in the business of buying such tickets from the original purchasers and reselling to others to be used in violation of their terms,[92] and especially is this true where the party dealing in the tickets has expressly declared his intention to continue doing so.[93]

73. Tex.—Roberts v. Stewart Farm Mortg. Co., Civ.App., 226 S.W. 1108.
32 C.J. p 152 note 9.

74. N.Y.—Sebring v. Lant, 9 How. Pr. 346.

75. Mich.—Federal Telephone & Telegraph Co. v. Robinson, 192 N.W. 711, 222 Mich. 186.

The finder of lost bonds may be enjoined from selling and disposing of them to persons who may claim to be innocent purchasers for value.—Federal Telephone & Telegraph Co. v. Robinson, supra.

76. N.Y.—Jones v. Diedrich, 3 Daly 177.
32 C.J. p 152 note 12.

77. Tex.—Neal v. Whitlock, 101 S. W. 284, 45 Tex.Civ.App. 457.

78. Ga.—Howser Bros. v. Tonson, 119 S.E. 313, 156 Ga. 447.
Tex.—Pappas v. D'Clonis, Civ.App., 254 S.W. 588.

79. Tex.—Pappas v. D'Clonis, supra.
32 C.J. p 153 note 15.

80. Tex.—Pappas v. D'Clonis, supra.

81. Tex.—Pappas v. D'Clonis, supra.

82. Mo.—Magee v. Pope, 112 S.W.2d 891, 234 Mo.App. 191.
Tex.—Pappas v. D'Clonis, Civ.App., 254 S.W. 588.
32 C.J. p 153 note 17.

"Straw owner's" note
Person taking title as straw owner of land at request of vendors and executing note to vendors without consideration could restrain transfer or assignment of note.—Haller v. Kabler, 169 N.E. 504, 269 Mass. 567.

83. Ala.—McCormick v. Fallier, 134 So. 471, 223 Ala. 80.
Ga.—Howser Bros. v. Tonson, 119 S. E. 313, 156 Ga. 447.
Tex.—American Soda Fountain Co. v. Hairston Drug Co., Civ.App., 52 S.W.2d 764.
32 C.J. p 153 note 18.

84. U.S.—New York Constr. Co. v. Simon, C.C.Ohio, 38 F. 1.
N.Y.—Galusha v. Flour City Nat. Bank, 1 Hun 573, 4 Thomps. & C. 68.

85. Neb.—Erickson v. Oakland First Nat. Bank, 62 N.W. 1078, 44 Neb. 622, 48 Am.S.R. 753, 28 L.R.A. 577.

86. U.S.—Piersoll v. Elliott, Ky., 6 Pet. 95, 8 L.Ed. 332.
32 C.J. p 153 note 21.

87. N.Y.—Venice v. Woodruff, 62 N. Y. 462, 20 Am.R. 495.
32 C.J. p 153 note 21.

88. Wash.—Ritterhoff v. Puget Sound Nat. Bank, 79 P. 601, 37 Wash. 76.

89. Okl.—Thompson v. North, 129 P. 2d 1011, 191 Okl. 356.

90. Okl.—Thompson v. North, supra.

91. Tex.—English v. Southwest Broadcasting Co., Civ.App., 81 S. W.2d 296—American Soda Fountain Co. v. Hairston Drug Co., Civ.App., 52 S.W.2d 764.

92. Ohio.—Kinner v. Lake Shore & M. S. R. Co., 69 N.E. 614, 69 Ohio St. 339.
32 C.J. p 153 note 25.

93. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U.S. 205, 52 L.Ed. 171, 12 Ann.Cas. 693.

The right invaded, the right to contract concerning a legal subject, is property within the meaning of the law;[94] and it is elementary that an actionable wrong is committed by one who maliciously interferes in a contract between the parties and induces one of them to break it to the injury of another.[95] This principle applies with full force and effect to the carrying on of the business of purchasing and selling nontransferable reduced railroad tickets for profit to the injury of the railroad issuing them,[96] and the ingredients of actual malice in the sense of personal ill will are not necessary because the element of just cause or excuse for the commission of the act is wanting.[97] The specific injury inflicted consists in cheating the carrier out of the regular fare on every mile of its line on which travel is made under cover of one of these tickets in the hands of anyone other than the original purchaser.[98]

Complainant may maintain an action at law for damages, but such a remedy is inadequate,[99] as involving a multiplicity of suits,[1] and because of the difficulty of detecting each offense and ascertaining the pecuniary equivalents for the injury to complainant's business and the inconvenience and annoyances, extra expense, outlays, and risks involved in enforcing the forfeiture provision in the contract of carriage.[2] Some decisions hold that an injunction will be awarded to prevent dealing not only in tickets issued or about to be issued but also in tickets which the carrier may issue from time to time in the future according as the business or interests of the company may require;[3] but others hold that a railroad company is not entitled to an injunction against dealing in nontransferable railway tickets which may thereafter be issued as occasion may arise.[4]

§ 76. Collection or Payment of Money

a. In general
b. Bills and notes

a. In General

An injunction may issue to prevent the payment or collection of money where there is no other adequate remedy to prevent an injury therefrom; but ordinarily it will not lie in other cases.

An injunction ordinarily will not lie for the collection of a debt or to compel the payment of money[5] or to restrain the collection or payment of money[6] where there is an adequate and complete rem-

94. U.S.—Pennsylvania Co. v. Bay, C.C.Ill., 150 F. 770—Nashville, C. & St. L. R. Co. v. McConnell, C.C. Tenn., 82 F. 65.

95. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U. S. 205, 52 L.Ed. 171, 12 Ann.Cas. 693.
Injunctions against inducing breach of contract see infra § 89.

96. U.S.—Bitterman v. Louisville & N. R. Co., supra—Nashville, C. & St. L. R. Co. v. McConnell, C.C. Tenn., 82 F. 65.

97. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U.S. 205, 52 L.Ed. 171, 12 Ann.Cas. 693.

98. Colo.—Kirby v. Union Pac. R. Co., 119 P. 1042, 51 Colo. 509, Ann. Cas.1913B 461.

99. Mo.—Schubach v. McDonald, 78 S.W. 1020, 179 Mo. 163, 101 Am.S. R. 452, 65 L.R.A. 136.
32 C.J. p 154 note 34.

1. Colo.—Kirby v. Union Pac. R. Co., 119 P. 1042, 51 Colo. 509, Ann. Cas.1913B 461.
32 C.J. p 154 note 35.

2. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U. S. 205, 255, 52 L.Ed. 171, 12 Ann. Cas. 693.

3. U.S.—Pennsylvania Co. v. Bay, C. C.Ill., 150 F. 770.
32 C.J. p 154 note 37.

4. Tex.—Lytle v. Galveston, H. & S. A. R. Co., 99 S.W. 396, 100 Tex. 292, 10 L.R.A.,N.S., 437.
32 C.J. p 154 note 38.

5. Ky.—United Mine Workers of America, Local Union 6659 v. Jones, 162 S.W.2d 17, 290 Ky. 569.
N.Y.—Max Hart Attractions v. Serpico, 22 N.Y.S.2d 745.
32 C.J. p 154 note 40.

Collection of rents
In the absence of a clause expressly conveying the rents, issues, and profits it was held that the mortgagee could not have recourse in equity against the tenant, but had the right either of an action in ejectment or by foreclosure to complete possession and ownership of the premises under the terms of the mortgage.—Peoples-Pittsburgh Trust Co. v. Henshaw, 88 Pittsb.Leg.J. 64, affirmed 15 A.2d 711, 141 Pa.Super. 585.

Operating as money judgment
Temporary mandatory injunction, not preserving status quo but, in effect, giving plaintiff money judgment payable under penalty of contempt of court, is improper.—McCollum v. McCollum, Tex.Civ.App., 67 S.W.2d 1055.

6. N.Y.—Central Sugar Co. v. Lamborn, 200 N.Y.S. 499, affirmed 186 N.Y.S. 936, 195 App.Div. 909.
Pa.—Schmitt v. Wyoming Valley Public Service Co., 33 Pa.Dist. & Co. 317—Peoples-Pittsburgh Trust Co. v. Henshaw, 88 Pittsb.Leg.J. 64, affirmed 15 A.2d 711, 141 Pa. Super. 585.
32 C.J. p 154 note 41.

Enforcement of valid lien
One who owes an amount secured by valid lien cannot avail himself of a mere irregularity or neglect of forms to shield himself by the extraordinary writ of injunction to prevent collection of the amount due.—Asher v. Everly, 32 N.E.2d 744, 109 Ind.App. 91.

The prevention of payment of ordinary wages by injunction under statute enjoining transfer of property by judgment debtor or third party would be improper.—Cunningham v. McCullough, 22 N.Y.S.2d 739.

Remedy at law, as provided by statute, held complete, adequate, efficient, plain, and effective.
N.Y.—Terner v. Glickstein & Terner, 28 N.E.2d 846, 283 N.Y. 299, reversing 17 N.Y.S.2d 1009, 258 App. Div. 985, appeal granted 18 N.Y.S. 2d 744, 258 App.Div. 1070, answering certified questions 18 N.Y.S.2d 744, 258 App.Div. 1070, motion denied 29 N.E.2d 667, 284 N.Y. 592.
Tex.—Youngblood v. Youngblood, Civ.App., 163 S.W.2d 731.

Blocked foreign funds
Equity will not intervene to restrain defendant bank from interfering with complainant's withdrawal of funds from its account where such funds have been "frozen" by executive orders of the president of

edy at law. On the other hand, where the remedy at law is inadequate,[7] or when the party about to receive or collect the money is insolvent,[8] or would be unable fully to respond to an award of damages,[9] or in a case where the remedy is conferred by statute,[10] a prohibitory or mandatory injunction may be granted with reference to the collection or payment of money. An injunction will not issue where its allowance would result in serious injury to the rights of the public[11] or where it is unnecessary for the protection of some substantial equity of complainant[12] or merely because the proceeding is representative in form.[13] A statute forbidding an action to restrain the assessment or collection of taxes cannot be extended beyond its terms.[14]

For the purpose of preventing fraud[15] or breach of trust,[16] and as ancillary relief to suits in equity,[17] the collection or payment of money may be enjoined. A mandatory injunction to compel payment of money is a proper remedy where a fund has been collected for a specific purpose under a contract authorizing disbursement of money only in the manner and form therein directed.[18]

Interference with collection. A finance company which holds the legal title to notes and purchase contracts in which dealers have a beneficial interest may restrain the dealers from interfering with the collection of such notes and contracts.[19]

b. Bills and Notes

The collection or payment of a bill or note may be enjoined in the absence of an adequate remedy at law where necessary for the prevention of fraud or where other circumstances render the collection or payment improper.

Where the remedy at law is inadequate, the collection or payment of bills, notes, or other negotiable instruments may be restrained.[20] In the exercise of its jurisdiction to prevent the consum-

the United States and complainant was entitled to apply to the secretary of treasury or the federal reserve bank for a license to withdraw its funds.—Carbone Corporation v. First Nat. Bank of Jersey City, 21 A. 2d 366, 130 N.J.Eq. 111.

7. U.S.—Mulford v. Smith, Ga., 59 S.Ct. 648, 307 U.S. 38, 83 L.Ed. 1092, affirming, D.C., 24 F.Supp. 919.
La.—Daspit v. Sinclair Refining Co., 3 So.2d 259, 198 La. 9.
N.Y.—Central Sugar Co. v. Lamborn, 200 N.Y.S. 499, affirmed 186 N.Y.S. 936, 195 App.Div. 909.
32 C.J. p 154 note 43

Particular matters restrained

(1) Delivery by county administrative assistant of federal rental check in payment of amount due a judgment debtor of complainant for compliance with federal conservation program.—Tilmon v. Adkisson, 162 S.W.2d 903, 204 Ark. 436.

(2) Payment of condemnation award to landlord prior to satisfaction of tenant's claim for reimbursement.—In re Additional Approach to Triborough Bridge, 12 N.Y.S.2d 884, 257 App.Div. 267.

(3) Payment by administrator of allegedly fraudulent claim against estate where complainant had attached interest of heir in realty.—Bosworth v. Bosworth, 167 A. 151, 53 R.I. 389.

(4) Payment to contractor's widow for money due under construction contract in injury to rights of sureties on construction bonds.—U. S. Fidelity & Guaranty Co. v. Barrow, 99 P.2d 949, 3 Wash.2d 89.

(5) Further collections of surety on official bond after full penalty had been exacted.—Riddick v. American Employers Ins. Co. of Boston, Mass., 182 So. 45, 236 Ala. 323.

(6) Payment to lessor by lessee agreeing to pay taxes before payment of income tax.—U. S. v. Morris & Essex R. Co., C.C.A.N.Y., 135 F.2d 711.

(7) Collection by plaintiff's agent of moneys belonging to plaintiff.—McDougall v. Woods, 247 Ill.App. 170.

Particular matters not restrained

(1) Payment by employer to representative of labor organization of money authorized under employment contract to be deducted from wages of employees.—Sanders v. Textile Workers Organizing Committee, 196 S.E. 543, 187 S.C. 66.

(2) Collection by an executor of money to which the estate is entitled, although he is relieved by the terms of the will from giving a bond and is alleged to be a nonresident.—In re Chisholm's Will, 264 N.Y.S. 352, 148 Misc. 158.

8. Ark.—Tilmon v. Adkisson, 162 S.W.2d 903, 204 Ark. 436.
N.Y.—Central Sugar Co. v. Lamborn, 200 N.Y.S. 499, affirmed 186 N.Y.S. 936, 195 App.Div. 909.
32 C.J. p 154 note 44.
Insolvency of defendant as ground for injunction generally see supra § 25.

9. U.S.—Mulford v. Smith, Ga., 59 S.Ct. 648, 307 U.S. 38, 83 L.Ed. 1092, affirming, D.C., 24 F.Supp. 919.

10. U.S.—U. S. v. Adler's Creamery, C.C.A.N.Y., 110 F.2d 482, certiorari denied Adler's Creamery v. U. S., 61 S.Ct. 12, 311 U.S. 657, 85 L.Ed. 421.

11. Tex.—Craven v. Davison, Civ. App., 233 S.W. 872.

12. Ind.—Asher v. Everly, 32 N.E. 2d 744, 109 Ind.App. 91.

13. **Action to recover unpaid minimum wages and overtime compensation**
N.Y.—Terner v. Glickstein & Terner, 28 N.E.2d 846, 283 N.Y. 299, reversing 17 N.Y.S.2d 1009, 258 App. Div. 985, appeal granted 18 N.Y.S. 2d 744, 258 App.Div. 1070, answering certified questions 18 N.Y.S.2d 744, 258 App.Div. 1070, motion denied 29 N.E.2d 667, 284 N.Y. 592.

14. **Deduction of penalties under Agricultural Adjustment Act** by local warehouseman from the sales price of tobacco may be enjoined by tobacco producers.—Mulford v. Smith, Ga., 59 S.Ct. 648, 307 U.S. 38, 83 L.Ed. 1092, affirming, D.C., 24 F. Supp. 919.

15. Ala.—Dunn v. Dunn, 8 Ala. 784.
Miss.—Memphis Grocery Co. v. Trotter, 7 So. 550.
32 C.J. p 155 note 49.

16. Ky.—United Mine Workers of America, Local Union 6659 v. Jones, 162 S.W.2d 17, 290 Ky. 569.

17. D.C.—Fletcher v. Kellogg, 2 F. 2d 315, 55 App.D.C. 97.
32 C.J. p 155 note 47.

18. Ky.—United Mine Workers of America, Local Union 6659, v. Jones, 162 S.W.2d 17, 290 Ky. 569.

19. U.S.—Norton v. Agricultural Bond & Credit Corporation, C.C.A. Kan., 92 F.2d 348, certiorari denied Agricultural Bond & Credit Corporation v. Norton, 58 S.Ct. 409, 302 U.S. 763, 82 L.Ed. 592.

20. Ga.—Walter E. Heller & Co. v. Capital City Supply Co., 19 S.E.2d 729, 193 Ga. 695.
Miss.—Lundy v. Greenville Bank & Trust Co., 174 So. 802, 179 Miss. 282.

mation of fraud, equity will enjoin the holder or indorsee from collecting notes or other negotiable securities which he has obtained or holds fraudulently,[21] and this principle has been extended to notes given in renewal of notes obtained by fraud or undue influence.[22] In the absence of special circumstances authorizing the intervention of equity, however, the lawful holder of a note cannot be restrained from collecting it.[23] Where, under the terms of a will, notes given by testator's children are to be deducted from their shares of the estate, the executor may properly be enjoined from collecting such a note against the spouse of a child, although such spouse is a joint maker.[24]

C. CONTRACTS

§ 77. In General

An injunction will not be granted to restrain persons sui juris from making valid contracts.

An injunction will not be granted to restrain persons sui juris from making valid contracts;[25] and injunctive relief against the making of an agreement will be denied where there is an adequate remedy at law or before an administrative agency.[26]

Injunctive relief will not be granted plaintiff when the effect of such grant would be to assist plaintiff to accomplish what he has agreed not to do,[27] or where it would result in effectuating a breach of a valid contract.[28]

§ 78. Negative or Restrictive Covenants or Stipulations in General

The enforcement of negative or restrictive covenants or stipulations by injunction is discussed infra § 79 et seq.

Examine Pocket Parts for later cases.

§ 79. —— Specific Performance Compared

An injunction to restrain the breach of a negative contract is in effect specific performance and the principles on which the two remedies are granted are generally the same.

Classifying contracts as either affirmative, where one agrees that something has been or will be done, or negative, where one agrees that something has not been or will not be done, the equitable remedy for breach of the first is a decree for specific performance and for breach of the second is an injunction.[29] Although it has been said that an injunction against the breach of a negative contract is not strictly specific performance,[30] it is, in effect, enforcing specific performance;[31] it is an indirect and

N.Y.—Nadler v. Mei Loong Corporation of China, 30 N.Y.S.2d 323, 177 Misc. 263.

However, it has been held that an injunction to prevent the collection of notes is available only where they were obtained by fraud, duress, or undue influence and without consideration.—Pappas v. D'Clonis, Tex. Civ.App., 254 S.W. 588.

21. N.C.—J. O. Proctor & Bro. v. Carolina Fertilizer & Phosphate Works, 110 S.E. 861, 183 N.C. 153.
32 C.J. p 155 note 49.

22. Vt.—Fairbanks v. Keiser, 84 A. 610, 86 Vt. 210.
32 C.J. p 155 note 51.

Enjoining attorney from enforcing client's note

Where a note was given by a client to an attorney in settlement of legal services, and an action was brought by the attorney on the renewal note, it was held that a bill for injunction would lie to restrain further proceedings and to determine the amount justly due from the client to the attorney.—Kelley v. Schwinghammer, 79 A. 260, 78 N.J. Eq. 437.

23. Ill.—Great Northern Laundry Co. v. Commercial Credit Co., 282 Ill.App. 334.

24. Iowa.—Roberts v. Roberts, 1 N.W.2d 269, 231 Iowa 394.

25. Mont.—State ex rel. Normile v. Cooney, 47 P.2d 637, 100 Mont. 391.
Restraining performance of contract see infra § 90.

26. U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529.

27. Ga.—Allmond v. Jenkins, 140 S.E. 879, 165 Ga. 334.

28. Mo.—Lewis v. Kaplan, App., 5 S.W.2d 699.

29. Fla.—Seaboard Oil Co. v. Donovan, 128 So. 821, 824, 99 Fla. 1296, quoting **Corpus Juris.**
Remedy of specific performance see the C.J.S. title Specific Performance § 1 et seq, also 58 C.J. p 846 note 1 et seq.

Action for injunction or specific performance

An action to enjoin interference with the construction of a tunnel under the land of defendant under a contract previously entered into is an action simply for injunctive relief, and not one for specific performance, so as to require certainty as to specifications of tunnel, etc.—Hydraulic Power Co. of Niagara Falls v. Pettibone Cataract Paper Co., 183 N.Y.S. 373, 112 Misc. 528, dismissal of appeal conditionally granted 188 N.Y.S. 927, 197 App.Div. 928, and affirmed 191 N.Y.S. 12, 198 App.Div. 644.

30. N.D.—Great Northern R. Co. v. Sheyenne Tel. Co., 145 N.W. 1062, 27 N.D. 256.
32 C.J. p 187 note 49.

31. U.S.—Engemoen v. Rea, C.C.A. Mo., 26 F.2d 576, certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A.Ariz., 17 F.2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1336.
Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Ill.—Dr. Allison, Dentist, Inc., v. Allison, 196 N.E. 799, 360 Ill. 638.
Mass.—Laine v. Aarnio, 164 N.E. 238, 265 Mass. 374—Edgecomb v. Edmonston, 153 N.E. 99, 257 Mass. 12.
Minn.—Reichert v. Pure Oil Co., 204 N.W. 882, 164 Minn. 252.
Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.
Ohio.—Briggs v. Butler, 45 N.E.2d 757, 140 Ohio St. 499, reversing 47 N.E.2d 812, 71 Ohio App. 48.

negative mode of compelling specific performance.[32] The jurisdiction exercised is in substance the same,[33] as are the general principles on which the two remedies are granted,[34] and where a contract is one of a class that will be specifically enforced, equity may enjoin a breach.[35] Unless otherwise expressly provided by statute,[36] the power and duty of a court of equity to grant an injunction against the breach of a contract are even greater than its power and duty to grant decrees of specific performance;[37] the remedy by injunction, in some circumstances, may be available, even though a decree for specific performance is not to be had,[38] although it has been stated that equity will not enforce a negative cov-

Wash.—Barash v. Robinson, 252 P. 680, 142 Wash. 118.
32 C.J. p 186 note 48.

Equivalent to specific performance
Ill.—Peru Wheel Co. v. Union Coal Co., 14 N.E.2d 998, 295 Ill.App. 276.

Specific performance pro tanto
Md.—Hearn v. Ruark, 129 A. 366, 148 Md. 354.

32. U.S.—National Marking Mach. Co. v. Triumph Mfg. Co., C.C.A.Mo., 13 F.2d 6.
N.H.—Manchester Dairy System v. Hayward, 132 A. 12, 82 N.H. 193—Kann v. Wausau Abrasives Co., 129 A. 374, 81 N.H. 535.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
Or.—Phez Co. v. Salem Fruit Union, 201 P. 222, 103 Or. 514, 25 A.L.R. 1090.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.
Tex.—Aldridge Seed Farms v. Texas Centennial Central Exposition, Civ. App., 95 S.W.2d 1051—Texas Farm Bureau Cotton Ass'n v. Stovall, Civ.App., 248 S.W. 1109, reversed on other grounds 253 S.W. 1101, 113 Tex. 273.
32 C.J. p 186 note 48.

33. N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.

34. U.S.—Engemoen v. Rea, C.C.A. Mo., 26 F.2d 576, 578, citing **Corpus Juris,** and certiorari denied 49 S. Ct. 28, 278 U.S. 627, 73 L.Ed. 546—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A.Ariz., 17 F.2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1336—Chicago Auditorium Ass'n v. Cramer, D.C.Ill., 8 F.2d 998, reversed on other grounds, C.C.A., Chicago Auditorium Ass'n v. Willing, 20 F.2d 837, certiorari granted Willing v. Chicago Auditorium Ass'n, 48 S.Ct. 122, 275 U.S. 519, 72 L.Ed. 404, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880—Bethlehem Engineering Export Corporation v. Christie, D.C.N.Y., 26 F.Supp. 121, affirmed, C.C.A., Bethlehem Engineering Export Co. v. Christie, 105 F.2d 933, 125 A.L.R. 1441.
Del.—New York Johnson Motor Co. v. Johnson Motor Co., 138 A. 603, 15 Del.Ch. 356.
Fla.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 130 Fla. 652, 117 A.L.R. 248—Seaboard Oil Co. v. Donovan, 128 So. 821, 99 Fla. 1296.
Ill.—Dr. Allison, Dentist, Inc., v. Allison, 196 N.E. 799, 360 Ill. 638—Tucker v. Carter Oil Co., 43 N.E. 2d 99, 315 Ill.App. 264—Peru Wheel Co. v. Union Coal Co., 14 N.E.2d 998, 295 Ill.App. 276.
Kan.—City of Holton v. Kansas Power & Light Co., 9 P.2d 675, 135 Kan. 58.
Ky.—Lexington Loose Leaf Tobacco Warehouse Co. v. Coleman, 158 S.W.2d 633, 289 Ky. 277.
Md.—Phœnix Pad Mfg. Co. v. Roth, 96 A. 762, 127 Md. 540.
Minn.—Reichert v. Pure Oil Co., 204 N.W. 882, 164 Minn. 252.
Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170—Smart v. Boston Wire Stitcher Co., 148 A. 803, 50 R.I. 409.
Tex.—Aldridge Seed Farms v. Texas Centennial Central Exposition, Civ. App., 95 S.W.2d 1051—Municipal Gas Co. v. Lone Star Gas Co., Civ. App., 259 S.W. 684, affirmed Lone Star Gas Co. v. Municipal Gas Co., 8 S.W.2d 790, 117 Tex. 331, 58 A.L.R. 797.
32 C.J. p 187 note 50.

Mandatory injunction
Del.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.
Tex.—White v. State, Civ.App., 122 S.W.2d 714.

Subject to same defenses
Ohio.—Lindner Co. v. Myrod Shoe Co., 175 N.E. 879, 38 Ohio App. 182.

35. Ohio.—Sunday Creek Coal Co. v. Big Bailey Coal Co., 26 Ohio N.P., N.S., 117.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, Civ.App., 248 S.W. 1109, reversed on other grounds 253 S.W. 1101, 113 Tex. 273.
32 C.J. p 187 note 50.
Injunction to restrain breach of contract see infra § 80 et seq.

36. Ariz.—Davies v. Johnson, 193 P. 1019, 22 Ariz. 63.
N.D.—Otter Tail Power Co. v. Clark, 229 N.W. 915, 59 N.D. 320.
Puerto Rico.—Nunez v. Nussa, 14 Puerto Rico 190.

Where contract is specifically enforceable, the statute forbidding issuance of injunction is not applicable.—Otter Tail Power Co. v. Clark, 229 N.W. 915, 59 N.D. 320.

In California
(1) Under the express provisions of Civ.Code § 3423 subd 5 and Code Civ.Proc. § 526 subd 5, an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.—Long Beach Drug Co. v. United Drug Co., 88 P.2d 698, 13 Cal.2d 158, rehearing denied 89 P. 2d 386, 13 Cal.2d 158—O'Brien v. O'Brien, 241 P. 861, 197 Cal. 577—Poultry Producers v. Barlow, 208 P. 93, 189 Cal. 278—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal.App.2d 100—Lovelace v. Free, 35 P.2d 342, 140 Cal.App. 264—Anderson v. Neal Institutes Co., 173 P. 779, 37 Cal.App. 174.

(2) However, it has been stated that the court may enjoin breach of contracts not capable of specific enforcement.—Lane Mortg. Co. v. Crenshaw, 269 P. 672, 93 Cal.App. 411.

37. U.S.—Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., C.C.A.Kan., 64 F.2d 881—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545—National Marking Mach. Co. v. Triumph Mfg. Co., C.C.A.Mo., 13 F.2d 6.
32 C.J. p 187 note 52.

38. U.S.—National Marking Mach. Co. v. Triumph Mfg. Co., supra—Singer Sewing Machine Co. v. Union Button-Hole & Embroidery Co., C.C.Wash., 22 F.Cas.No.12,904, Holmes 253.
Ala.—Buck Creek Cotton Mills v. Stokely, 181 So. 100, 236 Ala. 146.
Del.—New York Johnson Motor Co. v. Johnson Motor Co., 138 A. 603, 15 Del.Ch. 356.
La.—Daily States Pub. Co. v. Uhalt, 126 So. 228, 169 La. 893.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.
Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
Pa.—Rieger v. Pennsylvania Co., 37 Pa.Dist. & Co. 619.
32 C.J. p 187 note 52.

enant, express or implied, in a contract which it cannot specifically enforce, unless a breach of the negative covenant will cause loss to the promisee distinct from that resulting from the mere failure of the promisor to carry out his affirmative promise.[39]

Where the contract contains both affirmative and negative terms, breach of the latter may be enjoined, even though the former cannot be specifically enforced by decree,[40] where the negative and affirmative provisions are entirely separate and distinct,[41] although, as shown infra § 82 b (1) (4), according to some early decisions, relating to contracts for personal services, which decisions for the most part have been overruled, if the contract contained both affirmative and negative covenants and the affirmative covenants were of such a nature that they could not be specifically enforced, a court of equity was equally without power to enforce by injunction the negative covenants. The difficulties inherent in enforcing an affirmative contract, such as to perform personal services or to carry on an extensive business, are not met with in preventing the breach of a contract not to do something; but a court will not attempt to overcome such difficulties and enforce such an affirmative contract specifically by issuing an injunction mandatory in its nature.[42] Nevertheless injunctive relief against the breach of the negative covenant will not be ordered where the statute provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.[43]

§ 80. Relief against Breach of Contract in General

a. In general
b. Express or implied negative covenants
c. General principles applicable to issuance of injunction

a. In General

In a proper case a breach of a contract may be enjoined.

Except to the extent that injunctive relief may be forbidden by statute,[44] where the breach of a contract consists in the doing of acts that a court of equity can prevent by injunction, and when it further appears that damages at law are not an adequate remedy, because the damage cannot be computed or is otherwise irreparable, such acts may, sometimes as a result of express statutory provision, be enjoined.[45] Especially is this so where

39. Md.—Fitzpatrick v. Michael, 9 A.2d 639, 177 Md. 248.

40. Ill.—Match Corporation of America v. Acme Match Corporation, 1 N.E.2d 867, 285 Ill.App. 197.
Mich.—White Star Refining Co. v. Hansen, 231 N.W. 577, 251 Mich. 224.
32 C.J. p 187 note 53.

41. Ill.—Match Corporation of America v. Acme Match Corporation, 1 N.E.2d 867, 285 Ill.App. 197.
32 C.J. p 187 note 53 [a].

42. Tex.—Franklin Fire Proofing Co. v. Dallas, 68 S.W. 820, 29 Tex. Civ.App. 448.

43. Cal.—Long Beach Drug Co. v. United Drug Co., 88 P.2d 698, 13 Cal.2d 158, rehearing denied 89 P. 2d 386, 13 Cal.2d 158—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal. App.2d 100—Anderson v. Neal Institute Co., 173 P. 779, 37 Cal.App. 174.

44. N.Y.—Holland Laundry v. Lindquist, 16 N.Y.S.2d 140, 173 Misc. 121—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964.

45. U.S.—Roof v. Conway, C.C.A. Ohio, 133 F.2d 819—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446—Handy v. Johnson, D.C.Tex., 51 F.2d 805—National Marking Mach. Co. v. Triumph Mfg. Co., C.C.A.Mo., 13 F.2d 6—Waxmann v. Columbia Pictures Corporation, D.C.Pa., 40 F.Supp. 108, affirmed, C.C.A., 125 F.2d 1013.
Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367—Lowery v. May, 104 So. 5, 213 Ala. 66.
Cal.—General Petroleum Corporation of California v. Loughead, 24 P.2d 457, 218 Cal. 554—Associated Oil Co. v. Myers, 18 P.2d 668, 217 Cal. 297—Harlow v. Feder, 264 P. 782, 89 Cal.App. 435.
Ga.—Pepsi-Cola Co. v. Wright, 2 S. E.2d 73, 187 Ga. 723—Wofford Oil Co. v. Weems-Fuller Co., 142 S.E. 887, 166 Ga. 173—Lathem v. Odell, 142 S.E. 558, 166 Ga. 187—English v. Little, 139 S.E. 678, 164 Ga. 805.
Ill.—Ellis Electrical Laboratory Sales Corporation v. Ellis, 269 Ill. App. 417.
Ind.—Janalene, Inc. v. Burnett, 41 N. E.2d 942, 220 Ind. 253—Abshire v. Smith, 156 N.E. 408, 86 Ind.App. 354.
Iowa.—Rhoads v. Myers, 245 N.W. 707, 710, quoting **Corpus Juris.**
Kan.—Kansas Wheat Growers' Ass'n v. Ast, 234 P. 963, 118 Kan. 247—Kansas Wheat Growers' Ass'n v. Loehr, 234 P. 962, 118 Kan. 248.
Ky.—Reed v. Carter, 103 S.W.2d 663, 268 Ky. 1.
La.—Oliver v. Home Service Ice Co., App., 161 So. 766.
Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 110 Md. 236.
Mich.—White Star Refining Co. v. Hansen, 231 N.W. 577, 251 Mich. 224.
N.H.—Spaulding v. Mayo, 122 A. 899, 81 N.H. 85.
N.J.—Magna Mfg. Co. v. Ætna Casualty & Surety Co., 18 A.2d 565, 129 N.J.Eq. 142—Earrusso v. Town of Montclair, 164 A. 899, 112 N.J. Eq. 520, modified on other grounds 168 A. 398, 114 N.J.Eq. 12—City of East Orange v. Delaware, L. & W. R. Co., 121 A. 4, 94 N.J.Eq. 639.
N.Y.—Standard Fashion Co. v. Siegel-Cooper Co., 51 N.E. 408, 157 N. Y. 60, 68 Am.S.R. 749, 43 L.R.A. 854—Kelley v. Levitt & Sons, 28 N. Y.S.2d 175, 262 App.Div. 92, reargument denied 29 N.Y.S.2d 726, 262 App.Div. 891—Saratoga State Waters Corporation v. Pratt, 172 N. Y.S. 40, 184 App.Div. 561, motion denied 172 N.Y.S. 917, 186 App.Div. 933, reversed on other grounds 125 N.E. 834, 227 N.Y. 429—Belmont Quadrangle Drilling Corporation v. Galek, 244 N.Y.S. 231, 137 Misc. 637—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N.Y.S. 510, 230 App.Div. 601.
N.C.—New Hope Realty Co. v. Barnes, 147 S.E. 617, 197 N.C. 6.
Ohio.—Fuchs v. United Motor Stage Co., 22 N.E.2d 1011, 62 Ohio App. 20, affirmed 21 N.E.2d 669, 135 Ohio St. 509.

the act constituting the breach would leave defendant insolvent and incapable of responding in damages.[46] Whether or not the damage actually is irreparable is a matter to be determined by the circumstances of each particular case, and the mere difficulty of computing damages is not alone a ground for the interference of equity.[47]

The injury is considered irreparable in many cases where the parties have entered into contracts for the assignment or use of patented articles or patent rights,[48] or for the use or construction of a railroad or its right of way,[49] or, as considered infra § 83, for the sale of chattels not to be obtained elsewhere. On the other hand, no injunction should be granted where its effect would be to deprive defendant of his liberty.[50]

b. Express or Implied Negative Covenants

An injunction ordinarily is the appropriate remedy to restrain the breach of an express negative covenant and in some instances a negative covenant may be implied and its breach enjoined.

Where the contract is negative in form, requiring a party to refrain from doing certain things, injunction ordinarily is the appropriate equitable remedy.[51] However, the breach of a contract will not be enjoined merely because it is negative in form in case it is affirmative in substance.[52]

Implied negative covenants. A contract affirmative in form often involves a negative in substance, and in such case the court may import the negative quality and enjoin acts in breach of the contract, in cases where an injunction is otherwise proper; the test is not in the form of the language used, but in the quality of the acts required.[53] Where one has agreed to do a thing in a certain manner, the negative may be imported that he will not do it otherwise,[54] as, for example, in the case of a contract to construct a building according to

Or.—Guild v. Wallis, 279 P. 546, 130 Or. 148.

Pa.—Sulzer v. Conner, 41 Pa.Super. 317—DiPietro v. Cichilli, 38 Pa. Dist. & Co. 404, 42 Lack.Jur. 72, 55 York Leg.Rec. 49—Merchants' Warehouse Co. v. Crossen, 46 Dauph.Co. 185.

Tex.—Hotel & Restaurant Employees' International Alliance & Bartenders' International League of America v. Longley, Civ.App., 160 S.W.2d 124—Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, Civ. App., 48 S.W.2d 1033, error dismissed.

32 C.J. p 187 note 57.

Multiplicity of suits

Under express provisions of Code Civ.Proc. § 626 subd 6, breach of contract will be enjoined where the restraint is necessary to prevent a multiplicity of judicial proceedings. —Harlow v. Feder, 264 P. 782, 89 Cal.App. 435.

Sale of radio station

Where contract for sale of radio station owned by chamber of commerce was not invalid as in excess of power of board of governors of chamber, chamber would be restrained from doing any affirmative act, or exerting any influence to hinder or prevent performance of contract, which was unique in that it contemplated sale of station as an organized business, and sale of station's good will.—Chamber of Commerce of Hot Springs v. Barton, 112 S.W.2d 619, 195 Ark. 274.

Rule of an association of owners of property in a private community, prohibiting picketing, patrolling, and carrying of signs or in any way obstructing the property and streets of the private community, was reasonable and its continued breach by tenants of rooms or apartments in the private community would be restrained.—Sea Gate Ass'n v. Sea Gate Tenants Ass'n, 6 N.Y.S.2d 387, 168 Misc. 742, affirmed 11 N.Y.S.2d 232, 256 App.Div. 959.

46. U.S.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., Ill., 239 F. 603, 152 C.C.A. 437.
Iowa.—Rhoads v. Myers, 245 N.W. 707, 710, quoting **Corpus Juris.**

47. U.S.—Texas & P. R. Co. v. City of Marshall, Tex., 10 S.Ct. 846, 136 U.S. 393, 34 L.Ed. 385.
32 C.J. p 187 note 57, p 188 note 60.

48. Pa.—Appeal of Reese, 15 A. 807, 122 Pa. 392.
32 C.J. p 188 note 61.

49. Va.—Southern R. Co. v. Franklin & P. R. Co., 32 S.E. 485, 96 Va. 693, 44 L.R.A. 297.
32 C.J. p 188 note 62.

50. N.Y.—Burdick v. Fuller, 191 N. Y.S. 442, 199 App.Div. 94.
32 C.J. p 188 note 64.

51. U.S.—College Inn Food Products Co. v. Loudon Packing Co., C.C.A. Ind., 65 F.2d 883.
Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 31 N.E.2d 415, 308 Ill.App. 151 —First Trust & Savings Bank v. Economical Drug Co., 250 Ill.App. 112.
Ky.—Reed v. Carter, 103 S.W.2d 663, 268 Ky. 1.
Mich.—White Star Refining Co. v. Hansen, 231 N.W. 577, 251 Mich. 224.
N.J.—Phillips Oil Co. v. Galka, 22 A. 2d 533, 130 N.J.Eq. 386.
N.Y.—Kelley v. Levitt & Sons, 28 N. Y.S.2d 175, 262 App.Div. 92, reargument denied 29 N.Y.S.2d 726, 262 App.Div. 891—N. & L. Fur Co. v. Petkanas, 299 N.Y.S. 901, 252 App.Div. 844—Mohonk Realty Corporation v. Wise Shal Stores, 19 N. Y.S.2d 981, reversed on other grounds 20 N.Y.S.2d 739, 260 App. Div. 64, appeal granted 23 N.Y.S.2d 835, 260 App.Div. 909, appeal dismissed 36 N.E.2d 669, 286 N.Y. 476.
N.C.—New Hope Realty Co. v. Barnes, 147 S.E. 617, 197 N.C. 6.
Ohio.—Sunday Creek Coal Co. v. Big Bailey Coal Co., 26 Ohio N.P.,N.S., 117.
Wash.—United Dye Works v. Strom, 35 P.2d 760, 179 Wash. 41.
Wis.—Cities Service Oil Co. of Wisconsin v. Kuckuck, 267 N.W. 322, 221 Wis. 633.
32 C.J. p 189 note 66.

52. Ala.—American Laundry Co. v. E. & W. Dry Goods Co., 74 So. 58, 199 Ala. 154.
32 C.J. p 189 note 67.

53. U.S.—General Electric Co. v. Westinghouse Electric Co., C.C.N. Y., 151 F. 664.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.
N.J.—Essex Specialty Co. v. Bueschel, 173 A. 595, 116 N.J.Eq. 337.
Wis.—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
32 C.J. p 189 note 70.
Implied negative covenant in agreement for services requiring special skill see infra § 82 b (3).

54. N.Y.—Backes v. Curran, 74 N.Y. S. 723, 69 App.Div. 188.
32 C.J. p 189 notes 72, 73, 75, 76.

certain plans.[55] Nevertheless, to authorize the application of the rule under consideration, the implication must be clear and understood by all parties and indispensable to carry out their intention.[56]

c. General Principles Applicable to Issuance of Injunction

(1) In general
(2) Existence and nature of right
(3) Adequate remedy at law
(4) Conduct of complainant as affecting right
(5) Mutuality growing out of contract
(6) Provision for penalty or damages
(7) Other considerations in granting or refusing injunction

(1) In General

The granting of an injunction to restrain a breach of contract ordinarily rests in the sound discretion of the court.

In accordance with the general rule discussed supra § 14, the granting of an injunction to restrain a breach of contract rests largely in the sound discretion of the court.[57] This discretion, however, is a legal and not an arbitrary one;[58] and where the rights of the parties are based on a complete and fair contract the field of judicial discretion is much narrower than where the rights of the parties are based on the general law.[59] Relief by injunction will be granted or withheld according to the real equity of the case in view of all the facts and circumstances.[60]

(2) Existence and Nature of Right
(a) In general
(b) Doubtful and disputed rights

(a) In General

The breach of a contract which is unenforceable will not be enjoined.

An injunction will not issue to prevent the breach of a contract which is for any reason unenforceable,[61] as where the contract is against public policy,[62] or where it is unenforceable by reason of the infancy of defendant[63] or by reason of the fact that it is oral and is not to be performed within one year from the making thereof.[64] The contract, the violation of which is to be restrained, must be so far equal and just in its terms and circumstances as to be enforceable in equity and good

55. N.Y.—Backes v. Curran, supra.

56. U.S.—Kennerley v. Simonds, D. C.N.Y., 247 F. 822.
32 C.J. p 189 note 77.
Injunction refused
(1) In licensor's action against licensee under contract granting exclusive license to manufacture and sell a cooking oil, which licensor had manufactured under name of "Parev Schmaltz" but which licensee manufactured and sold under name "Nyafat," for injunction to enforce an alleged implied negative covenant by licensee not to sell "Kea," a similar oil, in competition with "Nyafat," record did not warrant granting injunction.—Parev Products Co. v. I. Rokeach & Sons, C.C.A.N.Y., 124 F.2d 147, affirming, D.C., 36 F.Supp. 686.
(2) Other cases see Kennerley v. Simonds, D.C.N.Y., 247 F. 822—32 C.J. p 189 note 77 [a].

57. U.S.—Madison Square Garden Corporation, Ill., v. Carnera, C.C.A. N.Y., 52 F.2d 47—Engemoen v. Rea, C.C.A.Mo., 26 F.2d 576, certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546.
Md.—Maas v. Maas, 168 A. 607, 165 Md. 342.
Minn.—McDonald v. Brewery and Beverage Drivers and Helpers and Warehousemen, Local Union No. 792, 9 N.W.2d 770.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
Utah.—Shell Oil Co. v. Stiffler, 48 P. 2d 503, 87 Utah 176, rehearing denied 49 P.2d 1150, 87 Utah 197.
32 C.J. p 189 note 79.

58. N.D.—Great Northern R. Co. v. Sheyenne Tel. Co., 145 N.W. 1062, 27 N.D. 256.

59. Mo.—Porter v. Johnson, 115 S. W.2d 529, 232 Mo.App. 1150.

60. U.S.—North Fork Water Co. v. Medland, C.C.Cal., 187 F. 163.
Ill.—Dr. Allison, Dentist, Inc., v. Allison, 196 N.E. 799, 360 Ill. 638.
Mass.—Service Wood Heel Co. v. Mackesy, 199 N.E. 400, 293 Mass. 183.

61. La.—Timken v. Wisner Estates, 95 So. 711, 153 La. 262.
Minn.—Tyler v. Bruce, 204 N.W. 644, 164 Minn. 167.
Neb.—Platte County Independent Tel. Co. v. Leigh Independent Tel. Co., 113 N.W. 799, 80 Neb. 41, opinion adhered to 116 N.W. 511, 80 Neb. 46.
N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App. Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199.
W.Va.—Raleigh County Bank v. Bank of Wyoming, 130 S.E. 476, 100 W.Va. 342.
32 C.J. p 190 note 82.
Agreement founded on void act of congress is unenforceable and does not warrant injunction prohibiting drilling for oil upon property contrary to terms of agreement.—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524.
Resolution of school board
Where no contract was ever entered into on the strength of school board's resolution that it approved and adopted, as the exclusive system of shorthand to be taught in public schools in city, a certain shorthand system, and that such system should be exclusive of any other courses of shorthand for a stated period, owner of such system was not entitled to have the board restrained from teaching any other system of shorthand.—Caton v. Board of Education of City of Minneapolis, 6 N.W.2d 266, 213 Minn. 165.

62. Ill.—South Chicago City R. Co. v. Calumet Electric St. R. Co., 49 N.E. 576, 171 Ill. 391.
Md.—Schill v. Remington-Putnam Book Co., 31 A.2d 467, reargument overruled 32 A.2d 296.
32 C.J. p 190 note 83.
Contracts in restraint of trade see infra § 84.

63. Ky.—Cain v. Garner, 185 S.W. 122, 169 Ky. 633, L.R.A.1916E 682, Ann.Cas.1918B 824.

64. Neb.—Platte County Independent Tel. Co. v. Leigh Independent Tel. Co., 113 N.W. 799, 80 Neb. 41, opinion adhered to 116 N.W. 511, 80 Neb. 46.

conscience;[65] and it must not operate harshly or be inequitable.[66]

(b) Doubtful and Disputed Rights

An injunction to restrain the breach of a contract will be refused where the existence of the contract is in doubt, or its existence is not established with that degree of certainty which is required, or its terms are vague, ambiguous, indefinite, or uncertain.

Where the existence of a contract is in doubt,[67] or its existence is not proved with that degree of certainty which the law requires,[68] or where its terms are vague, ambiguous, indefinite, or uncertain[69] an injunction against a breach thereof will be refused, the relief being improper where it is not clear what acts are to be performed.[70] To authorize the issuance of an injunction the terms of the agreement must be so precise that neither party could misunderstand them.[71] Where there is no immediately impending injury irreparable in nature, complainant will be left to establish his right at law.[72]

Breach doubtful. It is not necessary that a breach of contract should have already occurred in order to obtain an injunction, since threatened breaches may be enjoined if there is good ground for fearing their commission by defendant;[73] but if the threatened breach is not clearly impending, or if there is grave doubt as to whether the acts of defendant actually constitute a breach, an injunction will not issue.[74]

(3) Adequate Remedy at Law

An injunction to restrain the breach of a contract ordinarily will not issue where there is an adequate and complete remedy at law.

Although it has been held or said in some cases that, where the contract contains a direct negative stipulation, the breach thereof will be enjoined, even though no special damage can be proved, and even though damages at law would be an adequate remedy,[75] yet, subject to some well-defined exceptions, considered infra §§ 84, 87, the general rule, stated supra § 25, that an injunction will not issue where there is an adequate and complete remedy at law applies with full force and effect to the issuance of injunctions to prevent breaches of contract.[76] Where the remedy at law is adequate and com-

65. N.D.—Great Northern R. Co. v. Sheyenne Tel. Co., 145 N.W. 1062, 27 N.D. 256.

66. Kan.—Clark v. Vaughn, 292 P. 783, 786, 131 Kan. 438, citing **Corpus Juris.**
Pa.—Ferri v. Mulhern, 36 Luz.Leg. Reg. 213.
32 C.J. p 190 note 88.

67. U.S.—Chicago Auditorium Ass'n v. Cramer, D.C.Ill., 8 F.2d 998, reversed on other grounds, C.C.A., Chicago Auditorium Ass'n v. Willing, 20 F.2d 837, certiorari granted Willing v. Chicago Auditorium Ass'n, 48 S.Ct. 122, 275 U.S. 519, 72 L.Ed. 404, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880—Motor Parts Co. v. Bendix Home Appliances, D.C.Del., 36 F.Supp. 649.
N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 268, 130 N.J.Eq. 433, quoting **Corpus Juris**, and affirmed 28 A.2d 210, 132 N.J.Eq. 302.
32 C.J. p 190 note 90.
Doubtful right:
As affecting right to injunction generally see supra § 19.
Under contract in restraint of trade and business see infra § 84.

Right to enforce restrictive covenant as to use of land see infra § 87.

68. Mo.—Reynolds v. South Side Nat. Co., App., 64 S.W.2d 297, 302, quoting **Corpus Juris.**
Pa.—Keystone Ice Co. v. Klag, 54 Montg.Co. 112.
R.I.—Atlantic Refining Co. v. Dudek, 163 A. 477, 53 R.I. 44.
Tex.—Elder v. Highsmith, Civ.App., 10 S.W.2d 736—West Texas Compress & Warehouse Co. v. Panhandle & S. F. Ry. Co., Civ.App., 7 S.W.2d 597, affirmed, Com.App., 15 S.W.2d 558.
32 C.J. p 190 note 91.

69. U.S.—Okeh Phonograph Corporation v. Armstrong, C.C.A.Cal., 63 F.2d 636.
Cal.—Long Beach Drug Co. v. United Drug Co., 88 P.2d 698, 13 Cal.2d 158, rehearing denied 89 P.2d 386, 13 Cal.2d 158—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal.App.2d 100.
Ill.—Hein v. Shell Oil Co., 42 N.E.2d 949, 315 Ill.App. 297.
Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.
Md.—Hearn v. Ruark, 129 A. 366, 148 Md. 354.
Ohio.—Lindner Co. v. Myrod, Shoe Co., 175 N.E. 879, 38 Ohio App. 182.
Pa.—Fletcher v. Bien, 129 A. 558, 283 Pa. 517.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.
32 C.J. p 190 note 92.

70. Del.—Mundorff Beverage Co. v. Seven-Up Wilmington Co., Ch., 15 A.2d 174—New York Johnson Motor Co. v. Johnson Motor Co., 138 A. 603, 15 Del.Ch. 356.
Mo.—Reynolds v. South Side Nat. Co., App., 64 S.W.2d 297.
32 C.J. p 190 note 93.

71. Mo.—Reynolds v. South Side Nat. Co., supra.
32 C.J. p 191 note 94.

72. Ill.—Howell Co. v. Charles Pope Glucose Co., 49 N.E. 497, 171 Ill. 350.
32 C.J. p 191 note 95.
Adequate remedy at law see infra subdivision c (3) of this section.

73. Mass.—Jackson v. Stevenson, 31 N.E. 691, 156 Mass. 496, 32 Am. S.R. 476.
N.Y.—Lattimer v. Livermore, 72 N. Y. 174, affirming 6 Daly 501.
32 C.J. p 191 note 96.

74. Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
32 C.J. p 191 note 97.
Temporary injunction
Whether advertising company was justified in terminating plaintiff's advertising display as objectionable can be determined only at trial and not by affidavits on preliminary motion for temporary injunction.—Sanka Coffee Corporation v. Broadway Subway Advertising Co., 224 N.Y.S. 514, 221 App.Div. 579.

75. Ill.—Andrews v. Kinsbury, 72 N. E. 11, 212 Ill. 97.
32 C.J. p 191 note 98.

76. U.S.—McAlester Fuel Co. v. San Antonio Public Service Co., C.C.A. Tex., 40 F.2d 844—Chapman v. First Nat. Bank, D.C.Wash., 37 F.2d 105—Universal Rim Co. v. General Motors Corporation, D.C. Mich., 20 F.2d 966, set aside on other grounds, C.C.A., 31 F.2d 969

plete the complaining party will be remitted to it.[77] It is not enough that defendant is insolvent so that a judgment for damages against him could not be collected;[78] complainant must make an affirmative showing that the remedy at law is not adequate, except in cases where the very nature of the subject matter has led courts to presume that damages would not compensate, as in the case of contracts affecting the use and enjoyment of real property and contracts not to open up a competing business.[79]

(4) Conduct of Complainant as Affecting Right

An injunction to restrain the breach of a contract may be denied where the complainant is in default or where he has acquiesced in the breach or has been guilty of inequitable conduct.

A party is not entitled to enjoin the breach of a contract by another, unless he himself has performed what the contract required of him so far as possible; if he himself is in default or has given cause for nonperformance by defendant he has no standing in equity.[80] Small and insignificant

—Missouri-K.-T. R. Co. v. Sanders, D.C.Okl., 45 F.Supp. 602—Kelly v. Central Hanover Bank & Trust Co., D.C.N.Y., 11 F.Supp. 497, remanded, C.C.A., 85 F.2d 61.

Colo.—Mosco v. Jeannot, 282 P. 874, 86 Colo. 441.

Ga.—Moring v. Holton, 152 S.E. 254, 170 Ga. 237—Justices of Inferior Court of Dougherty County v. Croft, 18 Ga. 473.

Hawaii.—Yoshimasu v. Venhuizen, 27 Hawaii 292.

Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 31 N.E.2d 415, 308 Ill.App. 151.

Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344—Abshire v. Smith, 156 N.E. 408, 86 Ind.App. 354.

Iowa.—Eller v. Guthrie, 284 N.W. 412, 226 Iowa 467.

Kan.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., 19 P. 2d 484, 137 Kan. 217, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 551.

Ky.—Lexington Loose Leaf Tobacco Warehouse Co. v. Coleman, 158 S. W.2d 633, 289 Ky. 277—Morris v. Avondale Heights Co., 291 S.W. 752, 218 Ky. 356.

Md.—Blandford v. Duthie, 128 A. 138, 147 Md. 388.

Mass.—O'Reilly v. Frye, 160 N.E. 829, 263 Mass. 318.

Mich.—Terranova v. Cottrell Block Const. Co., 4 N.W.2d 710, 302 Mich. 417.

Neb.—Vance v. Sumner, 230 N.W. 490, 119 Neb. 630.

N.J.—Rafferty v. Schutzer, 153 A. 626, 107 N.J.Eq. 613.

N.Y.—N. & L. Fur Co. v. Petkanas, 299 N.Y.S. 901, 252 App.Div. 844—J. Walter Thompson Co. v. Winchell, 278 N.Y.S. 781, 244 App.Div. 195—Bowen v. City of Schenectady, 240 N.Y.S. 784, 136 Misc. 307, affirmed 246 N.Y.S. 913, 231 App. Div. 779.

Ohio.—Rice v. Campbell, 50 N.E.2d 430, 71 Ohio App. 477.

Okl.—Shaffer Oil & Refining Co. v. Tippett Pipe Line Co., 253 P. 275, 123 Okl. 261—Milliken v. Smith, 251 P. 84, 120 Okl. 211.

Pa.—Johnson v. Bruckhart, 21 Pa. Dist. & Co. 202, 39 Dauph.Co. 115—Pavloski v. Unatin, 90 Pittsb. Leg.J. 481.

R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.

Tex.—Harris v. Siegel, Civ.App., 68 S.W.2d 330—West Texas Compress & Warehouse Co. v. Panhandle & S. F. Ry. Co., Civ.App., 7 S.W.2d 597, affirmed, Com.App., 15 S.W.2d 558.

32 C.J. p 191 note 2.

Term "adequate remedy at law" means that the legal remedy must be as efficient as the indicated equitable relief would be, that such legal remedy must be presently available in a single action, and that such remedy must be certain and complete, taking into consideration the specific advantages to which the party to whom performance is due is entitled by the terms of the contract. —Fuchs v. United Motor Stage Co., 21 N.E.2d 669, 135 Ohio St. 509, affirming 22 N.E.2d 1011, 62 Ohio App. 20.

Adequate remedy at law

(1) As respects whether holders of corporate debentures had right to enjoin consummation of corporate loans allegedly in violation of covenants so as to entitle debenture holders to recover stock pledged by corporation as security for loans, that debenture holders would have to wait sixty days before bringing action at law for face amount of debt would not of itself have made legal remedy inadequate, unless at least some likelihood of insolvency occurring within sixty-day period were shown.—Kelly v. Central Hanover Bank & Trust Co., D.C.N.Y., 11 F.Supp. 497, remanded, C.C.A., 85 F.2d 61.

(2) Even if there was a contract between plaintiff and defendant respecting use of plaintiff's perfume bottles in filming of a motion picture by defendant and if contract was breached by defendant's use of a bottle in a scene where bottle, with plaintiff's trade-mark visible, was subject of a gift between persons allegedly depicted as immoral, and if plaintiff had a cause of action against defendant for fraud in connection with use of bottles, plaintiff's relief was by action for damages and not for injunction against showing of picture.—Caron Corporation v. R. K. O. Radio Pictures, 28 N. Y.S.2d 1020, affirmed 35 N.Y.S.2d 715, 264 App.Div. 763, reargument denied 36 N.Y.S.2d 186, 264 App.Div. 852, appeal denied 36 N.Y.S.2d 188, 264 App.Div. 852.

(3) Other cases see 32 C.J. p 191 note 2 [a].

Commercial contract

Ordinarily an action at law for money damages affords plain, adequate, and complete remedy for breach of commercial contract entered into for money profit, and injunction will not lie.—Cappetta v. Atlantic Refining Co., C.C.A.Conn., 74 F.2d 53, 98 A.L.R. 413, certiorari denied 55 S.Ct. 639, 294 U.S. 730, 79 L. Ed. 1260.

77. Ark.—McDaniel v. Orner, 120 S. W. 829, 830, 91 Ark. 171.

78. Ala.—Davis v. Kemp, 77 So. 745, 201 Ala. 219.

32 C.J. p 192 note 5.

79. U.S.—General Electric Co. v. Westinghouse Electric Co., C.C.N. Y., 151 F. 664.

Contracts in restraint of trade see infra § 84.

Covenants as to use of real property see infra § 87.

80. U.S.—College Inn Food Products Co. v. Loudon Packing Co., C.C.A. Ind., 65 F.2d 883.

Fla.—Seaboard Oil Co. v. Donovan, 128 So. 821, 824, 99 Fla. 1296, citing **Corpus Juris.**

Ind.—Bowerman v. First Merchants Nat. Bank of Lafayette, 7 N.E.2d 198, 211 Ind. 344.

Tex.—De Bolt v. Gonzalez, Civ.App., 141 S.W.2d 846.

Wash.—Vena v. Hunt, 213 P. 476, 124 Wash. 144.

32 C.J. p 192 note 9.

Restrictive covenants as to use of land see infra § 87 b (4) (d).

Only after showing of strict fulfillment of plaintiff's obligations under agreement will enforcement of agreement according to its terms be

breaches by complainant will not, however, bar his right to an injunction.[81]

Where the covenants are independently or only collaterally connected, although contained in the same instrument, a breach thereof by one party will not necessarily deprive him of the right to enjoin a violation of the contract by the other party; and where the breach is of such a nature that it may be fully repaired an injunction may be granted on condition that such reparation be made.[82]

Coming into court with clean hands. Equity will not grant injunctive relief against the breach of a contract unless complainant comes into court with clean hands,[83] although where the interests of the public are involved the court may restrain the breach notwithstanding plaintiff and defendant are in pari delicto.[84]

Acquiescence or laches. A party may lose his right to an injunction through his own acquiescence in the breach by the other party.[85] This acquiescence may be indicated in various ways, as by delay in making any objection and in seeking the injunction,[86] or by consenting to the breach in question, whether the consent is express or is implied from acts inconsistent with an intention to enforce the terms of the contract.[87] Complainant's own acts inconsistent with the contract may amount to an acquiescence in similar acts by others.[88] Acquiescence may be shown also by allowing third persons under the same contract relations with the complainant as is defendant to break their contracts without objection from him.[89] However, acquiescence in a mere trifling breach does not bar the right to enjoin some subsequent substantial breach.[90]

(5) Mutuality Growing Out of Contract

(a) Mutuality of remedy and obligation

(b) Mutuality of benefit; consideration

(a) Mutuality of Remedy and Obligation

A breach of contract usually will not be restrained unless there is mutuality of remedy and obligation.

In analogy to the remedy by specific performance the general rule is that a court of equity will not enjoin a breach of contract which is executory on both sides where the remedy is not mutual.[91] If the contract cannot be enforced by both parties, a court of equity will aid neither of them,[92] but will leave them to their remedy at law.[93] Nevertheless some decisions hold that, where there is mutuality of obligation under a contract, injunction for enforcement of the negative agreement there-

decreed.—Westchester Laboratories Sales Corporation v. Westchester Laboratories, 3 N.Y.S.2d 224, 167 Misc. 376.

Contract held not breached by plaintiff

Mass.—Rooney v. Weeks, 194 N.E. 666, 290 Mass. 18.

81. Tex.—Plaster v. Stutzman, Civ. App., 8 S.W.2d 750.

32 C.J. p 193 note 10.

82. U.S.—Clum v. Brewer, C.C. Mass., 5 F.Cas.No.2,910, Brunn.Col. Cas. 635.

83. Ala.—Ashe-Carson Co. v. Bonifay, 41 So. 816, 147 Ala. 376.

Enforcement of inequitable contract see infra subdivision c (5) (b) of this section.

84. N.D.—Otter Tail Power Co. v. Clark, 229 N.W. 915, 59 N.D. 320.

85. Iowa.—Johnson v. Robertson, 135 N.W. 585, 156 Iowa 64, Ann. Cas.1915B 137.

Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.

32 C.J. p 193 note 15.

Acquiescence and laches:

As affecting right to relief by injunction generally see infra § 171.

In respect of right to enforce restrictive covenants as to use of land see infra § 87 b (4) (d).

86. Mass.—Smith v. Brown, 42 N.E. 101, 164 Mass. 584.

32 C.J. p 193 note 16.

87. N.J.—Hemsley v. Marlborough Hotel Co., 52 A. 1132, 63 N.J.Eq. 804.

32 C.J. p 193 note 17.

88. Mass.—Scollard v. Normile, 63 N.E. 941, 181 Mass. 412.

Pa.—Ebert v. Kaufmann, 41 Pa.Super. 491.

32 C.J. p 193 note 18.

89. N.J.—Ocean City Ass'n v. Schurch, 41 A. 914, 57 N.J.Eq. 268.

32 C.J. p 193 note 19.

90. Mass.—Payson v. Burnham, 6 N. E. 708, 141 Mass. 547.

32 C.J. p 193 note 20.

91. U.S.—Madison Square Garden Corporation v. Braddock, C.C.A.N. J., 90 F.2d 924, affirming, D.C., 19 F.Supp. 392—Engemoen v. Rea, C. C.A.Mo., 26 F.2d 576, 579, citing **Corpus Juris,** and certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546—General Electric Co. v. Westinghouse Electric & Mfg. Co., C.C. N.Y., 144 F. 458.

Fla.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.

Iowa.—Wilson v. Airline Coal Co., 246 N.W. 753, 215 Iowa 855.

N.Y.—Saratoga State Waters Corporation v. Pratt, 172 N.Y.S. 40, 184 App.Div. 561, motion denied 172 N. Y.S. 917, 186 App.Div. 933, reversed on other grounds 125 N.E. 834, 227 N.Y. 429.

Or.—Harlow v. Oregonian Pub. Co., 78 P. 737, 45 Or. 520.

Pa.—Shor v. Freeman, 21 Pa.Dist. & Co. 111, 15 Lehigh Co.L.J. 411.

32 C.J. p 194 note 33.

Extent of mutuality

The mutuality required to render a contract enforceable in equity does not require that each party thereto have precisely the same remedy: it is sufficient that the contract be fair and reasonable, and that each party have the means of compelling performance of the promises mutually agreed on.

U.S.—Montgomery Light & Power Co. v. Montgomery Traction Co., C. C.A.Ala., 191 F. 657.

Fla.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 130 Fla. 652, 117 A.L.R. 248.

Pa.—Philadelphia Dairy Products Co. v. Kleiman, 36 Pa.Dist. & Co. 643—Shor v. Freeman, 21 Pa.Dist. & Co. 111, 15 Lehigh Co.L.J. 411—Cundiff v. Ertl, 47 Dauph.Co. 440.

32 C.J. p 195 note 40 [a].

92. Ill.—Welty v. Jacobs, 49 N.E. 723, 171 Ill. 624, 40 L.R.A. 98.

93. Fla.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 130 Fla. 652, 117 A.L.R. 248.

32 C.J. p 195 note 35.

in contained will not be denied because the affirmative obligation of the contract could not be enforced by the same remedy;[94] and in some jurisdictions the doctrine of mutuality of remedy no longer prevails.[95] Where there has been part performance of the contract by complainant and a failure on the part of defendant to carry it out would operate as a fraud on his rights, the fact that the contract is lacking in mutuality will not prevent the allowance of an injunction against its breach by defendant.[96]

Contract terminable at option of one party only. According to some decisions the fact that a contract is terminable at the option of one only of the parties does not of itself render the contract objectionable for lack of mutuality of remedy, or prevent the party in whose favor the option exists from enjoining a breach of the contract where a proper case is otherwise made out for equitable relief by injunction;[97] injunction will be awarded notwithstanding the option, unless the contract is of such a nature that the reservation of the option makes the whole contract inequitable.[98] Other decisions have held that there is no mutuality of remedy in a contract terminable at the option of only one of the parties and that a breach of the covenant will not be enjoined at the suit of the party in whose favor the option is given.[99]

Mutuality of obligation. While there is authority to the contrary,[1] it is very generally held that the breach of a negative covenant in a contract will not be enjoined where there is a want of mutuality in its obligation,[2] and this is so, although the contract is such that the difficulties of enforcing it against one of the parties might not be encountered in enforcing it against the other.[3]

(b) Mutuality of Benefit; Consideration

An injunction will not issue to restrain the breach of a contract which is palpably unfair, inequitable, and one-sided, although mere inadequacy of consideration is not ground for refusing relief.

Where a contract is palpably unfair, inequitable, and one-sided, and complainant is attempting to enforce an unconscionable bargain, he is not entitled to the equitable remedy of injunction,[4] but the court will relegate plaintiff to his cause of action at law, especially where it is not alleged that defendant is financially irresponsible or unable to respond in damages.[5] In considering the propriety of relief by injunction against the breach of a contract, a court of equity will not undertake to determine, whether complainant gave an adequate consideration for the right he claims; its adequacy is for the parties to determine, and an injunction issues without investigating whether defendant used

94. Wis.—Butterick Pub. Co. v. Rose, 124 N.W. 647, 141 Wis. 533.
32 C.J. p 195 note 37.

95. Del.—Sharpless-Hendler Ice Cream Co. v. Davis, 147 A. 305, 16 Del.Ch. 315.

96. N.Y.—Q. R. S. Co. v. Phillips-Jones Corp., 185 N.Y.S. 127, 194 App.Div. 170, affirmed 135 N.E. 946, 233 N.Y. 626.
32 C.J. p 195 note 39.

97. U.S.—Guffey v. Smith, Ill., 35 S. Ct. 526, 237 U.S. 101, 59 L.Ed. 856 and followed in 35 S.Ct. 532, 237 U.S. 120, 59 L.Ed. 866.
Fla.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 419, 130 Fla. 652, 117 A.L.R. 248, quoting **Corpus Juris.**
Wis.—Cities Service Oil Co. of Wisconsin v. Kuckuck, 267 N.W. 322, 221 Wis. 633.
32 C.J. p 195 note 40.

Reason for this view
The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach as the other. Mere difference in the right stipulated for does not destroy mutuality of remedy as the contract covers a wide range of obligation and duty as between the parties, and it may not be impaired so long as the bounds of reasonableness and fairness are not transgressed.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 417, 419, 130 Fla. 652, 117 A.L.R. 248, quoting **Corpus Juris**—32 C.J. p 195 note 40 [a].

98. U.S.—Singer Sewing-Mach. Co. v. Union Buttonhole & Embroidery Co., C.C.Mass., 22 F.Cas.No.12,904, 1 Holmes 253.
Wis.—Cities Service Oil Co. of Wisconsin v. Kuckuck, 267 N.W. 322, 221 Wis. 633.

99. Ill.—Ulrey v. Keith, 86 N.E. 696, 137 Ill. 284.
Pa.—Fry v. Howes, 25 Pa.Co. 493.
32 C.J. p 195 note 42.

Oil and gas lease
Okl.—Warner v. Page, 159 P. 264, 59 Okl. 259—Hill Oil & Gas Co. v. White, 157 P. 710, 53 Okl. 748.
32 C.J. p 195 note 42 [a] (2).

1. N.D.—Great Northern R. Co. v. Sheyenne Tel. Co., 145 N.W. 1062, 27 N.D. 256.
32 C.J. p 195 note 43.

2. Fla.—Thompson v. Shell Petroleum Corporation, 178 So. 413, 130 Fla. 652, 117 A.L.R. 248.
Ill.—Peru Wheel Co. v. Union Coal Co., 14 N.E.2d 998, 295 Ill.App. 276.
Iowa.—Wilson v. Airline Coal Co., 246 N.W. 753, 215 Iowa 855—Adams v. Iowa Gas & Electric Co., 203 N.W. 229, 200 Iowa 782, opinion corrected on rehearing 205 N. W. 368, 200 Iowa 782.
N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N.Y. 312, 29 A.L.R. 1325, reargument denied 142 N.E. 316, 236 N.Y. 638.
R.I.—Atlantic Refining Co. v. Dudek, 163 A. 477, 53 R.I. 44.
32 C.J. p 195 note 44.

Contract not invalid for want of mutuality
Ill.—Ellis Electrical Laboratory Sales Corporation v. Ellis, 269 Ill. App. 417.
32 C.J. p 195 note 44 [b].

3. Ill.—Bartholomae & Roesing Brewing & Malting Co. v. Modzelewski, 109 N.E. 1058, 269 Ill. 539.

4. Del.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.
Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
N.Y.—Westchester Laboratories Sales Corporation v. Westchester Laboratories, 8 N.Y.S.2d 224, 167 Misc. 376.
Wis.—Cities Service Oil Co. of Wisconsin v. Kuckuck, 267 N.W. 322, 221 Wis. 633.
32 C.J. p 195 note 46.

5. N.Y.—Witmark v. Peters, 140 N. Y.S. 642, 154 App.Div. 366.

poor judgment.[6] However, the consideration must be valuable; otherwise there is no contract either in equity or at law,[7] and, if the inadequacy is evident and so great as to shock the chancellor's conscience and lead to a conclusion of fraud or mistake, an injunction may be refused.[8] An injunction should not be granted where there is no consideration at all, where irreparable injury will occur.[9]

(6) Provision for Penalty or Damages

An injunction to restrain the breach of a contract will not be denied because the contract specifies that a penalty shall be paid on its breach, nor does a provision for liquidated damages necessarily preclude the granting of injunctive relief.

The fact that a sum of money is named in a contract as payable on its breach as a penalty and not as liquidated damages does not prevent equity from granting an injunction.[10] The penalty is intended as an additional security for the performance of the covenant and not as a substitute for performance.[11]

Liquidated damages. Where liquidated damages are provided for in case of a breach, and it appears that the intention was to give the party the alternative to perform or pay,[12] or that the liquidated damages should be an exclusive remedy,[13] the breach will not be enjoined; and it has been held that this is so, although defendant is insolvent.[14]

Nevertheless, the equitable jurisdiction of the court to enforce a negative covenant is not excluded merely by reason of the fact that in addition to the covenant the contract contains a stipulation for liquidated damages.[15] It is a question of intent to be deduced from the whole instrument and the surrounding circumstances whether the provision for liquidated damages was intended to be an exclusive remedy.[16] If the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely that an award of damages should be made for the breach, equitable relief by injunction will be granted notwithstanding the contract provides for liquidated damages for the breach.[17] A fortiori an injunction will not be denied because the contract provides for damages in case of breach where there is nothing to show that the sum named was intended as liquidated damages.[18]

(7) Other Considerations in Granting or Refusing Injunction

Various other matters may be considered in granting or refusing injunctive relief against the breach of a contract, such as the necessity for continuous supervision by the court, injury resulting to the public, etc.

In addition to the matters considered supra this section, various other matters may be of importance or decisive in determining whether an injunction to restrain the breach of a contract shall issue.[19] The mere fact that an injunction, if granted, will not in and of itself grant full and complete relief is not of itself sufficient ground for denying the writ where the party is otherwise entitled to it.[20]

6. Ill.—Ryan v. Hamilton, 68 N.E. 781, 205 Ill. 191.
Ind.—Beatty v. Coble, 41 N.E. 590, 142 Ind. 329.
32 C.J. p 196 note 49.

7. Ind.—Cincinnati, B. & C. R. Co. v. Wall, 96 N.E. 389, 48 Ind.App. 605.

8. Ga.—Shirk v. Loftis, 97 S.E. 66, 148 Ga. 500.
32 C.J. p 196 note 52.

9. N.Y.—Star Co. v. Press Pub. Co., 147 N.Y.S. 579, 162 App.Div. 486.

10. D.C.—Hundley v. Gorewitz, 132 F.2d 23, 77 U.S.App.D.C. 48—Torrey v. Wolfes, 6 F.2d 702, 56 App. D.C. 4.
Idaho.—Benewah Creek Improvement, Land & Logging Co. v. Milwaukee Lumber Co., 242 P. 793, 41 Idaho 783.
32 C.J. p 196 note 54.

11. Pa.—Mellon v. Oliver, 100 A. 796, 256 Pa. 209.

12. Ill.—American Dental Co. v. Central Dental Laboratory Co., 256 Ill.App. 279.
Ky.—Grant County Board of Control v. Allphin, 153 S.W. 417, 152 Ky. 280.
32 C.J. p 196 note 57.

13. Tex.—Bynum v. McFee, Civ. App., 70 S.W.2d 499, 500, citing **Corpus Juris.**
32 C.J. p 197 note 58.

14. N.Y.—Vincent v. King, 13 How. Pr. 234.

15. Mich.—White Star Refining Co. v. Hansen, 231 N.W. 577, 251 Mich. 224.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596—Dubert v. Blue White Star Travel Service, 21 N.Y.S.2d 932.
32 C.J. p 197 note 60.

16. N.Y.—Wirth & Hamid Fair Booking, Inc. v. Wirth, 192 N.E. 297, 265 N.Y. 214.
32 C.J. p 197 note 61.

17. Minn.—Minnesota Wheat Growers' Co-op Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.
Neb.—Nebraska Wheat Growers' Ass'n v. Norquest, 204 N.W. 798, 113 Neb. 731.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.
Wash.—Pierce County Dairymen's Ass'n v. Templin, 215 P. 352, 124 Wash. 567.
32 C.J. p 197 note 62.

18. Neb.—Hickey v. Brinkley, 129 N. W. 553, 88 Neb. 356.

19. Pa.—Merchants' Warehouse Co. v. Crossen, 46 Dauph.Co. 185.
Injury to third persons
Defendant will not be restrained by injunction from breaking his contract with complainant, when such action would necessarily compel him to break a contract with an innocent third person to the injury of such third person.—Edmundson-Randle Drug Co. v. Partin Mfg. Co., 75 So. 966, 200 Ala. 208—32 C.J. p 194 note 27.
Where subsequent events will make the performance of covenant onerous, equity will not generally enforce it.—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N.Y. S. 510, 230 App.Div. 601.

20. Ind.—Cincinnati, B. & C. R. Co.

An injunction should not be granted, it has been held, where, because of then existing facts, defendant would be unable to perform the acts commanded by the injunction;[21] where it has become impossible to perform the contract;[22] where the court is without adequate power to compel performance of the contract;[23] where the allowance of an injunction would indirectly or negatively compel the performance of duties, the specific performance of which would not be decreed if the action was brought in that form;[24] or where the breaches are merely technical and defendant is endeavoring in good faith to observe the contract;[25] but a breach of the spirit and intent of a contract will be enjoined, even though not a breach of its express terms.[26] An injunction will not be granted where it would be subversive of justice between the parties[27] or where it would serve no useful purpose.[28]

Balance of convenience and injury to public. Except, as considered infra § 87, in the case of contracts containing covenants restricting the use of land which for reasons peculiar to this class of contracts stands on a footing by itself, in accordance with the general rule stated supra § 31 that the court will take into consideration the relative inconvenience or injury which the parties will sustain by the granting or refusal of the application for injunction, where no substantial harm would be done to complainant by a breach of the contract and where very great damage would result to defendant if the relief asked for was granted, the injunction should be denied.[29] In addition, equity may decline to enjoin the breach of a contract where to do so would injuriously affect performance by defendant of duties which it owes to the public,[30] or deprive the public of the benefit of defendant's entering into an enterprise.[31]

Continuous supervision by court necessary to enforcement. Except in cases in which the public has an interest,[32] a court ordinarily will not enjoin a breach of contract where to render the injunction effective would require the continuous supervision and direction of the court for an indefinite period of time,[33] as such a duty is inappropriate to the functions of the court;[34] and especially is this so where the performance of such duty by the court would be practically impossible.[35]

Agreement for arbitration. It has been held that a provision in a contract that any differences arising thereunder shall be settled by arbitrators does not estop a party thereto from seeking an injunction to restrain a violation thereof.[36]

Agreement for termination. An injunction will not be granted to restrain defendant's alleged vio-

v. Wall, 96 N.E. 389, 48 Ind.App. 605.

21. N.Y.—Davis v. Epock Producing Corp., 155 N.Y.S. 597, 91 Misc. 631.

22. Kan.—City of Holton v. Kansas Power & Light Co., 9 P.2d 675, 135 Kan. 58.
N.Y.—Bowen v. City of Schenectady, 240 N.Y.S. 784, 136 Misc. 307, affirmed 246 N.Y.S. 913, 231 App.Div. 779.
Ohio.—Griffin v. Western Union Tel. Co., 8 Ohio Dec. (Reprint) 572, 9 Cinc.L.Bul. 22.

23. U.S.—Shubert v. Woodward, Mo., 167 F. 47, 92 C.C.A. 509.

24. U.S.—Arthur v. Oakes, Wis., 63 F. 310, 11 C.C.A. 209, 25 L.R.A. 414.
Wash.—People's Sav. Bank v. First Nat. Bank, 173 P. 52, 102 Wash. 436.
32 C.J. p 197 note 71.

25. N.Y.—Kilmer v. Dr. Kilmer, 162 N.Y.S. 617, 175 App.Div. 670, affirmed 122 N.E. 885, 225 N.Y. 705.

26. Pa.—Lukens v. Kelley, 2 Phila. 380.

27. N.J.—Williams v. M. E. Blatt Co., 123 A. 362, 95 N.J.Eq. 326.

28. N.Y.—Greenbaum v. Ripley, 22 N.Y.S.2d 385.

29. Okl.—Tulsa Creamery Co. v. Tulsa Milk Products Cooperative Ass'n, 51 P.2d 950, 175 Okl. 51.
32 C.J. p 194 note 23.

30. Ky.—Newport v. Newport Light Co., 21 S.W. 645, 14 Ky.L. 845.
32 C.J. p 194 note 25.

31. N.Y.—Fries v. Parr, 139 N.Y.S. 220.

32. Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.

33. U.S.—Bethlehem Engineering Export Co. v. Christie, C.C.A.N.Y., 105 F.2d 933, 125 A.L.R. 1441, affirming, D.C., 26 F.Supp. 121—Engemoen v. Rea, C.C.A.Mo., 26 F.2d 576, certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546—Universal Rim Co. v. General Motors Corporation, D.C.Mich., 20 F.2d 966, set aside on other grounds, C.C.A., 31 F.2d 969—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A. Ariz., 17 F.2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1336.
Cal.—Long Beach Drug Co. v. United Drug Co., 88 P.2d 698, 13 Cal.2d 158 rehearing denied 89 P.2d 386, 13 Cal.2d 158.
La.—Daily States Pub. Co. v. Uhalt, 126 So. 228, 169 La. 893.
32 C.J. p 194 note 29.

In actions:
For injunction generally see supra § 29.
To restrain breach of building covenants see infra § 87.

Injunction refused

(1) Trial court properly dismissed bill to enjoin breach of contract for joint adventure requiring supervision for period of years of matters involving exercise of skill, discretion, and judgment.—Engemoen v. Rea, C.C.A.Mo., 26 F.2d 576, certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546.

(2) Bill is not maintainable to enjoin violation of contract granting licenses under large number of patents.—Universal Rim Co. v. General Motors Corporation, D.C.Mich., 20 F.2d 966, set aside, C.C.A., 31 F.2d 969.

(3) Other cases see 32 C.J. p 194 note 29 [b].

Principle does not prevent injunctive relief against cutting of timber in violation of covenant.—May v. Lowery, 107 So. 67, 214 Ala. 230.

34. U.S.—Texas & P. R. Co. v. City of Marshall, Tex., 10 S.Ct. 846, 136 U.S. 393, 34 L.Ed. 385.

35. Cal.—Poultry Producers v. Barlow, 208 P. 93, 189 Cal. 278.

36. Kan.—Richardson v. Emmert, 24 P. 478, 44 Kan. 262.

lation of certain contracts, where it has been agreed between the parties on a good consideration to terminate such injunction prior to the commencement of the suit, in the absence of evidence that the settlement agreement had been modified or waived.[37]

Another contract outstanding. Where the right to enjoin a breach of contract is otherwise perfect, the right is not affected by the fact that defendant has entered into another contract and will have to respond in damages if he is obliged to perform the contract with complainant.[38]

Mistake. The fact that a contract was entered into by one party through mistake will not prevent the granting of an injunction against refusal to perform by such party, if complainant is otherwise entitled thereto.[39]

§ 81. Contracts for Exclusive Privileges

An injunction may issue to restrain the breach of a contract conferring an exclusive privilege.

An injunction may, sometimes as a result of express statutory provision, issue where complainant has an exclusive contract right to some privilege, to prevent such privilege from being extended to, and being enjoyed by, others; in such cases the agreement not to extend the privilege to others may be express or it may be implied from the fact that the right is agreed in positive terms to be exclusive.[40]

37. N.Y.—Northland Rubber Co. v. International Automobile League, 143 N.Y.S. 1.

38. N.J.—People's Brewing Co. v. Levin, 81 A. 1114, 78 N.J.Eq. 583.

39. U.S.—Star-Chronicle Pub. Co. v. New York Evening Post, N.Y., 256 F. 435, 167 C.C.A. 563.
32 C.J. p 197 note 65.

40. Del.—Cramer v. Lewes Sand Co., 140 A. 803, 16 Del.Ch. 66—Cramer v. Lewes Sand Co., 138 A. 78, 15 Del.Ch. 329.
Ill.—Match Corporation of America v. Acme Match Corporation, 1 N.E.2d 867, 285 Ill.App. 197—O'Cedar Corporation v. S. S. Kresge Co., 259 Ill.App. 396.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.
N.J.—Phillips Oil Co. v. Galka, 22 A.2d 533, 130 N.J.Eq. 386.
Pa.—Walsh v. Wissahickon Golf & Country Club, 58 Montg.Co. 337.
Puerto Rico.—Altagracia v. Javierre, 3 Puerto Rico Fed. 25.
Wis.—Hansen v. Taylor Beverage & Candy Co., 277 N.W. 115, 227 Wis. 140—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
32 C.J. p 224 note 35.
Injunction against breach of contract in restraint of trade see infra § 84.
Injunction to restrain third person inducing breach see infra § 89.

Agreement to sell plaintiff's gasoline, etc., exclusively

The breach of an agreement to sell plaintiff's gasoline and other petroleum products exclusively may be restrained.
Cal.—General Petroleum Corporation of California v. Loughead, 24 P.2d 457, 218 Cal. 554—Associated Oil Co. v. Myers, 18 P.2d 668, 217 Cal. 297.
Ga.—Wofford Oil Co. v. Weems-Fuller Co., 142 S.E. 887, 166 Ga. 173.
Ill.—Neer v. Coats, 265 Ill.App. 51.
Ind.—Abshire v. Smith, 156 N.E. 408, 86 Ind.App. 354.
N.J.—Phillips Oil Co. v. Galka, 22 A.2d 533, 130 N.J.Eq. 386.
Ohio.—Caldwell & Taylor Corporation v. Nieberhelman, 177 N.E. 42, 39 Ohio App. 136.

Druggist's agreement to deal exclusively in plaintiff's ice cream for three years is enforceable in equity by injunction.—Hendler Creamery Co. v. Lillich, 136 A. 631, 152 Md. 190, 60 A.L.R. 207.

Exclusive privilege of hanging advertising curtain in theater

Pa.—Lee Lash Co. v. Lyric Theater Co., 28 Pa.Dist. 264—Lee Lash Co. v. White, 16 Pa.Dist. 393.

Exclusive sales agency

The breach of a contract giving plaintiff the exclusive right to sell the products of defendant may be enjoined.
Ill.—Ellis Electrical Laboratory Sales Corporation v. Ellis, 269 Ill.App. 417.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292—Little Rock Surgical Co. v. Bowers, 42 S.W.2d 367, 227 Mo.App. 744.
Wis.—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

Co-operative marketing association agreements

(1) Injunction against member of association from disposing of produce to persons other than the association, especially where injunctive relief is expressly authorized by statute.
Ala.—Warren v. Alabama Farm Bureau Cotton Ass'n, 104 So. 264, 213 Ala. 61.
Ill.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.
Minn.—Minnesota Wheat Growers' Co-op Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.
Neb.—Nebraska Wheat Growers' Ass'n v. Norquest, 204 N.W. 798, 113 Neb. 731.
N.H.—Manchester Dairy System v. Hayward, 132 A. 12, 82 N.H. 193.
Or.—Dairy Co-op. Ass'n v. Brandes Creamery, 30 P.2d 338, 147 Or. 488, followed in 30 P.2d 344, 147 Or. 503—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109—Hollingsworth v. Texas Hay Ass'n, Civ.App., 246 S.W. 1068.
Wash.—Pierce County Dairymen's Ass'n v. Templin, 215 P. 352, 124 Wash. 567.

(2) Injunction against distributor contracting to buy entire requirements for trade.—Dairy Co-op. Ass'n v. Brandes Creamery, 30 P.2d 338, 147 Or. 488, followed in 30 P.2d 344, 147 Or. 503.

(3) Truckmen who transported milk from Connecticut producers, who were members of dairymen's co-operative association, to Rhode Island dealers designated by association, would be enjoined from delivering milk of association members to dealers not designated by association in violation of members' agreements with association, although truckmen had not induced breach of agreements, where enforcement of individual agreements would create multiplicity of suits, the remedy by damages would be inadequate, the association would sustain irreparable injury, and injunction would be effective to prevent breach of agreements.—Local Dairymen's Co-op. Ass'n v. Potvin, 173 A. 535, 54 R.I. 436.

An injunction will not be granted where the contract does not plainly confer the right to be protected[41] or where it is vague and indefinite,[42] where there is a want of mutuality of remedy,[43] where plaintiff has been guilty of laches,[44] where injunctive relief would be unjust and inequitable,[45] or where an injunction would require continuous or repeated supervision by the court.[46]

In some instances the court, where the legal remedy has been deemed adequate, has refused an injunction,[47] and a familiar application of this principle is that the remedy at law is adequate in the case of contracts to sell chattel articles exclusively to complainant, where such articles may be obtained in the market;[48] but the rule is otherwise where the remedy at law is not adequate because of the limited nature and uncertainty of the market, the necessity for going into other markets where competition is keen for a supply, the inconvenience and labor of finding a supply, the disarrangement of plaintiff's business and calculations for the future, the impossibility of determining the damages equitably, and the multiplicity of suits necessary to obtain recompense.[49]

Liquidated damages. A provision in the contract for liquidated damages does not necessarily preclude injunctive relief against its breach.[50]

41. U.S.—Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., C.C. Wash., 50 F. 493.
Ohio.—Lacy v. Heuck, 9 Ohio Dec. (Reprint) 347, 12 Cinc.L.Bul. 209.
32 C.J. p 224 note 36.

42. Del.—New York Johnson Motor Co. v. Johnson Motor Co., 138 A. 603, 15 Del.Ch. 356.
Contract held not indefinite.
Ill.—O'Cedar Corporation v. S. S. Kresge Co., 259 Ill.App. 396.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S. W. 1109.

43. Minn.—Reichert v. Pure Oil Co., 204 N.W. 882, 164 Minn. 252.
However, in some jurisdictions the doctrine of mutuality of remedy no longer prevails.—Sharpless-Hendler Ice Cream Co. v. Davis, 147 A. 305, 16 Del.Ch. 315.

Remedy held mutual

(1) While a cotton grower might sue for damages for a co-operative marketing association's breach of its contract to market his cotton, such action would ordinarily be ineffective or inadequate, in view of the fact that the association has no capital stock, so that the contract is not unenforceable in equity at the association's suit because of lack of mutuality of remedies, the grower being entitled to equitable relief in the event of a breach by the association.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.

(2) A co-operative marketing association, organized under Vernon Civ. St.Annot.Suppl. 1922 arts 14½k–14½yy, being an association, ordinarily unincorporated, without capital stock, having members instead of stockholders, and operated for some mutually beneficial purpose, as shown by arts 14½pp–14½qq, a grower's contract, as part of his membership application, to sell his cotton to it exclusively, is not unenforceable in equity for lack of mutuality of remedies, he being entitled to have it performed by the association, whose refusal would be tantamount to suspending or expelling him.—Texas Farm Bureau Cotton Ass'n v. Stovall, supra.

Effect of statute authorizing injunction

A co-operative marketing association, organized under Co-operative Marketing Act, Vernon Civ.St.Annot. Suppl. 1922 arts 14½k–14½yy, may enforce performance of a grower's contract to sell his cotton to it exclusively, in a suit for specific performance or for an injunction against a breach, as authorized by the statute, even if otherwise unenforceable in equity for lack of mutuality of remedies.—Texas Farm Bureau Cotton Ass'n v. Stovall, supra.

44. **Laches not shown**
Wis.—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N. W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S. Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

45. Okl.—Tulsa Creamery Co. v. Tulsa Milk Products Co-operative Ass'n, 51 P.2d 950, 175 Okl. 51.

46. U.S.—Bethlehem Engineering Export Co. v. Christie, C.C.A.N.Y., 105 F.2d 933, 125 A.L.R. 1441, affirming, D.C., 26 F.Supp. 121.

47. U.S.—Bethlehem Engineering Export Corporation v. Christie, D. C.N.Y., 26 F.Supp. 121, affirmed, C. C.A., Bethlehem Engineering Export Co. v. Christie, 105 F.2d 933, 125 A.L.R. 1441.
Mich.—O'Melia v. Berghoff Brewing Corporation, 8 N.W.2d 141, 304 Mich. 471, 145 A.L.R. 679.
N.Y.—N. & L. Fur Co. v. Petkanas, 299 N.Y.S. 901, 252 App.Div. 844.
32 C.J. p 224 note 38.

Determination of adequacy of legal remedy

Whether complainant, in suit to enjoin violation of contract to sell complainant's gasoline exclusively, had an adequate remedy at law against defendant, was to be determined by defendant's solvency, the difficulty of ascertaining complainant's damages, multiplicity of suits entailed, and continuing character of injury.—Phillips Oil Co. v. Galka, 22 A.2d 533, 130 N.J.Eq. 386.

48. N.Y.—St. Regis Paper Co. v. Santa Clara Lumber Co., 67 N.Y.S. 149, 55 App.Div. 225.
32 C.J. p 224 note 39.
Injunction against breach of contract for sale of chattels see infra § 83.

49. Mich.—White Marble Lime Co. v. Consolidated Lumber Co., 172 N. W. 603, 205 Mich. 634.
32 C.J. p 224 note 40.

50. Minn.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 203 N.W. 420, 162 Minn. 471.
Effect of provision for liquidated damages generally see supra § 80 c (6).
Contract between co-operative marketing association and member for sale of produce.
Minn.—Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, supra.
Neb.—Nebraska Wheat Growers' Ass'n v. Norquest, 204 N.W. 798, 113 Neb. 731.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.
Tex.—Texas Farm Bureau Cotton Ass'n v. Stovall, 253 S.W. 1101, 113 Tex. 273, reversing, Civ.App., 248 S.W. 1109.
Wash.—Pierce County Dairymen's Ass'n v. Templin, 215 P. 352, 124 Wash. 567.

§ 82. Contracts for Personal Services

a. Breach by employer
b. Breach by employee

a. Breach by Employer

The breach of a contract for personal services ordinarily cannot be enjoined at the suit of the employee.

Subject to certain limitations or exceptions either actual or apparent,[51] it is very generally held that an employee, whether classed as an agent or as a servant, cannot enforce a contract for service by enjoining a breach on the part of his employer.[52] The employer will not be enjoined from dismissing an employee or from refusing to continue to employ him, even though such action is a direct violation of contract.[53] Regardless of contract, a court of equity will not compel an employer to continue in his employ a servant or agent distasteful to him or be bound by the acts of an agent whom he no longer desires to represent him.[54] A fortiori no injunction will be granted when complainant has given cause for dismissal.[55] If there is any doubt as to the existence of the contract right or as to the fact of a breach on the part of the employer, the case against complainant is all the stronger.[56]

b. Breach by Employee

(1) In general
(2) Services requiring no special skill
(3) Services requiring special skill
(4) Services of theatrical performer
(5) Services of baseball player

(1) In General

A breach of a contract by an employee ordinarily will not be restrained, and injunctive relief is improper where it is prohibited by statute.

A contract to render personal services ordinarily cannot be specifically enforced directly by a court of equity; nor will it indirectly or negatively by means of an injunction restrain the violation of a contract by compelling the performance from day to day by the employee of his engagement.[57] In some of the early decisions, both English and American, it was held that, where a contract contains both an affirmative covenant to work for a designated party for a certain time and a negative covenant not to work for anyone else during that period, the court, being unable to enforce specifically the affirmative covenant, was without power to enforce by injunction the negative covenant;[58] but, as shown infra subdivision b (3) of this section, this

51. Cal.—Lane Mortg. Co. v. Crenshaw, 269 P. 672, 93 Cal.App. 411. 32 C.J. p 199 note 85.

Breach of contract of agency coupled with an interest may be enjoined, if warranted by the evidence, irrespective of whether the contract can be enforced.
Ala.—Buck Creek Cotton Mills v. Stokely, 181 So. 100, 236 Ala. 146.
Cal.—Lane Mortg. Co. v. Crenshaw, 269 P. 672, 93 Cal.App. 411.

52. Ark.—Paving Improvement Dist. No. 105 of Pine Bluff v. Wright, 28 S.W.2d 1062, 1064, 181 Ark. 919, citing **Corpus Juris.**
Ind.—Schwier v. Zitike, 36 N.E. 30, 136 Ind. 210.
Minn.—Safro v. Lakofsky, 238 N.W. 641, 184 Minn. 336.
N.Y.—Auerbach v. Northland Rubber Co., 161 N.Y.S. 396.
Ohio.—Rauh v. Siebler Tailoring Co., 30 Ohio N.P.,N.S., 442.
Injunction to restrain breach of collective agreement between management and labor see infra § 138.

Contract for personal services which cannot be enforced affirmatively will not be enforced by equity negatively; nor will it enjoin the breach of a negative covenant express or implied unless the breach will cause a loss to the promisee independent of the loss caused by the mere failure of the promisor to perform his affirmative covenants.—Fitzpatrick v. Michael, 9 A.2d 639, 177 Md. 248.

53. Ala.—Hewitt v. Magic City Furniture & Mfg. Co., 107 So. 745, 746, 214 Ala. 265, 44 A.L.R. 1441, citing **Corpus Juris.**
Ill.—Gold v. Metropolitan Trust Co., 17 N.E.2d 239, 297 Ill.App. 632, 633.
Ind.—Schwier v. Zitike, 36 N.E. 30, 136 Ind. 210.
La.—Seiler v. Fairex, 23 La.Ann. 397.
Miss.—Chambers v. Davis, 91 So. 346, 128 Miss. 613, 22 A.L.R. 114.
N.Y.—Bleendes v. Fellerman, 35 N.Y.S.2d 247, 264 App.Div. 223.
32 C.J. p 199 note 87.

Eviction by employer after discharge will not be restrained.—Tidd v. General Printing Co., 257 Ill.App. 596.

Appointment of successor and the assumption by him of the duties of the position cannot be prevented by injunction.—Healey v. Dillon, 2 So. 49, 39 La.Ann. 503—32 C.J. p 199 note 91.

54. N.Y.—Cooke v. Dodge, 299 N.Y.S. 257, 164 Misc. 78, modified on other grounds 4 N.Y.S.2d 768, 254 App. Div. 808—Kerr SS. Co. v. Kerr Nav. Corp., 184 N.Y.S. 646, 113 Misc. 56.

55. U.S.—Coburn v. Cedar Valley Land & Cattle Co., C.C.Tex., 25 F. 791.

56. N.Y.—Bronk v. Riley, 3 N.Y.S. 446, 50 Hun 489, modified on other grounds 21 N.E. 181, 113 N.Y. 482.
32 C.J. p 199 note 90.

57. U.S.—General Petroleum Corporation of California v. Beanblossom, C.C.A.Wash., 47 F.2d 826—Engemoen v. Rea, C.C.A.Mo., 26 F. 2d 576, 579, citing **Corpus Juris,** and certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546—Bethlehem Engineering Export Corporation v. Christie, D.C.N.Y., 26 F. Supp. 121, affirmed, C.C.A., Bethlehem Engineering Export Co. v. Christie, 105 F.2d 933, 125 A.L.R. 1441.
Ill.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill. App. 298—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill.App. 435.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N. E.2d 710, 273 N.Y. 596.
32 C.J. p 199 notes 93, 94.
Injunction to restrain breach of:
Collective agreement see infra § 138.
Covenant not to compete with employer after termination of employment see infra § 84.
Specific performance of contract for personal services see the C.J.S. title Specific Performance § 82, also 58 C.J. p 1056 note 10 et seq.

58. N.Y.—Sanquirico v. Benedetti, 1 Barb. 315.
32 C.J. p 200 note 95.

rule has in general been abrogated by later decisions in the same jurisdiction.

Statutes prohibiting injunction. Where prohibited by statute, an injunction may not issue to restrain an individual employee from quitting or threatening to quit his employment in violation of his contract of employment.[59]

(2) Services Requiring No Special Skill

A breach by an employee of a contract for personal services requiring no special skill or qualification will not be enjoined.

In the case of contracts to render services requiring no special skill or qualification, a breach of the contract by the employee will not be enjoined,[60] at least where the employee is not in possession of trade secrets or confidential information of the employer;[61] and this is also true, although he has expressly agreed to work for no one else or to devote all his time to the service of complainant.[62] The rule applies, although the employee showed bad faith in quitting and an utter disregard of contract rights and of the public convenience.[63]

The mere fact that the employee is financially irresponsible will not justify an injunction restraining a breach of covenant not to work for others than the employer.[64]

(3) Services Requiring Special Skill

The breach of a contract to render special, unique, or extraordinary personal services may be restrained, and in some jurisdictions the breach may be enjoined, although the contract contains no express negative covenant not to work for others.

Unless injunctive relief is prohibited by statute,[65] it is now very generally held subject to certain limitations in some jurisdictions that, where one contracts to render special, unique, or extraordinary personal services requiring special merit or qualification, or where the services to be rendered are purely intellectual, or are peculiar and individual in

59. N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441.
32 C.J. p 199 note 94 [a].
Statutes prohibiting injunctive relief in labor disputes see infra § 138.

60. U.S.—Kennerley v. Simonds, D. C.N.Y., 247 F. 822.
Minn.—Safro v. Lakofsky, 238 N.W. 641, 642, 184 Minn. 336, quoting **Corpus Juris.**
N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N.Y. 312, 29 A.L.R. 1325, reversing 184 N.Y.S. 914, 193 App.Div. 924, which affirmed 177 N.Y.S. 614, 108 Misc. 399, and reargument denied 142 N. E. 316, 236 N.Y. 638—Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 235 N.Y. 1, affirming 188 N.Y. S. 678, 197 App.Div. 66—Voorhees & Hobart v. Hobart, 295 N.Y.S. 616, 251 App.Div. 111—Small v. Kronstat, 24 N.Y.S.2d 535, 175 Misc. 626—Lantieri Beauty Salon v. Yale, 7 N.Y.S.2d 984, 169 Misc. 547—Eldridge v. Milo, 222 N.Y.S. 420, 129 Misc. 666—Merl, Inc., v. Richfield-Jenks, 209 N.Y.S. 530, 125 Misc. 318.
Ohio.—Briggs v. Butler, 45 N.E.2d 757, 140 Ohio St. 499, reversing 47 N.E.2d 812, 71 Ohio App. 48.
Wyo.—Beatty v. Chicago, B. & Q. R. Co., 52 P.2d 404, 49 Wyo. 22.
32 C.J. p 200 note 97.
"The enforcement of negative covenants in contracts of personal service is based squarely upon the theory that the defendant's services are unique and extraordinary and therefore cannot be compensated for in money damages."—Madison Square Garden Corporation v. Braddock, C.C.A.N.J., 90 F.2d 924, 926, affirming, D.C., 19 F.Supp. 392.

Reason for rule is that other employees may be found to do the work, and damages at law are adequate compensation for the breach of contract.—Simms v. Burnette, 46 So. 90, 55 Fla. 702, 127 Am.S.R. 201, 16 L. R.A.,N.S., 389, 15 Ann.Cas. 690—32 C. J. p 200 note 1.

Salesman generally
Experience, competency, and a high degree of efficiency in exploiting and selling any brand of goods are qualifications which can hardly be so rare as to require the aid of equity to prevent irreparable loss by an employer who finds himself compelled to substitute one saleswoman for another.
Iowa.—H. W. Gossard Co. v. Crosby, 109 N.W. 483, 132 Iowa 155, 176, 6 L.R.A.,N.S., 115.
N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N.Y. 312, 29 A.L.R. 1325, reversing 184 N.Y.S. 914, 193 App.Div. 924, which affirmed 177 N.Y.S. 614, 108 Misc. 399, and reargument denied 142 N. E. 316, 236 N.Y. 638.

Effect of recovery of damages for wrongful discharge
One employed for twelve-month period in business of manufacturing and selling ice under contract requiring him not to engage in business of selling or delivering ice in district in competition with his employer, and who, after being wrongfully discharged, recovered damages, was precluded from any course not consistent with his employment during the twelve-month period, and injunction was properly issued to restrain him from selling ice in employer's district during the term for which his employment was to run.—Southern Properties v. Carpenter, Tex.Civ.App., 21 S.W.2d 372, error dismissed.

61. N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N.Y. 312, 29 A.L.R. 1325, reversing 184 N.Y.S. 914, 193 App.Div. 924, which affirmed 177 N.Y.S. 614, 108 Misc. 399, and reargument denied 142 N. E. 316, 236 N.Y. 638—Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 235 N.Y. 1, affirming 188 N.Y. S. 678, 197 App.Div. 66—Corpin v. Wheatley, 237 N.Y.S. 205, 227 App. Div. 212.
Injunction to prevent use or disclosure of trade secrets see infra § 148.

Betrayal of trust and confidence
The general rule has no application to a case involving the betrayal of a trust and confidence reposed in the employee by his employer by attempting to take away for his own benefit and in direct violation of his express contract his employer's customers, knowledge of whom he had acquired in the course of the performance of his duty as an employee.—Cahill v. Madison, 94 Ill. App. 216.

62. Minn.—Safro v. Lakofsky, 238 N.W. 641, 184 Minn. 336.
32 C.J. p 200 note 98.

63. U.S.—Arthur v. Oakes, Wis., 63 F. 310, 11 C.C.A. 209, 25 L.R.A. 414.

64. Iowa.—H. W. Gossard Co. v. Crosby, 109 N.W. 483, 132 Iowa 155, 6 L.R.A.,N.S., 1115.

65. N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441.

their character, and where in case of default the same service is not to be obtained from others, although equity will not interfere to enforce specific performance of the whole contract, yet because the damage will be irreparable it will exert its preventive power and enjoin the employee from working for others or doing positive acts in violation of the contract.[66] Especially should an injunction be granted if in addition the services involve trade secrets.[67] It has been held that an injunction will not be refused because of the balancing of the conveniences, as such doctrine applies only to motions pendente lite.[68]

Nevertheless it has been held that an injunction will not be granted restraining a servant from devoting his services to another where complainant does not offer to continue the servant in his employ,[69] where the contract is unenforceable against defendant by reason of his minority,[70] where there is want of mutuality of remedy,[71] where no substantial benefit to complainant could arise from the granting of an injunction,[72] or where it is not necessary for the protection of the covenantee or reasonable and equitable under the facts of the case.[73]

Necessity for express negative covenant. In a number of decisions where the general rule is laid down, the contract which furnished the basis of the litigation contained an express negative covenant on the part of the employee not to work for anyone else during the period covered by the contract.[74] In other decisions in which an injunction was granted, it did not appear whether or not the contract contained an express negative covenant, the necessary inference being that the court considered a covenant of this character unnecessary;[75] and in many decisions it has been directly held that, even in the absence of an express negative covenant, the contract being such that its performance must necessarily prevent any further service for others, a negative covenant not to work for others during the period covered by the contract will be implied and will be enforced by injunction.[76] However, some decisions take the view that in the absence of an express negative covenant none can be implied, and that no injunction against the breach of a contract not containing such a covenant can be awarded.[77]

An author, editorial writer, or columnist may be enjoined from breaking his contract for literary work.[78]

66. U.S.—Madison Square Garden Corporation, Ill., v. Carnera, C.C.A.N.Y., 52 F.2d 47—Associated Newspapers v. Phillips, C.C.A.N.Y., 294 F. 845.
Ala.—Buck Creek Cotton Mills v. Stokely, 181 So. 100, 236 Ala. 146—Hewitt v. Magic City Furniture & Mfg. Co., 107 So. 745, 214 Ala. 265, 44 A.L.R. 1441, quoting **Corpus Juris**—Roquemore & Hall v. Mitchell Bros., 52 So. 423, 167 Ala. 475, 140 Am.S.R. 52.
N.Y.—Shubert Theatrical Co. v. Gallagher, 201 N.Y.S. 577, 206 App. Div. 514.
Tex.—Cleere v. Wise, Civ.App., 153 S.W.2d 311—Byers v. Trans-Pecos Abstract Co., Civ.App., 18 S.W.2d 1096, 1098, error dismissed, citing **Corpus Juris.**
32 C.J. p 201 note 6.

Services of particular persons
(1) Inventor employed to invent and design toys, etc.—Essex Specialty Co. v. Bueschel, 173 A. 395, 116 N.J.Eq. 337.
(2) Prizefighter.—Madison Square Garden Corporation, Ill., v. Carnera, C.C.A.N.Y., 52 F.2d 47.
(3) Other persons see 32 C.J. p 201 note 6 [b].

Expiration of contract period
Equity properly took jurisdiction to hear case on application for injunction against violation of defendant's agreement not to work for others than plaintiff during term of personal service contract in force when bill was filed, although the period provided by the contract for the services of defendant expired before the case was ripe for final decree.—Rooney v. Weeks, 194 N.E. 666, 290 Mass. 18.

67. N.Y.—Clark Paper & Mfg. Co. v. Stenacker, 165 N.Y.S. 367, 100 Misc. 173, modified on other grounds 170 N.Y.S. 1073, 183 App.Div. 915.
Injunction to restrain employee from revealing trade secrets see infra § 148.

68. N.J.—Tribune Ass'n v. Simonds, Ch., 104 A. 386.
32 C.J. p 201 note 8.

69. N.J.—Taylor Iron & Steel Co. v. Nichols, 69 A. 186, 73 N.J.Eq. 684, 133 Am.S.R. 753, 24 L.R.A.,N.S., 933.

70. Ky.—Cain v. Garner, 185 S.W. 122, 169 Ky. 633, L.R.A.1916E 682, Ann.Cas.1918B 824.
Pa.—Bradley v. Cool, 18 Pa.Dist. & Co. 404.
32 C.J. p 201 note 10.

71. U.S.—Madison Square Garden Corporation v. Braddock, C.C.A.N.J., 90 F.2d 924, affirming, D.C., 19 F.Supp. 392—Kenyon v. Weissberg, D.C.N.Y., 240 F. 536.

72. N.Y.—Max Hart Attractions v. Serpico, 22 N.Y.S.2d 745—De Pol v. Sohlke, 30 N.Y.Super. 280.

73. N.Y.—Eastman Kodak Co. v. Warren, 178 N.Y.S. 14, 108 Misc. 680, reversed on other grounds 179 N.Y.S. 325, 189 App.Div. 556.

74. U.S.—Madison Square Garden Corporation, Ill. v. Carnera, C.C.A.N.Y., 52 F.2d 47.
N.Y.—Shubert Theatrical Co. v. Gallagher, 201 N.Y.S. 577, 206 App.Div. 514.
32 C.J. p 201 note 14.

75. Ala.—Edmundson-Randle Drug Co. v. Partin Mfg. Co., 75 So. 966, 200 Ala. 208.
32 C.J. p 201 note 15.

76. N.J.—Essex Specialty Co. v. Bueschel, 173 A. 595, 116 N.J.Eq. 337.
N.Y.—Harry Rogers Theatrical Enterprises v. Comstock, 232 N.Y.S. 1, 225 App.Div. 34.
32 C.J. p 201 note 16.

77. U.S.—Madison Square Garden Corporation v. Braddock, C.C.A.N.J., 90 F.2d 924, affirming, D.C., 19 F.Supp. 392.
Iowa.—H. W. Gossard Co. v. Crosby, 109 N.W. 482, 132 Iowa 155, 6 L.R.A.,N.S., 1115.
32 C.J. p 201 note 17.

78. U.S.—Associated Newspapers v. Phillips, C.C.A.N.Y., 294 F. 845.
32 C.J. p 203 note 38.

Writer of humorous newspaper articles
U.S.—Associated Newspapers v. Phillips, supra.

(4) Services of Theatrical Performer

The breach of a contract of a theatrical performer will be restrained where the services require special qualification and cannot be duplicated by others, at least where the contract contains an express negative covenant not to perform for others.

Some of the earlier decisions laid down the rule that a theatrical performer who is engaged to perform for a theatrical manager for a specified time would in no circumstances be enjoined from performing for a rival theater, even though he had specifically agreed not to do so, the view being taken that the court, being without power to enforce specifically the affirmative covenant, is equally without power to enforce by injunction the negative covenant;[79] but, as hereinafter considered, this rule has very generally undergone substantial modification where the services in question are such as to require special skill.

Services requiring special skill. In the absence of statute prohibiting injunctive relief, the general rule now is that, where the performer's services are to be regarded as requiring special qualification and not to be duplicated by others, so that the damage caused by the breach is irreparable, a specific negative agreement not to perform for another will be enforced by injunction;[80] and in some decisions this rule has been extended to cases where the contract contains no express negative covenant but where the agreement not to perform can be implied from the impossibility of performing in two places at once;[81] but this extension of the rule has been refused in other decisions which hold that no injunction will issue to restrain the performance of services for another manager during the period of the contract, in the absence of an express covenant not to do so.[82]

Even where the contract contains an express negative covenant, it will not be enforced by injunction where the manager has himself breached the contract;[83] where it appears that the manager will be unable to pay for the services contracted for;[84] where the party seeking relief is not bound by the contract;[85] where the contract is one-sided and unconscionable;[86] where the contract is indefinite and uncertain;[87] or where the parties have stipulated for the damages to be paid in order to have the privilege of performing elsewhere.[88] Where the granting of an injunction would confer no substantial benefit on complainant, defendant should not be restrained.[89]

Services not requiring special skill. In accordance with the general rule considered supra subdivision b (2) of this section, an injunction will not be granted to restrain an actor under contract with a theatrical manager to perform for a designated time from acting for another manager during that time where his services are not special and unique and can be replaced by hiring others in his stead.[90]

(5) Services of Baseball Player

The breach of a contract of a baseball player may be restrained where his services are of a peculiar value and difficult of substitution, at least where the contract contains an express negative covenant not to play for another team.

In the absence of a statute prohibiting injunctive relief, where the services of a baseball player are

79. N.Y.—Sanquirico v. Benedetti, 1 Barb. 315.
32 C.J. p 202 note 18.

80. N.Y.—Shubert Theatrical Co. v. Gallagher, 201 N.Y.S. 577, 206 App. Div. 514.
32 C.J. p 202 note 20.

81. N.Y.—Harry Rogers Theatrical Enterprises v. Comstock, 232 N.Y. S. 1, 225 App.Div. 34.
32 C.J. p 202 note 21.

82. Md.—Burton v. Marshall, 4 Gill 487, 45 Am.D. 171.
32 C.J. p 202 note 22.

83. **Contract not breached by plaintiff**

(1) Where a theatrical contract gave plaintiff the right to place defendant actors in vaudeville, although at the time the contract was executed defendants expressed a desire to be featured in a play, which plaintiff's manager agreed to do as soon as he could secure a suitable play, it was no defense to an action to enjoin defendants from performing for rival producers that defendants were kept in vaudeville and were not put into a play.—Shubert Theatrical Co. v. Gallagher, 201 N.Y. S. 577, 206 App.Div. 514.

(2) In an action to enjoin actors under an exclusive contract with plaintiff from performing for rival producers, it was no defense that, although the contract called for performance not later than September 29, defendants were notified to appear for performance on October 3, in view of defendants' previous letter, practically repudiating the contract unless they should be placed in "production" before January 1, and other conduct tending to prove an intention to waive notice of opening on September 29.—Shubert Theatrical Co. v. Gallagher, supra.

84. Mass.—Rice v. D'Arville, 39 N. E. 180, 162 Mass. 559.

85. N.Y.—Lawrence v. Dixey, 104 N. Y.S. 516, 119 App.Div. 295.

86. Pa.—National Vaudeville Managers' Ass'n v. O'Hern, 37 Pa.Co. 72.
32 C.J. p 202 note 26.

87. N.Y.—Lawrence v. Dixey, 104 N. Y.S. 516, 119 App.Div. 295.

88. Md.—Hahn v. Baltimore Concordia Soc., 42 Md. 460.
32 C.J. p 202 note 28.

89. N.Y.—De Pol v. Sohlke, 30 N.Y. Super. 280.
32 C.J. p 203 note 29.

Where actress repudiated agreement to pay theatrical agents a certain percentage of her earnings and discontinued payments, agents were not entitled to an injunction pendente lite restraining actress from publicly appearing and performing for anyone unless consented to by agents where agents would not benefit by issuance of injunction and would not suffer irreparable injury as result of action of actress.—Max Hart Attractions v. Serpico, 22 N.Y. S.2d 745.

90. N.Y.—Carter v. Ferguson, 12 N. Y.S. 580, 58 Hun 569.
32 C.J. p 203 note 31.

of such a unique character, and display such a special knowledge, skill, and ability as render them of peculiar value to the owner of the ball club, and so difficult of substitution that their loss will produce irreparable injury to him, a player who commits a breach of an express negative covenant not to play for another team during the period fixed by the contract will be enjoined,[91] and it has been held that an injunction may issue, even though the contract for his services contains no express covenant not to play on another team.[92] On the other hand, when the services are not so regarded, no injunction will be granted.[93] In any event relief by injunction will be denied where the contract is indefinite or ambiguous,[94] or is lacking in mutuality and fairness.[95]

§ 83. Contracts for Sale of Chattels

An injunction usually will not be granted to restrain the breach of a contract for the sale of ordinary chattels.

In case of sales of ordinary marketable chattels, the contract will not be indirectly enforced by injunction, even though it contains a distinct negative term for the reason that the remedy at law is regarded as adequate.[96] On the other hand, a negative agreement in a contract for the sale of chattels may be specifically enforced where the circumstances are such that a breach of the covenant would result in irreparable injury.[97]

§ 84. Contracts in Restraint of Trade

a. In general
b. Covenants in contracts for sale of business
c. Covenants in contracts of employment
d. What constitutes breach of contract

a. In General

An injunction may issue to restrain the breach of a contract in restraint of trade where the contract is not against public policy and is otherwise valid.

Where a contract in restraint of trade is contrary to public policy and void, as considered in Contracts §§ 238–258, a breach thereof will be not enjoined;[98] and this is also the case where the contract is wholly unreasonable.[99] On the other hand, if a contract in restraint of trade is not against public

91. N.Y.—American League Baseball Club v. Chase, 149 N.Y.S. 6, 86 Misc. 441.
32 C.J. p 203 note 32.

92. Pa.—American Ass'n Base-Ball Club v. Pickett, 8 Pa.Co. 232.
32 C.J. p 203 note 33.

93. N.Y.—Spencer v. Milton, 287 N.Y.S. 944, 159 Misc. 793.
32 C.J. p 203 note 34.

94. U.S.—Metropolitan Exhibition Co. v. Ewing, C.C.N.Y., 42 F. 198, 7 L.R.A. 331.
N.Y.—Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779, 24 Abb.N.Cas. 393.

95. Ill.—See Cincinnati Exhibition Co. v. Johnson, 190 Ill.App. 630.
N.Y.—Spencer v. Milton, 287 N.Y.S. 944, 159 Misc. 793.
32 C.J. p 203 note 36.

96. Cal.—Richfield Oil Co. of California v. Hercules Gasoline Co., 297 P. 73, 112 Cal.App. 431.
Md.—Hearn v. Ruark, 129 A. 366, 148 Md. 354.
32 C.J. p 226 note 57.
Enforcement by injunction of covenant restricting use of personalty see infra § 87 a.

Injunction refused

(1) Where five-year contract, requiring defendant refiner to furnish gasoline to plaintiff, its authorized dealer, had been performed more than year before defendant sought to terminate it after plaintiff had begun to cut prices, plaintiff's remedy at law for breach was plain, complete, and adequate, precluding injunction requiring specific performance, although contract term was rendered somewhat indefinite by provision authorizing defendant to cancel it if plaintiff's mother canceled her outstanding garage lease to defendant. —Cappetta v. Atlantic Refining Co., C.C.A.Conn., 74 F.2d 53, 98 A.L.R. 418, certiorari denied 55 S.Ct. 639, 294 U.S. 730, 79 L.Ed. 1260.

(2) Other cases see 32 C.J. p 226 note 57 [a].

Sale of natural gas

Where supply of gas in field was sufficient to enable plaintiff to comply with its contract, breach of contract by defendant to deliver plaintiff gas from one particular well was not sufficient ground for injunction. —Shaffer Oil & Refining Co. v. Tippett Pipe Line Co., 253 P. 275, 123 Okl. 261.

97. U.S.—Gray v. Premier Inv. Co., D.C.La., 51 F.Supp. 944.
Del.—Cramer v. Lewes Sand Co., 140 A. 803, 16 Del.Ch. 66—Cramer v. Lewes Sand Co., 138 A. 78, 15 Del. Ch. 329.
Kan.—Peoples Ice & Fuel Co. v. Dickey Oil Co., 65 P.2d 319, 145 Kan. 351.
32 C.J. p 226 note 58.
Injunction to restrain breach of contract for exclusive privilege see supra § 81.

Sale of natural gas

(1) Where assignee of contract for sale of natural gas to city did not have adequate remedy at law, equity may enjoin breach of contract.—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545.

(2) Court properly enjoined violation of contract for sale to distributing company of all of natural gas produced on particular leasehold where violation thereof by selling gas to third parties would have irreparably injured distributing company by impairing its source of supply.—Peoples Ice & Fuel Co. v. Dickey Oil Co., 65 P.2d 319, 145 Kan. 351.

(3) Equity will enjoin a coal company under contract to furnish a refining company necessary gas from curtailing the supply on a showing that the refining company has complied with the terms of the contract, and that the necessary, steady, and certain supply from any other source than the coal company is impossible. —Elk Refining Co. v. Falling Rock Cannel Coal Co., 115 S.E. 431, 92 W. Va. 479.

98. Ga.—Seavy v. Spratling, 65 S.E. 137, 133 Ga. 27.
Ill.—Grounds v. Van Laningham, 256 Ill.App. 540.
32 C.J. p 216 note 5.
Injunctions to restrain combination or conspiracy in restraint of trade see the C.J.S. title Monopolies §§ 115–117, also 41 C.J. p 198 note 11 et seq.
Validity of combinations or agreements suppressing competition or restraining trade see the C.J.S. title Monopolies § 16, also 41 C.J. p 101 note 27 et seq.

99. R.I.—Herreshoff v. Boutineau,

policy and is otherwise valid, a breach of such contract may in a proper case be enjoined.[1] Where the injunction cannot conveniently be enforced, it will not be granted;[2] and the conduct of complainant may bar his right to an injunction to which he would otherwise be entitled.[3]

Discretion of court. The granting or refusal of an injunction to prevent the breach of a contract in restraint of trade ordinarily is within the discretion of the court.[4]

Where a contract in restraint of trade is divisible and valid as to one part, although invalid as to the other, an injunction against a breach of the valid part is proper.[5]

Doubtful rights. Before the court will enjoin a breach of a contract in restraint of trade, there must be no doubt about its validity,[6] and its existence and terms must be satisfactorily established,[7] as must also the fact of the breach or threatened breach.[8]

Adequacy of consideration. An injunction against the breach of a contract in restraint of trade will not be refused on the ground that the consideration is inadequate,[9] unless the inadequacy is so great as to shock the conscience of the chancellor and to indicate that unfair and fraudulent advantage was taken.[10]

Breach actual or threatened. Where there has been no breach and none is threatened, no injunction will issue.[11] It is not necessary, however, to wait until the contract has actually been violated before bringing suit to enjoin the breach;[12] an injunction may issue where it is shown that defendant is making preparations to perform acts in violation of the contract.[13]

b. Covenants in Contracts for Sale of Business

(1) In general
(2) Sale of medical or dental practice
(3) Agreement not to use same business name

(1) In General

The breach of an agreement in a contract for the sale of a business that the seller will not compete with the purchaser may be enjoined where the restraint imposed by the contract is reasonable and no greater than is necessary to protect the purchaser.

19 A. 712, 17 R.I. 3, 33 Am.S.R. 850, 8 L.R.A. 469.
32 C.J. p 217 note 7.

1. Ark.—Hultsman v. Carroll, 6 S.W.2d 551, 177 Ark. 432.
Iowa.—Haggin v. Derby, 229 N.W. 257, 209 Iowa 939.
La.—Hickman v. Branan, App., 151 So. 113.
Mich.—O'Melia v. Berghoff Brewing Corporation, 8 N.W.2d 141, 304 Mich. 471, 145 A.L.R. 679.
Ohio.—Robey v. Plain City Theatre Co., 186 N.E. 1, 126 Ohio St. 473, 91 A.L.R. 975.
Pa.—Parks v. German, 33 Lux.Leg. Reg. 134.
32 C.J. p 217 note 9.

Agreement on sale of stock

(1) Agreement by seller of corporation stock with purchaser, owning remaining stock, not to compete with corporation for reasonable time, is enforceable by injunction.—Hickman v. Branan, La.App., 151 So. 113.

(2) Where stockholder of corporation violated agreement, entered into when he sold his stock to corporation, not to engage in pig iron business, injunction should issue to restrain future violation.—Reed, Fears & Miller v. Miller, D.C.Pa., 2 F.2d 280, affirmed, C.C.A., Miller v. Reed, Fears & Miller, 5 F.2d 1018.

Rule applies in favor of assignee of promisee as well as the promisee. —Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232—32 C.J. p 217 note 10.

2. N.Y.—Stull v. Westfall, 25 Hun 1.

3. Mass.—Smith v. Brown, 42 N.E. 101, 164 Mass. 584.

4. Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.

5. Mass.—Whiting Milk Cos. v. O'Connell, 179 N.E. 169, 277 Mass. 570—Edgecomb v. Edmonston, 153 N.E. 99, 257 Mass. 12.
N.Y.—Consolidated Syrup Corporation v. Kaiser, 22 N.Y.S.2d 307—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.
R.I.—North Shore Dye House v. Rosenfield, 166 A. 346, 53 R.I. 279.
Tex.—McAnally v. Person, Civ.App., 57 S.W.2d 945, error refused.
32 C.J. p 217 note 15.

Enforcement within city rather than state

Seller's covenant not to engage in ice business within state for five years is enforceable as to city where located, although unenforceable throughout state.—Hill v. Central West Public Service Co., C.C.A.Tex., 37 F.2d 451.

6. N.J.—Cosmos Dyeing & Printing Works v. Calderini, 111 A. 517, 91 N.J.Eq. 378.
32 C.J. p 217 note 17.
Doubtful right as affecting right to injunction generally see supra §§ 19, 80 c (2) (b).

7. Va.—Klaff v. Pratt, 86 S.E. 74, 117 Va. 739.
32 C.J. p 217 note 18.
Weight and sufficiency of evidence see infra § 192.

8. Hawaii.—Consolidated Amusement Co., Ltd. v. Hughes, 22 Hawaii 550.
Pa.—Martin v. Kotarba, 35 Lux.Leg. Reg. 25.
32 C.J. p 217 note 19.

9. Md.—Anderson v. Truitt, 148 A. 223, 158 Md. 193.
32 C.J. p 217 note 20.
Consideration for contract in restraint of trade see Contracts § 257.

10. Ga.—Shirk v. Loftis, 97 S.E. 66, 148 Ga. 500.
32 C.J. p 217 note 21.

11. N.Y.—Weinstein v. Welden, 145 N.Y.S. 772, 160 App.Div. 554, affirmed 116 N.E. 1082, 220 N.Y. 693.
32 C.J. p 217 note 22.

12. Ala.—Harris v. Theus, 43 So. 131, 149 Ala. 133, 123 Am.S.R. 17, 10 L.R.A.,N.S., 204.
Mass.—Walker Coal & Ice Co. v. Westerman, 160 N.E. 801, 263 Mass. 235.
Tex.—Moore v. Duggan Abstract Co., Civ.App., 154 S.W.2d 519, error refused.

13. Ala.—Harris v. Theus, 43 So. 131, 149 Ala. 133, 123 Am.S.R. 17, 10 L.R.A.,N.S., 204.

The most usual instance of a contract in restraint of trade is a contract for the sale of a business with its good will, with an agreement on the part of the vendor not to open up a competing business of the same kind for a certain time within a certain area; if the restraint is reasonable and is no greater than is necessary for the proper protection of the purchaser in enjoying his property a breach may be enjoined.[14] It has been held that, even in the absence of an express contract not to interfere with the enjoyment of the good will so sold, a contract not to do so is necessarily implied, and such interference will be enjoined,[15] although there is also authority that a vendor will not be enjoined from setting up a rival business, where the sale of the business and good will is without any express restrictive agreement.[16] The vendor may be enjoined from entering into a partnership[17] or having any connection with a corporation formed by him to conduct a rival business.[18] It is not a reason for refusing an injunction that the business is more extensive than the purchaser can attend to.[19]

Where an established business has been sold with its good will and there is a valid covenant not to compete, a breach is regarded as the controlling factor and injunctive relief follows almost as a matter of course.[20] In such cases the damage is pre-

14. Ala.—Maddox v. Fuller, 173 So. 12, 233 Ala. 662.
Ark.—Hultsman v. Carroll, 6 S.W.2d 551, 177 Ark. 432.
Cal.—Langendorf United Bakeries v. Phillips, 53 P.2d 363, 5 Cal.2d 150.
Ill.—Brandenburger v. Martin, 225 Ill.App. 439.
Iowa.—L. H. Henry & Sons v. Rhinesmith, 260 N.W. 9, 219 Iowa 1088.
Md.—Anderson v. Truitt, 148 A. 223, 158 Md. 193.
Mass.—Laine v. Aarnio, 164 N.E. 238, 265 Mass. 374—Edgecomb v. Edmonston, 153 N.E. 99, 257 Mass. 12.
Mo.—Kreger Glass Co. v. Kreger, App., 49 S.W.2d 260.
N.J.—Stanley-Fabian Corporation v. H. J. Theatrical Enterprise Co., 169 A. 291, 115 N.J.Eq. 5, motion denied 174 A. 26, 116 N.J.Eq. 407—William T. Wiegand Glass Co. v. Wiegand, 148 A. 174, 105 N.J.Eq. 434.
N.M.—De Soto v. De Jaquez, 106 P. 2d 301, 44 N.M. 564.
N.Y.—Fintz v. Levy, 224 N.Y.S. 494, 221 App.Div. 583—Dairymen's League Co-op. Ass'n v. Weckerle, 291 N.Y.S. 704, 160 Misc. 866.
R.I.—North Shore Dye House v. Rosenfield, 166 A. 346, 53 R.I. 279.
Tex.—Goldberg v. Soltes, Civ.App., 32 S.W.2d 246.
Wash.—United Dye Works v. Strom, 35 P.2d 760, 179 Wash. 41.
32 C.J. p 218 notes 26, 27.
Sale or transfer of good will of business see Good Will §§ 7–16.

Reasons for rule

(1) The rule is based on the theory that one who has sold a business, agreeing to remain out of a like line for a definite term, cannot destroy the good will with which he has agreed that he will not interfere.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300—32 C.J. p 219 note 38.

(2) Interference by a court of equity is necessary because the parties cannot be placed in statu quo.—Locke v. Murdock, 151 P. 298, 20 N.M. 522, L.R.A.1917B 267.

(3) Damages afford no adequate remedy to the injured party, the damages not being susceptible of proof or exact computation, and the injury caused by the act complained of being a constantly recurring one for which multiplying suits at law could afford but an inadequate remedy.
R.I.—North Shore Dye House v. Rosenfield, 166 A. 346, 53 R.I. 279.
Tex.—Goldberg v. Soltes, Civ.App., 32 S.W.2d 246.
32 C.J. p 219 notes 40–42.

Meaning of city blocks within covenant

On motion for injunction pendente lite against operating garage, restricted ten-block area will be determined by standard block in land book.—Gru Corporation v. Right-In Garage, 244 N.Y.S. 484, 137 Misc. 139.

Mutuality of remedy

An injunction to restrain defendant from breaching a covenant not to engage in a competing business within a restricted territory would not be denied under the so-called negative doctrine of mutuality on ground that, if defendant had sought to enjoin plaintiff, remedy would have been denied, since no duty was imposed on plaintiff to refrain from entering into defendant's reserved territory, where adequate relief could be granted without hardship on either of parties, since plaintiff, by invoking equitable powers of the court, assumed duty of performance and thereby subjected itself to any proper conditions imposed by court in granting relief.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.

15. Mass.—Martino v. Pontone, 170 N.E. 67, 270 Mass. 158.
32 C.J. p 218 note 28.
Implied covenant not to interfere with good will see Good Will §§ 7, 12.

Sale by corporation as sale by real owner

(1) Where defendant, who was engaged in insurance business, sold good will of business to his own corporation in 1933, and thereafter in 1937 good will of defendant's corporation was sold to another corporation, and it appeared that defendant had so dominated his corporation that such corporation was his alter ego, defendant would be considered as not having parted with his good will until 1937, as regards right of purchaser of good will from corporation in 1939 to enjoin defendant from directly soliciting his former customers.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.

(2) Disregarding corporate entity generally see Corporations § 6.

Extent of restraint

(1) The restraint imposed by the injunction should go no further than is necessary to protect the buyer.—Martino v. Pontone, 170 N.E. 67, 270 Mass. 158.

(2) Where defendant, after selling a small grocery store, with the good will, opened competing store in neighborhood, restraint should be confined to area within which store reasonably sought and supplied customers.—Martino v. Pontone, supra.

16. N.Y.—Close v. Flesher, 28 N.Y.S. 737, 8 Misc. 299.
32 C.J. p 186 note 39.

17. Ark.—Bloom v. Home Ins. Agency, 121 S.W. 293, 91 Ark. 367.
Mich.—Vogue Cleaners & Dyers v. Berkowitz, 291 N.W. 12, 292 Mich. 575.

18. Tenn.—York v. Ambrose, 300 S. W. 586, 156 Tenn. 314.
32 C.J. p 218 note 31.

19. N.J.—Marvel v. Jonah, 90 A. 1004, 83 N.J.Eq. 295, L.R.A.1915B 206, Ann.Cas.1916C 185, reversing 86 A. 968, 81 N.J.Eq. 369.
32 C.J. p 218 note 32.

20. Minn.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.

sumed to be irreparable,[21] and the remedy at law is considered inadequate.[22] It is not necessary that the buyer first prove special pecuniary damages[23] or show an actual loss of customers who might in any event have discontinued their patronage.[24] Injunctive relief may be given, even though only nominal damages are shown[25] or although no actual damage is shown.[26] However, there is also authority that the mere breach of the covenant does not justify injunctive relief without a finding that the purchaser was or would be irreparably injured or that he had no adequate remedy at law.[27]

Complainant's breach or laches. Complainant will not be entitled to restrain a breach where he has himself been guilty of a substantial breach of contract[28] or of acquiescence or inexcusable laches.[29]

Provision for penalty, liquidated damages, etc. An injunction may be granted although a restrictive covenant provides that in case of breach the covenantor shall be subject to a penalty[30] or liquidated damages.[31] A contrary doctrine has, however, been maintained in some cases.[32] Covenants may be construed from their terms and the surrounding circumstances to mean that the seller shall have the privilege of renewing business on payment of a specified sum so as to preclude the issuance of an injunction.[33]

Where the purchaser of a business has abandoned it, a preliminary injunction will not be granted to restrain the seller from violating a covenant not to engage in the same business within the stated period, even though complainant intends to resume business as soon as convenient.[34]

Retiring partners. A retiring partner who agrees for a consideration not to open up a competing business may be enjoined from so doing.[35]

21. Minn.—Peterson v. Johnson Nut Co., supra.
Tex.—Malakoff Gin Co. v. Riddlesperger, 192 S.W. 530, 108 Tex. 273.
32 C.J. p 217 note 11.

Buyer is not required to show irreparable injury or that he had no adequate remedy at law.—Moore v. Duggan Abstract Co., Tex.Civ.App., 154 S.W.2d 519, error refused—Anderson v. Rowland, 44 S.W. 911, 18 Tex.Civ.App. 460.

22. Minn.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.
32 C.J. p 217 note 12.

23. Ohio.—Brass & Iron Works Co. v. Payne, 33 N.E. 88, 50 Ohio St. 115, 19 L.R.A. 82.

24. Cal.—Johnston v. Blanchard, 116 P. 973, 16 Cal.App. 321.

25. Cal.—Brown v. Kling, 35 P. 995, 101 Cal. 295.
Neb.—Roper v. Pryor, 169 N.W. 257, 162 Neb. 709.

26. Pa.—Emerick v. Groome, 4 Pa. Dist. 511.

27. N.M.—De Soto v. De Jaquez, 106 P.2d 301, 44 N.M. 564.

28. N.Y.—Fries v. Parr, 139 N.Y.S. 220.

Effect of bankruptcy
In suit to restrain breach of a mutual covenant not to engage in competing business within reserved territory, wherein covenant was part of a contract for sale of part of defendant's business and contract was assigned to a corporation which, with buyer, subsequently became bankrupt, such bankruptcy did not effect a termination of contract and constitute an "anticipatory breach" so as to justify denial of relief sought, since corporation had no duty to perform requiring affirmative action on its part and its lack of cash or physical assets was immaterial.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.

29. Complainant need not sue at once on obtaining knowledge of breach of the covenant, but he is entitled to reasonable time in which to consider whether it is advisable to sue.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

Plaintiff held not barred
(1) Plaintiff is not barred by laches where the delay in instituting action was brief and where there was no proof of injury to defendants by reason of the delay.—Montgomery Bros. v. Montgomery, 112 A. 474, 269 Pa. 332.

(2) Laches precluding school corporation's assertion of contract clause precluding ex-employee from soliciting pupils was not shown by inaction for six months after vice president, ignorant of contract, learned of ex-employee's soliciting.—Becker College of Business Administration and Secretarial Science v. Gross, 183 N.E. 765, 281 Mass. 355.

(3) Seller of grocery store who in violation of covenant conducted like business within three-year period within one-mile radius could not claim laches on part of buyer's assignees who sought to enjoin seller from conducting such business where it did not appear that assignees acquiesced in breach of covenant or that delay in bringing suit worked disadvantage to seller.—Adamowicz v. Iwanicki, 190 N.E. 711, 286 Mass. 453.

(4) Other cases see Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

Delay of nine months before suing to enjoin violation of agreement not to compete was not laches barring relief.—Johnson v. Schultz, 243 P. 644, 137 Wash. 584.

Where legal right was not barred, delay could not defeat buyers' right to injunction to prevent violation of seller's agreement regarding entering competing business.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.

30. Neb.—Hickey v. Brinkley, 129 N.W. 553, 88 Neb. 356.
32 C.J. p 219 note 46.
Effect of provision for penalty or liquidated damages generally see supra § 80 c (6).

31. Ala.—Maddox v. Fuller, 173 So. 12, 233 Ala. 662.
32 C.J. p 219 note 47.

32. Ind.—Martin v. Murphy, 28 N.E. 1118, 129 Ind. 464.
32 C.J. p 219 note 48.

33. N.Y.—Vincent v. King, 13 How. Pr. 234.
32 C.J. p 219 note 50.

34. N.Y.—Goldman v. Bootmann, 167 N.Y.S. 196, 179 App.Div. 767.

35. Cal.—Stephens v. Bean, 224 P. 1022, 65 Cal.App. 779.
Pa.—Sargent v. Gerga, 20 Pa.Dist. & Co. 689.
Tenn.—York v. Ambrose, 300 S.W. 586, 156 Tenn. 314.
Tex.—Goldberg v. Soltes, Civ.App., 32 S.W.2d 246.
32 C.J. p 221 note 87.
Competition of retiring partner with new firm see the C.J.S. title Partnership § 249, also 47 C.J. p 1024 note 28 et seq.

Fact that enforcement of covenant will entail a hardship on defendant is no reason to deny relief.—Yanko v. Goldberg, 137 A. 645, 101 N.J.Eq. 170.

Particular businesses. The jurisdiction of courts of equity to enjoin breaches of contract whereby one party has sold to another his business and good will with agreement not to open up a competing establishment within certain limits as to time and territory has been applied in a wide variety of businesses,[36] as, for instance, an abstract business,[37] a bakery business,[38] a banking business,[39] a barber business,[40] a blacksmith business,[41] a butcher business,[42] a cleaning and dyeing business,[43] a furniture business,[44] a garage business,[45] an ice business,[46] an iron and tin business,[47] a lawyer's practice,[48] a newspaper business,[49] a photograph gallery,[50] a plumbing business,[51] a restaurant business,[52] a taxicab business,[53] a transfer business,[54] and an undertaking business.[55]

Persons entitled to injunction. A covenant not to engage in the same business forms a valuable part of the good will of the business and the benefit of the covenant will pass to a subsequent purchaser of the good will as incidental thereto without special mention, as considered in Good Will § 13, so as to enable the subsequent purchaser to maintain a suit to restrain a breach of the covenant,[56] and the suit may not be maintained by the original purchaser.[57] However, there is authority that in the absence of an assignment of the covenant a subsequent purchaser of the business may not sue to restrain a breach.[58] At any rate, a subsequent purchaser of the business is entitled to an injunc-

Injunction refused

Where defendant sold interest in partnership business, known by combination of parts of plaintiff's and defendant's names, and contracted not to carry on similar business within restricted area, fact that, in conducting similar business without such area, he used his own surname and Christian name was not ground for injunction.—Shangold v. Berson, 211 N.Y.S. 695, 125 Misc. 646.

36. N.J.—Stein v. Kommit, 147 A. 111, 105 N.J.Eq. 90.
32 C.J. p 222 note 14.

Livery business

Ill.—Hursen v. Gavin, 44 N.E. 735, 162 Ill. 377.

37. Tex.—Moore v. Duggan Abstract Co., Civ.App., 154 S.W.2d 519, error refused.

38. Cal.—Langendorf United Bakeries v. Phillips, 53 P.2d 363, 5 Cal.2d 150.
Colo.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.
N.J.—Bloomfield Baking Co. v. Maluvius, 163 A. 441, 112 N.J.Eq. 109.
Pa.—Eckart v. Gerlach, 12 Phila. 530.

39. Neb.—Farmers' State Bank v. Petersburg State Bank, 187 N.W. 117, 108 Neb. 54.

40. Mass.—Laine v. Aarmo, 164 N. E. 238, 265 Mass. 374.
N.J.—Genelin v. Reisel, 10 N.J.L.J. 208.
Pa.—Sargent v. Gerga, 20 Pa.Dist. & Co. 689.
S.C.—Metts v. Wenberg, 155 S.E. 734, 158 S.C. 411.

Ladies' hair bobbing is a "branch of the barber business" within covenant, warranting injunction.—Dellacorte v. Gentile, 129 A. 739, 98 N.J. Eq. 194.

41. Pa.—Carroll v. Hickes, 10 Phila. 308.

42. Ind.—Eisel v. Hayes, 40 N.E. 119, 141 Ind. 41.

43. N.J.—Stein v. Kommit, 147 A. 111, 105 N.J.Eq. 90.
R.I.—North Shore Dye House v. Rosenfield, 166 A. 346, 53 R.I. 279.

44. D.C.—Hartung v. Hilda Miller, Inc., 133 F.2d 401, 77 U.S.App.D.C. 164.

45. N.Y.—Gru Corporation v. Right-In Garage, 244 N.Y.S. 484, 137 Misc. 139.

46. U.S.—Hill v. Central West Public Service, C.C.A.Tex., 37 F.2d 451.
Mich.—Up River Ice Co. v. Denler, 72 N.W. 157, 114 Mich. 296, 68 Am. S.R. 480.

47. N.J.—Carli v. Snyder, Ch., 26 A. 977.

48. Iowa.—Heinz v. Roberts, 110 N. W. 1034, 135 Iowa 748—Smalley v. Greene, 3 N.W. 78, 52 Iowa 241, 35 Am.R. 267.
32 C.J. p 222 note 5.

49. Ill.—Andrews v. Kingsbury, 112 Ill.App. 518, affirmed 72 N.E. 11, 212 Ill. 97.
N.C.—Cowan v. Fairbrother, 24 S.E. 212, 118 N.C. 406, 54 Am.S.R. 733, 32 L.R.A. 829.

"Shopping Guide" as newspaper

Weekly "Shopping Guide" containing serial stories, editorial comment, items taken from newspapers, and large amount of advertising, which was circulated free in city and was hardly distinguishable in appearance from ordinary county seat newspaper, was a "newspaper," publication of which was enjoinable as violating publishers' agreement not to engage in publication of a newspaper in city. —L. H. Henry & Sons v. Rhinesmith, 260 N.W. 9, 219 Iowa 1088.

50. Pa.—Stoffiet v. Stoffiet, 28 A. 857, 160 Pa. 529.

51. N.J.—Howell v. Keck, 11 A.2d 365, 127 N.J.Eq. 87.

52. Pa.—Hamilton v. Gerster, 33 Pittsb.Leg.J.,N.S., 24.

53. Ala.—Saxon v. Parson, 90 So. 904, 206 Ala. 491.

54. Mass.—Angier v. Webber, 14 Allen 211, 92 Am.D. 748.

55. Cal.—Stephens v. Bean, 224 P. 1022, 65 Cal.App. 779.
Ind.—O'Neal v. Hines, 43 N.E. 946, 145 Ind. 32.
Pa.—Jones v. Morrow, 6 Pa.Dist. & Co. 759, 73 Pittsb.Leg.J. 155.
Wash.—Merager v. Turnbull, 99 P. 2d 484, 2 Wash.2d 711, 127 A.L.R. 1142.

56. Va.—Burchell v. Capitol City Dairy, 163 S.E. 81, 158 Va. 6.
32 C.J. p 219 note 52.

Failure to file reports

Corporation's failure to file annual reports did not preclude its assignee from suing to restrain defendants from breaching contract not to engage in bakery business.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.

In Pennsylvania

(1) A subsequent purchaser of the business may sue to restrain a breach of the covenant although the covenant is not expressly assigned to him by the buyer.—Ebert v. Kaufmann, 17 Pa.Dist. 156.

(2) An agreement of sale of a business wherein the seller agrees not to enter into a similar or competitive business within the county is not enforceable by a vendee of the purchaser of the business.—Heiney v. Shindell, 1 Monroe L.R., Pa., 146.

57. Va.—Burchell v. Capitol City Dairy, 163 S.E. 81, 158 Va. 6.
32 C.J. p 219 note 52.

Where purchaser formed a corporation to which he transferred business, he no longer may sue to restrain a breach of the covenant.—Anderson v. Truitt, 148 A. 223, 158 Md. 193—32 C.J. p 219 note 52.

Where one of the purchasers assigns his interest to other, the assignor need not be made a party to a suit to restrain a breach of the covenant by the vendor.—Jenkins v. Eliot, 78 N.E. 431, 192 Mass. 474.

58. N.Y.—Penzes v. Martin, 144 N. Y.S. 702, 83 Misc. 141.

tion to restrain the breach of an express covenant not to engage in the same business where the covenant has been expressly assigned to him on the resale of the business.[59] Purchasers of corporate stock from the stockholders under an agreement that the sale should include the good will have been held proper parties to enforce the agreement.[60]

Persons who may be restrained. Where circumstances warrant the granting of an injunction, it may be issued against the seller or person who made the restrictive covenant.[61] The court may restrain the party violating the contract not only from breaching the terms of the contract but also from employing or combining with others to accomplish the same result.[62]

Respecting complainant's right to enjoin persons other than the seller or maker of a restrictive covenant, the authorities are not uniform; it has generally been held that an injunction should run against only those who are parties to the restrictive covenant.[63] Thus it has been stated that neither a corporation formed by the seller of a business to conduct a similar business nor those interested therein other than the seller may be enjoined.[64] The wife of the seller has the right to carry on a competing business under her own name,[65] provided she does not represent her goods as the goods of the business which her husband has sold.[66]

However, injunctions have been granted against those who, although not parties to the original sale, join with the seller in his subsequent breach,[67] as, for instance, a corporation formed to carry on a rival business by the employment of the seller therein.[68] Injunctions have been granted also against persons who, although not parties to the restrictive covenant, cause the covenantor to violate it with the direct result of giving themselves an advantage in their business.[69]

59. Cal.—Graca v. Rodrigues, 165 P. 1012, 33 Cal.App. 296.
N.Y.—Francisco v. Smith, 38 N.E. 980, 143 N.Y. 488.
32 C.J. p 219 note 51.
Assignability of contract not to engage in business see Assignments § 24, Good Will § 13.

Lessee of assignee
Where a newspaper was sold with stipulations against conducting a competing paper, the lessee of the purchaser's assignees was allowed an injunction.—Cowan v. Fairbrother, 24 S.E. 212, 118 N.C. 406, 54 Am.S.R. 733, 32 L.R.A. 829.

Remote purchaser
Where the covenant is assigned to the subsequent purchaser and assigned by him to a second subsequent purchaser on a further resale of the business, the second subsequent purchaser may sue.—Graca v. Rodrigues, 165 P. 1012, 33 Cal.App. 296.

Liability limited to buyer or estate
Where seller of theater equipment agreed not to reënter theater business for certain period as "affects" buyer or his estate, and after buyer's death the community survivor made one-year lease to third person for fixed rent and assigned the noncompetition agreement, injunction did not lie where buyer's estate suffered no financial injury from seller's reentry into business, since such assignment could not change noncompetition contract to read "as affects lessee or his estate" or enlarge the contract.—Yates v. Blythe, Civ.App., 79 S.W.2d 913, error dismissed Blythe v. Yates, 86 S.W.2d 219, 126 Tex. 85.

60. N.Y.—Komow v. Simplex Cloth Cutting Mach. Co., 179 N.Y.S. 682, 109 Misc. 358, affirmed 180 N.Y.S. 942, 191 App.Div. 884.

61. N.D.—Hanson v. Wirtz, 204 N. W. 672, 52 N.D. 604.
32 C.J. p 219 note 59.

Restraining partner where other partners not bound
One contracting to sell land and stock of merchandise and good will of business previously conducted thereon by him under partnership name or by firm of which he is partner, and agreeing not to reëngage in business for period of time in vicinity, may be enjoined from reëngaging in business, regardless of whether other members of firm are bound thereby, under Comp.L.1913 § 6404.—Hanson v. Wirtz, supra.

62. Cal.—H. G. Fenton Material Co. v. Challet, 121 P.2d 788, 49 Cal.App. 2d 410.

63. Cal.—H. G. Fenton Material Co. v. Challet, supra.
N.C.—Sineath v. Katzis, 12 S.E.2d 671, 218 N.C. 740.
32 C.J. p 220 note 60.

Party signing as president of vendor corporation
Where copartnership incorporated and later corporation sold good will and agreed not to engage in similar business, copartner, who signed agreement as corporation's president, could not be restrained from engaging in similar business.—California Linoleum & Shades Supplies v. Schultz, 287 P. 980, 105 Cal.App. 471.

64. N.M.—Gallup Electric Light Co. v. Pacific Impr. Co., 113 P. 848, 16 N.M. 86.
32 C.J. p 220 note 61.

65. Ind.—Vinall v. Hendricks, 71 N. E. 682, 33 Ind.App. 413.
N.J.—Fleckenstein Bros. Co. v. Fleckenstein, 57 A. 1025, 66 N.J.Eq. 252.

66. N.J.—William T. Wiegand Glass Co. v. Wiegand, 148 A. 174, 105 N.J.Eq. 434—Fleckenstein Bros. Co. v. Fleckenstein, 57 A. 1025, 66 N.J. Eq. 252.

67. Cal.—Imperial Ice Co. v. Rossier, 112 P.2d 631, 18 Cal.2d 33.
Colo.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.
N.J.—William T. Wiegand Glass Co. v. Wiegand, 148 A. 174, 105 N.J.Eq. 434.
N.C.—Sineath v. Katzis, 12 S.E.2d 671, 218 N.C. 740.
32 C.J. p 220 note 64, p 199 note 84 [a].
Injunction to restrain third person from inducing breach of contract see infra § 89.

Son
Where stockholder and employee of plumbing supply company sold his stock in the company and agreed not to engage in a competing business in the locality for two years, either as principal or agent, and thereafter his son, with knowledge of covenant, and with intent to evade it, started a plumbing supply business, ostensibly his own, but actually the business of the father, injunction would issue against both father and son to restrain them from carrying on the business.—Howell v. Keck, 11 A.2d 365, 127 N. J.Eq. 87.

68. Colo.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.
Mich.—Arctic Dairy Co. v. Winans, 255 N.W. 290, 267 Mich. 80, 94 A. L.R. 334.
32 C.J. p 220 note 65.

69. N.J.—William T. Wiegand Glass

(2) Sale of Medical or Dental Practice

The breach of an agreement in a contract for the sale of a medical or dental practice that the seller will not compete may be enjoined where the restraint imposed by the contract is reasonable.

In the case of a contract by a physician or dentist not to reopen practice after the sale thereof, he may be enjoined from practicing again within the agreed limits, if they are reasonable,[70] or from doing any other act preventing the vendee from enjoying the benefit of the contract.[71] It is not necessary for complainant to prove that the consideration was adequate,[72] but it is sufficient that some legal consideration appears.[73] It is ordinarily assigned as a reason for the assumption of jurisdiction by equity that the remedy at law is inadequate[74] by reason of the uncertainty in any calculation of damages,[75] and because of the multiplicity of suits that would be necessary to obtain redress.[76]

According to some decisions, where no time is mentioned in the contract, the covenant will endure for the lifetime of the grantor;[77] but it has been held that, in an action to restrain a physician from competing with another contrary to a contract, it was proper for the court to anticipate the probability of the other physician retiring from practice, and to limit the period of restriction to the time he was practicing.[78]

(3) Agreement Not to Use Same Business Name

The breach of a contract not to open up a competing business under a certain name may be enjoined.

A contract not to open up a competing business under a certain name and style is valid and will be enforced by injunction,[79] and, even though there is no term in the contract to that effect, if the good will of the business is a part of the subject matter of the sale the vendor will be enjoined from using the former name in such a way as to injure the enjoyment by the vendee of the rights he purchased.[80] A provision in the contract for liquidated damages does not necessarily preclude the issuance of an injunction.[81]

Co. v. Wiegand, 148 A. 174, 105 N. J.Eq. 434.
32 C.J. p 220 note 66.

70. Okl.—Herrington v. Hackler, 74 P.2d 388, 181 Okl. 396.
Pa.—Johnson v. McIntyre, 163 A. 290, 309 Pa. 191.
Tenn.—Johnson v. Jones, 1 Tenn. App. 24.
32 C.J. p 221 note 88, p 222 note 90.
Restrictive covenant in contract of employment see infra subdivision c of this section.
Validity of contracts in restraint of trade see Contracts §§ 238–258.

Joint enterprise
Where the arrangement between the parties was in the nature of a joint enterprise, a physician is not required to sue at law for damages but is entitled to injunction against former associate's violation of contract not to compete.—Proctor v. Hansel, 218 N.W. 255, 205 Iowa 542, 58 A.L.R. 153.

Sale of hospital
The action of the vendors of a hospital in one county, in accepting business from that county at hospital constructed three hundred yards over county line, in violation of assignment of good will under hospitalization contracts, which was provided for by contract of sale, constituted violation of restrictive covenant of contract for sale of hospital that vendors would not indirectly or directly engage in operation of hospital within county for ten years, against which vendees were entitled to injunction.—Johnson v. Stumbo, 126 S.W.2d 165, 277 Ky. 301.

Laches
Physician was not barred by laches from enforcing defendant physician's contract not to practice within radius of fifteen miles from named borough.—Johnson v. McIntyre, 163 A. 290, 309 Pa. 191.

Where covenant is not established, injunctive relief will be refused.—Mosher v. Moyer, 22 Pa.Co. 586.

Injunction against purchaser
Licensed physician, who purchased sanitarium and agreed not to practice profession within one hundred fifty miles therefrom, but subsequently defaulted, may be enjoined from violating restrictive agreement when such remedy is essential to protection of seller's contractual rights.—Tarry v. Johnston, 208 N.W. 615, 114 Neb. 496.

71. Kan.—Mills v. Ressler, 125 P. 58, 87 Kan. 549.

72. Ill.—Ryan v. Hamilton, 68 N.E. 781, 205 Ill. 191, reversing 103 Ill. App. 212.

73. Ala.—McCurry v. Gibson, 18 So. 806, 108 Ala. 451, 54 Am.S.R. 177.
Ind.—Beatty v. Coble, 41 N.E. 590, 142 Ind. 329.

74. Neb.—Tarry v. Johnston, 208 N. W. 615, 114 Neb. 496.
32 C.J. p 222 note 93.

75. Pa.—Wilkinson v. Colley, 30 A. 286, 164 Pa. 35, 26 L.R.A. 114.
Tenn.—Johnson v. Jones, 1 Tenn. App. 24.

76. Mo.—Gordon v. Mansfield, 84 Mo.App. 367.
Okl.—Tarelkeld v. Steward, 103 P. 630, 24 Okl. 403, 138 Am.S.R. 888.

77. Ind.—Beatty v. Coble, 41 N.E. 590, 142 Ind. 329.
N.C.—Hauser v. Harding, 35 S.E. 586, 126 N.C. 295.

78. Conn.—Styles v. Lyon, 86 A. 564, 87 Conn. 23.

79. N.Y.—Dubert v. Blue White Star Travel Service, 21 N.Y.S.2d 932.
32 C.J. p 222 note 15.

Using business name in stating former association
Where defendants, for a consideration, settled pending lawsuit and agreed that in furthering their products they would not use term "Charles of the Ritz," or the trade-name or corporate name of plaintiffs, and agreement did not expressly prohibit defendants stating their former business association with plaintiffs, use of quoted words to further products of defendants by setting up former business association was enjoined pendente lite in action to enforce restrictive covenant, since agreement was broad enough to prohibit defendants' use of former business association in furthering their products.—Charles of the Ritz v. Maison Caree Beauty Preparations, 22 N.Y.S.2d 147.

80. Mass.—Dwight v. Hamilton, 113 Mass. 175.
N.Y.—U. S. Cordage Co. v. William Wall's Sons Rope Co., 35 N.Y.S. 978, 90 Hun 429.
32 C.J. p 222 note 16.

81. N.Y.—Dubert v. Blue White Star Travel Service, 21 N.Y.S.2d 932.
Effect of provision for liquidated damages generally see supra § 80 c (6).

c. Covenants in Contracts of Employment

The breach of an express agreement by an employee, contained in a contract of hiring not to engage in the same or similar business after the termination of his employment, may, under proper circumstances, be enjoined.

Where an employee's express covenant not to engage in a competing business or to solicit orders from the employer's customers after the termination of his employment is not against public policy, as considered in Contracts § 254, a breach of the covenant may, under proper circumstances, be enjoined,[82] provided the restraint is reasonable and

82. U.S.—Grober v. Strick, C.C.A.N.J., 77 F.2d 762—Wark v. Ervin Press Corporation, C.C.A.Ill., 48 F.2d 152, 155, citing **Corpus Juris.**
Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Conn.—May v. Young, 2 A.2d 885, 125 Conn. 1, 119 A.L.R. 1445.
Ill.—Western-United Dairy Co. v. Nash, 12 N.E.2d 47, 293 Ill.App. 162—International Mutual Fire Ins. Co. v. Carrington, 241 Ill.App. 208.
Mass.—Shawsheen Dairy v. Keefe, 29 N.E.2d 157, 307 Mass. 80—Southern New England Ice Co. v. Ferrero, 4 N.E.2d 359, 295 Mass. 446—Walker Coal & Ice Co. v. Love, 174 N.E. 199, 273 Mass. 564—Chandler, Gardner & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309.
Mo.—Athletic Tea Co. v. Cole, App., 16 S.W.2d 735.
N.J.—Vander May v. Schoone-Jongen, 21 A.2d 819, 130 N.J.Eq. 227, affirming 16 A.2d 198, 128 N.J.Eq. 336—Davey Tree Expert Co. v. Ahlers, 200 A. 1012, 124 N.J.Eq. 175—Capital Laundry Co. v. Vannozzi, 169 A. 554, 115 N.J.Eq. 26.
N.Y.—Interstate Tea Co. v. Alt, 2 N.E.2d 51, 271 N.Y. 76, reversing 281 N.Y.S. 330, 245 App.Div. 818—Cosmos v. Crohan, 17 N.Y.S.2d 629, 258 App.Div. 1056—Markowitz v. Tabakin, 293 N.Y.S. 768, 250 App. Div. 768—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.
N.C.—Scott v. Gillis, 148 S.E. 315, 197 N.C. 223.
Pa.—Cundiff v. Ertl, 47 Dauph.Co. 440—Consolidated Rendering Co. v. Evans, 42 Lack.Jur. 74—Consolidated Rendering Co. v. Sekol, 42 Lack.Jur. 70—Balut v. Sterner, 31 Luz.Leg.Reg. 233.
32 C.J. p 220 note 70.
Injunction to compel performance of personal services see supra § 82.
Injunction to restrain breach of implied contract not to solicit orders from employer's customers see infra § 148.

Adequacy of remedy at law

(1) The reason usually assigned for granting injunctive relief is the inadequacy of the remedy at law.
Neb.—Personal Finance Co. of Lincoln v. Hynes, 265 N.W. 541, 130 Neb. 547.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.
32 C.J. p 220 note 70 [a].

(2) However, the fact that a legal remedy was available, which, if pursued, would have secured corporation adequate relief, does not operate to deny it right to injunctive relief against its employees, appropriating and using property intrusted to them, and the revenues therefrom and engaging in competition with it in violation of their contracts.—Red Ball Stage Lines v. Griffin, Tex.Civ.App., 275 S.W. 454.

Agreement as part of contract between employer and union

Ill.—Western-United Dairy Co. v. Nash, 12 N.E.2d 47, 293 Ill.App. 162.
Mass.—Whiting Milk Cos. v. O'Connell, 179 N.E. 169, 277 Mass. 570.

Tests in determining enforceability

(1) Whether agreement by employee not to compete with employer after termination of employment will be enforced is determined by whether basic contract is fair and equitable, whether restrictive covenant is reasonably necessary for protection of basic contract, and whether, in absence of trade secrets or peculiar confidences, other grounds exist for holding irreparable injury to plaintiff as consequence of defendant's act.—Briggs v. Boston, D.C. Iowa, 15 F.Supp. 763.

(2) On question of enforcing employee's contract not to sell in certain territory on ceasing employment, interests of employer, employee, and public must be considered.—Deuerling v. City Baking Co., 141 A. 542, 155 Md. 280, 67 A.L.R. 993.

(3) Where, in consideration of defendant's agreement not to engage in the undertaking business in competition with plaintiff, she employed him as an undertaker, the test to determine whether there was error in enjoining defendant from engaging in such business on his own account is to inquire whether it was the reasonable thing to do, considering the situation of the parties, their rights, and duties each owed the other, and the loss that defendant would sustain if enjoined as compared with plaintiff's loss if injunction is denied.—Spaulding v. Mayo, 122 A. 899, 81 N.H. 85.

Temporary injunction

(1) Corporation was not entitled to judgment restraining individual from conducting furniture and undertaking business in certain counties for ten years in violation of contract, where corporation was required under contract to employ individual for ten years, and question whether individual voluntarily relinquished his employment or was discharged by corporation without cause was in dispute, since in such case parties' rights will be determined only after trial of issues.—Voorhees & Hobart v. Hobart, 295 N.Y.S. 616, 251 App.Div. 111.

(2) Contract prohibiting employee from competing with employer for one year after termination of employment, and providing that if legal proceedings were necessary to enforce covenant employee could be enjoined for one year from date of final adjudication, did not entitle employee to continue violation of his contract for entire period up to final decree so as to preclude issuance of temporary restraining order, but by violating covenant employee exposed himself to further restraint.—J. I. Kislak, Inc., v. Artof, 176 A. 899, 13 N.J.Misc. 129.

Injunction in favor of third person

Injunction to restrain former employee from engaging in competing business was properly refused to former partners who had transferred business, but not employment contract, to corporation.—West v. Jacobs, 178 N.E. 615, 277 Mass. 406.

Injunction against third persons

(1) Persons with notice may be enjoined from employing person in a business contrary to his contract.
N.J.—Vander May v. Schoone-Jongen, 21 A.2d 819, 130 N.J.Eq. 227, affirming 16 A.2d 198, 128 N.J.Eq. 336.
N.Y.—Markowitz v. Tabakin, 293 N.Y.S. 768, 250 App.Div. 768.
32 C.J. p 220 note 71 [d].

(2) Injunction to restrain third person inducing breach of contract see infra § 89.

(3) Where contract between principal and agent bound agent not to sell competitors' products in specified territory for year after termination of employment, and agent's contract with subagent was made "subject to" terms thereof, subagent could be enjoined from selling competitors' products within year after his employment ended.—Sanitary Appliance Co. v. French, Tex.Civ.App., 58 S.W.2d 159, error dismissed.

is not broader than is necessary for the employer's protection,[83] and enforcement does not impose undue hardship on the employee,[84] and provided injunctive relief is not limited or prohibited by statute.[85]

Injunctive relief will not be granted in every case to compel an employee to fulfill his agreement.[86] Injunctive relief will be denied where the

83. U.S.—Wark v. Ervin Press Corporation, C.C.A.Ill., 48 F.2d 152.
Colo.—Whittenberg v. Williams, 185 P.2d 228, 110 Colo. 418.
Fla.—J. Schaeffer, Inc., v. Hoppen, 173 So. 900, 127 Fla. 703.
Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236—Deuerling v. City Baking Co., 141 A. 542, 155 Md. 280, 67 A.L.R. 993.
Mass.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135—New England Tree Expert Co. v. Russell, 28 N.E. 2d 997, 306 Mass. 504—Whiting Milk Cos. v. O'Connell, 179 N.E. 169, 277 Mass. 570—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67—Club Aluminum Co. v. Young, 160 N.E. 804, 263 Mass. 223—Walker Coal & Ice Co. v. Westerman, 160 N.E. 801, 263 Mass. 235—Edgecomb v. Edmonston, 153 N.E. 99, 257 Mass. 12.
Minn.—Granger v. Craven, 199 N.W. 10, 159 Minn. 296, 52 A.L.R. 1356.
Miss.—Wilson v. Gamble, 177 So. 363, 180 Miss. 499.
Neb.—Personal Finance Co. of Lincoln v. Hynes, 265 N.W. 541, 130 Neb. 547.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596—Kaumagraph Co. v. Stampagraph Co., 188 N.Y.S. 678, 197 App.Div. 66—Barnard Bakeshops v. Dirig, 19 N.Y.S. 2d 224, 173 Misc. 862—New York Linen Supply & Laundry Co. v. Schachter, 212 N.Y.S. 72, 125 Misc. 805—Rudolph Bros. v. Greulick, 21 N.Y.S.2d 971.
Ohio.—Briggs v. Butler, 45 N.E.2d 757, 140 Ohio St. 499, reversing 47 N.E.2d 812, 71 Ohio App. 48.
Pa.—Standard Dairies v. McMonagle, 11 A.2d 535, 139 Pa.Super. 267—Philadelphia Dairy Products Co. v. Kleiman, 36 Pa.Dist. & Co. 643.
R.I.—Koppers Products Co. v. Readio, 197 A. 441, 60 R.I. 207.
Tex.—Houston Credit Sales Co. v. English, Civ.App., 139 S.W.2d 163—Union Transfer & Storage Co. v. Greve, Civ.App., 131 S.W.2d 796—Burroughs Adding Mach. Co. v. Chollar, Civ.App., 79 S.W.2d 344—May v. Lee, Civ.App., 28 S.W.2d 202—Byers v. Trans-Pecos Abstract Co., Civ.App., 18 S.W.2d 1098, error dismissed—Carpenter v. Southern Properties, Civ.App., 299 S.W. 440—Jennings v. Shepherd Laundries Co., Civ.App., 276 S.W. 726.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.
W.Va.—O. Hommel Co. v. Fink, 177 S.E. 619, 621, 115 W.Va. 686, citing **Corpus Juris.**
Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.
32 C.J. p 220 note 71.

Reasonableness depends on facts of each case.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135.

What may be done

Reasonableness and fairness of a contract are measured by what may be done under the terms thereof and not by what has been done.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.

Necessity is controlling criterion of extent to which equity will enjoin breach of negative covenant, whether express or implied, in contract.—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.

Propriety of territorial restriction in employment contract on employee's right to compete with employer after leaving employment must be considered in connection with parties' circumstances and employee's activities, which must not be restrained in territory wherein his employment did not take him or give him opportunity for undue competitive advantages over employer.—Wisconsin Ice & Coal Co. v. Lueth, 250 N.W. 819, 213 Wis. 42.

Fact that covenant is unlimited as to time will not preclude grant of injunction restraining its violation where area of restraint is limited and reasonable.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596.

Temporary injunction

In suit to restrain former employee of laundry from soliciting employer's customers for period of five years, where plaintiff did not establish a clear and convincing claim of reasonableness of covenant, granting of injunctive relief should await trial of action.—New York Linen Supply & Laundry Co. v. Schachter, 212 N.Y.S. 72, 125 Misc. 805.

Term "radius," in provisions of employment contracts that employees should not engage in same business as employer in certain city or within five-mile radius of any city wherein employer had place of business after termination of employment, was used in sense of any area bounded by prescribed limits, not in geometric sense of line drawn from center of circle to its periphery, so as to authorize injunction against engaging in such business within certain cities and adjacent areas for five miles from cities' boundaries.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135.

84. Fla.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.
Minn.—Standard Oil Co. v. Bertelsen, 243 N.W. 701, 186 Minn. 483.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596—Lantieri Beauty Salon v. Yale, 7 N.Y.S.2d 984, 169 Misc. 547—Consolidated Syrup Corporation v. Kaiser, 22 N.Y.S.2d 307.
W.Va.—O. Hommel Co. v. Fink, 177 S.E. 619, 115 W.Va. 686.
"Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression."—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.

Discharge in time of business depression

Employer who discharged manager of meat department of store without cause in time of business depression was not entitled to injunction restraining manager from violating contract whereby, in consideration of employment and weekly compensation, manager agreed that, if his employment should terminate, he would not for one year thereafter be employed in meat business within radius of two miles of store.—Economy Grocery Stores Corporation v. McAharney, 195 N.E. 747, 290 Mass. 549.

85. N.Y.—Holland Laundry v. Lindquist, 16 N.Y.S.2d 140, 173 Misc. 121.
Statutes forbidding issuance of injunctions in labor disputes see infra § 138.

86. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Fla.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.
Ga.—Goldstein v. Wingo, 166 S.E. 433, 175 Ga. 867.
Pa.—General Office Equipment Corporation v. Sampson, 90 Pittsb.Leg. J. 179.

Courts should proceed with caution in giving effect to contract of employee not to engage in similar work after termination of employment.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.

Courts are slow to grant injunctive relief, for contracts limiting a party's right to engage in a particular

agreement is void,[87] where the employee has not covenanted to refrain from entering a rival business[88] or he has been released from his agreement,[89] where the agreement is uncertain[90] or is wanting in mutuality of obligation[91] or is harsh, unjust, or unreasonable,[92] or where plaintiff has first materially breached the contract[93] or has been guilty of unfair or unjust conduct.[94]

Consideration. Injunctive relief against the breach of a covenant contained in a contract of hiring will be denied where there is no consideration to support the employee's promise,[95] but inadequacy of consideration is not ground for refusing relief unless it is so grossly inadequate as to be evidence of fraud.[96]

Necessity of showing irreparable injury. Some decisions have drawn a distinction between contracts of this character and those for the sale of a business considered supra subdivision b (1) of this section, on the ground that the breach of a like covenant in an employment contract does not so readily indicate irreparable injury to the employer;[97] and the burden is placed by these decisions on complainant to show affirmatively that he had sustained, or was likely to sustain, irreparable damage.[98] However, it has also been held that it is not necessary to show actual damage by instances of successful competition, but it is sufficient if such competition, in violation of the covenant, may result in injury;[99] and irreparable injury need not be shown where the services of the employee have been of such a character that he gained knowledge of his employer's business methods and secrets,[1] and where the purpose of the subsequent employment was to obtain the benefit of those methods and secrets.[2]

vocation are not favored.—Stoneman v. Wilson, 192 S.E. 816, 169 Va. 239.

87. **Where the restraint is unlimited as to either time or territory,** it is void and cannot be enforced by injunction.
Mass.—Horn Pond Ice Co. v. Pearson, 166 N.E. 640, 267 Mass. 256.
Wis.—Wisconsin Ice & Coal Co. v. Lueth, 250 N.W. 819, 213 Wis. 42.
32 C.J. p 221 note 78.

Void under express provisions of statute
Mich.—Wedin v. Atherholt, 298 N.W. 483, 298 Mich. 142—Vogue Cleaners & Dyers v. Berkowitz, 291 N.W. 12, 292 Mich. 575.

88. **Construction of agreement**
Provision of milkman's contract with dairy company that, if milkman should become dissatisfied with milk route, he should return it to dairy company without compensation did not mean that after milkman was discharged or had quit he should refrain from soliciting customers on such route for himself or others, and hence dairy company was not entitled to injunction to restrain milkman, after being discharged, from soliciting customers for rival company.—Snow Cap Dairy v. Robanske, 47 P.2d 977, 151 Or. 59.

89. Neb.—Personal Finance Co. of Lincoln v. Hynes, 265 N.W. 541, 130 Neb. 547.

Suit by employee to restrain employer
Former employee could enjoin former employer from interfering with employee's proposed employment by competitor, notwithstanding employment contract provided that employee should not attach himself to competitor in case contract was terminated by breach thereof or by expiration of period mentioned therein, where employment was terminated before expiration of contract by mutual consent.—Yost v. I. Fleischer & Sons, 195 N.E. 68, 49 Ohio App. 46.

90. R.I.—Koppers Products Co. v. Readio, 197 A. 441, 60 R.I. 207.

91. U.S.—Super Maid Cook-Ware Corporation v. Hamil, C.C.A.Tex., 50 F.2d 830, certiorari denied 52 S.Ct. 138, 284 U.S. 677, 76 L.Ed. 572.

92. U.S.—McCluer v. Super Maid Cook-Ware Corporation, C.C.A.Kan., 62 F.2d 426—Super Maid Cook-Ware Corporation v. Hamil, C.C.A. Tex., 50 F.2d 830, certiorari denied 52 S.Ct. 138, 284 U.S. 677, 76 L. Ed. 572—Briggs v. Boston, D.C. Iowa, 15 F.Supp. 763.
Fla.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.
Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
N.Y.—Rudolph Bros. v. Greulick, 21 N.Y.S.2d 971.

93. Miss.—Wilson v. Gamble, 177 So. 363, 180 Miss. 499.
Neb.—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.
N.J.—Weiss v. Levine, 34 A.2d 237, 134 N.J.Eq. 1.
Pa.—Fink v. Redlinger, 31 Luz.Leg. Reg. 321.
Tex.—Public Laundries v. Taylor, Civ.App., 26 S.W.2d 1085.

Employer's reduction of employee's wages constituted material breach of employment contract precluding employer from enforcing negative covenant therein notwithstanding employee continued in employment three months after reduction.—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.

Breach of separate agreement, if any, to pay solicitor a specified bonus was no defense to former employer's application for injunction restraining solicitation of his customers contrary to contract.—McAnally v. Person, Tex.Civ.App., 57 S.W.2d 945, error refused.

Contract not breached by plaintiff
Miss.—Wilson v. Gamble, 177 So. 363, 180 Miss. 499.

94. Mass.—Economy Grocery Stores Corporation v. McAharney, 195 N. E. 747, 290 Mass. 549.
Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.

95. U.S.—McCluer v. Super Maid Cook-Ware Corporation, C.C.A. Kan., 62 F.2d 426.
Tex.—May v. Lee, Civ.App., 28 S.W. 2d 202.
Consideration for contract in restraint of trade see Contracts § 257.

96. Ga.—Shirk v. Loftis, 97 S.E. 66, 148 Ga. 500.

97. Minn.—Menter Co. v. Brock, 180 N.W. 553, 147 Minn. 407.
32 C.J. p 221 note 75.

98. Minn.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.
Utah.—Melrose v. Low, 15 P.2d 819, 80 Utah 356.
32 C.J. p 221 note 76.

99. N.J.—Capital Laundry Co. v. Vannozzi, 169 A. 554, 115 N.J.Eq. 26.

1. Tenn.—Matthews v. Barnes, 293 S.W. 993, 155 Tenn. 110, 52 A.L.R. 1350.

2. N.J.—Ideal Laundry Co. v. Guglielmone, 151 A. 617, 107 N.J.Eq. 108.
Injunction to prevent use or disclosure of trade secrets by former employee see infra § 148.

Trade secrets. An injunction may issue to restrain the breach of an employment contract not to engage in a rival business after termination of the employment where the services of the employee have been of such a character that he gained knowledge of his employer's business methods and secrets, the disclosure of which to a rival would result in irreparable injury to the employer,[3] and where it further appears that the purpose of the subsequent employment was to obtain the benefit of those secrets, and that there is imminent danger that through such subsequent employment such secrets would be disclosed.[4] In some decisions injunctive relief against the breach of an employee's covenant not to engage in a rival business after termination of his employment has been denied where there was no showing that the employee possessed trade secrets or confidential information of his employer.[5]

Liquidated damages. An injunction may issue, although the contract provides for liquidated damages in case of breach,[6] even though injunctive relief has been denied where an action for liquidated damages would afford full and adequate relief.[7]

Services requiring no special skill. The covenant of the employee may be enforced by injunction, although his services are not of a unique and special nature,[8] although it has been stated that restrictive covenants against an employee's acceptance of other employment after termination of his contract are rarely of equitable cognizance where the employment is of an ordinary kind.[9]

Voluntarily or involuntarily quitting service. Where the restriction is one that would otherwise be enforced, it is not a ground to refuse an injunction to restrain its breach that the employee may have voluntarily withdrawn from his employment with the consent of his employer,[10] or that the employee was discharged before the expiration of his time of employment where the discharge was for good cause.[11] It has been further held that it is immaterial whether the employee left the employment voluntarily or was discharged without cause,[12] although a discharge without cause may be a factor prompting the court to deny injunctive relief.[13] The fact that the employee is discharged without the notice provided for by the contract does not affect the employer's right to an injunction where he tendered to the employee pay for the full time of the period for which notice was required to be given, which amount the employee refused.[14]

Solvency of employee. If grounds exist for an injunction, the fact that the employee is solvent will not bar the right thereto.[15]

3. N.J.—Ideal Laundry Co. v. Gugliemone, 151 A. 617, 107 N.J.Eq. 108.
N.Y.—Ward Baking Co. v. Tolley, 225 N.Y.S. 75, 222 App.Div. 653—Holland Furnace Co. v. Beers, 29 N.Y.S.2d 876, 177 Misc. 29—Eagle Pencil Co. v. Jannsen, 238 N.Y.S. 49, 135 Misc. 534.
N.C.—Moskin Bros. v. Swartzberg, 155 S.E. 154, 199 N.C. 539.
Tenn.—Matthews v. Barnes, 293 S.W. 993, 155 Tenn. 110, 52 A.L.R. 1350.
Injunction to prevent use or disclosure of trade secrets by former employee see infra § 148.

Relations with customers

Employer's right depends on whether employee acquired such intimate relations with employer's customers or obtained such knowledge of employer's business that use of acquaintanceship or knowledge thus obtained in competing business in breach of agreement would result in irreparable injury to employer for which he had no adequate remedy at law.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.

4. N.J.—Ideal Laundry Co. v. Gugliemone, 151 A. 617, 107 N.J.Eq. 108—J. I. Kislak, Inc. v. Artof, 176 A. 899, 13 N.J.Misc. 129.

5. Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
N.Y.—Levy v. Cosmos, 224 N.Y.S. 486, 221 App.Div. 533, affirmed 162 N.E. 550, 248 N.Y. 622—Lantieri Beauty Salon v. Yale, 7 N.Y.S.2d 984, 169 Misc. 547.

6. Neb.—Personal Finance Co. of Lincoln v. Hynes, 265 N.W. 541, 130 Neb. 547.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596.
Effect of provision for liquidated damages generally see supra § 80 c (6).

7. Tex.—May v. Lee, Civ.App., 28 S.W.2d 202.

8. U.S.—Wark v. Ervin Press Corporation, C.C.A.Ill., 48 F.2d 152.
Ga.—National Linen Service Corporation v. Clower, 175 S.E. 460, 179 Ga. 136.
N.J.—Sarco Co. of New Jersey v. Gulliver, 129 A. 399, 3 N.J.Misc. 641, affirmed 131 A. 923, 99 N.J.Eq. 432.
N.Y.—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596.
N.C.—Scott v. Gillis, 148 S.E. 315, 197 N.C. 223.
Ohio.—Briggs v. Butler, 45 N.E.2d 757, 140 Ohio St. 499, reversing 47 N.E.2d 812, 71 Ohio App. 48.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.
Injunction to restrain breach of contract for personal services not requiring special skill see supra § 82.

9. U.S.—McCluer v. Super Maid Cook-Ware Corporation, C.C.A.Kan., 62 F.2d 426.

10. Pa.—Philadelphia Towel Supply & Laundry Co. v. Weinstein, 57 Pa. Super. 290—General Baking Co. v. Coyle, 29 Del.Co. 135.

11. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Mo.—Fred. A. H. Garlichs Agency Co. v. Anderson, App., 226 S.W. 978.
32 C.J. p 221 note 83.

12. N.C.—Moskin Bros. v. Swartzberg, 155 S.E. 154, 199 N.C. 539.

13. Mass.—Economy Grocery Stores Corporation v. McAharney, 195 N.E. 747, 290 Mass. 549.
Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.

14. N.Y.—Mutual Milk & Cream Co. v. Heldt, 105 N.Y.S. 661, 120 App. Div. 795.

15. Mo.—Fred. A. H. Garlichs Agency Co. v. Anderson, App., 226 S.W. 978.

Expiration of period of restraint. Where protection is restricted by the agreement to a designated time, the agreement binds the parties as to the time stipulated and after the expiration of the period the prohibition ceases to exist, and injunctive relief will not be afforded for a time beyond that for which the parties contracted.[16]

Particular employees. The rules discussed supra this section have been applied in the case of various types or classes of employees,[17] such as an abstractor,[18] an accountant,[19] an insurance agent,[20] a manager,[21] a manicurist,[22] a salesman,[23] a security trader,[24] a stenographic reporter,[25] a teacher,[26] an undertaker,[27] and to drivers or route men in various kinds of businesses,[28] as, for instance, the dry cleaning[29] and ice business,[30] and as, for in-

16. Mass.—Sherman v. Pfefferkorn, 135 N.E. 568, 241 Mass. 468.
Mich.—Wedin v. Atherholt, 298 N. W. 483, 298 Mich. 142.
N.Y.—Goldberg v. Goldberg, 200 N.Y. S. 3, 205 App.Div. 435, modified on other grounds 200 N.Y.S. 925, 206 App.Div. 769.

17. Ga.—Kinney v. Scarbrough Co., 74 S.E. 772, 138 Ga. 77, 40 L.R.A., N.S., 473.
32 C.J. p 220 note 71 [c].

Draftsman and engineer
N.Y.—Eagle Pencil Co. v. Jannsen, 238 N.Y.S. 49, 135 Misc. 534.

Hostess for "Welcome Wagon Service"
U.S.—Briggs v. Boston, D.C.Iowa, 15 F.Supp. 763.
N.Y.—Briggs v. Glover, 3 N.Y.S.2d 979, 167 Misc. 306.
Ohio.—Briggs v. Butler, 45 N.E.2d 757, 140 Ohio St. 499, reversing 47 N.E.2d 812, 71 Ohio App. 48.

18. Tex.—Byers v. Trans-Pecos Abstract Co., Civ.App., 18 S.W.2d 1096, error dismissed.

19. N.C.—Scott v. Gillis, 148 S.E. 315, 197 N.C. 223.

20. Ill.—International Mutual Fire Ins. Co. v. Carrington, 241 Ill.App. 208.

21. **Credit clothing store**
N.C.—Moskin Bros. v. Swartzberg, 155 S.E. 154, 199 N.C. 539.

Meat department of store
Mass.—Economy Grocery Stores Corporation v. McAharney, 195 N.E. 747, 290 Mass. 549.

Small loan business
Neb.—Personal Finance Co. of Lincoln v. Hynes, 265 N.W. 541, 130 Neb. 547.

Manager and soliciting agent in business of eradicating vermin from hotels and dwellings.—Whittenberg v. Williams, 135 P.2d 228, 110 Colo. 418.

22. N.Y.—Lantieri Beauty Salon v. Yale, 7 N.Y.S.2d 984, 169 Misc. 547.

23. Tex.—Burroughs Adding Mach. Co. v. Chollar, Civ.App., 79 S.W.2d 344.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.
W.Va.—O. Hommel Co. v. Fink, 177 S.E. 619, 115 W.Va. 686.

Construction sales manager
Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.

Special sales executive
U.S.—Wark v. Ervin Press Corporation, C.C.A.Ill., 48 F.2d 152.

Aluminum
U.S.—McCluer v. Super Maid Cook-Ware Corporation, C.C.A.Kan., 62 F.2d 426—Super Maid Cook-Ware Corporation v. Hamil, C.C.A.Tex., 50 F.2d 830, certiorari denied 52 S.Ct. 138, 284 U.S. 677, 76 L.Ed. 572.
Mass.—Club Aluminum Co. v. Young, 160 N.E. 804, 263 Mass. 223.

Real estate
N.J.—J. I. Kislak, Inc. v. Artof, 176 A. 899, 13 N.J.Misc. 129.

Tree surgery
N.J.—Davey Tree Expert Co. v. Ahlers, 200 A. 1012, 124 N.J.Eq. 175.

Fact that employer's loss of commissions could be readily calculated did not preclude employer from obtaining injunction against violation by real estate salesman, since loss caused by impairment of employer's business and diversion of its clientele to other channels was not calculable.—J. I. Kislak, Inc. v. Artof, 176 A. 899, 13 N.J.Misc. 129.

Violation of agreement by employer
A tree surgery company, which had instructed salesman in its business after he had signed a contract not to compete with it for certain period after ceasing to be employed by it was entitled to a preliminary injunction to restrain him from working for a competitor, notwithstanding salesman alleged that company violated employment agreement by failing to credit him with commissions to which he was entitled, reduced his drawing account, and failed to reassign him to territory promised him, where those allegations did not appear to be supported by specific facts.—Davey Tree Expert Co. v. Ahlers, 200 A. 1012, 124 N.J.Eq. 175.

24. N.Y.—Wallace v. Kranz, 233 N. Y.S. 30, 133 Misc. 591, affirmed 234 N.Y.S. 439, 226 App.Div. 125.

25. N.J.—Sarco Co. of New Jersey v. Gulliver, 129 A. 399, 3 N.J.Misc. 641, affirmed 131 A. 923, 99 N.J.Eq. 432.

Injury to good will
Where exercise of stenographic reporting business by defendant would impair good will of plaintiff's business, and latter's damages would be inadequate and speculative, defendant's covenant in contract of employment not to engage in similar business will be enforced.—Edgecomb v. Edmonston, 153 N.E. 99, 257 Mass. 12.

Volume of business
Fact that stenographic reporting constitutes only one sixth of total business of plaintiff seeking to enjoin former employee from doing such work in competition with it, in violation of covenant, and constitutes all of defendant's business, is no reason for refusing injunction.—Sarco Co. of New Jersey v. Gulliver, 129 A. 399, 3 N.J.Misc. 641, affirmed 131 A. 923, 99 N.J.Eq. 432.

26. Mass.—Saltman v. Smith, 46 N. E.2d 550, 313 Mass. 135.
32 C.J. p 222 note 13.

Music teacher
Mass.—Saltman v. Smith, supra.

27. N.H.—Spaulding v. Mayo, 122 A. 899, 81 N.H. 85.

28. **Bakery business**
Md.—Deuerling v. City Baking Co., 141 A. 542, 155 Md. 280, 67 A.L.R. 993.
N.Y.—Barnard Bakeshops v. Dirig, 19 N.Y.S.2d 224, 173 Misc. 862.

29. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.
Pa.—Cundiff v. Ertl, 47 Dauph.Co. 440.
Tex.—Jennings v. Shepherd Laundries Co., Tex.Civ.App., 276 S.W. 726.

30. Fla.—Nettles v. City Ice & Fuel Co., 160 So. 42, 118 Fla. 345.
Mass.—Southern New England Ice Co. v. Ferrero, 4 N.E.2d 359, 295 Mass. 446—Whiting Milk Cos. v. O'Connell, 179 N.E. 169, 277 Mass. 570—West v. Jacobs, 178 N.E. 615, 277 Mass. 406—Walker Coal & Ice Co. v. Love, 174 N.E. 199, 273 Mass. 564—Horn Pond Ice Co. v. Pearson, 166 N.E. 640, 267 Mass. 256—Walker Coal & Ice Co. v. Westerman, 160 N.E. 801, 263 Mass. 235.
Mo.—City Ice & Fuel Co. v. Snell, App., 57 S.W.2d 440—City Ice & Fuel Co. v. McKee, App., 57 S.W.2d 443.
Tex.—Carpenter v. Southern Properties, Civ.App., 299 S.W. 440—Texas Ice & Cold Storage Co. v. McGoldrick, Civ.App., 284 S.W. 615.
Wis.—Wisconsin Ice & Coal Co. v. Lueth, 250 N.W. 819, 213 Wis. 42.

stance the laundry business[31] and milk business.[32]

In addition the rules have been applied in the case of a dentist,[33] an optometrist,[34] and a physician.[35]

d. What Constitutes Breach of Contract

(1) In general
(2) Engaging in business in name of another

(1) In General

A contract not to engage in a particular business or calling may be breached by acts in violation of the spirit and intent, as well as of the letter, of the contract.

Within the rule discussed supra subdivisions a–c of this section, permitting an injunction to restrain a breach or threatened breach of contracts in restraint of trade, it constitutes a breach of the contract to enter into a business substantially the same as the one transferred,[36] or to do acts in violation of the spirit and intent of the contract, even though not of its letter.[37] The acceptance of unsolicited business may constitute a breach of the covenant.[38]

31. U.S.—Grober v. Strick, C.C.A.N.J., 77 F.2d 762.
Fla.—Wheeler v. Mickles, 160 So. 45, 118 Fla. 348—Lewis v. Kirkland, 160 So. 44, 118 Fla. 350.
Ga.—National Linen Service Corporation v. Clower, 175 S.E. 460, 179 Ga. 136.
Mass.—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67.
N.J.—Vander May v. Schoone-Jongen, 21 A.2d 819, 130 N.J.Eq. 227, affirming 16 A.2d 198, 128 N.J.Eq. 336—Capital Laundry Co. v. Vannozzi, 169 A. 554, 115 N.J.Eq. 26.
N.Y.—Holland Laundry v. Lindquist, 16 N.Y.S.2d 140, 173 Misc. 121—New York Linen Supply & Laundry Co. v. Schachter, 212 N.Y.S. 72, 125 Misc. 805.
Pa.—Clark v. Pinkerton, 169 A. 413, 111 Pa.Super. 150.
Tex.—Blaser v. Linen Service Corporation of Texas, Civ.App., 135 S.W.2d 509, error dismissed, judgment correct—Public Laundries v. Taylor, Civ.App., 26 S.W.2d 1085.
32 C.J. p 220 note 71 [b].

Fact that plaintiff was member of laundry organization whose members would like to see plaintiff prevail did not prevent maintenance of suit to enjoin former employee from violating contract not to solicit plaintiff's customers.—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67.

In view of probable unemployment which would result from granting injunction laundry company was not entitled to injunction to restrain its former truck drivers from violating provision of contract of employment which forbade for one year their solicitation of patronage of company's customers for a competitor.—Love v. Miami Laundry Co., 160 So. 32, 118 Fla. 137.

32. Ill.—Western-United Dairy Co. v. Nash, 12 N.E.2d 47, 293 Ill.App. 162.
Mass.—Shawsheen Dairy v. Keefe, 29 N.E.2d 157, 307 Mass. 30.
Or.—Snow Cap Dairy v. Robanske, 47 P.2d 977, 151 Or. 59.
Pa.—Standard Dairies v. McMonagle, 11 A.2d 535, 139 Pa.Super. 267—Philadelphia Dairy Products Co. v. Kleiman, 36 Pa.Dist. & Co. 643—Sanitary Farms Dairy v. Wernicki, 21 Erie Co. 201.

33. Pa.—Shor v. Freeman, 21 Pa. Dist. & Co. 111, 15 Lehigh Co.L.J. 411.
Restrictive covenant in contract of sale see supra subdivision b (2) of this section.

Employee of corporation unauthorized to practice
Dental corporation was not entitled to enjoin violation of agreement by former member not to practice operative dentistry within given period within given distance of corporate location, since corporation's charter could not authorize it to practice dentistry.—Dr. Allison, Dentist, Inc., v. Allison, 196 N.E. 799, 360 Ill. 638.

Temporary injunction where facts in dispute
A preliminary injunction to restrain dentist from engaging in practice of orthodontia for three years in designated counties, in violation of contract of employment with complainant, would be denied, where dentist admitted his practice of orthodontia but evidence as to whether he was discharged without cause was disputed.—Weiss v. Levine, 34 A.2d 237, 134 N.J.Eq. 1.

34. N.Y.—Scadron's Sons v. Susskind, 229 N.Y.S. 209, 132 Misc. 406—Rudolph Bros. v. Greulick, 21 N.Y.S.2d 971.
Wis.—Espenhains Dry Goods Co. v. Kurzon, 248 N.W. 153, 211 Wis. 641.

35. Iowa.—Larsen v. Burroughs, 277 N.W. 463, 224 Iowa 740—McMurray v. Faust, 276 N.W. 95, 224 Iowa 50.
Minn.—Granger v. Craven, 199 N.W. 10, 159 Minn. 296, 52 A.L.R. 1356.
Miss.—Wilson v. Gamble, 177 So. 363, 180 Miss. 499.
Neb.—Tarry v. Johnston, 208 N.W. 615, 114 Neb. 496.
N.Y.—Foster v. White, 17 N.E.2d 761, 279 N.Y. 38, reversing 3 N.Y.S.2d 456, 253 App.Div. 448, and reargument denied 18 N.E.2d 868, 279 N.Y. 786—Foster v. White, 290 N.Y.S. 394, 248 App.Div. 451, affirmed 7 N.E.2d 710, 273 N.Y. 596.

Mutual right to end contract
Where contract by which physician employed assistant gave both the right to terminate the contract on thirty days' notice, but where the assistant remained in physician's employ for two years under the contract, the assistant's covenant not to open an office in same territory for three years after termination of employment will be enforced by injunction, notwithstanding physician's right to terminate contract at any time on thirty days' notice.—Granger v. Craven, 199 N.W. 10, 159 Minn. 296, 52 A.L.R. 1356.

36. N.J.—Richardson v. Peacock, 28 N.J.Eq. 151, affirmed 33 N.J.Eq. 597.
What constitutes breach of contract in restraint of trade generally see Contracts § 327 d.

37. Ky.—Johnson v. Stumbo, 126 S.W.2d 165, 277 Ky. 301.
Tex.—Clay v. Richardson, Civ.App., 290 S.W. 235.
32 C.J. p 222 note 19.

Advertising within restricted area
Where seller of District of Columbia furniture business agreed not to engage in furniture business in District for ten years and seller established new furniture store outside the District but in same metropolitan area, seller's advertisement of new store in District of Columbia newspapers violated the covenant and injunction against such advertisement and advertisement in District of Columbia telephone directory was properly granted.—Hartung v. Hilda Miller, Inc., 133 F.2d 401, 77 U.S.App.D.C. 164.

Employment contract providing that employee should not, for year after termination of employment, in any way attempt to divert or take away employer's customers covered case of striking employee who had broken contract by quitting without notice and who attempted to induce regular customers to cease their patronage, entitling employer to preliminary restraining order.—Perfect Laundry Co. v. Marsh, 191 A. 774, 121 N.J.Eq. 588, reversing 186 A. 470, 120 N.J.Eq. 508.

38. **Physician who answers unsolicited calls** acts in violation of a contract for the sale of his practice.—Gaul v. Hoffman, 5 Pa.Co. 355—32 C.J. p 223 note 20.

While there is some authority to the contrary,[39] it is very generally held that acting as president, manager, or superintendent of a competing business within the restricted territory is a violation of a contract for the sale of a business with its good will with an agreement not to open up a competing business within such territory.[40] There is also authority to the effect that the seller will be enjoined from acting as agent[41] or employee[42] of a competitor within the restricted territory, although there is authority to the contrary.[43]

On the other hand, various acts have been held not to constitute a breach of the covenant.[44] It has been held that it is not a breach for the seller to lend money to another to enable him to carry on a competing business,[45] that it is so doubtful that such act constitutes a breach that an injunction should be denied.[46] Ownership and operation of a competing business by a third person on property leased by the seller do not alone show a breach of the contract warranting injunctive relief.[47]

(2) Engaging in Business in Name of Another

A contract not to engage in a certain business may be breached by the seller engaging in the business in the name of another.

Within the rule permitting an injunction for the breach or threatened breach of contracts in restraint of trade a contract not to engage in a certain business may be broken by engaging in it under the name of another person; if the use of the new name is not bona fide, but is a mere subterfuge to escape the penalty for breach of contract, the carrying on of such business under the new name will be enjoined.[48] Although the carrying on of the business by one under color of his wife's name will be enjoined,[49] there is nothing to prevent the other spouse or a near relative from carrying on such business if it is conducted in good faith and not really on behalf of the one who was a party to the contract.[50]

§ 85. Contracts Not to Entice Away Employees or Customers

An injunction may issue to restrain the breach of an agreement not to entice away employees or to solicit customers of the plaintiff.

One who sold and transferred a long established retail mercantile business, together with its good will and the right to use the firm name under which it was conducted, and agreed to serve the purchaser as an employee for a stated term and use his best efforts to retain the employees and customers, will be enjoined from attempting to entice away employees or soliciting customers who were such at the time of the sale to trade with a competing firm

Defendant's business outside area

Where defendant sold electrical business and good will to plaintiff and covenanted not to engage in the electrical business or appurtenances thereto, or to be interested directly or indirectly for himself or anyone else in such business in a certain village, his subsequent acceptance of unsolicited contracts for installation of wiring and electrical equipment in such village violated the covenant, although his electrical business was located outside the restricted territory.—McCarty v. Constable, 223 N.Y.S. 484, 221 App.Div. 307.

39. N.Y.—Hans Mahler Co. v. Mahler 145 N.Y.S. 764, 160 App.Div. 548.
32 C.J. p 223 note 21.

40. Cal.—Stephens v. Bean, 224 P. 1022, 65 Cal.App. 779.
32 C.J. p 223 note 22.

41. Me.—Flaherty v. Libby, 81 A. 166, 108 Me. 377—Emery v. Bradley, 34 A. 167, 88 Me. 357.

42. Ga.—Strauss v. Phillips, 180 S.E. 123, 180 Ga. 641.
N.J.—Langberg v. Wagner, 139 A. 518, 101 N.J.Eq. 383.
Pa.—Jones v. Morrow, 6 Pa.Dist. & Co. 759, 73 Pittsb.Leg.J. 155.
S.C.—Metts v. Wenberg, 155 S.E. 734, 158 S.C. 411.
32 C.J. p 223 note 24.

43. Ohio.—Schroeder v. Schultz, 16 Ohio Cir.Ct.,N.S., 303.
32 C.J. p 223 note 25.

44. **Announcing former business association**

Where agreement entered into in contemplation of divorce provided that husband was to become sole owner of a florist business conducted by the parties known as "Weigel's House of Flowers" and it was stipulated that wife should not maintain any place for sale of flowers in town of Palm Beach under the name of "Weigel" or any other name of which the word "Weigel" was a part, a card distributed by wife announcing retail store for sale of flowers which contained notation that wife was formerly associated with "Weigel's House of Flowers" was not a violation of stipulation contained in agreement, so as to authorize issuance of an injunction.—Weigel v. Wiener, 5 So.2d 447, 149 Fla. 231.

Mailing circulars to former customers

Where defendant sold share in partnership retail shoe business, and agreed not to engage in similar business on certain designated streets, fact that he opened new store beyond restricted area under his own name, and mailed circular letters to some of former customers, calling attention to previous connection with partnership business, did not show encroachment on good will of firm, calling for injunction.—Shangold v. Berson, 211 N.Y.S. 695, 125 Misc. 646.

45. N.Y.—Salzman v. Siegelman, 92 N.Y.S. 844, 101 App.Div. 406.

46. Pa.—Appeal of Harkinson, 78 Pa. 196, 21 Am.R. 9.

47. Fla.—Ericson v. Jayette, 6 So.2d 453, 149 Fla. 82.

48. N.J.—Howell v. Keck, 11 A.2d 365, 127 N.J.Eq. 87.
Wash.—Merager v. Turnbull, 99 P. 2d 434, 2 Wash.2d 711, 127 A.L.R. 1142.
32 C.J. p 223 note 31.

49. N.J.—William T. Wiegand Glass Co. v. Wiegand, 148 A. 174, 105 N.J.Eq. 434.
Pa.—Loevner v. Levy, 6 Fay.L.J. 103.
32 C.J. p 223 note 32.

50. Kan.—Emmert v. Richardson, 24 P. 480, 44 Kan. 268.
Pa.—Appeal of Harkinson, 78 Pa. 196, 21 Am.R. 9—Heiney v. Shindell, 1 Monroe L.R. 146.

organized by him after his term of service expired.[51]

§ 86. Contracts with Public Service Companies

A public service corporation may, under proper circumstances, be restrained from breaching its contract to supply water, gas, electricity, refrigeration, and telephone service.

Since the law can usually afford no adequate remedy in case of a breach of contracts for a supply of water for domestic, manufacturing, or other purposes, the shutting off of the supply may be enjoined.[52] The rule has no application where the cutting off of the service is in pursuance of valid regulations posted in compliance with the public service statutes,[53] or where no contract for service is shown to exist,[54] or where an alleged contract is indefinite in its terms as to price and duration, and where it does not appear that complainant was bound to take, or the city or defendant to furnish, water for any specific time.[55] A court of equity has power to grant a mandatory injunction restraining a water company from refusing to supply water to a complainant on the same terms on which it is supplied to others, where it clearly appears from the facts that such refusal is an unlawful discrimination, and that the injunction is the only adequate remedy available to complainant.[56] The user will be enjoined from taking more than he is entitled to when he cannot otherwise be prevented and the excess cannot be measured.[57]

Light, power, and gas. An injunction may be granted to prevent a public service corporation from wrongfully shutting off the supply of electricity or gas which such corporation is under contract to furnish, on the theory that the remedy at law is inadequate[58] and that the shutting off of the supply would cause irreparable injury.[59] It has been held that a city may maintain the action, although the citizens could redress the wrong individually or collectively,[60] and that a city may sue to restrain a public service company from exceeding the contract rates for the current supplied to the inhabitants.[61] Injunctive relief will be denied where under the contract the consumer is not obligated to take any current except at his own election.[62]

An injunction may issue to restrain a consumer from breaching a contract by which it bound itself to take all of the electrical power required in its business for a term of years from an electric power company at stated prices.[63] However, the court may decline to restrain the breach by the purchaser of a contract for the sale of electrical energy by one public utility company to another where it is impossible for the court to dispose of the whole controversy and an injunction would necessitate continuous supervision by the court.[64] A municipality will not be restrained from breaching a contract to take power where the contract was not authorized by the municipality,[65] where the

51. U.S.—Acker, Merrall & Condit Co. v. McGaw, C.C.Md., 144 F. 864.
32 C.J. p 226 note 59.
Injunction to restrain third person from inducing breach of contract see infra § 89.

52. Vt.—Hall v. Village of Swanton, 35 A.2d 381.
32 C.J. p 225 note 41.

53. Pa.—Rochester Bldg. & Loan Ass'n v. Beaver Valley Water Co., 68 Pa.Super. 122.
32 C.J. p 225 note 42.

54. Pa.—Summerhill Borough v. Cambria County Water Supply Co., 48 Pa.Super. 80.

55. S.C.—Childs v. Columbia, 70 S.E. 296, 87 S.C. 566, 34 L.R.A.,N.S., 542.
Where contract was executory and fixed no definite time for its duration, it was terminable at will of either party, and consumer was not entitled to injunction restraining village from discontinuing water supply.—Gage v. Village of Wilmette, 146 N.E. 325, 315 Ill. 328, affirming 233 Ill. App. 122.

56. U.S.—Wiemer v. Louisville Water Co., C.C.Ky., 130 F. 251.

57. Or.—Salem Mills Co. v. Lord, 69 P. 1033, 42 Or. 82, motion overruled 70 P. 832, 42 Or. 82.
Wis.—Lawson v. Menasha Woodenware Co., 18 N.W. 440, 59 Wis. 393, 48 Am.S.R. 528.

58. U.S.—Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., D.C.R.I., 295 F. 895.
Vt.—Hall v. Village of Swanton, 35 A.2d 381, 384, citing **Corpus Juris.**
32 C.J. p 225 note 48.
Gas company will be enjoined from turning off gas furnished under contract.—Ravencliff Development Co. v. Lafferty, 138 S.E. 104, 103 W.Va. 539.

59. D.C.—U. S. Electric Lighting Co. v. Metropolitan Club, 6 App.D.C. 536.

60. U.S.—City of Jamestown v. Pennsylvania Gas Co., D.C.N.Y., 268 F. 437, modified on other grounds, C.C.A., 1 F.2d 871.
Ala.—Mobile Electric Co. v. City of Mobile, 79 So. 39, 201 Ala. 607, L.R.A.1918F 667.

61. N.M.—Town of Gallup v. Gallup Electric Light & Power Co., 225 P. 724, 29 N.M. 610.

62. Iowa.—Adams v. Iowa Gas & Electric Co., 203 N.W. 229, 200 Iowa 782, reheard 205 N.W. 368, 200 Iowa 782.

63. U.S.—Montgomery Traction Co. v. Montgomery Light & Water Power Co., Ala., 229 F. 672, 144 C.C.A. 82, certiorari denied 37 S.Ct. 14, 242 U.S. 628, 61 L.Ed. 536, and affirming, D.C., Montgomery Light & Water Power Co. v. Montgomery Traction Co., 219 F. 963.
Fla.—Manatee County Growers' Ass'n v. Florida Power & Light Co., 152 So. 181, 113 Fla. 449.
Power company is without adequate remedy at law in such cases.—Manatee County Growers' Ass'n v. Florida Power & Light Co., 152 So. 181, 113 Fla. 449.

64. U.S.—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A.Ariz., 17 F.2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1336.

65. **Power company contracting with operator of municipal light plant** to furnish current was not entitled to sue for injunction against violation of contract by town where it appeared that town was not party to such contract inasmuch as opera-

remedy at law is adequate,[66] or where it is impossible for the city to perform the contract because of the transfer of its plant to a private company.[67]

Where a municipality has leased its gas plant to a private corporation, the city and its officers may be restrained from trespassing on, and taking possession of, the plant in violation of the lease.[68]

Refrigeration. A refrigerator company may be enjoined from summarily discontinuing service to the irreparable damage of a customer and the possible destruction of his product.[69]

Telephone or telegraph service. A contract made by a telephone company operating as a public service corporation, binding it to furnish service, may, in a proper case, be enforced by enjoining the company from discontinuing its service or removing its property from the patron's premises.[70] An injunction will be refused where plaintiff refuses to make payment in advance pursuant to valid rules of the company.[71]

The discontinuance of service by the telegraph company will not be restrained where the character of the use of the service is such as to justify an honest doubt as to its legality.[72]

§ 87. Covenants as to Use of Property

a. In general
b. Restrictive covenants as to use of land

a. In General

A covenant restricting the use of property, including personal property, may, in a proper case, be enforced by injunction.

Where a restrictive covenant with respect to the use of property is valid, it may in a proper case be enforced by injunction,[73] but only as against one under obligation not to violate the covenant.[74] Since a purchaser with notice takes title subject to the restriction, he may be enjoined from using the property in violation of the restriction.[75]

A person who has agreed that property shall not be subjected to a specified use has no standing in a court of equity when seeking an injunction which will in effect aid him in devoting the property to a use which violates his agreement.[76]

Personal property. A valid covenant restricting the use of personal property may, in a proper case, be enforced by injunction,[77] and as against a third person taking the property with notice of the restriction.[78] Thus an injunction may issue to re-

tor's contract with town was insufficient to create agency authorizing him to contract on town's behalf.—Town of Hagerstown v. Liberty Light & Power Co., 150 N.E. 116, 84 Ind.App. 115.

66. U.S.—Northwestern Light & Power Co. v. Town of Milford, C.C.A.Iowa, 82 F.2d 45, reheard 82 F.2d 1023.

67. Kan.—City of Holton v. Kansas Power & Light Co., 9 P.2d 675, 135 Kan. 58.

Injunction against private company will not issue where it had not assumed obligation of municipality to take the power.—City of Holton v. Kansas Power & Light Co., supra.

68. **Wrongful termination of contract by mayor**

An injunction would lie to restrain the city of Philadelphia and its officers from trespassing on, and taking possession of, gas plant which was leased from the city and operated by gas company where the mayor, contrary to ordinance passed over his veto, purported to terminate the contract without paying for improvements made by the gas company which was required by contract between the city and company as a prerequisite to termination of the contract, where the record indicated probable magnitude of damage which would result to citizens and to the gas company if the threatened trespass were not restrained.—Philadelphia Gas Works Co. v. City of Philadelphia, 1 A.2d 156, 331 Pa. 321.

69. N.Y.—Jacob Dold Packing Co. v. Kings County Refrigerator Co., 162 N.Y.S. 1035, 176 App.Div. 407, reargument denied 162 N.Y.S. 1151, 177 App.Div. 896.

70. Colo.—Colorado Telephone Co. v. Wilmore, 129 P. 204, 53 Colo. 585.
N.D.—Great Northern R. Co. v. Sheyenne Tel. Co., 145 N.W. 1062, 27 N.D. 256.
S.C.—O'Neal v. Citizens' Public Service Co. of South Carolina, 154 S.E. 217, 157 S.C. 320, 70 A.L.R. 887.
32 C.J. p 225 note 54—62 C.J. p 87 note 27.

Decree resulting in bankruptcy of company

An injunction will be refused in a suit to enforce a telephone ordinance requiring service at specified rates where it conclusively appeared that, because of the increased cost of the service, due to the increased number of telephones, the ordinance rate was insufficient to pay the cost of the service and that a decree enforcing such rates would bankrupt the company.—Maryland Telephone & Telegraph Co. v. Chas. Simons' Sons Co., 63 A. 314, 103 Md. 136, 115 Am.S.R. 346.

71. N.C.—Woodley v. Carolina Telephone & Telegraph Co., 79 S.E. 598, 163 N.C. 284, Ann.Cas.1914D, 116.

72. U.S.—Hamilton v. Western Union Telegraph Co., D.C.Ohio, 34 F. Supp. 928.

73. Ala.—Moseby v. Roche, 171 So. 351, 233 Ala. 280.
32 C.J. p 203 notes 40, 39 [a]–[c].
Injunction to restrain breach of contract in restraint of trade see supra § 84.

74. N.Y.—New York Phonograph Co. v. Davega, 111 N.Y.S. 363, 127 App.Div. 222.

75. U.S.—Magnolia Petroleum Co. v. Suits, D.C.Okl., 31 F.2d 205, 211, citing **Corpus Juris.**
N.Y.—Murphy v. Christian Press Ass'n Pub. Co., 56 N.Y.S. 597, 38 App.Div. 426.
32 C.J. p 204 note 42, p 226 note 58 [c], p 198 note 83 [b].

76. Ga.—Allmond v. Jenkins, 140 S.E. 879, 165 Ga. 334.

77. U.S.—P. Lorillard Co. v. Weingarden, D.C.N.Y., 280 F. 238.

78. U.S.—P. Lorillard Co. v. Weingarden, supra.
Mass.—Garst v. Charles, 72 N.E. 839, 187 Mass. 144.
N.Y.—Murphy v. Christian Press Ass'n Pub. Co., 56 N.Y.S. 597, 38 App.Div. 426.
32 C.J. p 198 note 83 [a].

strain the breach of a restriction as to the price of goods[79] or as to the resale of goods,[80] including the place of resale[81] and the resale price.[82] Where a covenant not to sell personal property without giving complainant the first opportunity to buy it is valid, it may be enforced by injunction.[83]

b. Restrictive Covenants as to Use of Land

(1) In general
(2) Persons entitled to injunction
(3) Persons who may be enjoined
(4) Considerations as to issuance of injunction
(5) Building restrictions
(6) Restrictions as to kinds of business
(7) Mandatory injunction

(1) In General

A covenant restricting the use of land may, in a proper case, be enforced by injunction.

Where one has made a valid contract, clearly manifesting his intent, restricting the use to which he may put his land, a violation of such restriction may be restrained by injunction.[84] An owner whose land is subject to equitable restrictions cannot violate them and, when suit is brought against

79. N.Y.—Murphy v. Christian Press Ass'n Pub. Co., supra.

80. U.S.—P. Lorillard Co. v. Weingarden, D.C.N.Y., 280 F. 238.
Legality of restrictions on resale of personalty see the C.J.S. titles Contracts § 253, and Monopolies § 48 et seq, also 41 C.J. p 138 note 65 et seq.

81. U.S.—P. Lorillard Co. v. Weingarden, supra.
32 C.J. p 226 note 58 [c].

82. Mass.—Garst v. Charles, 72 N.E. 839, 187 Mass. 144.

83. Ind.—Doss v. Yingling, 172 N.E. 801, 95 Ind.App. 494.

Restricting alienation of stock
(1) Stockholder properly sought injunctive relief against violation of agreement restricting alienation of stock since legal remedy was inadequate.—Doss v. Yingling, supra.

(2) The distribution by defendant to its stockholders of its share of another corporation's stock owned by it and plaintiff was not a "sale" within their contract that stock should not be sold by defendant until first offered to plaintiff, but was a mere "distribution by operation of law" which plaintiff could not enjoin as in violation of contract.—E. I. Du Pont De Nemours & Co. v. Pathe Film Corporation, D.C.N.Y., 25 F.Supp. 350.

(3) Restrictions on right to transfer corporate stock generally see Corporations § 391.

84. Ala.—Moseby v. Roche, 171 So. 351, 233 Ala. 280.
Ark.—Storthz v. Midland Hills Land Co., 90 S.W.2d 772, 192 Ark. 273.
Cal.—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal. App.2d 19—Title Insurance & Trust Co. v. Ritchardson, 266 P. 570, 90 Cal.App. 606.
Conn.—Harmonie Club v. Smirnow, 137 A. 769, 106 Conn. 243.
Ga.—Peebles v. Perkins, 140 S.E. 360, 165 Ga. 159—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.
Ill.—Chicago Title & Trust Co. v. Wabash-Randolph Corporation, 51 N.E.2d 132, 384 Ill. 78—Brandenburg v. Country Club Bldg. Corporation, 163 N.E. 440, 332 Ill. 136—Hoffman v. Schwan, 38 N.E.2d 53, 312 Ill.App. 160.
Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
Ky.—Bennett v. Consolidated Realty Co., 11 S.W.2d 910, 226 Ky. 747, 61 A.L.R. 453.
La.—Ouachita Home Site & Realty Co. v. Collie, 179 So. 841, 189 La. 521.
Md.—Williams Realty Co. v. Robey, 2 A.2d 683, 175 Md. 532.
Mo.—Toothaker v. Pleasant, 288 S. W. 38, 315 Mo. 1239.
N.J.—Baird v. Board of Recreation Com'rs of Village of South Orange, 154 A. 204, 108 N.J.Eq. 91, reversed on other grounds 160 A. 537, 110 N. J.Eq. 603.
N.Y.—Ridgway v. Cockburn, 296 N.Y. S. 936, 163 Misc. 511.
Or.—Crawford v. Senosky, 274 P. 306, 128 Or. 229.
Pa.—Wilson v. Giacomucci, 31 Del. Co. 351—Hourigan v. Valko, 31 Luz.Leg.Reg. 350.
Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 538—Cheatham v. Taylor, 138 S.E. 545, 148 Va. 26.
W.Va.—Wolfe v. Landers, 20 S.E.2d 124, 124 W.Va. 290—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 102 W.Va. 374.
32 C.J. p 204 note 44.
Covenants restricting use of land:
Generally see the C.J.S. titles Deeds §§ 162–171, and Landlord and Tenant §§ 235–243, also 35 C. J. p 1184 note 48 et seq.
As negative easements see Easements § 28.
Injunction to restrain nuisance see the C.J.S. title Nuisances §§ 109–138, also 46 C.J. p 759 note 75 et seq.

Covenant not to sell, lease, etc., to colored persons
D.C.—Hundley v. Gorewitz, 132 F.2d 23, 77 U.S.App.D.C. 48—Torrey v. Wolfes, 6 F.2d 702, 56 App.D.C. 4. Ill.—Lee v. Hansberry, 24 N.E.2d 37, 372 Ill. 369, certiorari granted Hansberry v. Lee, 60 S.Ct. 889, 309 U.S. 652, 84 L.Ed. 1002, reversed on other grounds 61 S.Ct. 115, 311 U.S. 32, 85 L.Ed. 22, 132 A.L.R. 741.
Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
N.Y.—Ridgeway v. Cockburn, 296 N. Y.S. 936, 163 Misc. 511.

Covenant not to use land except for church purposes
U.S.—Magnolia Petroleum Co. v. Suits, D.C.Okl., 31 F.2d 205.
Ky.—Sword v. Reynolds, 298 S.W. 942, 221 Ky. 314.

Covenant to use land exclusively for school purposes
W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 135 S.E. 399, 102 W.Va. 374.

Solvency of defendant
If grantee subjects estate to uses in violation of restrictive covenants, jurisdiction and powers of court of equity may be invoked to enforce equity or right so reserved, regardless of solvency or insolvency of grantee.—McKee v. Club-View Heights, 162 So. 671, 230 Ala. 652.

Covenant to alter fence
One who erected house in consideration and on strength of promise of adjoining owner to alter high fence could enjoin rebuilding or repairing of fence after alteration.—Strachan v. Burford, 162 S.E. 120, 173 Ga. 821.

Covenant to keep passageway open
The breach of a contract by a railroad company to maintain and keep open two existing passageways for stock under its road through plaintiff's farm may be restrained.—Rock Island & P. R. Co. v. Dimick, 32 N.E. 291, 144 Ill. 628, 19 L.R.A. 105.

Land subsequently acquired
Vendor could enjoin purchaser from violating covenant and could be enjoined from violating similar restriction on adjoining lot subsequently acquired.—Huber v. Guglielmi, 163 N.E. 571, 29 Ohio App. 390.

him, relieve his property from the restrictions by the payment of damages.[85] However, not every violation of a restrictive agreement relating to the use of realty will be restrained;[86] each case depends on its own circumstances.[87] Injunctive relief will be denied where the existence of a restrictive covenant is not established[88] or it is within the statute of frauds,[89] or where the circumstances have so changed as to defeat the original purpose of the covenant.[90]

Where a restrictive covenant is declared void in a proceeding brought for that purpose, it is not necessary in such proceeding to issue a permanent injunction to restrain the enforcement of the covenant where no attempt has been made to enforce it.[91] An invalid agreement by the owner of land to restrict the use of his property does not bar his right to injunctive relief to restrain interference with its use.[92]

The allowance of an injunction to restrain the breach of a covenant in a lease restricting the use of the property is considered in the C.J.S. title Landlord and Tenant § 307 et seq, also 36 C.J. p 50 note 64 et seq.

(2) Persons Entitled to Injunction

Where land is subdivided and distinct parcels are sold to separate grantees, with restrictions on its use, pursuant to a general plan of development, such restrictions may be enforced by injunction by one grantee against any other grantee with notice.

Within the rule permitting the enforcement of a restrictive covenant as to the use of land, when a restrictive covenant inserted by the grantor in a deed of a particular lot is part of a general scheme for the benefit and improvement of all the lands included in a larger tract it may be enforced by injunction against the purchaser of such lot or his grantees, at the suit of a holder of another lot in the tract who bought with notice of the general scheme and on the faith of the covenants inserted in the several deeds to carry it out;[93] and in

85. Mass.—Jenney v. Hynes, 184 N. E. 444, 282 Mass. 182.
Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.

86. N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App. Div. 135.

Closing business

Equity may close established business by temporary injunction as in breach of restrictive covenant only when continuance thereof would result in immediate and serious consequences to another.—Dilts v. Faulkner, Tex.Civ.App., 289 S.W. 131.

87. Mich.—Carey v. Lauhoff, 3 N.W. 2d 87, 301 Mich. 168.
N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App.Div. 135.
Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.

88. Md.—Smith v. Government Realty, 192 A. 341, 172 Md. 547.
N.J.—Ferraro v. Kozlowski, 138 A. 197, 101 N.J.Eq. 532—Beattie v. Howell, 129 A. 822, 98 N.J.Eq. 163.
Okl.—Cooke v. Southwest Petroleum Co., 61 P.2d 16, 177 Okl. 458.

Size of lots

An owner will not be restrained from subdividing or selling lots of smaller dimensions than indicated on a plan made by him, in absence of an express agreement that land embraced in map shall not be sold in lots smaller in area than those shown thereon.
N.J.—Herold v. Columbia Investment & Real Estate Co., 67 A. 607, 72 N. J.Eq. 857, 129 Am.S.R. 718, 14 L. R.A.,N.S., 1067, 16 Ann.Cas. 580.
Pa.—Stoever v. Gowen, 124 A. 684, 280 Pa. 424.

Where defendant is without capacity to make covenant, injunctive relief will be denied.—Belden v. City of Niagara Falls, 245 N.Y.S. 510, 230 App.Div. 601, reversing 241 N.Y.S. 5, 136 Misc. 406.

Where there was no general plan as to a restricted use of property in an allotment and covenants in a deed were purely personal with grantor who conveyed his interest in the tract and moved to another locality, a court of equity would not by injunction limit the full use of the property where no benefit was shown which would accrue to the grantor by the enforcement of the restriction or detriment if it was violated.—Taylor v. Summit Post No. 19, American Legion, 20 N.E.2d 267, 60 Ohio App. 201.

89. N.J.—Droutman v. E. M. & L. Garage, 20 A.2d 75, 129 N.J.Eq. 545, affirming 19 A.2d 25, 129 N.J.Eq. 1.
Oral agreement restricting use of realty as within statute of frauds see Frauds, Statute of § 124.

90. N.J.—Wellitoff v. Kohl, 147 A. 390, 105 N.J.Eq. 181, 66 A.L.R. 1317, modifying 143 A. 628, 103 N. J.Eq. 454.
N.Y.—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N. Y.S. 510, 230 App.Div. 601.
Pa.—Fletcher v. Bien, 129 A. 558, 283 Pa. 517.
W.Va.—Cole v. Seamonds, 104 S.E. 147, 87 W.Va. 19.

Valid covenant

Conclusion that covenant is valid is not necessarily inconsistent with conclusion that situation has so changed as to render it inequitable to enforce it strictly.—Clark v. Vaughan, 292 P. 783, 131 Kan. 438.

91. Cal.—Forman v. Hancock, 39 P. 2d 249, 3 Cal.App.2d 291.

92. **Agreement with city not to use floodlights**

Where city is without right to deny application for rezoning of property or for permit to erect filling station thereon, city could not condition its grant of permit on property owner's agreement not to use floodlights, and hence such an agreement did not preclude property owner from thereafter enjoining city from interfering with installation of floodlights.—City of Alexandria v. Texas Co., 1 S.E.2d 296, 172 Va. 209.

93. Ariz.—McRae v. Lois Grunow Memorial Clinic, 14 P.2d 478, 480, 40 Ariz. 496, citing **Corpus Juris.**
Cal.—Title Insurance & Trust Co. v. Ritchardson, 266 P. 570, 90 Cal. App. 606.
Ga.—Jones v. Lanier Development Co., 2 S.E.2d 923, 188 Ga. 141.
La.—Alfortish v. Wagner, 7 So.2d 708, 200 La. 198—Edwards v. Wiseman, 3 So.2d 661, 198 La. 382, amending, App., 3 So.2d 655.
N.Y.—Ridgeway v. Cockburn, 296 N. Y.S. 936, 163 Misc. 511.
W.Va.—Wolfe v. Landers, 20 S.E.2d 124, 124 W.Va. 290.
Wis.—Stein v. Endres Home Builders, 280 N.W. 316, 228 Wis. 620.
32 C.J. p 206 note 70.
Persons entitled to enforce restrictive covenants in deeds generally see Deeds § 167.

these circumstances it is immaterial whether or not the covenant runs with the land.[94] It makes no difference that a party cannot maintain a suit at law in his own name to enforce the stipulation as a covenant or contract; a court of equity will give full effect to the stipulation, on the complaint of a party for whose benefit and protection, as owner of the land, the stipulation was intended.[95] While it is not necessary that complainant should be a direct party to the covenant sought to be enforced, it is necessary that he should have bought with notice of, and in reliance on, it, and that the covenant should have been entered into for the benefit of the land complainant owns, and not merely for the personal advantage of the original covenantee.[96] A grantee of land is not, because the grantor in subsequent conveyances inserted restrictive covenants, entitled to the benefit of such restrictions.[97]

A lessee of the land is entitled to enforce a covenant restricting the use of the land where the owners of the land refuse to do so and the lessee is or will be injured by the breach.[98]

(3) Persons Who May Be Enjoined

A restrictive covenant as to the use of land may be enforced by injunction against one acquiring the property with knowledge of the restriction.

Within the rule permitting the enforcement of a restrictive covenant as to the use of land, it is a general rule that where one by gift or purchase acquires real property from another, with knowledge of a previous contract made by him with a third person affecting the use of such property, injunction will lie to prevent the one so acquiring the property from using it in a manner inconsistent with the contract to the injury of the third person,[99] provided the circumstances have not so changed as to defeat the original purpose of the restriction and render nugatory, ineffectual, and unduly burdensome its further enforcement.[1] Within this rule undertenants and sublessees of the covenantor also may be enjoined.[2] Such agreements are capable of being enforced by injunction against all those who take the estate with notice of them, although they may not be, strictly speaking, real covenants, so as to run with the land,[3] or of a nature to create a technical qualification of the title conveyed by the deed.[4]

On the other hand, a bona fide purchaser without notice of a restrictive covenant not running with the land will not be enjoined from acting contrary to its terms.[5] However, constructive notice of a restrictive covenant is sufficient in equity to

94. Ill.—Wiegman v. Kusel, 110 N.E. 884, 270 Ill. 520.

95. N.Y.—Barrow v. Richard, 8 Paige 351, 35 Am.D. 713.
32 C.J. p 207 note 72.

96. Mo.—Toothaker v. Pleasant, 288 S.W. 38, 315 Mo. 1239—Coughlin v. Barker, 46 Mo.App. 54.
32 C.J. p 207 note 73, p 198 note 79 [b].

97. N.J.—Seidel v. Mills, 96 A. 899, 84 N.J.Eq. 285, 507.

98. U.S.—Magnolia Petroleum Co. v. Suits, D.C.Okl., 31 F.2d 205.

99. U.S.—Goldberg v. Tri-States Theatre Corporation, C.C.A.Neb., 126 F.2d 26—Magnolia Petroleum Co. v. Suits, C.C.A.Okl., 40 F.2d 161.
Ala.—Moseby v. Roche, 171 So. 351, 233 Ala. 280.
Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733—Gamble v. Fierman, 255 P. 269, 82 Cal.App. 180.
Ill.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412—Reis v. Bixhorn, 271 Ill.App. 279.
Kan.—Reeves v. Morris, 124 P.2d 488, 155 Kan. 231—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
N.Y.—Sweet v. Hollearn, 252 N.Y.S. 202, 141 Misc. 135.
Tex.—Ragland v. Overton, Civ.App., 44 S.W.2d 768.
Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533—Clark v. Miller, 141 S.E. 141, 149 Va. 251—Cheatham v. Taylor, 138 S.E. 545, 148 Va. 26.
32 C.J. p 205 note 58.
Persons against whom restrictive covenants in deeds may be enforced generally see Deeds § 167.
Covenant not to sell, etc., to colored persons
Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
Purchaser at tax sale
Grantees of platted land under deeds which contained restrictive covenants against sale to and occupation by non-Caucasians and restricting use of land for residential purposes were entitled to injunction to restrain negro who obtained legal title to land under tax deed from occupying the land, constructing structures not in conformance with restrictions, and from causing land to be occupied for other than residential purposes or by others than members of Caucasian race.—Doherty v. Rice, 3 N.W.2d 734, 240 Wis. 389.
Plaintiff, having right under contract to use premises for advertising, could permanently enjoin purchaser taking with notice of rights from interfering with advertising signs.—Rochester Poster Advertising Co. v. Smithers, 231 N.Y.S. 315, 224 App. Div. 435, reversing 224 N.Y.S. 711, 130 Misc. 676.

1. W.Va.—Cole v. Seamonds, 104 S.E. 747, 87 W.Va. 19.

2. U.S.—Magnolia Petroleum Co. v. Suits, D.C.Okl., 31 F.2d 205.
32 C.J. p 205 note 60.

3. Ala.—May v. Lowery, 107 So. 67, 69, 214 Ala. 230, citing **Corpus Juris.**
Cal.—Wayt v. Patee, 269 P. 660, 205 Cal. 46—Martin v. Holm, 242 P. 718, 197 Cal. 733—Littlejohns v. Henderson, 295 P. 95, 111 Cal.App. 115.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
Md.—Schmidt v. Hershey, 140 A. 363, 154 Md. 302.
N.M.—Gonzales v. Reynolds, 275 P. 922, 34 N.M. 35.
Va.—Renn v. Whitehurst, 25 S.E.2d 276, 181 Va. 360—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.
32 C.J. p 205 note 61.
"The question whether such a covenant runs with the land is material in equity only on the question of notice. If it runs with the land, it binds the owner whether he had knowledge of it or not. If it does not run with the land, the owner is bound only if he has taken the land with notice of it."—Bauby v. Krasow, 139 A. 508, 509, 107 Conn. 109, 57 A.L.R. 331.

4. Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733.
32 C.J. p 205 note 61, p 206 note 62.

5. Ga.—Ward v. Parks, 143 S.E. 690, 166 Ga. 149.

bind a purchaser to observe it, and hence such purchaser may be restrained from breaching the terms of a covenant contained in a deed to some of his predecessors in title even though remote, and even though such limitation is not contained in the deed to the purchaser himself.[6] Subsequent purchasers with notice of a covenant not running with the land will be enjoined only when the covenant restricts the use of the land.[7]

An injunction to restrain the breach of a restrictive covenant will not be granted against a trespasser or adverse possessor on land owned by plaintiff.[8]

(4) Considerations as to Issuance of Injunction

(a) In general
(b) Doubtful rights
(c) Amount of damage as material
(d) Conduct of complainant
(e) Relative convenience and injury to parties
(f) Change in character of neighborhood

(a) In General

The enforcement by injunction of covenants restricting the use of land is within the discretion of the court; they may be enforced although they may not run with the land or constitute easements.

To render restrictive covenants as to the use of land enforceable by injunction it is not necessary that they should run with the land[9] or that they should constitute easements.[10] It is no bar to an injunction that the restriction is no part of a scheme of general improvement if complainant is the possessor of the land for the benefit of which the restriction was made.[11] It is not material that a restrictive stipulation should be binding at law,[12] or that any privity of estate or of contract should subsist between the parties,[13] in order to render such stipulation obligatory and to warrant equitable relief in case of the infraction of it. The fact that no violation has actually been committed does not preclude the court from exercising its equity jurisdiction to relieve against a breach of a covenant; it is sufficient that a breach is intended.[14]

However, the enforcement by injunction of restrictive covenants as to the use of land is a matter of discretion with the court and not a matter of absolute right,[15] and is governed by the same general rules which control equitable relief by specific performance.[16] Such covenants will not be enforced by injunction where they are vague or uncertain,[17] or wanting in mutuality,[18] or contrary to public policy,[19] where there is no breach or

Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.
32 C.J. p 206 note 63.

6. N.M.—Gonzales v. Reynolds, 275 P. 922, 34 N.M. 35.
32 C.J. p 206 note 64.
Intent of covenanting parties determines whether assignee with constructive notice of restrictive covenant will be enjoined from violating it.—Gonzales v. Reynolds, supra.

7. Del.—Merchants Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520, 10 Del.Ch. 18.
32 C.J. p 206 note 68.

8. Cal.—California-Michigan Land & Water Co. v. Fletcher, 274 P. 527, 206 Cal. 392.

9. N.M.—Gonzales v. Reynolds, 275 P. 922, 34 N.M. 35.
Or.—Duester v. Alvin, 145 P. 660, 74 Or. 544.
Restraining persons subsequently acquiring property with notice of restriction see supra subdivision b (3) of this section.

10. Or.—Duester v. Alvin, supra.

11. R.I.—Ball v. Milliken, 76 A. 789, 31 R.I. 86, 37 L.R.A.,N.S., 623, Ann. Cas.1912B 30, rehearing denied 78 A. 625.
32 C.J. p 207 note 77.

12. Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733.
32 C.J. p 207 note 78.
Right does not depend on existence of law action
Va.—Cheatham v. Taylor, 138 S.E. 545, 148 Va. 26.

13. Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733.
Va.—Cheatham v. Taylor, 138 S.E. 545, 148 Va. 26.
32 C.J. p 207 note 79.

14. Ind.—Burke v. Gardner, 47 N.E. 2d 148, 150, quoting **Corpus Juris.**
N.Y.—Evangelical Lutheran Church of The Ascension of Snyder v. Sahlem, 172 N.E. 455, 254 N.Y. 161, reversing 237 N.Y.S. 768, 227 App. Div. 841—Sweet v. Hollearn, 252 N. Y.S. 202, 141 Misc. 135.
N.C.—Guilford County v. Porter, 83 S.E. 564, 167 N.C. 366.

15. Iowa.—Melson v. Ormsby, 151 N. W. 817, 169 Iowa 522.
Kan.—Clark v. Vaughan, 292 P. 783, 784, 131 Kan. 438, quoting **Corpus Juris.**
Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.
N.Y.—Purdy v. Mulroney, 31 N.Y.S. 2d 1006.
Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.
Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.
32 C.J. p 212 note 31.
Granting of temporary injunction to enforce ambiguous restrictive covenant in deed rested only in discretion of court.—Jenkins v. Marsh, 233 N.Y.S. 360, 225 App.Div. 401.

16. Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W. 2d 545, 328 Mo. 1.
32 C.J. p 207 note 82.
Injunction and specific performance compared see supra § 79.
Specific performance not involved
Fact that equity may enforce a restriction contained in a deed does not necessarily involve a decree for specific performance, since equitable relief is subordinate to general principles on which equity proceeds.—Levy v. Dundalk Co., 11 A.2d 476, 177 Md. 636.

17. Mich.—Grant v. Craigie, 291 N. W. 44, 292 Mich. 658.
N.J.—Stanley-Fabian Corporation v. H. J. Theatrical Enterprise Co., 169 A. 291, 115 N.J.Eq. 5, motion denied 174 A. 26, 116 N.J.Eq. 407—Meaney v. Stork, 83 A. 492, 80 N.J.Eq. 60, affirmed 86 A. 398, 81 N.J.Eq. 210.

18. N.Y.—Kew Gardens Corporation v. Ciro's Plaza, 26 N.Y.S.2d 553, 261 App.Div. 576, reversing 23 N. Y.S.2d 957, 175 Misc. 475—Davidson v. Dunham, 152 N.Y.S. 16.

19. Va.—Cheatham v. Taylor, 138 S. E. 545, 148 Va. 26.
32 C.J. p 207 note 86.

threatened breach,[20] or the violation is unsubstantial,[21] or the restriction has expired by its own terms,[22] or where the enforcement would be inequitable,[23] although mere pecuniary loss to defendant will not prevent enforcement.[24] Where the restrictions are fixed, definite, and unambiguous, they should be enforced as written and should not be extended by judicial construction.[25] Where the restrictions definitely state what may and what may not be done with the property, the court will not imply additional restrictions to those fixed by the parties themselves.[26]

Where restrictions are omitted from the deed through accident or mistake, the remedy of the grantors is by bill to reform the deed, and cannot be considered under a bill to enforce restrictions.[27]

Provision for penalty or forfeiture. The violation of a restrictive covenant by a grantee may be enjoined even though there is no provision in the deed for the forfeiture of title to the grantor for breach of the restriction.[28] On the other hand, a covenant restricting the use of land may be enforced by injunction although it provides for a penalty in case of breach;[29] it is no objection to an injunction that forfeiture of the premises is fixed as a penalty for a breach or that a right of entry is reserved in case of a breach.[30]

Restriction must concern estate itself. A restriction as to the use of land, unless it is for the benefit of the land itself, must be considered as a purely personal covenant which will not be enforced by injunction against the grantees or successors in interest of the covenantor.[31]

Violation of restriction by other persons. The violation of a restrictive covenant by persons other than complainant, in which he has not acquiesced, will not in general debar him from the right to enjoin a violation by others,[32] unless there has been such a change in the neighborhood that the original purpose and design of the covenants have been broken up and the reason for enforcing them has ceased to exist.[33]

(b) Doubtful Rights

An injunction to restrict another in the uses to which he may put his land will not issue unless the right to restrict is made manifest and clear in the covenant.

Covenants which restrict another in the use to which he may put his lands are strictly construed, as considered in Deeds § 163, and, unless the right to restrict is made manifest and clear in the covenant, a court of equity will not aid by its process of injunction one owner to restrict another in the

20. Cal.—Fairbanks v. MacReady, 267 P. 716, 92 Cal.App. 156, modified on other grounds 268 P. 947, 92 Cal.App. 156.
N.J.—Miller v. Jersey Coast Resorts Corporation, 130 A. 824, 98 N.J.Eq. 289.
N.Y.—Smith v. Lazos, 11 N.Y.S.2d 712, 256 App.Div. 1099, reargument denied 13 N.Y.S.2d 288, 257 App. Div. 963.

21. Tex.—Foster v. Bunting, Civ. App., 19 S.W.2d 784.
32 C.J. p 215 note 72 [a].

Trivial violation
A deviation of fraction of foot in height of wire fence, erected on property in city subdivision, from lower maximum height, permitted by restrictions in deeds of lots therein, as result of owners of adjoining lot having raised surface thereof by grading, was too petty to justify granting of equitable relief by directing lowering of fence to such maximum height, as maxim, "De minimus non curat lex," should be applied.—Rich v. Isbey, 288 N.W. 353, 291 Mich. 119.

22. Tex.—Waggoner v. Floral Heights Baptist Church, 288 S.W. 129, 116 Tex. 187.

Termination by formal abandonment
Where contract imposing restrictions on use of realty authorized termination of restrictions after fifteen years by execution of formal abandonment by owners of majority of front footage, execution of formal abandonment by and other conduct of some owners did not preclude other owners from enforcing agreement by injunction, in absence of showing that owners who executed formal abandonment owned a majority of the front footage of lots involved.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.

23. Kan.—Clark v. Vaughan, 292 P. 783, 131 Kan. 438.
N.Y.—Forstmann v. Joray Holding Co., Inc., 154 N.E. 652, 244 N.Y. 22.
Va.—Cheatham v. Taylor, 138 S.E. 545, 148 Va. 26.
32 C.J. p 207 note 87.

24. Iowa.—Johnson v. Robertson, 135 N.W. 585, 156 Iowa 64, Ann. Cas.1915B 137.

25. Mich.—Hill v. Rabinowitch, 177 N.W. 719, 210 Mich. 220—Casterton v. Plotkin, 154 N.W. 151, 188 Mich. 333.

26. Mich.—Hill v. Rabinowitch, 177 N.W. 719, 210 Mich. 220.

27. Mass.—Sargent v. Leonardi, 112 N.E. 633, 223 Mass. 556.

28. Ky.—Sword v. Reynolds, 298 S. W. 942, 221 Ky. 314.
Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
Tex.—Smith v. K. M. Van Zandt Land Co., Civ.App., 246 S.W. 683.

29. Covenant against sale, etc., to colored persons
D.C.—Hundley v. Gorewitz, 132 F.2d 23, 77 U.S.App.D.C. 48—Torrey v. Wolfes, 6 F.2d 702, 56 App.D.C. 4.

30. Mich.—Watrous v. Allen, 24 N. W. 104, 57 Mich. 362, 58 Am.R. 363.
Minn.—Stees v. Kranz, 20 N.W. 241, 32 Minn. 313.
32 C.J. p 196 note 56.

31. Mass.—Norcross v. James, 2 N. E. 946, 140 Mass. 188.
32 C.J. p 207 note 92.

32. Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
N.J.—Matthews v. Captain, 134 A. 359, 99 N.J.Eq. 636.
32 C.J. p 213 note 42.

Violation of restrictive covenants in deeds to property in other subdivisions in the neighborhood does not bar relief.—Fick v. Burnham, 251 Ill. App. 333.

33. N.Y.—Adams v. Howell, 108 N. Y.S. 945, 58 Misc. 435.
Change in character of neighborhood as affecting injunctive relief see infra subdivision b (4) (f) of this section.
General disregard of building restrictions see infra subdivision b (5) of this section.

otherwise lawful use to which he may put his lands.[34]

(c) Amount of Damage as Material

A covenant restricting the use of land may be enforced by injunction without regard to the damages caused by the breach.

It is a well defined exception to a general rule stated supra § 22 that, where one who has entered into a restrictive covenant as to the use of land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no particular damage.[35] A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done.[36] It is not necessary to prove that the injury will be irreparable.[37]

It has even been held that the right to an injunction will in no way be affected by the fact that the act complained of or the removal of the restriction would be beneficial to complainant's property or enhance its value or the value of other properties in the restricted area;[38] but it has also been held that, where the purpose of the restriction has been frustrated and the result of enforcing it is to depreciate rather than to enhance the value of the property concerned, a court of equity should not interfere.[39]

(d) Conduct of Complainant

aa. In general

bb. Laches, acquiescence, waiver, and estoppel

34. U.S.—Threedy v. Brennan, C.C. A.Wis., 131 F.2d 488, 491, citing **Corpus Juris** and affirming, D.C., 40 F.Supp. 69.
N.J.—Murtha v. McGarry, 164 A. 698, 112 N.J.Eq. 454—Bennett v. Haerlin, 164 A. 461, 112 N.J.Eq. 285, reversing 152 A. 164, 107 N.J.Eq. 224—Paff v. Margerum, 142 A. 6, 103 N.J.Eq. 74—Muller v. Cavanaugh, 121 A. 339, 94 N.J.Eq. 619.
32 C.J. p 207 note 95.

35. Ariz.—Continental Oil Co. v. Fennemore, 299 P. 132, 133, 38 Ariz. 277, citing **Corpus Juris.**
Fla.—Lincoln Tower Corporation v. Richter's Jewelry Co., 12 So.2d 452.
Ill.—Hoffman v. Schwan, 38 N.E.2d 53, 312 Ill.App. 160—Louis K. Liggett Co. v. Strum, 249 Ill.App. 263.
Kan.—Clark v. Vaughan, 292 P. 783, 786, 131 Kan. 438, citing **Corpus Juris.**
Ky.—Fackler v. Cincinnati, N. O. & T. P. Co., 17 S.W.2d 194, 196, 229 Ky. 339, quoting **Corpus Juris.**
Mass.—Shade v. M. O'Keeffe, Inc., 156 N.E. 867, 260 Mass. 180.
Mich.—Smart Farm Co. v. Promak, 241 N.W. 813, 257 Mich. 684.
Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 552, 328 Mo. 1, citing **Corpus Juris**—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150—Wuertenbaecher v. Feik, App., 43 S.W.2d 848, transferred, see, Sup., 36 S.W. 2d 913.
N.M.—Gonzales v. Reynolds, 275 P. 922, 34 N.M. 35.
32 C.J. p 208 note 97.

Extent of investment by plaintiff in reliance on covenant restricting use of land is immaterial.—Gonzales v. Reynolds, supra.

In Mississippi the granting of an injunction to restrain the use of property should not be allowed, except where parties are irreparably injured in a pecuniary way.—Greenwood Lodge, No. 118, I. O. O. F., v. Hyman, 177 So. 43, 180 Miss. 198.

In New York

(1) Relief against violation of restrictive covenant is not withheld because complainant's money damage is unsubstantial or even none at all.—Evangelical Lutheran Church of The Ascension of Snyder v. Sahlem, 172 N.E. 455, 254 N.Y. 161, reversing 237 N.Y.S. 768, 227 App.Div. 841.

(2) "The threat of restraint implied in restrictive covenants is not penal in its character. To violate them without harming any one in so doing gives rise to no cause of action. Equity takes jurisdiction in such cases to prevent irreparable injury to comfort and enjoyment, although without damage, but not to protect a mere preference."—Forstmann v. Joray Holding Co., 154 N.E. 652, 654, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App.Div. 135—Purdy v. Mulroney, 31 N.Y.S.2d 1006, 1012.

(3) A judgment denying an injunction to restrain a violation of a covenant limiting use of property for residence is justified where plaintiffs have not suffered any damage by reason of defendant's acts and where the street has been and is still a business street.—Schnibbe v. Glenz, 168 N.E. 444, 252 N.Y. 7, reversing 233 N.Y.S. 886, 226 App.Div. 698.

(4) A temporary injunction may be denied where no special injury to applicant by reason of defendant's use of the property is shown.—Brighton by the Sea v. Rivkin, 195 N.Y.S. 198, 201 App.Div. 726.

36. Ill.—Southern Fire Brick & Clay Co. v. Garden City Sand Co., 79 N. E. 313, 223 Ill. 616, 9 L.R.A.,N.S., 446, 7 Ann.Cas. 50—American Sand & Gravel Co. v. Chicago Gravel Co., 184 Ill.App. 509.

37. Pa.—Drucker v. Potruch, 29 Pa. Dist. 989.
32 C.J. p 208 note 1.

38. Ill.—Fick v. Burnham, 251 Ill. App. 333.
Mich.—Tolsma v. James E. Scripps Corp., 116 N.W. 622, 153 Mich. 14.
Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.
32 C.J. p 208 note 2.

Plaintiff may stand on very letter of his obligation, for a person may not make a solemn engagement and then disregard it on the ground that no harm will result.—Kenwood Land Co. v. Hancock Inv. Co., 155 S.W. 861, 169 Mo.App. 715.

Fact that enforcement of restrictions on use of lot will lessen its value constitutes no reason for non-enforcement of such restrictions.—Jenney v. Hynes, 184 N.E. 444, 282 Mass. 182.

39. D.C.—Hundley v. Gorewitz, 132 F.2d 23, 77 U.S.App.D.C. 48.

Restriction against ownership by colored persons

Where common grantors sold six contiguous lots to different purchasers inserting in all deeds but one covenant restricting against negro ownership or occupation, but during the more than thirty years which had expired since execution of deeds, residential conditions had changed so that strict enforcement of all five covenants would not give advantages which the covenants sought to confer, and market value of property was greater for colored occupancy than for white occupancy, the court would not grant injunctive relief for violation of the covenant, but would leave the parties to such remedies as they might have at law.—Hundley v. Gorewitz, supra.

aa. In General

Injunctive relief against the breach of a covenant restricting the use of land will be denied where the plaintiff has himself materially breached the covenant.

A substantial violation by complainant of a covenant restricting the use of land bars any right to an injunction in his favor against others violating the same covenant;[40] and this rule is especially applicable where defendant has spent large sums of money on the premises in reliance on complainant's abandonment of the restriction,[41] or where the violation complained of will not be detrimental to complainant's interests.[42]

Nevertheless the fact that complainant has violated a restriction in the same manner as defendant will not bar him from invoking the jurisdiction of equity to restrain defendant from a further and different encroachment to his injury.[43] Unsubstantial violations by complainant of the covenant will not prevent him from maintaining an action for an injunction to prevent substantial violations thereof.[44]

bb. Laches, Acquiescence, Waiver, and Estoppel

Injunctive relief to restrain the breach of a covenant restricting the use of land may be barred by laches, waiver, or acquiescence of the plaintiff in the violation of the covenant.

The right to enforce by injunction a covenant restricting the use of land may be lost by laches,[45] waiver,[46] or by acquiescence in the violation of the covenant,[47] in which cases the person injured will be remitted to an action of damages.[48]

An important limitation to the general rule is recognized in many decisions to the effect that a person entitled to enforce a restrictive covenant may have notice of violations which inflict no substantial injury on him without losing the right to enforce the restriction in case of a substantially injurious violation by failure to take steps to restrain the first mentioned class of violations.[49]

Whether there has been laches, waiver, or acquiescence is a question of fact to be determined in each case.[50] To prevent a bar by reason of laches, seasonable notice or protest to defendant or other appropriate action is necessary.[51] Plaintiff is not guilty of laches where he acts with reasonable promptness after he receives knowledge of the violation,[52] especially where defendant know-

40. Ark.—Moore v. Adams, 141 S.W. 2d 46, 200 Ark. 810.
Pa.—Enders v. Okle, 6 Pa.Dist. & Co. 796, 73 Pittsb.Leg.J. 700.
32 C.J. p 209 notes 4, 7.

Even though covenant violated by plaintiff is entirely different from that disregarded by defendant, he cannot enjoin violations.—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal. App.2d 646.

41. Ga.—Florida Cent. R. Co. v. Cherokee Sawmill Co., 74 S.E. 523, 137 Ga. 815.
N.J.—Ocean City Ass'n v. Schurch, 41 A. 914, 57 N.J.Eq. 268.

42. N.J.—Page v. Murray, 19 A. 11, 46 N.J.Eq. 325.

43. Tex.—Plaster v. Stutzman, Civ. App., 8 S.W.2d 750, 754, quoting **Corpus Juris.**
32 C.J. p 209 note 8.

44. Ill.—Gordon v. Caldwell, 235 Ill. App. 170.
Tex.—Plaster v. Stutsman, Civ.App., 8 S.W.2d 750.
32 C.J. p 209 note 9.

45. Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 885, 151 Kan. 978, citing **Corpus Juris.**
Minn.—Cantieny v. Boze, 296 N.W. 491, 209 Minn. 407.
Wash.—Ronberg v. Smith, 232 P. 283, 132 Wash. 345.
32 C.J. p 209 note 11.
Laches generally see Equity §§ 112–132.
Laches in enforcing restrictive covenants in deeds generally see Deeds § 171 d.
Laches as affecting right to:
Relief by injunction generally see infra § 171.
Restrain breach of contract see supra § 80 c (4).

46. Ill.—Drexel State Bank of Chicago v. O'Donnell, 176 N.E. 348, 344 Ill. 173—Cuneo v. Chicago Title & Trust Co., 169 N.E. 760, 337 Ill. 589.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
Mich.—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620—Goodfriend v. Maltesta, 224 N.W. 389, 246 Mich. 369.
32 C.J. p 210 note 12.
Waiver or abandonment of restrictions in deeds generally see Deeds § 169.

Acts or omissions constituting waiver
Mich.—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620.

Acts or omissions not constituting waiver
Ill.—Burke v. Kleiman, 277 Ill.App. 519, transferred, see 189 N.E. 372, 355 Ill. 390.
32 C.J. p 210 note 12 [c].

47. Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535—Brandenburg v. Country Club Bldg. Corporation, 163 N.E. 440, 332 Ill. 136.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
Mich.—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620.
Ohio.—Barclay v. Akenhead, 28 N.E. 2d 952, 64 Ohio App. 461.
Tex.—Baker v. Henderson, Civ.App., 125 S.W.2d 660, affirmed 153 S.W. 2d 465, 137 Tex. 266.
32 C.J. p 210 note 13.

48. Pa.—Henderson v. Price, 26 Pa. Co. 308.
32 C.J. p 209 note 11–p 210 note 13.

49. Pa.—Enders v. Ohle, 6 Pa.Dist. & Co. 796, 73 Pittsb.Leg.J. 700.
Tex.—Klein v. Palmer, Civ.App., 151 S.W.2d 652, 655, citing **Corpus Juris.**
32 C.J. p 211 note 24.

50. Ky.—Starck v. Foley, 272 S.W. 890, 209 Ky. 332, 41 A.L.R. 756.
Mass.—Fenton v. Malfas, 190 N.E. 540, 286 Mass. 339.
Mich.—Grandmont Imp. Ass'n v. Liquor Control Commission, 293 N.W. 744, 294 Mich. 541—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620.

51. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Fla.—Mercer v. Keynton, 127 So. 859, 99 Fla. 914.
N.J.—White & Hess v. Schwartzbacker, 159 A. 311, 110 N.J.Eq. 115.
32 C.J. p 210 note 15.

52. Mich.—Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 278 N.W. 75, 283 Mich. 304—Tuttle

ingly violated the restriction.[53] Plaintiff is not chargeable with laches where steps were taken to enforce the restriction immediately on discovery of its violation,[54] or where on the attempted violation protest was made and a bill filed as quickly as could be done,[55] or as soon as the protest was shown to be unavailing.[56] There are some decisions which hold that protest alone is insufficient to avoid the imputation of laches, and that legal proceedings should be instituted at the earliest practicable moment after knowledge of the proposed violation and before any serious expenditure of money has been made,[57] but it has also been held that, if defendant has received notice or protest against proposed violations of restrictive covenants, as soon as the violations are commenced or as soon as they are discovered, no laches is attributable to complainant such as will bar his right to a mandatory injunction to compel the restoration of the property to its original condition, although he does not bring suit immediately after protest or indeed until after the completion of the acts constituting a violation of the covenant,[58] as under these circumstances defendant must be considered to have acted at his peril,[59] and the right of complainant to an injunction is not affected by the fact that he delayed suit until an injunction would cause more damage to defendant than its refusal would cause to complainant.[60] In any event the right to relief by injunction is not lost by laches or estoppel where defendant is not injured by reason of the failure of complainant to take earlier proceedings for the enforcement of his rights.[61] The delay of complainant in protesting a violation of the covenant and in instituting suit does not bar injunctive relief where the delay was caused by defendant.[62]

Further violations. The fact that the right to injunctive relief against violation of a restrictive covenant has been lost by laches or acquiescence in no way affects the right to enjoin further violations of the covenant.[63]

Waiver by other interested persons. The court may take into consideration the fact that all the interested persons, or most of them, are willing to waive the enforcement of the covenant when injunctive relief to restrain its violation is sought by one of their number.[64]

(e) Relative Convenience and Injury to Parties

On an application to restrain the violation of a covenant restricting the use of land, the court ordinarily will not consider the relative inconvenience and injury to the parties.

On an application for an injunction to restrain the breach of a restrictive covenant as to the use of land, the court ordinarily will not take into consideration the relative inconvenience and injury to the parties,[65] and especially is this true where defendant had knowingly and deliberately violated the

v. Ohio Boulevard Land Co., 222 N.W. 171, 245 Mich. 188.
Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150—Palfrey v. Killian, 27 S.W.2d 462, 224 Mo.App. 325.
N.J.—Durham Essex Corporation v. Schaffer, 133 A. 754, 99 N.J.Eq. 602—Lamonte v. Orlando, 129 A. 442, 97 N.J.Eq. 425.

Plaintiff held not guilty of laches
Conn.—Armstrong v. Leverone, 136 A. 71, 105 Conn. 464.
Mich.—Grandmont Imp. Ass'n v. Liquor Control Commission, 293 N.W. 744, 294 Mich. 541.
Mo.—Hall v. Koehler, 148 S.W.2d 489, 347 Mo. 658.
Pa.—Benner v. Tacony Athletic Ass'n, 196 A. 390, 328 Pa. 577—Lavan v. Menaker, 124 A. 743, 280 Pa. 591.
Va.—Deitrick v. Leadbetter, 8 S.E.2d 276, 175 Va. 170, 127 A.L.R. 849.
32 C.J. p 209 note 11 [c].

53. N.J.—Durham Essex Corporation v. Schaffer, 133 A. 754, 99 N.J.Eq. 602.

54. N.J.—Rothholz v. Stern, 127 A. 97, 97 N.J.Eq. 189.
32 C.J. p 210 note 16.

Owner who was absent during initial construction of filling station, but took immediate steps on return to enforce restrictive covenants, was not guilty of laches.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239.

Suit commenced within three days after plaintiffs discovered that building was in violation of covenant was not barred by laches.—Bunce v. Jones, 213 N.W. 125, 238 Mich. 337.

55. Mass.—Storey v. Brush, 152 N. E. 225, 256 Mass. 101.
N.J.—Rosenblatt v. Levin, 12 A.2d 627, 127 N.J.Eq. 207, affirmed 18 A. 2d 267, 129 N.J.Eq. 103.
32 C.J. p 210 note 17.

56. Tex.—Hooper v. Lottman, Civ. App., 171 S.W. 270.

57. N.J.—Smith v. Spencer, 87 A. 158, 81 N.J.Eq. 389.
32 C.J. p 211 note 19.

58. Pa.—Douglass v. Queeney, 167 A. 453, 109 Pa.Super. 336.
32 C.J. p 211 note 20.

59. Mich.—Tolsma v. James E. Scripps Corp., 116 N.W. 622, 153 Mich. 14.

60. Mich.—Tolsma v. James E. Scripps Corp., supra.

61. Ky.—Starck v. Foley, 272 S.W. 890, 209 Ky. 332, 41 A.L.R. 756.
Mass.—Daly v. Foss, 85 N.E. 94, 199 Mass. 104.
Mich.—Burns v. Terzian, 207 N.W. 913, 233 Mich. 627—Sanders v. Campbell, 204 N.W. 767, 231 Mich. 592.

62. Ill.—Fick v. Burnham, 251 Ill. App. 333.

63. Mich.—Hartwig v. Grace Hospital, 165 N.W. 827, 198 Mich. 725.
32 C.J. p 211 note 25.

64. N.Y.—Batchelor v. Hinkle, 104 N.E. 629, 210 N.Y. 243—Winston v. 524 West End Ave., 251 N.Y.S. 96, 233 App.Div. 5.

Fact that some plaintiffs in injunction suit withdrew as plaintiffs, and that some of the original plaintiffs had stated that they had no objection to abandonment or violation of the restrictions, did not affect right of remaining plaintiffs to injunction.—Porter v. Johnson, 115 S. W.2d 529, 232 Mo.App. 1150.

65. Va.—Spilling v. Hutcheson, 68 S.E. 250, 111 Va. 179.
32 C.J. p 211 note 26.
Balancing conveniences generally see supra §§ 30, 80 c (7).

restrictive covenant.[66] Nevertheless, it has been held that, in case complainant's right is doubtful, a court of equity will give consideration to the inconvenience and damage that would result to defendant in determining whether an injunction should issue, and where great inconvenience and damage would result to defendant with little or no corresponding benefit to complainant, the remedy by injunction is properly denied.[67]

(f) Change in Character of Neighborhood

Injunctive relief to restrain the violation of a covenant restricting the use of land will be denied where there has been such a change in the character of the neighborhood since the making of the covenant as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome.

Where covenants restricting the use of real property were made with reference to the continuance of existing general conditions of the property and its surroundings and there has been such a change in the character of the neighborhood as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome, a court of equity will not enforce these restrictions by injunction but will leave complainant to his remedy at law.[68] Especially should an injunction be denied where this change is due to the acts of the grantor who imposed the restriction or of those who derive title under him,[69] or where it appears that complainant would be benefited rather than injured by the erection and violation complained of and where the granting of an injunction would bear very heavily on defendant.[70] Nevertheless to render this limitation of the general rule operative, it must appear that there has been a radical change in the environment and character of the neighborhood in which the property is situated,[71] and, where the change does not conflict with the essential purpose

Mandatory injunction see infra subdivision b (7) of this section.

66. Okl.—Williamson v. Needles, 133 P.2d 211, 191 Okl. 560.
32 C.J. p 211 note 27.

Expenditure in adapting house to use as boarding house will not preclude enforcement of building restriction against buildings other than private dwellings.—Schreiber v. Drosness, 136 A. 515, 100 N.J.Eq. 591, affirmed Schreiber v. Drossness, 135 A. 920, 100 N.J.Eq. 591.

67. Ill.—Loomis v. Collins, 111 N.E. 999, 272 Ill. 221.

Temporary injunction
The granting of a temporary injunction at request of neighboring owners to restrain lot owner from completing erection of a building on his lot allegedly in violation of restrictive covenants in deed was an abuse of discretion, where neighboring owners would not suffer any appreciable damage by the denial of the temporary injunction, they could be fully protected by a mandatory order if judgment were rendered in their favor, and the lot owner and others would suffer a distinct and measurable damage.—Monk v. Danna, Tex.Civ.App., 110 S.W.2d 84, error dismissed.

68. Cal.—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal.App.2d 646.
Ill.—Drexel State Bank of Chicago v. O'Donnell, 176 N.E. 348, 344 Ill. 173—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412—Cuneo v. Chicago Title & Trust Co., 169 N.E. 760, 337 Ill. 589.
Kan.—Clark v. Vaughan, 292 P. 783, 784, 131 Kan. 438, quoting **Corpus Juris.**
Mo.—Mathews Real Estate Co. v. National Printing & Engraving Co., 48 S.W.2d 911, 330 Mo. 190, 81 A.L.R. 1039—Pickel v. McCawley, 44 S.W.2d 857, 861, 329 Mo. 166, citing **Corpus Juris**—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 553, 328 Mo. 1, citing **Corpus Juris**—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
N.J.—Welitoff v. Kohl, 147 A. 390, 105 N.J.Eq. 181, 66 A.L.R. 1317, modifying 143 A. 628, 103 N.J.Eq. 454.
N.Y.—Purdy v. Mulroney, 31 N.Y.S. 2d 1006.
N.C.—Starkey v. Gardner, 138 S.E. 408, 194 N.C. 74, 54 A.L.R. 806, followed in Higgins v. Hough, 143 S.E. 212, 195 N.C. 652, and Stroupe v. Truesdell, 145 S.E. 925, 196 N.C. 303.
Pa.—Bodek v. Sinclair Refining Co., 28 Del.Co. 145.
Wis.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 364.
32 C.J. p 212 note 31.
Building restrictions see infra subdivision b (5) of this section.
Effect of change in neighborhood on enforcement of restrictive covenants in deeds generally see Deeds § 171 c.

Restriction against ownership or occupation by colored persons
D.C.—Hundley v. Gorewitz, 132 F.2d 23, 77 U.S.App.D.C. 48.

Affirmative defense
Defense that injunction to restrain violation of restrictions should be withheld because of changed conditions is affirmative defense.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.

Discretion of court
Whether equity should refuse to restrain the violation of restrictive covenants on the use of land, imposed by the common owner thereof in deeds conveying lots plotted by the common owner, on account of changed conditions affecting the premises to which covenants relate, rests in the discretion of the court and depends largely on the facts of the particular case, and mainly on whether the enforcement of covenants would greatly harm the defendant without any substantial benefit to plaintiff so as to make enforcement inequitable.—Purdy v. Mulroney, 31 N.Y.S.2d 1006.

Fact that property was leased with intention of breaking restrictive covenants, if possible, did not require granting of injunction against lessee's violation of covenants where the character of the neighborhood had changed.—Hurd v. Albert, 3 P.2d 545, 214 Cal. 15, 76 A.L.R. 1348.

Change of conditions barring enforcement are those bringing industry into close proximity to restricted area, or such a general failure by property owners to observe covenants as to indicate their abandonment.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 364.

69. Ill.—Hurt v. Hejhal, 259 Ill.App. 221.
32 C.J. p 212 note 32.

70. N.Y.—Batchelor v. Hinkle, 104 N.E. 629, 210 N.Y. 243, reversing 133 N.Y.S. 501, 149 App.Div. 910.
32 C.J. p 212 note 33.

71. Mich.—Sanders v. Campbell, 204 N.W. 767, 231 Mich. 592—Moreton v. Louis G. Palmer & Co., 208 N.W. 116, 230 Mich. 409.
Mo.—Porter v. Pryor, 164 S.W.2d 353.
32 C.J. p 212 note 35.

Change in surrounding territory
(1) Where no radical change in the condition and use of the restricted

of the covenant,[72] or prevent the general plan from being carried out,[73] a violation may be enjoined. A violation of the restriction will be enjoined as long as it remains of substantial benefit to the dominant estate.[74]

(5) Building Restrictions

The violation of a building restriction may in a proper case be enjoined.

Building restrictions, such as those which prohibit the erection of buildings on the land, or which prescribe the character of buildings which may be erected, may be enforced by injunction, where they are not unreasonable and not contrary to public policy,[75] as long as the restrictions are of substantial value to the persons intended to be benefited.[76] Such restrictions may be enforced by injunction against one acquiring the property with notice of the restriction.[77] They may be enforced without proof of actual or substantial injury;[78] it is not an objection to the allowance of an injunction that the inconvenience to complainant caused by the breach of the covenant is slight,[79] or even that he would be benefited by the breach as he is entitled to stand on his legal rights.[80] Relief against a breach of the covenant may be decreed although the acts of defendant are permitted under a zoning

property occurs, the circumstance that there have been changes in the territory surrounding the restricted area will not of itself preclude injunctive relief.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.

(2) Where property owners anticipated increased occupancy by negroes in surrounding neighborhood when they made agreement prohibiting use or ownership of property by negroes, subsequent increase of negro occupancy in the surrounding neighborhood, but not within the restricted area, did not authorize denial of injunction enforcing restrictions on ground that change in conditions rendered restrictions valueless.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.

72. N.J.—Sanford v. Keer, 83 A. 225, 80 N.J.Eq. 240, 40 L.R.A.,N.S., 1090.
Tenn.—Laughlin v. Wagner, 244 S.W. 475, 146 Tenn. 647.

73. Iowa.—Johnson v. Robertson, 135 N.W. 585, 156 Iowa 64, Ann. Cas.1915B 137.
N.J.—Hyman v. Tash, Ch., 71 A. 742.

74. Mo.—Pierce v. St. Louis Union Trust Co., 278 S.W. 398, 311 Mo. 262—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
Or.—Crawford v. Senosky, 274 P. 306, 128 Or. 229.
Pa.—Hunter v. Wood, 120 A. 781, 277 Pa. 150.

75. Ala.—Thrasher v. Bear, 195 So. 441, 239 Ala. 438.
Cal.—Joyce v. Krupp, 257 P. 124, 83 Cal.App. 391.
Conn.—Armstrong v. Leverone, 136 A. 71, 105 Conn. 464—Mellitz v. Sunfield Co., 129 A. 228, 103 Conn. 177.
Ga.—Smith v. Pindar Real Estate Co., 200 S.E. 131, 187 Ga. 229—Raven v. Laurens, 139 S.E. 546, 164 Ga. 868.
Ill.—Brandenburg v. Lager, 112 N.E. 321, 272 Ill. 622—Hunger v. Johnson, 31 N.E.2d 280, 308 Ill.App. 314.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 885, 151 Kan. 978, citing **Corpus Juris.**
Mass.—Vorenberg v. Bunnell, 153 N.E. 884, 257 Mass. 399, 48 A.L.R. 1431—Allen v. Massachusetts Bonding & Insurance Co., 143 N.E. 499, 248 Mass. 378, 33 A.L.R. 669.
Mich.—Putnam v. Ernst, 206 N.W. 527, 232 Mich. 682.
Mo.—State ex rel. Britton v. Mulloy, 61 S.W.2d 741, 332 Mo. 1107.
N.Y.—Evangelical Lutheran Church of The Ascension of Snyder v. Sahlem, 172 N.E. 455, 254 N.Y. 161, reversing 237 N.Y.S. 768, 227 App. Div. 841—Sweet v. Hollearn, 252 N.Y.S. 202, 141 Misc. 135.
Pa.—Wimer v. Yellin, 132 A. 809, 286 Pa. 33—Smith v. Epstein, 6 Pa. Dist. & Co. 261, 11 Lehigh Co.L.J. 79—Bodek v. Sinclair Refining Co., 28 Del.Co. 145—Hourigan v. Valko, 31 Luz.Leg.Reg. 350.
Tenn.—Carson v. Knaffl, 15 Tenn.App. 507.
Tex.—Plaster v. Stutzman, Civ.App., 8 S.W.2d 750—Couch v. Southern Methodist University, 290 S.W. 256, reversed on other grounds, Com. App., 10 S.W.2d 973—Austin v. Richardson, Civ.App., 278 S.W. 513, reversed on other grounds, Com.App., 288 S.W. 180—Babb v. Miller, Civ.App., 259 S.W. 177, reversed on other grounds Miller v. Babb, Com.App., 263 S.W. 253, rehearing denied 264 S.W. xiv.
32 C.J. p 213 notes 51, 52.
Mandatory injunction see infra subdivision b (7) of this section.
Restrictive covenants in deeds as to buildings or other structures and improvements see Deeds § 164.

Agreement not to attach building to plaintiff's wall

Plaintiff owning building with wall extending into defendant's property was entitled to enjoin defendant from violating oral agreement of parties' predecessors by attaching new building to wall, where wall was erected and windows constructed therein on faith of contract.—McBride Realty Co. v. Grace, 15 S.W.2d 957, 223 Mo.App. 508.

Agreement not to violate or question building zone ordinance

Equity will not permit one who is a party to a private contract not to violate or question the validity of a building zone ordinance to violate its covenants, regardless of pecuniary gain or loss.—Kelley v. Levitt & Sons, 28 N.Y.S.2d 175, 262 App.Div. 92, reargument denied 29 N.Y.S.2d 726, 262 App.Div. 891.

Where existence of building restriction is not established injunctive relief will be denied.
N.J.—Ferraro v. Kozlowski, 138 A. 197, 101 N.J.Eq. 532—Ryall v. Saxe, 129 A. 433, 97 N.J.Eq. 393.
Tex.—Allen v. Grant, Civ.App., 6 S.W.2d 170.

76. Pa.—Todd v. Sablosky, 15 A.2d 677, 339 Pa. 504, 132 A.L.R. 282—Pehlert v. Neff, 31 A.2d 446, 152 Pa.Super. 84—Douglass v. Queeney, 167 A. 453, 109 Pa.Super. 336.

77. Ill.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412.
Va.—Clarke v. Miller, 141 S.E. 141, 149 Va. 251.
32 C.J. p 205 note 58.

78. Cal.—Morgan v. Veach, 139 P. 2d 976, 59 Cal.App.2d 682—Joyce v. Krupp, 257 P. 124, 83 Cal.App. 391.
Conn.—Hooker v. Alexander, 29 A. 2d 308, 129 Conn. 433—Armstrong v. Leverone, 136 A. 71, 105 Conn. 464.
Mich.—Austin v. Van Horn, 222 N.W. 721, 245 Mich. 344.
Tex.—Dellaughter v. Hargrove, Civ. App., 40 S.W.2d 253.
Wash.—Ronberg v. Smith, 232 P. 283, 132 Wash. 345.
32 C.J. p 208 note 97 [c].

79. N.J.—Kirkpatrick v. Peshine, 24 N.J.Eq. 206.

80. Mich.—Tolsma v. James E. Scripps Corp., 116 N.W. 622, 153 Mich. 14.
Pa.—Bodek v. Sinclair Refining Co., 28 Del.Co. 145.

ordinance.[81] The suit may be instituted as soon as a breach of the covenant is threatened without awaiting an actual breach.[82]

However, not every violation of a building restriction will entitle plaintiff to injunctive relief.[83] The granting or refusal of relief is a matter of discretion with the court and not a matter of absolute right,[84] and is to be governed by equitable considerations.[85] Each case must depend on its peculiar circumstances.[86] Injunctive relief will be denied where there is no breach or threatened breach of the building restriction,[87] or the violation is unsubstantial,[88] or the right to relief is doubtful,[89] or the restriction has expired,[90] where enforcement will involve inequitable consequences and great hardship to defendant,[91] where complainant has substantially violated the restrictions[92] or has been guilty of laches, waiver, or acquiescence,[93]

81. Ill.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412.
Or.—Ludgate v. Somerville, 256 P. 1042, 121 Or. 643, 54 A.L.R. 837.

82. Ind.—Burke v. Gardner, 47 N.E. 2d 148.

83. N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App. Div. 135.

84. Mass.—Vorenberg v. Bunnell, 153 N.E. 884, 257 Mass. 393, 48 A.L.R. 1431.
Mo.—Hall v. Koehler, 148 S.W.2d 489, 347 Mo. 658.
Pa.—Todd v. Sablosky, 15 A.2d 677, 339 Pa. 504, 132 A.L.R. 282.
Tex.—Gillingham v. Timmins, Civ. App., 104 S.W.2d 115, error dismissed.

85. Mich.—Cherry v. Board of Home Missions of Reformed Church in U. S., 236 N.W. 841, 254 Mich. 496—Johnstone v. Detroit, G. H. & M. Ry. Co., 222 N.W. 325, 245 Mich. 65, 67 A.L.R. 373.

86. N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App. Div. 135.

Conduct of parties, character of district and all the circumstances must be considered in the light of equitable rules and principles.—Ronberg v. Smith, 232 P. 283, 132 Wash. 345.

87. Ala.—McKee v. Club-View Heights, 162 So. 671, 230 Ala. 652.
N.J.—Shmidheiser v. States Ave. Const. Co., 121 A. 521, second case, 94 N.J.Eq. 522, affirming, Ch., 121 A. 521, first case—Muller v. Cavanaugh, 121 A. 339, 94 N.J.Eq. 619.
Pa.—Todd v. Sablosky, 15 A.2d 677, 339 Pa. 504, 132 A.L.R. 282—Francis v. Dean, 80 Pa.Super. 108—Lakewood Trustees v. Serr, 24 Erie Co. 60—Ninth Ward Building & Loan Ass'n v. Ferguson, 56 Montg. Co. 42.
Tex.—Allen v. Grant, Civ.App., 6 S.W.2d 170.

88. Tex.—Foster v. Bunting, Civ. App., 19 S.W.2d 784.
32 C.J. p 215 note 72 [a].

89. N.J.—Paff v. Margerum, 142 A. 6, 103 N.J.Eq. 74—Jones v. Mulligan, Ch., 121 A. 608.

90. Tex.—Waggoner v. Floral Heights Baptist Church, 288 S.W. 129, 116 Tex. 187.

91. Ill.—Hoffman v. Schwan, 38 N.E. 2d 53, 312 Ill.App. 160—Hurt v. Hejhal, 259 Ill.App. 221.
Iowa.—Johnson v. Robertson, 135 N. W. 585, 156 Iowa 64, Ann.Cas.1915B 137.

92. Ark.—Moore v. Adams, 141 S.W. 2d 46, 200 Ark. 810.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105.
Mich.—Goodfriend v. Maltesta, 224 N.W. 389, 246 Mich. 369.
32 C.J. p 209 note 4 [d], [e].

Trivial violations of restrictions by plaintiff will not bar relief.
Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105.
32 C.J. p 209 note 9 [a].

Partial violation
Owner, violating building restrictions, may be estopped to enjoin like violation by neighbor without being estopped to ask observance thereof in other beneficial respects.—Polk Manor Co. v. Manton, 265 N.W. 457, 274 Mich. 539—Wilcox v. Mueller, 229 N.W. 600, 250 Mich. 167.

Violation by persons other than complainant in which he has not acquiesced will not bar injunctive relief.
Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
N.J.—Matthews v. Captain, 134 A. 359, 99 N.J.Eq. 636.

93. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Ill.—Harmon v. Vinci, 19 N.E.2d 760, 299 Ill.App. 614.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 151 Kan. 978.
Mich.—Cherry v. Board of Home Missions of Reformed Church in U. S., 236 N.W. 841, 254 Mich. 496.
N.J.—Reforso Knitting Mills v. M. & N. Const. Co., 144 A. 877, 104 N. J.Eq. 219—Stone v. Avalon Ice & Cold Storage Co., 131 A. 579, 99 N. J.Eq. 425, 2 N.J.Misc. 628—Scull v. Eilenberg, Ch., 119 A. 275, reversed on other grounds 121 A. 788, 94 N.J.Eq. 759.
Ohio.—Davidson v. Buckeye Homes, 11 Ohio Supp. 54.
Or.—De Martini v. Hayhurst, 62 P. 2d 1, 154 Or. 663.
Tex.—Gillingham v. Timmins, Civ. App., 104 S.W.2d 115, error dismissed.
Wash.—Tindolph v. Schoenfeld Bros., 289 P. 530, 157 Wash. 605.
Wis.—Burden v. Doucette, 2 N.W.2d 204, 240 Wis. 230.
32 C.J. p 210 note 12 [b].

Estoppel or waiver not shown
Mich.—Carey v. Lauhoff, 3 N.W.2d 67, 301 Mich. 168—Boston-Edison Protective Ass'n v. Allen, 292 N.W. 524, 293 Mich. 668—Wilcox v. Mueller, 229 N.W. 600, 250 Mich. 167.
Wis.—Mueller v. Schier, 205 N.W. 912, 189 Wis. 70.

Laches not shown
Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
D.C.—Avignone v. Roumel, 13 F.2d 292, 56 App.D.C. 320.
Ga.—Caffey v. Parris, 197 S.E. 898, 186 Ga. 803.
Mass.—Fenton v. Malfas, 190 N.E. 540, 286 Mass. 339.
Mich.—Carey v. Lauhoff, 3 N.W.2d 67, 301 Mich. 168—Boston-Edison Protective Ass'n v. Allen, 292 N.W. 524, 293 Mich. 668—Michiana Shares Estates v. Robbins, 287 N. W. 547, 290 Mich. 384—Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 278 N.W. 75, 283 Mich. 304—Kiskadden v. Berman, 221 N. W. 632, 244 Mich. 473—Burns v. Terzian, 207 N.W. 913, 233 Mich. 627—Signaigo v. Begun, 207 N.W. 799, 234 Mich. 246.
Mo.—Milligan v. Balson, 264 S.W. 73, 214 Mo.App. 627.
N.J.—Lamonte v. Orlando, 129 A. 442, 97 N.J.Eq. 425—Cassidy v. Kruvant, 127 A. 339, 97 N.J.Eq. 372, 2 N.J.Misc. 892—McGalliard v. Chapman, 129 A. 256, 3 N.J.Misc. 609.
Pa.—Drucker v. Russell, 124 A. 92, 279 Pa. 443—Pehlert v. Neff, 31 A. 2d 446, 152 Pa.Super. 84.
Wis.—Schneider v. Eckhoff, 206 N.W. 838, 188 Wis. 550.

Where there is nothing to show detrimental change of position mere delay and acquiescence in the violation of a building restriction will not defeat the right thereafter to enforce the restriction.—Michiana Shores Estates v. Robbins, 287 N.W. 547, 290 Mich. 384.

or where defendant is without notice of a building restriction not running with the land.[94] Where a proposed building is strictly within the letter of the requirements of the restrictive covenants, its erection will not be enjoined, although it would be detrimental to the interests of the neighborhood,[95] and injunctive relief may be denied where the building does not violate the spirit of the covenant although it violates the letter.[96]

Kind of building. An injunction may issue to restrain the breach of an agreement not to put up a building other than one to be used as a dwelling or for residential purposes,[97] or not to put up a

Notifying defendant before work commenced

Where owner of realty in addition restricted by plat mainly to residences, obtained a permit about September 10 to build a gasoline service station, and prior to commencement of any work on the premises actions were brought against the owner by certain residents of the subdivision, other residents of the subdivision who commenced another action to enjoin the erection of the station on October 11 were not guilty of "laches."—Williamson v. Needles, 133 P.2d 211, 191 Okl. 560.

Five months after protest

Although mere assertion by written notice of rights of neighboring landowners to prevent contemplated violation of building restriction on all land in the section did not relieve landowners from bringing legal action to establish such rights, a delay of five months did not necessarily constitute "laches" that would bar an action to enforce restriction, the test being whether landowners were guilty of any omission that would warrant presumption that they had abandoned the claim of a violation.—Pehlert v. Neff, 31 A.2d 446, 152 Pa.Super. 84.

Misrepresentation as to violation

Under restrictions excluding bungalows generally, but permitting them in a certain portion of the tract bounded by a line one hundred feet from M street, where plaintiff may not have known that defendants' bungalows were within one hundred feet of such street, and was assured by defendants' representative that they did not violate the restriction, injunctive relief will not be denied because the bungalows have been completed.—Pellegrino v. MacKenzie St. Const. Corporation, 197 N.Y.S. 699, 120 Misc. 89, affirmed 200 N.Y.S. 939, 206 App.Div. 709.

Purchaser of lot obtaining waiver of building restrictions from corporation former owner, which had reserved right to waive restriction, after corporation on dissolution had conveyed property to another, cannot be enjoined from violating building restrictions, where conveyance by corporation was for purpose of settling its affairs, and it did not appear that corporation, by conveying remaining lots, had transferred right to waive restrictions, in view of Or. L. §§ 6875, 6877.—Grussi v. Eighth Church of Christ, Scientist, of Portland, 241 P. 66, 116 Or. 336.

94. Ga.—Ward v. Parks, 142 S.E. 690, 166 Ga. 149—Arnovitz v. Murphy Real Estate Co., 139 S.E. 530, 164 Ga. 739.

Sufficiency of notice

Vendor's representations to two purchasers that there were building restrictions on entire subdivision did not put other purchasers on inquiry.—Zwickey v. Sullivan, 211 N. W. 746, 237 Mich. 333.

Where purchaser's deed does not contain restrictions, it must clearly appear that there was such general plan of uniform restriction on all lots in the allotment, that deeds for the lots uniformly contain such restrictions, and that purchaser had knowledge of such general plan and uniform restriction at time he purchased his lot.—Davidson v. Buckeye Homes, 11 Ohio Supp. 54.

95. Mich.—Casterton v. Plotkin, 154 N.W. 151, 188 Mich. 333.
32 C.J. p 214 note 57.

96. Ill.—Hoffman v. Schwan, 38 N. E.2d 53, 312 Ill.App. 160.

Two buildings on single lot in violation of covenant

Where a restriction was placed in deeds conveying lots in subdivision limiting one private dwelling house to a lot, and, because of a splitting of lots, only eleven houses were maintained on twelve lots, the dividing of lots so that portions of two separate buildings were maintained on single lots violated letter but not spirit of restriction, and injunction will be refused against a lot owner who sought to build a second dwelling on a subdivision of his lot.—Hoffman v. Schwan, supra.

97. Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733.
Ga.—Atlanta Ass'n of Baptist Churches v. Cowan, 196 S.E. 780, 186 Ga. 10—Gulf Oil Corporation of Pennsylvania v. Suburban Realty Co., 190 S.E. 179, 183 Ga. 847—Raven v. Laurens, 139 S.E. 546, 164 Ga. 868.
Ill.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412.
Mich.—Polk Manor Co. v. Manton, 265 N.W. 457, 274 Mich. 539—Signaigo v. Begun, 207 N.W. 799, 234 Mich. 246.
Mo.—Andrews v. Metropolitan Bldg. Co., 163 S.W.2d 1024, 349 Mo. 927.
N.Y.—Todd v. North Ave. Holding Corporation, 201 N.Y.S. 31, 121 Misc. 301, affirmed 204 N.Y.S. 953, 209 App.Div. 834.
Pa.—Hogan v. Rose, 14 Pa.Dist. & Co. 256.
Tenn.—Carr v. Trivett, 143 S.W.2d 900, 24 Tenn.App. 308.
Tex.—Green v. Gerner, Civ.App., 283 S.W. 615, affirmed, Com.App., 289 S.W. 999.
32 C.J. p 214 note 60.

Camp for underprivileged children

Owners of land in subdivision were entitled to injunction to restrain defendants from operating summer camp for underprivileged children on their lots in subdivision in violation of restrictive covenant limiting use of property to residential purposes, notwithstanding defendants were engaged in charitable enterprise.—Ulmer v. Ulrey, 133 S.W.2d 744, 280 Ky. 457.

Erection of billboard in violation of covenant allowing improvements only for "residential purposes" will be enjoined.—Greer v. Bornstein, 54 S.W.2d 927, 246 Ky. 286.

Erection of commercial garage may be enjoined under covenant restricting building to construction of residences.
Mich.—Stahl v. Dyer, 209 N.W. 107, 235 Mich. 355—Sullivan v. Playfair Realty Co., 213 N.W. 973, 238 Mich. 274.
Okl.—Magnolia Petroleum Co. v. Drauver, 83 P.2d 840, 183 Okl. 579, 119 A.L.R. 1112.

Excavating lot

Where a deed contained a stipulation that land conveyed was to be used only for residence purposes, with a clause that the title should be forfeited on violation of the conditions of the stipulation, a subsequent purchaser can be enjoined from excavating the lot to a depth of ten feet, and lessening the value of property in the vicinity.—Smith v. K. M. Van Zandt Land Co., Tex.Civ.App., 246 S.W. 683.

Use of property as cat and dog hospital would be restrained, where deed restricted use of property for residential purposes, except that physicians or dentists could maintain office in residence.—Palfrey v. Killian, 27 S.W.2d 462, 224 Mo.App. 325.

Operation of boarding house or tourist home

(1) Holders, under deed contain-

dwelling on the premises,[98] not to erect a building for commercial purposes,[99] or not to build a tenement house,[1] a flat,[2] a frame building,[3] or a building composed of any but specified materials,[4] or not to erect a building above a certain height on the premises,[5] or not to put up a building costing less than a specified amount;[6] and it has been held that the fact that the building put up in violation of the restriction is portable, and that the violation of the restriction might be only temporary, does not prevent the issuance of an injunction to restrain the violation.[7] An injunction against the erection of a particular kind of building will be refused where the lot is not included in the area covered by the restrictive covenants.[8]

Location of building. An injunction may be granted to restrain the breach of a contract fixing the limits within which buildings may be erected,[9] as in the case of a contract not to put up a building within a certain number of feet from a street or boundary line.[10] The breach of a covenant not

ing building restriction requiring private dwelling, will be restrained from operating boarding house.—Schreiber v. Drosness, 136 A. 515, 100 N.J.Eq. 591, affirmed Schreiber v. Drossness, 135 A. 920, 100 N.J.Eq. 591.

(2) Trial court did not abuse its discretion in granting injunction to property owners in subdivision enjoining one of the owners from violating restrictive covenants forbidding construction or maintenance on the premises of any building except one one-family dwelling house by operating his house as a rooming house, notwithstanding that covenant had only about a year and a half to run when suit was brought.—Hooker v. Alexander, 29 A.2d 308, 129 Conn. 433.

(3) Where land was developed under general scheme and on much of the developed land restrictive covenants were imposed requiring that land should be used only for residential purposes, one who bought home with intention of using it for tourist home and so used it, with constructive knowledge of covenants restricting use to residential purposes, and actual knowledge from abstract of title, was properly enjoined from using home as tourist home.—Deitrick v. Leadbetter, 8 S.E.2d 276, 175 Va. 170, 127 A.L.R. 849.

Operation of restaurant within subdivision, which was located near plaintiff's residence and in which fighting and noisemaking occurred late at night, disturbing plaintiff's sleep, was enjoined as violating restriction.—Smith v. Nickuloff, 277 N. W. 880, 283 Mich. 188.

That defendant was occupying garage as residence in violation of building restriction only pending construction of permanent residence was no defense to injunction against violation.—Plaster v. Stutsman, Tex. Civ.App., 8 S.W.2d 750.

Public inconvenience in requiring consumers of gasoline to go one thousand and nine hundred feet further did not prevent enforcement of covenant restricting use of property for residential purposes.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.

98. Tex.—North Texas Trust Co. v. Brittson, Civ.App., 279 S.W. 892.
32 C.J. p 214 note 61.

Premises to be used for park

(1) Purchaser is entitled to injunction restraining building on lots reserved for park purposes.
Ga.—Caffey v. Parris, 197 S.E. 898, 186 Ga. 303.
Tex.—North Texas Trust Co. v. Brittson, Civ.App., 279 S.W. 892.

(2) Acceptance by city of dedication of lots for park purposes need not be shown in suit to enjoin building thereon.—North Texas Trust Co. v. Brittson, supra.

99. Boarding house

The facts that city lot is located in zoned district, provided by municipal ordinance regulating keeping of boarders, and that owner has applied for license to carry on such business in her dwelling house thereon, are immaterial in suit to enjoin use of such house for that purpose in violation of covenant in deed conveying lot to defendant that she would not use any building thereon for commercial purpose.—David v. Bowen, 12 S.E.2d 873, 191 Ga. 467.

1. N.Y.—Lewis v. Gollner, 29 N.E. 81, 129 N.Y. 227, 26 Am.S.R. 516.
32 C.J. p 214 note 62.

2. Ill.—Vansant v. Rose, 170 Ill.App. 572.
Mo.—Kenwood Land Co. v. Hancock Inv. Co., 155 S.W. 861, 169 Mo. App. 715.

3. Ala.—White v. Harrison, 81 So. 565, 202 Ala. 623.

4. N.Y.—Atlantic Dock Co. v. Leavitt, 54 N.Y. 35, 13 Am.R. 556.

5. Pa.—Wesley v. Sulzer, 73 A. 333, 224 Pa. 311.
32 C.J. p 214 note 66.

6. Pa.—Lavan v. Menaker, 124 A. 743, 280 Pa. 591.
Tex.—Dellaughter v. Hargrove, Civ. App., 40 S.W.2d 253.
32 C.J. p 214 note 67.

Temporary use of garage house as residence

Property owners in tract which was subdivided under trust agreement containing building restriction requiring any dwelling to cost not less than six thousand dollars were not entitled to enjoin construction of "garage-house" to be used for temporary residence of lot owners who contemplated building a house in conformance with building restriction, where similar "garage-houses" had been previously constructed, and property owners showed no monetary damage.—Gillingham v. Timmins, Tex.Civ.App., 104 S.W.2d 115, error dismissed.

7. N.Y.—Seibert v. Ware, 158 N.Y. S. 229.

8. Ala.—Marsh v. Cheeseman, 128 So. 796, 221 Ala. 390.

9. Mass.—Hamlen v. Sorkin, 146 N. E. 265, 251 Mass. 143.
32 C.J. p 214 note 69.

10. Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682—Gamble v. Fierman, 255 P. 269, 82 Cal.App. 180.
Md.—Levy v. Dundalk Co., 11 A.2d 476, 177 Md. 636.
Mass.—Hamlen v. Sorkin, 146 N.E. 265, 251 Mass. 143.
Mich.—Woughter v. Van Marter, 275 N.W. 236, 281 Mich. 408.
N.J.—McGalliard v. Chapman, 129 A. 256, 3 N.J.Misc. 609.
Pa.—Willis v. Baldwin, 24 Erie Co. 18.
W.Va.—Kaminsky v. Barr, 145 S.E. 867, 106 W.Va. 201.
Wis.—Schneider v. Eckhoff, 206 N. W. 838, 188 Wis. 550.
32 C.J. p 214 note 70.

Porch extending beyond limit

(1) Where restriction in deed prohibited erection of building within thirty feet from street line, a dwelling house, the foundation of which extended back thirty feet from street, but the porch of which as part of building extended forward several feet, from foundation, violated the restriction and would be restrained at grantor's suit.—Clough v. Mesnick, 126 A. 740, 96 N.J.Eq. 482, affirmed 130 A. 917, 98 N.J.Eq. 706.

(2) Porch projecting nine feet beyond building line, created by a covenant, so as to obstruct the light and air of plaintiff, adjoining lot owner, and spoil uniformity of building line, was an encroachment damaging

to erect buildings so as to obstruct a view,[11] or the passage of light and air,[12] may be enjoined.

Change in use of buildings. A change in the use of buildings in respect of which it has been agreed that they shall not extend or project beyond a designated line does not affect the right to enjoin a breach of the covenant since the importance of the maintenance of a building line may be as great when buildings are used for purposes of business as when they are occupied only as dwellings.[13]

Change in character of neighborhood. Injunctive relief to restrain the violation of building restrictions will be denied where there has been a change in the character of the neighborhood which would render enforcement of the restrictions inequitable and burdensome.[14] To justify the denial of injunctive relief, it must appear that there has been a radical change in the environment and character of the neighborhood.[15] As long as the restriction is of substantial value to the dominant owner its violation will be restrained.[16] The fact that the current of business has reached the restricted territory does not of itself afford ground for denying equitable relief where the encroachments of business have not made the property undesirable for private residences.[17] Those owning property in a restricted residential district or neighborhood, and especially those who have their homes there and have been led to buy or build in such locality by reason of restrictive covenants running with the land imposed on the street, block, or subdivision in which they have purchased, are entitled to protection against prohibited invasion regardless of how close business may crowd around them on unrestricted property, provided the original plan for a residential district has not been departed from in the restricted district, street, or block, and the restrictive requirements have been generally enforced, or accepted and complied with by purchasers.[18]

General disregard of restrictions. Where building restrictions have been disregarded and practically abandoned by substantially all of those owning land within the building scheme or plan, and the enforcement of the restriction against defendant would not be effectual to put the general building plan in the condition contemplated by the restrictions, equity will not enjoin a violation thereof.[19] Especially is the rule applicable where the

plaintiff which he was entitled to enjoin.—Mueller v. Schier, 205 N.W. 912, 189 Wis. 70.

Where violation is unsubstantial, injunctive relief will be denied, especially where plaintiff has also violated the restriction.—Foster v. Bunting, Tex.Civ.App., 19 S.W.2d 784.

11. N.J.—Buck v. Adams, 17 A. 961, 45 N.J.Eq. 552.

12. Pa.—Murphy v. Ahlberg, 97 A. 406, 252 Pa. 267.
32 C.J. p 215 note 72.

13. D.C.—Avignone v. Roumel, 13 F. 2d 292, 56 App.D.C. 320—Castleman v. Avignone, 12 F.2d 326, 56 App.D.C. 253.
Mass.—Codman v. Bradley, 87 N.E. 591, 201 Mass. 361.

14. Cal.—Hurd v. Albert, 3 P.2d 545, 214 Cal. 15, 76 A.L.R. 1348—Friesen v. City of Glendale, 288 P. 1080, 209 Cal. 524—Downs v. Kroeger, 254 P. 1101, 200 Cal. 743—Jewett v. Albin, 266 P. 329, 90 Cal.App. 535.
Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394.
Ill.—Hurt v. Hejhal, 259 Ill.App. 221.
N.J.—Kliem v. Sisters of Charity of St. Elizabeth, 139 A. 174, 101 N.J. Eq. 761.
N.C.—Starkey v. Gardner, 138 S.E. 408, 194 N.C. 74, 54 A.L.R. 806, followed in Higgins v. Hough, 143 S. E. 212, 195 N.C. 652, and Stroupe v. Truesdell, 145 S.E. 925, 196 N.C. 303.
32 C.J. p 212 note 31 [a], [b].
Effect of change in character of neighborhood generally see supra subdivision b (4) (f) of this section.

15. Mich.—Carey v. Lauhoff, 3 N.W. 2d 67, 301 Mich. 168—Pink v. Elder, 300 N.W. 104, 299 Mich. 320—Stahl v. Dyer, 209 N.W. 107, 235 Mich. 355—Moreton v. Louis G. Palmer & Co., 203 N.W. 116, 230 Mich. 409.

Although unrestricted land across street was used for business enterprises, covenant restricting use to residential purposes will be enforced.—Frick v. Foley, 141 A. 172, 102 N.J. Eq. 430, affirmed Frick v. Northern Trust Co., 146 A. 914, 110 N.J.Eq. 573.

Increase in traffic and existence of temporary real estate offices was not such change in conditions as rendered enforcement of restrictions inequitable.—Austin v. Van Horn, 222 N.W. 721, 245 Mich. 344.

That sparsely settled community grew to popular summer resort did not preclude enforcement of building restrictions permitting dwellings only.—Schreiber v. Drosness, 136 A. 515, 100 N.J.Eq. 591, affirmed Schreiber v. Drosness, 135 A. 920, 100 N.J. Eq. 591.

16. Mich.—Smith v. Nickuloff, 277 N.W. 880, 283 Mich. 188.
Pa.—Hunter v. Wood, 120 A. 781, 277 Pa. 150.

17. N.Y.—Pagenstecher v. Carlson, 131 N.Y.S. 413, 146 App.Div. 738.
32 C.J. p 212 note 38.

18. Mich.—Bigham v. Locklin, 267 N.W. 564, 275 Mich. 545—Moreton v. Louis G. Palmer & Co., 203 N.W. 116, 230 Mich. 409—Swan v. Mitshkun, 173 N.W. 529, 530, 207 Mich. 70.

Where subdivision was still residential, presence of stores, gasoline station, and lumber yard near outer boundary did not warrant refusal of injunction to enforce restrictive covenant limiting lots for residential purposes.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412.

19. Cal.—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal.App.2d 646.
Ill.—Hurt v. Hejhal, 259 Ill.App. 221.
La.—Edwards v. Wiseman, 3 So.2d 661, 198 La. 382, amending, App., 3 So.2d 655.
Mich.—Goodfriend v. Maltesta, 224 N.W. 389, 246 Mich. 369.
Tex.—Johnson v. Poteet, Civ.App., 279 S.W. 902.
Wash.—Tindolph v. Schoenfeld Bros., 289 P. 530, 157 Wash. 605—Ronberg v. Smith, 232 P. 283, 132 Wash. 345.
Wis.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 864.
32 C.J. p 213 note 44.

infraction complained of does not diminish the value of the other estates,[20] where an enforcement of compliance with the restrictions against defendant will be attended with great loss to him,[21] or where a large part of the time during which the restriction should be operative has already expired.[22]

Nevertheless in order to bar the right to enjoin a breach of a building restriction on the ground of general disregard of the restriction by others in the restricted district, it is essential that the departure from the restrictions should be of a substantial character.[23] A few sporadic instances of violation of the restrictions, which violations have not been attacked, do not establish evidence of an abandonment of the general plan.[24] That there have been some deviation from the restrictions is not alone ground for refusing to enforce them to the extent that they remain beneficial,[25] especially where the deviation is in another part of the subdivision.[26]

(6) Restrictions as to Kinds of Business

An injunction may issue to restrain the breach of a covenant not to engage in a certain business on the premises.

Where defendant has agreed not to carry on certain classes of business on the premises, he will be enjoined from breaking his contract.[27] No showing of actual,[28] or substantial damage,[29] or irreparable injury,[30] is essential to authorize the issuance of an injunction, and the fact that forfeiture is prescribed by the contract as a penalty for its breach is no objection to the granting of an injunction.[31] The fact that the use prohibited by the covenant is not a private or public nuisance does not affect the right to an injunction against a breach of the covenant.[32]

On the other hand, injunctive relief will be denied where the covenant is lacking in mutuality[33] or is unreasonable,[34] or where there has been such change in the general neighborhood since the property was bought by defendant as would make enforcement inequitable,[35] or where plaintiff has been guilty of laches.[36]

Building line restrictions
Tex.—Sisk v. Richards, Civ.App., 130 S.W.2d 1076.
32 C.J. p 213 note 44 [a].

Failure of other lot owners to bring suit to prevent other violations may be considered.—Hurt v. Hejhal, 259 Ill.App. 221.

20. Cal.—Bryant v. Whitney, 174 P. 32, 178 Cal. 640.
Mass.—Loud v. Pendergast, 92 N.E. 40, 206 Mass. 122.

21. Mass.—Loud v. Pendergast, supra.

22. Mass.—Loud v. Pendergast, supra.
32 C.J. p 213 note 47.

23. Mich.—Rosenzweig v. Rose, 167 N.W. 1008, 201 Mich. 681.
32 C.J. p 213 note 49.

24. Mich.—Smith v. Nickuloff, 277 N.W. 880, 283 Mich. 188.
Or.—Crawford v. Senosky, 274 P. 306, 128 Or. 229.
32 C.J. p 213 note 50.

Use of office in development and management of real estate development enterprise did not constitute an abandonment of restrictive covenant forbidding use of any tract for business purposes so as to preclude injunction to restrain continued use of such office by real estate firm after its use in connection with the development tract was no longer necessary.—Powell v. Seashore Properties Corporation, 148 A. 621, 106 N.J. Eq. 98.

25. Mich.—Polk Manor Co. v. Manton, 265 N.W. 457, 274 Mich. 539—Wilcox v. Mueller, 229 N.W. 600, 250 Mich. 167—Putnam v. Ernst, 206 N.W. 527, 232 Mich. 682.

26. Mich.—Wilcox v. Mueller, 229 N.W. 600, 250 Mich. 167.

27. Mich.—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620.
Ohio.—Wilgus v. Indian Lake Amusement Co., App., 37 N.E.2d 210.
32 C.J. p 215 note 73.
Contracts in restraint of trade see supra § 84.

Purchaser at tax sale
A common vendor selling lots subject to restriction against sale of intoxicating liquors could enforce by injunction restriction against purchaser of one lot at tax sale with notice of restriction, notwithstanding that tax deed conveyed property by new and paramount title in fee simple absolute, free and clear of all liens and "encumbrances," where increased value of lot arising from restriction was considered in assessing lot.—Alamogordo Imp. Co. v. Prendergast, 91 P.2d 428, 43 N.M. 245, 122 A.L.R. 1277.

28. Neb.—Schlitz Brewing Co. v. Neilsen, 110 N.W. 746, 77 Neb. 868, 8 L.R.A.,N.S., 494.

29. Ill.—Star Brewery Co. v. Primas, 45 N.E. 145, 163 Ill. 652, affirming 59 Ill.App. 581.

30. Neb.—Schlitz Brewing Co. v. Neilsen, 110 N.W. 746, 77 Neb. 868, 8 L.R.A.,N.S., 494.

31. Mich.—Watrous v. Allen, 24 N. W. 104, 57 Mich. 362, 58 Am.R. 363.
N.J.—Richards v. Burdsall, Ch., 10 A. 274.

32. N.Y.—Dodge v. Lambert, 15 N.Y. Super. 570.

33. N.Y.—Kew Gardens Corporation v. Ciro's Plaza, 26 N.Y.S.2d 553, 261 App.Div. 576, reversing 23 N. Y.S.2d 957, 175 Misc. 475.

34. N.J.—Stanley-Fabian Corporation v. H. J. Theatrical Enterprise Co., 174 A. 26, 116 N.J.Eq. 407, denying motion 169 A. 291, 115 N.J. Eq. 5.

Covenant not to use premises for motion pictures
Restraint imposed by covenant in deed providing that theater in Newark should not be used for motion pictures, etc., so long as beneficiaries of covenant were interested in any place of amusement in entire part of New Jersey including and lying north of Trenton, was greater than necessary to afford fair protection, precluding injunction.—Stanley-Fabian Corporation v. H. J. Theatrical Enterprise Co., supra.

35. N.Y.—Kew Gardens Corporation v. Ciro's Plaza, 26 N.Y.S.2d 553, 261 App.Div. 576, reversing 23 N. Y.S.2d 957, 175 Misc. 475—De Lima v. Mitchell, 98 N.Y.S. 811, 49 Misc. 171.

36. Pa.—Benner v. Tacony Athletic Ass'n, 196 A. 390, 328 Pa. 577.

Laches not shown
Where title deeds to all lots in a territory contained covenant prohibiting sale of beer or liquor thereon, and residents of territory, on learning that licenses to dispense beer and liquor had been granted, immediately brought suit against certain

Application of rules. The above rules have been applied where the premises were used contrary to a restrictive covenant as a blacksmith shop,[37] a Chinese laundry,[38] a distillery for resin oil,[39] a grocery,[40] a livery stable,[41] a public eating house,[42] a public garage,[43] or a saloon or place for the sale of intoxicating liquors.[44] The maintenance of a hospital for the open air treatment of consumptives has been held a violation of a restriction in the use of the premises prohibiting their use in any "business causing offensive smells or injuriously affecting the health or condition of the neighborhood," which will be enjoined.[45]

(7) Mandatory Injunction

A mandatory injunction may be issued directing the removal or alteration of a building or structure erected in violation of a restrictive covenant.

Unless prohibited by statute,[46] in a proper case the court by means of a mandatory injunction may compel the undoing of a thing already done in violation of a restrictive agreement affecting real estate.[47]

When buildings or structures have been erected in breach of a restrictive covenant, their removal or alteration may be ordered,[48] especially where the structure has been erected with full knowledge of the restriction and in willful violation of plaintiff's rights.[49] The court will not ordinarily take into consideration the relative amount of inconvenience or injury to be suffered by the parties in case the injunction is granted or refused, except in cases where the damage caused by the breach is minute.[50] However, the breach of the restrictive covenant does not entitle plaintiff to a mandatory injunction directing the removal of a building or structure as a matter of right.[51] Whether such an injunction shall issue depends on all the equities between the parties.[52] The breach must be very clear to justify a mandatory injunction,[53] and it is essential that the common scheme of building should have been actually preserved.[54] A mandatory injunction may be denied when it will operate inequitably and oppressively,[55] or where there has been nothing more than a mere breach of a negative legal right which

licensees in order to test enforceability of restriction, and thereafter sought injunction against other licensees, restriction was enforceable and residents were not guilty of laches, although two or three years had elapsed since licenses were issued.—Benner v. Tacony Athletic Ass'n, supra.

37. Ohio.—Heidorn v. Wright, 6 Ohio S. & C.P. 315, 4 Ohio N.P. 253.

38. Mass.—Hills v. Metzenroth, 53 N.E. 890, 173 Mass. 423.

39. N.Y.—Atlantic Dock Co. v. Leavitt, 54 N.Y. 35, 13 Am.R. 556.

40. Mass.—Door v. Harrahan, 101 Mass. 531, 3 Am.R. 398.

41. N.Y.—Schenk v. Campbell, 11 Abb.Pr. 292.

42. Mass.—Parker v. Nightingale, 6 Allen 341, 83 Am.D. 632.

43. Md.—Legum v. Carlin, 177 A. 287, 168 Md. 191, 99 A.L.R. 536.

44. Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.
Mich.—Bigham v. Winnick, 286 N.W. 102, 288 Mich. 620.
Mont.—Northwestern Improvement Co. v. Lowry, 66 P.2d 792, 104 Mont. 289, 110 A.L.R. 605.
N.M.—Alamogordo Imp. Co. v. Prendergast, 91 P.2d 428, 43 N.M. 245, 122 A.L.R. 1277.
32 C.J. p 215 note 87.

45. Pa.—Gowen v. O'Hara, 15 Pa. Dist. 753.

46. **In Georgia**
Under Code 1933 § 55-110, providing that injunction may only restrain and it may not compel a party to perform an act, an injunction against the violation of a restrictive covenant is not inappropriate because it requires affirmative act of removing unauthorized obstruction.—Peebles v. Perkins, 140 S.E. 360, 165 Ga. 159.
Mandatory injunction:
Generally see supra § 5.
Breach of contract generally see infra § 93.

47. Mo.—Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.
Court may order defendants to vacate premises which they bought and occupied with full knowledge of agreement restricting sale and occupancy.—Porter v. Johnson, supra.

48. Ariz.—McRae v. Lois Grunow Memorial Clinic, 14 P.2d 478, 483, 40 Ariz. 496, quoting **Corpus Juris.**
Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 883, 885, 151 Kan. 978, citing **Corpus Juris.**
Md.—Levy v. Dundalk Co., 11 A.2d 476, 177 Md. 636.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105—Parsons v. Duryea, 158 N.E. 761, 261 Mass. 314.
Pa.—Black v. Harrison, 87 Pa.Super. 251.
32 C.J. p 215 note 91.
"It is no defense to a complaint for an injunction that the defendants went ahead with their plans and expended a large sum of money. In such case the defendants take the risk of being compelled to raze the structure erected in violation of the covenant."—Hoffman v. Schwan, 38 N.E.2d 53, 57, 312 Ill.App. 160.
Where building can be altered to comply with restrictions it should not be ordered removed or destroyed.—Boston-Edison Protective Ass'n v. Goodlove, 227 N.W. 772, 248 Mich. 625—Sanborn v. McLean, 206 N.W. 496, 233 Mich. 227, 60 A.L.R. 1212.

49. Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.
Ill.—Lee v. Hansberry, 10 N.E.2d 406, 291 Ill.App. 517—Fick v. Burnham, 251 Ill.App. 333.
Mich.—Nechman v. Supplee, 210 N.W. 323, 236 Mich. 116.
Or.—Menstell v. Johnson, 262 P. 853, 125 Or. 150, 57 A.L.R. 311, modified on other grounds and rehearing denied 266 P. 891, 125 Or. 150, 57 A.L.R. 311.
Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.
32 C.J. p 215 note 91 [a].

50. Va.—Spilling v. Hutcheson, 68 S.E. 250, 111 Va. 179.
32 C.J. p 216 note 95.

51. Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.
Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
32 C.J. p 216 note 1.

52. Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.

53. Pa.—Gatzmer v. St. Vincent School Soc., 23 A. 452, 147 Pa. 313.

54. Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.
N.J.—Zelman v. Kaufherr, 73 A. 1048, 76 N.J.Eq. 52.

55. N.J.—Straus v. Loudenslager, 127 A. 22, 96 N.J.Eq. 678.

is not injurious or detrimental in any way to plaintiff's rights,[56] or where the injury complained of is not serious or substantial and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject defendant to great inconvenience and loss,[57] especially where defendant has acted in good faith.[58] The application must be promptly made[59] and relief will be denied where plaintiff has been guilty of laches or has waived or acquiesced in the violation.[60] The limited duration of the covenant, in connection with other circumstances, is a circumstance adverse to its enforcement by mandatory injunction.[61] Where a lot was purchased and a building erected before a building line is established and without notice of an intention to establish such a line, equity will not compel the removal of the building, even though subsequent to the erection a deed is accepted containing the restriction.[62]

Pendente lite. A mandatory injunction directing the removal of a structure erected in violation of a building covenant will never be granted pendente lite.[63]

§ 88. Other Contracts

An injunction may issue to restrain the breach of various contracts, such as a contract not to contest a will or a patent, not to contract with others for the manufacture of goods, etc.

In addition to the numerous classes of contracts considered supra §§ 81–87, a breach or threatened breach of various other contracts may, in a proper case, be enjoined,[64] such as a contract not to contest a will[65] or to infringe or contest the validity of patents;[66] not to engage in the insurance business except for plaintiff corporation;[67] or not to erect poles on a right of way.[68]

In addition, an injunction may issue to enjoin the violation of a contract not to invade the territory of the vendee for the sale of articles;[69] not to make changes in a play or additions thereto without plaintiff's consent;[70] not to make machines of the same pattern as that used in making machines for complainant for persons in competition with complainant;[71] not to manufacture and sell a patented article;[72] not to contract with others for the manufacture of goods;[73] not to sell goods other than those furnished by complainant to defendant in competition with plaintiff's goods;[74] or not to molest or annoy.[75] By force of statutory provision a sale of standing timber may carry such an interest in real estate that a breach of a contract therefor may be enjoined.[76]

N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App.Div. 135.

32 C.J. p 216 note 97.

56. Pa.—Asbury v. Carroll, 54 Pa. Super. 97.

57. Ariz.—McRae v. Lois Grunow Memorial Clinic, 14 P.2d 478, 40 Ariz. 496.

Ga.—Aspinwall v. Enterprise Development Co., 140 S.E. 67, 70, 165 Ga. 83, citing **Corpus Juris.**

Ind.—Schwartz v. Holycross, 149 N. E. 699, 83 Ind.App. 658.

Miss.—Greenwood Lodge, No. 118, I. O. O. F., v. Hyman, 177 So. 43, 180 Miss. 198.

32 C.J. p 216 note 99.

58. Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.

Removal of sixteen thousand dollar dwelling erected in violation of restrictive covenant will not be required, where defendant acted in good faith, damages being adequate remedy.—Bauby v. Krasow, supra.

59. Ind.—Schwartz v. Holycross, 149 N.E. 699, 83 Ind.App. 658.

N.J.—Zelman v. Kaufherr, 73 A. 1048, 76 N.J.Eq. 52.

60. Ill.—Brandenburg v. Country Club Bldg. Corporation, 163 N.E. 440, 332 Ill. 136.

Kan.—N. P. Dodge Corporation v. Calderwood, 101 P.2d 833, 151 Kan. 978.

Tex.—Gillingham v. Timmins, Civ. App., 104 S.W.2d 115, error dismissed.

32 C.J. p 209 note 11 [b].

Mandatory injunction should be issued with great caution where there is delay in bringing action and defendant has meantime incurred expense.—Pehlert v. Neff, 31 A.2d 446, 152 Pa.Super. 84.

61. Ill.—Brandenburg v. Country Club Bldg. Corporation, 163 N.E. 440, 332 Ill. 136.

N.Y.—Forstmann v. Joray Holding Co., 154 N.E. 652, 244 N.Y. 22, reversing 215 N.Y.S. 65, 216 App. Div. 135.

62. Pa.—Jason v. Slotlow, 30 Pa. Dist. 347.

63. N.Y.—Williams v. Robert M. Silverman Realty Const. Co., 97 N. Y.S. 945, 111 App.Div. 679.

32 C.J. p 216 note 3.

64. S.D.—Ewing v. Waddington, 252 N.W. 28, 62 S.D. 166.

32 C.J. p 226 notes 61, 69–73.

Violation of agreement to be bound by decision of four persons named therein as to a division of business on dissolution of corporation may be restrained.—Glasner v. Bressler, 22 N.E.2d 347, 281 N.Y. 218, reversing 11 N.Y.S.2d 332, 256 App.Div. 1085, reargument denied 22 N.E.2d 869, 281 N.Y. 673.

65. S.D.—Ewing v. Waddington, 252 N.W. 28, 62 S.D. 166.

66. U.S.—Reece Folding Mach. Co. v. Earl & Wilson, D.C.N.Y., 205 F. 639.

67. Mo.—Fred. A. H. Garlichs Agency Co. v. Anderson, App., 226 S.W. 978.

32 C.J. p 226 note 62.

68. Ga.—Southern R. Co. v. Wofford-Shoals Light & Power Co., 69 S.E. 107, 135 Ga. 235.

69. N.Y.—New York Phonograph Co. v. Davega, 111 N.Y.S. 363, 127 App.Div. 222.

70. N.Y.—Royle v. Dillingham, 104 N.Y.S. 783, 53 Misc. 383.

71. Pa.—Wilmsen v. Rehfuss, 16 Pa. Dist. 871.

72. U.S.—Kinsman v. Parkhurst, N. Y., 18 How. 289, 15 L.Ed. 385.

73. Ind.—Janalene, Inc. v. Burnett, 41 N.E.2d 942, 220 Ind. 253.

74. Mich.—Peerless Pattern Co. v. Gauntlett Dry Goods Co., 136 N.W. 1113, 171 Mich. 158, 42 L.R.A.,N.S., 843.

32 C.J. p 226 note 74, p 224 note 35 [f].

Restraining breach of contracts for exclusive privileges see supra § 81.

75. Ky.—Reed v. Carter, 103 S.W.2d 663, 268 Ky. 1.

76. U.S.—Hamilton Ridge Lumber Corp. v. Southern Cotton Oil Co., C.C.A.S.C., 271 F. 934, 935.

32 C.J. p 227 note 78.

§ 89. Inducing Breach of Contract

a. In general
b. Particular contracts

a. In General

An injunction ordinarily may issue to restrain a third person from unlawfully inducing the breach of a lawful contract by one of the parties thereto when it will result in irreparable injury to the other.

In the absence of statutes limiting or prohibiting injunctive relief, an injunction will lie to restrain third persons singly or in combination from unlawfully inducing the breach of a lawful contract by one of the parties thereto when it will result in irreparable injury to the other,[77] irrespective of the fact that defendant is solvent;[78] nor is it essential that the contract should be of such a nature that specific performance could be decreed.[79]

On the other hand, the mere interference with a lawful contract by a stranger thereto does not of itself give the injured person a remedy by injunction.[80] Injunctive relief will be denied where there is legal justification for interference,[81] where full indemnity may be had at law,[82] or where the contract is indefinite, uncertain, or incomplete,[83] or is prohibited by statute, is contrary to public policy, is in restraint of trade, or monopolistic in its tendency or result.[84]

Contract terminable at will. The fact that the contract is "at will" and terminable by either party at any time is of no consequence,[85] where neither party had attempted to revoke the contract and was not obliged to do so,[86] since each party to the con-

77. U.S.—Fairbanks, Morse & Co. v. Texas Electric Service Co., C.C.A.Tex., 63 F.2d 702, certiorari denied Texas Electric Service Co. v. Fairbanks, Morse & Co., 290 U.S. 655, 54 S.Ct. 71, 78 L.Ed. 567—Oklahoma Natural Gas Corporation v. Municipal Gas Co., C.C.A.Okl., 38 F.2d 444—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963.
Cal.—Imperial Ice Co. v. Rossier, 112 P.2d 631, 18 Cal.2d 33—H. G. Fenton Material Co. v. Challet, 121 P.2d 788, 49 Cal.App.2d 410—California Grape Control Board v. California Produce Corporation, 40 P.2d 846, 847, 4 Cal.App.2d 242, citing **Corpus Juris.**
Colo.—McCreery v. Miller's Grocerteria Co., 64 P.2d 803, 99 Colo. 499.
D.C.—Meyer v. Washington Times Co., 76 F.2d 988, 64 App.D.C. 218, certiorari denied Washington Times Co. v. Meyer, 55 S.Ct. 646, 295 U.S. 734, 79 L.Ed. 1682.
Fla.—Dade Enterprises v. Wometco Theatres, 160 So. 209, 119 Fla. 70.
Iowa.—L. H. Henry & Sons v. Rhinesmith, 260 N.W. 9, 11, 219 Iowa 1088, citing **Corpus Juris.**
Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292—Little Rock Surgical Co. v. Bowers, 42 S.W.2d 367, 227 Mo.App. 744—F. C. Church Shoe Co. v. Turner, 279 S.W. 232, 218 Mo.App. 516.
N.Y.—Harry Rogers Theatrical Enterprises v. Comstock, 232 N.Y.S. 1, 225 App.Div. 34.
Pa.—Dorrington v. Manning, 32 Luz. Leg.Reg. 417.
Philippine.—Gilchrist v. Cuddy, 29 Phillipine 542.
Tenn.—Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.
Tex.—Borden Co. v. Local No. 133, Etc., Civ.App., 152 S.W.2d 828.
Wis.—Neillsville Shipping Ass'n v. Lastofka, 274 N.W. 280, 225 Wis. 350—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
32 C.J. p 228 note 98.
Inducing breach of contract as tort see the C.J.S. title Torts § 44, also 62 C.J. p 1141 note 64 et seq.

History of doctrine
Wis.—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 88, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

Advice of counsel as defense
Defendant's reliance on opinion from its counsel that contract of news syndicate with another newspaper publishing company was nonassignable was no defense in suit by purchaser of other newspaper's assets at receiver's sale to enjoin defendant newspaper company from publishing same copyrighted features under subsequent contract with syndicate.—Meyer v. Washington Times Co., 76 F.2d 988, 64 App.D.C. 218, certiorari denied Washington Times Co. v. Meyer, 55 S.Ct. 646, 295 U.S. 734, 79 L.Ed. 1682.

78. Ga.—Hamby & Toomer v. Georgia Iron & Coal Co., 56 S.E. 1033, 127 Ga. 792.

79. Ala.—Alcazar Amusement Co. v. Mudd, etc., Amusement Co., 86 So. 209, 204 Ala. 509.
32 C.J. p 229 note 1.

80. Philippine.—Gilchrist v. Cuddy, 29 Philippine 542.

81. U.S.—Fairbanks, Morse & Co. v. Texas Electric Service Co., C.C.A. Tex., 63 F.2d 702, certiorari denied Texas Electric Service Co. v. Fairbanks, Morse & Co., 54 S.Ct. 71, 290 U.S. 655, 78 L.Ed. 567.

82. Ga.—Felton Beauty Supply Co. v. Kline, 184 S.E. 703, 182 Ga. 20.
32 C.J. p 228 note 97.

Hearing before administrative board
Physician was not entitled to enjoin threatened disciplinary proceedings against him by state medical board for allegedly unprofessional conduct in contracting with fraternal society to serve its members on ground that such proceedings would interfere with the contractual relationship, since the statute providing for a hearing before the board and a review of its orders afforded an adequate remedy at law.—Fisch v. Sivertsen, 292 N.W. 753, 208 Minn. 102.

83. Md.—James L. Kernan Co. v. Wilson Amusement Co., 152 A. 503, 160 Md. 17.
N.J.—William Buechse & Sons Co. v. Blue Moon Cheese Products, 196 A. 664, 123 N.J.Eq. 165.

84. U.S.—Fairbanks, Morse & Co. v. Texas Electric Service Co., C.C.A. Tex., 63 F.2d 702, certiorari denied Texas Electric Service Co. v. Fairbanks, Morse & Co., 290 U.S. 655, 54 S.Ct. 71, 78 L.Ed. 567.

85. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
32 C.J. p 228 note 2.

86. U.S.—Quinlivan v. Dail-Overland Co., C.C.A.Ohio, 274 F. 56.

tract has a manifest interest in the freedom of the other to exercise his judgment without illegal interference or compulsion.[87]

Expiration of term of contract. The right to an injunction is not affected by the fact that the term of the contract had expired before the final order was made where it did not affirmatively appear that there had been a full compliance with its provisions and where the bill had been taken as confessed before the contract expired.[88]

Means employed. The rule restraining a third person from inducing the breach of a contract applies where the means employed to induce the breach consist in persuasion,[89] false or fraudulent representations,[90] coercion,[91] threats,[92] intimidation,[93] or violence.[94]

b. Particular Contracts

In a proper case an injunction may issue to restrain a third person from inducing the breach of an employment contract or a contract conferring an exclusive privilege, and a third person may be restrained from inducing one's customers to break their contracts.

The rule, discussed supra subdivision a of this section, that an injunction may issue to restrain a third person from unlawfully inducing a breach of contract has been applied to various types of contracts,[95] such as a contract conferring an exclusive agency or privilege.[96] The rule has also been applied in the case of service contracts;[97] and the fact that the contract is terminable at the will of either employer or employee does not affect the right to an injunction.[98]

Customers' contracts. Injunctions have been granted in many cases to prevent third persons from inducing one's customers to break their contracts with him,[99] without proof of express malice,[1] and that, too, although the contract was revocable at will, where neither party had revoked the contract and was not obliged so to do.[2] Relief will be denied where the remedy at law is adequate.[3]

§ 90. Restraining Execution of Contract

An injunction ordinarily will not be granted to restrain the performance of a contract.

It is seldom that a party to a contract will be prevented by injunction from carrying it out, since complainant's remedy at law ordinarily is adequate,[4]

87. U.S.—Truax v. Raich, Ariz., 36 S.Ct. 7, 239 U.S. 33, 60 L.Ed. 131.

88. U.S.—Quinlivan v. Dail-Overland Co., C.C.A.Ohio, 274 F. 56.

89. N.Y.—Cook v. Wilson, 178 N.Y.S. 463, 108 Misc. 438.
32 C.J. p 229 note 6, p 228 note 98.

90. U.S.—American Malting Co. v. Keitel, D.C.N.Y., 217 F. 672.
32 C.J. p 229 note 7.

91. Ga.—Callan v. Exposition Cotton Mills, 99 S.E. 300, 149 Ga. 119.
N.Y.—Cook v. Wilson, 178 N.Y.S. 463, 108 Misc. 438.

92. Cal.—Patterson Glass Co. v. Thomas, 183 P. 190, 41 Cal.App. 559.
Tex.—Ex parte Tucker, 220 S.W. 75, 110 Tex. 335.

93. Ga.—Culpepper v. Cunningham, 76 S.E. 750, 139 Ga. 88.
Mass.—Walton Lynch Co. v. Kearney, 128 N.E. 429, 236 Mass. 310.

94. U.S.—Kinloch Tel. Co. v. Local Union No. 2, I. B. E. W., C.C.A.Mo., 275 F. 241, certiorari denied 42 S. Ct. 270, 257 U.S. 662, 66 L.Ed. 423.
Ga.—Culpepper v. Cunningham, 76 S. E. 750, 139 Ga. 88.

95. Or.—Phez Co. v. Salem Fruit Union, 205 P. 970, 103 Or. 514.
32 C.J. p 231 note 35.

96. Ill.—Neer v. Coats, 265 Ill.App. 51.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.
Wis.—Hansen v. Taylor Beverage & Candy Co., 277 N.W. 115, 227 Wis. 140—E. L. Husting Co. v. Coca Cola Co., 237 N.W. 85, 205 Wis. 356, 84 A.L.R. 22, rehearing denied 238 N.W. 626, 205 Wis. 356, and certiorari denied Wisconsin Coca Cola Bottling Co. v. E. L. Husting Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
32 C.J. p 231 note 36.

Co-operative marketing agreement
Tenn.—Dark Tobacco Growers' Co-Op. Ass'n v. Dunn, 266 S.W. 308, 150 Tenn. 614.

Reformation of contract as condition to relief
One having an exclusive sales contract was not required to have a written instrument reformed to conform to the true contract before obtaining injunctive relief against third person's interference.—Nokol Co. of Missouri v. Becker, 300 S. W. 1108, 318 Mo. 292.

97. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
Ill.—Messenger Pub. Co. v. Mokstad, 257 Ill.App. 161.
N.Y.—Harry Rogers Theatrical Enterprises v. Comstock, 232 N.Y.S. 1, 225 App.Div. 34—Vail-Ballou Press v. Casey, 212 N.Y.S. 113, 125 Misc. 689.
32 C.J. p 229 note 14.

Injunction to restrain breach induced in furtherance of labor dispute see infra § 138.
Enticing servant to leave employment see the C.J.S. title Master and Servant §§ 624–628, also 39 C.J. p 1370 note 11 et seq.

Statute making it lawful to persuade or attempt to persuade another to do anything not unlawful, actionable, or in violation of duty does not legalize interference.—Rice, Barton & Fales Mach. & Iron Co. v. Willard, 136 N.E. 629, 242 Mass. 566.

Where persons are not complainant's employees injunctive relief cannot be obtained.—Air-Way Electric Appliance Corporation v. Wolfe, C.C.A.Okl., 59 F.2d 716.

98. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
32 C.J. p 229 note 16 [a].

99. U.S.—American Malting Co. v. Keitel, D.C.N.Y., 217 F. 672.
32 C.J. p 230 note 32.

1. U.S.—Sperry & Hutchinson Co. v. Pommer, D.C.N.Y., 199 F. 309.

2. U.S.—Quinlivan v. Dail-Overland Co., C.C.A.Ohio, 274 F. 56.

3. Ga.—Felton Beauty Supply Co. v. Kline, 184 S.E. 703, 182 Ga. 20.

4. Ga.—McRea v. Smith, 137 S.E 390, 164 Ga. 23.

and especially should an injunction be denied where the execution of the contract will result in actual benefit to the party asking the injunction and where an injunction would cause defendant great loss.[5] The equitable powers of the court cannot be invoked for the purpose of restraining enforcement of a contract, unless there be some facts justifying such relief of which a court of equity could, and a court of law could not, take cognizance.[6]

However, it has been held that, where a contract is void as against public policy, a court of equity may at the suit of one of the parties enjoin the other party from carrying it out.[7] It has also been held that the enforcement of a contract which is illegal by reason of the fact that one of the parties was a foreign corporation which had not complied with the domestic laws may be enjoined at the suit of the other party who had repented in time,[8] that a court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the injury of one engaged in a competing business,[9] and that, where parties make a contract conditioned on the organization of a corporation, and the corporation is not formed, an injunction should be granted to one party to restrain the other from contracting under a corporate name or acting with the property mentioned in the contract as partnership property.[10] The performance of a void contract of a municipality may be enjoined at the suit of a taxpayer.[11]

Pending suit for rescission, cancellation, or reformation. Pending a suit for the rescission, cancellation, or reformation of a contract, the court may grant a temporary injunction restraining defendant from exercising rights under the contract in fraud of complainant.[12]

Effect of injunction. The court cannot completely destroy a valid contract by granting a temporary injunction against its performance; it can thereby only delay its consummation.[13]

§ 91. Restraining Forfeiture of Contract

An injunction may issue to restrain the forfeiture of a contract.

Injunction will lie to prevent a party from enforcing the forfeiture of a contract by means manifestly never intended and such as are clearly oppressive.[14] However, where the circumstances warrant, injunctive relief against a forfeiture will be denied.[15]

W.Va.—Shepherd v. Groff, 11 S.E. 997, 34 W.Va. 123.
32 C.J. p 227 notes 82, 83.
Restraining making of contract see supra § 77.

Execution of contract in restraint of trade will not be enjoined at the instance of a third party injured thereby, since such ground is merely a defense when the contract is sought to be enforced against a party thereto.—Tanenbaum v. New York F. Ins. Exch., 68 N.Y.S. 342, 33 Misc. 134.

Restraining performance of prior assignment

Assignees of oil and gas lease previously assigned by one defendant to codefendants under escrow agreement, were not entitled to restrain codefendants as prior assignees from carrying out first assignment, in absence of a showing that prior assignment was unenforceable, plaintiff's remedy being confined to recovery for damages for breach of contract.—Chaffin v. Harpham, 266 S.W. 685, 166 Ark. 578.

Necessity of reformation to correct mistake in contract

Equity will not enjoin the enforcement of an unambiguous contract on the ground that by mistake of the scrivener it was not made to express the real agreement between the parties, without first reforming the instrument under appropriate proceedings.—McRae v. Smith, 137 S.E. 390, 164 Ga. 23—32 C.J. p 227 note 82 [a] (2).

Circumstances excusing delay in performance barring injunction

Owner of dramatic rights in play was not entitled to restrain producer from asserting rights under contract to produce play where the producer's failure to produce the play within the time specified was due to injuries suffered by the leading character.—Hopkins v. Woodward, 15 P. 2d 499, 216 Cal. 619.

5. Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.

6. N.Y.—Stoddard v. Stoddard, 124 N.E. 91, 227 N.Y. 13, affirming 175 N.Y.S. 636.
32 C.J. p 227 note 85.

7. U.S.—Merz Capsule Co. v. U. S. Capsule Co., C.C.Mich., 67 F. 414, affirmed 71 F. 787, 19 C.C.A. 108, 31 L.R.A. 415.
32 C.J. p 227 note 86.

8. Pa.—Atherton v. Wilkes-Barre, 3 Kulp 402.

9. Iowa.—Reeves v. Decorah Farmers' Co-op. Soc., 140 N.W. 844, 160 Iowa 194, 44 L.R.A.,N.S., 1104.
32 C.J. p 227 note 88.

10. Iowa.—Lyons v. Van Oel, 165 N. W. 376, 183 Iowa 114.

11. Neb.—Interstate Power Co. of Nebraska v. City of Ainsworth, 250 N.W. 649, 125 Neb. 419.

12. Md.—Baltimore Sugar Refining Co. v. Campbell Zell Co., 34 A. 369, 83 Md. 36.
Mass.—Smith v. Everett, 126 Mass. 304.
32 C.J. p 228 note 92.
Actions or proceedings in aid of which injunction authorized see supra § 13.

13. Tex.—Dallas Trust & Savings Bank v. Wortham Independent School Dist., Civ.App., 25 S.W.2d 174, error refused.

14. Pa.—Lehigh Valley Coal Co. v. Searle & Stark Heirs, 94 A. 74, 248 Pa. 385.
32 C.J. p 227 note 81.

Conditions precedent

It is not essential in a suit to restrain a vendor from declaring a forfeiture on a contract for the sale of realty for default in payment that the amount due be brought into court, but it is sufficient that a tender of the amount be made in the bill.—Strey v. Buehl, 265 Ill.App. 554.

15. **Circumstances justifying refusal of injunction**

Where predominating purpose of both parties in entering into an agreement for license to use patent was utilization of the patented process for their mutual advantage, and grant of license carried with it an implied obligation of licensee to promote sales of process, and licensee's

§ 92. Restraining Person from Incapacitating Himself, or Preventing Others, from Performing Contract

An injunction may issue to restrain a party to a contract from doing acts which will prevent him from performing his contract or which prevent the plaintiff from performing his part of the contract.

A party to a contract may be enjoined from doing acts that will prevent him from performing his contract,[16] and from doing acts that will prevent complainant from performing his part of the contract.[17]

§ 93. Mandatory Injunction

A mandatory injunction may issue to prevent irreparable injury where property or privileges have been taken away in violation of a contract.

The court has power to prevent irreparable injury by issuing mandatory injunctions, where property or privileges have been taken away in violation of a contract.[18] A mandatory injunction to perform a contract is a drastic remedy[19] and will be sparingly granted.[20] A mandatory injunction will be denied where there is no breach or threatened breach of the contract,[21] or the contract is vague or uncertain,[22] or there is an adequate remedy at law.[23]

Preliminary injunction. A mandatory injunction to compel performance of a contract should be granted on preliminary application only in cases of great urgency and when the right of complainant is very clear.[24]

past performance did not generate any reasonable assurance that it would be capable of doing so with any fair degree of success, court of equity would not enjoin licensor from declaring forfeiture as authorized by license on licensee failing to make payments required therein. —Eno Systems v. Eno, 41 N.E.2d 17, 311 Mass. 334.

16. Pa.—Rosenbaum v. Hardie, 16 Pa.Dist. & Co. 645, 646, citing Corpus Juris.
32 C.J. p 227 note 79.

Injunction against disposition of property agreed to be conveyed

Where defendant in consideration of plaintiffs' caring for defendant for remainder of his life agreed that plaintiffs should occupy a nearby farm which should belong to plaintiffs at defendant's death, and that plaintiffs should become owners of defendant's property at defendant's death, and plaintiffs entered on performance of agreement, and defendant's conduct rendered continued performance impossible, plaintiffs were entitled to injunction restraining defendant from disposing of any of his property except for the reasonable cost of his personal maintenance.—Guzorek v. Williams, 2 N.W. 2d 796, 300 Mich. 633.

17. Neb.—State Bank v. Rohren, 75 N.W. 543, 55 Neb. 223.
32 C.J. p 227 note 80.

18. U.S.—Hazeltine Corporation v. Zenith Radio Corporation, C.C.A. Ill., 100 F.2d 10, certiorari denied Zenith Radio Corporation v. Hazeltine Corporation, 59 S.Ct. 646, 306 U.S. 656, 83 L.Ed. 1054—Simon v. Frankfort Distillery, C.C.A.Ky., 2 F.2d 949.
Conn.—Xanthakey v. Hayes, 140 A. 808, 107 Conn. 459.
Kan.—State Highway Commission of Kansas v. Ames, 57 P.2d 17, 143 Kan. 847.
Minn.—Tyler v. Bruce, 204 N.W. 644, 164 Minn. 167.
32 C.J. p 198 note 75.
Mandatory injunction:
Generally see supra § 5.
To compel removal of structures erected in violation of restrictive covenant see supra § 87 b (7).
Specific performance of contracts see the C.J.S. title Specific Performance § 1 et seq, also 58 C.J. p 846 note 1 et seq.

Mandatory injunction is equitable remedy

Tex.—Cleere v. Wise, Civ.App., 153 S.W.2d 311.

19. Tex.—White v. State, Civ.App., 122 S.W.2d 714.

20. Minn.—Tyler v. Bruce, 204 N.W. 644, 164 Minn. 167—Bennett v. Fox Film Corp., 182 N.W. 905, 149 Minn. 88.

Agreement of railroad to operate shops perpetually

City was not entitled to mandatory injunction to compel railroad to perform its contract with city to operate perpetually shops, equipment, and facilities in city as its sole construction and principal repair shops. —New York Cent. R. Co. v. City of Bucyrus, 186 N.E. 450, 126 Ohio St. 558, followed in Bush v. Hague, 191 N.E. 5, 128 Ohio St. 342.

21. U.S.—City of Seattle v. Puget Sound Power & Light Co., C.C.A. Wash., 284 F. 659, reversing, D.C., Puget Sound Power & Light Co. v. City of Seattle, 282 F. 712, and certiorari denied 43 S.Ct. 520, 262 U.S. 743, 67 L.Ed. 1210.

Defendant making every effort to perform

A mandatory injunction to compel the furnishing of an adequate water supply according to contract will be denied where defendant is making every effort to perform the contract and plaintiffs show no practical way to furnish the water.—Kissinger v. Yellow Pine Bldg. Co., 152 N.E. 775, 21 Ohio App. 165.

22. Tex.—White v. State, Civ.App., 122 S.W.2d 714.

Where there is doubt as to whether contract imposes duty to perform the act which is to be enforced by the injunction relief will be denied. —Eddy v. U. S. Fidelity & Guaranty Co., C.C.A.Mo., 281 F. 628.

Contracts held not uncertain or ambiguous

U.S.—Hazeltine Corporation v. Zenith Radio Corporation, C.C.A.Ill., 100 F.2d 10, certiorari denied Zenith Radio Corporation v. Hazeltine Corporation, 59 S.Ct. 646, 306 U. S. 656, 83 L.Ed. 1054.
Kan.—State Highway Commission of Kansas v. Ames, 57 P.2d 17, 143 Kan. 847.

23. U.S.—Missouri-K.-T. R. Co. v. Sanders, D.C.Okl., 45 F.Supp. 602.
Tex.—White v. State, Civ.App., 122 S.W.2d 714.

Contract to supply water

Where building company failed to furnish adequate supply of water as agreed, purchasers of houses erected by it have remedy under the Code or in an action for damages for breach of contract and are not entitled to mandatory injunction.—Kissinger v. Yellow Pine Bldg. Co., 152 N.E. 775, 21 Ohio App. 165.

24. Ill.—Nu-Enamel Nortown Distributors v. Nu-Enamel Corporation, 43 N.E.2d 205, 315 Ill.App. 494.
N.Y.—Schulman Goldberg Theatrical Corp. v. Katz, 215 N.Y.S. 549, 126 Misc. 777.
R.I.—Smart v. Boston Wire Stitcher Co., 148 A. 803, 50 R.I. 409.

Mutuality of remedy

Decree substantially ordering specific performance of contract pendente lite on motion for preliminary injunction, notwithstanding objection of lack of mutuality of remedy, was

§ 94. Person Entitled to Injunction

An injunction to restrain a breach of contract may be granted at the suit of assignees or grantees when the contract right is transferrable and inures to their benefit.

Although the person asking an injunction to restrain a breach of contract must usually be a party to the contract itself,[25] yet assignees and grantees may also obtain an injunction to prevent the breach of contract, when the contract right was intended to be thus transferable and to inure to their benefit.[26] An assignor who has sufficient interest may sue to restrain a breach of the contract.[27]

In a suit to restrain the breach of a covenant not to engage in a competing business, whether a person not named as plaintiff is the real party in interest is a question of fact, to be determined as such.[28]

§ 95. Who May Be Restrained

Injunctive relief to restrain a breach of contract ordinarily will not be granted against a person who is not a party to the contract.

An injunction to restrain the breach of a contract ordinarily will not be issued against a person who is not a party to the contract.[29] However, it is not indispensable to the issuance of an injunction against a breach of contract that the party against whom the injunction is sought should himself have been a party to the contract.[30] Thus an injunction may be issued against one who stands in the place of a party to the contract for a breach thereof, if the conditions necessary to the allowance of an injunction against the original party to the contract are present.[31] Third persons may be enjoined from assisting a party to a contract to commit a breach thereof.[32]

D. CORPORATE FRANCHISES, MANAGEMENT AND DEALINGS

§ 96. In General

As resorted to against a corporation, quo warranto and injunction are inconsistent remedies.

Under varying circumstances injunction is a proper remedy to protect corporate franchises as discussed infra § 97, to compel corporate action as discussed generally infra § 101, or to prevent unauthorized or wrongful acts of a corporation or of corporate officers as discussed infra §§ 99, 102–107.

Quo warranto distinguished. When employed against a corporation, the remedies of quo warranto and injunction are wholly inconsistent; quo warranto goes to the life of the corporation informed against while a proceeding to enjoin is necessarily predicated on an anticipation of the continuance of defendant's corporate existence.[33]

§ 97. Protection of Corporate Rights and Franchises

Subject to the usual limitations on the right to an injunction, injunction is a proper remedy to prevent wrongful invasion of a franchise or right of a corporation.

Injunction is a proper remedy in cases in which a franchise of a corporation or rights thereunder are

erroneous.—Smart v. Boston Wire Stitcher Co., 148 A. 803, 50 R.I. 409.

25. Ill.—D. & P. Pub. Corporation v. Conway, 252 Ill.App. 41.
32 C.J. p 198 note 78.
Persons entitled to injunction:
Generally see supra § 35.
Contracts in restraint of trade see supra § 84.
Covenants restricting use of realty see supra § 87 b (2).
Contracts with public service companies see supra § 86.

Where contract is with parent corporation subsidiary corporation may not sue to restrain a breach of the contract.—D. & P. Pub. Corporation v. Conway, 252 Ill.App. 41.

26. Pa.—Ebert v. Kaufmann, 17 Pa. Dist. 156.
32 C.J. p 198 note 79.

27. **Assignor of life insurance policy** Although insured had assigned life policy to mother who subsequently died, and brother, insured had sufficient "interest" to maintain action to restrain defendant from declaring the policy lapsed where insured was mother's executor and heir.—Salomon v. Equitable Life Assur. Soc. of U. S., 13 So.2d 329, 202 La. 1001.

28. Minn.—Peterson v. Johnson Nut Co., 283 N.W. 561, 204 Minn. 300.

29. Md.—James L. Kerman Co. v. Wilson Amusement Co., 152 A. 503, 160 Md. 17.
Pa.—Polanskey v. Monongahela Ry. Co., 19 A.2d 377, 342 Pa. 188.
R.I.—Thresher v. Cuddy-Gardner Co., 165 A. 438, 439, 53 R.I. 175, citing **Corpus Juris.**
Persons who may be restrained:
Generally see supra § 34.
Contracts in restraint of trade see supra § 84.
Covenants restricting use of property see supra § 87.

Person under no obligation to perform contract ordinarily may not be enjoined.—New York Phonograph Co. v. Davega, 111 N.Y.S. 363, 127 App. Div. 222.

Tenants of one not party to injunction suit should not be disturbed until lessor was brought in and heard.—Cities Service Oil Co. v. Waldron, 238 N.W. 249, 255 Mich. 530.

30. N.J.—Vander May v. Schoone-Jongen, 16 A.2d 198, 128 N.J.Eq. 336, affirmed 21 A.2d 819, 130 N.J. Eq. 227.

31. U.S.—Kinsman v. Parkhurst, N. Y., 18 How. 289, 15 L.Ed. 385.
32 C.J. p 198 note 83.

32. N.J.—Vander May v. Schoone-Jongen, 16 A.2d 198, 128 N.J.Eq. 336, affirmed 21 A.2d 819, 130 N.J. Eq. 227.
32 C.J. p 199 note 84.
Injunction to restrain third person from inducing breach of contract see supra § 89.

33. Mo.—State v. People's Ice Storage & Fuel Co., 151 S.W. 101, 246 Mo. 168.
Definition and nature of remedy:
Injunction see supra §§ 1–11.
Quo warranto see the C.J.S. title Quo Warranto §§ 1–4, also 51 C. J. p 309 note 1–p 314 note 81.

being invaded.[34] This right to protection extends, not only to actual, but also to threatened interference with the rights conferred by the franchise.[35] An injunction is proper whether the invasion complained of is by another corporation or person,[36] or by the public or a political subdivision of the state,[37] and whether the invasion seeks to destroy the franchise or merely to participate in the privileges of complainant corporation.[38]

While a corporation whose franchise is not exclusive is not entitled to enjoin legitimate competition by another person or corporation operating under a similar franchise or right in the same territory,[39] a corporation whose franchise is prior in point of time may be entitled to protection against another corporation acting under a like authority in such a manner as is likely to injure the property of plaintiff or endanger its employees;[40] and, even though complainant's franchise is not exclusive, equity may, according to some authorities, enjoin the illegal acts of others who assume to exercise a like privilege where complainant's franchise is operative, in the absence of authority and in defiance of laws regulating the privilege,[41] but according to some cases the corporate holder of a franchise which is not exclusive is not entitled to an injunction against a competitor solely on the ground that such competitor is not legally constituted as a corporation[42] or is not authorized by law to conduct the operation in question.[43]

34. U.S.—Denver & R. G. W. Ry. Co., C.C.A.Utah, 56 F.2d 957—Central Power Co. v. City of Hastings, D.C.Neb., 52 F.2d 487, 492, citing **Corpus Juris**—Southern Ry. Co. v. City of Greenwood, D.C.S.C., 40 F. 2d 679—Gallardo v. Porto Rico Ry., Light & Power Co., Puerto Rico, C.C.A., 18 F.2d 918, 922, citing **Corpus Juris**—Oklahoma Utilities Co. v. City of Hominy, D.C.Okl., 2 F. Supp. 849.
Fla.—St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., 5 So.2d 55, 149 Fla. 14.
Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.
Or.—Yamhill County Mut. Telephone Co. v. Yamhill Electric Co., 224 P. 1081, 111 Or. 57, 33 A.L.R. 373.
Tex.—Texas Power & Light Co. v. Brownwood Public Service Co., Civ. App., 87 S.W.2d 557.
32 C.J. p 232 note 47.

A public service corporation is peculiarly entitled to protection by injunction of its operating facilities used in the public service against unlawful obstruction or continuous trespass which results, or will probably result, in jeopardizing its public functions.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E. 2d 217, 124 W.Va. 118, 139 A.L.R. 1199.

Statute held not to deprive corporation of right to injunction
U.S.—Denver & R. G. W. Ry. Co. v. Linck, C.C.A.Utah, 56 F.2d 957.
Protecting franchise and rights thereunder in general see Franchises § 30.

35. U.S.—Pacific Telephone & Telegraph Co. v. City of Seattle, D.C. Wash., 14 F.2d 877.
32 C.J. p 232 note 47.

36. Fla.—St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., 5 So.2d 55, 149 Fla. 14.
N.Y.—Newburgh & C. Turnp. Road v. Miller, 5 Johns.Ch. 101, 9 Am.D. 274.
Va.—Turner v. Hicks, 180 S.E. 543, 545, 164 Va. 612, quoting **Corpus Juris**.
Wash.—State v. Superior Court for King County, 212 P. 259, 123 Wash. 116.
32 C.J. p 232 note 49.

37. U.S.—Vicksburg v. Vicksburg Water Works Co., Miss., 26 S.Ct. 660, 202 U.S. 453, 50 L.Ed. 1102, 6 Ann.Cas. 253—Oklahoma Utilities Co. v. City of Hominy, D.C.Okl., 2 F.Supp. 849.
Va.—Turner v. Hicks, 180 S.E. 543, 545, 164 Va. 612, quoting **Corpus Juris**.
32 C.J. p 233 note 50.

Seizure of property installed under franchise or permit
As telephone company, suing before expiration of franchise to enjoin city from taking possession of property in its streets on expiration of franchise, was not then a trespasser in streets, equity had jurisdiction.—Pacific Telephone & Telegraph Co. v. City of Seattle, D.C. Wash., 14 F.2d 877.

38. Va.—Turner v. Hicks, 180 S.E. 543, 545, 164 Va. 612, quoting **Corpus Juris**.
32 C.J. p 233 note 51.

39. U.S.—Ashwander v. Tennessee Valley Authority, D.C.Ala., 9 F. Supp. 800.
Ark.—City of El Dorado v. Coats, 299 S.W. 355, 175 Ark. 289.
Fla.—St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., 5 So.2d 55, 149 Fla. 14.
32 C.J. p 233 note 52.

40. Ala.—Consolidated Electric Light Co. v. People's Electric Light & Gas Co., 10 So. 440, 94 Ala. 372.
32 C.J. p 233 note 53.

Adjudication as to franchise rights of defendant unnecessary
When property of a public utility corporation is trespassed upon or is unlawfully injured, or such corporation is unlawfully hindered in performance of its duty in rendering its authorized public service, by a potential competitor or others, appropriate relief by injunction may be granted without adjudicating the corporate franchise rights of a defendant corporation.—St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co., 5 So.2d 55, 149 Fla. 14.

41. Ala.—Alabama Power Co. v. Cullman County Electric Membership Corporation, 174 So. 866, 234 Ala. 396, adhered to 178 So. 919, 235 Ala. 694.
Neb.—Lincoln Tract. Co. v. Omaha L. & B. R. Co., 187 N.W. 790, 108 Neb. 154.
Wash.—State v. Superior Court for King County, 212 P. 259, 123 Wash. 116.
32 C.J. p 233 note 54, p 235 note 69 [e].

Impossibility of obtaining bond as defense
It has been held that the person whose operation in competition with complainant is invalid because it has failed to file a bond as a condition precedent to doing business, cannot defend on the ground that it is impossible to comply with the statute requiring a bond.—Puget Sound Traction, Light & Power Co. v. Grassmeyer, 173 P. 504, 102 Wash. 482, L.R.A.1918F 469.

42. N.Y.—Geneva-Seneca Electric Co. v. Economic Power & Const. Co., 120 N.Y.S. 926, 136 App.Div. 219.
32 C.J. p 233 note 54.

43. N.Y.—Geneva-Seneca Electric Co. v. Economic Power & Const. Co., supra.

Want of consent or approval of public authorities
(1) A public service corporation was not entitled to an injunction merely because a competitor was operating without the necessary con-

The illegal interferenee may be enjoined, even though it is accompanied by, or consists of, acts of personal trespass,[44] or even arrests and criminal prosecutions,[45] and regardless of the fact that the acts complained of constitute a misdemeanor.[46]

Where there is no interference with complainant's rights other than a claim of the exclusive franchise on the part of defendant, a court of equity will not interfere;[47] and this is also the case where the interference causes but slight, if any, inconvenience to complainant and public convenience is being served by defendant,[48] or, in some cases, where the acts complained of are not inconsistent, or do not interfere, with complainant's operations.[49] Under some circumstances, where a remedy is provided by statute for an invasion of complainant corporation's rights, equity will not intervene by granting an injunction,[50] but, according to some cases, the fact that a statute provides for a suit by the attorney general for an injunction does not prevent a suit by the injured corporation for an injunction,[51] and the fact that a statute provides for resort to a state administrative body for relief does not prevent such a suit by the corporation where the relief which such body might give would be inadequate.[52]

The invasion of a corporate right or franchise will be enjoined only when the existence of such right or franchise is clear[53] or has been established at law,[54] and an injunction against interference with an alleged right will not, of course, be granted where there is no such right.[55] As a general rule a preliminary injunction should not be granted unless a reasonably clear case of necessity and threatened irreparable damage is made out.[56]

sent of local authorities; the basis of an injunction in such case is irreparable loss to complainant and an injunction may be refused in the exercise of a sound discretion.—New York, O. & W. Ry. Co. v. Griffin, 139 N.E. 231, 235 N.Y. 174, reversing 195 N.Y.S. 112, 201 App.Div. 733.

(2) In action in which public service commission and persons receiving current from defendant were not parties, a public service company having a franchise to distribute electricity within a city was not entitled to restrain another such company from maintaining within that city, without approval of public service commission, a substitution, and distributing current, under lines which run over its own or private property, to a few customers requiring a current frequency which it was not shown that plaintiff company could supply where conditions complained of had existed to knowledge of plaintiff for fourteen years, notwithstanding Pub.Serv.Commn.L. § 68.—Fulton Light, Heat & Power Co. v. Seneca River Power Co., 205 N.Y.S. 821, 123 Misc. 585.

44. Ala.—Port of Mobile v. Louisville & N. R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 342.
32 C.J. p 233 note 55.

45. Ga.—Atlanta v. Gate City Gas Light Co., 71 Ga. 106.
Kan.—City of La Harpe v. Elm Tp. Gas, Light & Fuel Co., 76 P. 448, 69 Kan. 97.

46. N.Y.—United Tract. Co. v. Smith, 187 N.Y.S. 377, 115 Misc. 73.
Injunction against criminal act in general see infra §§ 150–155.

47. Mo.—Consumers' Gas Co. v. Kansas City Gas-Light & Coke Co., 13 S.W. 874, 100 Mo. 501, 18 Am.S.R. 563.

48. N.Y.—Ninth Ave. R. Co. v. New York El. R. Co., 7 Daly 174, 3 Abb. N.Cas. 347.
Ohio.—Spring Grove Ave. Co. v. St. Bernard, 1 Ohio S. & C. P. 99, 1 Ohio N. P. 85.
32 C.J. p 234 note 61.

49. Fla.—Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 108 So. 689, 91 Fla. 612, 46 A.L.R. 870.

Use of part of railroad right of way as highway

After long use of part of a railroad right of way over public lands, granted by the state to the railroad company, as a highway, with the permission of such company, such use will not be restrained in a suit by such company unless such use is inconsistent with the grant for railroad purposes or the part so used is necessary for the purpose of the grant.—Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, supra.

50. Conn.—Salem & H. Turnp. Co. v. Lyme, 18 Conn. 451.
Ill.—East St. Louis Connecting R. Co. v. East St. Louis Union R. Co., 108 Ill. 265.

51. Wash.—State v. Superior Court for King County, 212 P. 259, 123 Wash. 116.

52. Wash.—State v. Superior Court for King County, supra.

53. Pa.—Myersdale & S. St. R. Co. v. Pennsylvania & M. St. R. Co., 69 A. 92, 219 Pa. 558, 566.
Tenn.—Memphis St. R. Co. v. Rapid Transit Co., 179 S.W. 635, 133 Tenn. 99, L.R.A.1916B 1143, Ann.Cas. 1917C 1045.
32 C.J. p 231 note 39.

Preliminary injunction

Where a telegraph company, after terminating the arrangement under which it maintained lines on a railroad right of way, was denied right of condemnation in Alabama, the propriety of the continuance in full force of a preliminary injunction against the railroad company's interference with the line of the telegraph company in Alabama pending determination of condemnation proceedings in that state was not established by the facts that the federal government had assumed control of the railroad and that there was a public necessity for the operation of the telegraph system as a whole; in the case at bar it appeared that the railroad company had promised to comply with the request of the secretary of war that such company should not interfere with the operation of the telegraph system until the secretary of war gave his approval, and it was held that the preliminary injunction should be dissolved with the proviso that the railroad company should not interfere with existing telegraph lines or their use by the telegraph company until the secretary of war consented thereto or until after thirty days' notice to him and lack of objection by him.—Louisville & N. R. Co. v. Western Union Telegraph Co., Ky., 252 F. 29, 164 C.C.A. 141.

54. Ala.—Port of Mobile v. Louisville & N. R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 242—Moses v. Mobile, 52 Ala. 198, appeal dismissed 15 Wall., U.S., 387, 21 L.Ed. 176.

55. Conn.—Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

56. U.S.—Louisville & N. R. Co. v. Western Union Telegraph Co., Ky., 252 F. 29, 164 C.C.A. 141.

§ 98. Exercise of Powers and Management of Business

As a broad general rule, in the absence of fraud or breach of trust, injunction will not be granted to restrain a corporation in the exercise of its powers, nor will persons in control of a corporation be prevented from exercising powers duly vested in them.

It has been stated broadly that a court of equity has no peculiar jurisdiction to restrain a corporation in the exercise of its powers or to control its actions, in the absence of a showing of fraud or breach of trust.[57] In general persons in control of a corporation may not be prevented, by injunction, from exercising powers vested in such persons by the by-laws of the corporation,[58] and it has been held that an injunction may not be granted to prevent interference, pending a proceeding by mandamus, with the enjoyment of the privileges of membership in a corporation by one who has been expelled from membership.[59] It has been held, however, that, in a derivative action in the right of the corporation by members of the corporation to recover damages and for an accounting and other relief, an injunction pendente lite to restrain trial of charges against plaintiff members before the corporation's council of discipline which is controlled by defendants may be granted.[60]

A corporation whose business is not affected with a public interest may not be enjoined from refusing to deal with, or from discriminating, as to charges for services, against, a person with whom such corporation does not have a contractual relation.[61]

The right to injunction involving officers of a corporation in cases involving control and management is discussed in various aspects infra §§ 102–107.

§ 99. —— Exceeding or Misuse of Powers

Acts or threatened acts of a corporation in excess of its corporate powers or misuse of a franchise held by it may be prevented by injunction under some circumstances.

Where a corporation is acting or threatening to act in excess of its corporate powers,[62] or is misusing a franchise which it possesses,[63] to the injury of others, an injunction to restrain such acts may be a proper remedy, and the fact that the acts also constitute a crime is immaterial.[64] It has been stated broadly, however, that a court of equity has no peculiar jurisdiction to prevent corporations from violating their charters, in the absence of a showing of fraud or breach of trust.[65]

Injunction may be obtained by public or political entities or by public officers in cases in which the requisite public rights or interests are involved,[66]

57. Ill.—People ex rel. Barrett v. Shurtleff, 187 N.E. 271, 353 Ill. 248.
Judicial supervision of acts or omissions of corporation in general see Corporations § 984.

58. Cal.—Tyler v. Park Ridge Country Club, 284 P. 243, 103 Cal.App. 117.

59. Ill.—Baxter v. Chicago Board of Trade, 83 Ill. 146.

60. N.Y.—Tricarico v. Society of Saint Joseph Palo Del Colle, Italy, 299 N.Y.S. 404, 252 App.Div. 786, motion denied 1 N.Y.S.2d 510, 253 App.Div. 786.

61. N.Y.—Thorp v. General News Bureau, 275 N.Y.S. 41, 242 App. Div. 330.

62. Ill.—People v. Metropolitan State Bank, 111 N.E. 992, 272 Ill. 311.
N.Y.—Hollender v. Rochester Foods Products Corporation, 207 N.Y.S. 319, 124 Misc. 130, affirmed 212 N. Y.S. 838, 215 App.Div. 751, affirmed 152 N.E. 271, 252 N.Y. 490.
32 C.J. p 234 note 63.
Judicial supervision of acts or omissions of corporation in general see Corporations § 984.

63. Ind.—Columbian Athletic Club v. State, 40 N.E. 914, 143 Ind. 98, 52 Am.S.R. 407, 28 L.R.A. 727.
Tenn.—Hogan v. Nashville Interurban R. Co., 174 S.W. 1118, 131 Tenn. 244, L.R.A.1915E 788, Ann. Cas.1916C 1162.
32 C.J. p 234 note 63.

64. Ind.—Columbian Athletic Club v. State, 40 N.E. 914, 143 Ind. 98, 52 Am.S.R. 407, 28 L.R.A. 727.
Injunction against criminal acts in general see infra §§ 150–155.

65. Ill.—People ex rel. Barrett v. Shurtleff, 187 N.E. 271, 353 Ill. 248.

66. Ind.—Columbian Athletic Club v. State, 40 N.E. 914, 143 Ind. 98, 52 Am.S.R. 407, 28 L.R.A. 727.
Ky.—Louisville v. Louisville Home Tel. Co., 148 S.W. 13, 149 Ky. 234, Ann.Cas.1914A 1240.
Pa.—Plymouth Tp. v. Chestnut Hill & N. R. Co., 32 A. 19, 168 Pa. 181.
Wis.—City of Madison v. Madison Gas & Electric Co., 108 N.W. 65, 129 Wis. 249, 116 Am.S.R. 944, 8 L.R.A.,N.S., 529, 9 Ann.Cas. 819—Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425.
32 C.J. p 234 note 65.
Statutory authorization
(1) In view of Code 1932 § 9351, the state could maintain a suit to enjoin a corporation from doing a particular thing in violation of its charter; in this connection it was held that the substance of Acts 1845–1846 c 55 authorizing suit for injunction was incorporated into the code. —State ex rel. v. Southern Junior College, 64 S.W.2d 9, 166 Tenn. 535.
(2) Where a corporation organized under Code of District of Columbia § 599, was granting degrees, although not empowered to do so, under § 793 of such code the district attorney, in the name of the United States, could maintain a suit to restrain this usurpation of power.—National Ass'n of Certified Public Accountants v. U. S., 292 F. 668, 53 App.D.C. 391.
(3) Under Pub.Serv.L. § 103, public service commission could maintain proceeding to enjoin telephone company from furnishing service to hotels which failed to comply with tariff schedule filed pursuant to order of the commission fixing rates which hotels might charge their guests for telephone service.—People ex rel. Public Service Commission of New York (State Division, Department of Public Service) v. New York Telephone Co., 21 N.Y.S.2d 405, 174 Misc. 517.
(4) Where corporation by acting as a master plumber without being registered as such, was transacting an unauthorized business, such corporation was enjoined from carrying on the business of master plumber in a suit by the attorney general at the relation of the commissioner of corporations, pursuant to the statute, now Gen.L.Ter.Ed. c 155 § 11, providing that, on information in equity by the attorney general at the relation of the commissioner of

and in such cases it has generally been held that an injunction will issue, even though no affirmative showing is made of any special or definite injury,[67] although there is authority apparently to the contrary with respect to the right of a municipality to an injunction to restrain the misuse of a franchise.[68]

An injunction may be obtained by another corporation or an individual when special injury from the acts of the corporation is shown,[69] but, in general, not otherwise.[70] In a suit by a private individual brought under some statutes specifically authorizing such a suit, it is not necessary to show any special injury to, or special interest of, plaintiff, apart from that of other citizens.[71]

If complainant's remedy at law is adequate, he is not entitled to an injunction.[72] In any event, an injunction should be refused where the right thereto is doubtful[73] or where the acts complained of are in the nature of a public enterprise and improvement for the welfare of the public, and there is no showing of irreparable injury or serious damages from such acts.[74] So an individual cannot enjoin a corporation from exercising its legitimate corporate powers, on the ground that it has acquired a portion of its property illegally.[75]

Notwithstanding a statute provides that the court shall restrain by injunction injurious acts of a corporation if it does not have the right or franchise to do such acts, an injunction will not be granted unless a proper case is made out in accordance with the principles of equity practice;[76] and an injunction may properly be refused where complainant has delayed for a considerable period in bringing the case to a hearing, conditions have so changed pending suit that an injunction would cause great loss to defendant and inconvenience to the public, and the small injury to complainant is compensable in money.[77] A statutory provision authorizing the court to restrain a corporation from exercising any franchise or privilege or transacting any business not authorized by its charter or the laws of the state does not confer authority to enjoin a corporation from acting under a license, regularly but mistakenly granted, where the board granting it was clothed by law with jurisdiction in the premises.[78] The propriety of an injunction to prevent the practice of law by a corporation is discussed infra § 123, and of an injunction to prevent the practice of medicine, dentistry, or similar professions by a corporation infra § 124.

Restraining unauthorized location of road.

corporations, the supreme judicial court may restrain by injunction any corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter and the laws of the commonwealth.—Attorney General v. Union Plumbing Co., 16 N.E.2d 89, 301 Mass. 86.

(5) In suit by attorney general under Gen.L.Ter.Ed. c 175 § 193A, an insurer was enjoined from enforcing provisions of agreement with its agent which violated statute regarding compensation to be paid agents procuring policies of industrial life insurance.—Attorney General v. Prudential Ins. Co. of America, 39 N.E. 2d 664, 310 Mass. 762.

(6) The remedy under such statute is exclusive; and the attorney-general cannot maintain an information in his own name on his own initiative against a corporation abusing its corporate franchise or usurping a franchise not granted to it.—Malone v. New York, N. H. & H. R. Co., 83 N.E. 408, 197 Mass. 194.

(7) Under Civ.Code 1910 § 254 et seq, and §§ 6528, 6529, attorney general of the state has no authority to institute equitable action in name of state on relation of designated individuals against domestic corporation to enjoin it from doing acts alleged to be ultra vires.—Walker v. Georgia Ry. & Power Co., 92 S.E. 57, 146 Ga. 655.

67. Ky.—Louisville v. Louisville Home Tel. Co., 148 S.W. 13, 149 Ky. 234, Ann.Cas.1914A 1240.
N.J.—Wilson v. Hudson County Water Co., 76 A. 560, 76 N.J.Eq. 543.
32 C.J. p 234 note 67.

Reason for rule

The corporation's breach of the contract involved in a franchise, especially if it arises out of the doing of an act which the contract declares shall not be done, will presumptively result in the oppression of the citizens.—Louisville v. Louisville Home Tel. Co., 148 S.W. 13, 149 Ky. 234, Ann.Cas.1914A 1240.

68. Mich.—Erin Tp. v. Detroit & E. Plank-Road Co., 73 N.W. 556, 115 Mich. 465.

69. U.S.—Seattle Gas & Electric Co. v. Citizens' Light & Power Co., C. C.Wash., 123 F. 588, reversed on other grounds 125 F. 1001, 60 C.C. A. 686.
Ala.—Mobile & O. R. Co. v. Zimmern, 89 So. 475, 206 Ala. 37.
N.Y.—Fulton Light, Heat & Power Co. v. Seneca River Power Co., 197 N.Y.S. 319, 119 Misc. 729.
32 C.J. p 235 note 69.

Wrongful use of name

R.I.—Armington v. Palmer, 42 A. 308, 21 R.I. 109, 79 Am.S.R. 786, 43 L. R.A. 95.

70. Ill.—Chicago General R. Co. v. Chicago, B. & Q. R. Co., 54 N.E. 1026, 181 Ill. 605.
32 C.J. p 235 note 70.

71. N.H.—Currier v. Concord R. Co., 48 N.H. 321.

72. N.Y.—Davis v. American S. P. C. A., 6 Daly 81, affirmed 75 N.Y. 362.

73. N.J.—Attorney General v. Delaware & B. B. R. Co., 27 N.J.Eq. 1, affirmed 27 N.J.Eq. 631.
Ohio.—Walker v. Mad River & L. E. R. Co., 8 Ohio 38.
32 C.J. p 231 note 42.

Resort to court of law

In general the existing doubt should first be cleared up in a court of law.—Sheboygan v. Sheboygan & F. du L. R. Co., 21 Wis. 667.

74. N.C.—Turner v. North Carolina Public Service Co., 86 S.E. 1033, 170 N.C. 172.
32 C.J. p 235 note 74.

75. Ga.—Brown v. Atlanta R. & Power Co., 39 S.E. 71, 113 Ga. 462.

76. Pa.—Gring v. Sinking Spring Water Co., 113 A. 435, 272 Pa. 232 —Becker v. Lebanon & M. St. R. Co., 41 A. 612, 188 Pa. 484.

77. Pa.—Becker v. Lebanon & M. St. R. Co., supra.
32 C.J. p 235 note 77.

78. Mass.—Attorney-General v. Lyons, 108 N.E. 356, 220 Mass. 536.

Where a railroad company[79] or a turnpike company[80] is locating its road in a manner beyond its corporate authority, it may be enjoined, and, according to some cases, an injunction may be granted where the corporate act is wholly unauthorized and is one for which there is no adequate measure of damages at law, a showing of irreparable injury not being required in such case.[81]

Restraining imposition of wrongful rates or tolls by public service corporations. A public service corporation may be restrained by injunction from charging rates in excess of those fixed by statute, ordinance, or contract at the suit of the state[82] or of a municipality.[83] It is not a ground for denying the injunction that penalties are provided against the agents of a company who may be guilty of a violation of the statute in this regard.[84]

Under some circumstances a private individual may be entitled to an injunction to prevent the collection from him of rates in excess of rates fixed in a contract between a municipality and defendant corporation.[85] It has been held that a shipper who shows special damage may enjoin a carrier from making excessive charges for the carrying of freight,[86] but it has also been held that a preliminary mandatory injunction will not issue at the suit of a private shipper to compel a railroad company to carry freight at the rate fixed.[87] Persons who, by statute, are specifically exempted from the payment of tolls may maintain a suit to enjoin a turnpike company from collecting tolls from such persons.[88]

§ 100. —— Acts Ultra Vires

Injunctions against acts in excess of corporate powers are discussed generally supra § 99, and injunctions against unauthorized or unlawful acts of corporation which infringe rights of stockholders are discussed generally infra § 103.

§ 101. —— Compelling Corporate Action

Injunction to compel the performance of a duty imposed on a public service corporation, or to prevent the discontinuance of performance of such duty, usually is an appropriate and available remedy.

Mandatory injunction to compel a public service corporation to perform duties imposed on it,[89] or an injunction to restrain such a corporation from discontinuing the performance of such duties,[90] has been regarded as a proper remedy, at least where the remedy by mandamus would not be adequate;[91] and the injunction may be granted in a suit by a municipality which has the requisite interest.[92] It has been held or recognized, however, that a man-

79. N.Y.—People v. Third Ave. R. Co., 45 Barb. 63, 30 How.Pr. 121.
Pa.—Appeal of Edgewood R. Co., 79 Pa. 257.
32 C.J. p 236 note 81.

80. Ga.—Justices Pike County Inferior Ct. v. Griffin & W. P. Plank Road Co., 9 Ga. 475.
32 C.J. p 236 note 81.

81. Pa.—Appeal of Groff, 18 A. 431, 128 Pa. 621, 635.

82. Wis.—Attorney-General v. Chicago & N. W. R. Co., 35 Wis. 425.
32 C.J. p 236 note 86.

83. La.—City of Lake Charles v. Lake Charles Ry., Light & Waterworks Co., 80 So. 260, 144 La. 217.
32 C.J. p 236 note 87.

Effect of application to public service commission

The fact that defendant corporation had filed a petition with the public service commission to fix rates did not preclude suit to prevent collection of rates in excess of rates fixed in contract between such corporation and the municipality.—Wackenhut v. Empire Gas & Electric Co., 166 N.Y.S. 29.

84. Wis.—Attorney-General v. Chicago & N. W. R. Co., 35 Wis. 425.

85. N.Y.—Wackenhut v. Empire Gas & Electric Co., supra.

86. Md.—American Coal Co. v. Consolidation Coal Co., 46 Md. 15.
32 C.J. p 236 note 91.
For discussion in detail of proceedings to enforce compliance by carrier of goods with rates fixed by statute or railroad commission see Carriers § 304.
Injunction to enforce compliance with rates fixed for carriage of passengers see Carriers § 584 b (2).

87. N.J.—Rogers Locomotive & Machine Works v. Erie R. Co., 20 N. J.Eq. 379.
32 C.J. p 236 note 92.

88. Ky.—Louisville & T. Turnpike-Road Co. v. Boss, 44 S.W. 981, 19 Ky.L. 954.

89. Ga.—Milltown Lumber Co. v. Milltown, 102 S.E. 435, 150 Ga. 55.
Ohio.—Zanesville Gas-Light Co. v. Zanesville, 23 N.E. 60, 47 Ohio St. 35.
32 C.J. p 236 note 95—62 C.J. p 87 note 28.

90. Colo.—Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Inv. Co., 111 P. 834, 49 Colo. 122, 33 L.R.A.,N.S., 1078.
32 C.J. p 236 note 95—62 C.J. p 87 note 27.

Discretion of court

Where street railroad threatened to discontinue service on part of its line, whether court of chancery would take jurisdiction of whole matter, or merely issue temporary injunction pending determination by public service commission, was for court to determine.—Town of West Rutland v. Rutland Ry. Light & Power Co., 127 A. 883, 98 Vt. 379.

91. U.S.—U. S. v. Union Pac. Ry. Co., Neb., 16 S.Ct. 190, 160 U.S. 1, 40 L.Ed. 319, reversing Union Pac. Ry. Co. v. U. S., 59 F. 813, 8 C. C.A. 282, reversing, C.C., U. S. v. Western Union Tel. Co., 50 F. 28.
Mandamus to compel performance of public duties by corporation in general see the C.J.S. title Mandamus §§ 228–231, 236, also 38 C.J. p 803 note 6–p 821 note 71.

92. Fla.—City of Gainesville v. Gainesville Gas & Electric Co., 62 So. 919, 65 Fla. 404, 46 L.R.A.,N. S., 1119.
Ohio.—Zanesville Gas-Light Co. v. Zanesville, 23 N.E. 60, 47 Ohio St. 35.
32 C.J. p 236 note 95.

Regulation

Where mere reasonable regulation of a service corporation is involved, equity may compel obedience to rules of municipality.—Borough of Midland v. Steubenville East Liverpool & Beaver Valley Traction Co., 150 A. 300, 300 Pa. 134.

datory injunction should not in general be granted in such case where the remedy by mandamus is appropriate and adequate,[93] but, in order to maintain the status quo, a mandatory injunction may be granted pending an action at law in which mandamus is sought[94] or pending a quo warranto action at law.[95]

An injunction to compel the performance, or to prevent the discontinuance of performance, of a duty may issue at the suit of an individual or another corporation where the invasion of his or its rights would work a serious injury for which there is no adequate remedy at law,[96] but it is not permissible to maintain a suit for injunction against a corporation to which the property and franchises of another corporation have been assigned where the assignor corporation, and not the assignee corporation, has wrongfully refused to furnish the service.[97] A public service corporation may not be prevented by injunction from discontinuing service to a person where such service is used in maintaining and conducting an illegal or immoral enterprise.[98]

Where the performance of certain acts is a condition precedent to the right of a public service corporation to enjoy certain rights or franchises, the exercise by it of such rights or franchises may be enjoined until such performance.[99] Under some circumstances a court of equity will not intervene to grant relief by injunction before the questions involved have been submitted to, and considered by, a state regulatory body which, under statute, has jurisdiction in that respect.[1]

Posting by-laws. Mandatory injunction is not the proper remedy to compel a corporation to comply with a statutory requirement to post corporate by-laws for inspection, which posting is designed primarily for the protection of the public.[2]

§ 102. —— Disposition of, or Dealings with, Corporate Property

Injunction is a proper remedy to prevent the misapplication of corporate funds and property.

The misapplication or misappropriation of corporate funds and property may be enjoined[3] at the suit of a stockholder,[4] or of a creditor who would

93. N.J.—McCran v. Public Service Ry. Co., 122 A. 205, 95 N.J.Eq. 22—McCran v. Western Union Telegraph Co., 120 A. 515, 94 N.J.Eq. 281—New York & G. L. R. Co. v. Montclair Tp., 21 A. 493, 47 N.J. Eq. 591.

In New York the rule has been announced that, where a railroad company discontinues the operation of part of its business, the remedy is not a suit in equity to compel operation or for specific performance, but that resort should be had to mandamus or indictment, or, at the election of the people, to a proceeding to annul the existence of the corporation.—People v. Albany & V. R. Co., 24 N.Y. 261, 82 Am.D. 295.

94. N.J.—McCran v. Public Service Ry. Co., 122 A. 205, 95 N.J.Eq. 22.

95. N.J.—McCran v. Western Union Telegraph Co., 120 A. 515, 94 N.J. Eq. 281.

96. Ark.—Kansas City Southern Ry. Co. v. Ft. Smith Suburban Ry. Co., 22 S.W.2d 21, 180 Ark. 492.
Ky.—Marion Electric Light & Ice Co. v. Rochester, 149 S.W. 977, 149 Ky. 810—Louisville & N. R. Co. v. Pittsburg & K. Coal Co., 64 S.W. 969, 111 Ky. 960, 98 Am.S.R. 447, 55 L.R.A. 601, 23 Ky.L. 1318.
N.Y.—Wackenhut v. Empire Gas & Electric Co., 166 N.Y.S. 29.
32 C.J. p 236 note 97—62 C.J. p 87 notes 27, 28.

97. N.Y.—Sterne v. Metropolitan Telephone & Telegraph Co., 53 N.Y. S. 467, 33 App.Div. 164.

98. U.S.—Tracy v. Southern Bell Telephone & Telegraph Co., D.C. Fla., 37 F.Supp. 829.
Ky.—Smith v. Western Union Tel. Co., 2 S.W. 483, 84 Ky. 664.

99. Pa.—Appeal of Unangst, 55 Pa. 128—Philadelphia v. Lombard & S. S. P. R. Co., 5 Phila. 248.
32 C.J. p 237 note 98.

1. Or.—First Nat. Bank of Albany v. Pacific Telephone & Telegraph Co., 159 P. 561, 81 Or. 307.

2. Iowa.—Boardman v. Marshalltown Grocery Co., 75 N.W. 343, 105 Iowa 445.
Mandamus as proper remedy see the C.J.S. title Mandamus § 225, also 38 C.J. p 806 note 42.

3. Ga.—Atlanta Real Estate Co. v. Atlanta Nat. Bank, 75 Ga. 40.
Wis.—Wolf v. Gegenseitige Unterstuetzungs Gesellschaft Germania, 136 N.W. 175, 149 Wis. 576.
32 C.J. p 237 note 5.
Injunction against corporate trustee (1) In a suit under the Securities Exchange Act of 1933 § 12(2), 15 U.S.C.A. § 77l (2) by the buyer of certificates, representing participation in an investment trust or plan, against the seller corporation, based on fraudulent misrepresentations and concealment in the sale, an injunction, to preserve the status quo pending final determination of the litigation, might properly be granted against another corporation which was a party defendant, restraining such other corporation from transferring or otherwise disposing of certain funds held by such other corporation under a trust agreement between it and the seller corporation. —Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000.

(2) Where in such case, however, an injunction granted impounding the sum of more than thirty-eight thousand dollars was sufficient to protect the investors whose securities did not exceed ten thousand dollars, who failed to show that they represented even a substantial number of some thirteen thousand investors whose securities amounted to several million dollars, the issuance of another injunction, which had the effect of suspending operation of trusts and functions of the trustee corporation and disturbed status of parties instead of maintaining it, was an abuse of discretion.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Deckert, C.C.A.Pa., 123 F.2d 979, reversing, D. C., Deckert v. Independence Shares Corporation, 39 F.Supp. 592.
Injunction against payment of dividends see Corporations § 474.

4. Ill.—Fitzgerald v. Christy, 242 Ill.App. 343.

otherwise be without adequate remedy.[5] It has been held, however, that a creditor is not entitled to an injunction if he does not have a lien or other legal claim on the assets of the corporation,[6] especially where the claim is an unliquidated one,[7] and that one holding a claim against a corporation is not entitled to an injunction if he has an adequate remedy at law.[8] The receiver of a corporation may thus prevent the improper distribution of corporate property.[9] On the other hand an outsider is not entitled to enjoin an issue of mortgage bonds on the ground that it will depreciate the stock which he may in future acquire.[10] Relief by injunction against the illegal or fraudulent proceedings of corporate officers should be sought by a stockholder[11] or other person whose pecuniary interest is affected;[12] but stockholders who have failed to comply with the terms of their stock subscription have no interest

N.Y.—Smallwood v. Smith, 189 N.Y.S. 427, 197 App.Div. 533.
32 C.J. p 237 note 5, p 238 note 6.

Payment of unreasonable salaries

Minority stockholders were entitled to injunction against payment of unreasonable salaries, the particular case not being within the general rule that courts will not interfere with the proper management of the affairs of the corporation by the directors.—Hubbard v. Caserta, 144 A. 39, 108 Conn. 567.

Sale with approval of majority stockholders

(1) Fact that statute, Code § 3820a, authorising sale of corporate assets when approved by holders of two thirds of outstanding stock gives to dissenting stockholders remedy by appraisal and payment of appraised value does not render remedy at law adequate so as to defeat jurisdiction of equity to grant injunction.—Craddock-Terry Co. v. Powell, 25 S.E.2d 363, 181 Va. 417, rehearing 22 S.E.2d 30, 180 Va. 242.

(2) Under Corporation L. § 64a, where majority stockholders have authorized sale of corporate assets and approved terms and conditions, the only question in suit for injunction is whether such terms and conditions are expedient and for best interests of the corporation, and question whether any sale should be made cannot be reviewed, and in such case, discrepancy between what chancellor conceives to be fair price for corporate assets and proposed selling price must be so great as to be attributable to bad faith, before sale will be enjoined at instance of minority stockholders.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.

(3) Sale of corporate property with approval of majority stockholders in general see Corporations § 515.

Temporary injunction

(1) Where stockholder was entitled to priority in receipts of building and loan association, which threatened to prorate receipts in liquidating its assets among all its stockholders, temporary injunction to preserve status quo could properly be granted.—Kelly v. Republic Building & Loan Ass'n, Tex.Civ.App., 34 S.W.2d 924.

(2) In stockholders' action to restrain consummation of purchase of stock of another corporation, stockholders were entitled to injunction pendente lite restraining acts which might irremediably prejudice their rights.—Weiss v. Fox Theatres Corporation, 242 N.Y.S. 283, 136 Misc. 312.

Special injunction

(1) In a suit by a stockholder, a special injunction was issued to restrain the corporation and its officers from acting illegally with respect to corporate funds, even though there was doubt as to the commission of the acts charged, where, if true, irreparable injury would be done and where the injunction would work no injury in any event.—Manderson v. Commercial Bank, 28 Pa. 379.

(2) Nature of special injunction see supra § 6.

Stock passing to heirs

The heirs at law of intestate whose entire estate consisted of almost all of a corporation's stock were entitled to injunction restraining agent, who had been appointed by heirs to manage corporation's affairs, from mismanaging assets, and a showing that agent was insolvent was not necessary where agent's acts were continuous and directly affected value of stock, since otherwise acts might give rise to multiplicity of suits.—Shingler v. Shingler, 192 S.E. 824, 184 Ga. 671.

Actions or suits in general of stockholders against:
Corporation see Corporations §§ 518–532.
Officers of corporation see Corporations §§ 820–833.

As to injunctions to prevent other infringements or denials of rights of stockholder see infra § 103.

5. Md.—State v. Northern Cent. R. Co., 18 Md. 193.
N.Y.—Buel v. Baltimore & O. S. W. R. Co., 53 N.Y.S. 749, 24 Misc. 646.
32 C.J. p 238 note 7.

6. Pa.—Erie R. Co. v. Wilkesbarre Coal & Iron Co., 9 Phila. 262.

7. Pa.—Erie R. Co. v. Wilkesbarre Coal & Iron Co., supra.

Retention of assets pending recovery on claim

(1) Injunction against removal or disposal of assets until after trial of an action at law for damages should not have been granted.—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

(2) Person instituting action on contested claim against going corporation may not enjoin distribution of its assets to its stockholders, pending determination of the claim, unless there is danger that sufficient funds will not be forthcoming to satisfy judgment which he may obtain.—Kohlsaat v. Main Island Creek Coal Co., 132 S.E. 721, 101 W.Va. 256.

Doubtful right to recover in pending litigation

Plaintiff, having unsuccessfully prosecuted action against corporation in state courts, and having petitioned federal supreme court for certiorari, did not have such probable right to corporation's assets as to justify injunction against contemplated sale thereof on theory that sale would hinder collection of plaintiff's anticipated judgment.—Yount-Lee Oil Co. v. Federal Crude Oil Co., Tex.Civ.App., 82 S.W.2d 987.

8. Tex.—Yount-Lee Oil Co. v. Federal Crude Oil Co., supra.

Preserving assets for enforcement of judgment

Plaintiff was not entitled to injunction against contemplated sale of corporation's assets on theory that sale would hinder collection of judgment which plaintiff expected to obtain in pending litigation, since plaintiff had adequate remedy at law by enforcing judgment directly against assets transferred if transfer were illegal, especially where proposed transferees, being parties to injunction suit, were charged with notice.—Yount-Lee Oil Co. v. Federal Crude Oil Co., supra.

9. N.Y.—Gray v. DeCastro & Donner Sugar Refining Co., 10 N.Y.S. 632, 57 Hun 592.

10. U.S.—Mayer v. Denver T. & Ft. W. R. Co., C.C.N.Y., 38 F. 197.

11. U.S.—Roebling v. Richmond First Nat. Bank, D.C.W.Va., 30 F. 744.
Ga.—Legg v. Hood, 113 S.E. 642, 154 Ga. 28.

12. N.Y.—People v. Conklin, 5 Hun 452.

which will enable them to sue for an injunction in connection with the corporation's affairs.[13]

Acts of directors that are in breach of trust and are calculated to work great injury to the corporation or to render it insolvent will be enjoined at the suit of stockholders;[14] but a court of equity will not control by injunction the exercise of discretion vested in directors or other corporate officers as to the disposition of corporate property and funds, when there is no fraud or breach of trust.[15] It has been held that payments out of corporate funds by the corporation will not be enjoined notwithstanding such payments contravene a contract between persons who have an interest in the corporation, where such payments are reasonable and are for a proper corporate purpose, and the corporation is not bound by the contract because it is not a party to it.[16]

It has been held that an injunction is impracticable to restrain and supervise the actions of officers on the ground of a deadlock in the management because of dissensions,[17] although it has also been held that the making of certain purchases for corporate purposes may be enjoined pending the determination of litigation arising out of a deadlock in corporate affairs.[18] Where there is an adequate remedy elsewhere for the illegal disposition of property or the misapplication of funds, no injunction will be granted.[19] An injunction against the sale of the assets of a corporation will not be granted where the sale has already been completed;[20] nor should an injunction be granted where it appears that there is no intention on the part of the governing authorities to dispose of corporate property.[21]

§ 103. —— Infringement or Denial of Rights of Stockholders

Injunction against a corporation or its officers to prevent unauthorized or unlawful acts is a proper remedy to protect the rights of stockholders.

Whenever necessary for the adequate protection of stockholders the court acting on equitable grounds may enjoin a corporation or its officers from doing unauthorized or unlawful acts.[22] In a suit by a

13. Md.—Busey v. Hooper, 35 Md. 15, 6 Am.R. 350.
14. Ala.—Birmingham Mining & Mfg. Co. v. Mutual Loan & Trust Co., 11 So. 368, 96 Ala. 364.
Cal.—Wright v. Oroville Gold & Silver Mining Co., 40 Cal. 20.
Conn.—Sears v. Hotchkiss, 25 Conn. 171, 65 Am.D. 557.
32 C.J. p 238 note 12.
15. Ala.—Fairhope Single Tax Corp. v. Melville, 69 So. 466, 193 Ala. 289—Moses v. Tompkins, 4 So. 763, 84 Ala. 613.
La.—McCloskey v. New Orleans Brewing Co., 54 So. 738, 128 La. 197.
32 C.J. p 238 note 13.

Use of capital funds of membership corporation to purchase membership certificate

Membership corporation's purchase out of capital of one of its memberships could not be enjoined as involving illegal reduction in number of outstanding memberships.—Keeler v. New York Hide Exchange, 247 N.Y.S. 482, 231 App.Div. 450.

Submission to shareholders of plan for sale

(1) Preferred stockholder was not entitled to equitable relief to prevent corporation and its directors from submitting to shareholders for adoption a plan for sale of corporate assets in exchange for securities of a stronger corporation to be distributed among stockholders of vendor corporation according to proposed amendment to articles of incorporation, where such proposal would not unfairly benefit one class of stock at the expense of another and dissenting stockholder had adequate remedy at law to obtain fair cash value of his stock.—Daus v. Otis Steel Co., 11 Ohio Supp. 94.

(2) In determining the fairness of the plan as bearing on the right to an injunction in such case, it was held that the fact that holders of sixty-four per cent of preferred stock owned thirty-eight per cent of common stock was entitled to little or no weight in absence of showing that such stockholders planned to force the adoption of the plan.—Daus v. Otis Steel Co., supra.

16. R.I.—Thresher v. Cuddy-Gardner Co., 165 A. 438, 53 R.I. 175.
17. N.J.—Sternberg v. Wolff, 39 A. 397, 56 N.J.Eq. 389, 67 Am.S.R. 494, 39 L.R.A. 762.
18. Pa.—Bowman v. Gum, Inc., 193 A. 271, 327 Pa. 403.
19. N.J.—Schoenfeld v. American Can Co., Ch., 55 A. 1044.
32 C.J. p 238 note 15.

20. Sale by liquidating trustees

A suit to enjoin the sale of assets of a dissolved corporation by liquidating trustees of such corporation could not be maintained, where such assets had already been sold.—Elson v. Schmidt, 237 N.W. 196, 136 Neb. 778.

21. N.J.—Odlin v. Bingham Copper & Gold Mining Co., 51 A. 925, 64 N.J.Eq. 363.
22. U.S.—Mullins v. De Soto Securities Co., D.C.La., 45 F.Supp. 871.
Ind.—Redkey Citizens' Natural Gas Light Fuel & Petroleum Co. v. Orr, 60 N.E. 716, 27 Ind.App. 1.
Kan.—Fox v. Kansas Farmers' Union Royalty Co., 139 P.2d 815, 157 Kan. 297.
N.Y.—Hollender v. Rochester Food Products Corporation, 207 N.Y.S. 319, 124 Misc. 130, affirmed 212 N.Y.S. 833, 215 App.Div. 751, affirmed 152 N.E. 271, 252 N.Y. 490—Runcie v. Bankers Trust Co., 11 N.Y.S.2d 924, applications granted 17 N.Y.S.2d 197.
Tex.—Texas Plains Building & Loan Ass'n v. Colonial Corporation, Civ. App., 135 S.W.2d 153, affirmed 151 S.W.2d 193, 136 Tex. 393, 134 A.L.R. 1206.
W.Va.—Boyle v. Siegele, 5 S.E.2d 118, 121 W.Va. 485.
32 C.J. p 237 note 99.

Disclosure of secret processes

Stockholder was entitled to an injunction against the unnecessary and fraudulent disclosure of corporation's secret processes to president, in violation of agreement under which the affairs of the corporation were to be conducted.—Alley v. Positype Corporation of America, 231 N.Y.S. 461, 224 App.Div. 603.

Acceptance of improper fidelity bonds

Where a stockholder of a banking corporation might suffer irreparable damage by the acceptance by the corporation of fidelity bonds of employees from insurance companies not operating under authority of New York insurance department as required by statute, equity may grant injunctive relief against the continued acceptance of such bonds.

stockholder brought for this purpose it has been held essential for him to show that he is acting bona fide in the interest of the corporation and not in the interest of persons hostile to it,[23] and, where the acts complained of have the approval of persons holding a large majority of the shares, an injunction should not be granted unless such acts are unquestionably wrongful and the case made generally is free from reasonable doubt;[24] but it is not necessary for the stockholder to show special injury to himself,[25] or pecuniary loss to the corporation as a result of the acts complained of,[26] although he must be diligent to prevent the illegal acts and prompt in applying to the courts.[27] It has been held that, if a board of directors has power to adopt a resolution, its motives do not concern the court and will not be considered in an action by stockholders and directors against other directors holding the majority of the stock and, in the absence of a showing of fraud or breach of trust, will not enjoin them from acting under such resolution.[28] In a suit to determine the ownership of shares of corporate stock, defendant may be enjoined pendente lite from doing any acts in conflict with plaintiff's claim.[29]

Injunctions in suit by stockholder with regard to disposition of, or dealings with, corporate property are discussed supra § 102. Injunction with respect to the voting of stock generally is discussed in the C.J.S. title Corporations § 558 c, and with respect to voting at election of corporate officers infra § 105.

Submission of questions to stockholders. It has been held that, under some circumstances, injunction may be granted to restrain the submission to stockholders for adoption or rejection by them of a proposed amendment of the by-laws of the corporation,[30] or of a resolution authorizing the directors to issue stock where to permit a vote would work a gross injustice to certain stockholders.[31] It has also been held, however, that an injunction will not be granted to prevent a meeting of stockholders to consider the repeal of a corporate by-law in the absence of a showing that such repeal would be unlawful.[32]

Inspection of books and records. In some jurisdictions, in view of the fact that mandamus is not an available remedy, injunction is a proper remedy to enforce the right of a stockholder to inspect the books and records of the corporation.[33] In other

--Runcie v. Bankers Trust Co., 11 N.Y.S.2d 924, applications granted 17 N.Y.S.2d 197.

Preliminary injunction

(1) If it appears that directors were using their powers to obtain control of the corporation, or in any way other than in the honest exercise of their discretion, a preliminary injunction to maintain the status quo until hearing should be granted, even though the case of plaintiff stockholders is doubtful.—Borg v. International Silver Co., C.C.A.N.Y., 11 F. 2d 147, affirming, D.C., 11 F.2d 143.

(2) A preliminary injunction should not be granted on mere suspicion, however, at least where the balance of advantage does not weigh very strongly in plaintiffs' favor.—Borg v. International Silver Co., supra.

(3) In a suit by stockholders to enjoin the amendment of the certificate of incorporation, a preliminary injunction may be granted where the case involves only the construction and determination of validity of proposed amendments without extraneous evidence.—Costello v. Thomas Cusack Co., 124 A. 615, 96 N.J.Eq. 83, 90, affirmed 120 A. 15, 94 N.J.Eq. 423.

Actions or suits in general of stockholders against:
- Corporation see Corporations §§ 518–532.
- Officers of corporation see Corporations §§ 820–893.

Injunction against:
- Declaration and payment of dividends see Corporations § 474.
- Issuance of stock see Corporations § 250.

Judicial supervision of acts or omissions of corporations in general see Corporations § 984.

23. U.S.—Camblos v. Philadelphia & R. R. Co., C.C., 4 F.Cas.No.2,331, 4 Brewst. Pa., 563, 9 Phila. 411.
N.Y.—Belmont v. Erie R. Co., 52 Barb. 637.

24. N.Y.—Gere v. New York Cent. & H. R. R. Co., 19 Abb.N.Cas. 193.

25. Pa.—Kuhn v. American Academy of Music, 17 Phila. 193.
32 C.J. p 237 note 2.

26. **Acceptance of improper fidelity bonds**

Where defendants were violating provisions of statute requiring banking institutions to obtain fidelity bonds of employees from insurance companies operating under authority of New York insurance department, the mere fact that no loss had resulted did not prevent an interested stockholder from obtaining an injunction to prevent further violations of the statute which had continued over a term of years.—Runcie v. Bankers Trust Co., 11 N.Y.S.2d 924, application granted 17 N.Y.S.2d 197.

27. U.S.—Leo v. Union Pac. R. Co., C.C.N.Y., 19 F. 283.

N.J.—Rabe v. Dunlap, 25 A. 959, 51 N.J.Eq. 40.

28. Ky.—Haldeman v. Haldeman, 197 S.W. 376, 176 Ky. 635.

29. U.S.—Harvey v. Harvey, C.C.A. Wis., 290 F. 653.

30. N.J.—Scott v. P. Lorillard Co., 154 A. 515, 108 N.J.Eq. 153, affirmed 157 A. 388, 109 N.J.Eq. 417.

31. N.J.—Scott v. P. Lorillard Co., supra.

32. Ind.—Doss v. Yingling, 185 N.E. 281, 204 Ind. 571.

33. Ga.—Scott v. Flint River Pecan Co., 126 S.E. 769, 159 Ga. 668.
Ky.—Schumann v. Crook, 168 S.W. 2d 1002, 293 Ky. 331—Otis-Hidden Co. v. Scheirich, 219 S.W. 191, 187 Ky. 423, 22 A.L.R. 19—Pilcher v. Stadler, 124 S.W.2d 475, 276 Ky. 450.
Ohio.—Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 62 Ohio St. 189, 78 Am.S.R. 707, 48 L.R.A. 732—Flowers v. Rotary Printing Co., 31 N.E.2d 251, 65 Ohio App. 543—Edward D. Woodward Co. v. Hart, 17 Ohio App. 103—Blymyer v. Blymyer Iron Works Co., 3 Ohio S. & C. P. 463, 5 Ohio N.P. 71.

Right of pledgee

Pledgee was entitled to sue pledgor to restrain pledgor from interfering with pledgee's rights in good faith and under reasonable regulations, in examining corporation's books.—Scott v. Flint River Pecan Co., 126 S.E. 769, 159 Ga. 668.

jurisdictions, however, mandatory injunction is not a proper remedy, in view of the fact that mandamus is an available and the proper remedy to compel inspection.[34] Remedies with respect to the right to inspect corporate books and records are discussed generally in Corporations § 510, and mandamus to enforce such right is discussed in detail in the C. J.S. title Mandamus § 223, also 38 C.J. p 794 note 97-p 797 note 39.

Disposal or withholding of stock. The forfeiture and sale of shares of stock, where authorized, will not be enjoined;[35] but, if wrongful, the stockholder is entitled to an injunction,[36] unless his remedy at law is adequate;[37] and an injunction will be granted to prevent a fraudulent abuse of the statutory power to sell with resultant fraudulent preference of some creditors of the stockholder over other of his creditors.[38]

It has been held that, where a stockholder has surrendered the certificate for his shares in order to have certificates made in smaller denominations, he is entitled to an injunction to restrain the disposal of part of such shares to another, pending determination of his suit to compel issuance of such part to him,[39] but it has also been held that a stockholder claiming the right to additional shares is not entitled to a temporary injunction to restrain a proposed sale by directors, where a sufficient number of shares remain available to satisfy the claim of such stockholder.[40] According to some cases the fact that the corporation deprives a stockholder of his right to a proportionate share of new stock by a contract with third persons is not ground for an injunction against the performance of such contract by the corporation if the corporation is able to respond in damages to such stockholder.[41]

Issuance of bonds. A proposed corporate bond issue will not be enjoined at the suit of minority stockholders as too large, where the bonds are to be issued in amounts necessary to meet the company's requirements, since, if the demands become excessive, relief may then be applied for.[42] So a proposed issue of corporate bonds convertible into stock to be offered to the stockholders in proportion to their holdings of stock will not be enjoined, although stockholders failing to respond will suffer tremendous loss by depreciation in the value of their stock, all stockholders being dealt with alike.[43]

Contracts of corporation. A minority stockholder may be entitled to an injunction to restrain the execution of a contract by the corporation which is designed to serve the interest of persons in control of the corporation in contravention of their fiduciary duty to the corporation.[44] An injunction, sought by a minority stockholder, to restrain the performance of a contract by the corporation may be denied, however, on the ground that the contract is beneficial to the corporation.[45]

Contract between stockholders. Injunction may be a proper remedy to prevent violation of a valid

Compliance with injunction condition precedent to suspension of penalties

Provision in judgment making compliance with injunction a condition precedent to suspension of part of statutory penalties for failure to permit inspection was proper.—Flowers v. Rotary Printing Co., 31 N.E.2d 251, 65 Ohio App. 543.

Books and records out of state

A court of equity will balance the conveniences of the parties in determining whether a mandatory injunction will be granted to compel a domestic corporation to produce books of account, kept in a foreign state in which the corporation is doing business, so that a stockholder may enforce his right to inspect such books under the statute dealing with corporate accounts, and such relief will be denied if the court finds that to compel the corporation to send its books to Ohio would interrupt its business to the great damage of the corporation and other stockholders.—Cornell v. Nestle Le Mur Co., 29 N. E.2d 162, 65 Ohio App. 1.

34. Tenn.—Brown v. Crystal Ice Co., 122 S.W. 84, 122 Tenn. 239, 19 Ann. Cas. 308.

W.Va.—Nolan v. Guardian Coal & Oil Co., 194 S.E. 347, 119 W.Va. 545.

35. Cal.—Burnham v. San Francisco Fuse Mfg. Co., 17 P. 940, 76 Cal. 24—Sullivan v. Triunfo Gold & Silver Mining Co., 29 Cal. 585.

Injunction against enforcement of calls or assessments with respect to corporate stock see Corporations § 362.

Relief against, or annulment of, forfeiture of corporate stock on ground of nonpayment of calls or assessments in general see Corporations § 372.

36. N.Y.—Moore v. New Jersey Lighterage Co., 5 N.Y.S. 192, 57 N. Y.Super. 1.

32 C.J. p 239 note 20.

37. Ala.—Elliott v. Sibley, 13 So. 500, 101 Ala. 344.

38. R.I.—Seagraves v. Railroad Bank, 4 R.I. 372.

39. N.Y.—Bedford v. American Aluminum & Specialty Co., 64 N. Y.S. 856, 51 App.Div. 537.

Enjoining transfer or pledge of corporate stock in general see supra § 73.

40. Wis.—Quin v. Havenor, 94 N.W. 642, 118 Wis. 53.

41. N.J.—Meredith v. New Jersey Zinc & Iron Co., 37 A. 539, 55 N.J. Eq. 211, affirmed 41 A. 1116, 56 N.J. Eq. 454.

42. N.J.—Farmers' Loan & Trust Co. v. Hewitt, 118 A. 267, 94 N.J. Eq. 65, affirmed 118 A. 926, 94 N.J. Eq. 187.

43. N.J.—Farmers' Loan & Trust Co. v. Hewitt, supra.

Reason for rule

In case stockholders fail to respond, their loss will be of their own making.—Farmers' Loan & Trust Co. v. Hewitt, supra.

44. U.S.—Graham v. Tom Moore Distillery Co., D.C.Ky., 42 F.Supp. 853.

45. U.S.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.

Contract for use of railroad station

Minority preferred stockholder could not enjoin performance by railroad company of contract for use of union passenger station even if action of interstate commerce commission with respect to joint use was subject to change, where contract was apparently beneficial to railroad. —Atwater v. Wheeling & L. E. Ry. Co., supra.

agreement with respect to corporate affairs, to which all stockholders are parties.[46]

§ 104. Corporate Officers

In general injunction is not a proper remedy to determine the right to a corporate office.

In general it is not the province of a court of equity to decide, in a suit for an injunction, the right to a corporate office,[47] although it may do so as an incident to matters otherwise within its jurisdiction.[48]

Under some circumstances an injunction may be granted to prevent the amendment of the by-law of a corporation for the purpose of preventing continued control of the corporate trust by a self-perpetuating governing body.[49]

Injunctions against corporate officers with respect to infringement or denial of rights of stockholders in general are discussed supra § 103, and with respect to disposition of, or dealings with, corporate property, supra § 102. Various other matters relating to injunctions involving corporate officers are discussed infra §§ 105–107.

Mandatory injunction. Under some circumstances a mandatory injunction will lie to compel a corporate officer to perform certain acts connected with corporate affairs.[50]

§ 105. —— Election, Removal, and Reinstatement

a. Election
b. Removal or reinstatement

a. Election

Usually the holding of an election of corporate officers will not be enjoined; nor will a disputed election be tested on an application for an injunction; but the improper voting of particular stock at such an election may be enjoined under some circumstances.

The holding of a corporate election will rarely be enjoined,[51] although in a proper case equity has power to do so;[52] nor is an application for an injunction the proper method of settling a disputed election.[53]

Injunction to prevent voting by member or stockholder. The propriety of an injunction to prevent the improper voting of certain stock at an election of corporate officers has been recognized,[54] and it has been held that, where stock in a corporation is transferred without consideration, for the purpose of fraudulently obtaining more votes than the real owner of the stock might otherwise cast, in order to control an election, the voting of such stock may be enjoined.[55] An injunction to restrain a person

46. Ill.—Fitzgerald v. Christy, 242 Ill.App. 343.
N.Y.—Harris v. Magrill, 226 N.Y.S. 621, 131 Misc. 380.

47. Cal.—Somo v. Superior Court of Los Angeles County, 27 P.2d 790, 791, 135 Cal.App. 584, quoting **Corpus Juris.**
Ga.—McCarthy v. McKinney, 73 S.E. 394, 137 Ga. 292.
32 C.J. p 239 note 36, p 240 note 40.
Injunction:
As method of settling disputed election in general see infra § 105.
To prevent officer acting as such in order to test validity of his election see infra § 106.
Power of court of equity to review corporate election in general see Corporations § 725 a.
Quo warranto to try title to corporate office see the C.J.S. title Quo Warranto § 9, also 51 C.J. p 318 notes 38–42.

48. Tex.—Arno Co-op. Irr. Co. v. Pugh, Civ.App., 177 S.W. 991—De Zavala v. Daughters of the Republic, 124 S.W. 160, 58 Tex.Civ. App. 19.
32 C.J. p 240 notes 40, 41.

49. Plan of original founders
The rule stated in the text was applied where it was the intention of the original members of an eleemosynary, nonprofit corporation that the control of the affairs of the organization should be vested in the trustees rather than the membership, and the self-perpetuating provision as to the governing body was embodied in the original by-laws, and not in the articles of association, control by a self-perpetuating body having been a fundamental element of the plan of the original founders of the corporate trust.—Detroit Osteopathic Hospital v. Johnson, 287 N.W. 466, 290 Mich. 283.

50. Md.—Berlin v. Baltimore County Bank, 175 A. 196, 167 Md. 435.
Pa.—See Italian League of Archbald, Pennsylvania v. Villella, 31 Lack. Jur. 189.

Payment over of proceeds of insurance
Mandatory injunction against officer of mortgagor corporation refusing to perform agreement to join in signing checks to mortgagees against joint deposit of proceeds of fire policy on factory payable to mortgagees, because of claim for expenditures alleged to have been incurred by such officer at mortgagees' request in keeping alive fire policy, was justified, where such officer had acted in interest of corporation in keeping property insured.—Berlin v. Baltimore County Bank, 175 A. 196, 167 Md. 435.

51. N.Y.—Walker v. Devereaux, 4 Paige 229.
32 C.J. p 239 note 34.

52. Pa.—Deal v. Erie Coal & Coke Co., 92 A. 701, 246 Pa. 552.
32 C.J. p 239 note 35.

53. Md.—Talley v. Dadds, 157 A. 775, 161 Md. 558.
Mass.—New England Mut. Life Ins. Co. v. Phillips, 6 N.E. 534, 141 Mass. 535.
32 C.J. p 239 note 36, p 240 note 43.
Injunction to decide right to corporate office in general see supra § 104.
Power of court of equity to review election of corporate officer in general see Corporations § 725 a.
Quo warranto to try title to corporate office see the C.J.S. title Quo Warranto § 9, also 51 C.J. p 318 notes 38–42.
Testing validity of election by suit for injunction to restrain officer from acting as such see infra § 106.

54. Ohio.—Allen v. Largerberger, 10 Ohio Dec.Reprint 341, 20 Cinc.L. Bul. 368.
Enjoining voting at stockholders' meeting in general see Corporations § 558 c.

55. Md.—Webb v. Ridgely, 38 Md. 364—Campbell v. Poultney, 6 Gill & J. 94, 26 Am.D. 550.
32 C.J. p 239 note 29.

from voting at an election should not be granted, however, if it is not clearly shown that he is not entitled to vote,[56] or if there is not a sufficient showing of serious or irreparable injury, apprehended or threatened;[57] and an injunction will not be granted where its real purpose is to control an election by keeping the majority from ruling.[58]

In a proper case election officers may be enjoined from receiving the votes of persons not entitled to vote.[59]

b. Removal or Reinstatement

Usually injunction is not a proper remedy to remove a corporate officer from his office or to restore to office one wrongfully removed.

Injunction is not the proper remedy for the removal of an officer of a private corporation,[60] or for restoring one wrongfully removed.[61] Under some circumstances, however, a corporate officer may be entitled to an injunction pendente lite to prevent the holding of a stockholders' meeting for the purpose of removing such officer from his office,[62] and an injunction may be a proper remedy to restrain ouster of a stockholder from a corporate office in violation of a valid contract to which all stockholders are parties.[63]

§ 106. —— Restraining Corporate Officer

Officers of a corporation in general will not be enjoined from acting as such within their powers and in the exercise of their discretion.

In the absence of special legislation, officers of a corporation will not be enjoined from acting as such within their powers and in the exercise of discretion,[64] even though they are only de facto officers,[65] for the reason in general that there is an adequate remedy at law.[66]

While there is some authority to the contrary,[67] it has generally been held that, where an injunction to prevent an officer from acting as such is really to test the validity of his election, it will be refused,[68] since the remedy at law is usually ade-

56. Wis.—Reed v. Jones, 6 Wis. 680.
32 C.J. p 239 note 30.

Injunction against depositaries' voting stock denied
Ill.—Babcock v. Chicago Rys. Co., 236 Ill.App. 360.

57. N.Y.—McHenry v. Jewett, 90 N. Y. 58.
Wis.—Reed v. Jones, 6 Wis. 680.

58. Ala.—American Refrigerating & Construction Co. v. Linn, 7 So. 191, 93 Ala. 610.
32 C.J. p 239 note 31.

59. N.Y.—People v. Albany & S. R. Co., 1 Lans. 308, 55 Barb. 344, 38 How.Pr. 228, 7 Abb.Pr.N.S. 265, modified on other grounds 5 Lans. 25, modified on other grounds 57 N.Y. 161.
Pa.—McElvain v. Christ Church, 2 Woodw. 293.

60. Cal.—Stesel v. Santa Ana River Water, 94 P.2d 1052, 35 Cal.App.2d 117.
Md.—Talley v. Dadds, 157 A. 775, 161 Md. 558—Supreme Lodge O. of G. C. v. Simering, 40 A. 723, 88 Md. 276, 71 Am.S.R. 409, 41 L.R.A. 720.
32 C.J. p 240 note 45.
Power of courts to remove corporate officers in general see Corporations § 738 b.
Enjoining corporate officer from acting as such see infra § 106.

61. Nev.—Sherman v. Clark, 4 Nev. 138, 97 Am.D. 516.
32 C.J. p 240 note 46.

62. N.Y.—Davis v. Arguls Gas & Oil Sales Co., 3 N.Y.S.2d 241, 167 Misc. 377.

Contract as to control
In a case in which one of the three stockholders, each of whom owned a third of the stock, sued the corporation and others and relied on a contract designed to prevent any two stockholders from outvoting the other, it was held that plaintiff was entitled to an injunction pendente lite to prevent the holding of a stockholders' meeting for the purpose of removing plaintiff as a director on the alleged ground of misconduct, the suit was not premature.—Davis v. Arguls Gas & Oil Sales Co., supra.

63. N.Y.—Harris v. Magrill, 226 N. Y.S. 621, 131 Misc. 380.

64. U.S.—Converse v. Dimock, C.C. N.Y., 22 F. 573.
Cal.—Somo v. Superior Court of Los Angeles County, 27 P.2d 790, 791, 135 Cal.App. 584, quoting **Corpus Juris.**
Ga.—McCarthy v. McKinney, 73 S. E. 394, 137 Ga. 292.
Iowa.—Harvey v. Kirton, 164 N.W. 888, 182 Iowa 973.
Pa.—Markovitz v. Markovitz, 8 A.2d 46, 336 Pa. 145, 124 A.L.R. 359.
32 C.J. p 239 note 37.

Statute
Code Civ.Proc. § 526 subd 6, and the provision of Civ.Code § 3423 subd 6 that an injunction cannot be granted to prevent the exercise of a private office, in a lawful manner, by the person in possession, were cited in asserting the impropriety of an injunction pendente lite to prevent the exercise of the duties of certain corporate offices.—Somo v. Superior Court of Los Angeles County, 27 P. 2d 790, 135 Cal.App. 584.

Right to temporary restraining order denied
Cal.—Stesel v. Santa Ana River Water Co., 94 P.2d 1052, 35 Cal.App.2d 117.
Power of courts to remove corporate officers in general see Corporations § 738 b.

65. Cal.—Stesel v. Santa Ana River Water Co., 94 P.2d 1052, 35 Cal. App.2d 117—Somo v. Superior Court of Los Angeles County, 27 P.2d 790, 791, 13 Cal.App. 584, quoting **Corpus Juris.**
Ga.—McCarthy v. McKinney, 73 S.E. 394, 137 Ga. 292.
Iowa.—Harvey v. Kirton, 164 N.W. 888, 182 Iowa 973.
32 C.J. p 240 note 38.

66. Cal.—Somo v. Superior Court of Los Angeles County, 27 P.2d 790, 791, 135 Cal.App. 584, quoting **Corpus Juris.**
Colo.—Grant v. Elder, 170 P. 198, 64 Colo. 104.
Iowa.—Schmidt v. Pritchard, 112 N. W. 801, 135 Iowa 240.
Quo warranto to determine right to corporate office see the C.J.S. title Quo Warranto § 9, also 51 C.J. p 318 notes 38–42.

67. Neb.—Reynolds v. Bridenthal, 77 N.W. 658, 57 Neb. 280—Humboldt Driving Park Ass'n v. Stevens, 52 N.W. 568, 34 Neb. 528.

68. Cal.—Somo v. Superior Court of Los Angeles County, 27 P.2d 790, 791, 135 Cal.App. 584, quoting **Corpus Juris.**
Ind.—Carmel Natural Gas & Improvement Co. v. Small, 47 N.E. 11, 150 Ind. 427, rehearing overruled 50 N.E. 476, 150 Ind. 427.
Md.—Talley v. Dadds, 157 A. 775, 161 Md. 558.
32 C.J. p 240 note 43.

quate.[69]

Injunctions against corporate officers with respect to disposition of, or dealings with, corporate property are discussed supra § 102, and with respect to infringement or denial of rights of stockholders in general, supra § 103; and injunctions to restrain acts within discretion of corporate officers in general are discussed infra § 107.

§ 107. —— Discretion of Corporate Officer

In general injunctions against acts of corporate officers which are within the limits of the discretion of such officers will not be granted.

In general acts of corporate officers connected with the management of the corporation, which are within the limits of their discretion, will not be enjoined,[70] but, even with respect to acts which are within the general power of corporate officers, an injunction pendente lite to maintain the status quo may be granted on a showing that such acts constitute an abuse of discretion.[71]

E. PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES

§ 108. In General

a. General rule
b. Discretionary acts
c. Injury sustained and lack of other remedy
d. Police officers

a. General Rule

Injunction will not issue to restrain public officers from performing any official act which is not in excess of the authority reposed in them, but unlawful acts by public officers may, in a proper case, be restrained.

Courts of equity have no power to restrain public officers by injunction from performing any official act which they are by law required to perform, or acts which are not in excess of the authority and discretion reposed in them.[72] Nevertheless, it is a rule of very general application that, where public officers are acting in breach of trust,[73] or un-

Injunction to:
Decide right to corporate office in general see supra § 104.
Settle disputed election of corporate officer in general see supra § 105.
Power of court of equity to review election of corporate officer in general see Corporations § 725 a.

69. Md.—Talley v. Dadds, 157 A. 775, 161 Md. 558.
32 C.J. p 240 note 48.

70. U.S.—Lich v. U. S. Rubber Co., C.C.A.N.J., 123 F.2d 145, affirming, D.C., 39 F.Supp. 675—Borg v. International Silver Co., C.C.A.N.Y., 11 F.2d 147, affirming, D.C., 11 F. 2d 143—Taylor v. Southern Pac. Co., C.C.Ky., 122 F. 147, appeal dismissed 129 F. 1007, 62 C.C.A. 684.
N.J.—Farmers' Loan & Trust Co. v. Hewitt, 118 A. 267, 94 N.J.Eq. 65, affirmed 118 A. 926, 94 N.J.Eq. 187.
Ohio.—Daus v. Otis Steel Co., 11 Ohio Supp. 94.
32 C.J. p 238 note 13, p 239 note 37.

Powers conferred by by-laws

Courts cannot by injunction prevent directors from exercising powers conferred on them under by-laws. —Tyler v. Park Ridge Country Club, 284 P. 247, 103 Cal.App. 117.

Duties imposed by statute

District court could not restrict or supervise by injunction the manner and method of performance of lawful duties of college board of directors as to election of a college president, imposed on the board by statute.—Steele v. Winningham, Tex.Civ. App., 128 S.W.2d 454.

Enjoining:
Acts constituting infringement or denial of rights of stockholders in general see supra § 103.
Corporate officers from acting as such see supra § 105.
Injunctions with respect to the disposition of, or dealings with, corporate property see supra § 102.
Judicial control of discretion of directors in general see Corporations § 743.
Judicial supervision of acts or omissions of corporations in general see Corporations § 984.

71. U.S.—Borg v. International Silver Co., C.C.A.N.Y., 11 F.2d 147, affirming, D.C., 11 F.2d 143.

72. U.S.—Kelley v. Kavanaugh, D. C.N.Y., 3 F.Supp. 666, 667, citing **Corpus Juris.**
Ala.—Goodwin v. State Board of Administration, 102 So. 718, 212 Ala. 453.
Ill.—Litzelman v. Town of Fox, 1 N. E.2d 915, 285 Ill.App. 7.
Ind.—Sweigart v. State, 12 N.E.2d 134, 137, 213 Ind. 157, 114 A.L.R. 1117, citing **Corpus Juris.**
Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.
Minn.—School Dist. No. 1 of Itasca County v. Lindhe, 261 N.W. 486, 488, 195 Minn. 14, citing **Corpus Juris.**
N.J.—Brex v. Smith, 146 A. 34, 35, 104 N.J.Eq. 386, quoting **Corpus Juris.**
Ohio.—Lyons v. City of Cincinnati, 9 N.E.2d 988, 55 Ohio App. 458.
Or.—State v. Kozer, 270 P. 513, 126 Or. 641.
Tex.—Hurt v. Oak Downs, Inc., Civ. App., 85 S.W.2d 294, appeal dismissed Oak Downs v. Hurt, 97 S. W.2d 673, 128 Tex. 218—Marine Transport Workers' Industrial Union No. 510 v. Covington, Civ.App., 281 S.W. 217.
Wis.—Goodland v. Zimmerman, 10 N. W.2d 180, 183, 243 Wis. 459, citing **Corpus Juris.**
32 C.J. p 240 note 48, p 245 note 6.
Acts of public officers as subject of equitable relief generally see Equity § 65.

"The courts have not the power to interfere by injunction with the performance of a ministerial act of a public officer under a valid statute unless the manner of performance is in violation of law or is contrary to plain, official duty. Otherwise, the effect of such interference would be to render a valid statute null and void—a contradiction of reason and a usurpation of power."—Yoder v. Givens, 18 S.E.2d 380, 383, 179 Va. 229.

An injunction will not be granted to restrain an official in the exercise of his official functions, but the writ lies only against suitors in the proceedings before him.
Ga.—Stone v. King-Hodgson Co., 79 S.E. 122, 140 Ga. 487.
Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.

73. U.S.—Pughe v. Lyle, D.C.Cal., 10 F.Supp. 245, 248, citing **Corpus Juris.**

lawfully or without authority or threatening to do so,[74] and, as discussed infra subdivision c of this section, such acts may be enjoined where they will result in irreparable injury, or will require a multiplicity of suits at law to obtain redress. This is, it has been held, not an action or suit against the state or county.[75]

Complainant must clearly show actual illegal action on the part of defendants;[76] and the presumption is in favor of the legality of the action taken by them.[77]

Effect of constitutional and statutory provisions. It has been held that, under a constitutional provision that justice shall be administered without prejudice, completely and without delay and that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, an injunction is as available against public officers for a violation of private rights as any other remedy.[78] Under some statutes an injunction cannot be granted to prevent the execution of a public statute, by officers of the law, for the public benefit.[79] It has been held that this power to enjoin public officers is not affected by a statute providing that "officers of the law" shall not be enjoined;[80] and that a statute assuming to exempt a certain class of officers from liability to injunctive process is unconstitutional.[81]

Compelling performance of official duties. As a general rule courts of equity will not compel by injunction the performance by public officers of their official duties;[82] but a court of equity may compel

Ind.—Sweigart v. State, 12 N.E.2d 134, 137, 213 Ind. 157, 114 A.L.R. 1117, citing **Corpus Juris.**
N.J.—Brex v. Smith, 146 A. 34, 35, 104 N.J.Eq. 386, quoting **Corpus Juris.**
32 C.J. p 240 note 50.

74. U.S.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932, certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, and affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed. 381—Nagle v. O'Connor, C.C.A.Pa., 88 F.2d 936, certiorari granted **Adams** v. Nagle, 58 S.Ct. 18, 302 U.S. 665, 82 L.Ed. 513, reversed on other grounds 58 S.Ct. 687, 303 U.S. 532, 82 L.Ed. 999—Tobias v. O'Connor, C.C.A.Pa., 88 F.2d 936, certiorari granted Adams v. Tobias, 58 S.Ct. 19, 302 U.S. 665, 82 L. Ed. 513, reversed on other grounds 58 S.Ct. 687, 303 U.S. 532, 82 L.Ed. 999—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382—U. S. v. Phillips, D.C.Okl., 33 F. Supp. 261—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F. Supp. 995—Spang v. Roper, D.C. Pa., 13 F.Supp. 840, 843, citing **Corpus Juris,** and vacated on other grounds, C.C.A., Gossnell v. Spang, 84 F.2d 889, certiorari denied Spang v. Gossnell, 57 S.Ct. 233, 299 U.S. 605, 81 L.Ed. 446—Pughe v. Lyle, D.C.Cal., 10 F.Supp. 245, 248, citing **Corpus Juris.**
Cal.—Brock v. Superior Court in and for Los Angeles County, 81 P.2d 931, 11 Cal.2d 682, followed in 81 P.2d 934, 11 Cal.2d 781.
D.C.—Hutchins Mut. Ins. Co. of District of Columbia v. Hazen, 105 F. 2d 53, 70 App.D.C. 174.
Idaho.—Fritchman v. Athey, 211 P. 1080, 36 Idaho 560.
Ind.—Sweigart v. State, 12 N.E.2d 134, 137, 213 Ind. 157, 114 A.L.R. 1117, citing **Corpus Juris.**
Mass.—Criscuolo v. Department of Public Utilities, 19 N.E.2d 708, 302 Mass. 438.
Minn.—School Dist. No. 1 of Itasca County v. Lindhe, 261 N.W. 486, 488, 195 Minn. 14, citing **Corpus Juris.**
N.J.—Howard Co. Jewelers v. New Jersey State Board of Optometrists, 29 A.2d 742, 133 N.J.Eq. 4—Drive-to Department Stores v. City of Newark, 170 A. 29, 115 N.J.Eq. 222—Miller v. City of Atlantic City, 162 A. 143, 144, 111 N.J.Eq. 260, quoting **Corpus Juris**—Brex v. Smith, 146 A. 34, 35, 104 N.J.Eq. 386, quoting **Corpus Juris.**
N.Y.—Lair v. Grant, 244 N.Y.S. 427, 137 Misc. 470.
Ohio.—Columbia Life Ins. Co. v. Hess, 162 N.E. 466, 28 Ohio App. 107, affirmed Hess v. Columbia Life Ins. Co., 156 N.E. 504, 116 Ohio St. 416.
Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146—Annenberg v. Roberts, 2 A.2d 612, 333 Pa. 203—Salus v. Lawrence, 46 Dauph.Co. 286, appeal dismissed 3 A.2d 417, 332 Pa. 429.
Tex.—State v. Ferguson, 125 S.W.2d 272, 133 Tex. 60—Terrell v. Kasch, Civ.App., 10 S.W.2d 208, 210, error refused, citing **Corpus Juris.**
32 C.J. p 240 note 51.

Any subordinate attempting to enforce regulations made by his superior in excess of his authority is a trespasser and may be enjoined.—Eastman v. U. S., D.C.Wash., 28 F. Supp. 807.

Void acts

Where proceedings of board or inferior tribunal are not merely irregular, but void, as based on unconstitutional statute or failing to follow statutory provisions, injunction will lie.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.

75. U.S.—Weyman-Bruton Co. v. Ladd, N.D., 231 F. 898, 146 C.C.A. 94.
Ohio.—Columbia Life Ins. Co. v. Hess, 162 N.E. 466, 28 Ohio App. 107, affirmed Hess v. Columbia Life Ins. Co., 156 N.E. 504, 116 Ohio St. 416.

76. D.C.—Laughlin v. Cummings, 105 F.2d 71, 70 App.D.C. 192—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.S. 604, 83 L.Ed. 384.
Ky.—Murray v. Gill, 106 S.W.2d 634, 269 Ky. 207.
32 C.J. p 245 note 4.

Legislative bodies should not be enjoined, unless applicant shows clear legal right to injunctive relief. —Hoey v. Dalton, 213 N.Y.S. 583, 126 Misc. 194.

77. Neb.—Western Reference & Bond Ass'n v. Morehead, 154 N.W. 238, 98 Neb. 717.
32 C.J. p 245 note 5.

78. Or.—Wiegand v. West, 144 P. 481, 73 Or. 249.

79. Ariz.—Corbin v. Rodgers, 85 P. 2d 59, 53 Ariz. 35.
Cal.—Wright v. Jordan, 221 P. 915, 192 Cal. 704—Daugherty v. Superior Court in and for City and County of San Francisco, 74 P.2d 549, 23 Cal.App.2d 739—Drumhiller v. Wright, 222 P. 166, 64 Cal.App. 498.

The purpose of such a statute is to prevent interference by the judicial branch of the government with the enforcement by the executive branch through the use of the power of injunction.—Hislop v. Rodgers, 92 P.2d 527, 54 Ariz. 101.

80. N.D.—Bartels Northern Oil Co. v. Jackman, 150 N.W. 576, 29 N.D. 236.
32 C.J. p 242 note 68.

81. Cal.—Guy v. Hermance, 5 Cal. 73, 63 Am.D. 85.

82. Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.

public officers or boards to act in a matter with respect to which they have jurisdiction or authority,[83] particularly where the act is merely ministerial,[84] but the court will not control or guide the exercise of their authority.[85] The courts by injunction cannot compel public officers to do more than the law permits them to do.[86]

It has been held that a court of equity has no power to compel a public officer as an individual to undo, set aside, and make null that which he has done in his official capacity.[87]

Discretion of court. In accordance with the general rule discussed supra § 14, the granting or refusal of an injunction against public officers and boards, as a general rule, rests in the sound discretion of the court under the facts and circumstances of the particular case.[88]

b. Discretionary Acts

In the absence of an abuse of discretion, the exercise of discretionary power vested in public officers will not be controlled by injunction.

Where public officials are intrusted with discretionary power in certain matters, their exercise of such discretion will not be controlled by injunction[89] in the absence of any showing that their ac-

Ga.—Sutton v. Adams, 178 S.E. 365, 180 Ga. 48.
N.J.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J. Eq. 91.
Ohio.—Meeker v. Scudder, 17 Ohio App. 210, affirmed 140 N.E. 627, 108 Ohio St. 423.
32 C.J. p 241 note 64.

83. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389—Kersh Lake Drainage Dist. of Jefferson, Lincoln, and Desha Counties v. State Bank & Trust Co. of Wellston, Mo., C.C.A.Ark., 92 F.2d 783.
Compulsion by federal court of performance of duty by state officer or agent see Federal Courts § 50.
Control by mandamus of discretionary matters see the C.J.S. title Mandamus § 133, also 38 C.J. p 689 notes 96, 97.
Judicial character of relief granted by equity courts generally see Equity § 18.

No discretion

Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except on certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate.—Adams v. Nagle, Pa., 58 S.Ct. 687, 303 U.S. 532, 82 L.Ed. 999, reversing, C.C.A., Nagle v. O'Connor, 88 F.2d 936, certiorari granted Adams v. Nagle, 58 S.Ct. 18, 302 U.S. 665, 82 L.Ed. 513—Adams v. Tobias, 58 S.Ct. 687, 303 U.S. 532, 82 L.Ed. 999, reversing, C.C.A., Tobias v. O'Connor, 88 F.2d 936, certiorari granted Adams v. Tobias, 58 S.Ct. 19, 302 U.S. 665, 82 L. Ed. 513—Eastman v. U. S., D.C. Wash., 31 F.Supp. 754, reversed on other grounds, C.C.A., U. S. v. Eastman, 118 F.2d 421, certiorari denied Eastman v. U. S., 62 S.Ct. 68, 314 U.S. 635, 86 L.Ed. 510.

84. U.S.—Western Union Telegraph Co. v. Tax Commission of Ohio, D. C.Ohio, 21 F.2d 355.
D.C.—Ducker v. Butler, 104 F.2d 236, 70 App.D.C. 103.
Ky.—City of Catlettsburg v. Fabric Fire Hose Co., 95 S.W.2d 285, 264 Ky. 594—City of Catlettsburg v. Davis' Adm'r, 91 S.W.2d 56, 262 Ky. 726.
Pa.—Munce v. Beamish, 48 Dauph. Co. 432.

A "ministerial act" subject to injunction is one which a public officer or agent is required to perform on a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.—Kansas Milling Co. v. Ryan, 102 P. 2d 970, 152 Kan. 137.

85. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389.

86. Ark.—Johnson v. Kersh Lake Drainage Dist., 131 S.W.2d 620, 198 Ark. 743, dissenting opinion 132 S.W.2d 658, 198 Ark. 743, certiorari granted Kersh Lake Drainage Dist. v. Johnson, 60 S.Ct. 468, 309 U.S. 642, 84 L.Ed. 996, affirmed Kersh Lake Drainage Dist. of Jefferson, Lincoln and Desha Counties, Ark. v. Johnson, 60 S.Ct. 640, 309 U.S. 685, 84 L.Ed. 881, 128 A.L.R. 386, rehearing denied Kersh Lake Drainage Dist. v. Johnson, 60 S.Ct. 886, 309 U.S. 699, 84 L.Ed. 1037.

87. Tex.—Boyd v. Dillard, Civ.App., 151 S.W.2d 847, error dismissed, judgment correct.

88. U.S.—Fenner v. Boykin, Ga., 46 S.Ct. 492, 271 U.S. 240, 70 L.Ed. 927, affirming, D.C., 3 F.2d 674—Gaines Dry Cleaners v. City of Chicago, C.C.A.Ill., 123 F.2d 104.
N.Y.—Smidt v. McKee, 186 N.E. 869, 262 N.Y. 373, reversing 262 N.Y.S. 734, 237 App.Div. 754, and reargument denied 263 N.Y.S. 936, 239 App.Div. 769—Bareham v. City of Rochester, 158 N.E. 51, 246 N.Y. 140, modifying 222 N.Y.S. 141, 221 App.Div. 36, which modified 220 N. Y.S. 66, 128 Misc. 642.

89. U.S.—Adams v. Nagle, Pa., 58 S. Ct. 687, 303 U.S. 532, 82 L.Ed. 999, reversing, C.C.A., Nagle v. O'Connor, 88 F.2d 936, certiorari granted Adams v. Nagle, 58 S.Ct. 18, 302 U. S. 665, 82 L.Ed. 513—Adams v. Tobias, Pa., 58 S.Ct. 687, 303 U.S. 532, 82 L.Ed. 999, reversing, C.C. A., Tobias v. O'Connor, 88 F.2d 936, certiorari granted Adams v. Tobias, 58 S.Ct. 19, 302 U.S. 665, 82 L.Ed. 513—Western Union Telegraph Co. v. Tax Commission of Ohio, D.C.Ohio, 21 F.2d 355.
Ala.—Heck v. Hall, 190 So. 280, 288, 238 Ala. 274, citing **Corpus Juris**—Scott v. Mattingly, 182 So. 24, 26, 236 Ala. 254, quoting **Corpus Juris**—Goodwin v. State Board of Administration, 102 So. 718, 212 Ala. 453.
Ark.—Johnson v. Russell, 127 S.W. 2d 260, 262, 198 Ark. 49, quoting **Corpus Juris.**
D.C.—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.

tion is fraudulent or in bad faith,[90] or that it amounts to an abuse of the discretion so vested in them;[91] and this is true even though the powers vested in such officers are quasi judicial as well as administrative;[92] and especially is this true where the restraining of the officer's action would impose a large additional expense on the public.[93]

Courts will not hear proofs and attempt to determine whether official discretion is wisely exercised or not.[94] Where the law casts both a right and a duty on an officer which involves exercise of discretion, the officer's conduct with respect to his duty or discretion is no more to be controlled by injunction than by mandamus.[95] Interference in such a case would be to interfere with the ordinary functions of government.[96] Courts cannot legislate or invade the other departments of government in matters of policy,[97] and courts will act with extreme caution where the granting of injunctive relief will result in embarrassment to the operations of government.[98] However, the general rule has no application where there has been fraud or collusion on the part of the public officer in the performance of his duty,[99] and an injunction may be issued in case of a gross abuse of discretion,[1] but to constitute an abuse of such discretion it must appear that it was exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable.[2]

S. 604, 83 L.Ed. 884—Ambruster v. Mellon, 41 F.2d 430, 59 App.D.C. 341—Tidal Osage Oil Co. v. West, 30 F.2d 737, 58 App.D.C. 327, certiorari denied Tidal Osage Oil Co. v. Wilbur, 49 S.Ct. 351, 279 U.S. 855, 73 L.Ed. 997.

Fla.—Johnson v. McNeill, 10 So.2d 143, 151 Fla. 606—Ruff v. Fisher, 153 So. 642, 115 Fla. 247—Hathaway v. Monroe, 119 So. 149, 97 Fla. 28.

Ga.—Stevenson v. Weekes, 171 S.E. 710, 177 Ga. 867.

Idaho.—Fritchman v. Athey, 211 P. 1080, 36 Idaho 560.

Ill.—Stewart v. Department of Public Works and Buildings, 168 N.E. 372, 336 Ill. 513.

Kan.—City of Emporia v. Humphrey, 297 P. 712, 716, 132 Kan. 682, citing **Corpus Juris,** and rehearing denied 299 P. 950, 133 Kan. 176.

Ky.—Meade County Board of Education v. Powell, 71 S.W.2d 638, 640, 254 Ky. 352, quoting **Corpus Juris.**

Nev.—Public Service Commission v. Eighth Judicial Dist. Court in and for Clark County, 123 P.2d 237, 61 Nev. 245.

Ohio.—Conway v. Cull, 11 Ohio Supp. 1.

Okl.—Moore v. Porterfield, 257 P. 307, 125 Okl. 217—Moore v. Porterfield, 241 P. 346, 348, 113 Okl. 234, citing **Corpus Juris.**

Or.—Caples v. McNaught, 31 P.2d 780, 147 Or. 72.

Tex.—Angelo v. Brown, Civ.App., 139 S.W.2d 197—Speed v. Keys, Civ. App., 110 S.W.2d 1245.

Va.—Yoder v. Givens, 18 S.E.2d 880, 179 Va. 229.

32 C.J. p 242 note 70.

Interference by court of equity with exercise by public officers of discretionary powers generally see Equity § 65.

90. Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.

Okl.—Moore v. Porterfield, 257 P. 307, 125 Okl. 217.

32 C.J. p 242 note 70.

Arbitrary conduct

Courts with equity jurisdiction have power to relieve against injuries resulting from conduct of officer so oppressive, arbitrary, and capricious as to amount to fraud.—State v. Mowry, 237 P. 1032, 119 Kan. 74.

91. Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.

La.—Chiro v. Fourth Jefferson Drainage Dist., 105 So. 556, 159 La. 471.

Okl.—Moore v. Porterfield, 257 P. 307, 125 Okl. 217—Moore v. Porterfield, 241 P. 346, 348, 113 Okl. 234, citing **Corpus Juris.**

32 C.J. p 242 note 71.

92. Ala.—Lehmann v. State Board of Public Accountancy, 94 So. 94, 208 Ala. 185, affirmed 44 S.Ct. 128, 263 U.S. 394, 68 L.Ed. 354.

Determinations involving mixed questions of law and fact, however, are subject to judicial review.—Cameron v. State Highway Commission, 123 S.E. 465, 188 N.C. 84.

93. N.Y.—Nathan v. O'Brien, 102 N. Y.S. 947, 117 App.Div. 664.

94. Tex.—Shivers v. Stovall, Civ. App., 75 S.W.2d 276, 282, quoting **Corpus Juris,** and affirmed Stovall v. Shivers, 103 S.W.2d 363, 129 Tex. 256.

32 C.J. p 243 note 74.

Wisdom or policy of official action may not be a predicate for an injunction when the action taken does not involve illegality or a palpable abuse of authority amounting to illegality.

Ala.—Goodwin v. State Board of Administration, 102 So. 718, 212 Ala. 453.

Fla.—Hathaway v. Munroe, 119 So. 149, 97 Fla. 28.

95. Mo.—Kearney v. Laird, 144 S. W. 904, 164 Mo.App. 406.

96. U.S.—Louisiana v. McAdoo, 34 S.Ct. 938, 234 U.S. 627, 58 L.Ed. 1506.

97. Hawaii.—McCandless v. Carter, 18 Hawaii 269.

32 C.J. p 243 note 77.

98. Conn.—Coombs v. Larson, 152 A. 297, 112 Conn. 236.

99. Ala.—Salter v. Board of Education of Jefferson County, 159 So. 78, 79, 229 Ala. 631, citing **Corpus Juris.**

32 C.J. p 243 note 78.

1. Ala.—Salter v. Board of Education of Jefferson County, supra, citing **Corpus Juris.**

Mich.—Reed v. Civil Service Commission, 3 N.W.2d 41, 301 Mich. 137.

Ohio.—Conway v. Cull, 11 Ohio Supp. 1.

Okl.—Moore v. Porterfield, 241 P. 346, 348, 113 Okl. 234, citing **Corpus Juris.**

32 C.J. p 243 note 79.

2. Colo.—Rio Grande County v. Lewis, 65 P. 51, 28 Colo. 378.

Tex.—Hunt County Permanent Road Comrs. v. Johnson, Civ.App., 231 S.W. 859, 860.

"Arbitrariness" of executive officer controllable by injunction consists in conduct or acts based alone on his will, and not on reasoning or judgment; if matter involves controversy concerning which reasonable and experienced men differ, authority is not arbitrarily exercised.—Boyle v. Rock Island Coal Mining Co., 256 P. 883, 125 Okl. 137.

Malice or motive

(1) Equity will not restrain where there is mere abuse of power on the part of a public officer in doing, from a wrong motive or to accomplish an ulterior purpose, that which the law authorizes.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F. 2d 665, affirming, D.C., 19 F.Supp. 932, certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed. 381.

(2) The mere fact that a public officer hates a person and may be glad to see him suffer as a consequence of that officer's official act is not enough to justify interference by the courts, but the rule is other-

c. Injury Sustained and Lack of Other Remedy

Complainant must show, before he can secure an injunction against the acts of a public officer, that such acts will result in irreparable injury to him and that there is no other adequate remedy available.

To be entitled to an injunction against a public officer or board, complainant must show that the illegal acts complained of will result in irreparable injury to himself,[3] or will require a multiplicity of suits at law to obtain redress.[4] Courts, however, are reluctant to grant injunctive relief against public officers,[5] and an injunction will not be granted where the injury is slight or doubtful,[6] or where on the facts the right to the injunction is doubtful.[7] Mere apprehension of unauthorized acts by public officers will not authorize the issuance of an injunction,[8] but the prevention by injunction of impending injury by unlawful official action is proper,[9] and an officer may be enjoined from proceeding illegally whenever he threatens to, or is about to, proceed in that manner.[10] Even where the right to an injunction might otherwise exist, the court may properly refuse it by reason of plaintiff's acquiescence in the acts complained of,[11] or because of acts raising an estoppel against him.[12]

The rights which will be protected by injunction

wise where the officer acts in bad faith, with malice, and from no purpose except to injure another.—Speyer v. School Dist. No. 1, City and County of Denver, 261 P. 859, 82 Colo. 534.

3. U.S.—State of California v. Latimer, Cal., 59 S.Ct. 166, 305 U.S. 255, 83 L.Ed. 159—Pughe v. Lyle, D.C.Cal., 10 F.Supp. 245, 248, citing **Corpus Juris**—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., D.C.Okl., 6 F.Supp. 893, vacated on other grounds 54 S.Ct. 732, 292 U.S. 386, 78 L.Ed. 1318—Starring v. Frazier, D.C.Tenn., 4 F. Supp. 818.
Cal.—Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans, v. Board of Sup'rs of Butte County, 277 P. 500, 98 Cal. App. 585.
Fla.—Williams v. Public Utility Protective League of Florida, 178 So. 286, 130 Fla. 603.
Ga.—Barber v. Housing Authority of City of Rome, 5 S.E.2d 425, 189 Ga. 155.
Ill.—Litzelman v. Town of Fox, 1 N. E.2d 915, 285 Ill.App. 7.
Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.
N.J.—Brex v. Smith, 146 A. 34, 35, 104 N.J.Eq. 386, quoting **Corpus Juris.**
N.Y.—Lair v. Grant, 244 N.Y.S. 427, 137 Misc. 470.
N.D.—Lockwood v. Baird, 231 N.W. 851, 59 N.D. 713.
Tex.—Los Angeles Heights Independent School Dist. v. Chestnut, Civ.App., 287 S.W. 693.
Wash.—State ex rel. Hays v. Wilson, 137 P.2d 105, 17 Wash.2d 670.
Wis.—Hobbins v. Hannan, 202 N.W. 800, 186 Wis. 284.
32 C.J. p 240 note 51, p 245 note 7.

Definite property right

It is the general and perhaps the universal rule that public officers will be enjoined from the enforcement of state or federal laws only when the party seeking such injunction has a definite property right which will, without such relief, be damaged or destroyed.—Brandenburg v. Doyle, D.C.Ill., 12 F.Supp. 342.

Deprivation of patronage

Generally, no person in any business has such an interest in possible customers as to enable him to restrain the exercise of a proper power by the state on the ground that he will be deprived of patronage; but this rule is inapplicable to one asking protection against unlawful interference with patrons and the consequent destruction of his business and property.—Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, Or., 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L. R. 468, affirming, D.C., Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 P. 928.

Injury distinct from that suffered by others

To entitle one to relief against real or imaginary injuries from unauthorized acts of public officials, he must bring his case under some acknowledged head of equity jurisdiction and show what special injury he will sustain thereby distinct from that suffered by others.—Metropolis Pub. Co. v. City of Miami, 129 So. 913, 100 Fla. 784—Rickman v. Whitehurst, 72 Fla. 152, 74 So. 205.

Person, property, or reputation

One may enjoin injury to his person, property, or reputation done by public officers claiming to act under legal authority.—McKee v. Hogan, 110 So. 775, 145 Miss. 747.

Substantial nature

Complainant must show that the injury is of a substantial nature.
Mich.—Brown v. Gardner, Harr. 291.
N.H.—Brown v. Reding, 50 N.H. 336.
32 C.J. p 245 note 8.

4. U.S.—Pughe v. Lyle, D.C.Cal., 10 F.Supp. 245, 248, citing **Corpus Juris.**
Fla.—City of Jacksonville v. Giller, 135 So. 549, 102 Fla. 92.
Ga.—Jones v. Nethvin, 17 S.E.2d 172, 193 Ga. 17.
Ind.—Sweigart v. State, 12 N.E.2d 134, 137, 213 Ind. 157, 114 A.L.R. 1117, citing **Corpus Juris.**
N.J.—Brex v. Smith, 146 A. 34, 35, 104 N.J.Eq. 386, quoting **Corpus Juris.**
32 C.J. p 241 note 52.

5. U.S.—Brandenburg v. Doyle, D. C.Ill., 12 F.Supp. 342.
Tex.—Shivers v. Stovall, Civ.App., 75 S.W.2d 276, affirmed Stovall v. Shivers, 103 S.W.2d 363, 129 Tex. 256.

6. Miss.—Meek v. Humphreys County, 97 So. 674, 133 Miss. 386.
32 C.J. p 241 note 58.

7. Ga.—Ennis v. Pollock, 84 S.E. 539, 143 Ga. 252—Glaze v. Bogle, 27 S.E. 969, 97 Ga. 840.

8. U.S.—Stork Restaurant Corporation v. McCampbell, D.C.N.Y., 55 F. 2d 687—Kelley v. Kavanaugh, D.C. N.Y., 3 F.Supp. 666, 667, citing **Corpus Juris.**
Fla.—Hernandez v. Board of Com'rs of Hillsborough County, 153 So. 790, 114 Fla. 219.
Va.—Yoder v. Givens, 18 S.E.2d 380, 179 Va. 229.
32 C.J. p 241 note 61.

9. U.S.—Work v. State of Louisiana, 46 S.Ct. 92, 269 U.S. 250, 70 L.Ed. 259, modifying Fall v. State of Louisiana, 287 F. 999, 53 App.D.C. 22—Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, Or., 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468, affirming, D.C., Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 F. 928.

10. U.S.—New Hampshire Gas & Electric Co. v. Morse, D.C.N.H., 42 F.2d 490.
Kan.—State v. Miley, 243 P. 262, 120 Kan. 321.

11. Ind.—Sunderland v. Martin, 15 N.E. 689, 113 Ind. 411.

12. Ind.—Stewart v. Beck, 90 Ind. 458.

may belong to the public,[13] individuals,[14] or corporations.[15] Ordinarily, however, before an individual can maintain an action to restrain a public officer or board he must show individual injury or special damage peculiar to himself.[16]

Complainant must show also that there is no other available adequate remedy.[17] Where the action of the officer amounts to a mere trespass, for which the remedy at law is adequate, no injunction will be granted.[18] So where there is a remedy by certiorari,[19] appeal,[20] mandamus,[21] or writ of prohibition,[22] or where another remedy is provided by statute,[23] no injunction should be granted.

Taxpayers have the right to restrain public servants from transcending their lawful powers, or violating their legal duties in any unauthorized mode, which will increase the burden of taxation or otherwise injuriously affect the taxpayers or their property.[24]

Completed wrongs. An injunction against a public officer or board lies only to prevent threatened injury, and has no application to wrongs which have been committed.[25]

Temporary injunctions. A temporary injunction against public officers and boards and municipalities may be granted where it is necessary to preserve the property in status quo during the pendency of the suit in which the rights to it are to be decided.[26] The issuance of such a temporary injunction rests in the sound discretion of the trial court guided by established rules and principles of equity jurisprudence.[27] Preliminary restraint against public officers should not be ordered unless on the pressure of urgent necessity,[28] and ordinarily a temporary injunction against public officers will be refused where plaintiff's right to an injunction is doubtful[29] or is based on facts determinable only by trial.[30] To justify a temporary injunction against a public officer or board, danger of irreparable injury to plaintiff must be shown.[31] Where great and irreparable injury may be done private citizens by officers acting under a mistaken belief of their authority,[32] or by the unlawful acts of public offi-

13. Or.—Taylor Sands Fishing Co. v. State Land Board, 108 P. 126, 56 Or. 157.
32 C.J. p 241 note 54.

The state has the right to commence a suit to enjoin illegal acts on the part of an officer.—State v. Miley, 243 P. 262, 120 Kan. 321.

14. Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
32 C.J. p 241 note 55.

15. Or.—Sandys v. Williams, 80 P. 642, 46 Or. 327.

16. N.Y.—New York League for Separation of Church and State v. Graves, 10 N.Y.S.2d 142, 170 Misc. 196.

17. U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529.
Ill.—Cann v. City of Chicago, 241 Ill. App. 21.
N.D.—Lockwood v. Baird, 231 N.W. 851, 59 N.D. 713.
Wis.—Ritholz v. Ammon, 4 N.W.2d 173, 240 Wis. 578.
32 C.J. p 245 note 9.

18. U.S.—Herron v. Runkle, C.C. Tenn., 12 F.Cas.No.6,428.
Fla.—Baldwin v. Tucker, 16 Fla. 258.

19. Fla.—Ruff v. Fisher, 155 So. 642, 115 Fla. 247.
32 C.J. p 246 note 11.

20. Ky.—Polsgrove v. Moss, 157 S. W. 1133, 154 Ky. 408.
32 C.J. p 246 note 12.

21. Cal.—Moore v. Superior Court in and for Contra Costa County, 57 P.2d 1314, 1315, 6 Cal.2d 421, citing **Corpus Juris.**
32 C.J. p 246 note 13.

However, it has been held that where the proceedings are void injunction or mandamus will lie, as one or the other may be appropriate to the relief sought.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.

22. N.Y.—Ward v. Kelsey, 14 Abb. Pr. 106.

23. Iowa.—Drennen v. Olmstead, 275 N.W. 884, 224 Iowa 85.
Or.—Stangler v. Goad, 97 P.2d 191, 163 Or. 314.
32 C.J. p 246 note 15.

24. La.—Donaldson v. Police Jury of Tangipahoa Parish, 109 So. 34, 161 La. 471.

25. Cal.—Vincent Petroleum Corporation v. Culver City, 111 P.2d 433, 43 Cal.App.2d 511.
Ga.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683.

26. Tex.—Peeples v. Nagel, Civ. App., 137 S.W.2d 1064, error dismissed, judgment correct—Texas Milk Products Co. v. City of Mt. Pleasant, Civ.App., 55 S.W.2d 1101.

27. Fla.—Reaves v. Sadler, 189 So. 41, 136 Fla. 553—Wells v. Cochrane, 188 So. 87, 137 Fla. 241.

Injunction held properly denied
Ky.—Goodwin v. Anderson, 106 S.W. 2d 152, 269 Ky. 11.
Tex.—Garland v. Sanders, Civ.App., 114 S.W.2d 302, error dismissed.

28. Ill.—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.
N.J.—Pappas v. Meyer, 130 A. 834, 98 N.J.Eq. 18.
Pa.—Randall v. City of Clairton, 10 A.2d 779, 337 Pa. 276, reversing 88 Pittsb.Leg.J. 1, 31 Mun.L.R. 83.

Denial held proper
La.—Martin v. City of Lafayette, 110 So. 415, 162 La. 262.
Tex.—Williams v. De Fee, Civ.App., 77 S.W.2d 729—Booth v. Board of Education of Fort Worth Independent School Dist., Civ.App., 70 S.W.2d 350.

29. U.S.—Pocahontas Fuel Co. v. Early, D.C.Va., 13 F.Supp. 605.

30. U.S.—Interstate Power Co. v. City of Cushing, D.C.Okl., 12 F. Supp. 806, appeal dismissed, C.C. A., 82 F.2d 1012.

31. U.S.—American Mercury v. Kiely, C.C.A.N.Y., 19 F.2d 295.
N.Y.—Acorn Employment Service v. Moss, 24 N.Y.S.2d 669, 261 App.Div. 178, appeal denied 26 N.Y.S.2d 315, 261 App.Div. 897.

Local effect of removal of railroad shops are considerations entitled to weight on railroad's application for interlocutory injunction to restrain interference by state authorities.—Lawrence v. St. Louis-San Francisco Ry. Co., Okl., 47 S.Ct. 720, 274 U.S. 588, 71 L.Ed. 1219.

32. Cal.—Brock v. Superior Court in and for Los Angeles County, 81 P. 2d 931, 11 Cal.2d 682, followed in 81 P.2d 934, 11 Cal.2d 781—Agricultural Prorate Commission v. Superior Court in and for Los Angeles County, 55 P.2d 495, 5 Cal.2d 550—Agricultural Prorate Co. of California v. Superior Court in and for

cers,[33] or where great confusion will result if the officers are not temporarily restrained,[34] a temporary injunction may issue to preserve the status quo pending the determination of the litigation.

d. Police Officers

Police officers will not be enjoined from performing their proper duties.

Police officers will not be enjoined from performing their proper duties in the exercise of the general police power,[35] even though the acts may be performed in an oppressive and unlawful way.[36] The remedy is ordinarily by action for damages,[37] or by a criminal prosecution.[38] In accordance with this rule, a system of picketing or espionage of a person's place of business by the police will not be enjoined where the officers had reasonable grounds to believe that plaintiff was violating the law.[39]

Where, however, it is shown that illegal acts of police officers will result in irreparable injury to the property rights of complainant,[40] or will result in

Sonoma County, 88 P.2d 253, 31 Cal.App.2d 518.
Pa.—WCAU Broadcasting Co. v. Driscoll, 46 Dauph.Co. 293.

33. Fla.—City of Jacksonville v. Giller, 135 So. 549, 102 Fla. 92.

34. U.S.—Truax-Traer Coal Co. v. National Bituminous Coal Commission, C.C.A., 95 F.2d 218.

35. U.S.—Chambers v. Bachtel, C.C. A.Tex., 55 F.2d 851.
Ala.—Eastburn v. Holcombe, 10 So.2d 457, 243 Ala. 433—Caudle v. Cotton, 173 So. 847, 234 Ala. 126—Higdon v. McDuff, 172 So. 636, 233 Ala. 497.
Ill.—Coleman v. City of Chicago, 17 N.E.2d 365, 297 Ill.App. 130.
Iowa.—Des Moines Drug Co. v. Doe, 211 N.W. 694, 202 Iowa 1162.
Ky.—Strand Amusement Co. v. City of Owensboro, 47 S.W.2d 710, 242 Ky. 772.
La.—Tonahill v. Molony, 101 So. 130, 156 La. 753.
Mass.—Harmon v. Commissioner of Police of Boston, 174 N.E. 198, 274 Mass. 56—Morley v. Wilson, 159 N. E. 41, 261 Mass. 269, certiorari denied 48 S.Ct. 320, 276 U.S. 625, 72 L.Ed. 738.
Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
N.J.—Dell Pub. Co. v. Beggans, 158 A. 765, 110 N.J.Eq. 72—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
N.Y.—Biddles, Inc., v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766, affirming 203 N.Y.S. 920, 208 App.Div. 790—International Mutoscope Reel Co. v. Valentine, 286 N. Y.S. 806, 247 App.Div. 130, affirmed 3 N.E.2d 453, 271 N.Y. 622, amendment of remittitur denied 3 N.E.2d 885, 272 N.Y. 494—Alexander v. Enright, 206 N.Y.S. 785, 211 App.Div. 146—Oriental Merchants Ass'n of Harlem v. Valentine, 3 N.Y.S.2d 229, 167 Misc. 373—Kalwin Business Men's Ass'n v. McLaughlin, 214 N.Y.S. 99, 126 Misc. 698, reversed on other grounds 214 N.Y.S. 507, 216 App. Div. 6—St. Malachy's Home v. Hylan, 200 N.Y.S. 856, 121 Misc. 344—Fusaro v. McKennell, 198 N.Y.S. 719, 120 Misc. 434.
Ohio.—Nickles v. Echelberger, App., 31 N.E.2d 474—Lyons v. City of Cincinnati, 9 N.E.2d 988, 55 Ohio App. 458—Snyder v. City of Alliance, 179 N.E. 426, 41 Ohio App. 48, error dismissed 181 N.E. 880, 124 Ohio St. 665.
Okl.—Board of Trustees of Town of Canton v. Gunning, 130 P.2d 817, 191 Okl. 448—Colbert v. Superior Confection Co., 6 P.2d 791, 154 Okl. 28—Callison v. Kirkpatrick, 292 P. 54, 57, 145 Okl. 132, quoting **Corpus Juris**—Stout v. Pardoe, 261 P. 366, 367, 128 Okl. 3, quoting **Corpus Juris.**
S.C.—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347—Charleston Oil Co. v. Poulnot, 141 S.E. 454, 143 S.C. 283, 60 A.L.R. 750.
Tenn.—V. E. Schevenell Const. Co. v. City of Memphis, 8 Tenn.App. 22.
Tex.—Martinez v. Kilday, Civ.App., 117 S.W.2d 151—Speed v. Keys, Civ.App., 110 S.W.2d 1245.
32 C.J. p 261 note 33.
Restraining arrests see infra § 160.
Restraining searches by police officers, see infra § 156.

Arrests on premises

Business man having customers whom police believe guilty of crimes may not enjoin arrest of such persons on his premises.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris** as to text rule.

Port commissioners

The statutes creating the board of commissioners of the port of New Orleans, and creating a police department for the port and placing it under the authority of the board of commissioners, make the police power of the board over the docks and wharves as immune from interference by injunction as is the police power of the municipal council throughout the city.—Keegan v. Board of Com'rs of Port of New Orleans, 98 So. 50, 154 La. 639.

36. Ill.—Jackie Cab Co. v. Chicago Park District, 9 N.E.2d 213, 216, 366 Ill. 474, 112 A.L.R. 1410, citing **Corpus Juris.**
Ky.—City of Louisville v. Lougher, 272 S.W. 748, 209 Ky. 299.
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
Okl.—Callison v. Kirkpatrick, 292 P. 54, 57, 145 Okl. 132, quoting **Corpus Juris**—Stout v. Pardoe, 261 P. 366, 367, 128 Okl. 3, quoting **Corpus Juris.**
32 C.J. p 261 note 34.

37. Iowa.—Joyner v. Hammond, 200 N.W. 571, 572, 199 Iowa 919, 36 A. L.R. 934, citing **Corpus Juris.**
Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
Okl.—Stout v. Pardoe, 261 P. 366, 367, 128 Okl. 3, quoting **Corpus Juris.**
32 C.J. p 261 note 35.

38. Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
Okl.—Stout v. Pardoe, 261 P. 366, 367, 128 Okl. 3, quoting **Corpus Juris.**
32 C.J. p 261 note 36.

39. Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
N.Y.—Oriental Merchants Ass'n of Harlem v. Valentine, 3 N.Y.S.2d 229, 167 Misc. 373—Kalwin Business Men's Ass'n v. McLaughlin, 214 N.Y.S. 99, 126 Misc. 698, reversed on other grounds 214 N.Y.S. 507, 216 App.Div. 6.
Ohio.—Monfrino v. Gutelius, 33 N.E. 2d 1003, 66 Ohio App. 293.
32 C.J. p 262 note 42.

40. U.S.—Healy v. Ratta, C.C.A.N. H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459, and reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248.
Cal.—Pavilion Ice Rink v. O'Brien, 212 P. 631, 60 Cal.App. 182.
Fla.—Lee v. Beach Pub. Co., 173 So. 440, 127 Fla. 600.
Md.—Gaither v. Cate, 144 A. 239, 156 Md. 254.
Minn.—National Cab Co. v. Kunze, 233 N.W. 838, 840, 182 Minn. 152, citing **Corpus Juris.**
Mo.—Russo v. Miller, 3 S.W.2d 266,

irreparable injury to fundamental personal rights,[41] of complainant, if an injunction is not issued, injunctive relief may be available, as where continued unlawful trespasses are committed under the guise of preventing violations of the law,[42] or where no claim is made that violations of law had ever been committed on the premises,[43] or where there is nothing more than the suggestion of a suspicion that the law had even been violated on the premises.[44] Courts should be slow in issuing injunctions against police officers,[45] and the writ should issue only in cases where a clear right to such relief is established.[46] An injunction will not issue on a mere apprehension that police officers will commit an unlawful act.[47]

The general rule prohibiting the issuance of injunctions to prevent the doing of an act that has already been performed applies in respect of unlawful acts committed by police officers. The mere fact that they have committed unlawful acts will not authorize an injunction against them where there is no showing that a repetition of the acts is threatened.[48]

Assistance in law violations. Under the rule that he who comes into equity must come with clean hands,[49] an injunction will not issue against police officers in order to assist complainant in violating the law.[50]

269, 221 Mo.App. 292, citing **Corpus Juris.**
N.J.—Miller v. Atlantic City, 162 A. 143, 111 N.J.Eq. 260.
N.Y.—Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766, affirming 203 N.Y.S. 920, 208 App.Div. 790.
Ohio.—Monfrino v. Gutelius, 33 N.E. 2d 1003, 66 Ohio App. 293—Nickles v. Echelberger, App., 31 N.E.2d 474—Snyder v. City of Alliance, 179 N.E. 426, 41 Ohio App. 48, error dismissed 181 N.E. 880, 124 Ohio St. 665.
Okl.—Newman v. Ardmore Rod & Gun Club, 125 P.2d 191, 190 Okl. 470—Stout v. Pardoe, 261 P. 366, 128 Okl. 3.
Pa.—Cohen v. Schofield, 13 Pa.Dist. & Co. 145, 157, citing **Corpus Juris,** and affirmed 149 A. 710, 299 Pa. 496—Penn Beverage Co. v. Mackey, 12 Pa.Dist. & Co. 280.
Tex.—Gurtov v. Williams, Civ.App., 105 S.W.2d 328, error dismissed.
32 C.J. p 261 note 37.

Conversely, peace officers will not be interfered with where no irreparable loss will follow from a failure to enjoin.—Eastburn v. Holcombe, 10 So.2d 457, 243 Ala. 433.

General rule against injunction against police officer applies only when officers are engaged in performance of proper duties in the exercise of the general police power, and not when they have no duty to perform.—City of Louisville v. Lougher, 272 S.W. 748, 209 Ky. 299.

41. Va.—Thompson v. Smith, 154 S. E. 579, 155 Va. 367, 71 A.L.R. 604.

42. Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
32 C.J. p 261 note 38.

43. Mo.—Russo v. Miller, supra, citing **Corpus Juris.**
N.Y.—Olms v. Bingham, 193 N.Y.S. 1196, 118 App.Div. 894.

44. Mo.—Russo v. Miller, 3 S.W.2d 266, 269, 221 Mo.App. 292, citing **Corpus Juris.**
32 C.J. p 261 note 40.

45. Mo.—Oliver v. Orrick, 288 S.W. 966, 220 Mo.App. 614.

46. N.Y.—Triangle Mint Corporation v. Mulrooney, 177 N.E. 420, 257 N.Y. 200, affirming 248 N.Y.S. 880, 232 App.Div. 783—Kelly-Sullivan, Inc. v. Moss, 22 N.Y.S.2d 491, 174 Misc. 1098, affirmed 24 N.Y.S.2d 984, 260 App.Div. 921—Lyttle v. Valentine, 290 N.Y.S. 11, 160 Misc. 355.

47. R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.

48. Ill.—Bruner v. Courtney, 3 N.E. 2d 150, 285 Ill.App. 584.
32 C.J. p 262 note 44.

49. N.J.—American League of Friends of New Germany of Hudson County v. Eastmead, 174 A. 156, 116 N.J.Eq. 487.

50. Ariz.—Corbin v. Rodgers, 35 P. 2d 59, 53 Ariz. 35.
Ga.—United Liquors v. Legg, 191 S. E. 376, 184 Ga. 411.
Ky.—Strand Amusement Co. v. City of Owensboro, 47 S.W.2d 710, 242 Ky. 772.
Miss.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.
Ohio.—Monfrino v. Gutelius, 33 N.E. 2d 1003, 66 Ohio App. 293—Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 64 Ohio App. 105, affirmed 30 N.E.2d 799, 137 Ohio St. 460—Ohio Amusement Co. v. Marks, 15 N.E.2d 175, 57 Ohio App. 529.
Tex.—Angelo v. Brown, Civ.App., 139 S.W.2d 197.
32 C.J. p 262 note 41.
Injunctions, effect of which would be to further criminal or illegal acts see supra § 33.
Preventing enforcement of rights acquired by crime see infra § 154.

Illegal meetings

It appearing that complainant has used its meetings in order to break the law, equity will not restrain police interference in order to aid it to hold more meetings.—American League of Friends of New Germany of Hudson County v. Eastmead, 174 A. 156, 116 N.J.Eq. 487.

Slot machines

(1) The owners of slot machines which are gambling devices, or which may easily be converted into gambling devices, are not entitled to an injunction restraining seizure and confiscation thereof.
U.S.—Chambers v. Bachtel, C.C.A. Tex., 55 F.2d 851.
Colo.—Walker v. Begole, 63 P.2d 1224, 99 Colo. 471.
Ill.—Guarnera v. Lee County, 1 N.E. 2d 98, 285 Ill.App. 238. See Harder v. County of Ogle, 281 Ill.App. 613.
Md.—Gaither v. Cate, 144 A. 239, 156 Md. 254.
N.J.—Pure Mint Co. v. Labarre, 125 A. 105, 96 N.J.Eq. 186.
Ohio.—Brassel v. Benham, App., 32 N.E.2d 482—Snyder v. City of Alliance, 179 N.E. 426, 41 Ohio App. 48, error dismissed 181 N.E. 880, 124 Ohio St. 665—Snyder v. McCune, 28 Ohio N.P.,N.S., 506.
Or.—Stangier v. Goad, 97 P.2d 191, 163 Or. 314.
S.C.—Harvie v. Heise, 148 S.E. 66, 150 S.C. 277, appeal dismissed Wilson v. McLane, 49 S.Ct. 351, 279 U.S. 822, 73 L.Ed. 976, appeal dismissed and certiorari denied Superior Confection Co. v. Craig, 49 S.Ct. 478, 279 U.S. 824, 73 L.Ed. 977, and appeal dismissed Adler v. Rector, 49 S.Ct. 480, 279 U.S. 876, 73 L.Ed. 1010.

(2) Before equity can restrain the seizure of mint-vending machines which discharge metal tokens, it must affirmatively appear that such property is legal, and not used as

§ 109. Federal or State Boards and Officers

a. Federal officers or boards
b. State officers or boards

a. Federal Officers or Boards

Injunction will not issue to control the action of federal officers or boards in the exercise of their powers, but acts beyond their authority or powers may be enjoined where irreparable injury will result therefrom to a complainant who has no adequate remedy at law.

The general rule is that the judicial power will not interpose by injunction to limit or direct the action of departmental officers of the federal government in respect of matters pending within their jurisdiction and control.[51] If engaged in the performance of a duty which involves the exercise of either judgment or discretion, they are entitled to protection from interference by the judicial power.[52] On the other hand, exemption of the United States from suit does not protect its officers from personal liability to persons whose rights to property they have invaded by acts not within the scope of their authority,[53] or from injunctive process where their ultra vires acts will result in irreparable injury,[54] or where their ultra vires acts will re-

medium of fraud with petitioner's knowledge.—Green v. Hart, D.C. Conn., 41 F.2d 855.

(3) Owners of slot machines seized by sheriffs have an adequate legal remedy in claim and delivery, precluding injunction.

U.S.—Durant v. Bennett, D.C.S.C., 54 F.2d 634.

S.C.—State v. Kizer, 162 S.E. 444, 164 S.C. 383, 81 A.L.R. 722.

(4) Where it is doubtful whether a vending machine is a gambling device, the court may decline to issue an injunction and may properly leave the question for the law courts to determine.

D.C.—White v. Hesse, 48 F.2d 1018, 60 App.D.C. 106.

Fla.—Sweat v. Daley, 156 So. 720, 116 Fla. 755.

Okl.—Callison v. Kirkpatrick, 292 P. 54, 145 Okl. 132.

(5) The owner of a vending machine which is not a gambling device, however, is entitled to enjoin an illegal seizure thereof.—Mills Novelty Co. v. Farrell, C.C.A.Conn., 64 F.2d 476, affirming, D.C., 3 F.Supp. 555—Mills Novelty Co. v. Bolan, D.C. N.Y., 3 F.Supp. 968, affirmed, C.C.A., Mills Novelty Co. v. O'Ryan, 68 F.2d 1009, certiorari granted O'Ryan v. Mills Novelty Co., 54 S.Ct. 629, 292 U.S. 615, 78 L.Ed. 1474, reversed on other grounds 54 S.Ct. 779, 292 U.S. 609, 78 L.Ed. 1469.

Slot machines as gambling devices generally see Gaming § 1 g.

51. U.S.—Hegeman Farms Corporation v. Baldwin, N.Y., 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259, affirming, D.C., 6 F.Supp. 297—Newfield v. Ryan, C.C.A.Fla., 91 F.2d 700, certiorari denied Ryan v. Newfield, 58 S.Ct. 54, two cases, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, two cases, 302 U.S. 650, 82 L.Ed. 504—Ballentine v. Florida Tex Oil Co., C.C.A.Fla., 91 F.2d 700, certiorari denied Florida Tex Oil Co. v. Ballentine, 58 S.Ct. 54, 30 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, 302 U.S. 650, 82 L.Ed. 504—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F.2d 288, certiorari denied 55 S. Ct. 119, 293 U.S. 603, 79 L.Ed. 695—Cooley v. Bergin, D.C.Mass., 27 F.2d 930—Ferris v. Wilbur, C.C.A. Va., 27 F.2d 262, 264, citing **Corpus Juris**—Alpirn v. Huffman, D.C. Neb., 49 F.Supp. 337—Drumheller v. Berks County Local Board No. 1 of Selective Service System, D.C. Pa., 43 F.Supp. 881, affirmed, C. C.A., Drumheller v. Berks County Local Board No. 1, 130 F.2d 610—London Guarantee & Accident Co. v. Rhoades, D.C.La., 39 F.Supp. 589—Totus v. U. S., D.C.Wash., 39 F. Supp. 7—Stewart v. Yellowtail, D. C.Mont., 35 F.Supp. 798—Z. & F. Assets Realization Corporation v. Hull, D.C.D.C., 31 F.Supp. 371, affirmed 114 F.2d 464, 72 App.D.C. 234, certiorari granted 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, and American Hawaiian S. S. Co. v. Hull, 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, affirmed Z. & F. Assets Realization Corporation v. Hull, 61 S.Ct. 351, 311 U.S. 470, 85 L.Ed. 288—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491—Svenson v. Coe, 101 F.2d 684, 69 App.D.C. 359—Dunn v. O'Connor, 89 F.2d 820, 67 App.D.C. 76.

32 C.J. p 246 note 16.

Injunction against secretary of interior to control judgment as to cancellation of lease of Indian lands see Indians § 57.

Issuance of injunction against National Labor Relations Board see infra § 138.

State courts have no power of supervision or regulation over the administration of the internal affairs of a federal agency or to interfere with the performance of its functions by those to whom this duty has been intrusted by the acts of congress.—Parry v. Delaney, 37 N.E. 2d 249, 310 Mass. 107.

52. U.S.—Ferris v. Wilbur, C.C.A. Va., 27 F.2d 262, 264, citing **Corpus Juris**—Barr v. Rhodes, D.C. Ky., 35 F.Supp. 223—Caplis v. Helvering, D.C.N.Y., 4 F.Supp. 181.

D.C.—Utah Fuel Co. v. National Bituminous Coal Commission, 101 F. 2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362, affirmed 59 S.Ct. 409, 306 U.S. 56, 83 L.Ed. 483—U. S. ex rel. American Gas-Accumulator Co. v. Coe, 84 F.2d 398, 66 App.D. C. 21—Ambruster v. Mellon, 41 F. 2d 430, 59 App.D.C. 341—Tidal Osage Oil Co. v. West, 30 F.2d 737, 58 App.D.C. 327, certiorari denied Tidal Osage Oil Co. v. Wilbur, 49 S.Ct. 351, 279 U.S. 855, 73 L.Ed. 997.

32 C.J. p 246 note 17.

Wartime requisitions

Under statute authorizing president during national emergency to requisition machinery, tools, or materials whenever president determines use thereof is needed for national defense, even if executive determination that all other means of obtaining use of property on fair and reasonable terms had been exhausted was erroneous, court could not grant injunctive relief.—Alpirn v. Huffman, D.C.Neb., 49 F.Supp. 337.

53. U.S.—Philadelphia Co. v. Stimson, App.D.C., 32 S.Ct. 340, 223 U. S. 605, 56 L.Ed. 570.

54. U.S.—Utah Fuel Co. v. National Bituminous Coal Commission, 59 S. Ct. 409, 306 U.S. 56, 83 L.Ed. 483, affirming 101 F.2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362—State of Colorado v. Toll, Colo., 45 S.Ct. 505, 268 U.S. 228, 69 L. Ed. 927—Noce v. Edward E. Morgan Co., C.C.A.Ark., 106 F.2d 746—Shields v. Utah Idaho Cent. R. Co., C.C.A.Utah, 95 F.2d 911, certiorari granted 58 S.Ct. 1055, 304 U.S. 556, 82 L.Ed. 1524, reversed on other grounds 59 S.Ct. 160, 305 U.S. 177, 83 L.Ed. 111—Gibson Howell Co. v. Helvering, C.C.A.N.

sult in a multiplicity of suits.[55] In these circumstances the suit is not one against the United States,[56] but to restrain the ultra vires act of its officer.[57] Although federal officers or agencies may by injunction be compelled to perform ministerial duties,[58] as a general rule the performance of official duties will not be compelled by injunction, except perhaps to protect property rights against irremediable injuries.[59]

The right to an injunction must be clearly shown,[60] and no injunction will lie where there is another adequate remedy,[61] or where plaintiff has

J., 80 F.2d 592—Darger v. Hill, C.C.A.Cal., 76 F.2d 198, affirming, D.C., Hill v. Darger, 8 F.Supp. 189—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F.2d 288, certiorari denied 55 S.Ct. 119, 293 U.S. 603, 79 L.Ed. 695—Knapp v. Hyde, D.C.N.Y., 50 F.2d 272—White v. Federal Radio Commission, D.C.Ill., 29 F.2d 113—Southwestern Bell Tel. Co. v. U. S., D.C.Mo., 45 F.Supp. 403—Barr v. Rhodes, D.C.Ky., 35 F.Supp. 223—Parker v. McDermitt, D.C.N.J., 23 F.Supp. 207—Cottman Co. v. Dailey, D.C.Md., 20 F.Supp. 142, affirmed, C.C.A., 94 F.2d 85—Chester C. Fosgate Co. v. Kirkland, D.C.Fla., 19 F.Supp. 152—Precision Castings Co. v. Boland, D.C.N.Y., 13 F.Supp. 877, affirmed, C.C.A., 85 F.2d 15—Spang v. Roper, D.C.Pa., 13 F.Supp. 840, vacated on other grounds, C.C.A., Gossnell v. Spang, 84 F.2d 889, certiorari denied Spang v. Gossnell, 57 S.Ct. 233, 299 U.S. 605, 81 L.Ed. 446—Morgan v. Nolan, D.C.Ind., 3 F. Supp. 143, affirmed, C.C.A., Nolan v. Morgan, 69 F.2d 471—P. De Ronde & Co. v. U. S. Sugar Equalization Board, D.C.Del., 299 F. 659, affirmed, C.C.A., U. S. Sugar Equalization Board v. P. De Ronde & Co., 7 F.2d 981, certiorari granted 46 S.Ct. 107, 269 U.S. 548, 70 L. Ed. 406, dismissed 46 S.Ct. 631, 271 U.S. 691, 70 L.Ed. 1154.

D.C.—Bank of American Nat. Trust & Savings Ass'n v. Douglas, 105 F.2d 100, 70 App.D.C. 221, 123 A.L.R. 1266—McNinch v. Heitmeyer, 105 F.2d 41, 70 App.D.C. 162, certiorari granted 60 S.Ct. 121, 308 U.S. 540, 84 L.Ed. 455, reversed on other grounds Fly v. Heitmeyer, 60 S. Ct. 443, 309 U.S. 146, 84 L.Ed. 664—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27—Ickes v. Virginia-Colorado Development Corporation, 69 F.2d 123, 63 App. D.C. 47, certiorari granted 54 S. Ct. 780, 292 U.S. 620, 78 L.Ed. 1477, affirmed 55 S.Ct. 888, 295 U.S. 639, 79 L.Ed. 1627.

32 C.J. p 246 note 19.

Performance of official duty

When a plain official duty, not requiring exercise of discretion, is to be performed, and performance will be made impossible by threatened official act, for which adequate compensation cannot be had at law, party who will be injured thereby may have injunction to prevent such act. —U. S. Sugar Equalization Board, Inc., v. P. De Ronde & Co., C.C.A. Del., 7 F.2d 981, affirming, D.C., P. De Ronde & Co. v. U. S. Sugar Equalization Board, 299 F. 659, certiorari granted U. S. Sugar Equalization Board, Inc., v. P. De Ronde & Co., 46 S.Ct. 107, 269 U.S. 548, 70 L.Ed. 406, dismissed 46 S.Ct. 631, 271 U.S. 691, 70 L.Ed. 1154.

Offsetting benefits

In coal companies' suit to enjoin enforcement of Administrator's unconstitutional orders amending Bituminous Coal Code and requiring wage increase, benefits allegedly resulting from Code and orders by way of higher prices and greater stabilization of business could not be offset against injury which would result from paying increased wages, as regards injunction.—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F. Supp. 825.

55. U.S.—Hart Coal Corporation v. Sparks, supra.

56. U.S.—Kuenster v. Meredith, D.C. Ill., 264 F. 243—Masses Pub. Co. v. Patten, N.Y., 245 F. 102, 157 C.C.A. 398.

57. U.S.—Kuenster v. Meredith, D. C.Ill., 264 F. 243.

32 C.J. p 247 note 21.

58. U.S.—Transcontinental & Western Air v. Farley, C.C.A.N.Y., 71 F.2d 288, certiorari denied 55 S. Ct. 119, 293 U.S. 603, 79 L.Ed. 695.

32 C.J. p 247 note 23.

59. U.S.—Milliken v. Stone, C.C.A. N.Y., 16 F.2d 981, affirming, D.C., 7 F.2d 397, and certiorari denied 47 S.Ct. 764, 274 U.S. 748, 71 L.Ed. 1331.

60. U.S.—Wickard v. Filburn, Ohio, 63 S.Ct. 82, 317 U.S. 111, 87 L.Ed. 122, reversing, D.C., Filburn v. Helke, 43 F.Supp. 1017—Alpirn v. Huffman, D.C.Neb., 49 F.Supp. 337—New Orleans Private Patrol Service v. Fleming, D.C.La., 33 F. Supp. 856—Johnson v. Rylander, D.C.Cal., 18 F.Supp. 689.

D.C.—Dow v. Ickes, 123 F.2d 909, 74 App.D.C. 319, followed in Gilbert v. Ickes, 123 F.2d 917, 74 App.D.C. 327, and certiorari denied 62 S.Ct. 639, 315 U.S. 807, 86 L.Ed. 1206, rehearing denied 62 S.Ct. 912, 315 U.S. 807, 86 L.Ed. 1224—Brunswick v. Elliott, 103 F.2d 746, 70 App.D.C. 45.

Fla.—Johnson v. McNeill, 10 So.2d 143, 151 Fla. 606.

61. U.S.—Hegeman Farms Corporation v. Baldwin, N.Y., 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259, affirming, D.C., 6 F.Supp. 297—Paramino Lumber Co. v. Marshall, C.C.A. Wash., 95 F.2d 203, affirming, D.C., 18 F.Supp. 645, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 382—Myers v. Cocheco Woolen Mfg. Co., C.C.A.N.H., 94 F.2d 590, vacating, D.C., Cocheco Woolen Mfg. Co. v. Myers, 16 F.Supp. 788—Cottman Co. v. Dailey, C.C.A.Md., 94 F.2d 85, affirming, D.C., 20 F. Supp. 142—Newport News Shipbuilding & Dry Dock Co. v. Schauffler, C.C.A.Va., 91 F.2d 730, certiorari granted 58 S.Ct. 43, 302 U.S. 673, 82 L.Ed. 519, affirmed, 58 S.Ct. 466, 303 U.S. 54, 82 L.Ed. 646—Beman v. Bendix Products Corporation, C.C.A.Ill., 89 F.2d 661, reversing, D.C., Bendix Products Corporation v. Beman, 14 F.Supp. 58—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F.2d 12, followed in Precision Casting Co. v. Boland, C.C.A.N.Y., 85 F.2d 15, affirming, D.C., 13 F.Supp. 877 and Alexander Smith & Sons Carpet Co. v. Herrick, 85 F.2d 16—Abe Rafelson Co. v. Tugwell, C.C.A.Ill., 79 F.2d 653—Gardner v. Mellon, C.C.A.Cal., 5 F.2d 954—Aron v. Federal Trade Commission, D.C.Pa., 50 F.Supp. 289—Alpirn v. Huffman, D.C.Neb., 49 F.Supp. 337—Bata Shoe Co. v. Perkins, D.C.D.C., 33 F.Supp. 508—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776—Washington Mills Co. v. Schauffler, D.C.N.C., 18 F.Supp. 397—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F. Supp. 633—Kirk v. Good, D.C.Mo., 13 F.Supp. 1020—Caplis v. Helvering, D.C.N.Y., 4 F.Supp. 181—Kreutz v. Eiting, D.C.N.Y., 3 F. Supp. 364, affirmed, C.C.A., Kreutz v. Durning, 69 F.2d 802—Angelus v. Sullivan, N.Y., 246 F. 54, 158 C.C.A. 280.

D.C.—Sykes v. Jenny Wren Co., 78 F.2d 729, 64 App.D.C. 379, 104 A.L.R. 864, certiorari denied Jenny Wren Co. v. Sykes, 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443—Hurley v. Shanley, 60 F.2d 335, 61 App.D.C. 237—Bell Oil & Gas Co. v. Wilbur, 50 F.2d 1070, 60 App.D.C. 256—McKee v. Rudolph, 12 F.2d 148, 56 App.D.C. 207, certiorari denied 47 S.Ct. 101, 273 U.S. 710, 71 L.Ed. 852—Luber v. Beach, 289 F. 638, 53 App.D.C. 240.

not suffered[62] irreparable injury or injury distinct from that of other members of the public or,

Administrative remedies

(1) As a general rule all administrative remedies must be exhausted before a suit for injunction will lie.

U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F. Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515—Aron v. Federal Trade Commission, D.C.Pa., 50 F. Supp. 280—Sanco Piece Dye Works v. Herrick, D.C.N.Y., 33 F.Supp. 80.

Cal.—U. S. v. Superior Court, 120 P. 2d 26, 19 Cal.2d 189.

(2) An inapplicable administrative remedy does not preclude the issuance of an injunction.—Darger v. Hill, C.C.A.Cal., 76 F.2d 198, affirming, D.C., Hill v. Darger, 8 F. Supp 189.

(3) Where no question is made of the power of an administrative body to deal with the subject matter of the controversy, but the complaint is that the administrative body improperly exercised such authority, the administrative methods for review must first be exhausted.—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.

(4) Where the complaint is that the administrative authority has no power to act with reference to the subject matter of the controversy, a failure to exhaust the administrative remedy does not bar relief by injunction.—Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F. 2d 435, 92 A.L.R. 1475—Chester C. Fosgate Co. v. Kirkland, D.C.Fla., 19 F.Supp. 152—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.

(5) The federal communications commission having adopted an order under its rule-making power could not insist that radio network seeking to enjoin enforcement of order be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected network to threatened irreparable injury.—Columbia Broadcasting System v. U. S., N.Y., 62 S. Ct. 1194, 316 U.S. 407, 86 L.Ed. 1563, reversing, D.C., National Broadcasting Co. v. U. S., 44 F.Supp. 688.

(6) Where radio network seeking to enjoin enforcement of federal communications commission's order promulgating chain broadcasting regulations alleged that affiliates were cancelling or threatening to cancel contracts to conform to regulations and attacked regulations to avoid irreparable injury which would result, commission's minute setting up procedure by which validity of regulations might be tested on application for a license did not afford an adequate basis for requiring network to seek relief by intervention in a proceeding on application for a license.—Columbia Broadcasting System v. U. S., supra.

Great expense

The fact that complainant has been at great expense in constructing the property sought to be protected does not entitle him to an injunction where he has not exhausted the administrative remedy or appealed therefrom as permitted by law.—Black River Valley Broadcasts v. McNinch, 101 F.2d 235, 69 App.D. C. 311, certiorari denied 59 S.Ct. 793, 307 U.S. 623, 83 L.Ed. 1501.

Interlocutory orders

To permit judicial review by injunction of every procedural, preliminary, and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible, and result in bringing to the courts such an avalanche of trivial procedural questions as would largely monopolize their time and energies. —Utah Fuel Co. v. National Bituminous Coal Commission, 101 F.2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362, affirmed 59 S.Ct. 409, 306 U.S. 56, 83 L.Ed. 483.

Plaintiff held to have no other adequate remedy

U.S.—Ganley v. Wallace, D.C., 17 F. Supp. 115, reversed on other grounds Wallace v. Ganley, 95 F. 2d 364, 68 App.D.C. 235.

D.C.—Gilbert v. Sargent, 19 F.2d 681, 57 App.D.C. 207, followed in Linkins v. Sargent, 19 F.2d 683, 57 App.D.C. 209.

The existence of statutory means, which might be legal of consummating proposed transfer of public lands in New Mexico for private lands, did not preclude court from enjoining interior department officials from carrying out proposed transfer in an unlawful manner.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27.

62. U.S.—Stark v. Wickard, 64 S. Ct. 559, 321 U.S. 288, 88 L.Ed. ——, reversing, App.D.C., 136 F.2d 786, certiorari granted 64 S.Ct. 58, 320 U.S. 723, 88 L.Ed. —— —Perkins v. Lukens Steel Co., 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108, reversing Lukens Steel Co. v. Perkins, 107 F.2d 627, 70 App.D.C. 354, certiorari granted Perkins v. Lukens Steel Co., 60 S.Ct. 513, 309 U.S. 643, 84 L.Ed. 997—State of California v. Latimer, Cal., 59 S.Ct. 166, 305 U.S. 255, 83 L.Ed. 159—State of New Jersey v. Sargent, 46 S.Ct. 122, 269 U.S. 328, 70 L.Ed. 281—Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 290 F. 306, 53 App.D.C. 331—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F. 2d 12—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U. S. 599, 81 L.Ed. 411—Sparks v. Hart Coal Corporation, C.C.A.Ky., 74 F.2d 697, vacating, D.C., Hart Coal Corporation v. Sparks, 7 F. Supp. 16—Blackman v. Mellon, D.C. N.Y., 5 F.2d 987—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417—New Orleans Private Patrol Service v. Fleming, D.C.La., 33 F.Supp. 856 —Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—Condenser Corporation of America v. Delaney, D.C.N.J., 18 F.Supp. 611—Washington Mills Co. v. Schauffler, D.C.N.C., 18 F.Supp. 397 —John Blood & Co. v. Madden, D.C. Pa., 15 F.Supp. 779—Bornn v. Page, D.C.N.Y., 14 F.Supp. 767—Kirk v. Good, D.C.Mo., 13 F.Supp. 1020—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

D.C.—U. S. ex rel. American Silver Producers' Ass'n v. Mellon, 32 F. 2d 415, 59 App.D.C. 24, certiorari denied 50 S.Ct. 19, 280 U.S. 561, 74 L.Ed. 616.

Loss of business due to the publicity incident to an administrative investigation is not such irreparable damage as will authorize the issuance of an injunction.—Arrow Distilleries v. Alexander, D.C.D.C., 24 F. Supp. 880, affirmed 59 S.Ct. 489, 306 U.S. 615, 83 L.Ed. 1023.

Rules and regulations

Radio network's standing to maintain action to enjoin enforcement of federal communications commission's order promulgating regulations was not affected by fact that regulations were not directed to network and did not in terms compel action by it or impose penalties on it for its action or failure to act, but it was enough that regulations purported to operate to alter and affect adversely network's contractual rights and business relations with radio station owners.—Columbia Broadcasting System v. U. S., N.Y., 62 S.

likewise, has not been threatened with,[63] irreparable injury or injury distinct from that of other members of the public, or where plaintiff comes into court with unclean hands.[64] Suit will not be entertained to enjoin the enforcement of an unconstitutional act or order when not brought against the official charged with its enforcement,[65] nor will a federal officer be enjoined from performing an act which there is no likelihood of his performing.[66]

Officers of the land department. The acts of the officers of the United States land department, so long as within the scope of their powers as conferred on them by statute, will not be enjoined.[67] The determination as to what person is entitled to certain land scrip,[68] to a patent to certain public land,[69] to a right of preëmption,[70] to the right to make entry in the office of the register and receiver,[71] or to the right to make additional homestead entries,[72] is a judicial function that has been intrusted to the land department and in its performance the land officers will not be enjoined, at least if the construction placed on them by the statutes which they are required to construe is a possible one.[73] The same has been held as to the decision whether or not certain land is open for settlement;[74] whether in interference proceedings there has been an abandonment by another party to the interference;[75] whether lands are mineral in character;[76] and as to the cancellation of an entry for lands.[77] On the other hand, when the officers of the land department go beyond their jurisdiction, they are liable to be enjoined just as are other public officers, if the elements necessary to give jurisdiction to a court of equity to issue an injunction are present.[78] If the head of a department has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.[79]

b. State Officers or Boards

Illegal acts of state officers or boards resulting in or threatening irreparable injury to plaintiff may be enjoined where there is no adequate remedy at law available.

A state itself cannot be enjoined,[80] and state officers or boards will not be enjoined from the performance of duties imposed by valid statutes,[81] or

Ct. 1194, 316 U.S. 407, 86 L.Ed. 1563, reversing, D.C., National Broadcasting Co. v. U. S., 44 F.Supp. 688.

63. U.S.—Ganley v. Wallace, D.C., 17 F.Supp. 115, reversed on other grounds Wallace v. Ganley, 95 F. 2d 364, 68 App.D.C. 235.

64. **Perpetration of falsehood**
Injunction will not be granted where it would aid in the perpetration of a falsehood.—Gomez v. Kiely, D.C.N.Y., 27 F.2d 889.

65. U.S.—Appalachian Electric Power Co. v. Smith, C.C.A.Va., 67 F. 2d 451, reversing, D.C., 4 F.Supp. 6, and certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063.

66. U.S.—Boggus Motor Co. v. Onderdonk, D.C.Tex., 9 F.Supp. 950.
D.C.—Morrison v. Fall, 290 F. 306, 53 App.D.C. 331, affirmed Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394.

Placing property beyond jurisdiction
No injunction is necessary in aid of a suit by citizens of a neutral country to recover from alien property custodian proceeds of sale of property seized by him as enemy property, in view of a provision of the statute that the money or property must be held by the custodian or in the treasury to await the final decree in such suit, since it must be presumed that the custodian and the treasurer will perform their statutory duty, and not attempt to put the property beyond the jurisdiction of the court.—Sigg-Fehr v. White, 285 F. 949, 52 App.D.C. 215.

67. U.S.—Work v. State of Louisiana, 46 S.Ct. 92, 269 U.S. 250, 70 L.Ed. 259, modifying Fall v. State of Louisiana, 287 F. 99, 53 App. D.C. 22.
D.C.—Perry v. Work, 10 F.2d 887, 56 App.D.C. 92, certiorari denied 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1141.
32 C.J. p 247 note 25.

68. U.S.—Walker v. Smith, D.C., 21 How. 579, 16 L.Ed. 223.

69. U.S.—Maese v. Herman, App.D. C., 22 S.Ct. 91, 183 U.S. 572, 46 L. Ed. 335—Leitensdorfer v. Campbell, C.C.Colo., 15 F.Cas.No.8,225, 5 Dill. 419.

70. U.S.—Litchfield v. Richards, Iowa, 9 Wall 575, 19 L.Ed. 681, affirming C.C., 15 F.Cas.No.8,388, Woolw. 299.
Ala.—Bell v. Payne, 2 Stew. 414.

71. U.S.—Koehler v. Barin, C.C.Or., 25 F. 161.

72. D.C.—O'Brien v. Lane, 40 App., D.C., 493, 495.

73. U.S.—U. S. v. Fisher, App.D.C., 32 S.Ct. 356, 223 U.S. 683, 56 L. Ed. 610.
D.C.—O'Brien v. Lane, 40 App.D.C. 493.

74. U.S.—Sioux City & St. P. R. Co. v. U. S., C.C.Iowa, 34 F. 835.

Appropriation by statute
Secretary of the interior and commissioner of general land office could not be enjoined from ejecting plaintiff's selection of island as unoccupied public land on ground that island was appropriated under act of congress providing for harbor improvement in accordance with certain report.—Lyders v. Ickes, 84 F. 2d 232, 65 App.D.C. 379.

75. D.C.—Snelling v. Whitehead, 269 F. 712, 50 App.D.C. 196.

76. D.C.—Central Pac. Ry. Co. v. Lane, 46 App.D.C. 372.
32 C.J. p 247 note 34.

77. D.C.—Keusch v. Lane, 47 App. D.C. 577.
32 C.J. p 247 note 35.

78. U.S.—Work v. State of Louisiana, 46 S.Ct. 92, 269 U.S. 250, 70 L.Ed. 259, modifying Fall v. State of Louisiana, 287 F. 999, 53 App.D. C. 22.
D.C.—Work v. Read, 10 F.2d 637, 56 App.D.C. 72.
32 C.J. p 247 note 36.

79. D.C.—Smith v. Reynolds, 9 App. D.C. 261, 287, reversed on other grounds 17 S.Ct. 998, 166 U.S. 717, 41 L.Ed. 1186.

80. Ill.—Kent v. City of Chicago, 22 N.E.2d 799, 301 Ill.App. 312.
Okl.—Choctaw Pressed Brick Co. v. Townsend, 236 P. 46, 108 Okl. 235.
32 C.J. p 247 note 39.

81. Ariz.—Hilkert v. Canning, 119 P.2d 233, 58 Ariz. 290.
Cal.—Loftis v. Superior Court in and for Kings County, 77 P.2d 491, 25 Cal.App.2d 346.
Tex.—Cochran v. Cavanaugh, Civ. App., 252 S.W. 284.

Enforcement of constitutional statute cannot be enjoined.—Francis

enjoined from enforcing the execution of a general law protecting only public rights.[82] Likewise, courts will not interfere with state officers or boards as long as they are acting within the authority granted them,[83] and are exercising discretionary powers vested in them.[84]

On the other hand, when state officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the state,[85] either in its sovereign or governmental capacity,[86] and they may be enjoined if the ordinary remedies at law are inadequate,[87] or, if necessary to avoid a

v. Allen, 96 P.2d 277, 54 Ariz. 377, 126 A.L.R. 190.

82. D.C.—Grant v. Cooke, 7 D.C. 165.

83. U.S.—Cloverleaf Butter Co. v. Patterson, C.C.A.Ala., 116 F.2d 227, certiorari granted 61 S.Ct. 834, 313 U.S. 551, 85 L.Ed. 1515, reversed on other grounds 62 S.Ct. 491, 315 U.S. 148, 828, 86 L.Ed. 754, 223—Crater Lake Nat. Park Co. v. Oregon Liquor Control Commission, D.C.Or., 26 F.Supp. 363.

Ala.—Brammer v. Housing Authority of Birmingham Dist., 195 So. 256, 239 Ala. 280—Goodwin v. State Board of Administration, 102 So. 718, 212 Ala. 453.

Ark.—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.

Cal.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275—Evans v. Superior Court in and for City and County of San Francisco, 96 P.2d 107, 14 Cal.2d 563, prior opinion 91 P.2d 1056, and appeal dismissed Superior Court of California in and for City and County of San Francisco v. Evans, 60 S.Ct. 893, 309 U.S. 640, 84 L.Ed. 995—Skinner v. Coy, 90 P.2d 296, 13 Cal.2d 407—Affonso Bros. v. Brock, 84 P.2d 515, 29 Cal.App.2d 26—Daugherty v. Superior Court in and for City and County of San Francisco, 74 P.2d 549, 23 Cal.App.2d 739—State Board of Equalization of California v. Superior Court in and for City and County of San Francisco, 42 P.2d 1076, 5 Cal.App.2d 374.

Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

Ga.—Herrington v. Wimberly, 170 S.E. 670, 177 Ga. 536—Speer v. Martin, 136 S.E. 425, 163 Ga. 535.

Mo.—Hughes v. State Board of Health, 137 S.W.2d 523, 345 Mo. 995—Selecman v. Matthews, 15 S.W.2d 788, 321 Mo. 1047, 63 A.L.R. 512.

N.H.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N.H. 426.

N.J.—Crescent Bottling Works v. Board of Pharmacy, 189 A. 57, 121 N.J.Eq. 237—Dornbusch v. Board of Adjustment of City of Newark, 174 A. 152, 116 N.J.Eq. 355.

N.M.—Turley v. State Engineer, 49 P.2d 1135, 39 N.M. 472—Stovall v. Vesely, 34 P.2d 862, 38 N.M. 415.

N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 321, 14 N.Y.S.2d 74, 257 App. Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199—Ryder v. Pyrke, 224 N.Y.S. 289, 130 Misc. 505.

Okl.—Boyle v. Rock Island Coal Mining Co., 256 P. 883, 125 Okl. 137.

Pa.—Selavitch v. Appel, 20 Pa.Dist. & Co. 293.

Injunction by federal court against enforcement of state statutes see Federal Courts § 50.

Judicial encroachment on the executive powers generally see Constitutional Law §§ 156–159.

Operation of statute

Courts are not authorized to enjoin the operation of a statute which has been duly adjudged to be constitutional and operative, unless the statute is being illegally applied or unless the statute or the challenged part of it is unconstitutional on unadjudicated grounds.—Cone v. King, 196 So. 697, 143 Fla. 323.

State building and loan commissioner is entitled to the protection of Civ.Code § 3423, providing that an injunction cannot be granted to prevent the execution of a public statute, by officers of the law, for the public benefit.—Richardson v. Superior Court in and for Los Angeles County, 32 P.2d 405, 138 Cal.App. 389.

84. U.S.—Pearl Assur. Co., Limited, of London, England, v. Harrington, D.C.Mass., 38 F.Supp. 411, affirmed 61 S.Ct. 1120, 313 U.S. 549, 85 L.Ed. 1514, rehearing denied 62 S.Ct. 56, 314 U.S. 707, 86 L.Ed. 564—Bowles v. Kinney, D.C.Wash., 292 F. 419.

Cal.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275.

Iowa.—Long v. Highway Commission of Iowa, 213 N.W. 532, 204 Iowa 376.

Mo.—State ex rel. Shartel v. Westhues, 9 S.W.2d 612, 320 Mo. 1093.

Okl.—Bankers Union Life Ins. Co. v. Read, 77 P.2d 26, 182 Okl. 103.

Tex.—Bobbitt v. Gordon, Civ.App., 108 S.W.2d 234.

85. U.S.—Handy v. Johnson, D.C. Tex., 51 F.2d 805—Carmichael v. Anderson, D.C.Mo., 14 F.2d 166.

Okl.—Choctaw Pressed Brick Co. v. Townsend, 236 P. 46, 108 Okl. 235. 32 C.J. p 247 note 42.

86. U.S.—Ex parte Young, Minn., 28 S.Ct. 441, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann. Cas. 764.

87. U.S.—Champlin Refining Co. v. Corporation Commission of State of Oklahoma, Okl., 52 S.Ct. 559, 286 U.S. 210, 76 L.Ed. 1062, 86 A.L.R. 403, modifying, D.C., 51 F.2d 823—Beal v. Missouri Pac. R. Corporation in Nebraska, C.C.A.Neb., 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396, and reversed on other grounds Beal v. Missouri Pac. R. Corporation, 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577—Handy v. Johnson, D.C. Tex., 51 F.2d 805—Smith v. Tillitson, C.C.A.Kan., 29 F.2d 535, certiorari denied Tillitson v. Smith, 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79—Springfield Fire & Marine Ins. Co. v. Holmes, D.C.Mont., 32 F. Supp. 964, reversed on other grounds Holmes v. Springfield Fire & Marine Ins. Co., 61 S.Ct. 19, 311 U.S. 606, 85 L.Ed. 384, rehearing denied 61 S.Ct. 129, 311 U.S. 726, 85 L.Ed. 473—Carolina Power & Light Co. v. South Carolina Public Service Authority, D.C.S.C., 20 F. Supp. 854, affirmed, C.C.A., 94 F.2d 520, certiorari denied 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, South Carolina Power Co. v. South Carolina Public Service Authority, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, and South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1541—First Federal Savings & Loan Ass'n of Wisconsin v. Finnegan, D.C.Wis., 19 F.Supp. 678, affirmed, C.C.A., First Federal Savings & Loan Ass'n of Wisconsin v. Loomis, 97 F.2d 831, 121 A.L.R. 99, constitutional question certified Loomis v. First Federal Savings & Loan Ass'n, 59 S.Ct. 92, 1st case, 305 U.S. 564, 83 L.Ed. 355, certiorari granted 59 S.Ct. 92, 2nd case, 305 U.S. 562, 83 L.Ed. 354, certiorari dismissed Martin v. First Federal Savings & Loan Ass'n, 59 S.Ct. 363, 305 U.S. 666, 83 L.Ed. 432—Paramount Publix Corporation v. Hill, D.C.Wis., 11 F.Supp. 478—Hegeman Farms Corporation v. Baldwin, D.C.N.Y., 6 F.Supp. 297, affirmed 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259—Bowles v. Kinney, D.C.Wash., 292 F. 419.

Colo.—Stong v. Milliken, 233 P. 154, 155, 76 Colo. 515, citing **Corpus Juris.**

Fla.—Coen v. Lee, 156 So. 747, 116 Fla. 215—Sparkman v. County Budget Commission, 137 So. 869, 103 Fla. 242.

Ga.—Purvis v. Tippins, 17 S.E.2d

multiplicity of suits.[88]

743, 193 Ga. 251—Sutton v. Adams, 178 S.E. 365, 180 Ga. 48.

Ill.—Schwing v. Miles, 11 N.E.2d 944, 367 Ill. 436, 113 A.L.R. 1504—Kent v. City of Chicago, 22 N.E.2d 799, 301 Ill.App. 312.

Ind.—State Board of Barber Examiners v. Cloud, 44 N.E.2d 972, 220 Ind. 552—State ex rel. Feeney v. Superior Court of Marion County, 188 N.E. 486, 206 Ind. 78—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

Iowa.—Thede v. Thornburg, 223 N.W. 386, 207 Iowa 639.

La.—Garnier v. Louisiana Milk Commission, 8 So.2d 611, 200 La. 594—Barnett v. State Mineral Board, 192 So. 701, 193 La. 1055.

Md.—Weer v. Page, 141 A. 518, 155 Md. 86.

Mich.—Reed v. Civil Service Commission, 3 N.W.2d 41, 301 Mich. 137—Kindy Opticians v. Michigan State Board of Examiners in Optometry, 289 N.W. 112, 291 Mich. 152—Lewis v. Michigan State Board of Dentistry, 269 N.W. 194, 277 Mich. 334.

Mo.—State ex rel. Brokaw v. Board of Education of City of St. Louis, App., 171 S.W.2d 75.

Neb.—Golden v. Bartholomew, 299 N. W. 356, 140 Neb. 65—State v. Heldt, 213 N.W. 578, 115 Neb. 435.

N.J.—Howard Co. Jewelers v. New Jersey State Board of Optometrists, 29 A.2d 742, 133 N.J.Eq. 4.

N.Y.—Carlisle v. Bennett, 277 N.Y.S. 187, 243 App.Div. 186, affirming 275 N.Y.S. 152, 153 Misc. 151, affirmed 277 N.Y.S. 197, 243 App.Div. 655, reversed on other grounds 197 N. E. 220, 268 N.Y. 212—Brown v. University of State of New York, 273 N.Y.S. 809, 242 App.Div. 85, dismissing appeal 267 N.Y.S. 859, 150 Misc. 193, and motion denied 192 N.E. 416, 265 N.Y. 290, affirmed 195 N.E. 217, 266 N.Y. 598—Leader-Observer v. State Alcoholic Beverage Control Board of New York, 265 N.Y.S. 509, 148 Misc. 757, affirmed 269 N.Y.S. 935, 241 App.Div. 637—Ryder v. Pyrke, 224 N.Y.S. 289, 130 Misc. 505.

Okl.—Wentz v. Dawson, 299 P. 493, 149 Okl. 94—Wentz v. Board of Com'rs of Lincoln County, 295 P. 599, 147 Okl. 173—Wentz v. Ingenthron, 294 P. 154, 146 Okl. 165—Choctaw Pressed Brick Co. v. Townsend, 236 P. 46, 108 Okl. 235.

Or.—Purple Truck Garage Co. v. Campbell, 250 P. 213, 119 Or. 484, 51 A.L.R. 816.

Pa.—Page v. King, 131 A. 707, 285 Pa. 153—Western Pennsylvania Hospitals v. Lichliter, 49 Dauph. Co. 326, affirmed 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146—Green v. Milk Control Commission of Pennsylvania, 48 Dauph.Co. 385—McGuire v. Dexter, 47 Dauph.Co. 419—Wagner v. Brown, 47 Dauph.Co. 33—Harrisburg Dairies v. Eisaman, 45 Dauph.Co. 61, appeal dismissed 195 A. 337, 328 Pa. 195.

S.C.—Xepapas v. Richardson, 146 S. E. 686, 149 S.C. 52, followed in Armstrong Pharmacy v. Rector, 146 S.E. 692, 149 S.C. 187, and Carpenter Bros. v. Rector, 146 S.E. 693, 149 S.C. 188.

Tenn.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.

Tex.—McDonald v. American Fruit Growers, Civ.App., 126 S.W.2d 83, error dismissed 127 S.W.2d 291, 133 Tex. 149—Tyrrell & Garth Inv. Co. v. American Title Guaranty Co., Civ.App., 79 S.W.2d 153, reversed on other grounds Daniel v. Tyrrell & Garth Inv. Co., 93 S.W. 2d 372, 127 Tex. 213—State Highway Commission of Texas v. Tengg, Civ.App., 57 S.W.2d 929—Terrell v. Kasch, Civ.App., 10 S.W. 2d 208, error refused.

Vt.—Nichols Electric Co. v. Fienberg, 141 A. 679, 101 Vt. 99.

Va.—Steelman v. Field, 128 S.E. 558, 142 Va. 383.

Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

32 C.J. p 248 note 44.

Legislative committee

If the resolution of the legislature creating a committee charged with the duty of investigating the conduct of the president of a state institution is unconstitutional and illegal, injunction will lie to enjoin it from acting.—Gilbreath v. Willett, 251 S.W. 910, 148 Tenn. 92, 28 A.L. R. 1147.

Particular officers enjoined

(1) Auditors.—Chesapeake & O. R. Co. v. Miller, 19 W.Va. 408, affirmed 5 S.Ct. 813, 114 U.S. 176, 29 L.Ed. 121.

(2) Boards of liquidation.—Board of Liquidation v. McComb, La., 92 U. S. 531, 23 L.Ed. 623—32 C.J. p 248 note 46.

(3) Boards of medical examiners. —State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.

(4) Boards of penitentiary commissioners.—McConnell v. Arkansas Brick & Mfg. Co., 69 S.W. 559, 70 Ark. 568.

(5) Department of public works.—Borggaard v. Department of Public Works, 10 N.E.2d 724, 298 Mass. 417.

(6) Health officers and boards, see Health § 39.

(7) Insurance commissioners.—Mutual Life Ins. Co. v. Boyle, C.C. Kan., 82 F. 705, appeal dismissed 89 F. 1014, 32 C.C.A. 604.

(8) Live stock inspectors.—Castleman v. Rainey, Tex.Civ.App., 211 S. W. 630—32 C.J. p 248 note 50.

(9) Officers of the land department.—Corvallis & E. R. Co. v. Benson, 121 P. 418, 61 Or. 359, error dismissed 35 S.Ct. 206, 235 U.S. 691, 59 L.Ed. 428—32 C.J. p 248 note 51.

(10) Professional committee conducting proceedings to revoke a physician's or dentist's license.—Kalman v. Walsh, 189 N.E. 315, 355 Ill. 341—Ramsay v. Shelton, 160 N. E. 769, 329 Ill. 432.

(11) Secretary of state.—State v. Marion Circuit Court, 176 N.E. 626, 202 Ind. 501—32 C.J. p 248 note 52.

(12) Public safety commissions.—Cook v. Burnquist, D.C.Minn., 242 F. 321.

(13) State treasurers.—Auditor v. Treasurer, 4 S.C. 311.

32 C.J. p 248 note 54.

Use of military force

(1) The use of military force illegally to deprive plaintiff of his property rights may be enjoined.

U.S.—Constantin v. Smith, D.C.Tex., 57 F.2d 227, appeal dismissed Sterling v. Constantin, 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375—U. S. v. Phillips, D.C.Okl., 33 F. Supp. 261—Strutwear Knitting Co. v. Olson, D.C.Minn., 13 F.Supp. 384.

Okl.—Russell Petroleum Co. v. Walker, 19 P.2d 582, 162 Okl. 216.

(2) Where there is no actual or apparent violence threatening public safety, the use of military force by state officers which interferes with property rights will be enjoined.—U. S. v. Phillips, D.C.Okl., 33 F.Supp. 261.

(3) Suit to enjoin governor of state, adjutant general of state, and mayor of city from preventing plaintiff from using its property in lawful manner was not rendered moot by withdrawal of troops with which interference was made, in the absence of assurance that the acts complained of would not be repeated if the injunction was denied, or of recognition of plaintiff's right to use its property free from interference. —Strutwear Knitting Co. v. Olson, supra.

An injunction will be granted against state offi-

88. U.S.—Beal v. Missouri Pac. R. Corporation in Nebraska, C.C.A. Neb., 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396, and reversed on other grounds Beal v. Missouri Pac. R. Corporation, 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577.

Tex.—Texas Unemployment Compensation Commission v. Metropolitan Building & Loan Ass'n, Civ.App., 139 S.W.2d 309, error refused, and certiorari denied Metropolitan Bldg. & Loan Ass'n v. Texas Un-

cers only when the equities of the bill are plain,[89] and the mere fact that a statute is being erroneously construed by those charged with administering it, so as to include an act or acts which are not within its terms, will not alone justify injunctive relief.[90] An injunction will not issue where plaintiff's property[91] rights are not interfered with,[92] where plaintiff has an adequate remedy at law,[93]

employment Compensation Commission, 61 S.Ct. 140, 311 U.S. 701, 85 L.Ed. 454.

89. U.S.—Massachusetts State Grange v. Benton, D.C.Mass., 10 F.2d 515, affirmed 47 S.Ct. 189, 272 U.S. 525, 71 L.Ed. 387—Amazon Petroleum Corporation v. Railroad Commission of Texas, D.C.Tex., 5 F.Supp. 633.
Fla.—Kilgore Groves v. Mayo, 191 So. 498, 139 Fla. 874.
Mich.—Reed v. Civil Service Commission, 8 N.W.2d 41, 301 Mich. 137.
Miss.—State Game and Fish Commission v. Louis Fritz Co., 193 So. 9, 187 Miss. 539.
Mo.—Hughes v. State Board of Health, 137 S.W.2d 523, 345 Mo. 995.
N.M.—Turley v. State Engineer, 49 P.2d 1135, 39 N.M. 472.
Pa.—Page v. King, 131 A. 707, 285 Pa. 153.

Apprehension well founded

The facts stated must be such as to satisfy the court that the board is not only exceeding its lawful jurisdiction, but that the apprehension of irreparable injury is well founded.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

Defense held insufficient

In suit to enjoin insurance commissioner's enforcement of order, affirmative defense charging attempted monopoly was held to be insufficient to warrant denial of motion for decree.—Olsness v. Home Ins. Co., C.C.A.N.D., 14 F.2d 907.

Facts considered

In suit to enjoin state's proceeding to investigate allegedly unlawful trade practices of nonresident producer-affiliated exhibitors engaged in licensing motion picture films shown in state, facts to be considered in determining right to injunctive relief do not depend on probabilities of truth of facts charged by state but depend on state's power to charge and to consider whether, on proof which it intends to adduce, such charge is true or false.—Paramount Publix Corporation v. Hill, D.C.Wis., 11 F.Supp. 478.

Injunction properly denied

U.S.—Must Hatch Incubator Co. v. Patterson, D.C.Or., 32 F.2d 714, appeal dismissed 49 S.Ct. 338, 73 L.Ed. 1011.
Iowa.—Peverill v. Department of Agriculture of Iowa, 245 N.W. 334, 216 Iowa 534.

Laches

Where complaint filed before Eclectic State Medical Board more than nine years after issuance of license sought revocation of physician's license on ground that physician illegally and fraudulently obtained diploma from medical school and that the license issued to him was obtained by fraud and deception, physician could not enjoin the board from conducting a hearing on the complaint on the ground that the board was barred by "laches," since the board had a right to proceed after the fraud, if any, had been discovered.—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.

Law violator

Injunction will not issue to aid a law violator in his violation of the law.—Panama Refining Co. v. Railroad Commission of Texas, D.C.Tex., 16 F.Supp. 289—Hercules Oil Co. v. Thompson, D.C.Tex., 10 F.Supp. 988.

Legal acts

Acts sought to be enjoined held not illegal.—Purviance v. Compton, 271 P. 120, 94 Cal.App. 277.

Proceedings of prior board

A physician could not enjoin Eclectic State Medical Board from conducting a hearing on a complaint to revoke physician's license on ground that present board members had no right to review proceedings of a board composed of different members at the time physician was licensed.—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.

90. N.D.—Lockwood v. Baird, 231 N.W. 851, 59 N.D. 713.

91. U.S.—Platek v. Aderhold, C.C.A. Ga., 73 F.2d 173.

92. U.S.—Corporation Commission of Oklahoma v. Lowe, Okl., 50 S.Ct. 397, 281 U.S. 431, 74 L.Ed. 945—Panama Refining Co. v. Railroad Commission of Texas, D.C.Tex., 16 F.Supp. 289—Hegeman Farms Corporation v. Baldwin, D.C.N.Y., 6 F. Supp. 297, affirmed 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259.
Fla.—York v. Williams, 9 So.2d 156, 151 Fla. 42—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.
Ind.—Department of State v. Kroger Grocery & Baking Co., 46 N.E.2d 237.
Pa.—Constitution Defense League v. Shannon, 16 Pa.Dist. & Co. 595.
Wis.—Goodland v. Zimmerman, 10 N. W.2d 186, 243 Wis. 459—Hobbins v. Hannan, 202 N.W. 800, 186 Wis. 284.

"To justify the use of the extraordinary power of a court of equity something more must be involved than an application of a statute in an unconstitutional manner against complainant. There must be an allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction."—Petroleum Exploration v. Public Service Commission of Kentucky, Ky., 58 S.Ct. 834, 839, 304 U.S. 209, 82 L.Ed. 1294, affirming, D.C., 21 F. Supp. 254, motion denied 58 S.Ct. 527.

Great and irreparable injury

Necessity of injunction to prevent great and irreparable injury must be shown.—Massachusetts State Grange v. Benton, D.C.Mass., 10 F.2d 515, affirmed 47 S.Ct. 189, 272 U.S. 525, 71 L.Ed. 387—Pearl Assur. Co., Limited, of London, England, v. Harrington, D.C.Mass., 38 F.Supp. 411, affirmed 61 S.Ct. 1120, 313 U.S. 549, 85 L.Ed. 1514, rehearing denied 62 S.Ct. 56, 314 U.S. 707, 86 L.Ed. 564.

93. U.S.—White v. Sparkill Realty Corporation, N.Y., 50 S.Ct. 186, 280 U.S. 500, 74 L.Ed. 578—Thompson v. Schwaebe, C.C.A.Cal., 22 F.2d 518, modifying, D.C., 21 F.2d 696.
Ark.—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.
Cal.—Moore v. Superior Court in and for Contra Costa County, 57 P.2d 1314, 6 Cal.2d 421—Ex parte McDonough, 80 P.2d 485, 27 Cal.App. 2d 155.
Conn.—Lazarevich v. Stoeckel, 167 A. 823, 117 Conn. 260.
Ga.—Sutton v. Adams, 178 S.E. 365, 180 Ga. 48—Ballenger v. Rock Run Iron Co., 148 S.E. 595, 166 Ga. 490.
Kan.—Bohl v. Teall, 139 P.2d 418, 157 Kan. 239.
Mo.—Hughes v. State Board of Health, 137 S.W.2d 523, 345 Mo. 995—Horton v. Clark, 293 S.W. 362, 316 Mo. 770.
N.J.—Dornbusch v. Board of Adjustment of City of Newark, 174 A. 153, 116 N.J.Eq. 355.
N.Y.—Dairy Sealed v. Ten Eyck, 289 N.Y.S. 85, 248 App.Div. 352, followed in Sunshine Farms v. Ten Eyck, 289 N.Y.S. 89, 248 App.Div. 814 and Sheehy v. Ten Eyck, 289 N.Y.S. 89, 248 App.Div. 814, reversing Dairy Sealed v. Ten Eyck, 288 N.Y.S. 641, 159 Misc. 716—S. H. Cranston, Inc., v. Department of Health of City of New York, 6 N. Y.S.2d 275, 168 Misc. 749—Co-operative Dairymen of Fraser v. Ten Eyck, 286 N.Y.S. 351, 158 Misc. 726.
Pa.—Western Pennsylvania Hospital

32 C.J. p 249 note 57.

where it is merely apprehended that a state board may erroneously exercise its discretion,[94] or where an injunction is sought to aid in the violation of the laws of the state.[95]

The performance of acts which have already been committed,[96] or which the officer or board have no authority to perform and which they have not expressed an intention of performing,[97] will not be enjoined.

Statutes relating to the issuance of injunctions against state officers or boards are to be given a reasonable interpretation so as to effectuate the intention of the legislature.[98] Relief by injunction against a state body or officer has been held not to be within the scope of a statute abolishing writs and orders of certiorari to review, mandamus, and prohibition, and providing other procedure therefor.[99] A statute providing that no court can compel, by any writ, the performance of any act or duty of any state officer does not limit the power of the courts to restrain the performance of an illegal and unconstitutional act by a state officer.[1] A statute providing that any order of a particular board substantially affecting rights of any interested party may be reviewed by any court of competent jurisdiction has been held to authorize an injunction against the enforcement of an order of such board.[2] A statute prohibiting the issuance of a writ of injunction against the lessees of the state, or the officers or employees of the state, to prevent the exploration for oil, gas, or other minerals on state property does not prevent a lessee from obtaining an injunction to restrain state officers from interfering with his leasehold rights.[3]

Compelling acts. State officers and boards will not be compelled by injunction to perform their duties,[4] other than mere ministerial acts.[5]

Governor. In some jurisdictions the rule seems to be that whatever doctrine is applicable in respect of inferior state officers, state courts under no circumstances have power to issue an injunction against the governor of a state acting in his official capacity as such,[6] and it is immaterial whether such act proceeded from an error of judgment or misapprehension of official duty under the law,[7] and whether the acts are of a character strictly ministerial or are such as call for the exercise of discretion and judgment alone.[8] On the other hand,

v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146—Shor v. Miller, 48 Dauph.Co. 39.

Utah.—Moormeister v. Golding, 27 P. 2d 447, 84 Utah 324, affirmed 35 P. 2d 307, 84 Utah 345.

Wis.—Rust v. State Board of Dental Examiners of Wisconsin, 256 N.W. 919, 216 Wis. 127.

Expense of appeal

A barber is not entitled to injunction restraining state barber board from inquiring into his alleged violations of Barber Law because of expense of filing appeal from board's order in the proper district court.—Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967.

Void order

A party is not required to follow the statutory remedy to overcome a void order which, if executed, would deprive him of his property.—State Board of Tax Com'rs v. McDaniel, 160 N.E. 347, 199 Ind. 708.

94. U.S.—Lehman v. State Board of Public Accountancy, 44 S.Ct. 128, 263 U.S. 394, 68 L.Ed. 354, affirming Lehmann v. State Board of Public Accountancy, 94 So. 94, 208 Ala. 185—F. C. Henderson, Inc. v. Railroad Commission of Texas, D. C.Tex., 56 F.2d 218, appeal dismissed 53 S.Ct. 4, 287 U.S. 672, 77 L.Ed. 579.

Ala.—Miller v. Alabama State Board of Public Accountancy, 98 So. 893, 210 Ala. 619.

Ariz.—Hilkert v. Canning, 119 P.2d 233, 58 Ariz. 290.

Ark.—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.

Neb.—Dawson County Irr. Co. v. McMullen, 231 N.W. 840, 120 Neb. 245.

32 C.J. p 248 note 55.

However, in a case in which an injunction was authorized it was stated that it would not injure defendants to be prevented from doing an unauthorized act where they disclaim any intention of doing it.—Terrell v. Kasch, Tex.Civ.App., 10 S. W.2d 208, error refused.

95. Md.—Middlekauff v. Le Compte, 132 A. 48, 149 Md. 621.

96. Ohio.—Meyer v. O'Dwyer, 107 N. E. 759, 90 Ohio St. 341.

32 C.J. p 249 note 56.

97. U.S.—Mississippi Valley Hardwood Co. v. McClanahan, D.C. Tenn., 8 F.Supp. 388.

Minn.—Schwartz v. Rice County Co-op. Egg & Poultry Ass'n, 204 N.W. 316, 163 Minn. 515.

98. **Operation of statute**

Paragraph of civil service amendment to state constitution declaring that violation of "any" of the provisions hereof may be restrained or observance compelled by injunctive proceeding applies to the entire amendment and not merely to the paragraph in which the provision occurs.—Reed v. Civil Service Commission, 2 N.W.2d 41, 301 Mich. 137.

99. N.Y.—J. D. L. Corporation v. Bruckman, 11 N.Y.S.2d 741, 171 Misc. 3—Bonacker v. Chuckrow, 2 N.Y.S.2d 265, 166 Misc. 171.

1. Tex.—Terrell v. Middleton, Civ. App., 187 S.W. 367, error denied 191 S.W. 1138, 108 Tex. 14, rehearing denied 193 S.W. 139, 108 Tex. 14.

2. Cal.—Agricultural Prorate Co. of California v. Superior Court in and for Sonoma County, 88 P.2d 253, 31 Cal.App.2d 518.

3. La.—Gulf Refining Co. of Louisiana v. Grace, 116 So. 405, 165 La. 979.

4. Ark.—McConnell v. Arkansas Brick & Mfg. Co., 69 S.W. 559, 70 Ark. 568.

32 C.J. p 247 note 40.

5. Cal.—City of Oakland v. Brock, 67 P.2d 344, 8 Cal.2d 639.

6. U.S.—U. S. v. Phillips, D.C.Okl., 33 F.Supp. 261.

32 C.J. p 249 note 59.

A tribunal other than courts must be resorted to for a correction of the official wrongs of a governor, if any, namely, the legislature.—State v. Huston, 113 P. 190, 27 Okl. 606, 34 L.R.A.,N.S., 380.

7. Minn.—Western R. Co. v. De Graff, 6 N.W. 341, 27 Minn. 1.

8. Minn.—Western R. Co. v. De Graff, supra.

the supreme court of the United States has held that a state governor may be enjoined from the commission of acts in pursuance of an unconstitutional statute where irreparable injury will result therefrom,[9] the view being taken that he is acting in his own wrong and on his own responsibility and is personally liable;[10] and it has been held by a number of the state courts that illegal acts committed by the governor of the state which are ministerial in their nature and for which there is no adequate remedy at law may be enjoined,[11] although the courts will not undertake by injunction to control or direct the exercise by the governor of political or discretionary acts the performance of which he assumes,[12] or enjoin the commission of acts for which there is an adequate remedy at law.[13] The illegal use of military force by a governor may be enjoined,[14] and a governor is subject to injunction if he retains military personnel on the grounds of complainant in uniform and on active duty under an illegal declaration of martial law.[15]

State railroad commissions. A state railroad commission will be enjoined from acting illegally to the irreparable damage of complainant who has no other adequate remedy available,[16] but injunction will not issue where there is available another remedy for reviewing the action of the commission.[17] A state railroad commission will not be enjoined from considering the formulation and promulgation of rules for the government of common carriers doing business within the state.[18] An injunction will not be granted to restrain the enforcement of orders of a commission when the action commanded by the orders had already been taken and suspended by order of the commissioner.[19] On the other hand, injunction is the proper remedy to restrain acts of the commission which are beyond its jurisdiction.[20] The rule that equity cannot enjoin the administration of criminal justice, discussed infra § 156, will not preclude enjoining a commission from enforcing an unconstitutional statute where the proceedings which the state authorizes to be instituted for violation thereof are in the civil courts alone in which the violators are to be made defendants in actions of assumpsit to recover penalties.[21]

Public service commissions. Where there is a clear, certain, and adequate remedy at law, a court of equity will not enjoin the commission of alleged unauthorized acts by a public service commission,[22] or prevent it from taking cognizance of a matter

9. U.S.—Davis v. Gray, Tex., 16 Wall. 203, 21 L.Ed. 447.
32 C.J. p 249 note 63.

10. U.S.—Davis v. Gray, supra.

11. Ky.—Gordon v. Morrow, 218 S. W. 258, 186 Ky. 713.
32 C.J. p 249 note 65.

Importance of question

In suit to enjoin governor from certifying to secretary of state of United States legislature's resolution ratifying proposed amendment to federal Constitution, importance of question whether ratification was valid required a decision on the merits, regardless of whether governor and other defendants had waived question of plaintiffs' right to maintain suit.—Wise v. Chandler, 108 S. W.2d 1024, 270 Ky. 1.

12. Ky.—Gordon v. Morrow, 218 S. W. 258, 186 Ky. 713.

Injury to legal rights

Within the limits of the power conferred on him by the constitution and laws, the governor is not subject to control by the courts, nor can an injunction direct or restrain him in the exercise of his power. Any act, however, which may injure a citizen in his legal rights, under the law, is subject to redress in the courts.—State v. McPhail, 180 So. 387, 182 Miss. 360.

13. Ky.—Gordon v. Morrow, 218 S. W. 258, 186 Ky. 713.

14. U.S.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D. C., Constantin v. Smith, 57 F.2d 227—U. S. v. Phillips, D.C.Okl., 33 F.Supp. 261.

15. U.S.—U. S. v. Phillips, supra.

16. **Extreme penalties**

The penalties imposed for violations of the statute and rules of the commission may be so extreme as to make the remedies at law inadequate.—Texoma Natural Gas Co. v. Railroad Commission of Texas, D.C. Tex., 59 F.2d 750.

No provision for review

An order of a commission prescribing maximum rates for services performed, if no provision for review by the courts is made, entitles one who claims the rates to be confiscatory to a review by a court of equity especially if the penalties for violation of the order are so severe that every one would be deterred from testing it in a criminal prosecution.—Allen v. Omaha Live Stock Commn. Co., C.C.A.Neb., 275 F. 1.

Order to replace track

Where a railroad company tore up a spur track, to replace which would cost a large sum of money, which would be wasted if it should be finally determined that the railroad was acting within its rights, and where damages will adequately compensate the shipper who used the track, a temporary injunction against an order of a commission to replace the track should be granted.—Chicago & N. W. R. Co. v. Railroad Commn., 185 N.W. 632, 175 Wis. 534.

17. **Train service**

Under some statutes providing means for reviewing orders as to rates, a temporary injunction will not issue as to such orders, but such an injunction may be issued as to orders relating to train service.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 163 P. 115, 53 Mont. 229.

18. Ga.—Long v. Georgia R. Commn., 89 S.E. 328, 145 Ga. 353.
32 C.J. p 250 note 76½.
Injunction by carrier for relief against unreasonable rates see Carriers § 306.

19. U.S.—Grand Trunk R. Co. v. Michigan R. Commn., D.C.Mich., 198 F. 1009, affirmed 34 S.Ct. 152, 231 U.S. 457, 58 L.Ed. 310.

20. Wis.—Chippewa Power Co. v. Railroad Commission of Wisconsin, 205 N.W. 900, 188 Wis. 246.

21. Pa.—Pennsylvania R. Co. v. Ewing, 88 A. 775, 241 Pa. 561, 49 L.R.A.,N.S., 977, Ann.Cas.1915B 157.

22. Va.—Dalton Adding Mach. Co. v. State Corporation Commn., D.C. Va., 213 F. 889, affirmed 35 S.Ct. 480, 236 U.S. 699, 59 L.Ed. 797.
32 C.J. p 249 note 68.

within its jurisdiction on the ground that it may reach an erroneous decision.[23] The court, however, in the exercise of its equitable powers, can entertain a bill to enjoin a public utilities commission from exercising powers not conferred on it or unconstitutionally conferred on it.[24] Where a public service commission possessing delegated legislative authority has the executive power to put its act into effect and it enacts an unconstitutional or void law or rule of action or order, it may be enjoined by the courts from enforcing it.[25] Ordinarily mandamus is a clear, certain, and adequate remedy to compel the performance of its duties by a public service commission, and a court of equity will not interfere by injunction where no other grounds of equitable jurisdiction exist.[26]

A temporary restraining order pending a motion for injunction against a public service commission will not be granted unless, in accordance with the statute governing the matter "there appears to be danger of irreparable injury."[27] Generally the power will be exercised only for the purpose of preserving the existing status.[28] In order to warrant the allowance of an interlocutory injunction against the enforcement of orders made by public service boards or commissions, it is necessary to show clearly that such order is arbitrary, unreasonable, or confiscatory in its nature,[29] in which event its enforcement may ordinarily be enjoined.[30] Injunctions pendente lite to restrain the enforcement of orders of a public service commission relating to rates will not be granted where it is expressly provided by statute that all rates fixed by the commission shall be deemed reasonable and just and shall remain in full force and effect until final determination by the courts having jurisdiction.[31]

§ 110. County or Town Boards and Officers

Injunction will not issue to control the exercise of the discretionary powers vested in county or town boards and officers, but an abuse of their discretion, or acts clearly beyond their powers, may be enjoined by one suffering irreparable injury thereby and who has no other adequate remedy available.

Where county or town officers,[32] such as the county court,[33] the county commissioners,[34] the police jury of a parish,[35] or a township commit-

23. Ga.—Georgia Public Service Commission v. Camel Lines, 170 S.E. 673, 177 Ga. 570.
32 C.J. p 249 note 69.

24. U.S.—New Hampshire Gas & Electric Co. v. Morse, D.C.N.H., 42 F.2d 490.
Ga.—Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100, followed in Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.
Mass.—Criscuolo v. Department of Public Utilities, 19 N.E.2d 708, 302 Mass. 438.
Or.—Purple Truck Garage Co. v. Campbell, 250 P. 213, 119 Or. 484, 51 A.L.R. 816.
Pa.—Bell Tel. Co. of Pennsylvania v. Driscoll, 21 A.2d 912, 343 Pa. 109.

25. U.S.—Delaware, L. & W. R. Co. v. Stevens, C.C.N.Y., 172 F. 595.

26. Ill.—Illinois Bell Tel. Co. v. Commerce Commn., 137 N.E. 449, 306 Ill. 109.

27. U.S.—Cumberland Tel. & Tel. Co. v. Railroad Commn., C.C.La., 156 F. 834, 836.

28. U.S.—Cumberland Tel. & Tel. Co. v. Railroad Commn., supra.

29. U.S.—Public Service Commission of Wisconsin v. Wisconsin Telephone Co., Wis., 53 S.Ct. 514, 289 U.S. 67, 77 L.Ed. 1036.
32 C.J. p 249 note 72.

30. N.Y.—Rockland Light & Power Co. v. Maltbie, 271 N.Y.S. 858, 241 App.Div. 122, affirming 266 N.Y.S. 377, 148 Misc. 22, and followed in 271 N.Y.S. 867, 241 App.Div. 130.
32 C.J. p 249 note 73.

31. Nev.—Steamboat Canal Co. v. Garson, 185 P. 801, 43 Nev. 298, rehearing denied 185 P. 1119, 43 Nev. 298.

32. Cal.—Loftis v. Superior Court in and for Kings County, 77 P.2d 491, 25 Cal.App.2d 346.
Injunction to prevent award of illegal contract by county see Counties § 202.
Injunction to prevent illegal organization of county see Counties § 46.
Rights and remedies of taxpayers against county generally see Counties § 286.
Rule applies
(1) To the fixing of the amount of a tax levy.—Bradbury v. Burschell, 69 A. 1108, 220 Pa. 439—32 C.J. p 250 note 82.
(2) To location of a bridge.—Allen v. Monmouth County, 13 N.J.Eq. 68.
(3) To location of a ditch.—Vornholt v. Gordon, 4 Ohio S. & C.P. 498, 30 Cinc.L.Bul. 33.
(4) To location of a jail.—Bacon v. Walker, 77 Ga. 336.
(5) To the choosing of a county depository.—Medicine Lodge First Nat. Bank v. Barber County, 23 P. 1079, 43 Kan. 648.
(6) To the redesignation of a newspaper for the publication of delinquent tax lists.—Bowden v. Ricker, 69 So. 694, 70 Fla. 154.

33. Or.—Kime v. Thompson, 118 P. 174, 60 Or. 183.
W.Va.—County Court of Mingo County v. Bailey, 125 S.E. 253, 97 W.Va. 351.
Collateral prohibitive procedure by means of injunction does not lie, except when court or defendant is attempting to proceed without jurisdiction.—Howard v. Howard, 33 S.W.2d 635, 236 Ky. 557.

34. Ga.—Phillips v. Head, 4 S.E.2d 240, 188 Ga. 511.
Ill.—Rockford Amusement & Refreshment Co. v. Baldwin, 252 Ill. App. 1.
Ind.—Meredith v. Crowder, 142 N.E. 876, 81 Ind.App. 221—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.
Kan.—Smith v. Board of Com'rs of Reno County, 247 P. 1046, 121 Kan. 444.
Neb.—Lindburg v. Bennett, 219 N.W. 851, 117 Neb. 66.
Tex.—Dodson v. Marshall, Civ.App., 118 S.W.2d 621, error dismissed—Newman v. Biggs, Civ.App., 68 S.W.2d 632—Dennett v. Dancy, Civ. App., 10 S.W.2d 1057, error refused—Cannon v. McComb, Civ. App., 268 S.W. 999.
Utah.—Bailey v. Van Dyke, 240 P. 454, 66 Utah 184.
32 C.J. p 250 note 79.

35. La.—Cruse v. La Salle Parish Police Jury, 92 So. 679, 151 La. 1056—Murphy v. St. Mary Police Jury, 42 So. 979, 118 La. 401.

tee,[36] are vested with discretionary power, an injunction will not issue to control or prevent acts done by them in the exercise of this discretion in the absence of fraud or an abuse of discretion. County officers cannot be enjoined merely for acts of mistaken judgment.[37]

On the other hand acts by county commissioners which are plainly an abuse of the discretion vested in them may be enjoined.[38] Likewise, the officers of a county or town may be restrained by injunction when they are proceeding illegally to the irreparable injury of complainant.[39] The right to injunctive relief, however, must clearly appear,[40] and injunction will not issue where there is another adequate remedy available.[41] Ordinarily, plaintiff must show, in addition to the illegality of the acts of the county board or officer, an injury to himself from the illegal act peculiar and distinct from that suffered by the public in general.[42] While a showing that threatened injury is imminent is sufficient,[43] it must be shown that the threatened injury is certainly impending,[44] and mere allegations that a county board is threatening to pass resolutions which, if passed, will be unlawful or ineffective constitute no ground for interference with the preliminary internal functioning of the board.[45] Injunction will not lie against a county officer to restrain him from doing an act which he has no authority to do and which he has not announced an intention of doing.[46]

Compelling performance of duty. A county officer ordinarily will not be compelled by injunction to perform his duties, the remedy, if any, being either by mandamus or by an action on the officer's bond.[47] The performance of a mere ministerial duty involving no discretion, however, may be com-

36. N.J.—Webb v. Township Committee of Hanover Tp., 142 A. 244, 105 N.J.Eq. 738.

37. Ala.—Long v. Shepherd, 48 So. 675, 159 Ala. 595.
32 C.J. p 250 note 81.

38. Ohio.—State v. Perry, 150 N.E. 78, 113 Ohio St. 641.
32 C.J. p 250 note 88.

39. Cal.—Loftis v. Superior Court in and for Kings County, 77 P.2d 491, 25 Cal.App.2d 346.
Fla.—Mizelle v. Sweat, 177 So. 709, 130 Fla. 345—Palm Beach County v. South Florida Conservancy Dist., 170 So. 630, 126 Fla. 170.
Ga.—McDonald v. Marshall, 195 S.E. 571, 185 Ga. 438.
Ill.—Jentink v. Lake County, 244 Ill. App. 370.
Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.
Ky.—Patterson v. Lawson, 75 S.W. 2d 507, 255 Ky. 781—Breathitt County v. Cockrell, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626—Ellis v. Wright, 34 S.W.2d 966, 237 Ky. 98.
Md.—Anne Arundel County Com'rs v. Thomas, 190 A. 681, 172 Md. 18.
Mich.—Netzel v. Township Board of Waterford Tp., Oakland County, 255 N.W. 314, 267 Mich. 220.
N.Y.—Davis v. Garofalo, 42 N.Y.S.2d 672, 180 Misc. 607.
Okl.—Richards v. Rose, 248 P. 315, 119 Okl. 62.
Pa.—Haytock v. Nickel, 19 Pa.Dist. & Co. 671, 24 North Co. 96—Richards v. Johns, 88 Pittsb.Leg.J. 351, appeal dismissed 13 A.2d 59, 338 Pa. 232.
Tex.—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ. App., 121 S.W.2d 1048—Hogg v. Campbell, Civ.App., 48 S.W.2d 515.
32 C.J. p 250 note 89.

Attempt to enforce void election permits judicial interference, where laws are violated.—Winder v. King, Tex.Com.App., 1 S.W.2d 587, affirming, Civ.App., 297 S.W. 689 and rehearing denied, Com.App., 5 S.W.2d xx.

40. N.Y.—Bonacker v. Chuckrow, 2 N.Y.S.2d 265, 166 Misc. 171.
Ohio.—Rice v. Campbell, 50 N.E.2d 430, 71 Ohio App. 477.

Fraud of one member
In suit to enjoin action of commissioners' court, specific allegations of fraud on part of county judge and one commissioner are insufficient to warrant relief, where of four commissioners vote of majority of three is determinative and county judge votes only in case of tie.—Cannon v. McComb, Tex.Civ.App., 268 S.W. 999.

41. Ala.—City of Birmingham v. Hawkins, 194 So. 538, 239 Ala. 9.
Ark.—Penix v. Shaddox, 263 S.W. 389, 165 Ark. 152.
Ill.—Rockford Amusement & Refreshment Co. v. Baldwin, 252 Ill. App. 1.
Ind.—Meredith v. Crowder, 142 N. E. 876, 81 Ind.App. 221.
Neb.—Everts v. Young, 251 N.W. 109, 125 Neb. 562.
N.J.—Webb v. Township Committee of Hanover Tp., 142 A. 244, 105 N. J.Eq. 738.
Okl.—Ingram v. Board of County Com'rs, 289 P. 273, 144 Okl. 41.
Tex.—City of Abilene v. Fryar, Civ. App., 143 S.W.2d 654.
32 C.J. p 251 note 90.

Plaintiff held without other adequate remedy
Ga.—Jones v. Methvin, 17 S.E.2d 172, 193 Ga. 17—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860.
Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.
S.C.—Greenville Baseball v. Bearden, 20 S.E.2d 813, 200 S.C. 363.

42. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 81 F. 2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, 12 F. Supp. 70, cause remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 379, reversed on other grounds 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178.
W.Va.—County Court of Mingo County v. Bailey, 125 S.E. 253, 97 W.Va. 351.

43. U.S.—Connor v. Board of Com'rs of Logan County, D.C.Ohio, 12 F.2d 789.

44. U.S.—Borges v. Loftis, C.C.A. Cal., 87 F.2d 734, certiorari denied 57 S.Ct. 789, 301 U.S. 687, 81 L.Ed. 1344, rehearing denied 57 S.Ct. 928, 301 U.S. 714, 81 L.Ed. 1366.

45. Fla.—Hernandez v. Board of Com'rs of Hillsborough County, 153 So. 790, 114 Fla. 219.

46. Minn.—Schwartz v. Rice County Co-op. Egg & Poultry Ass'n, 204 N.W. 316, 163 Minn. 515.

Void election
Court will not assume beforehand, in suit to enjoin holding of election, that officers will attempt to enforce void election. Consequently, injunction to restrain enforcement of void election was properly denied, where neither result of election nor attempt of officials to enforce it was shown.—Winder v. King, Tex.Com. App., 1 S.W.2d 587, affirming, Civ. App., 297 S.W. 689, and rehearing denied, Com.App., 5 S.W.2d xx.

47. Cal.—Goodwin v. Glaser, 10 Cal. 333.

pelled by injunction.[48]

Completed acts. Injunction will not be granted to restrain acts already completed by county or town officers.[49]

Removal of county seat. The illegal removal of a county seat may be enjoined,[50] as where there is an entire absence of legal authority to initiate proceedings for the removal of the county seat, being taken under an unconstitutional law,[51] or in direct contravention of a law regulating the matter,[52] or where the county commissioners have fraudulently canvassed the votes cast in a county seat election, and have purposely declared the result improperly.[53] Of course no injunction will be granted when the removal is regular,[54] or, it has been held, for mere error committed by the commissioners in the exercise of their discretion.[55]

The suit must be brought by one who will be damaged by such removal.[56] It is generally held that a resident taxpayer has sufficient interest to bring the suit;[57] but there is authority to the contrary.[58] The removal of the county seat in accordance with the vote of the people may be compelled at the suit of a citizen and taxpayer.[59]

§ 111. Municipalities and Municipal Officers

Injunction will lie against a municipality or municipal officers to restrain illegal acts resulting in irreparable injury to a complainant who has no other adequate remedy available.

Unlawful interference by a municipal corporation or municipal officers or agents with the property or property rights of an individual or of another corporation will be enjoined when irreparable injury is caused thereby.[60] On the other hand, a

N.J.—Barber v. West Jersey Title & Guaranty Co., 32 A. 222, 53 N.J. Eq. 158.

48. Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
Ky.—Scott County Board of Education v. Steele, 280 S.W. 1098, 213 Ky. 343.

Complaint held to state cause of action

A complaint by holder of bonds issued by a county, praying for order directing sheriff to proceed with enforcement of tax executions in his hands in accordance with general laws to realize funds for payment of interest on county bonds, stated a cause of action.—Kirk v. Douglass, 3 S.E.2d 536, 190 S.C. 495.

49. Ga.—Shurley v. Black, 119 S.E. 618, 156 Ga. 683.

50. Ala.—Dennis v. Prather, 103 So. 59, 62, 212 Ala. 449, citing **Corpus Juris.**
Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.
32 C.J. p 251 note 91.

51. Minn.—Todd v. Rustad, 46 N. W. 73, 43 Minn. 500.
Wash.—Rickey v. Williams, 36 P. 480, 8 Wash. 479.

52. Minn.—Streissguth v. Geib, 69 N.W. 1097, 67 Minn. 360.

53. Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.
32 C.J. p 251 note 94.

Irregularities

The removal of a county seat under election authorizing such removal would not be enjoined because of mere irregularities in canvass of the ballots, in absence of statute rendering election void for irregularities, and in absence of proof that irregularities affected result of election.—Orchard v. Board of Com'rs of Sierra County, 76 P.2d 41, 42 N.M. 172.

54. Tex.—Worsham v. Richards, 46 Tex. 441—Walker v. Tarrant County, 20 Tex. 16.

55. Wash.—Mann v. Wright, 142 P. 697, 81 Wash. 358.

56. Kan.—McMillen v. Butler, 15 Kan. 62.
Tex.—Harrell v. Lynch, 65 Tex. 146.

57. Minn.—Todd v. Rustad, 46 N.W. 73, 43 Minn. 500.
32 C.J. p 251 note 98.

58. Tex.—Walker v. Tarrant County, 20 Tex. 16.
32 C.J. p 251 note 99.

59. Ind.—Clarke County Com'rs v. State, 61 Ind. 75.

60. U.S.—Tebbetts v. McElroy, D.C. Mo., 56 F.2d 621—Threedy v. Brennan, D.C.Wis., 40 F.Supp. 69—Strutwear Knitting Co. v. Olson, D. C.Minn., 13 F.Supp. 384—Mississippi Power Co. v. City of Starkville, D.C.Miss., 4 F.Supp. 833.
Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
Ark.—McClellan v. Stuckey, 120 S. W.2d 155, 196 Ark. 816—Bush v. Echols, 10 S.W.2d 906, 178 Ark. 507.
Cal.—Eaton v. Klimm, 18 P.2d 678, 217 Cal. 362—Stone v. City of Los Angeles, 299 P. 838, 114 Cal.App. 192.
Colo.—City & County of Denver v. Gibson, 24 P.2d 751, 93 Colo. 122.
Fla.—Blitch v. City of Ocala, 195 So. 406, 142 Fla. 612—Pohl Beauty School v. City of Miami, 159 So. 789, 792, 118 Fla. 664, citing **Corpus Juris.**
Ga.—Wingate v. City of Doerun, 170 S.E. 226, 177 Ga. 373—City Council of Augusta v. Sanders, 138 S.E. 234, 164 Ga. 235.
Ill.—Nimpfer v. Village of Fox Lake, 165 N.E. 143, 334 Ill. 46—Deir v. Retirement Board of Municipal Employees' Annuity and Benefit Fund of Chicago, 36 N.E.2d 273, 311 Ill.App. 369—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152—Fox Film Corporation v. Collins, 236 Ill.App. 281.
Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.
Kan.—Youmans v. City of Osawatomie, 236 P. 638, 118 Kan. 767.
La.—St. Bernard Oil Co. v. City of New Orleans, 115 So. 817, 165 La. 665—Wachsen v. Commission Council of Lake Charles, 111 So. 177, 162 La. 823—Connell v. Commission Council of City of Baton Rouge, 96 So. 657, 153 La. 788—Brunning v. City of New Orleans, 94 So. 909, 152 La. 989—City of Shreveport v. Dickson, App., 150 So. 581—Dawkins v. Bazer, 134 So. 119, 16 La.App. 284, conforming to answer to certified questions 134 So. 238, 172 La. 327.
Mich.—Grosse Pointe Fire Fighters Ass'n Local No. 533, v. Village of Grosse Pointe Park, 6 N.W.2d 725, 303 Mich. 405.
N.J.—Drive-to Department Stores v. City of Newark, 170 A. 29, 115 N. J.Eq. 222—Jackson v. Miller, 60 A. 1019, 69 N.J.Eq. 182.
N.Y.—Mazzarella v. Kern, 32 N.E.2d 803, 285 N.Y. 85, reversing 24 N.Y. S.2d 26, 260 App.Div. 1012, and affirming 25 N.Y.S.2d 386—Saidel v. Village of Tupper Lake, 4 N.Y.S.2d 814, 254 App.Div. 22—Tribune Association v. Sun Printing & Publishing Ass'n, 7 Hun 175—Schenectady Ry. Co. v. Whitmyer, 199 N. Y.S. 827, 121 Misc. 4.
Ohio.—Union Land & Building Co. v. City of Youngstown, 18 Ohio App. 253.
Pa.—Randall v. City of Clairton, 88 Pittsb.Leg.J. 1, 31 Mun.L.R. 83, reversed on other grounds 10 A.2d 779, 337 Pa. 276.
Tex.—City of Dallas v. McElroy, Civ. App., 254 S.W. 599.
W.Va.—Lee v. City of Elkins, 128 S.

court of equity will not interfere with the exercise of discretionary powers on the part of a municipal corporation or its officers as long as the limits of those powers are not exceeded[61] and no fraud, malice, bad faith, or improper motives are shown,[62] for otherwise this would be an assumption by the court of the right to exercise the powers delegated only to the corporation or its officers.[63] As long as they have acted honestly, the fact that a mistake has been made in the exercise of this discretion,[64] or that the acts are hasty and ill-advised and not for the best interests of the inhabitants,[65] constitute no ground for an injunction; but in case of an abuse of discretion whereby property rights are or will be injuriously affected the acts of such officers may be enjoined.[66] It is only

E. 83, 99 W.Va. 201—Harvey v. City of Elkins, 64 S.E. 247, 65 W. Va. 305.

32 C.J. p 259 note 9.

Absence of statutory appeal

The fact that neither the rules of municipal civil service commission nor any statute authorizes an appeal to court from action of the commission does not prevent the court, in a proper action, from restraining such commission from fraudulent, capricious, and illegal action.—Coleman v. City of Gary, 44 N.E.2d 101, 220 Ind. 446.

Interference by force

Where individuals are actually occupying a disputed area of land, the right to the use and possession of which is claimed by a municipal corporation, such municipal corporation is without justification in attempting to interfere by force with the established possession of the individuals in actual occupancy of the disputed area, since municipalities have no greater right to ignore orderly processes of law than have individuals.—City of Jacksonville v. Giller, 135 So. 549, 102 Fla. 92.

Utility of second injunction

Ohio.—Foltzer v. City of Cincinnati, 36 N.E.2d 192, 70 Ohio App. 127.

61. U.S.—City of Seattle v. Puget Sound Power & Light Co., C.C.A. Wash., 284 F. 659, reversing, D.C., Puget Sound Power & Light Co. v. City of Seattle, 282 F. 712, and certiorari denied 43 S.Ct. 520, 262 U.S. 743, 67 L.Ed. 1210.

Fla.—City of Miami Beach v. Ocean & Inland Co., 3 So.2d 364, 147 Fla. 480.

Ga.—Borough of Atlanta v. Kirk, 165 S.E. 69, 175 Ga. 395.

Ill.—Smutny v. Irving Park Dist., 269 Ill.App. 544.

Ind.—Vonnegut v. Baun, 188 N.E. 677, 206 Ind. 172.

Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

Kan.—Kansas Power Co. v. City of Washington, 67 P.2d 1095, 1098, 145 Kan. 962, quoting **Corpus Juris**—City of Emporia v. Humphrey, 297 P. 712, 716, 132 Kan. 682, citing **Corpus Juris.**

La.—Keegan v. Board of Com'rs of Port of New Orleans, 98 So. 50, 154 La. 639—State ex rel. Maes v. New Orleans Police Board, 6 La. App. 48.

Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Mo.—State ex rel. and to Use of Bader v. Flynn, 159 S.W.2d 379, 383, 236 Mo.App. 577, citing **Corpus Juris.**

Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

N.J.—Soper v. Conly, 154 A. 852, 108 N.J.Eq. 370, affirmed 153 A. 586, 107 N.J.Eq. 537—Coles v. City of Newark, 121 A. 782, 95 N.J.Eq. 73, affirmed 123 A. 926, 95 N.J.Eq. 775—Araneo-White Const. Co. v. Joint Municipal Sewer Commission, 154 A. 313, 9 N.J.Misc. 243.

N.Y.—Barr v. Algon Realty Corporation, 2 N.Y.S.2d 273, 166 Misc. 177, affirmed 8 N.Y.S.2d 119, 255 App. Div. 869, reargument denied 8 N. Y.S.2d 1005, 255 App.Div. 986—Fisher v. Manhattan Beach, 2 N. Y.S.2d 273, 166 Misc. 177, affirmed 8 N.Y.S.2d 120, 255 App.Div. 869, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986.

Ohio.—City of Cincinnati v. Wegehoft, 162 N.E. 389, 119 Ohio St. 136—Lyons v. City of Cincinnati, 9 N.E.2d 988, 55 Ohio App. 458—Schultz v. City of Cincinnati, 31 Ohio N.P.,N.S., 284, affirmed 194 N. E. 38, 48 Ohio App. 432.

Okl.—Whittington v. Dyer, 265 P. 126, 130 Okl. 38.

Tex.—Mayer v. Kostes, Civ.App., 71 S.W.2d 398, 402, citing **Corpus Juris**—Robinson v. Hays, Civ.App., 62 S.W.2d 1007—Cain v. City of San Antonio, Civ.App., 28 S.W.2d 190.

Va.—Shield v. Peninsula Land Co., 133 S.E. 586, 147 Va. 736.

Wash.—State ex rel. Gebhardt v. Superior Court for King County, 131 P.2d 943, 15 Wash.2d 673.

32 C.J. p 260 note 23.

62. Okl.—Whittington v. Dyer, 265 P. 126, 130 Okl. 38.

32 C.J. p 260 note 24.

63. Pa.—Rosenbaum v. Philadelphia & R. R. Co., 19 Pa.Co. 666.

Decree held not within rule

Decree enjoining city officials from excluding or removing plaintiffs or their sympathizers from streets, from exercising any personal restraint over plaintiffs or their sympathizers, from preventing holding of public meetings, from interfering with distribution of circulars, leaflets and handbills and from interfering with carrying of signs was not objectionable on ground that decree was not enforceable and substituted the will of the court for that of the governing authority of city.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed 1423.

64. Mo.—State ex rel. and to Use of Bader v. Flynn, 159 S.W.2d 379, 383, 236 Mo.App. 577, citing **Corpus Juris.**

Pa.—Schall v. Norristown, 6 Leg.Gaz 157.

65. N.H.—Cox v. Jones, 63 A. 178, 73 N.H. 504.

66. U.S.—Fox Film Corp. v. Chicago, D.C.Ill., 247 F. 231, affirmed, 251 F. 883, 164 C.C.A. 99.

Mich.—Wetherby v. City of Jackson, 249 N.W. 484, 264 Mich. 146.

N.J.—Araneo-White Const. Co. v. Joint Municipal Sewer Commission, 154 A. 313, 9 N.J.Misc. 243.

Okl.—City of Tulsa v. Thomas, 214 P. 1070, 89 Okl. 188.

Pa.—Shuck v. Borough of Ligonier, 23 West.Co.L.J. 20.

Arbitrary enforcement

(1) An attempt to enforce a valid ordinance arbitrarily, unreasonably, and without warrant of law or facts may be enjoined.

Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.

Ga.—Town of Lilburn v. Alford Bros., 136 S.E. 65, 163 Ga. 282.

(2) The ruling of a plumbing inspector that certain appliances are being improperly installed is not final, since it is finally for the courts to determine whether an ordinance is being arbitrarily and unreasonably enforced.—City Council of Augusta v. Loftis, 118 S.E. 666, 156 Ga. 77.

(3) City should have been enjoined from making discriminations, and not from entire enforcement of ordinance where its enforcement of ordinance was discriminatory.—City of Covington v. Gausepohl, 62 S.W.2d 1040, 240 Ky. 323.

where it is shown clearly that the municipal corporation or its officers have transcended the powers vested in them,[67] or that there has been abuse of discretion,[68] that a court of equity will interfere.

An injunction will be refused where the municipality or municipal officer is proceeding legally,[69] where there will be no irreparable injury[70] to the property rights[71] or fundamental personal rights,[72] of complainant,[73] or where the injured person has an adequate remedy at law,[74] as by an action for

67. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.
Fla.—Sweat v. Daley, 156 So. 720, 116 Fla. 755.
Pa.—Paris v. Philadelphia, 63 Pa. Super. 41.

68. Cal.—Pratt v. Rosenthal, 183 P. 542, 181 Cal. 158.
Ga.—Gainesville v. Dunlap, 94 S.E. 247, 147 Ga. 344.
Kan.—Fairchild v. Holton, 166 P. 503, 101 Kan. 330.

69. Cal.—Vincent Petroleum Corporation v. Culver City, 111 P.2d 433, 43 Cal.App.2d 511.
Fla.—City of Miami v. Rosen, 10 So. 2d 307, 151 Fla. 677.
Ga.—Southern Theatres Corporation v. Martin, 5 S.E.2d 39, 188 Ga. 852.
Ind.—City of Indianapolis v. Ryan, 7 N.E.2d 974, 212 Ind. 447, 135 A.L.R. 1300.
La.—Martin v. City of Lafayette, 110 So. 415, 162 La. 262.
Mass.—Liggett Drug Co. v. Board of License Com'rs of City of North Adams, 4 N.E.2d 628, 296 Mass. 41.
N.Y.—Tobin v. Hennessy, 222 N.Y.S. 484, 220 App.Div. 695, modifying 223 N.Y.S. 618, 129 Misc. 756—Mestichelli v. Valentine, 18 N.Y.S. 2d 405, 173 Misc. 539.
Okl.—Bowles v. Perkinson, 213 P. 74, 88 Okl. 239.
32 C.J. p 260 note 16.

70. Md.—Mayor and City Council of Baltimore v. Brack, 3 A.2d 471, 175 Md. 615, 120 A.L.R. 543.
N.Y.—Hudson v. Town of Oyster Bay, 288 N.Y.S. 627, 248 App.Div. 737—Kelly-Sullivan, Inc., v. Moss, 22 N.Y.S.2d 491, 174 Misc. 1098, affirmed 24 N.Y.S.2d 984, 260 App. Div. 921.
32 C.J. p 260 note 17.

Destruction of one's business is an irreparable injury.—Greenfield v. Board of City Planning Com'rs of Los Angeles, 45 P.2d 219, 6 Cal.App. 2d 515.

Irreparable injury shown
Fla.—Williams v. Public Utility Protective League of Florida, 178 So. 286, 130 Fla. 603.

The possibility that an encroachment upon uses permitted in certain district under zoning ordinance may lead to others is not sufficient to justify invocation of injunctive relief.—Bowen v. Hider, 37 N.Y.S.2d 76.

71. Fla.—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677.
Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
Mass.—Kelley v. Board of Health of Peabody, 143 N.E. 39, 248 Mass. 165.

Building permit
Person who has secured building permit and has started to construct building may enjoin city from interfering with his right to proceed under the permit.—Wasserman v. City of Kenosha, 258 N.W. 857, 217 Wis. 223—Lindemann v. City of Kenosha, 240 N.W. 373, 206 Wis. 364.

Political matter
Equity has no power to interfere by injunctive process with matters which are political in character and which do not involve property rights or matters of public taxation.—Miller v. Tatum, 279 S.W. 1002, 170 Ark. 152.

72. Va.—Thompson v. Smith, 154 S. E. 579, 155 Va. 367, 71 A.L.R. 604.

73. U.S.—Missouri Power & Light Co. v. City of La Plata, Mo., D.C. Mo., 10 F.Supp. 653, appeal dismissed, C.C.A., 82 F.2d 1016.
Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265—James Rees & Sons Co. v. City of Pittsburgh, 175 A. 420, 316 Pa. 356.
32 C.J. p 260 note 17.

74. Cal.—Vincent Petroleum Corporation v. Culver City, 111 P.2d 433, 43 Cal.App.2d 511.
Conn.—Coombs v. Larson, 152 A. 297, 112 Conn. 236.
Ill.—Cann v. City of Chicago, 241 Ill.App. 21—Fox Film Corporation v. Collins, 236 Ill.App. 281.
Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.
Ky.—Arbogast v. Weber, 60 S.W.2d 144, 249 Ky. 20.
Mass.—Kelley v. Board of Health of Peabody, 143 N.E. 39, 248 Mass. 165.
Mo.—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W.2d 290, transferred, see, Sup., 152 S. W.2d 178.
N.J.—Brower v. Board of Com'rs of City of Asbury Park, 142 A. 648, 103 N.J.Eq. 176—Gibbs Bldg. & Const. Co. v. Town of Belleville, 135 A. 333, 100 N.J.Eq. 240.
N.Y.—Erie R. Co. v. Village of Elmira Heights, 211 N.Y.S. 688, 125 Misc. 441.
Pa.—Soliak v. North Belle Vernon Borough, 29 Mun.L.R. 84, 21 West. Co.L.J. 205, reversed on other grounds 200 A. 707, 131 Pa.Super. 459.
Tex.—Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446, reversing Lorino v. Holcombe, Civ.App., 71 S.W.2d 402.
Wash.—Hall v. Elliott, 131 P.2d 137, 15 Wash.2d 518—Boyer v. City of Yakima, 273 P. 188, 150 Wash. 421.
32 C.J. p 260 note 18.

However, it has been stated that it is not after the manner of the courts of equity to close their doors on allegations of excessive use of power, even in the face of other available remedies.—McGuinn v. City of High Point, 13 S.E.2d 48, 219 N.C. 56.

Administrative review
(1) The right of appeal to board of health from ruling of plumbing inspector unlawfully prohibiting installation of given appliances in building being erected does not provide complete and adequate remedy preventing resort to equity for injunction, as ruling of board, being ministerial or administrative, would not be reviewable by certiorari.—City Council of Augusta v. Loftis, 118 S.E. 666, 156 Ga. 77.

(2) Even though appeal to board of health from ruling of plumbing inspector unlawfully prohibiting installation of given appliances in building being erected, as authorized by ordinance, is necessary to exhaust available remedies and perfect right to resort to equity, the board's ruling, if adverse, is not judgment concluding appellant from suing for injunction.—City Council of Augusta v. Loftis, supra.

Complainant held not to have other adequate remedy
(1) Generally.
U.S.—Northern Texas Telephone Co. v. City of Sherman, Tex., D.C.Tex., 4 F.Supp. 554.
Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.

(2) A district attorney was without legal remedy and could maintain suit for injunction to restrain issuance of liquor licenses under allegedly unconstitutional statute where constitutional provision relied on, prohibiting legalization of saloons, provided no penalty for its violation.—Golden v. People ex rel. Baker, 74 P.2d 715, 101 Colo. 381.

Irregular proceedings by a building inspector must stand until set aside by a legal tribunal, and are not a basis for enjoining the inspector

damages[75] or by mandamus,[76] or by certiorari.[77] Likewise, an injunction will not issue to restrain municipal officers in order to permit plaintiff to enjoy the advantage of a wrongful act on his part.[78]

As a general rule a municipality or municipal officers will not be enjoined from future action on the mere possibility that it or they may do an illegal act,[79] or from doing an act which the officer has no authority or duty to do and which he has not threatened to do.[80]

Compelling acts. Where there is doubt as to the power of a city to do an act, it will not be ordered to do it by mandatory injunction.[81] Likewise, although the performance of mere ministerial duties may be compelled,[82] as a general rule courts of equity will not compel a municipal officer to do his duty,[83] and, in any event, before a mandatory injunction will be issued, the right to, and necessity for, such an injunction must be clearly shown.[84] A mandatory injunction compelling a municipality to remove a completed public improvement has been denied on the ground that the rights of citizens may sometimes be abridged in the interests of the public welfare.[85]

Persons entitled to injunction. If the illegal acts of a municipal corporation are such as to increase taxation or violate public rights, any taxpayer,[86] or the state acting through its proper legal officers,[87] or another municipality whose rights have been infringed by the municipality sought to be enjoined,[88] may bring suit for an injunction; but where the interests of the state at large are not affected the state is not a proper party.[89]

§ 112. School Boards and Officers

While injunction will not, in the absence of an abuse of discretion, issue to control the acts of school boards and officers within the limits of the powers conferred on them, unlawful acts or acts beyond the scope of the pow-

from proceeding with his duties.—Pappas v. Meyer, 130 A. 834, 98 N.J.Eq. 18.

Irregularities in performing valid public contract or authorized municipal function do not authorize injunction.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Multiplicity of actions

Where city authorities threaten repeated acts of usurpation over complainants' land and threaten a continued interference with and destruction of complainants' business, the action of trespass does not afford a plain, complete, and adequate remedy at law because it might require a multiplicity of actions successfully to recover for the damage done.—City of Jacksonville v. Giller, 135 So. 549, 102 Fla. 92.

75. Ariz.—Hislop v. Rodgers, 92 P. 2d 527, 54 Ariz. 101.
32 C.J. p 260 note 19.

76. Ill.—Klever Shampay Karpet Kleaners v. City of Chicago, 238 Ill.App. 291—Hamilton v. City of Chicago, 227 Ill.App. 291.
32 C.J. p 260 note 20.
However, it has been held that, assuming that an adequate remedy was afforded by mandamus, such fact presents no obstacle to the controversy being settled on its merits in an action for a mandatory injunction.—Bissey v. Marion, 178 P. 611, 991, 104 Kan. 311.

Where remedy by mandamus is inadequate, injunction will lie.—City of Dallas v. McElroy, Tex.Civ.App., 254 S.W. 599.

77. Wis.—Ferch v. Schroedel, 6 N.W. 2d 176, 241 Wis. 457—Gaertner v. Fond du Lac, 34 Wis. 497.

78. Tex.—City of Odessa v. Halbrook, Civ.App., 103 S.W.2d 223.

Nuisance

The owner of a wooden building constructed within a city fire limits in violation of an ordinance cannot restrain the city from demolishing the building regardless of the validity of the ordinance providing for such demolitions, since such building constitutes a nuisance, and equity will refuse any relief designed to perpetuate its maintenance.—Maguire v. Reardon, 183 P. 303, 41 Cal.App. 596.

79. Ga.—Darby v. Fulmer, 161 S.E. 621, 173 Ga. 783.
Iowa.—Mote v. Incorporated Town of Carlisle, 283 N.W. 695, 211 Iowa 392.
N.Y.—Barr v. Algon Realty Corporation, 2 N.Y.S.2d 273, 166 Misc. 177, affirmed 8 N.Y.S.2d 119, 255 App. Div. 869, reargument denied 8 N.Y. S.2d 1005, 255 App.Div. 986—Fisher v. Manhattan Beach, 2 N.Y.S.2d 273, 166 Misc. 177, affirmed 8 N.Y. S.2d 120, 255 App.Div. 869, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986.
Or.—Slovanian Literary & Social Ass'n v. City of Portland, 224 P. 1098, 111 Or. 335.

City officials' admission that they intended to prevent use of premises by general contractor for conduct of his business showed "irreparable injury" justifying injunctive relief where such use was lawful.—Greenfield v. Board of City Planning Com'rs of Los Angeles, 45 P.2d 219, 6 Cal.App.2d 515.

80. N.Y.—Manhattan Refrigerating Co. v. Fassler, 300 N.Y.S. 571, 165 Misc. 29.

81. Neb.—Andrews v. Steele City, 89 N.W. 739, 2 Neb., Unoff., 676.

82. Ohio.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.
Tex.—City of San Benito v. Hays & Sons, Civ.App., 15 S.W.2d 99.

Execution issued on judgment against city and returned no property found was the equivalent of a demand for payment before filing petition for mandatory injunction to compel city council members to meet and levy tax sufficient to pay judgment.—City of Catlettsburg v. Fabric Fire Hose Co., 95 S.W.2d 285, 264 Ky. 594.

83. Mass.—Kelley v. Board of Health of Peabody, 143 N.E. 39, 248 Mass. 165.
Ohio.—Village of Newburgh Heights v. Tegg, 167 N.E. 894, 32 Ohio App. 248.

84. U.S.—City of Seattle v. Puget Sound Power & Light Co., C.C.A. Wash., 284 F. 659, reversing, D.C., Puget Sound Power & Light Co. v. City of Seattle, 282 F. 712, and certiorari denied 43 S.Ct. 520, 262 U.S. 743, 67 L.Ed. 1210.

85. Cal.—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

86. Iowa.—Van Horn v. Des Moines, 191 N.W. 144, 195 Iowa 340.
32 C.J. p 259 note 11.

87. Kan.—State v. Neodesha, 45 P. 122, 3 Kan.App. 319.
32 C.J. p 259 note 12.

88. N.D.—Red River Valley Brick Co. v. Grand Forks, 145 N.W. 725, 27 N.D. 8.
32 C.J. p 259 note 13.

89. N.Y.—People v. New York, 27 How.Pr. 34.

ers of such boards or officers may be enjoined, where there is no other adequate remedy available, on the complaint of one whose property rights are irreparably injured thereby.

School boards or school officers may be enjoined from acting beyond the scope of their powers or in violation of law where the remedy at law is inadequate.[90] The right to an injunction, however, must be clearly shown,[91] and the injunction should go no further than is necessary to preserve the rights assailed.[92] An injunction will not issue in the absence of a showing of some threatened injury from the acts complained of,[93] where there is an adequate remedy at law,[94] or where there is a remedy special-

90. Ga.—Edge v. Garrett, 74 S.E. 758, 138 Ga. 93.
Iowa.—Security Nat. Bank of Mason City v. Bagley, 210 N.W. 947, 202 Iowa 701, 49 A.L.R. 705—District Tp. of Union v. Meyers, 49 N.W. 1042, 83 Iowa 688.
Mo.—State ex rel. Brokaw v. Board of Education of City of St. Louis, App., 171 S.W.2d 75.
Pa.—Kroshinsky v. Dickson City School Dist., 44 Pa.Co. 327, 16 Lack.Jur. 321.
S.C.—State ex rel. Frier v. State Board of Education, 183 S.E. 705, 179 S.C. 188.
Utah.—Beard v. Board of Education of North Summit School Dist., 16 P.2d 900, 903, 81 Utah 51, citing **Corpus Juris.**
32 C.J. p 251 note 3.

Board of education of school district had right to bring action to enjoin county superintendent from creating new school district.—Rowe v. Ray, 231 N.W. 689, 120 Neb. 118, 70 A.L.R. 1056.

Injunction held to lie to restrain

(1) Changing site of school house, or building a new school house on a new site, without first obtaining sanction of voters at an election.—Buchanan v. School Dist. of City of Hannibal, 25 Mo.App. 85.

(2) Execution of contract for construction of a school building contrary to mandatory statutory requirements as to height of ceilings, fire doors, and other preventive measures.—Benzing v. Board of Education of Hamilton City School Dist., 181 N.E. 150, 41 Ohio App. 468.

(3) Illegal act in furthering the organization of a consolidated school district.—Specht v. Joint School Dist. No. 54 of Alfalfa and Major Counties, 223 P. 386, 97 Okl. 202.

(4) Illegally detaching territory from a school district.—State ex rel. Miller v. Eisenbise, 46 P.2d 852, 142 Kan. 251—32 C.J. p 251 note 3 [a] (1).

(5) Illegal removal of school building.—District Tp. of Lodomillo v. District Tp. of Cass, 6 N.W. 163, 54 Iowa 115.

(6) Assuming jurisdiction over lands in other districts, pursuant to change of district's boundaries made under unconstitutional act.—Schafersman v. School Dist. No. 85 of Dodge County, 234 N.W. 791, 120 Neb. 673.

(7) Illegal use of school buildings for other purposes.
Kan.—Spencer v. Joint School Dist. No. 6 of Nemaha and Brown Counties, 15 Kan. 259, 22 Am.R. 268.
Ohio.—Weir v. Day, 35 Ohio St. 143.

(8) Illegal use of school buildings for religious purposes.
Conn.—Scofield v. Eighth School Dist., 27 Conn. 499.
Ind.—Hurd v. Walters, 48 Ind. 148.
Pa.—Larson v. DuBois Borough School Directors, 24 Pa.Dist. 680, 42 Pa.Co. 449.

(9) Other acts see 32 C.J. p 251 note 3 [a].

State, on relation of county attorney, may sue to enjoin board of trustees of community high school from using school money to pay for busses to transport pupils, or to pay cost of such transportation.—State v. Cruzan, 243 P. 329, 120 Kan. 316.

91. Ind.—Hurd v. Walters, 48 Ind. 148—Yoder v. Cole, 172 N.E. 545, 91 Ind.App. 630.
Ohio.—Board of Education of Berea Rural School Dist. of Hamilton County v. Board of Education of Hamilton County, 31 N.E.2d 702, 66 Ohio App. 267.
Pa.—Strine v. School Dist. of Upper Merion Tp., 27 A.2d 552, 149 Pa. Super. 612.

Title to land

Building will not be restrained on ground that district does not own land, where homesteader donating land on acquiring title continues willing to convey land and in any event would be estopped to assert title.—Hopkins v. Howard, 283 P. 18, 131 Or. 448.

92. Iowa.—Knowlton v. Baumhover, 166 N.W. 202, 203, 182 Iowa 691, 5 A.L.R. 841.
32 C.J. p 253 note 25.

93. Ga.—McCaskill v. Bower, 54 S.E. 942, 126 Ga. 341.
Ind.—Hurd v. Walters, 48 Ind. 148.
Tex.—San Felipe Independent School Dist. v. Nelson, Civ.App., 74 S.W. 2d 136—Independent School Dist. v. Salvatierra, Civ.App., 33 S.W.2d 790, appeal dismissed and certiorari denied Salvatierra v. Independent School Dist., 52 S.Ct. 28, 284 U.S. 580, 76 L.Ed. 503.

Collection of fees

Where students at state teachers' college refused to pay matriculation and incidental fees, and college authorities refused to accept payment limited to purpose of tuition, but students continued in college until after bringing action to enjoin collection of fees, "irreparable injury" was not shown.—McIntyre v. State Board of Higher Education, 3 N.W. 2d 463, 71 N.D. 630.

Father may bring action in his name to compel county to pay daughter's tuition under a statute providing therefor, where high school of another county is more convenient.—Scott County Board of Education v. Steele, 280 S.W. 1098, 213 Ky. 343.

Illegal use of buildings

(1) An injunction against the use of school buildings for other purposes will be enjoined, on the application of a taxpayer, although the injury to him may be very slight, as he has no other remedy.
Conn.—Scofield v. Eighth School District, 27 Conn. 499.
Ohio.—Weir v. Day, 35 Ohio St. 143.

(2) A person seeking to restrain an alleged misuse of a school house, who alleges that he is a taxpayer and resident of the school district, that the school house has been built partially out of the taxes that he has paid, that he has children attending the school, and that by reason of the misuse the books of his children are torn, soiled, carried away, lost, and misplaced, their copy books written on or thrown on the floor, their slates and pens broken, their inkstands upset, and their paper wasted and destroyed, shows such a personal and private interest as to entitle him to an injunction.—Spencer v. Joint School Dist. No. 6 of Nemaha and Brown Counties, 15 Kan. 259, 22 Am.R. 268.

Owner of shorthand system could not maintain a suit to enjoin board of education of city from teaching in city schools any system of shorthand other than that belonging to plaintiff or using or distributing to the students during that period any shorthand textbooks embodying another shorthand system, where there was no showing of loss, damage or increase of burdens to anyone.—Caton v. Board of Education of City of Minneapolis, 6 N.W.2d 266, 213 Minn. 165.

94. U.S.—School Dist. No. 7, Muskogee County, Okl., v. Hunnicutt, D.C.Okl., 51 F.2d 528, affirmed 51

ly provided by statute,[95] although as to this last proposition there is authority apparently to the contrary.[96] An injunction will not issue to prevent the commission of acts which have been fully completed before the commencement of the action,[97] or to restrain unlawful practices which ceased before action was instituted.[98]

Matters of discretion. As long as school boards or officers act within the limits of the powers conferred on them, their discretion cannot be interfered with by injunction,[99] unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion;[1] and the general rule applies although the discretion may not

S.Ct. 653, 283 U.S. 810, 75 L.Ed. 1428.

Ga.—Nichols v. Board of Education of Richmond County, 178 S.E. 292, 180 Ga. 84.

Mont.—Peterson v. School Board of School Dist. No. 1, Cascade County, 236 P. 670, 73 Mont. 442.

N.Y.—Cooke v. Dodge, 299 N.Y.S. 257, 164 Misc. 73, modified on other grounds 4 N.Y.S.2d 768, 254 App. Div. 808.

N.D.—McIntyre v. State Board of Higher Education, 8 N.W.2d 463, 71 N.D. 630.

Ohio.—Swedersky v. Board of Education of Green Tp. Rural School Dist., Hamilton County, App., 37 N.E.2d 680.

Pa.—Weiss v. Ziegler, 193 A. 642, 327 Pa. 100, 112 A.L.R. 102.

32 C.J. p 251 note 5.

Appeal to school authorities

Under some statutes resort must first be had to the school authorities before the courts will hear any complaint as to a matter belonging to the administration of the school laws, but such resort is not necessary before suing to enjoin a wrong which does not arise out of the administration of the school laws.—Warren v. Sanger Independent School Dist., 288 S.W. 159, 116 Tex. 183—Rocky Mount Independent School Dist. v. Jackson, Civ.App., 152 S.W.2d 400, error refused—Nacogdoches Independent School Dist. v. Adams, Tex.Civ.App., 36 S.W.2d 567—City of Dallas v. Mosely, Tex.Civ.App., 286 S.W. 497, affirmed Mosely v. City of Dallas, Com.App., 17 S.W.2d 36.

Validity of organization

If the action is for the purpose of determining the question of the validity of the organization of a school district, quo warranto is the proper remedy, and the question cannot be determined by injunction restraining the existing officers from exercising their proper functions.—Specht v. Joint School Dist. No. 54 of Alfalfa and Major Counties, 223 P. 386, 97 Okl. 202—Cheek v. Eye, 219 P. 883, 96 Okl. 44.

Where other remedy is not adequate, complete, and full, injunctive relief will be granted.

U.S.—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954.

Ga.—Brinson v. Jackson, 148 S.E. 96, 168 Ga. 353.

95. Iowa.—Security Nat. Bank of Mason City v. Bagley, 210 N.W. 947, 202 Iowa 701, 49 A.L.R. 705.

Okl.—Cox v. Bowles, 254 P. 101, 124 Okl. 117.

S.C.—State v. Dick, 131 S.E. 772, 134 S.C. 46.

Tex.—Boydstun v. Fort Worth Independent School Dist., Civ.App., 33 S.W.2d 811—Maxey v. Noland, Civ. App., 31 S.W.2d 468, error denied Noland v. Maxey, 32 S.W.2d 822, 119 Tex. 462.

32 C.J. p 252 note 6.

Procedure unavailable

School district being without statutory authority to appeal to circuit court from special school committee's order granting petition for exclusion of certain territory from district, its failure to appeal therefrom within statutory time did not bar consideration on merits of its action to set aside order and enjoin compliance therewith.—Camp Crook Independent School Dist. No. 1 v. Shevling, 270 N.W. 518, 65 S.D. 14.

96. Miss.—Hobbs v. Germany, 49 So. 515, 94 Miss. 469, 22 L.R.A.,N.S., 983.

32 C.J. p 252 note 7.

97. N.D.—State ex rel. Reilly v. Gress, 256 N.W. 721, 65 N.D. 184—School Dist. No. 94 v. Thompson, 146 N.W. 727, 27 N.D. 459.

98. Kan.—State ex rel. Boynton v. Englehart, 40 P.2d 329, 141 Kan. 101.

99. Ga.—Jolly v. Catoosa County Board of Education, 154 S.E. 788, 171 Ga. 193.

Ind.—Lee v. Browning, 182 N.E. 550, 96 Ind.App. 282, followed in Lee v. McKinley, 182 N.E. 552, 96 Ind. App. 713, Lee v. Pride, 182 N.E. 552, 96 Ind.App. 713, and Lee v. Squire, 182 N.E. 552, 96 Ind.App. 712.

Iowa.—Security Nat. Bank of Mason City v. Bagley, 210 N.W. 947, 202 Iowa 701, 49 A.L.R. 705.

Kan.—Wright v. Board of Education of City of Leavenworth, 188 P. 439, 106 Kan. 469.

Okl.—Kincannon v. Pugh, 243 P. 945, 114 Okl. 90.

N.C.—Messer v. Smathers, 195 S.E. 376, 213 N.C. 183.

Ohio.—Frederick v. Owens, 25 Ohio Cir.Ct.,N.S., 581.

Okl.—Board of Education of City of Muskogee v. Baldwin, 137 P.2d 932—Brooks v. Shannon, 86 P.2d 792, 184 Okl. 255.

Pa.—Reed v. California Borough School Dist., 33 Pa.Co. 584, 38 Pittsb.Leg.J. 3.

32 C.J. p 252 notes 9, 14 [a].

De facto officers

The acts of school trustees in office, and recognized by authority as such, cannot be restrained by injunction if they are such as may be done by legal trustees.—Peets v. Martin, 101 So. 78, 135 Miss. 720.

Injunction denied as to

(1) Location and construction of a school or school building.

Cal.—Bingham v. Douglass, 256 P. 588, 83 Cal.App. 334.

Tenn.—Reams v. Town of McMinnville, 284 S.W. 382, 153 Tenn. 408.

Tex.—Independent School Dist. v. Salvatierra, Civ.App., 33 S.W.2d 790, appeal dismissed and certiorari denied Salvatierra v. Independent School Dist., 52 S.Ct. 28, 284 U.S. 580, 76 L.Ed. 503.

32 C.J. p 252 note 23.

(2) Other discretionary acts see 32 C.J. p 252 notes 15–22.

Ministerial acts

The performance of a mere ministerial act, as to which the board has no discretion, may be compelled by injunction.—Scott County Board of Education v. Steele, 280 S.W. 1098, 213 Ky. 343.

Temporary injunction held properly denied

Ala.—Salter v. Board of Education of Jefferson County, 159 So. 78, 229 Ala. 631.

1. Kan.—State v. Mowry, 237 P. 1032, 119 Kan. 74.

Ohio.—Watkins v. Hall, 13 Ohio Cir. Ct. 255, 7 Ohio Cir.Dec. 434.

Okl.—Brooks v. Shannon, 86 P.2d 792, 795, 184 Okl. 255, quoting **Corpus Juris.**

Pa.—Robb v. Stone, 146 A. 91, 296 Pa. 482—Philadelphia & R. C. & I. Co. v. Blythe Tp. School Dist., 5 Sch.Reg. 130.

32 C.J. p 252 note 10.

Abandonment of well-located school site on which a school building with a good foundation had been partially erected, being in manifest disregard of public interests, is an abuse of discretion which will be enjoined.—Lamb v. Redding, 63 A. 362, 234 Pa. 481.

be wisely exercised.[2] As long as there is a substantial compliance with the law technical defects will be disregarded.[3] Especially will such acts not be interfered with by a court of equity where, in addition to the fact that the acts are not in excess of their authority, a special remedy is provided by appeal to the county superintendent.[4]

Restraining illegal appointment or employment or discharge. An injunction will issue at the instance of the taxpayers or patrons of a school to restrain the illegal appointment or employment of a teacher,[5] such as to restrain the employment of one who has no legal certificate or license,[6] or of one whom the voters of the district have regularly decided they do not desire.[7] Also a county superintendent may sue the directors of a school district to restrain them from illegally appointing a teacher not qualified to teach,[8] although there is authority to the contrary.[9] Where school authorities are given power to employ and discharge teachers, taxpayers cannot by injunction interfere with their exercise of such discretionary power.[10] Injunction will not lie in a suit by taxpayers to prevent a school board from paying a teacher who has entered into a valid contract to teach.[11] Taxpayers cannot maintain an injunction to restrain school authorities from breaking a contract with a teacher where they are deprived of no right to instruction for their children,[12] nor can they by the extraordinary remedy of injunction compel the school board to keep its present superintendent and enjoin it from engaging another in his place.[13] The question as to who is legally employed to teach a school cannot properly be determined in an action to restrain one who assumes to act as director, or a teacher employed by him, from interfering with the school,[14] unless the action is based on alleged fraud.[15]

A teacher cannot maintain a bill for injunction to prevent his own trial and dismissal,[16] but he may enjoin an attempted dismissal without the hearing to which he is entitled under the statute.[17] In the absence of a special statutory remedy,[18] where a teacher has a contract to teach the right may be protected by injunction to prevent the school board or trustees from contracting with another,[19] and

Payment of board of a pupil by school directors from public funds will be restrained.—Peiffer v. Reno, 14 Pa.Dist. 47, 29 Pa.Co. 145.

2. Pa.—Wharton v. Cass Tp. School Directors, 42 Pa. 358.

3. Iowa.—Crawford v. Beaver School Tp., 166 N.W. 702, 182 Iowa 1324.
N.Y.—Lawson v. Lincoln, 83 N.Y.S. 667, 86 N.Y.App.Div. 217, affirmed 71 N.E. 1133, 178 N.Y. 636.

4. Iowa.—Security Nat. Bank of Mason City v. Bagley, 210 N.W. 947, 202 Iowa 701, 49 A.L.R. 705.
32 C.J. p 252 note 13.

5. Ill.—Lindblad v. Normal School Dist. Bd. of Education, 77 N.E. 450, 221 Ill. 261, reversing 122 Ill.App. 617.

Ratification of informal employment
Where a school board informally employs a teacher and enters into a contract with her, and thereafter formally meets and approves the informal action, it amounts to a ratification of the employment of the teacher, and the court will not enjoin the board from carrying out such contract, especially where the teacher has entered on her work with the consent and acquiescence of the school board.—Beckman v. Belyea, 236 N.W. 361, 60 N.D. 738.

6. Ill.—Martin v. Jamison, 89 Ill. App. 248.
Iowa.—Perkins v. Wolf, 17 Iowa 228.

7. Ind.—O'Brien v. Moss, 30 N.E. 894, 131 Ind. 99.

8. Colo.—Catlin v. Christie, 63 P. 328, 15 Colo.App. 291.

9. Iowa.—Perkins v. Wolf, 17 Iowa 228.
56 C.J. p 415 note 35.

10. Colo.—School Dist. No. 1 of Pitkin County v. Carson, 46 P. 846, 9 Colo.App. 6.

11. N.D.—Beckman v. Belyea, 236 N.W. 361, 60 N.D. 738.

12. Ind.—Schwier v. Zitike, 36 N.E. 30, 136 Ind. 210.

Cannot champion cause
Realtors, taxpayers of the school district, asserting that the school board had theretofore employed a teacher and entered into a valid contract with her, and that the board had illegally disregarded such contract so that the teacher has a cause of action against the district for damages, and asking a writ of injunction to prevent the board from interfering with the teacher and preventing her from carrying out her contract, cannot champion the cause of such teacher and secure an injunction for that purpose.—Beckman v. Belyea, 236 N.W. 361, 60 N.D. 738.

13. Minn.—Jensen v. Hennepin County Independent Cons. School Dist. No. 85, 199 N.W. 911, 160 Minn. 233.

14. Iowa.—Soldier Dist. Tp. v. Barrett, 47 Iowa 110.

15. Pa.—McCue v. Holleran, 7 Del. Co. 458, 9 Kulp 433.
56 C.J. p 416 note 39.

16. N.Y.—Cooke v. Dodge, 299 N.Y.S. 257, 164 Misc. 78, modified on other grounds 4 N.Y.S.2d 768, 254 App.Div. 808.
Ohio.—Frederick v. Lakewood Bd. of Education, 18 Ohio Cir.Ct.,N.S., 435.
32 C.J. p 252 note 24—56 C.J. p 408 note 63.

Hearing charges
District court will not enjoin two members of school board from participating with county superintendent in hearing charges alleging immorality of school teacher.—Kincannon v. Pugh, 243 P. 945, 114 Okl. 90.

17. Ohio.—Layton v. Clements, 27 Ohio C.A. 369.

18. S.C.—State v. Dick, 131 S.E. 772, 134 S.C. 46.

19. Miss.—Stokes v. Newell, 159 So. 540, 172 Miss. 289.

Superintendent
(1) Superintendent of schools of independent school district may be protected in his legal possession of office by injunction as against illegal attempts to deprive him of it. —Temple Independent School Dist. v. Proctor, Tex.Civ.App., 97 S.W.2d 1047, error refused.

(2) Ousted superintendent of independent school district whose contract of employment was held valid by state superintendent of public instruction and state board of education was entitled to have status quo maintained until determination of controversy on merits, where school board refused to comply with orders but had not brought suit to set them aside.—Temple Independent School Dist. v. Proctor, supra.

to prevent a usurper from interfering with the teacher in the discharge of his or her duties.[20] In the absence of another adequate remedy provided by statute,[21] where school teachers or employees, after a certain number of years of service, are entitled to tenure, injunction is the proper remedy to restrain a school board wrongfully attempting to deprive such a teacher or employee of his position.[22]

§ 113. Highway Boards and Officers

Injunction will not issue to direct or control the acts of highway officers or boards within the scope of their authority, although unlawful acts beyond their authority may be enjoined.

Highway officers will not be enjoined from the commission of acts within the scope of their authority as fixed by valid statutes,[23] or from doing acts which the law makes it their duty to perform,[24] even though productive of irreparable injury.[25] Likewise no injunction will issue in case the injured person has an adequate remedy at law[26] where complainant fails to show irreparable injury to himself,[27] where the right to the injunction is doubtful,[28] or where the injury inflicted is slight or it is doubtful whether any injury at all has been sustained.[29] Mere apprehension of the commission of unauthorized acts by highway officers will not authorize the issuance of an injunction.[30] Also the right to an injunction may be precluded by complainant's acquiescence in the proceedings,[31] or by facts amounting to estoppel; but these facts must be clearly established.[32]

On the other hand, the acts of highway officers which are outside the scope of the authority conferred on them and productive of irreparable in-

20. Miss.—Stokes v. Newell, 159 So. 540, 172 Miss. 289—Campbell v. Warwick, 107 So. 657, 142 Miss. 510.
56 C.J. p 408 note 62.

21. Ohio.—Quigg v. Board of Education of Toledo, 43 N.E.2d 320, 69 Ohio App. 165.

22. Cal.—Grigsby v. King, 260 P. 789, 202 Cal. 299.

Compliance with statutory procedure
Where tenure teacher and superintendent of schools in city, who had actual notice of school board's resolution fixing date for consideration and determination whether his indefinite contract with school should be terminated, failed, within the time allowed by statute, to make request for a hearing, and board, in compliance with statute, entered an order canceling the contract, teacher's failure to ask for hearing within statutory time was a "consent" that board might decide, without a hearing, whether there was sufficient ground for canceling the contract, decision of board was final, and superior court should not have enjoined board from interfering with his performance of his duties as superintendent and should not have expunged the record of the board's order canceling the contract.—Phillippe v. Axe, 38 N.E.2d 341, 219 Ind. 328.

To compel contract
An action for mandatory injunction was remedy available to teacher who had acquired a permanent tenure status, to compel trustee of school township to furnish her with a definite written contract, and to reinstate her as a teacher.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216—Lost Creek School Tp. Vigo County v. York, 21 N.E.2d 58, 215 Ind. 636.

23. Tex.—Mosheim v. Rollins, Civ. App., 79 S.W.2d 672, error dismissed.
32 C.J. p 258 note 27.
Enjoining illegal disposition of public funds generally see infra § 122.
For injunctions as to particular matters consult Highways and the specific references thereto in the Descriptive-Word Index to that title in 40 C.J.S. page 1323 sub verbo "Injunctions."

24. Ill.—Public Service Co. of Northern Illinois v. Lynch, 242 Ill. App. 28.
32 C.J. p 253 note 28.

25. Tex.—Carrie v. Glasscock County, Civ.App., 179 S.W. 1095.

Planting Bermuda grass
State highway officials planting Bermuda grass on highway right of way were not subject to injunction without legislative consent on theory they were committing a tort or abusing discretionary powers to injury of adjoining landowners' property rights, since, in absence of prohibitory statute, no cause of action could arise from planting of Bermuda grass, which would eventually spread on adjacent land by natural causes.—Moshein v. Rollins, Tex.Civ.App., 79 S.W.2d 672, error dismissed.

26. Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467.
La.—Nunn v. List & Weatherly Const. Co., 143 So. 268, 175 La. 293.
Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 191 Miss. 192.
Mo.—Chicago, R. I. & P. Ry. Co. v. State Highway Commission of Missouri, 17 S.W.2d 535, 322 Mo. 419.
N.C.—Town of Greenville v. State Highway Commission, 145 S.E. 31, 196 N.C. 226.
Tenn.—Darwin v. Town of Cookeville, 97 S.W.2d 838, 170 Tenn. 508.
32 C.J. p 253 note 36.

27. Ky.—Mitchell v. State Highway Commission, 56 S.W.2d 991, 247 Ky. 188.
Tenn.—Darwin v. Town of Cookeville, 97 S.W.2d 838, 170 Tenn. 508.

A trades council, speaking for union labor in lines of work involved in proposed state highway construction, has sufficient interest in subject matter to institute proceedings for injunction against opening of bids on ground that wage rates, mentioned in published invitation for bids, are not prevailing rates and that resulting dispute should be referred to industrial commission before execution of contract.—Denver Bldg. & Const. Trades Council v. Vail, 86 P. 2d 267, 103 Colo. 364.

28. Tex.—Cunningham v. Koons, Civ.App., 38 S.W.2d 761.
32 C.J. p 253 note 37.

29. Mich.—Brown v. Gardner, Harr. p 291.

30. Kan.—Troy v. Doniphan County, 4 P. 1009, 32 Kan. 507.

No action on petition
A suit to enjoin a board of supervisors from proceeding to alter or change a public highway was premature, where the board had taken no action on the petition for the alteration or change, as it might dismiss the proceeding, and there was therefore no certainty of injury.—Meek v. Humphreys County, 97 So. 674, 133 Miss. 386.

31. Ind.—Sunderland v. Martin, 15 N.E. 689, 113 Ind. 411.

32. Ind.—Stewart v. Beck, 90 Ind. 458.

jury will be enjoined;[33] and this rule has been applied in the case of the annexing of disputed territory to a road improvement district under a void statute,[34] or the improper removal of trees, walls, and fences on private property.[35]

In the absence of a clear showing of right thereto and necessity therefor, an interlocutory injunction against a highway board or officers will be refused.[36]

Matters of discretion. Except in the case of a showing of an abuse of discretion resulting in irreparable injury,[37] an injunction will not issue to restrain the acts of highway officers in respect of which they are vested with discretionary power;[38] and this is so however impolitic may be the law under which they were acting,[39] and although they may have been guilty of errors of judgment.[40]

Mixed questions of law and fact, decided by a local administrative highway body, are subject to judicial review in proceedings for an injunction, even though there has been no abuse of discretion.[41]

§ 114. Other Public Boards and Officers

Injunction will not be granted to restrain canal and drainage officers when they are acting in good faith within their statutory powers.

Acts of officers vested with the power of establishing, locating, constructing, improving, and repairing canals or drains, if illegal and not within the scope of their authority, and resulting in irreparable injury, will be enjoined;[42] and a mandatory injunction may be issued in a proper case to compel affirmative action by them.[43] On the other hand, the right to an injunction must appear clearly,[44] and an injunction will not be granted when they are acting in good faith and within their statutory powers,[45] or because of mere irregularities in the exercise of the power conferred.[46] The discretion vested in them will not be controlled except in a clear case of abuse thereof.[47] An injunction will not be granted where an adequate remedy is provided by statute.[48]

§ 115. Elections and Election Officers

a. In general
b. Calling or holding election
c. Canvass of votes, declaration of result, and giving of certificate of election

33. Fla.—Perry v. Monarch Orange Co., 194 So. 320, 142 Fla. 176.
Ky.—Anderson v. State Highway Commission of Kentucky, 68 S.W. 2d 5, 252 Ky. 696.
Mich.—Dunn v. Meyer, 235 N.W. 254, 253 Mich. 563.
Okl.—Leininger v. Ward, 258 P. 863, 126 Okl. 114.
Pa.—Copley v. Stewart, 14 Pa.Dist. & Co. 733.
32 C.J. p 253 notes 30, 35.

34. Ark.—McCord v. Welch, 227 S. W. 765, 147 Ark. 362.

35. W.Va.—Downs v. Lazzelle, 136 S.E. 195, 102 W.Va. 663.
32 C.J. p 253 note 34.

36. Ga.—Madronah Sales Co. v. Wilburn, 181 S.E. 173, 180 Ga. 837—Seaboard Air-Line Ry. Co. v. Camden County, 159 S.E. 668, 173 Ga. 93.

37. Tex.—Tippett v. Gates, Civ. App., 223 S.W. 702.
32 C.J. p 253 note 43.

38. Ga.—Crump v. State Highway Department, 12 S.E.2d 310, 191 Ga. 130.
Kan.—Smith v. Board of Com'rs of Reno County, 247 P. 1046, 121 Kan. 444.
N.D.—Rode v. State Highway Commission, 225 N.W. 801, 53 N.D. 249.
Okl.—State ex rel. Sanders v. Grisso, 87 P.2d 155, 184 Okl. 348—Eckerle v. Ferris, 51 P.2d 766, 175 Okl. 107—Furgason v. Mitchell, 262 P. 500, 128 Okl. 232.
Or.—De Neffe v. Duby, 239 P. 109, 115 Or. 511.
Tex.—Dennett v. Dancy, Civ.App., 10 S.W.2d 1057, error refused.
32 C.J. p 253 note 44.

39. Tenn.—Chaffin v. Johnson, 5 Tenn.Civ.App. 570.

40. Kan.—Dennis v. Osborn, 89 P. 925, 75 Kan. 557.
Tex.—Grayson County v. Harrell, Civ.App., 202 S.W. 160.
32 C.J. p 254 note 46 [a].

41. N.C.—Cameron v. State Highway Commission, 123 S.E. 465, 188 N.C. 84.

42. Miss.—Mississippi State Highway Commission v. Yellow Creek Drainage Dist., 180 So. 749, 181 Miss. 651.
32 C.J. p 254 note 48.
Enjoining abandonment of canal see Canals § 45.
For injunctions as to particular matters consult Drains and the specific references thereto in the Descriptive-Word Index to that title in 28 C.J.S. page 1161 sub verbo "Injunctions."

43. Ky.—Caldwell & Co.'s Ancillary Receiver v. Landrum, 83 S.W.2d 876, 260 Ky. 77.
Mo.—Diekroeger v. Jones, 151 S.W. 2d 691, 235 Mo.App. 1117, transferred, see, Sup., 145 S.W.2d 435.
Neb.—Mooney v. Drainage Dist. No. 1 of Richardson County, 278 N.W. 368, 134 Neb. 192, vacating 274 N. W. 467, 133 Neb. 197, and certiorari denied Drainage Dist. No. 1 of Richardson County, Neb., v. Mooney, 59 S.Ct. 84, 305 U.S. 622, 83 L.Ed. 398.
32 C.J. p 254 note 49.
At whose instance
Right of prosecuting attorney of county, into which drainage district extended, to maintain action at relation of state to compel district to construct bridge, extended over all territory within boundaries of district, regardless of county lines.—State ex rel. Walker v. Locust Creek Drainage Dist., 67 S.W.2d 840, 228 Mo.App. 434, transferred, see, Sup., 58 S.W.2d 452.

44. Ill.—County Ditch Drainage and Levee Dist. v. East Side Levee and Sanitary Dist., 245 Ill.App. 367.

45. Kan.—Sedgwick County Drain. Dist. No. 3 v. Sedgwick County Riverside Drain. Dist., 178 P. 433, 104 Kan. 233.
32 C.J. p 254 note 50.

46. Neb.—Brown County School Dist. No. 25 v. De Long, 114 N.W. 934, 80 Neb. 667.

47. Kan.—Marts v. Freeman, 136 P. 943, 91 Kan. 106.
32 C.J. p 254 note 52.

48. Mich.—Grandchamp v. McCormick, 114 N.W. 80, 150 Mich. 232.

d. Compelling performance of duties
e. Initiative and referendum elections

a. In General

As a general rule, injunction will not issue to control the actions of election officers in the performance of their duties, although illegal acts preliminary to an election may, in a number of jurisdictions, be restrained.

As a general rule, a court of equity is without jurisdiction to control by injunction election officers in the exercise of their statutory authority with respect to political elections,[49] at least at the suit of a taxpayer who shows no special injury peculiar to himself;[50] and this rule is applicable alike to general and primary elections.[51] An injunction will not issue for the purpose of directing or controlling the mode in, or of determining the rules of law in pursuance of, which an election shall be held.[52] It is particularly true that courts will not by injunction interfere with election officers in the performance of their duties where complainant has another adequate remedy,[53] where there has not been a compliance with statutory prerequisites to the bringing of such a suit,[54] where the case has become moot,[55] or where the issuance of the injunction will deprive the public of the right to vote in a general election.[56]

49. Cal.—Wright v. Jordan, 221 P. 915, 192 Cal. 704—Drumhiller v. Wright, 222 P. 166, 64 Cal.App. 498.
Ill.—Litzelman v. Town of Fox, 1 N.E.2d 915, 285 Ill.App. 7.
N.Y.—Brennan v. Mahoney, 300 N.Y.S. 1295, 165 Misc. 276, affirmed 299 N.Y.S. 750, 252 App.Div. 741.
Enjoining recall proceedings of:
Municipal officers see the C.J.S. title Municipal Corporations § 516, also 43 C.J. p 674 notes 7, 8.
Officers generally see the C.J.S. title Officers § 69, also 46 C.J. p 1005 note 67.
Issuance of injunctions in judicial supervision of party organizations and regulations see Elections § 68.
"Courts must have a case lest in unwarranted manner they become involved in the determination of issues which the people in their sovereign capacity have reserved to themselves, and upon which they are about to act."—People ex rel. Sauter v. Monson, 62 P.2d 467, 469, 99 Colo. 289.

Absentee ballots

(1) Under a statute providing that the board of elections shall determine whether the duties, occupation, or business of the applicant for an absentee ballot, as set forth in his affidavit, are of a nature ordinarily to require absence from the state or county, and shall determine, if they are not found to be of such a nature, whether the special circumstances, as set forth in the affidavit, are sufficient, the board will not be restrained from delivering absentee ballots to registrants where the board has not made the required determination, notwithstanding the required affidavits and applications may be insufficient.—Application to Strike from Registry of Electors for Second Election District of Town of Nassau, Rensselaer County, Names of Certain Registrants, 15 N.Y.S.2d 352, 257 App.Div. 683.

(2) Injunction would not lie to restrain casting of absent voters' ballots by inmates of county home, notwithstanding inmates would be in county on election day and able to go to polls, and applications for ballots had been brought to county home and there signed up in a wholesale manner at instigation of persons other than the inmates, where legislature had provided a plain, speedy, and adequate procedure for challenging absent voters' ballots.—Drennen v. Olmstead, 275 N.W. 884, 224 Iowa 85.

Election contests

(1) Injunction is not the proper remedy for an election contest.
Ark.—Davis v. Wilson, 35 S.W.2d 1020, 183 Ark. 271.
Ill.—Litzelman v. Town of Fox, 1 N.E.2d 915, 285 Ill.App. 7.
Ind.—State ex rel. Seal v. Superior Court of Knox County, 46 N.E.2d 226.
Ky.—Watts v. Glover, 39 S.W.2d 1004, 239 Ky. 562.
N.D.—State v. McFarland, 223 N.W. 931, 57 N.D. 708.
Tex.—Crawford v. Maples, Civ.App., 114 S.W.2d 696.

(2) Where the board of county commissioners has the right to try and determine the validity of the election and where from their decision an appeal may be taken, a court should not, before the commissioners have passed on the question, undertake to determine the legality of the election in an action for an injunction.—Board of Com'rs of Jennings County v. Fetter, 139 N.E. 451, 193 Ind. 283.
Election contests generally, see Elections §§ 245–322.
Absence of remedy in equity to contest election see Elections § 248.

Legality of votes cannot be tried in a suit for injunction.—North East Coal Co. v. Johnson County Fiscal Court, 143 S.W.2d 1061, 284 Ky. 121.

Use of voting machines should not be restrained unless legislative or constitutional provision is clearly violated.—Davidowitz v. Philadelphia County, 187 A. 585, 324 Pa. 17.

50. Ala.—Wilkinson v. Henry, 128 So. 362, 221 Ala. 254, 70 A.L.R. 712.
Ky.—Rentz v. Campbell County, 84 S.W.2d 44, 260 Ky. 242.
N.Y.—Burns v. Flynn, 281 N.Y.S. 494, 155 Misc. 742, affirmed 281 N.Y.S. 497, 245 App.Div. 799, affirmed 198 N.E. 424, 268 N.Y. 601.

51. Ala.—Wilkinson v. Henry, 128 So. 362, 221 Ala. 254, 70 A.L.R. 712.

52. Ala.—Ex parte State ex rel. Tucker, 181 So. 761, 236 Ala. 284.
Fla.—Joughin v. Parks, 143 So. 145, 107 Fla. 833.

Suggestions

Supreme court, in view of presumption that general election would be properly conducted, could not give suggestions with regard thereto.—Gardner v. Blackwell, 166 S.E. 338, 167 S.C. 313.

Numbered ballot

A ballot which is numbered in compliance with constitutional requirement that ballots as cast be numbered in accordance with number of voter is a "secret ballot" and election officers who proposed to follow requirement could not be restrained therefrom at instance of regularly certified nominee on ground that election would be illegal.—Johnson v. Clark, D.C.Tex., 25 F.Supp. 285.

53. Pa.—O'Neil v. Lawrence, 27 Pa. Dist. & Co. 441—Kemmerer v. Schroat, 24 Pa.Dist. & Co. 592.

54. N.Y.—Taylor v. Redmond, 267 N.Y.S. 694, 239 App.Div. 112.

Qualifications of candidates

Where no objections to qualifications of defendant candidates were made before executive committee, court could not restrain defendants from submitting names for commissioners of election on ground defendants were not bona fide candidates for public service commission.—Le Blanc v. Hoffmann, 143 So. 393, 175 La. 517.

55. Tex.—Iles v. Hargis, Civ.App., 120 S.W.2d 1094.

56. U.S.—Feinglass v. Reinecke, D.C.Ill., 48 F.Supp. 438.

Registration officers or boards cannot be enjoined from performing the duties prescribed by the registration laws on the ground that such laws are unconstitutional and will deprive complainant and other citizens similarly situated of their right to vote.[57] Although it has been held that registration officers cannot be enjoined from performing the prescribed duties of their office in an irregular, fraudulent, or corrupt manner resulting in the denial of the right to register,[58] it has also been held that, where fraud or other palpable violation of the registration or election laws is charged prior to an election, an elector is entitled to relief by injunction.[59] A court of equity does not have jurisdiction to enjoin an election officer from certifying and having printed on the official ballot the names of duly nominated candidates to be voted for at a forthcoming election.[60] Although it has been held that injunction will not issue to restrain the placing of the name of a nominee on the ballot because of fraud in the primary election,[61] it has also been held that an injunction will issue to restrain election officers from certifying the name of a candidate to be placed on the election ballots where he is not entitled to have his name printed on such ballots,[62] and the certification of a person as nominee may be restrained pending the receipt of valid returns.[63] Injunction will lie after the election to restrain an illegal surrender of the ballots cast.[64]

b. Calling or Holding Election

Although in some jurisdictions the holding of a clearly illegal nonpolitical election may be enjoined, as a general rule injunction will not issue to restrain the calling or holding of an election.

Courts of equity ordinarily will not enjoin the calling of an election[65] at least unless fraud, corruption, oppression, or gross injustice is clearly shown.[66] However, it has been held that an injunction may be granted at the suit of the state to restrain the calling of an election for which the law makes no provision,[67] especially where the holding of such election would result in a waste of public funds,[68] or where the law under which it is proposed to be called is unconstitutional.[69] It has also been held that citizens and taxpayers have an equitable standing to enjoin by injunction the calling of an election, where there has not been a compliance with statutory conditions precedent to the calling of such an election,[70] or where the proposed

57. U.S.—Green v. Mills, S.C., 69 F. 852, 16 C.C.A. 516, 30 L.R.A. 90, appeal dismissed 16 S.Ct. 132, 159 U.S. 651, 40 L.Ed. 293.
32 C.J. p 254 note 54.

58. Md.—Hardesty v. Taft, 23 Md. 512, 87 Am.D. 584.
32 C.J. p 254 note 55.

59. Colo.—Aichele v. People, 90 P. 1122, 40 Colo. 482.
Fla.—Joughin v. Parks, 143 So. 145, 107 Fla. 833—McGregor v. Burnett, 141 So. 599, 105 Fla. 447.
N.Y.—In re Sullivan, 18 N.Y.S.2d 723, 259 App.Div. 752—Flynn v. Cohen, 282 N.Y.S. 835, 246 App.Div. 550.
N.D.—State ex rel. Andrews v. Quam, 7 N.W.2d 738.

Preliminaries to election
Irrespective of court's power to interfere with election, it may interfere with preliminaries to election.—Elkins v. Milliken, 249 P. 655, 80 Colo. 135.

Striking names
Registrars may be enjoined from illegally striking names from the voters' list.
Ga.—Geer v. Dozier, 166 S.E. 433, 175 Ga. 865—Padrosa v. Amos, 165 S.E. 248, 175 Ga. 413.
Pa.—Steinhauser v. Morrow, 20 Pa. Dist. & Co. 156, 31 Pittsb.Leg.J. 399.

Violation of primary election law
State courts have jurisdiction in matters involving proper administration of primary election law by officials charged with its execution, and injunction will issue to restrain attempted ministerial act in violation of its provision.—State ex rel. Ward v. Board of Sup'rs of Elections, Parish of Rapides, 173 So. 726, 186 La. 949.

60. Ariz.—Van Dyke v. Elledge, 224 P. 314, 26 Ariz. 294.
La.—Long v. Martin, 194 So. 896, 194 La. 797, followed in Long v. Looney, 194 So. 900, 194 La. 811.
N.Y.—In re Grill, 7 N.Y.S.2d 385, 169 Misc. 589.
32 C.J. p 254 note 56.

Suit by private citizen
The placing of names on a primary ballot will not be enjoined at the suit of a private citizen, who is not authorized by statute to invoke the court's jurisdiction, at least where the suit is merely to vindicate the right of other candidates to have fewer opponents.—Manning v. Young, 247 N.W. 61, 210 Wis. 588.

61. Miss.—Barnes v. McLeod, 140 So. 740, 165 Miss. 437.

62. Tex.—Staples v. State, Civ.App., 244 S.W. 1068.

An undisputed nominee for office had the right to restrain general election officials from printing names of unauthorized persons on the general election ballot.—Pulliam v. Trawalter, Tex.Civ.App., 120 S.W.2d 108.

63. N.C.—Burgin v. North Carolina State Board of Elections, 198 S.E. 592, 214 N.C. 140.

64. N.D.—State ex rel. Schmeding v. District Court of Sixth Judicial Dist. in and for Morton County, 271 N.W. 137, 67 N.D. 196.

65. Ark.—Swilling v. Biffle, 93 S.W. 2d 328, 192 Ark. 603.
32 C.J. p 255 note 59.

66. N.C.—Griffith v. Forsyth County Bd. of Education, 112 S.E. 10, 183 N.C. 408.
32 C.J. p 255 note 60.

67. Kan.—State v. McPherson County, 190 P. 594, 107 Kan. 144.
32 C.J. p 255 note 61.

68. N.C.—Griffith v. Forsyth County Bd. of Education, 112 S.E. 10, 183 N.C. 408.
Enjoining illegal disposition of public funds generally see infra § 122.

69. Wis.—State v. Cunningham, 51 N.W. 724, 81 Wis. 440, 15 L.R.A. 561.
32 C.J. p 255 note 63.

70. Mo.—Baum v. City of St. Louis, 123 S.W.2d 48, 343 Mo. 738.
N.D.—Larkin v. Gronna, 285 N.W. 59, 69 N.D. 234.

Insufficient petition
Where twenty per cent of the qualified electors of the county must sign the petition for an election, taxpayers are entitled to an injunction against the calling of an election on a petition not signed by the requisite number of qualified voters.—Tacker v. Board of Com'rs of Polk

constitutional amendment, if adopted, would be invalid.[71] It has also been held that the ordering of a new election may be enjoined until the result of one just held has been determined, where the announced result shows a tie, and there are allegations of fraud.[72]

Holding election in general. An injunction does not lie to restrain the holding of a public election authorized by law and properly called.[73] Mere conjectures as to the difficulties which may arise as a result of the election do not furnish justification for a restraint of the proposed election.[74]

Holding illegal or unauthorized election. Although there is authority to the contrary,[75] the general rule is that an injunction will not issue to prevent the holding of an election whether or not the election is illegal,[76] and that this is so whether the election relates to the filling of public office or other matters, such as changes in boundaries of political subdivisions and kindred matters.[77] Among others,[78] the reasons assigned for this view are that there is an adequate remedy at law,[79] by quo warranto,[80] and that the right involved is a strictly political right which cannot be enforced or protected by a court of equity but is cognizable only by a court of law.[81] Also injunctions have been denied in some cases by reason of the peculiar conditions which attended them, as, for instance, where it appeared to be probable that more harm would be done than prevented by granting the injunction prayed for,[82] or where it was apparent that the election would be of no possible benefit to anyone but would probably work irreparable injury to some, particularly if the acts complained of would have a tendency to prevent the construction of works in which the public had an interest.[83]

In some jurisdictions a distinction is drawn between a purely political election and one in which a public office is not involved; in such jurisdictions a purely political election cannot be enjoined.[84] Where, however, the election is not one in which a public office is involved and the election is without authority of law and would be void and cause unnecessary and improper expense, a taxpayer or other person who will be injured thereby is entitled to an injunction.[85] A court of equity is not bound

County, 170 So. 458, 126 Fla. 15, 127 Fla. 248.

71. Iowa.—Mathews v. Turner, 236 N.W. 412, 212 Iowa 424.

72. N.C.—Cozart v. Fleming, 31 S. E. 822, 123 N.C. 547.

73. Ala.—Ex parte State ex rel. Tucker, 181 So. 761, 236 Ala. 284.
Cal.—Harnett v. Sacramento County, 235 P. 445, 195 Cal. 676.
Fla.—City of De Land v. Fearington, 146 So. 573, 108 Fla. 498—Joughin v. Parks, 143 So. 145, 107 Fla. 833.
Ill.—Fletcher v. City of Paris, 35 N. E.2d 329, 377 Ill. 89.
Minn.—State v. District Court in and for Ramsey County, 194 N.W. 630, 156 Minn. 270.
N.D.—State ex rel. Andrews v. Quam, 7 N.W.2d 738.
Okl.—Lowry v. Town of Meeker, 1 P.2d 378, 151 Okl. 264.
Or.—Priest v. James, 265 P. 1092, 125 Or. 72.
Tenn.—Buena Vista Special School Dist. v. Board of Election Com'rs of Carroll County, 116 S.W.2d 1008, 1009, 173 Tenn. 198, citing Corpus Juris.
32 C.J. p 255 note 65.

Not prohibited by law

Chancery will not interfere, where the purpose and object of the election finds apparent sanction in law, or is not prohibited by law.—Gulick v. Linn, 216 P. 460, 90 Okl. 201.

74. W.Va.—Sale v. Board of Education of Cabell County, 192 S.E. 173, 119 W.Va. 192.

75. Wash.—Gibson v. Campbell, 241 P. 21, 136 Wash. 467.
32 C.J. p 255 note 66.

76. Tex.—Ex parte Barrett, 37 S. W.2d 741, 120 Tex. 311—Winder v. King, Com.App., 1 S.W.2d 587, affirming, Civ.App., 297 S.W. 689—Harris v. Elder, Civ.App., 38 S. W.2d 352, error refused—McCall v. Lewis, Civ.App., 263 S.W. 325.
32 C.J. p 255 note 67.

77. Tex.—Winder v. King, Com. App., 1 S.W.2d 587, affirming, Civ. App., 297 S.W. 689.
32 C.J. p 255 note 68.

78. S.C.—Parler v. Fogle, 59 S.E. 707, 78 S.C. 570.
32 C.J. p 256 note 69.

79. S.C.—Chappell v. McCown, 87 S. E. 147, 103 S.C. 6—Little v. Barksdale, 63 S.E. 308, 81 S.C. 392.

80. Colo.—Pagosa Springs v. People, 130 P. 618, 23 Colo.App. 479.
32 C.J. p 256 note 71.

81. Tex.—Winder v. King, Com. App., 1 S.W.2d 587, affirming, Civ. App., 297 S.W. 689.
32 C.J. p 256 note 72.

82. Ind.—Fesler v. Brayton, 44 N. E. 37, 145 Ind. 71, 32 L.R.A. 578.

83. N.C.—Murfreesboro R. Co. v. Hertford County, 12 S.E. 952, 108 N.C. 56.

84. Ala.—Hawkins v. Moore, 143 So. 166, 225 Ala. 340.

Primary election

This rule is applicable to a primary election.—Wilkinson v. Henry, 128 So. 362, 221 Ala. 254, 70 A.L.R. 712.

85. Ala.—Dennis v. Prather, 103 So. 59, 212 Ala. 449—Petree v. McMurray, 98 So. 782, 210 Ala. 639—City of Mobile v. Mobile Electric Co., 84 So. 316, 203 Ala. 574.
Cal.—Harnett v. Sacramento County, 235 P. 445, 195 Cal. 676.
Fla.—Duval County v. Jennings, 164 So. 356, 121 Fla. 584—Kuhn v. Swanson, 159 So. 29, 118 Fla. 335.
Ga.—Marlut v. Hollingshead, 158 S. E. 28, 172 Ga. 531.
Ky.—Ginsburg v. Giles, 72 S.W.2d 438, 254 Ky. 720.
Mo.—Baum v. City of St. Louis, 123 S.W.2d 48, 343 Mo. 738.
Mont.—Burgan & Walker v. State Highway Commission, 137 P.2d 663, 114 Mont. 459.
Nev.—Caine v. Robbins, 131 P.2d 516, 61 Nev. 416.
Or.—Priest v. James, 265 P. 1092, 125 Or. 72.
Tenn.—Buena Vista Special School Dist. v. Board of Election Com'rs of Carroll County, 116 S.W.2d 1008, 173 Tenn. 198.
Wash.—Weyerhaeuser Timber Co. v. Banker, 58 P.2d 285, 186 Wash. 332.
Wyo.—Spriggs v. Clark, 14 P.2d 667, 668, 45 Wyo. 62, citing Corpus Juris.
32 C.J. p 256 notes 75, 76.

"An election held in violation of law or contrary to well-established legal requirements, or when it would result in substantial injury to any suitor or the public generally, may on proper showing be enjoined where there is no other legal reme-

to speculate on the likely or probable result of the election if held, but may enjoin the holding of it in a clear case,[86] and the fact that the validity of a wholly unauthorized election may be tested by other proceedings after the election is not an adequate remedy at law.[87] A statute forbidding courts of equity to entertain jurisdiction of election contests does not preclude a court of equity from enjoining an election wholly unauthorized by law.[88]

c. Canvass of Votes, Declaration of Result, and Giving of Certificate of Election

As a general rule election officers will not be restrained from canvassing the vote, declaring the result, and giving a certificate of election.

While there is some authority apparently to the contrary,[89] it has generally been held that election officers will not be restrained from canvassing the vote and declaring the result,[90] even though there was fraud and illegality in the election,[91] or although the statute under which the election officers acted was unconstitutional and void.[92] Especially should an injunction be denied where a special remedy is provided by law for testing the validity of the particular election complained of.[93]

Even where complainant's property or pecuniary rights would be affected by the canvass and declaration of the result, some decisions have held that the rule applies;[94] but other decisions limit the rule and allow an injunction in such cases,[95] at least where the election is nonpolitical.[96]

An exception to the rule has been recognized where the constitutional rights of a citizen, a taxpayer, are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of a popular election.[97]

Certificate of election. Election officers will not be enjoined from giving a certificate of election to the successful candidate,[98] and the fact that there was fraud in the election sufficient to vitiate it,[99] or that the election was held under a void statute,[1]

dy."—City of De Land v. Fearington, 146 So. 573, 108 Fla. 498.

Personal or property rights

Courts have the power to issue injunctions to restrain the conducting of an election wherein the personal or property rights of complainant are involved.—State v. Patten, 69 P. 2d 931, 41 N.M. 395.

Prohibited by express law

Where the election is called for the purpose of voting on whether certain parts of a county shall be detached therefrom and formed into a new county, and it is alleged that the detachment of the territory described is prohibited by express law, and the election would involve an expenditure of public funds, equity has jurisdiction to enjoin the election.—Gulick v. Linn, 216 P. 460, 90 Okl. 201.

Sunday baseball

Court of equity could not enjoin election on proposed ordinance authorizing playing of baseball on Sunday, it being election of purely political nature, involving no property or contract rights.—Hawkins v. Moore, 143 So. 166, 225 Ala. 340.

86. Fla.—Duval County v. Jennings, 164 So. 356, 121 Fla. 584.

87. Ala.—Dennis v. Prather, 103 So. 59, 212 Ala. 449.

Court does not have to wait until after the election and then undo that evil which it could have prevented by its injunction.—State v. Patten, 69 P.2d 931, 41 N.M. 395.

88. Ala.—Dennis v. Prather, 103 So. 59, 212 Ala. 449.

89. Ky.—North East Coal Co. v. Johnson County Fiscal Court, 143 S.E.2d 1061, 284 Ky. 121.
32 C.J. p 256 note 77.

90. N.D.—State ex rel. Sathre v. Byrne, 258 N.W. 121, 125, 65 N.D. 283, citing **Corpus Juris.**
Okl.—McAlister v. State, 221 P. 779, 96 Okl. 143.
Tex.—Leslie v. Griffin, Com.App., 25 S.W.2d 820, reversing, Civ.App., 23 S.W.2d 535—Winder v. King, Com. App., 1 S.W.2d 587, affirming, Civ. App., 297 S.W. 689.
32 C.J. p 256 note 78.

Primary election

Ark.—Terry v. Harris, 64 S.W.2d 80, 188 Ark. 60.
Ga.—Avery v. Hale, 145 S.E. 76, 167 Ga. 252.

Reasons assigned are

(1) That the canvass of elections is the exercise of a political power beyond judicial authority.
Okl.—McAlister v. State, 221 P. 779, 96 Okl. 143.
Tex.—Winder v. King, Com.App., 1 S.W.2d 587, affirming, Civ.App., 297 S.W. 689.
32 C.J. p 257 note 81.

(2) That there is an adequate remedy at law by quo warranto or contest.—In re Grear, 9 Ohio S. & C. P. 299, 6 Ohio N.P. 312.

Wholly void elections

(1) A suit for injunction would, however, lie to restrain the enforcement of a wholly void order of the commissioners' court declaring the result of an election consolidating school districts.—Benton v. Long, Tex.Civ.App., 128 S.W.2d 446.

(2) It has also been held that, if election returns in the hands of the secretary of state are false, the secretary's opening, estimating, and certifying the returns to the governor are unlawful acts to the injury of one entitled to a certificate of election, and that the proper remedy to prevent such actions is injunction.—Leslie v. Griffin, Tex.Civ. App., 23 S.W.2d 534.

91. N.D.—State ex rel. Sathre v. Byrne, 258 N.W. 121, 125, 65 N.D. 283 citing **Corpus Juris.**
32 C.J. p 257 note 79.

92. Ga.—Gaskins v. Dorsey, 104 S. E. 433, 150 Ga. 638.
32 C.J. p 257 note 80.

93. Colo.—Vickery v. Wilson, 90 P. 1034, 40 Colo. 490.
32 C.J. p 257 note 83.

94. Colo.—Vickery v. Wilson, supra.
32 C.J. p 257 note 84.

95. Ill.—Morgan Park v. Chicago, 99 N.E. 388, 255 Ill. 190, 194, Ann. Cas.1913D 399.
32 C.J. p 257 note 85.

96. Wash.—Weyerhaeuser Timber Co. v. Banker, 58 P.2d 285, 186 Wash. 332.

97. Ga.—Tolbert v. Long, 67 S.E. 826, 134 Ga. 292, 137 Am.S.R. 222.
La.—Gretna v. Bailey, 72 So. 996, 140 La. 363.
32 C.J. p 257 note 88.

98. Okl.—State ex rel. Cameron v. Jones, 25 P.2d 648, 650, 165 Okl. 193, quoting **Corpus Juris.**
32 C.J. p 257 note 87.
But see Salus v. Lawrence, 46 Dauph.Co. 286, appeal dismissed 3 A.2d 417, 332 Pa. 429.

99. Tenn.—Adcock v. Houk, 122 S. W. 979, 122 Tenn. 269.

1. Mich.—Gildemeister v. Lindsay, 180 N.W. 633, 212 Mich. 299.

does not affect the operation of the rule. The right to hold office cannot be tried in a suit to enjoin certification of an election, the remedy being by quo warranto.[2]

Who may institute proceedings. A statute authorizing the attorney general to bring an action in the name of the state to restrain a corporation from exercising any franchise or privilege not authorized by its charter does not authorize him to bring an action to enjoin a mayor and common council from recounting votes at a referendum election on the question of license, but he may bring such action only on request of the governor or one branch of the legislature as is provided in other cases.[3]

d. Compelling Performance of Duties

Where there is no other adequate remedy available, election officers may be compelled by injunction to perform their ministerial duties.

While mandamus is the usual remedy to compel officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof to perform the specific ministerial duties imposed on them by the law, and while injunction will be refused where such remedy is adequate,[4] it has been held that an injunction will lie to compel the performance of these ministerial duties where mandamus would be too slow to afford adequate relief or would for other reasons be an inadequate remedy,[5] and some decisions seem to hold without qualification that an injunction will lie to compel the performance of these duties.[6] On the other hand, in matters within their discretion their action cannot be controlled by injunction.[7] Election officers will not be compelled by injunction to perform acts not authorized by law.[8] Election officers will not be required by injunction to place the name of a particular party and its candidates on the ballot when, due to the proximity of the date of the election, to do so would deprive the voters of an opportunity to vote.[9]

e. Initiative and Referendum Elections

It is generally held that injunction will issue to restrain the holding of an election on an initiative or referendum proposal which, if enacted, would be invalid.

Generally an injunction will issue to restrain the holding of an election under an initiative or referendum act where there is no authority for calling it or where the measure, if enacted, would be invalid, and where the holding of it would result in a waste of public funds;[10] but, where the expense incurred would be but a trifling sum, equity may refuse to enjoin the submission on the ground that it would result in an illegal expenditure of the taxpayers' money.[11] A referendum may be enjoined where the petition for a referendum is in-

2. Ind.—State ex rel. Seal v. Superior Court of Knox County, 46 N.E.2d 226, 229, citing **Corpus Juris.**
Mich.—Gildemeister v. Lindsay, 180 N.W. 633, 213 Mich. 299.
N.D.—State ex rel. Sathre v. Byrne, 258 N.W. 121, 125, 65 N.D. 283, quoting **Corpus Juris.**

3. Wis.—State v. Sayle, 169 N.W. 810, 168 Wis. 159.

4. Ala.—Bates v. Baumhader, 194 So. 520, 239 Ala. 255.
Injury
Petitioner for election was not entitled to injunctive relief to compel appointment of election commissioners, where petitioner had only right of general public, and would sustain no special injury.—Greene v. Holmes, 166 N.E. 281, 201 Ind. 122.

5. Ky.—Scott v. Singleton, 188 S. W. 302, 171 Ky. 117.
32 C.J. p 257 note 94.
Calling election
Courts of equity do not have general jurisdiction to order elections to be held in the absence of valid statutory authority, but they do have power in proper cases to require that to be done which in law should be done.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
No objection
Where action involving plaintiff's right to election certificate was brought, and no special objections were made to form of remedy, mandatory injunction was permissible to compel board of elections to perform mandatory duty.—Board of Elections of Montgomery County v. Henry, 158 N.E. 94, 25 Ohio App. 278.

6. Ky.—Watts v. Glover, 89 S.W.2d 1004, 239 Ky. 562.
32 C.J. p 258 note 95.

7. Ky.—Graham v. Treadway, 179 S.W. 1029, 166 Ky. 768.
32 C.J. p 258 note 96.

8. **Single ballot**
Court would not enjoin state officials or managers of election from allowing qualified voter to vote in general election a ballot other than single ballot containing names of all candidates for any office, state or federal.—Gardner v. Blackwell, 166 S.E. 338, 167 S.C. 313.

9. U.S.—Feinglass v. Reinecke, D.C. Ill., 48 F.Supp. 438.

10. Ariz.—Allen v. State, 130 P. 1114, 14 Ariz. 458, 44 L.R.A.,N.S., 468.
Mo.—Baum v. City of St. Louis, 126 S.W.2d 48, 343 Mo. 738.
Mont.—Burgan & Walker v. State Highway Commission, 137 P.2d 663, 114 Mont. 459.
Ohio.—Spahr v. Brown, 19 Ohio App. 107.
Enjoining illegal expenditures of public funds generally see infra § 122.
However, it has been held that, where an initiative petition is in proper form, the court cannot enjoin the secretary of state from certifying it and causing the ballot title and numbers to be printed on the official ballot on the ground that the bill, if enacted, would be unconstitutional.—State v. Kozer, 270 P. 613, 126 Or. 641—59 C.J. p 715 note 59.
No enacting clause
The submission of proposed initiative measure to voters was properly enjoined where measure, if adopted, would be invalid by reason of omission of an enacting clause therein.—Caine v. Robbins, 131 P.2d 516, 61 Nev. 416.

11. Ill.—Spies v. Byers, 122 N.E. 341, 287 Ill. 627.
Wis.—State v. Zimmerman, 210 N.W. 381, 191 Wis. 10.

sufficient[12] or vitiated by fraud,[13] and the secretary of state may be enjoined from putting on the ballot a referendum not authorized by law.[14] On the filing of a petition for a referendum, action on the part of administrative officials may be enforced or restrained so as to obtain a proper submission of the questions raised by the petition.[15] Where it appears at any stage of a proceeding to restrain the placing of an initiative measure on the ballot that the real object of the person invoking the aid of the court is the perpetration of fraud, the court, of its own motion, will deny him relief.[16]

At whose instance. Ordinarily the remedies are available at the instance of any citizen and taxpayer.[17] The prosecuting attorney of a county in which are located the offices of the attorney general, the secretary of state, and the state capitol cannot, by virtue of his office, maintain an action to enjoin such officials from filing a petition for a referendum on a general act.[18] On the other hand, a suit to enjoin the secretary of state, under some statutes, from certifying and printing an initiative measure on the official ballot must be brought in the name of the state by duly authorized officers.[19]

§ 116. Appointment or Removal of Officers

As a general rule equity has no jurisdiction to enjoin the appointment or removal of public officers.

While injunctions have been granted to prevent the improper removal of an officer where there was no doubt as to the illegality of the action and where the removal had not already taken place but was threatened,[20] the general rule, in the absence of statute providing otherwise, is that equity has no jurisdiction to enjoin the appointment or removal of public officers, whether the power of appointment or removal is vested in executive or administrative boards or officers or is intrusted to a judicial tribunal.[21] Likewise, although it has been held that a court of equity may order an officer's reinstate-

12. Ariz.—Barth v. White, 14 P.2d 743, 40 Ariz. 548.
Colo.—Elkins v. Milliken, 249 P. 655, 80 Colo. 135.
Md.—Sun Cab Co. v. Cloud, 159 A. 922, 162 Md. 419.
Ohio.—Spahr v. Brown, 19 Ohio App. 107.

At next regular election
The court may enjoin submission of a matter at the next regular election in a suit seeking such injunction on the grounds of insufficiency of the petition; but if such election is not permanently enjoined it should be had at the regular election, or as soon as may be under the law, awaiting the final decision of the court.—Barkley v. Pool, 169 N.W. 730, 732, 102 Neb. 799—59 C. J. p 714 note 36.

Procedural errors
The injunctive procedure authorized by a statute providing that, on showing that any petition filed is not legally sufficient, the court may enjoin the certifying or printing of such measure on the official ballot will not reach substantive defects in the proposed enactment, but is preliminary and goes only to procedural errors in proposing it.—State v. Burns, Mo., 172 S.W.2d 259.

13. Concealed mutilation, separation, or alteration of sections of petition for initiated amendment of constitution will warrant equitable relief by suit to enjoin secretary of state from placing question on ballot, pursuant to petition.—Elkins v. Milliken, 249 P. 655, 80 Colo. 135.

Protest inadequate
(1) Where the secretary of state is without power to summon witnesses or to compel them to testify, the right to protest before the secretary is not an adequate remedy at law.—Elkins v. Milliken, supra.

(2) Since such a protest is an inadequate remedy, the fact that a protest is pending does not constitute another suit pending so as to preclude the issuance of an injunction.—Elkins v. Milliken, supra.

Specification of protested names
In suit to enjoin secretary of state from placing question of repeal of constitutional section on election ballot pursuant to petition for initiated amendment, objection that protested names on petition were not specified held not available, Comp.L. § 31 being inapplicable to such suit.—Elkins v. Milliken, supra.

14. Colo.—Elkins v. Milliken, supra.
Mo.—Carson v. Sullivan, 223 S.W. 571, 284 Mo. 353.

Acceptance and filing
The secretary of state cannot be enjoined from certifying legally insufficient referendum petitions until after they have been accepted and filed by him.—Kaesser v. Becker, 243 S.W. 346, 295 Mo. 93.

Two ballot titles
Under a provision by which the secretary of state is required to certify a ballot title to the county clerks, when two separate petitions are filed for a referendum of the same law, he may be enjoined from certifying two ballot titles.—State v. Kozer, 217 P. 827, 108 Or. 550—59 C.J. p 715 note 62.

15. Ohio.—Portmann v. Board of Elections of Stark County, 19 N. E.2d 531, 60 Ohio App. 54.
59 C.J. p 714 note 38.

16. Or.—State v. Kozer, 210 P. 172, 105 Or. 509.

17. Ariz.—Allen v. State, 130 P. 1114, 14 Ariz. 458, 44 L.R.A.,N.S., 468.
59 C.J. p 716 notes 68–70.

Elector of city had authority to maintain an injunction suit to require submission of a referendum on municipal ordinance in a form that was not misleading.—Portmann v. Board of Elections of Stark County, 19 N.E.2d 531, 60 Ohio App. 54.

18. Mo.—State v. Sullivan, 224 S. W. 327, 283 Mo. 546.

19. Or.—State v. Kozer, 270 P. 518, 126 Or. 641.
59 C.J. p 715 notes 66, 67.

20. Ky.—Cornett v. Duff, 141 S.W. 2d 870, 283 Ky. 466—Baker v. McIntosh, 115 S.W.2d 384, 272 Ky. 763—Henderson v. Lane, 260 S.W. 361, 202 Ky. 610.
32 C.J. p 258 note 97.

No abuse of discretion
Action of county board of education in removing superintendent of schools cannot be enjoined if evidence shows that board did not abuse its discretion.—Meade County Board of Education v. Powell, 71 S. W.2d 638, 254 Ky. 352.

21. Ark.—Davis v. Wilson, 35 S.W. 2d 1020, 183 Ark. 271.
Cal.—Sharpe v. City of Los Angeles, 29 P.2d 797, 798, 136 Cal.App. 732, citing **Corpus Juris.**
Ga.—Brackett v. Bridges, 173 S.E. 379, 178 Ga. 588.
Ind.—State ex rel. Seal v. Superior Court of Knox County, 46 N.E.2d 226.
Ky.—Murray v. Gill, 106 S.W.2d 634, 269 Ky. 207.
N.D.—State v. McFarland, 223 N.W. 931, 57 N.D. 708.
Tex.—Levy v. Rivaux, Civ.App., 84

ment after he has been unlawfully removed,[22] it has also been held that as a court of equity has no power to prevent an illegal removal, it cannot by mandatory injunction compel the reinstatement of a person who has been illegally removed.[23] Furthermore a board of officers will not be restrained from hearing and acting on charges against an officer, on the ground that it is prejudiced and will proceed illegally.[24] On the other hand, although injunction is not the appropriate remedy to try the title to the office,[25] equity will interfere on behalf of an officer de facto, claiming to be the officer de jure, to prevent another, especially an intruder, from wresting the office from him without process of law.[26] In order to enjoin an appointee to office from qualifying and the county clerk from accepting the qualification, it must be made very clear that the clerk is transcending his duties and that the appointee's title to the office is spurious.[27] Persons who have not been legally employed as public employees cannot resist injunctive proceedings against them to prevent their interfering with the proper employees on the ground that they are de facto public officers and that they can be removed only by quo warranto proceedings.[28]

Effect of civil service rules. In the application of the general rule that equity has no jurisdiction to enjoin the appointment or removal of public officers, it is immaterial that the appointee is within the protection of the civil service rules.[29] It has been held, however, that, although where a civil service employee is discharged for cause, either in conformity with the civil service procedure or in violation of it, he has no cause for injunctive relief,[30] equity can enjoin illegal removal of civil service employees.[31] Injunction is available, if necessary, to secure for a discharged civil service employee a hearing on his appeal.[32] To entitle a person to injunctive relief to compel the civil service commission to make an appointment, the right to such relief must be clear.[33] A court will not order the continuance in employment of provisional employees and enjoin the civil service commission from dismissing them from their positions.[34]

§ 117. Meetings and Proceedings of Boards or Other Officers

The issuance of injunctions against particular officers and boards has been discussed in detail supra §§ 108–116.

S.W.2d 347—Miles v. Logan, Civ. App., 265 S.W. 421.
32 C.J. p 258 notes 98, 99.
Injunction to restrain occupancy or exercise of office or interference therewith see the C.J.S. title Officers § 76, also 46 C.J. p 1007 note 99–p 1009 note 8.

Federal courts, sitting as courts of equity, have no jurisdiction over the appointment and removal of state officer, although removal is through a proceeding in nature of criminal prosecution.—Walton v. House of Representatives of State of Oklahoma, 44 S.Ct. 628, 265 U.S. 487, 68 L.Ed. 1115.

22. Ky.—Henderson v. Lane, 260 S.W. 361, 202 Ky. 610.

23. N.Y.—McNiece v. Sohmer, 61 N.Y.S. 193, 29 Misc. 238.

Must seek other remedy
One desiring to be restored to official position from which he was illegally removed must seek relief by mandamus, quo warranto, or some other adequate remedy at law. —Miles v. Logan, Tex.Civ.App., 265 S.W. 421.

24. Neb.—Cox v. Moores, 75 N.W. 35, 55 Neb. 34.
Ohio.—Reeves v. Griffin, 29 Cinc.L. Bul. 281, 4 Ohio S. & C. P. 461.

25. Ohio.—Palmer v. Zeigler, 81 N.E. 234, 76 Ohio St. 210, followed in 81 N.E. 238, 76 Ohio St. 229.
32 C.J. p 258 note 8.

26. Ky.—Board of Education of Boyle County v. McChesney, 32 S.W.2d 26, 29, 235 Ky. 692, citing **Corpus Juris.**
Or.—Moulton v. Logan, 72 P.2d 64, 157 Or. 406.
Tex.—City of Electra v. Taylor, Civ. App., 297 S.W. 496.
32 C.J. p 258 note 4.

Discharged deputy
(1) In sheriff's suit to enjoin discharged deputy from performing duties of office, deputy's possession of official property was only incidentally involved and hence court could order deputy to turn over keys and official papers, irrespective of adequacy of sheriff's legal remedies to recover possession and of statute prohibiting purely mandatory injunction.—Denson v. Tarver, 197 S.E. 242, 186 Ga. 180.

(2) Enjoining a discharged deputy sheriff from further seeking to perform functions of the office was not error, where evidence indicated that deputy had refused to recognize sheriff's authority to discharge him, notwithstanding deputy had turned over keys and papers at the time of the interlocutory hearing, since even an expressed abandonment of deputy's illegal course of action would not necessarily preclude injunction. —Denson v. Tarver, supra.

27. Ky.—Murray v. Gill, 106 S.W. 2d 634, 269 Ky. 207.

28. Mo.—Waller v. Jones, 262 S.W. 455, 218 Mo.App. 131.

29. Cal.—Sharpe v. City of Los Angeles, 29 P.2d 797, 136 Cal.App. 732.
Or.—Moulton v. Logan, 72 P.2d 64, 157 Or. 406.
32 C.J. p 258 note 7.

30. Mo.—State ex rel. and to Use of Baumes v. Mason, 154 S.W.2d 67, 348 Mo. 436.

31. Mo.—State v. Lucas, 139 S.W. 348, 236 Mo. 18.

Political discharges
Court had jurisdiction in a class suit by park department employees to enjoin apprehended discharge of the plaintiffs by the commissioner of parks because of political affiliations.—State ex rel. and to Use of Baumes v. Mason, 154 S.W.2d 67, 348 Mo. 436.

32. Tex.—Ellis v. Holcombe, Civ. App., 69 S.W.2d 449, error refused.

33. **Findings of medical officers**
Action of city civil service commission in accepting findings of medical officers employed by commission as to physical fitness of candidate for civil service position, rather than accepting findings of physicians personally employed by applicant, did not constitute "arbitrary" action or an abuse of discretion entitling applicant to injunctive relief.—Conway v. Cull, 11 Ohio Supp. 1.

34. N.Y.—Poss v. Kern, 32 N.Y.S.2d 979, 262 App.Div. 320.

Examine Pocket Parts for later cases.

§ 118. Enactment or Publication of Ordinances or Resolutions

As a general rule injunction will not issue to restrain the enactment or publication of ordinances or resolutions.

The general rule is that a municipal corporation, in the exercise of legislative power with relation to the subjects committed to its jurisdiction, can no more be enjoined than can the legislature of the state.[35] The restraining power of the court should be directed against the enforcement rather than the passage of orders and resolutions or ordinances by municipal corporations.[36]

There are exceptions, however, to this doctrine of noninterference, as where the mere passage of the ordinance would immediately occasion, or would be followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, or where it would cause a multiplicity of suits.[37] So a distinction has been drawn between a case in which the municipality is acting in its governmental or public character with discretionary authority and one in which it is acting as the owner of property.[38] Furthermore, if the ordinance, the passing of which is sought to be enjoined, is not within the legislative discretion of the municipal body, there is no question as to the jurisdiction to grant an injunction.[39] Under ordinary circumstances the passing of an ordinance will not be enjoined on the ground that its enforcement will violate the obligation of a prior contract.[40]

An injunction will not issue to prevent the passing of an unconstitutional or otherwise void ordinance where it will not result in any irreparable injury.[41] Moreover, the injury threatened must be impending as a direct result of the voting on, and passing of, the ordinance as distinguished from injury that may result from the carrying out or enforcement of the ordinance.[42] Where it is the enforcement of the ordinance that will cause the injury it is the enforcement that must be enjoined.[43] Residents of a parish, but not within the limits of a municipality therein, having no property interest therein, have no right to an injunction restraining the citizens of the town from enacting ordinances touching local option and holding elections in the town.[44]

Publication. Where an ordinance has been passed by the council and approved by the mayor and nothing remains to be done to render it immediately effective except publication, which is merely a ministerial act, the court may on a proper showing enjoin the publication thereof.[45] However, it has

35. Colo.—City and County of Denver v. Widom, 7 P.2d 406, 90 Colo. 147.
Ky.—Kerr v. City of Louisville, 111 S.W.2d 1046, 271 Ky. 335.
La.—Durrett Hardware & Furniture Co. v. City of Monroe, 5 So.2d 911, 199 La. 329, 140 A.L.R. 433.
Md.—Broening v. Haley, 144 A. 836, 156 Md. 605.
N.Y.—Greenberg v. O'Brien, 269 N. Y.S. 458, 149 Misc. 866.
Okl.—Hackney v. City of Guthrie, 41 P.2d 705, 707, 171 Okl. 320, citing **Corpus Juris.**
Or.—Hauke v. Ten Brook, 259 P. 908, 122 Or. 485.
Pa.—Brill v. City of Nanticoke, 31 Lux.L.Reg. 323, 29 Mun.L.R. 120.
Tex.—City of Dallas v. Couchman, Civ.App., 249 S.W. 234.
Vt.—Rixford Mfg. Co. v. Town of Highgate, 144 A. 680, 102 Vt. 1.
32 C.J. p 262 note 45.
Injunction against enactment of statute see Constitutional Law § 151 a.

36. Colo.—City and County of Denver v. Widom, 7 P.2d 406, 90 Colo. 147.
Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.
Md.—Broening v. Haley, 144 A. 836, 156 Md. 605.
N.Y.—Greenberg v. O'Brien, 269 N. Y.S. 458, 149 Misc. 866.
32 C.J. p 263 note 46.

37. Minn.—Meyers v. Knott, 174 N. W. 842, 144 Minn. 199.
Tex.—Atlas Metal Works v. City of Dallas, Civ.App., 30 S.W.2d 431—City of Dallas v. Couchman, Civ. App., 249 S.W. 234.
Vt.—Rixford Mfg. Co. v. Town of Highgate, 144 A. 680, 102 Vt. 1.
32 C.J. p 263 note 47.

38. Ky.—Roberts v. Louisville, 17 S.W. 216, 92 Ky. 95, 13 Ky.L. 406, 13 L.R.A. 844.
32 C.J. p 263 note 48.

39. La.—Connell v. Commission Council of City of Baton Rouge, 96 So. 657, 153 La. 786.
Okl.—Hackney v. City of Guthrie, 41 P.2d 705, 707, 171 Okl. 320, citing **Corpus Juris.**
32 C.J. p 263 note 49.
Violation of prohibition
An injunction will lie to restrain city council from adopting an ordinance which is in direct violation of a prohibitory law.—Durrett Hardware & Furniture Co. v. City of Monroe, 5 So.2d 911, 199 La. 329, 140 A.L.R. 433.

40. U.S.—New Orleans Water-Works v. New Orleans, La., 17 S. Ct. 161, 164 U.S. 471, 41 L.Ed. 518.
32 C.J. p 264 note 57.

41. U.S.—Murphy v. East Portland, C.C.Or., 42 F. 308.
Ga.—Zaring v. Adams, 3 S.E.2d 635, 188 Ga. 97.
La.—Durrett Hardware & Furniture Co. v. City of Monroe, 5 So.2d 911, 199 La. 329, 140 A.L.R. 433.
32 C.J. p 263 note 54.

42. Tex.—City of Dallas v. Couchman, Civ.App., 249 S.W. 234.
32 C.J. p 263 note 55.

43. Ga.—Zaring v. Adams, 3 S.E.2d 635, 188 Ga. 97.
La.—Durrett Hardware & Furniture Co. v. City of Monroe, 5 So.2d 911, 199 La. 329, 140 A.L.R. 433.
32 C.J. p 263 note 56.
Injunction against officers
Decree not enjoining city council as such from exercise of quasi-legislative act, but only officers named from buying or hiring boat for municipal purposes, is not such premature action as prevents review of other questions involved in case.—City Council of Augusta v. Thomas, 126 S.E. 144, 159 Ga. 435, 39 A.L.R. 1317.

44. La.—Marshall v. Marksville, 41 So. 57, 116 La. 746.

45. U.S.—Minneapolis St. R. Co. v.

been held that publication will not be enjoined where it does not appear that irreparable damage to complainant will follow the mere enactment of the ordinance;[46] and in any event an injunction is improper where the ordinance is concededly valid as to several of its provisions, and the valid provisions are not so dependent on, or connected with, the provision attacked that they would necessarily fall with it.[47]

§ 119. Enforcement of Statutes, Ordinances, or Other Regulations

Injunction will lie to restrain the enforcement of an unconstitutional or invalid statute or ordinance on the complaint of one whose property rights will be irreparably injured thereby and who has no other available remedy.

An injunction is proper to restrain a public officer or municipality from acting under an unconstitutional or otherwise invalid statute[48] or ordi-

Minneapolis, C.C.Minn., 155 F. 989, modified on other grounds 30 S.Ct. 118, 215 U.S. 417, 54 L.Ed. 259.
Ohio.—Columbus Railway & Light Co. v. City of Columbus, 10 Ohio N.P.,N.S., 161.

46. Minn.—Sullivan v. East Grand Forks, 155 N.W. 397, 131 Minn. 424.

47. Minn.—Sullivan v. East Grand Forks, supra.

48. U.S.—Bacardi Corporation of America v. Domenech, Puerto Rico, 61 S.Ct. 219, 311 U.S. 150, 85 L.Ed. 98, reversing, C.C.A., Sancho v. Bacardi Corporation of America, 109 F.2d 57, certiorari granted Bacardi Corporation of America v. Sancho, 60 S.Ct. 388, 309 U.S. 652, 84 L.Ed. 1002—Panama Refining Co. v. Ryan, Tex., 55 S.Ct. 241, 293 U.S. 388, 79 L.Ed. 446, reversing, C.C.A., Ryan v. Amazon Petroleum Corporation, 71 F.2d 1, which reversed, D.C., Amazon Petroleum Corporation v. Railroad Commission of Texas, 5 F.Supp. 639, and certiorari granted Amazon Petroleum Corporation v. Ryan, 55 S.Ct. 102, 293 U.S. 539, 79 L.Ed. 645, followed in, C.C.A., Ryan v. Panama Refining Co., 71 F.2d 8, certiorari granted Panama Refining Co. v. Ryan, 55 S.Ct. 83, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 241, 293 U.S. 388, 79 L.Ed. 446—Williams v. Standard Oil Co. of Louisiana, Tenn., 49 S.Ct. 115, 278 U.S. 235, 73 L.Ed. 287, 60 A.L.R. 596, affirming, D.C., Standard Oil Co. of Louisiana v. Hall, 24 F.2d 455—Louis K. Liggett Co. v. Baldridge, Pa., 49 S.Ct. 57, 278 U.S. 105, 73 L.Ed. 204, reversing, D.C., 22 F.2d 993, and followed in Pratter v. Lascoff, 185 N.E. 716, 261 N.Y. 509, affirming 258 N.Y.S. 1002, 236 App.Div. 713, which affirmed 249 N.Y.S. 2[illegible], 140 Misc. 311, and certiorari denied Lascoff v. Pratter, 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1498—Packard v. Banton, N.Y., 44 S.Ct. 257, 264 U.S. 140, 68 L.Ed. 596—Terrace v. Thompson, Wash., 44 S.Ct. 15, 263 U.S. 197, 68 L.Ed. 255—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Healy v. Ratta, C.C.A.N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459 and reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—Northwestern Nat. Ins. Co. of Milwaukee, Wis., v. Lee, D.C.Or., 49 F.2d 274, affirmed Averill v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 52 S.Ct. 139, 284 U.S. 590, 76 L.Ed. 509—Maumee Valley Electric Co. v. Schlesinger, D.C.Ohio, 33 F.2d 318, reversed on other grounds Kirk v. Maumee Valley Electric Co., 49 S.Ct. 507, 279 U.S. 797, 73 L.Ed. 963, rehearing denied 50 S.Ct. 79—Smith v. Tillitson, C.C.A.Kan., 29 F.2d 535, certiorari denied Tillitson v. Smith, 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79—Standard Oil Co. of Louisiana v. Hall, D.C.Tenn., 24 F.2d 455, affirmed Williams v. Standard Oil Co. of Louisiana, 49 S.Ct. 115, 278 U.S. 235, 73 L.Ed. 287, 60 A.L.R. 596—Farrington v. T. Tokushige, C.C.A.Hawaii, 11 F. 2d 710, certiorari granted 47 S.Ct. 99, 273 U.S. 677, 71 L.Ed. 835, and affirmed 47 S.Ct. 406, 273 U.S. 284, 71 L.Ed. 646—Fox Film Corporation v. Trumbull, D.C.Conn., 7 F. 2d 715—Milliken v. Stone, D.C.N. Y., 7 F.2d 397, affirmed, C.C.A., 16 F.2d 981—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 332—Davidowitz v. Hines, D.C.Pa., 30 F.Supp. 470, affirmed Hines v. Davidowitz, 61 S.Ct. 399, 312 U.S. 52, 85 L.Ed. 581—Pavel v. Pattison, D.C.La., 24 F.Supp. 915—Southern Pac. Co. v. Mashburn, D.C.Nev., 18 F.Supp. 393—Sovereign Camp, W. O. W., v. Murphy, D.C.Iowa, 17 F. Supp. 650—Oldetyme Distillers v. Gordy, D.C.Md., 17 F.Supp. 424—Dugan v. Bridges, D.C.N.H., 16 F. Supp. 694, appeal dismissed 57 S. Ct. 668, 300 U.S. 684, 81 L.Ed. 887—Atchison, T. & S. F. Ry. Co. v. La Prade, D.C.Ariz., 2 F.Supp. 855—Broom v. Wood, D.C.Miss., 1 F. Supp. 134, reversed on other grounds Wood v. Broom, 53 S.Ct. 1, 287 U.S. 1, 77 L.Ed. 131—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C. Or., 296 F. 928, affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S. Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468—Carolene Products Co. v. Mahoney, D.C.Mass., 294 F. 902, affirmed, C.C.A., Mahoney v. Carolene Products Co., 2 F.2d 366—Southern Bell Telephone & Telegraph Co. v. Town of Calhoun, D. C.S.C., 287 F. 381.
Ark.—Merritt v. Gravenmier, 277 S. W. 526, 169 Ark. 779.
Cal.—Brock v. Superior Court in and for Los Angeles County, 86 P.2d 805, 12 Cal.2d 605.
D.C.—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.S. 604, 83 L.Ed. 384—Haskins Bros. & Co. v. Morgenthau, 85 F.2d 677, 66 App.D.C. 178, certiorari denied 57 S.Ct. 118, 299 U.S. 588, 81 L.Ed. 433.
Ill.—Doe v. Jones, 158 N.E. 703, 327 Ill. 387—Kent v. City of Chicago, 22 N.E.2d 799, 301 Ill.App. 312.
Mass.—Mueller v. Commissioner of Public Health, 30 N.E.2d 217, 307 Mass. 270—Slome v. Godley, 23 N. E.2d 133, 304 Mass. 187—Morley v. Wilson, 159 N.E. 41, 261 Mass. 269, certiorari denied 48 S.Ct. 320, 276 U.S. 625, 72 L.Ed. 738.
Mo.—State ex rel. Public Service Commission of Missouri v. Mulloy, 62 S.W.2d 730, 333 Mo. 282—Arnold v. Hanna, 290 S.W. 416, 315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721—State ex rel. Chase v. Hall, 250 S.W. 64, 297 Mo. 594.
Mont.—State v. Carroll, 279 P. 234, 235, 85 Mont. 439, citing **Corpus Juris.**
N.M.—State v. Graham, 270 P. 897, 33 N.M. 504.
Or.—Purple Truck Garage Co. v. Campbell, 250 P. 213, 119 Or. 484, 51 A.L.R. 816—Winslow v. Fleischner, 223 P. 922, 110 Or. 554.
Pa.—Meadville Park Theatre Corporation v. Mook, 10 A.2d 437, 337 Pa. 21—Annenberg v. Roberts, 2 A.2d 612, 333 Pa. 203—Reeser's Milk Co. v. Pates, 181 A. 211, 320 Pa. 11—Harris v. State Board of Optometrical Examiners of Department of Public Instruction of the Commonwealth, 135 A. 237, 287 Pa. 531—Heinel Motors v. Motor Vehicle Dealers' Commission, 35 Pa.Dist. & Co. 60—Pennsylvania R. Co. v. Driscoll, 47 Dauph.Co. 108—Heinel Motors v. Teefy, 46 Dauph.Co. 281—Fidelity Philadel-

nance[49] when the proposed enforcement will deprive complainant of his property or property rights

phia Trust Co. v. Bashore, 44 Dauph.Co. 380.
R.I.—C. Tisdall Co. v. Board of Aldermen of City of Newport, 188 A. 648, 57 R.I. 96.
S.C.—Xepapas v. Richardson, 146 S. E. 686, 149 S.C. 52, followed in Armstrong Pharmacy v. Rector, 146 S.E. 692, 149 S.C. 187, and Carpenter Bros. v. Rector, 146 S. E. 693, 149 S.C. 188.
Tenn.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.
Tex.—State v. Ferguson, 125 S.W.2d 272, 133 Tex. 60—Rogers v. Daniel Oil & Royalty Co., Civ.App., 105 S.W.2d 476, affirmed 110 S.W.2d 891, 130 Tex. 386.
Wis.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
32 C.J. p 243 note 81—p 247 note 22.
Injunction by federal court against enforcement of state statutes see Federal Courts § 50.

A wrong attempted by an officer under color of a void statute will be enjoined as readily as one attempted by a private person in violation of law and without color of office provided sufficient ground for injunction under the rules and principles governing the subject are shown, as where acts of either are trespasses. —Coal & Coke R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

In name of state

Even if the name of the state is used to enforce such a statute, it is, nevertheless, a proceeding without authority which does not affect the state in its sovereign or governmental capacity.—Young v. Rafferty, 33 Philippines 556.

Operation of injunction

"If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."
U.S.—Commonwealth of Massachusetts v. Mellon, 43 S.Ct. 597, 601, 262 U.S. 447, 67 L.Ed. 1078, affirming Frothingham v. Mellon, 288 F. 252, 53 App.D.C. 47.
D.C.—Elliott v. White, 23 F.2d 997, 998, 57 App.D.C. 389.
Encroachment by judiciary on legislature generally see Constitutional Law § 151 a.

Personal trespasses

Court of equity has jurisdiction to issue injunction against officers of state, who, under color of authority of unconstitutional or void legislation, are guilty of personal trespasses, wrongs, and infringements on property of individual.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

49. U.S.—Hague v. Committee for Industrial Organization, N.J., 59 S. Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U. S. 624, 83 L.Ed. 1028—City of Dayton, Ohio, v. City Ry. Co., C.C.A. Ohio, 16 F.2d 401—Gamage v. Masonic Cemetery Ass'n, D.C.Cal., 31 F.2d 308, reversed on other grounds, C.C.A., Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 1027, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755 —Marrs v. City of Oxford, D.C. Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Zimmerman v. Village of London, D.C.Ohio. 38 F. Supp. 582—Ambler Realty Co. v. Village of Euclid, Ohio, D.C.Ohio, 297 F. 307, reversed on other grounds Village of Euclid, Ohio, v. Ambler Realty Co., 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303.
Ala.—City of Birmingham v. Leo A. Seltzer, Inc., 159 So. 203, 229 Ala. 675.
Ariz.—City of Glendale v. Betty, 43 P.2d 206, 208, 45 Ariz. 327, quoting **Corpus Juris.**
Ark.—Shipley Baking Co. v. City of Hartford, 31 S.W.2d 944, 182 Ark. 503.
Cal.—McKay Jewelers v. Bowron, 122 P.2d 543, 19 Cal.2d 595, 139 A.L.R. 1188—Bueneman v. City of Santa Barbara, 65 P.2d 884, 8 Cal.2d 405, 109 A.L.R. 895—Schofield v. City of Los Angeles, 7 P.2d 1076, 120 Cal.App. 240—People v. City of Los Angeles, 218 P. 63, 62 Cal.App. 781.
Conn.—Adley Express Co. v. Town of Darien, 7 A.2d 446, 125 Conn. 501.
Fla.—City of Miami v. Lithgow, 12 So.2d 380—City of Miami Beach v. Texas Co., 194 So. 368, 141 Fla. 616, 128 A.L.R. 350—City of Miami Beach v. Gulf Oil Corporation, 194 So. 236, 141 Fla. 642.
Ga.—City of Atlanta v. State, 182 S. E. 184, 181 Ga. 346—Dewell v. Quarles, 181 S.E. 159, 180 Ga. 864 —Gray v. City of Atlanta, 179 S.E. 357, 180 Ga. 409—Southeastern Greyhound Lines v. City of Atlanta, 170 S.E. 43, 177 Ga. 181—Gregory v. Quarles, 157 S.E. 306, 172 Ga. 45.
Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—United Artists Corporation v. Thompson, 171 N.E. 742, 339 Ill. 595—Western Theological Seminary v. City of Evanston, 156 N.E. 778, 325 Ill. 511—Fox Film Corporation v. Collins, 236 Ill.App. 281.
Iowa.—Brodkey v. Sioux City, 296 N. W. 352, 229 Iowa 1291, modifying and denying rehearing 291 N.W. 171, 229 Iowa 1291—Cook v. Davis, 252 N.W. 754, 218 Iowa 335.
Md.—Jewel Tea Co. v. Town of Bel Air, 192 A. 417, 172 Md. 536—Spann v. Gaither, 136 A. 41, 152 Md. 1, 50 A.L.R. 620.
Mich.—Postal v. Village of Grosse Pointe, 214 N.W. 148, 239 Mich. 286.
Miss.—Fitzhugh v. City of Jackson, 97 So. 190, 132 Miss. 585, 33 A.L. R. 279.
Mo.—Baker v. Hasler, 274 S.W. 1095, 218 Mo.App. 1.
Neb.—Speier's Laundry Co. v. City of Wilber, 269 N.W. 119, 131 Neb. 606.
N.J.—Howard Co. Jewelers v. New Jersey State Board of Optometrists, 29 A.2d 742, 133 N.J.Eq. 4.
N.Y.—Cowan v. City of Buffalo, 288 N.Y.S. 239, 247 App.Div. 591, affirming 282 N.Y.S. 880, 157 Misc. 71—Lo Tempio v. City of Niagara Falls, 2 N.Y.S.2d 103, 166 Misc. 338.
N.C.—Loose-Wiles Biscuit Co. v. Town of Sanford, 157 S.E. 432, 200 N.C. 467—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207, 52 A.L.R. 663, affirmed 47 S.Ct. 763, 274 U.S. 725, 71 L.Ed. 1329—Dixie Poster Advertising Co. v. City of Asheville, 128 S.E. 149, 189 N.C. 737.
Ohio.—Direct Plumbing Supply Co. v. City of Dayton, App., 40 N.E.2d 166, affirmed 38 N.E.2d 70, 138 Ohio St. 540, 137 A.L.R. 1058—Henslee v. City of Columbus, App., 34 N.E. 2d 580—Richards v. Dauben, 17 Ohio N.P.,N.S., 190—Livingston v. City of Cincinnati, 14 Ohio N.P.,N. S., 331.
Okl.—Magnolia Petroleum Co. v. City of Broken Bow, 87 P.2d 319, 184 Okl. 362—Cain's Coffee Co. v. City of Muskogee, 44 P.2d 50, 171 Okl. 635—Grantham v. City of Chickasha, 9 P.2d 747, 156 Okl. 56, followed in Ex parte Russum, 9 P.2d 753, 156 Okl. 62—City of Tulsa v. Thomas, 214 P. 1070, 89 Okl. 188.
Or.—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310—Kroner v. City of Portland, 240 P. 536, 116 Or. 141.
Pa.—Valley Rys. v. City of Harrisburg, 134 A. 644, 280 Pa. 385—Sherwin v. City of Erie, 30 Pa.Dist. & Co. 701, 19 Erie Co. 383, 85 Pittsb. Leg.J. 761—Altmiller v. City of Hazleton, 35 Luz.Leg.Reg. 325.
Tex.—Bowers v. City of Taylor, Com. App., 24 S.W.2d 816, denying rehearing 16 S.W.2d 520, reversing Bowers v. International Great

and will cause him injury for which he cannot obtain adequate redress in a court of law, or where the illegal action will give rise to a multiplicity of actions at law if it is not prevented,[50] provided there is a community of interest between complainants at least in questions of law and fact on which the issue depends.[51] Action under a void statute or ordinance will also be enjoined where delay until the trial would render the remedy unavailable if the person seeking it were found to be entitled to such relief.[52] Injunction may issue although the officer's color of authority for the enforcement of the act is found, not in the act itself, but in the common law or in some other statute.[53] Also the operation of the rule is not affected by a statute providing that an injunction shall not be granted to prevent the execution of a public statute by a public officer for the public benefit, as this statute refers solely to injunctions against the execution of valid statutes.[54]

On the other hand, courts are slow to restrain the enforcement of statutes and ordinances,[55] and the right to an injunction[56] and the invalidity of

Northern R. Co., Civ.App., 286 S. W. 590—Bielecki v. City of Port Arthur, Com.App., 12 S.W.2d 976, reversing, Civ.App., 2 S.W.2d 1001—Murphy v. Wright, Civ.App., 115 S.W.2d 448—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S.W.2d 586—City of Winters v. Murphey, Civ.App., 297 S.W. 479—Stone v. Kendall, Civ.App., 268 S. W. 759—City of Bowie v. Painter, Civ.App., 255 S.W. 498—Prater v. Storey, Civ.App., 249 S.W. 871.

Wash.—State ex rel. Rand v. City of Seattle, 124 P.2d 207, 13 Wash.2d 107—Brennan v. City of Seattle, 276 P. 886, 151 Wash. 665.

Wis.—Williams v. City of Hudson, 262 N.W. 607, 219 Wis. 119.

32 C.J. p 264 note 58.

Ordinance not promulgated

Officer attempting to act under ordinance not promulgated should be enjoined from so doing.—Soniat v. Village of Krotz Springs, 109 So. 840, 161 La. 1066.

Zoning ordinances

U.S.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 Cal. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 Cal. 778, Stern v. City of Los Angeles, 295 P. 23, 211 Cal. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 Cal. 777—Hagenburger v. City of Los Angeles, 124 P.2d 345, 51 Cal. App.2d 161.

Fla.—Snedigar v. Keefer, 179 So. 421, 131 Fla. 191.

Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642, affirming 245 N.Y.S. 819, 231 App.Div. 746—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936, second case, 241 App.Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

N.C.—Clinard v. City of Winston-Salem, 6 S.E.2d 867, 217 N.C. 119, 126 A.L.R. 634.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Pa.—Padgunas v. Valentine, 6 Pa. Dist. & Co. 667, 23 Luz.Leg.Reg. 417—Vickerman v. West View Borough, 88 Pittsb.Leg.J. 133.

Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Time governing

In a suit to enjoin enforcement of an ordinance prohibiting commercial advertising on the exterior of street cars, the transit company was held to be empowered under its articles or franchises to engage in the advertising business, although its original articles gave no such power where it was given by an amendment of articles after the commencement of the suit, since it is the state of things as of the trial, rather than of the commencement of the action, which governs.—Pacific Rys. Advertising Co. v. City of Oakland, 276 P. 629, 98 Cal.App. 165.

50. Pa.—Valley Rys. v. City of Harrisburg, 124 A. 644, 280 Pa. 385.

32 C.J. p 244 note 82, p 265 note 59.

Multiplicity of suits held not threatened so as to warrant issuance of injunction.—Erie R. Co. v. Village of Elmira Heights, 211 N.Y.S. 688, 125 Misc. 441.

51. Ill.—Kearney v. Canton, 113 N. E. 98, 273 Ill. 507—Klever Shampay Karpet Kleaners v. City of Chicago, 238 Ill.App. 291.

"Courts of equity are reluctant to take jurisdiction of a case to enjoin the enforcement of a municipal ordinance on a matter on which the municipality has the power to legislate, and will not do so to prevent a multiplicity of suits unless the ordinance actually affects a right or interest common to a large number of complainants."—Moy v. City of Chicago, 140 N.E. 845, 847, 309 Ill. 242.

Subject to arrest

The fact that each of plaintiffs may be subject to arrest for violation of the ordinance has been held not to entitle them to maintain injunctive proceedings against the enforcement of the ordinance on the ground that they are threatened with a multiplicity of suits.—Oklahoma City v. Norton-Johnson Buick Motor Co., 36 P.2d 278, 169 Okl. 179.

52. N.Y.—Coler v. American S. P. C. A., 122 N.Y.S. 549.

32 C.J. p 244 note 83.

Killing dogs

An injunction was proper remedy to prevent enforcement of order of selectmen of town prohibiting plaintiffs from harboring more than a certain number of dogs within the town, where plaintiffs were maintaining a licensed kennel, and plaintiffs' failure to obey order might result in killing of valuable dogs, and plaintiffs had no right of appeal from order and unless its enforcement were enjoined, dogs might be killed before validity of order could be otherwise tested.—Scudder v. Town of Greenwich, 14 A.2d 728, 127 Conn. 71.

53. W.Va.—Coal & Coke R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

32 C.J. p 244 note 88.

54. Cal.—Brock v. Superior Court in and for Los Angeles County, 86 P.2d 805, 12 Cal.2d 605—Bueneman v. City of Santa Barbara, 65 P.2d 884, 8 Cal.2d 405, 109 A.L.R. 895.

32 C.J. p 244 note 90.

55. **Last practicable moment**

It has also been held that, instead of interfering with a legislative movement to the accomplishment of an illegal purpose, at the outset thereof, the court should rather act at the last practicable moment, giving ample time for appeals to be made to the reason and good judgment of the legislators.—Gray v. Wilmington, 83 A. 321, 10 Del.Ch. 39—32 C.J. p 265 note 66.

56. U.S.—Columbia Terminals Co. v. Lambert, D.C.Mo., 30 F.Supp. 28, vacated on other grounds 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 983, and Public Service Commission of State of Missouri v. Columbia Terminals Co., 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 984.

Ill.—Schlosser's Bakeries v. Village of Oak Park, 41 N.E.2d 234, 314 Ill. App. 386.

the statute[57] or ordinance[58] must be clearly established. The mere fact that a statute[59] or ordinance[60] is unconstitutional or void is not alone sufficient ground for enjoining its enforcement; other circumstances bringing the case under some recognized head of equity jurisdiction must be shown.[61]

Inequitable advantage

Equity will not enjoin the enforcement of an invalid ordinance to enable plaintiff to obtain an inequitable advantage over others.—Marrs v. City of Oxford, C.C.A.Kan., 32 F.2d 134, 67 A.L.R. 1336, affirming, D.C., 24 F.2d 541, and certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625.

No benefit to plaintiff

A colored teacher was not entitled to injunction enjoining enforcement of allegedly discriminatory Maryland statutes relating to salaries for white and colored teachers where real objective of suit was to tie up equalization fund and prevent its distribution to counties as beneficiaries, since injunction would not directly benefit teacher and would be detrimental to elementary school education in counties participating in fund.—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792.

57. U.S.—National Fertilizer Ass'n v. Bradley, S.C., 57 S.Ct. 748, 301 U.S. 178, 81 L.Ed. 990, affirming, D.C., 18 F.Supp. 263—West Coast Macaroni Mfg. Co. v. Brock, D.C. Cal., 24 F.Supp. 442—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444—Consolidated Freight Lines v. Pfost, D.C.Idaho, 7 F.Supp. 629—Wonder Bakeries Co. v. White, D.C.Ohio, 3 F.Supp. 311.

Cal.—Brock v. Superior Court in and for Los Angeles County, 71 P.2d 209, 9 Cal.2d 291, 114 A.L.R. 127.

Tex.—Rayburn v. Richardson, Civ. App., 131 S.W.2d 1000, appeal dismissed 60 S.Ct. 718, 309 U.S. 632, 84 L.Ed. 990—Neiman-Marcus Co. v. City of Houston, Civ.App., 109 S.W.2d 543, error refused.

32 C.J. p 244 note 91.

58. Ala.—Gilchrist Drug Co. v. City of Birmingham, 174 So. 609, 234 Ala. 204, 111 A.L.R. 103.

Tex.—City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 162 S.W.2d 150, affirmed Kemp Hotel Operating Co. v. City of Wichita Falls, 170 S.W.2d 217, 141 Tex. 90.

Confiscatory ordinance

It has been held that an injunction against the enforcement of an ordinance on the ground that it is confiscatory will not be granted where on the evidence there is no certainty that the rates prescribed will necessarily be confiscatory; but if it shall thereafter appear that under the actual operation of the ordinance the returns allowed by it are confiscatory, nothing in the judgment denying the application for injunction will prevent another application for an injunction.—City of Knoxville v. Knoxville Water Co., Tenn., 29 S.Ct. 148, 212 U.S. 1, 53 L.Ed. 371.

Minor provisions

Where injunction against zoning ordinance is sought on broad ground that ordinance adversely affects plaintiff, court will not examine ordinance to determine constitutionality of minor provisions.—Village of Euclid, Ohio, v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016, reversing, D.C., Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307.

59. U.S.—Northport Power & Light Co. v. Hartley, Wash., 51 S.Ct. 581, 283 U.S. 568, 75 L.Ed. 1275, affirming, D.C., 35 F.2d 199—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Richmond Hosiery Mills v. Camp, C.C.A.Ga., 74 F.2d 200, affirming, D.C., 7 F.Supp. 139—Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475—Mills v. Lowndes, D.C. Md., 26 F.Supp. 792—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

Alaska.—Anderson v. Smith, 8 Alaska 470.

32 C.J. p 244 note 92.

Not judicial controversy

To enjoin officials of the executive department of the government from executing an act of congress asserted to be unconstitutional, in absence of injury sustained or immediately threatened, would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another department.—Commonwealth of Massachusetts v. Mellon, 43 S.Ct. 597, 262 U.S. 447, 67 L.Ed. 1078, affirming Frothingham v. Mellon, 288 F. 252, 53 App.D.C. 47.

60. Ga.—Asa G. Candler, Inc., v. City of Atlanta, 174 S.E. 129, 178 Ga. 661.

Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—Ferguson Coal Co. v. Thompson, 174 N.E. 896, 343 Ill. 20—United Artists Corporation v. Thompson, 171 N.E. 742, 339 Ill. 595—Western Theological Seminary v. City of Evanston, 156 N.E. 778, 325 Ill. 511—Moy v. City of Chicago, 140 N.E. 845, 309 Ill. 242.

Ind.—Males v. Elbert, 180 N.E. 193, 203 Ind. 512.

N.Y.—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244.

Okl.—Oklahoma City v. Norton-Johnson Buick Motor Co., 36 P.2d 278, 169 Okl. 179.

Pa.—Hollearn v. Silverman, 12 A.2d 292, 338 Pa. 346.

Tex.—City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 129 Tex. 40, reversing, Civ.App., 78 S.W.2d 1065—Malott v. City of Brownsville, 298 S.W. 540, affirming, Civ.App., 292 S.W. 606, and modified on other grounds, Com. App., 300 S.W. 29, corrected 4 S.W.2d 965.

32 C.J. p 265 note 61, p 266 note 82, p 267 notes 83, 84.

"The general rule is that equity will not interfere by injunction to test the validity of an alleged unlawful or invalid municipal ordinance."—Loose-Wiles Biscuit Co. v. Town of Sanford, 157 S.E. 432, 433, 200 N.C. 467.

61. U.S.—State of New Jersey v. Sargent, 46 S.Ct. 122, 269 U.S. 328, 70 L.Ed. 289—Cottman Co. v. Dailey, C.C.A.Md., 94 F.2d 85, affirming, D.C., 20 F.Supp. 142—Lone Star Gas Co. v. City of Fort Worth, C.C.A.Tex., 93 F.2d 584, reversing, D.C., 15 F.Supp. 171, certiorari denied City of Fort Worth v. Lone Star Gas Co., 58 S.Ct. 943, 304 U.S. 562, 82 L.Ed. 1529, rehearing denied 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549—Petroleum Exploration v. Public Service Commission of Kentucky, D.C.Ky., 21 F.Supp. 254, motion denied 58 S.Ct. 527, affirmed 58 S.Ct. 834, 304 U.S. 209, 82 L.Ed. 1294—Texas Co. v. Grosjean, D.C.La., 16 F.Supp. 264—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444—Associated Press v. Herrick, D.C.N.Y., 13 F. Supp. 897—Chandler v. Neff, D.C. Tex., 298 F. 515.

Alaska.—Anderson v. Smith, 8 Alaska 470.

Ariz.—City of Glendale v. Betty, 43 P.2d 206, 45 Ariz. 327.

Cal.—Golden Gate S. Tours v. City and Co. of San Francisco, 69 P.2d 899, 900, 21 Cal.App.2d 582, quoting **Corpus Juris.**

Ga.—Corley v. City of Atlanta, 182 S.E. 177, 181 Ga. 381—Bowden v. Georgia Public Service Commission, 153 S.E. 42, 170 Ga. 505.

Me.—Stoddard v. Public Utilities Commission, 19 A.2d 427, 137 Me. 320—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Mo.—Park Transp. Co. v. Missouri State Highway Commission, 60 S.W.2d 388, 332 Mo. 592.

N.Y.—Erie R. Co. v. Village of Elmira Heights, 211 N.Y.S. 688, 125 Misc. 441.

Accordingly, an injunction should not be granted except when necessary to prevent great and irreparable injury[62] distinct from that suffered by the public generally,[63] and injunction will not issue where the remedy at law is adequate.[64] Although in some jurisdictions injunction will issue to re-

N.C.—Moore v. Bell, 131 S.E. 724, 191 N.C. 305.
N.D.—Lockwood v. Baird, 231 N.W. 851, 853, 59 N.D. 713, quoting **Corpus Juris.**
Pa.—In re Borough of State College, 158 A. 298, 104 Pa.Super. 211.
32 C.J. p 244 note 93, p 265 note 62.

Police regulation

The cases wherein the courts may by injunction prevent the execution or enforcement of a police regulation of a municipal corporation are extraordinary ones, where the legislative body has exceeded or grossly abused its authority and has invaded an individual's vested or fundamental right or immunity.—Keegan v. Board of Com'rs of Port of New Orleans, 98 So. 50, 154 La. 639.

Violation of legal right

To be in a position to attack a statute or an order by injunction suit as invalid, it is not sufficient that complaining party show damage to himself but, in addition, he must show a violation of his legal right by the statute or order which is attacked.—U. S. v. Superior Court, 120 P.2d 26, 19 Cal.2d 189.

62. U.S.—Terrace v. Thompson, Wash., 44 S.Ct. 15, 263 U.S. 197, 68 L.Ed. 255—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirming, D.C., Securities and Exchange Commission v. Electric Bond & Share Co., 18 F.Supp. 131, certiorari granted Electric Bond & Share Co. v. Securities and Exchange Commission, 58 S.Ct. 411, 302 U.S. 681, 82 L.Ed. 526, affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105—Reed v. Lehman, C.C.A.N.Y., 91 F.2d 919—Carolene Products Co. of Litchfield, Ill., v. Wallace, D.C.D.C., 27 F.Supp. 110, affirmed Carolene Products Co. v. Wallace, 59 S.Ct. 1033, 307 U.S. 612, 83 L.Ed. 1495—Black v. Little, D.C.Mich., 8 F.Supp. 367—Buckland v. Lee, D.C.W.Va., 6 F.Supp. 606.
Kan.—Kansas Utilities Co. v. City of Burlington, 44 P.2d 223, 141 Kan. 926, appeal dismissed 56 S.Ct. 21, 296 U.S. 658, 80 L.Ed. 469.
Neb.—Omaha Grain Exchange v. Spillman, 226 N.W. 452, 118 Neb. 729.
N.D.—Lockwood v. Baird, 231 N.W. 851, 853, 59 N.D. 713, quoting **Corpus Juris.**
Tex.—City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 168 S.W.2d 150, affirmed Kemp Hotel Operating Co. v. City of Wichita Falls, 170 S.W.2d 217, 141 Tex. 90.
32 C.J. p 244 note 94.

Anticipation of invalid action

Resort to injunction against allegedly unconstitutional statute may not be had merely because of anticipation of invalid action in administration.—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

Heavy penalty

The injury which flows from the threat of enforcement of an unconstitutional, regulatory statute with penalties so heavy as to forbid the risk of challenge in proceedings to enforce it constitutes irreparable injury.—Petroleum Exploration v. Public Service Commission of Kentucky, Ky., 58 S.Ct. 834, 304 U.S. 209, 82 L.Ed. 1294, affirming, D.C., 21 F. Supp. 254, motion denied 58 S.Ct. 527.

Mere inconvenience and expense and apprehension of injury to property rights or mere general allegations of irreparable injury and deprivation of property rights will not give equity jurisdiction to enjoin the enforcement of a penal statute.—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.

63. Ill.—Fletcher v. City of Paris, 35 N.E.2d 329, 377 Ill. 89.

Individual damage

In single suit by sponge fishermen, each of whom operated as an individual, to restrain enforcement of Florida criminal statute prohibiting use of diving equipment by sponge fishermen, each fisherman must rely on his own cause of action and must show individual irreparable damage.—Pope v. Blanton, D.C.Fla., 10 F.Supp. 15, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384.

Taxpayers, however, have sufficient interest to maintain a suit to enjoin action by public officers under an invalid law which will affect the property of the state or the amount of taxes to be paid.—McCullough v. Brown, 19 S.E. 458, 41 S.C. 220, 23 L.R.A. 410—32 C.J. p 245 note 1.

64. U.S.—Cottman Co. v. Dailey, C.C.A.Md., 94 F.2d 85, affirming, D.C., 20 F.Supp. 142—Town of Green River v. Fuller Brush Co., C.C.A.Wyo., 65 F.2d 112, 88 A.L.R. 177, reversing, D.C., Fuller Brush Co. v. Town of Green River, 60 F.2d 613—Brown v. Lee, D.C.Cal., 51 F. Supp. 85—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792—National Fertilizer Ass'n v. Bradley, D.C.S.C., 18 F.Supp. 263, affirmed 57 S.Ct. 748, 301 U.S. 178, 81 L.Ed. 990.
Fla.—Stocks v. Lee, 198 So. 211, 144 Fla. 627—Egan v. City of Miami, 178 So. 132, 130 Fla. 465—City of West Palm Beach v. Zellar, 107 So. 146, 91 Fla. 223.
Ill.—Ruban v. City of Chicago, 161 N.E. 133, 330 Ill. 97—Klever Shampay Karpet Kleaners v. City of Chicago, 154 N.E. 131, 323 Ill. 368, 49 A.L.R. 103.
Ind.—Indianapolis Market Ass'n v. City of Indianapolis, 192 N.E. 754, 207 Ind. 356.
Mass.—Knowlton v. Inhabitants of Swampscott, 181 N.E. 849, 280 Mass. 69.
Mo.—Gerhart v. City of St. Louis, 270 S.W. 680, 307 Mo. 206.
Neb.—Omaha Grain Exchange v. Spillman, 226 N.W. 452, 118 Neb. 729.
N.Y.—Erie R. Co. v. Village of Elmira Heights, 211 N.Y.S. 688, 125 Misc. 441.
N.D.—Lockwood v. Baird, 231 N.W. 851, 853, 59 N.D. 713, quoting **Corpus Juris.**
Ohio.—Rowe v. City of Cincinnati, 159 N.E. 492, 26 Ohio App. 87, petition dismissed 159 N.E. 365, 117 Ohio St. 382.
Pa.—Bradford Electric Co. v. Driscoll, 35 Pa.Dist. & Co. 312, 47 Dauph.Co. 48—Chambers v. City of McKeesport, 89 Pittsb.Leg.J. 224, 32 Mun.Co. 136—Flinn v. Borough of Fox Chapel, 88 Pittsb. Leg.J. 335.
Tex.—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—City of Wichita Falls v. Roberson, Civ.App., 283 S.W. 870—Jones v. Whitehead, Civ.App., 278 S.W. 305—City of Ranger v. Southern Ice & Utilities Co., Civ.App., 262 S. W. 839.
32 C.J. p 244 note 97, p 265 note 63.

Administrative remedy

Where an administrative remedy provided is not inadequate, a failure to exhaust the administrative remedy precludes injunctive relief.
Cal.—Metcalf v. Los Angeles County, 148 P.2d 645.
Ohio.—Meeker v. Scudder, 140 N.E. 627, 108 Ohio St. 423.
Wis.—State ex rel. Martin v. City of Juneau, 300 N.W. 187, 238 Wis. 564.

Legal remedy held inadequate

U.S.—Marrs v. City of Oxford, D.C. Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1386, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 562, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Gallardo v. Porto Rico Ry., Light & Power Co., C.C. A.Puerto Rico, 18 F.2d 913—Reid v. Borough of Brookville, D.C.Pa., 39 F.Supp. 30.
Ill.—Scully v. Hallihan, 6 N.E.2d

strain official action under an illegal statute or ordinance where fundamental civil rights are involved,[65] as a general rule injunction will be denied where complainant's property rights are not involved.[66] Likewise injunction will be denied where

176, 365 Ill. 185—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Iowa.—Craven v. Bierring, 269 N.W. 801, 222 Iowa 613.

Md.—Jewel Tea Co. v. Town of Bel Air, 192 A. 417, 172 Md. 536.

Mo.—Glencoe Lime & Cement Co. v. City of St. Louis, 108 S.W.2d 143, 341 Mo. 689.

N.Y.—Lang's Creamery v. City of Niagara Falls, 231 N.Y.S. 368, 224 App.Div. 483, affirmed 167 N.E. 464, 251 N.Y. 343.

Pa.—Heinel Motors v. Teefy, 46 Dauph.Co. 281—Equitable Loan Soc. v. Harr, 45 Dauph.Co. 198.

License tax

Plaintiff, who paid a license tax under protest and who had an adequate legal remedy to recover it back, if unlawful, cannot regard such payment as an irreparable injury to his business.—Loose-Wiles Biscuit Co. v. Town of Sanford, 157 S.E. 432, 200 N.C. 467.

Proceedings to enforce

Where the validity of laws or administrative orders under them may be fully contested in proceedings brought by the administrative officers to enforce them, such proceedings offer an adequate legal remedy, and a bill to enjoin the administrative authorities from taking steps to enforce such orders will not lie.—McDermott v. Bradford, D.C. Wash., 10 F.Supp. 661.

Requests for permits

(1) Where it would be idle to make a request for a permit under the statute or ordinance alleged to be invalid, a request for such a permit is not a condition precedent to a suit to enjoin enforcement.—Van Gammeren v. City of Fresno, 124 P. 2d 621, 51 Cal.App.2d 235—Laura Vincent Co. v. City of Selma, 111 P. 2d 17, 43 Cal.App.2d 473.

(2) Where the owner of a building contends that an ordinance is inapplicable to him and sues to enjoin enforcement as to him, he need not, as a condition to bringing suit, have requested a permit under the ordinance.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

(3) Where, however, a zoning ordinance provides for appeals from a grant or refusal of a zoning permit, a property owner must exhaust that remedy before he can enjoin the enforcement of the ordinance, at least in the absence of an attack on the ordinance in its entirety.—Central Trust Co. v. City of Cincinnati, 23 N.E.2d 450, 62 Ohio App. 139.

65. U.S.—Hill v. Darger, D.C.Cal., 8 F.Supp. 189, affirmed, C.C.A., Darger v. Hill, 76 F.2d 198.

Or.—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310.

Driver's permit

Injunction lies to restrain the enforcement of an invalid ordinance provision authorizing revocation of a driver's permit.—Thompson v. Smith, 154 S.E. 579, 155 Va. 367, 71 A.L.R. 604.

Enforcement of ordinances enjoined where enforcement would result in the denial of freedom of speech, of the press, and of religion.—Reid v. Borough of Brookville, D. C.Pa., 39 F.Supp. 30, followed in Douglas v. City of Jeannette, D.C. Pa., 39 F.Supp. 32.

66. U.S.—Town of Green River v. Fuller Brush Co., C.C.A.Wyo., 65 F.2d 112, 88 A.L.R. 177, reversing, D.C., Fuller Brush Co. v. Town of Green River, 60 F.2d 613.

Fla.—Egan v. City of Miami, 178 So. 132, 130 Fla. 465.

Ga.—Friedman v. City of Atlanta, 7 S.E.2d 911, 189 Ga. 862, certiorari denied 61 S.Ct. 20, 311 U.S. 663, 85 L.Ed. 426—Georgia Music Operators Ass'n v. City of Atlanta, 190 S.E. 32, 183 Ga. 794.

Ill.—Ferguson Coal Co. v. Thompson, 174 N.E. 896, 343 Ill. 20—Western Theological Seminary v. City of Evanston, 156 N.E. 778, 325 Ill. 511.

Ind.—Indianapolis Market Ass'n v. City of Indianapolis, 192 N.E. 754, 207 Ind. 356—Lickey v. City of South Bend, 190 N.E. 858, 206 Ind. 636—Males v. Elbert, 180 N.E. 193, 203 Ind. 512.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Mo.—Graves v. Purcell, 85 S.W.2d 543, 337 Mo. 574.

N.M.—Simon v. Gallegos, 99 P.2d 451, 44 N.M. 127.

N.C.—Fleming v. City of Asheville, 172 S.E. 362, 205 N.C. 765.

N.D.—Lockwood v. Baird, 231 N.W. 851, 853, 59 N.D. 713, quoting **Corpus Juris.**

Okl.—Oklahoma City v. Norton-Johnson Buick Motor Co., 36 P.2d 278, 169 Okl. 179.

Or.—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310.

Pa.—Flinn v. Borough of Fox Chapel, 88 Pittsb.Leg.J. 335.

Tenn.—Cravens v. Storie, 133 S.W.2d 609, 175 Tenn. 285.

Tex.—Kemp Hotel Operating Co. v. City of Wichita Falls, 170 S.W.2d 217, 141 Tex. 90, affirming City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 162 S.W.2d 150—Rayburn v. Richardson, Civ. App., 131 S.W.2d 1000, appeal dismissed 60 S.Ct. 718, 309 U.S. 632, 84 L.Ed. 990—Crawford v. Maples, Civ.App., 114 S.W.2d 696—Nieman-Marcus Co. v. City of Houston, Civ. App., 109 S.W.2d 543, error refused—City of Wink v. Griffith Amusement Co., Civ.App., 78 S.W. 2d 1065, reversed on other grounds 100 S.W.2d 695, 129 Tex. 40—Box v. Newsom, Civ.App., 43 S.W.2d 981—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S.W. 2d 586.

32 C.J. p 244 note 95, p 265 note 64.

A creditor of a city whose rights are impaired by an issue of bonds under an unconstitutional statute may sue.—Smith v. Appleton, 19 Wis. 468.

Annoyance and embarrassment

A naturalized citizen could not maintain suit to enjoin enforcement of state statute requiring registration of alien on the ground that he had a foreign appearance, spoke broken English, and was likely to suffer annoyance and embarrassment from attempts to enforce the statute against him in the belief that he was an alien.—Davidowitz v. Hines, D.C.Pa., 30 F.Supp. 470, affirming Hines v. Davidowitz, 61 S.Ct. 399, 312 U.S. 52, 85 L.Ed. 581.

A stockholder in a bank, who may become liable personally, may sue to restrain the collection of taxes against the bank under an invalid law.—Markoe v. Hartranft, 15 Am. L.Reg. 487.

Plaintiff held entitled to maintain suit

(1) Generally.

Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.

Mass.—Mueller v. Commissioner of Public Health, 30 N.E.2d 217, 307 Mass. 270.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Wis.—Wadhams Oil Co. v. City of Delavan, 243 N.W. 224, 208 Wis. 578.

(2) One who purchases land after the enactment of an invalid ordinance affecting such land has a right to maintain an action to enjoin the enforcement of such ordinance.—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

(3) Owner of premises leased to another could sue to enjoin enforcement of zoning ordinance as against

the danger to plaintiff's property is not imminent,[67] where there is nothing to show that the officer or municipality proposes to put the statute or ordinance into execution or to do anything about it,[68] or where, if property rights are involved, there is no showing that they will be injured by the enforcement of the statute.[69]

If a statute or ordinance as a whole is invalid, an injunction restraining its enforcement may be issued although no action has been taken to enforce it, at least where the act itself constitutes a threat against plaintiff's property, against which he is entitled to relief.[70] Where, however, the act in its general features and purposes is valid, and only some subordinate and interior feature of it is in question, an injunction will not issue against those features, even if generally invalid, until they are sought to be applied against plaintiff.[71] It is no objection to a bill to restrain the enforcement of an unconstitutional statute that the act is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right.[72] Where the ordinance is void in part only, the enforcement of the part that is void may be enjoined.[73]

Valid ordinances. When the action of the mu-

objection that owner was not "real party in interest."—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F. Supp. 499.

(4) In suit to restrain enforcement of zoning ordinance, plaintiff, who had not assigned or defaulted on his contract to purchase realty zoned for residence purposes, was "real party in interest," notwithstanding he had contracted with third person for sale of realty and erection of filling station, where contract with third person was conditioned on plaintiff's obtaining change in zoning.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Right of disposal

If the enforcement of an unconstitutional statute or ordinance will deprive the owner of land of his right to dispose of it for lawful purposes, it constitutes an unlawful restriction on his property rights.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

67. U.S.—Beckman v. Mall, D.C. Kan., 48 F.Supp. 653.
Tex.—Bielecki v. City of Port Arthur, Civ.App., 2 S.W.2d 1001, reversed on other grounds, Com. App., 12 S.W.2d 976.

Before effective date

Court will not enjoin enforcement of ordinance before time provided for ordinance to become effective.—Bagby v. Bowen, 178 S.E. 439, 180 Ga. 214.

Complainant held entitled to maintain suit where license commissioners notified him that his license would not be renewed unless he complied with the allegedly unconstitutional act.—C. Tisdall Co. v. Board of Aldermen of City of Newport, 188 A. 648, 57 R.I. 96.

Segregation ordinance

Enforcement of segregation ordinance preventing occupancy of lot by colored person in block where majority of residences were occupied by white persons should be enjoined if ordinance was invalid, in view of written notice of intention to enforce ordinance, proceedings to such end, and provisions constituting each day's continued occupancy as prohibited, separate offense.—Allen v. Oklahoma City, 52 P.2d 1054, 175 Okl. 421, followed in Scott v. Watt, 52 P.2d 1059, 175 Okl. 426, Ex parte Lee, 52 P.2d 1059, 175 Okl. 426, and Ex parte Hawkins, 52 P.2d 1059, 175 Okl. 425.

Tax statute

Injunction cannot be obtained against operation of statute, especially statute levying taxes, not yet enforced against petitioners.—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 857.

68. Pa.—Smith v. Pittsburgh, 30 Pa. 454.
Tex.—Davis v. City of Houston, Civ. App., 264 S.W. 625.

Bare threat

(1) Injunction will not issue to prevent the consummation of a bare threat which, if followed up by an overt act, would work irreparable injury.—West v. Chastain, 198 S.E. 736, 186 Ga. 667.

(2) It has also been held, however, that a threat to enforce a regulation constituting an unlawful restriction on property rights may be enjoined.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

In advance of any act

Provision of an ordinance providing for police inspection of social clubs required to obtain licenses may not in an injunction action be complained of in advance of any act of inspection because of what might be done under it.—Slovanian Literary & Social Ass'n v. City of Portland, 224 P. 1098, 111 Or. 335.

Remission of taxes

A court will not enjoin the enforcement of a provision of an occupational tax ordinance permitting the council to remit all or part of the tax in the absence of a showing of any effort to remit any tax.—Rogers v. City of Rogers, 295 S.W. 708, 174 Ark. 486.

69. N.D.—Lockwood v. Baird, 231 N.W. 851, 853, 59 N.D. 713, quoting **Corpus Juris.**
32 C.J. p 244 note 96.

70. U.S.—Village of Euclid, Ohio, v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 360, 71 L.Ed. 303, 54 A.L.R. 1016, reversing, D.C., Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307—Armstrong v. Whitten, D.C.Tex., 41 F.2d 241—Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, D.C.Or., 296 F. 928, affirmed Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 45 S.Ct. 571, 268 U.S. 510 69 L.Ed. 1070, 39 A.L.R. 468.

71. U.S.—Stone v. Farmers' Loan & Trust Co., Miss., 6 S.Ct. 334, 388, 1191, 116 U.S. 307, 29 L.Ed. 636—Armstrong v. Whitten, D.C.Tex., 41 F.2d 241—Buckland v. Lee, D.C.W. Va., 6 F.Supp. 606.
Wis.—Interstate Trucking Co. v. Dammann, 241 N.W. 625, 208 Wis. 116, 82 A.L.R. 1080.
32 C.J. p 245 note 98.

Jurisdiction not exercised

It has been held that the court should as a rule decline to exercise jurisdiction, although having it, to enjoin public officers from executing the legislative will as to some one or more minor features of a law not essential to the efficacy of its dominant legislative features.—Wadhams Oil Co. v. Tracy, 123 N.W. 785, 141 Wis. 150, 18 Ann.Cas. 779.

72. Mo.—Park Transp. Co. v. Missouri State Highway Commission, 60 S.W.2d 388, 389, 332 Mo. 592, quoting **Corpus Juris.**
W.Va.—Coal & Coke R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

73. Tenn.—Ignaz v. Knoxville, 1 Tenn.Ch.A. 1.

A zoning ordinance may be valid in its general aspects, yet as to a particular state of facts involving a particular parcel of realty affected thereby be so clearly arbitrary and unreasonable as to result in confiscation, thereby justifying the interposition of a court of equity to restrain enforcement of the ordi-

nicipality is within its charter powers, and raises mere questions of expediency, the decision of which is within the discretion of the municipal body, no injunction will be granted.[74] Courts cannot restrain the enforcement of an ordinance which is within the constitutional limitations of the municipality which enacted it;[75] nor can they restrain the enforcement thereof merely because they may not agree with the legislative body enacting the ordinance in the wisdom or propriety thereof.[76] The fact that an ordinance otherwise valid will inflict some hardship on individuals constitutes no ground for restraining its enforcement.[77] Where a valid ordinance requires a license or permit as a prerequisite to carrying on a certain business, the enforcement of the ordinance will not be enjoined where no application has been made for a permit,[78] or merely because the license is wrongfully withheld.[79] A statute providing that an injunction cannot be granted to prevent the execution of a public statute, by officers of the law, for the public benefit includes valid municipal ordinances.[80]

Temporary injunction. Where a strong showing of the invalidity of a statute or ordinance is made[81] a temporary injunction may be issued to restrain enforcement thereof pending trial,[82] particularly where it is clear that greater injury would be done by refusing such injunction than by granting it,[83] as where such enforcement pendente lite might result in the imposition of enormous penalties, or the forfeiture of valuable property rights, for which no redress could be later had for the injury done.[84] Where the constitutionality of the statute depends on controverted facts and can be determined only on a hearing, the court may suspend the operation of the statute in a proper case, to prevent irreparable injury, until the final hearing.[85] A temporary injunction will be granted enjoining a municipality from enforcing an ordinance of doubtful validity where serious inconvenience to the traveling public and serious damage to the business interests of the city may otherwise result.[86] On the other hand,

nance.—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.

74. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.
Ga.—Lindsey v. City of Atlanta, 191 S.E. 467, 184 Ga. 449.
Miss.—Alexander v. Graves, 173 So. 417, 178 Miss. 583.
Mo.—Glencoe Lime & Cement Co. v. City of St. Louis, 108 S.W.2d 143, 341 Mo. 689.
N.Y.—Madison Products Co. v. Coler, 212 N.Y.S. 865, 215 App.Div. 700, reversed on other grounds 152 N. E. 264, 242 N.Y. 467.
N.C.—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207, 52 A.L.R. 663, affirmed 47 S.Ct. 763, 274 U.S. 725, 71 L.Ed. 1329.
Tenn.—Frankland Carriage Co. v. City of Jackson, 28 S.W.2d 343, 160 Tenn. 649.
32 C.J. p 266 note 76.

No attack on validity

(1) A city will not be enjoined from enforcing an ordinance where no attack on the validity of the ordinance is made.—Robinson v. City of Macon, 144 S.E. 767, 167 Ga. 83.

(2) The court refused to enjoin the collection of a license fee under a valid ordinance imposing a fine for failure to pay, where the validity of the ordinance was not attacked but only its application to complainant questioned, it appearing that only one proceeding under the ordinance had been instituted against complainant and that others were only threatened.—Ludlow & Cincinnati Coal Co. v. City of Ludlow, 43 S.W. 435, 102 Ky. 354, 19 Ky.L. 1381.

75. U.S.—Schoenfeld v. City of Seattle, D.C.Wash., 265 F. 726.
76. Pa.—Baily v. City of Philadelphia, 20 Pa.Co. 173.
77. Ill.—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.
32 C.J. p 266 note 79.
78. Minn.—Meyers v. City of Minneapolis, 191 N.W. 609, 154 Minn. 238.
79. Cal.—Mutual Electric Light Co. v. Ashworth, 50 P. 10, 118 Cal. 1.
Ill.—Klinesmith v. Harrison, 18 Ill. App. 467.
32 C.J. p 266 note 80.
80. Ariz.—Hislop v. Rodgers, 92 P. 2d 527, 54 Ariz. 101.
81. Fla.—Mayo v. Florida Grapefruit Growers' Protective Ass'n, 151 So. 25, 112 Fla. 117.
Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.

Emergency legislation

Liberal practice of granting restraining orders in suits relating solely to private rights should not be followed where suit involves administration of emergency legislation and is matter of public concern.—Willamette Valley Lumber Co. v. Watzek, D.C.Or., 5 F.Supp. 689.

82. N.Y.—Town of Harrison v. Sunny Ridge Builders, 8 N.Y.S.2d 632, 170 Misc. 161.
Pa.—Miller v. Bashore, 45 Dauph.Co. 67, affirmed Holgate Bros. Co. v. Bashore, 200 A. 672, 331 Pa. 255, 117 A.L.R. 639.
Tex.—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S. W.2d 586.

Duty

Where judges fail in their duty to enjoin operation of oppressive, statutory penalties and of the statute itself until its constitutionality has been determined, they violate their oath of office.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.

Notice

A statute prohibiting issuance of a temporary injunction to restrain enforcement of an ordinance except on hearing after notice of time and place and copy of bill have been served on the municipality's executive officer twenty-four hours prior to hearing, was not unconstitutional as an invasion of judicial power or as violation of requirement that justice be administered without delay.—Rochell v. City of Florence, 182 So. 50, 236 Ala. 313.

83. Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.
84. Fla.—Mayo v. Florida Grapefruit Growers' Protective Ass'n, 151 So. 25, 112 Fla. 117.

Tax statute

Interlocutory injunction would be granted to restrain enforcement of state tax statute, where taxes paid during pendency of suit could not be recovered, if statute was adjudged invalid.—Ohio Oil Co. v. Conway, La., 49 S.Ct. 256, 279 U.S. 813, 73 L.Ed. 972, vacating, D.C., Ohio Oil Co. v. McFarland, 28 F.2d 441.

85. U.S.—Louisville & N. R. Co. v. Railroad Commission of Alabama, C.C.Ala., 157 F. 944.
Pa.—Harrisburg Dairies v. Elsaman, 195 A. 337, 328 Pa. 195.
86. N.Y.—New York State Railways

where it is not apparent that a restraining order is necessary,[87] or where irreparable injury will not result if a temporary injunction is denied,[88] a temporary injunction will not be issued. The writ will not issue where it is sought merely for the purpose of delay in the enforcement of a statute or administrative order promulgated under it,[89] nor should it be issued to suspend the operation of a valid statute.[90] Whether or not a sufficient showing has been made to warrant the issuance of a temporary injunction is a matter committed primarily to the discretion of the trial court.[91] The presumption that a statute is constitutional requires denial of temporary injunction against enforcement of such statute by a three-judge court except in extraordinary situations.[92]

§ 120. Unauthorized or Fraudulent Improvements or Contracts

In a suit by a taxpayer or other person having an interest entitling him to sue, public officers or boards may be enjoined from letting or carrying out unauthorized and illegal contracts for public improvements.

Equity has jurisdiction to prevent public officers and boards from letting or carrying out unauthorized and illegal contracts for public improvements.[93] On the other hand, the right to an injunction must be clearly shown,[94] and no injunction will issue where the acts sought to be enjoined are not contrary to law,[95] or where they are within the discretion of the officers and no fraud is charged,[96] or where it is established by competent evidence that the officers have no intention of doing the act which it is sought to enjoin.[97] It has also been held that, where the proposed contract would be void and no rights could be acquired under it, no injunction will be granted,[98] but there is also authority to the contrary.[99] To authorize an injunction, the threatened injury must be substantial and the illegality must amount to more than a mere irregularity when the object is proper and beneficial.[1]

Motives of complainant in seeking injunctive relief are not subject to inquiry if he has shown that he has the other qualifications to sue.[2]

Letting contracts to lowest bidders. Where the statute requires a contract to be let to the lowest bidder, the letting of it to one not the lowest bidder will be enjoined;[3] but not in case the matter is in the discretion of the officers sought to be enjoined,[4] unless fraud or its equivalent has been

v. Rochester, 195 N.Y.S. 783, 119 Misc. 128.

87. N.Y.—Municipal Gas Co. of City of Albany v. Nolan, 201 N.Y.S. 582, 121 Misc. 606.

88. Ga.—Speed Oil Co. v. City of Dublin, 18 S.E.2d 627, 193 Ga. 325—Coker v. City of Atlanta, 198 S.E. 74, 186 Ga. 473.

89. U.S.—Bay Petroleum Corporation v. Corporation Commission of State of Kansas, D.C.Kan., 36 F. Supp. 66.

90. Tex.—State v. Ferguson, 125 S.W.2d 272, 133 Tex. 60—Richardson v. Hurley, Civ.App., 126 S.W.2d 1001, error refused.

91. Fla.—City of Miami Beach v. Sun Oil Co., 178 So. 109, 130 Fla. 582, followed in City of Miami Beach v. Texas Co., 178 So. 109, 130 Fla. 580 and City of Miami Beach v. Gulf Oil Corporation, 178 So. 110, 130 Fla. 581.

92. U.S.—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S.Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D.C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44.

93. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.
Iowa.—Gunnar v. Town of Montezuma, 293 N.W. 1, 228 Iowa 581—Weiss v. Incorporated Town of Woodbine, 289 N.W. 469, 228 Iowa 1.
N.Y.—Luboil Heat & Power Corporation v. Pleydell, 34 N.Y.S.2d 587, 178 Misc. 562.
32 C.J. p 267 notes 85–87.

Right to object
A court of equity is not without jurisdiction to declare that a city council had no power to enter into a certain contract, which would call for the levy of special assessments, and to issue an injunction, although the statute provides for objections and hearings before the council.—Gantenbein v. City of Pasco, 129 P. 374, 71 Wash. 635.

94. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.

Where action is delayed until the building or improvement complained of has nearly been completed and an injunction at such stage of the proceeding would make confusion and give rise to embarrassing questions, it should be denied and the parties left to whatever remedy they may have at law.—White v. Stamford, 37 Conn. 578.

95. N.D.—Rode v. State Highway Commission, 225 N.W. 801, 58 N. D. 249.
32 C.J. p 267 note 88.

96. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.
N.Y.—American La France & Foamite Corporation v. City of New York, 281 N.Y.S. 519, 156 Misc. 2, affirmed 283 N.Y.S. 899, 246 App. Div. 699.
Pa.—Fischer v. Delaware County, 27 Del.Co. 42.
32 C.J. p 267 note 89.

97. Tex.—Basham v. Holcombe, Civ. App., 240 S.W. 691.

98. Cal.—Barto v. San Francisco, 67 P. 758, 135 Cal. 494—Linden v. Case, 46 Cal. 171.

99. Ind.—Middleton v. Greeson, 5 N.E. 755, 106 Ind. 18.
32 C.J. p 267 note 92.

1. Mich.—Attorney General v. Detroit, 20 N.W. 894, 55 Mich. 181.
Minn.—Wagner v. Cranmer, 188 N. W. 65, 152 Minn. 114.

2. Hawaii.—Lucas v. American-Hawaiian Engineering & Construction Co., Ltd., 16 Hawaii 80.
32 C.J. p 269 note 19.

3. N.Y.—Luboil Heat & Power Corporation v. Pleydell, 34 N.Y.S.2d 587, 178 Misc. 562.
32 C.J. p 267 note 96.

Lowest responsible bidder
Ind.—Haywood Pub. Co. v. West, 39 N.E.2d 785, 110 Ind.App. 568.

4. Ill.—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443.
32 C.J. p 267 note 97.

practiced,[5] or where ratification by the municipality is required before the contract is made.[6]

Who may sue. Injunction will not be granted unless complainant's right to bring the suit is clear.[7] It is generally proper for suit to be brought by the state through the attorney-general[8] or by a taxpayer.[9] A disappointed bidder for a contract, unless he is also a taxpayer,[10] is not the proper party to sue for an injunction.[11] To entitle a taxpayer or other person to sue for such an injunction he must show that he is interested in the matter and will be damaged if the improper acts are not prevented by injunction,[12] and that he has no other adequate remedy.[13]

To entitle him to the injunctive relief complainant must act promptly. He is not entitled to an injunction to stop a public improvement, on the ground that it is unauthorized, after the taxes have been levied for it and have been collected without objection.[14]

§ 121. —— Issue of Bond or Other Securities

An illegal issuance of bonds or other securities by a public officer may be enjoined.

When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction,[15] and this is so, even though the issuing officers have no public money under their control.[16] Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.[17] To authorize the issuance of an injunction it must be shown that the bond issue is actually contemplated[18] and is illegal,[19] and that complainant has no other adequate remedy.[20] Where the bonds would be utterly void, even in the hands of innocent third persons, no injunction will be granted, since complainant will suffer no injury.[21]

§ 122. Payment or Other Disposition of Public Funds

Where sought by a person occupying the proper status to maintain the suit, injunction is a proper remedy to restrain unlawful appropriation or disposition of public funds.

Public officers will not be restrained from the payment or other disposition of public funds where in so doing they are acting lawfully and within the authority vested in them.[22] On the other hand, in-

5. Ohio.—Robinson v. Cleveland, 17 Ohio Cir.Ct.,N.S., 519.

6. Conn.—Dibble v. New Haven, 14 A. 210, 56 Conn. 199.
32 C.J. p 268 note 99.

7. U.S.—Fellows v. Walker, C.C. Ohio, 39 F. 651, appeal dismissed 11 S.Ct. 1020, 140 U.S. 680, 35 L.Ed. 603.
32 C.J. p 268 note 11.

8. Mo.—Matthis v. Cameron, 62 Mo. 504.
N.Y.—Duanesburgh v. Jenkins, 46 Barb. 294.
32 C.J. p 268 note 9.

9. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.
N.Y.—Luboil Heat & Power Corporation v. Pleydell, 34 N.Y.S.2d 587, 178 Misc. 562.
32 C.J. p 268 note 10.

10. Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318.

11. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.
Mont.—State ex rel. Helena Allied Printing Council v. Mitchell, 74 P. 2d 417, 105 Mont. 326.
32 C.J. p 268 note 14.

12. U.S.—Fellows v. Walker, C.C. Ohio, 39 F. 651, appeal dismissed 11 S.Ct. 1020, 140 U.S. 680, 35 L.Ed. 603.
32 C.J. p 268 note 15.

Bondholder
Where agreement between city and water conservation board provided that city was to obtain water supply from board, owner of bond issued by city to finance former water supply project was not entitled to enjoin city and board from entering into such contract where the net income which would be realized by city from water sales would be increased if agreement with water conservation board were carried out.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

Depreciation of property value
Injunction to restrain town from erecting incinerator and entering into contract for its construction was properly denied, where property owners merely stated that their property would depreciate and become unsuitable for residence purposes if incinerator was erected, and did not show that they had reasonable prospect of success in suit or that their damage would be irreparable if wrong complained of was permitted to continue.—Hudson v. Town of Oyster Bay, 288 N.Y.S. 627, 248 App. Div. 737.

13. N.J.—Jackson v. Newark, 31 A. 233, 53 N.J.Eq. 322.
Va.—Manly Mfg. Co. v. Broaddus, 27 S.E. 438, 94 Va. 547.

14. Ohio.—State v. Bader, 13 Ohio Cir.Ct. 15, 7 Ohio Cir.Dec. 1—Harpster v. Brower, 5 Ohio Cir.Ct. 395, 3 Ohio Cir.Dec. 194.

15. Iowa.—Gunnar v. Town of Montezuma, 293 N.W. 1, 228 Iowa 581.
32 C.J. p 268 note 1.

16. Ill.—Littler v. Jayne, 16 N.E. 374, 124 Ill. 123.
32 C.J. p 268 note 2.

17. Neb.—Cook v. Beatrice, 48 N.W. 828, 32 Neb. 80.
32 C.J. p 268 note 3.

18. Wis.—Phillips v. Albany, 28 Wis. 340.

19. Ga.—Heilbron v. Cuthbert, 28 S. E. 206, 96 Ga. 312.
Mich.—Carlisle v. Saginaw, 47 N.W. 444, 84 Mich. 134.

Expediency
As respects right to enjoin registration of city electric light bonds by state auditor, whether it was expedient to vote the indebtedness, or whether amount was entirely adequate, was matter for voters of city and its duly authorized representatives to decide.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

20. Idaho.—Morgan v. Kootenai County, 39 P. 1118, 4 Idaho 418.

21. Cal.—Streator v. Linscott, 95 P. 42, 153 Cal. 285.
32 C.J. p 268 note 7.

22. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A. Wash., 29 F.2d 254.

junction ordinarily is a proper remedy to restrain the fraudulent or unlawful appropriation of public moneys[23] or the improper disposition thereof.[24] Before an injunction will issue, however, the illegality of the proposed expenditure must appear clearly,[25] and an injunction will be denied where there is an adequate and complete remedy provided by law,[26] as where there is a sufficient remedy by appeal or certiorari[27] or where there is a suf-

Ark.—Johnson v. Page, 88 S.W.2d 839, 191 Ark. 1011.
La.—Cook & Boyett v. Police Jury of Bienville Parish, 5 La.App. 692.
Okl.—Wentz v. Dawson, 299 P. 493, 149 Okl. 94—Wentz v. Board of Com'rs of Lincoln County, 295 P. 599, 147 Okl. 173—Wentz v. Ingenthron, 294 P. 154, 146 Okl. 165.
Tenn.—Bilbrey v. Smith, 158 S.W.2d 735, 25 Tenn.App. 446—Ray v. Oliphant, 1 Tenn.App. 219.
Tex.—Robbins v. Limestone County, Civ.App., 272 S.W. 526, conforming answers to certified questions 268 S.W. 915, 114 Tex. 345.
32 C.J. p 269 note 21.

Any expenditure

Although school funds were wrongfully diverted, injunction restraining state treasurer from expending any moneys, except for specified purposes, until funds had been replaced, was improper.—Hall v. Blan, 148 So. 601, 227 Ala. 64.

De facto officers

Independent school district trustees could not, pending litigation to determine district's validity, enjoin common school district trustees as de facto officers from spending funds for new building.—Baker v. Hill, Tex. Civ.App., 35 S.W.2d 779, error dismissed.

23. U.S.—Tyler County, Tex., v. Town, C.C.A.Tex., 23 F.2d 371, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530.
Ala.—Hall v. Blan, 148 So. 601, 227 Ala. 64—Turnipseed v. Blan, 148 So. 116, 226 Ala. 549.
Ark.—County Board of Education v. Austin, 276 S.W. 2, 169 Ark. 436.
Fla.—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114—Duval County v. Jennings, 164 So. 356, 121 Fla. 584.
Ill.—Board of Education of Villa Grove Tp. High School Dist. No. 231, Champaign and Douglas Counties, Ill., v. Barracks, 235 Ill.App. 35.
Ind.—Haywood Pub. Co. v. West, 39 N.E.2d 785, 110 Ind.App. 568.
Iowa.—Harding v. Board of Sup'rs of Osceola County, 287 N.W. 625, 213 Iowa 560—Schmidt v. Blair, 213 N. W. 598, 203 Iowa 1016.
Ky.—Estill County v. Noland, 167 S. W.2d 707, 292 Ky. 698.
La.—Williams v. Road Dist. No. 11 of Parish of Winn, 134 So. 94, 172 La. 287.
Mich.—Carrier v. State Administrative Board, 196 N.W. 182, 225 Mich. 563.
Miss.—Knox v. Jefferson Davis County, 137 So. 783, 162 Miss. 9.
Mont.—School Dist. No. 28 of Lake and Missoula Counties v. Larson, 260 P. 1042, 80 Mont. 363.
Ohio.—State v. Semple, 148 N.E. 342, 112 Ohio St. 559—Lehman v. City of Toledo, 192 N.E. 537, 48 Ohio App. 121.
Okl.—City of Alva v. Mason, 300 P. 784, 150 Okl. 25.
Pa.—Collins v. Martin, 153 A. 130, 302 Pa. 144.
See Philadelphia & Reading Coal & Iron Co. v. Coal Tp. School Dist., 13 Northumb.L.J. 398.
S.C.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 187 S.C. 89.
Wash.—City of Hillyard v. Collier, 233 P. 955, 133 Wash. 249.
32 C.J. p 269 note 22.

Enjoining:

Calling of illegal election to avoid waste of public funds see supra § 115.
Illegal expenditure of highway funds see Highways § 176 i.

An unconstitutional statute is not law, and the appropriation of public funds thereunder is unlawful appropriation, which will be restrained.—McAlpine v. Dimick, 157 N.E. 235, 326 Ill. 240.

Funds for special use

(1) A writ of injunction will properly issue to restrain the diversion of public funds intrusted to public officers for special use.—Newman v. Biggs, Tex.Civ.App., 68 S.W.2d 632—Fletcher v. Ely, Tex.Civ.App., 53 S. W.2d 817, error refused—City of Dallas v. Mosely, Tex.Civ.App., 286 S. W. 497, affirmed Mosely v. City of Dallas, Com.App., 17 S.W.2d 36.

(2) Injunction, however, will not lie to require spending proceeds of bond issue on particular state highway project, where question submitted to voters did not require expenditure on particular project.—Moore v. Polsgrove, 293 S.W. 965, 219 Ky. 410.

Payment of salaries

(1) Illegal payment of salaries may be enjoined.
Colo.—Stong v. Milliken, 233 P. 154, 76 Colo. 515.
Ga.—Sammons v. Glascock County, 131 S.E. 881, 161 Ga. 893.

(2) Injunction will not issue, however, to prevent the payment of salaries to public officers where the object of the suit is to determine disputed questions as to the title to public offices.—Davis v. Wilson, 35 S. W.2d 1020, 183 Ark. 271.

(3) Constitutional authorization of suit by citizen to protect inhabitants of municipality against illegal exactions does not give chancery court jurisdiction to restrain issuance of salary vouchers and warrants to alleged de facto officer.—Davis v. Wilson, supra.

Preamble in proposed act reciting purposes of the act and containing argumentative statements of reason for its adoption was improper under laws providing for publication of such at the expense of the proponent, and the publication of such preamble at the expense of the state was enjoined.—State v. Thurston County Super. Ct., 159 P. 92, 92 Wash. 16.

The motive of the citizen and taxpayer, as long as it is not illegal or contrary to public policy, is immaterial if the proposed expenditure is illegal.—Spahr v. Brown, 19 Ohio App. 107.

24. Ala.—Hall v. Blan, 148 So. 601, 227 Ala. 64.
Fla.—Dade County v. Kerce, 188 So. 642, 137 Fla. 194.
32 C.J. p 269 note 23.

The foundation of the relief by injunction against municipal corporations for the prevention of an illegal or unauthorized diversion of public funds rests in the doctrine of trusts. —Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

25. Ind.—Haywood Pub. Co. v. West, 39 N.E.2d 785, 110 Ind.App. 568.

26. Ark.—Davis v. Wilson, 35 S.W. 2d 1020, 183 Ark. 271.
Ga.—Gavant v. Berger, 180 S.E. 613, 180 Ga. 753.
32 C.J. p 269 note 24.

Multiplicity of suits

Injunction will issue where a resort to law would require a multiplicity of suits.
Ark.—Martin v. State, 286 S.W. 873, 171 Ark. 576.
Fla.—Pinellas County v. City of St. Petersburg, 156 So. 523, 116 Fla. 582.

Where suit is pending to test legality of proposed expenditure of public funds, equity should leave citizen to intervene therein or appear as amicus curiæ.—McKee v. Hogan, 110 So. 775, 145 Miss. 747.

27. N.J.—City of Millville v. Board of Education of City of Millville in Cumberland County, 134 A. 748, 100

ficient remedy by quo warranto.[28] An injunction will not be granted where the payment or disposition is actually not illegal,[29] or is only technically illegal and should be made because value has been received for it;[30] or where the payment, although illegal, is made in settlement of a claim for which the municipality would be ultimately liable;[31] or where the propriety of the payment is merely doubtful;[32] or where, although the statute has been only partially complied with, no fact is shown which places the taxpayers in a different or worse position from that which they would have occupied if the orders for the payment of money on their face had been made in strict compliance with every detail of the statute.[33]

Who may sue. Before an injunction will issue to restrain payment or other disposition of public funds, complainant must show that he has such an interest in the public funds in question that he has the proper status to maintain the suit.[34]

Where a municipality is attempting to exceed the powers conferred on it by the state and is about to expend public money, the suit to restrain such expenditure may be brought in the name of the state or its attorney general.[35] So the municipality whose officers are about to make the illegal expenditure may sue for an injunction.[36] A city, as such, however, has no interest in money collected by its officers pursuant to state and county tax levies, and it cannot restrain its officers from paying over such funds to the state and county.[37]

As a general rule resident taxpayers are proper parties to sue for an injunction to prevent an illegal disposition of public funds, and it is not generally required that complainants show injury to themselves other than that which they must suffer in common with the public at large;[38] but some decisions hold that complainant must show a special injury to himself different from that suffered by the general public;[39] and in a few cases it has been required that the taxpayer should bring the suit, not for his own benefit alone, but also on behalf of all the other taxpayers, where he had no interest in the question to be determined other than that which arises from a liability to pay taxes.[40]

Where a creditor has an adequate remedy at law,[41] or where he can compel by mandamus the application of public funds to the payment of the debt,[42] an injunction is not the proper remedy to prevent the misapplication of such funds; and it has been held that an injunction can be awarded a creditor only as an adjunct to the remedy for the enforcement of the debt,[43] and that where plaintiff fails to establish his right to mandamus prayed for to compel payment of his debt, the remedy by injunction must fall with it;[44] that a creditor is not entitled to an injunction to prevent moneys from being paid out where they properly belong merely because other moneys which should have been paid to him have been wrongfully divert-

N.J.Eq. 162, affirmed 137 A. 916, 101 N.J.Eq. 302.
Okl.—Ingram v. Board of County Com'rs, 289 P. 273, 144 Okl. 41.
32 C.J. p 269 note 25.

28. N.Y.—Greene v. Knox, 67 N.E. 910, 175 N.Y. 432.
32 C.J. p 269 note 26.

29. U.S.—Morrisey v. Shenango Furnace Co., C.C.A.Minn., 280 F. 798.
32 C.J. p 269 note 27.

Mere irregularity, amounting to nothing more than a technical error, which will cause no injury, will not be enjoined.—Parker v. Police Jury of Rapides Parish, 109 So. 353, 161 La. 675.

30. Minn.—Farmer v. St. Paul, 6 N. W. 990, 65 Minn. 176, 33 L.R.A. 199.
32 C.J. p 270 note 28.

31. Wis.—Ebert v. Langlade County, 83 N.W. 942, 107 Wis. 569.
32 C.J. p 270 note 29.

32. N.Y.—Tappen v. Crissey, 64 How.Pr. 496.
32 C.J. p 270 note 30.

33. Ill.—Gray v. Peoria School Inspectors, 135 Ill.App. 494, affirmed 83 N.E. 95, 231 Ill. 63.
32 C.J. p 270 note 31.

34. U.S.—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792.
Ill.—Loomis v. McCahey, 17 N.E.2d 1015, 297 Ill.App. 479.

County and road district held authorized to bring suit restraining county tax collector from turning over proceeds of motor vehicle tax to state highway department.—Robbins v. Limestone County, 268 S.W. 915, 114 Tex. 345, answers to certified questions conformed to, Civ.App., 272 S.W. 526.

35. Mich.—Attorney-General v. Detroit, 26 Mich. 263.
32 C.J. p 270 note 33.

36. Kan.—Missouri River, Ft. S. & G. R. Co. v. Miami County Comrs., 12 Kan. 230.
N.Y.—Cherry Creek v. Becker, 2 N. Y.S. 514, affirmed 25 N.E. 369, 123 N.Y. 161.

37. Wis.—City of Appleton v. Bachman, 220 N.W. 393, 197 Wis. 4.

38. Iowa.—Harding v. Board of Sup'rs of Osceola County, 237 N. W. 625, 213 Iowa 560.
Ohio.—Spahr v. Brown, 19 Ohio App. 107.
Pa.—Miller v. Bashore, 45 Dauph.Co. 310, affirmed Holgate Bros. Co. v. Bashore, 200 A. 672, 331 Pa. 255, 117 A.L.R. 639—Miller v. Bashore, 45 Dauph.Co. 67, affirmed Holgate Bros. Co. v. Bashore, 200 A. 672, 331 Pa. 255, 117 A.L.R. 639.
32 C.J. p 270 note 35.

Citizens and residents, as distinguished from taxpayers, have no right to invoke the jurisdiction of a court of equity.—Loomis v. McCahey, 17 N.E.2d 1015, 297 Ill.App. 479.

39. Mich.—Miller v. Grandy, 13 Mich. 540.
32 C.J. p 270 note 37.

40. Colo.—Packard v. Jefferson County, 2 Colo. 338.
32 C.J. p 270 note 38.

41. Kan.—Courtney v. Cherryvale, 51 P. 930, 7 Kan.App. 391.

42. U.S.—Hausmeister v. Porter, C. C.Cal., 21 F. 355.
32 C.J. p 66 note 4.

43. La.—Droz v. East Baton Rouge Parish, 36 La.Ann. 307.

44. La.—Droz v. East Baton Rouge Parish, supra.

ed elsewhere;[45] and that a creditor cannot avoid an alienation of property of the corporation on which he has no specific or general lien and which is not shown to be essential to the security of the corporate creditors.[46] A holder of bonds, for the payment of which taxes are levied and collected, is entitled to an injunction against the unlawful diversion of such funds to other purposes when such misapplication results in impairment of contracts or other justiciable injury,[47] and this is true whether or not the bonds are in default.[48] A creditor has been held to be entitled to a temporary injunction against the expenditure for other purposes of proceeds of bonds issued for the designated purpose from which his claim arises, where necessary to render his suit effectual.[49] Bondholders have been held not to be entitled to have the proceeds of the bonds impounded by injunction on the mere apprehension that, in a suit by taxpayers, the statute under which the bonds were issued may be declared invalid, at least where such apprehension does not appear to be well founded.[50]

To compel payment. An injunction should not issue against a public officer to compel him to make payment, or authorize payment, from public funds unless a clear right to such relief is shown.[51] A mandatory injunction to compel payment from public funds will not be issued where there is a complete and adequate remedy at law.[52] Where, however, the granting of a mandatory injunction is necessary to afford complainant a complete remedy,[53] or where the duty to make payment is so clear that the making of the payment is a mere ministerial act,[54] injunction may issue to compel payment. A mandatory injunction to rectify the unconstitutional application of money from taxes will not be granted when there is no lawful authority for applying it for any purpose whatever.[55]

F. PUBLIC WELFARE, PROPERTY, AND RIGHTS

§ 123. In General

Injunction is a proper remedy to protect the rights and welfare of the public as such.

An injunction frequently is a proper remedy for the protection of the rights or welfare of the public as such where some ground for equitable jurisdiction exists.[56] In general, however, an injunction should not be granted when there is an

45. U.S.—Self v. Jenkins, C.C., 21 F. Cas.No.12,640, 1 Hughes 23, 71 N.C. 578.
32 C.J. p 270 note 43.

46. N.Y.—Roosevelt v. Draper, 23 N. Y. 318.

47. S.C.—Kirk v. Watson, 4 S.E.2d 16, 191 S.C. 162—Kirk v. Clark, 4 S.E.2d 13, 16, 191 S.C. 205, citing **Corpus Juris.**
32 C.J. p 270 note 45.

48. S.C.—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

49. Tex.—Davisson v. Eastland County, Com.App., 287 S.W. 901, reversing Eastland County v. Davisson, Civ.App., 277 S.W. 779.

50. U.S.—Farmers' State Bank of New Washington, Ohio v. Board of Com'rs of Jensen Bridge Dist., D.C.Fla., 295 F. 755.

51. D.C.—Brunswick v. Elliott, 103 F.2d 746, 70 App.D.C. 45—Richmond, F. & P. R. Co. v. McCarl, 62 F.2d 203, 61 App.D.C. 290, certiorari denied 53 S.Ct. 506, 288 U.S. 615, 77 L.Ed. 988.

Void order

Although the clerk of the county and fiscal courts has no discretion to pass on the validity of claims, injunction will not issue to compel him to pay a void order of the fiscal court allowing a claim.—Noble v. Combs, 117 S.W.2d 579, 273 Ky. 578.

52. U.S.—S. J. Groves & Sons Co. v. Warren, 135 F.2d 264, 77 U.S. App.D.C. 347, certiorari denied 63 S.Ct. 1327, 319 U.S. 766, 87 L.Ed. 1716.
Ill.—Lyle v. City of Chicago, 191 N. E. 255, 357 Ill. 41, 93 A.L.R. 1492.

53. Ky.—Breathitt County v. Cockrell, 63 S.W.2d 920, 250 Ky. 743, 92 A.L.R. 626.

54. U.S.—Peltason, Tenenbaum & Harris v. Refunding Board of Arkansas, D.C.Ark., 16 F.Supp. 179.
D.C.—S. J. Groves & Sons Co. v. Warren, 135 F.2d 264, 77 U.S.App. D.C. 347, certiorari denied 63 S. Ct. 1327, 319 U.S. 766, 87 L.Ed. 1716.
Fla.—Davis v. Keen, 192 So. 200, 140 Fla. 764.
Ky.—City of Owensboro v. Nolan, 46 S.W.2d 490, 242 Ky. 342.
Minn.—C. B. Enkema & Co. v. School Dist. No. 6 of Itasca County, 216 N.W. 789, 173 Minn. 94.

Soldier's retirement pay

(1) Enlisted man in Phillippine scouts was an "enlisted man in army" within retirement statute, and statutes were so clear that construction was unnecessary and payment of retirement pay constituted mere ministerial act, justifying mandatory injunction notwithstanding comptroller general's decision that payment was unauthorized.—Miguel v. McCarl, 54 S.Ct. 465, 291 U.S. 442, 78 L.Ed. 901, modifying McCarl v. Miguel, 66 F.2d 564, 62 App.D.C. 259, certiorari granted Miquel v. McCarl, 54 S.Ct. 102, 290 U.S. 618, 78 L.Ed. 540.

(2) Under such circumstances, a contention that petitioner has a remedy at law in the court of claims for his retired pay is not maintainable.—Miguel v. McCarl, supra.

(3) Mandatory injunction, however, would not lie to compel comptroller general to return voucher after advising disbursing officer that he was unauthorized to pay voucher for Philippine scout's retirement pay, nor to enjoin comptroller general's interference with payment thereof. —Miguel v. McCarl, supra.

55. U.S.—Davenport v. Cloverport, Ky., 72 F. 689.

56. Ind.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485.
N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.
N.M.—State ex rel. Marion v. Compere, 103 P.2d 273, 44 N.M. 414.
32 C.J. p 271 note 47.

Other statement

Equity courts go much farther to give relief by injunction in furtherance of the public interest than they are accustomed to go where only private interests are involved.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A.,

adequate remedy elsewhere,[57] although a showing of want of an adequate remedy at law is not necessarily required where a statute authorizes the remedy by injunction.[58]

Under general principles of equity, injunction has been regarded as a proper remedy to enforce, or to prevent the violation of, statutes regulating dealings or transactions involving certain commodities,[59] statutes requiring a license for the carrying on of certain operations,[60] or usury statutes.[61] In

84 F.2d 641, affirming, D.C., System Federation No. 40 v. Virginian Ry. Co., 11 F.Supp. 621—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.

Balancing of convenience

In determining the right to an injunction where the act complained of violates a clear legal right of the state and its inhabitants, there will not be a balancing of convenience.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.

Right of federal government

(1) The federal government may, in a proper case, have the assistance of its courts by injunctive relief to promote the public interest and prevent injury to public welfare.—Reed v. Com'rs of Delaware County, D.C.Pa., 21 F.2d 144, affirmed, C.C.A., 21 F.2d 1018, certiorari granted 48 S.Ct. 324, 276 U.S. 613, 72 L.Ed. 731, and affirmed 48 S.Ct. 531, 277 U.S. 376, 72 L.Ed. 924—Walling v. Builders' Vencer & Woodwork Co., D.C.Wis., 45 F.Supp. 808.

(2) Where former attorney for federal securities and exchange commission was retained, without commission's consent, by bank involved with other defendants in proceedings previously commenced by commission, and subsequent to his retention submitted to an officer of the bank memorandum relating to those proceedings, government was entitled to enjoin use by defendants in the pending litigation of confidential information obtained by attorney while employed by commission.—U. S. v. Mahaney, D.C.Cal., 27 F.Supp. 463.

(3) In such case the facts were sufficient to show that the bank was a party to litigation with the commission so as to authorize an injunction against the bank.—U. S. v. Mahaney, supra.

(4) In such case, in determining right of government to an injunction, the attorney's consent to a permanent injunction against him was disregarded.—U. S. v. Mahaney, supra.

(5) Where delivery of tires by seller to buyer had not been made at time of promulgation by the price administrator of tire rationing regulations and freezing of stocks notwithstanding contract for sale had been entered into prior thereto, the price administrator was entitled to a permanent injunction against a violation of the regulations by the buyer notwithstanding up until the time of hearing the government had not determined whether it would requisition the frozen tires or release them to private use.—Henderson v. Smith-Douglass Co., D.C.Va., 44 F. Supp. 681.

Conduct connected with business affected with public interest

(1) Equity may intervene to restrain course of conduct in respect of a business affected with a public interest, which tends to affect public interest injuriously.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

(2) A contract in restraint of trade, entered into by fire insurance companies, the necessary effect and actual result of which is to control such business within a certain area, and to fix and regulate prices, and limit or eliminate competition to the injury of the public, is contrary to public policy and ultra vires, and may be restrained at the suit of the attorney-general.—McCarter v. Firemen's Ins. Co., 73 A. 80, 414, 74 N.J. Eq. 372, 135 Am.S.R. 708, 29 L.R.A.,N. S., 1194, 18 Ann.Cas. 1048, rehearing 61 A. 705, 70 N.J.Eq. 291.

(3) But, while general public has interest in regulation and control of insurance business, business of insurance agent is primarily a private enterprise, for damage to which, by enforcement of state inspection bureau's rules and regulations as to forms of policies and riders under a statute, such agent is not entitled to redress by injunction, under guise of asserting public right.—Hobbins v. Hannan, 202 N.W. 800, 186 Wis. 284.

Interference with school program

Injunction in suit by school district to prevent teachers who had wrongfully abandoned their classes from entering school building and interfering with conduct of school program and class recitations was proper remedy.—Cuba Consol. School Dist. No. 1 v. Fox, Mo.App., 79 S. W.2d 772.

Suit by organized township to enforce state law not authorized

Organized township cannot maintain action to enjoin holding or conducting public dances in violation of state law.—Denmark Tp., Ward County, v. Ukkelberg, 235 N.W. 353, 60 N.D. 508.

Injunction against criminal act see infra §§ 150–155.

57. Miss.—Redmond v. State ex rel. Attorney General, 118 So. 360, 152 Miss. 54.

Pa.—Appeal of Concord Tp., 1 Walk. 195.

32 C.J. p 271 note 48.

58. U.S.—American Fruit Growers v. U. S., C.C.A.Cal., 105 F.2d 722—Securities and Exchange Commission v. Jones, D.C.N.Y., 15 F.Supp. 321, affirmed, C.C.A., 85 F.2d 17, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

59. Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

Federal Agricultural Adjustment Act of 1933

(1) It was held that the federal government was entitled to a temporary injunction to restrain defendant from dealing in certain commodities after revocation of license issued pursuant to Agricultural Adjustment Act of 1933.—U. S. v. Shissler, D.C.Ill., 7 F.Supp. 123.

(2) The right to an injunction against dealing in certain commodities after revocation of a license issued by the secretary of agriculture, purporting to act under such act of 1933, was denied, however, on the ground that such license was invalid in that the secretary, in issuing the license, acted in excess of his authority by attempting to regulate activities of defendant.—U. S. v. Seven Oaks Dairy Co., D.C.Mass., 10 F.Supp. 995.

60. **Radio broadcasting**

Suit by United States to restrain radio broadcasting without a license, in violation of former Radio Act of 1927, 44 U.S.St. at L. p 1162, c 169, as amended by Act of May 28, 1928, 45 U.S.St. at L. p 373, was within jurisdiction of equity.—U. S. v. American Bond & Mortgage Co., D.C. Ill., 31 F.2d 448, affirmed, C.C.A., American Bond & Mortgage Co. v. U. S., 52 F.2d 318, certiorari denied 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

61. **In Kansas**

(1) A suit by the state on the relation of the attorney general or the county attorney to enjoin a business conducted in flagrant violation of statutes respecting lawful interest rates will lie; the fact that such statutes do not make usury a crime and fix a penalty therefor does not preclude the maintenance of such suit, but, in fact, renders injunction suit the appropriate, if not the only available, remedy for the state.—State ex rel. Beck v. Basham, 70 P.

some jurisdictions, however, in the absence of statutory provision for injunction, injunction is not a proper remedy to prevent a person merely from making loans of his own money at usurious rates;[62] or to prevent the conduct or practice of a business or profession without the required license, if the matter complained of is not declared a nuisance by statute.[63]

By the terms of some statutes, the validity of which has been upheld in various cases,[64] injunction is a proper remedy to enforce, or to prevent the violation of, various statutes involving public rights or welfare or of rules under such statutes,[65] as, for example, statutes or orders thereunder regulating dealings or transactions involving certain commodities,[66] or regulating the carrying on of

2d 24, 146 Kan. 181—State ex rel. Smith v. McMahon, 280 P. 906, 128 Kan. 772, 66 A.L.R. 1072.

(2) A single attempt by a dealer to exact usury in connection with the sale of property would not justify exercise of extraordinary remedy of injunction.—Smith v. Wyandotte Furniture Co., 119 P.2d 478, 154 Kan. 494.

Violation of small loan law

Injunction to restrain the carrying on of business of making small loans without obtaining a license under the statutory small loan law has been granted, notwithstanding the statute imposed penalties for violations.—Commonwealth ex rel. Grauman v. Continental Co., 121 S.W.2d 49, 275 Ky. 238.

62. Tex.—Means v. State, Civ.App., 75 S.W.2d 953.

63. N.D.—Richmond v. Miller, 292 N.W. 633, 70 N.D. 157.

Isolated transaction

A single instance of registering automobiles that were being illegally caravaned into the state in violation of a statute regulating the caravaning of motor vehicles would not justify an injunction prohibiting the person from carrying on travel information bureau business, in course of which such registration occurred.—Strickler v. Schaaf, 91 P.2d 1007, 199 Wash. 372, 123 A.L.R. 226.

64. **Dealing in certain commodities**

Statute authorizing injunction against violation of statute regulating dealing in certain commodities has been held valid.

N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

Va.—Reynolds v. Milk Commission of Virginia, 179 S.E. 507, 163 Va. 957.

Practicing profession without license

The validity of a statute authorizing an injunction to prevent the practice of a profession without the required license has been upheld.

Iowa.—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.

Tenn.—Lamb v. Whitaker, 105 S.W. 2d 105, 171 Tenn. 485.

Authorizing injunction without showing usually required

Congress has power to permit the issuance of injunctions without the showing ordinarily required by equity tribunals.—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997.

65. **The purpose of an injunction,** granted pursuant to statutory authorization, against violations of a statute is not to punish for past violations but to insure future compliance with the statute.—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

Statutory grant

(1) In view of the limitation contained in § 6 of the statutory grant, the act of congress of Dec. 19, 1913, 38 U.S.St. at L. p 242 c 4, by the United States to the city and county of San Francisco, known as the "Hetch-Hetchy" grant, and of the provision of § 9 (u) of such grant for the maintenance of suits or proceedings to enforce and carry out the provisions of the statute, the federal government was entitled to enjoin city from transferring to private corporation right to sell electricity generated and transmitted through utilization of the grant, in order to prohibit continued use of the land in violation of declared policy of congress and to enforce the covenants of the city.—U. S. v. City and County of San Francisco, Cal., 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed. 1050, reversing, C.C.A., City and County of San Francisco v. U. S., 106 F.2d 569, reversing, D.C., U. S. v. City and County of San Francisco, 23 F. Supp. 40, certiorari granted 60 S.Ct. 467, 309 U.S. 642, 84 L.Ed. 996, and rehearing denied 60 S.Ct. 1071, 310 U. S. 657, 84 L.Ed. 1420.

(2) In such case an injunction could be granted regardless of the reasons for violation of the statutory grant.—U. S. v. City and County of San Francisco, D.C.Cal., 23 F.Supp. 40, reversed, C.C.A., City and County of San Francisco v. U. S., 106 F.2d 569, certiorari granted U. S. v. City and County of San Francisco, 60 S. Ct. 467, 309 U.S. 642, 84 L.Ed. 996, reversed 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed. 1050, rehearing denied 60 S.Ct. 1071, 310 U.S. 657, 84 L.Ed. 1420.

Injunction refused

(1) Federal Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix § 901 et seq. does not require issuance of injunction against defendant who may have technically violated a provision of price schedules through error of fact in good-faith effort to comply with the law, regulations, and price schedule, and who had no intention to violate the act.—Henderson v. J. B. Beaird Corporation, D.C.La., 48 F.Supp. 252.

(2) The use of a name by a political group would not be enjoined as a violation of statute prohibiting use of name so as to deceive the public, since such statute is designed chiefly to cover commercial frauds and to reach deception involving property, and is not intended to control names, slogans, or pretensions of candidates for public office.—Brennan v. Mahoney, 300 N.Y.S. 1295, 165 Misc. 276, affirmed 299 N. Y.S. 750, 252 App.Div. 741.

(3) Pen.Code 1911 art 503 did not authorize court to enjoin use of dance hall, unless such use constituted a nuisance, or was unlawful or in violation of either article 496, 502, or 503, and, therefore, injunction merely restraining use of dance hall, where such use did not constitute nuisance and was not in violation of law, was improper.—Murphy v. State, Tex.Civ.App., 266 S.W. 807.

66. Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind.App. 196.

N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

Va.—Reynolds v. Milk Commission of Virginia, 179 S.E. 507, 163 Va. 957.

Federal agricultural marketing act

(1) An injunction against violation of an order under the federal agricultural marketing act of 1937 would be proper notwithstanding the effect of the act and the order would be to give cooperatives a monopoly of the commodity involved.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., U. S. v. Rock Royal Co-op., 26 F.Supp. 534, rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

(2) Temporary injunctions have

certain businesses or trades,[67] or statutes requiring a license for the practice of professions.[68]

An injunction to restrain the violation of a statute has been denied for want of a showing of irreparable injury to property or civil rights which cannot be redressed at law,[69] but, if a statute in terms authorizes an injunction to enforce, or to prevent the violation of, a statute or an order thereunder, usually an injunction may be granted without a showing of irreparable injury,[70] or of want of adequate remedy at law.[71]

Ordinances. While the propriety of an injunction to prevent the violation of certain municipal ordinances is recognized in some jurisdictions,[72] at least where there is no other adequate remedy,[73] it has been stated broadly that injunction is available to enforce municipal ordinance only when a statute creates a remedy by injunction.[74] According to some cases a court cannot restrain the threatened violation of an ordinance if the threatened act would not create a nuisance in fact,[75] and a court will not interfere by injunction if the municipality has the power to provide an adequate remedy at law for violations of the ordinance.[76] Some statutes authorize the remedy by injunction to restrain violations of ordinances.[77] Thus various statutes which confer on municipalities power to enact zoning ordinances or by-laws also authorize an injunction to restrain violations of such ordinances or by-laws,[78] and, under a constitutional provision authorizing municipalities to enforce police, sanitary, and other regulations, a municipality may maintain a suit for an injunction to prevent or restrain the violation of a zoning ordinance.[79] A statute which in terms authorizes a municipal corporation to maintain a suit to enjoin the violation of an ordinance does not authorize

been granted to compel compliance pendente lite.—U. S. v. Hughes, D.C. Wash., 28 F.Supp. 977—U. S. v. Andrews, D.C.Mass., 26 F.Supp. 123.

67. Fla.—Economy Cash & Carry Cleaners v. Florida Dry Cleaning and Laundry Board, 190 So. 31, 138 Fla. 642.

Statute regulating transactions or dealings concerning real estate

Cal.—People v. Gallinger, 99 P.2d 597, 37 Cal.App.2d 261.

68. Iowa.—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.

Tenn.—Lamb v. Whitaker, 105 S.W. 2d 105, 171 Tenn. 485.

69. U.S.—World's Columbian Exposition v. U. S., C.C.A.Ill., 56 F. 654.

70. U.S.—American Fruit Growers v. U. S., C.C.A.Cal., 105 F.2d 722—Securities and Exchange Commission v. Torr, C.C.A.N.Y., 87 F.2d 446, reversing, D.C., 15 F.Supp. 315—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F. Supp. 808—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833—Interstate Commerce Commission v. Consolidated Freightways, D.C.N. C., 41 F.Supp. 651—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

71. U.S.—American Fruit Growers v. U. S., C.C.A.Cal., 105 F.2d 722—Securities and Exchange Commission v. Jones, D.C.N.Y., 15 F. Supp. 321, affirmed, C.C.A., 85 F.2d 17, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

72. Kan.—City of Oberlin v. Keys, 215 P. 283, 113 Kan. 421.

Injunction against criminal act see infra §§ 150–155.

73. Ky.—Galanty v. Maysville, 196 S.W. 169, 176 Ky. 523—Monticello v. Bates, 173 S.W. 159, 163 Ky. 38.

74. N.Y.—Walsh v. Thomas Cusack Co., 196 N.Y.S. 435.

75. Mich.—Village of St. Johns v. McFarlan, 33 Mich. 72.

N.H.—City of Manchester v. Smyth, 10 A. 700, 64 N.H. 380.

Pa.—Cambridge Springs v. Moses, 22 Pa.Co. 637.

76. Mich.—Village of St. Johns v. McFarlan, 33 Mich. 72.

77. N.Y.—Ogden v. Welden, 15 N.Y. S. 790.

78. **Injunction proper remedy to restrain**

(1) Construction of structure in violation of zoning ordinance.—City of Goldsboro v. W. P. Rose Builders' Supply Co., 157 S.E. 58, 200 N.C. 405—Elizabeth City v. Aydlett, 156 S.E. 163, 200 N.C. 58.

(2) Use of building in violation of zoning ordinance.—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

(3) Removal of loam from land in violation of town zoning by-law.—Town of Lexington v. Montomy Trust Co., 23 N.E.2d 559, 304 Mass. 283.

Preliminary injunction

In suit on behalf of city to enjoin landowner from using part of land as a lumber yard in alleged violation of zoning ordinance, granting preliminary injunction against such use was not an abuse of discretion, but landowner should be allowed to sell lumber remaining on premises in regular course of business pending trial, without replacing it with other lumber.—Miller v. Tanenbaum, 200 A. 449, 61 R.I. 92.

Suit by township of first class

Pa.—Township of Haverford v. Bruno, 29 Del.Co. 307, 31 Mun.L.R. 152.

Attacking validity of ordinance

The failure of lot owner to apply to board of adjustment for relief against restrictions placed on his lot by zoning ordinance did not preclude him from contending, in city's suit to enjoin construction of building on lot in violation of ordinance, that ordinance was unreasonable and discriminatory against him.—City of West University Place v. Ellis, Civ. App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Injunction refused

(1) Where owner of structure which was partially destroyed by fire had the right to rebuild notwithstanding the existence of a zoning ordinance, and he was informed by village authorities that permit required by zoning ordinance for restoration of structure would be refused, his restoration thereof without permit did not justify injunction requiring removal of structure.—Incorporated Village of North Hornell v. Rauber, 40 N.Y.S.2d 938, 181 Misc. 546.

(2) Injunction has been denied where the zoning ordinance was not duly adopted in conformity with the provisions of the governing statute. —Village of Mill Neck v. Nolan, 182 N.E. 196, 259 N.Y. 596, affirming 251 N.Y.S. 533, 233 App.Div. 248.

79. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 Cal.App. 277.

Ordinance not prescribing penalty

Cal.—City of Stockton v. Frisbie & Latta, supra.

a suit by a private property owner to maintain such a suit.[80]

Illegal practice of law. Injunction has been regarded as a proper remedy to prevent the illegal practice of law,[81] on the ground that such practice affects the interest of the public or the administration of justice,[82] or, according to some cases, on the ground that the right to practice is in the nature of a property right which duly authorized practitioners may protect by injunction to prevent practice by a person not authorized,[83] and an in-

80. N.Y.—Ogden v. Welden, 15 N.Y.S. 790.

81. D.C.—American Automobile Ass'n v. Merrick, 117 F.2d 23, 73 App.D.C. 151, modifying, D.C., Merrick v. American Automobile Ass'n, 31 F.Supp. 876.
Ill.—Chicago Bar Ass'n v. United Taxpayers of America, 38 N.E.2d 349, 312 Ill.App. 243.
Kan.—Wheat v. Hilkey, 79 P.2d 865, 148 Kan. 60—Depew v. Wichita Retail Credit Ass'n, 42 P.2d 214, 141 Kan. 481.
Mich.—Grand Rapids Bar Ass'n v. Denkema, 287 N.W. 377, 290 Mich. 56.
Minn.—Cowern v. Nelson, 290 N.W. 795, 207 Minn. 642.
N.Y.—In re Dawkins, 27 N.Y.S.2d 797, 262 App.Div. 56, leave to appeal denied 29 N.Y.S.2d 511, 262 App.Div. 844, affirmed 43 N.E.2d 530, 289 N.Y. 553.
Pa.—Shortz v. Farrell, 193 A. 20, 327 Pa. 81—Walker v. Kahn, 31 Pa.Dist. & Co. 620, 86 Pittsb.Leg.J. 173—Northampton County Bar Ass'n v. Young, 1 Monroe L.R. 94, 26 North.Co. 363—Shortz v. Mooney, 32 Luz.Leg.Reg. 345—Kountz v. Rowlands, 90 Pittsb.Leg.J. 193.
Tex.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, Civ.App., 131 S.W.2d 686.
Wash.—Paul v. Stanley, 12 P.2d 401, 168 Wash. 371.

Other statement

A district court had power to enjoin the illegal practice of law or to take such other steps within its constitutional power as might be necessary to suppress such practice.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, Tex. Civ.App., 131 S.W.2d 686.

Practice by corporation

(1) In a proper case a corporation may be enjoined from practicing law.
D.C.—American Automobile Ass'n v. Merrick, 117 F.2d 23, 73 App.D.C. 151, modifying, D.C., Merrick v. American Automobile Ass'n, 31 F. Supp. 876—Merrick v. American Security & Trust Co., 107 F.2d 271, 71 App.D.C. 72, affirming, D.C., 22 F.Supp. 177, certiorari denied 60 S.Ct. 380, 308 U.S. 625, 84 L.Ed. 521.
Kan.—Depew v. Wichita Retail Credit Ass'n, 42 P.2d 214, 141 Kan. 481.
N.J.—Unger v. Landlords' Management Corporation, 168 A. 229, 114 N.J.Eq. 68.
Ohio.—Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 129 Ohio St. 23—Dworken v. Cleveland Auto Club, 29 Ohio N.P.,N.S., 607—Goodman v. Motorists' Alliance of America, Inc., 29 Ohio N.P.,N.S., 31—Goodman v. Western Bank & Trust Co., 28 Ohio N.P.,N.S., 272.
Okl.—State Bar of Oklahoma v. Retail Credit Ass'n, 37 P.2d 954, 170 Okl. 246.
Tex.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, Civ.App., 131 S.W.2d 686.

(2) Attorneys at law, as officers of court, suing for themselves and other practicing attorneys in vicinity, were proper parties plaintiff in action to enjoin corporation from unlawful practice of law in city of plaintiffs' residence.—Depew v. Wichita Retail Credit Ass'n, 42 P.2d 214, 141 Kan. 481.

(3) Suit by an attorney to enjoin illegal practice of law by a corporation may be maintained notwithstanding the grant of relief will result indirectly in preventing the exercise of certain rights ostensibly granted to the corporation by its charter.—Dworken v. Apartment House Owners' Ass'n of Cleveland, 176 N.E. 577, 38 Ohio App. 265.

(4) Attorney may sue to enjoin illegal practice of law by corporation, although relief could be accomplished directly by quo warranto proceeding instituted by attorney general.—Dworken v. Apartment House Owners' Ass'n of Cleveland, supra.

(5) The view has been taken that a quo warranto proceeding would not afford such adequate remedy as is a prerequisite to the denial of equitable jurisdiction.—Goodman v. Western Bank & Trust Co., supra.

(6) That acts performed by an abstract company and a title guaranty company which constituted, prima facie at least, the practice of law, were performed pursuant to a regulation concerning fees to be charged by such companies which was adopted by state board of insurance commissioners, which supervised business conducted by companies, did not constitute a defense.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, supra.

(7) Practice of law by corporation generally is discussed in Corporations § 956.

Services for pay or reward

In some cases, with respect to certain acts, relief by injunction has been limited to services for which compensation would be received or a charge would be made.
Minn.—Cowern v. Nelson, 290 N.W. 795, 207 Minn. 642.
Wash.—Paul v. Stanley, 12 P.2d 401, 168 Wash. 371.

Discontinuance of acts of which complaint made

(1) Where a proceeding was instituted to have a person adjudged guilty of contempt for assuming to practice law without legal right, or, in the alternative, to have such person restrained or enjoined from continuing the acts complained of, and such person discontinued such acts when an order to show cause was served on him, an injunction was denied.—In re Clark, 11 N.Y.S.2d 432, 256 App.Div. 674.

(2) Testimony of defendants, who were not attorneys engaged in business of preparing simple income tax returns for wage earners and salaried employees, that after interlocutory hearing they decided not to perform their contracts to furnish legal services after the income tax returns were filed did not require denial of injunction against their practicing law by furnishing such legal services, where their decision was never made known to patrons and evidence did not show a genuine and permanent change of policy in this respect.—Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 315 Mass. 176.

Particular acts not enjoined

Pa.—Shorty v. Farrell, 193 A. 20, 327 Pa. 81.
What constitutes practice of law generally see Attorney and Client § 3 g.

82. Pa.—In re Graham, 30 Pa.Dist. & Co. 531, 1 Monroe L.R. 89.
Tex.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, Civ.App., 131 S.W.2d 686.
In Oklahoma suit to enjoin unauthorized practice of law and acts which are illegal and tend to bring into disrepute the practice of law and the administration of justice may be maintained by state bar, as a legal association.—State Bar of Oklahoma v. Retail Credit Ass'n, 37 P.2d 954, 170 Okl. 246.

83. Minn.—Fitchette v. Taylor, 254 N.W. 910, 191 Minn. 582, 94 A.L.R. 356.
N.J.—Unger v. Landlords' Manage-

junction is authorized by some statutes.[84] It has been held, however, that an injunction will not be granted in a suit by an individual attorney solely on the theory that the illegal practice by another constitutes the violation of a property right or an encroachment on a franchise,[85] and that an injunction will not be granted in a suit by an individual attorney for his own benefit in the absence of a showing of a private right to the relief[86] or of a showing of special injury.[87]

The fact that the illegal practice of law is a criminal offense does not prevent the grant of an injunction,[88] a criminal prosecution not being regarded as an adequate remedy.[89]

Transactions involving securities. By virtue of some state statutes the attorney general of the state may institute a suit for, and obtain, an injunction against practices or transactions which are violative of the statute commonly known as the Blue

ment Corporation, 168 A. 229, 114 N.J.Eq. 68.

Wash.—Paul v. Stanley, 12 P.2d 401, 168 Wash. 371.

Franchise or privilege

(1) Injunction is a proper remedy to protect the special privilege in the nature of a franchise, included in the right of an attorney to practice law, from invasion by illegal practice by another.—Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 129 Ohio St. 23—Dworken v. Cleveland Auto Club, 29 Ohio N.P.,N.S., 607.

(2) Injunction is a proper remedy to prevent illegal practice of law when sought by attorneys acting for themselves and other members of the legal profession affected by such practice, in view of the character of the right to practice law as a special privilege or franchise, and, therefore, a property right or a right in the nature of a property right.

Minn.—Fitchette v. Taylor, 254 N.W. 910, 191 Minn. 582, 94 A.L.R. 356.

N.J.—Unger v. Landlords' Management Corporation, 168 A. 229, 114 N.J.Eq. 68.

Ohio.—Dworken v. Apartment House Owners' Ass'n of Cleveland, 176 N.E. 577, 38 Ohio App. 265—Goodman v. Motorists' Alliance of America, Inc., 29 Ohio N.P.,N.S., 31—Goodman v. Western Bank & Trust Co., 28 Ohio N.P.,N.S., 272.

Wash.—Paul v. Stanley, 12 P.2d 401, 168 Wash. 371.

In Iowa the district court had jurisdiction of subject matter of suit by members of the bar to enjoin unlicensed practitioner from engaging in the practice of law; whether plaintiffs had a valuable right, privilege, or franchise which was being unlawfully encroached on by defendant, to the irreparable injury or damage and injury of plaintiffs and others similarly situated, and whether plaintiffs were entitled to injunctive relief, were questions to be determined by the trial court after hearing the evidence.—Johnson v. Purcell, 282 N.W. 741, 225 Iowa 1265.

Nature of right to practice law in general see Attorney and Client § 4 b.

84. Tenn.—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450.

Statute applicable to professions generally

(1) Under a statute authorizing an injunction against the practice of a profession without the required license, an injunction against the practice of law without a license may be granted.—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450.

(2) The validity of such statute as applied to the practice of law without a license has been upheld.—Lamb v. Whitaker, 105 S.W.2d 105, 171 Tenn. 485.

(3) Injunction against a corporation has been granted under such statute.—State v. Retail Credit Men's Ass'n of Chattanooga, supra.

(4) Suit for injunction may be prosecuted by attorneys individually and as representatives of bar association in view of Code 1932 § 9976.—Lineberger v. State ex rel. Beeler, 129 S.W.2d 198, 174 Tenn. 538—Lamb v. Whitaker, 105 S.W.2d 105, 171 Tenn. 485.

In Massachusetts, under Gen.L. c 221 § 46B, inserted by St.1935, c 346 § 2, injunction to restrain the unauthorized practice of law may be granted on the petition of the attorney general; the authority of the state court to restrain such practice may include practice in federal courts in so far as there is no conflict with federal statute, rule, or established practice.—In re Lyon, 16 N.E.2d 74, 301 Mass. 80.

85. N.Y.—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 148 Misc. 529, affirmed Wollitzer v. Title Guarantee & Trust Co., 270 N.Y.S. 968, 241 App.Div. 757, leave to appeal denied 270 N.Y.S. 987, 241 App.Div. 817.

86. Mass.—Steinberg v. McKay, 3 N.E.2d 23, 295 Mass. 139.

Want of showing of unlawful competition

In a case in which an injunction was denied on the ground that there was no showing of a private right to relief, it was pointed out that plaintiff failed to allege or prove that he earned his living by practicing law and that defendant was unlawfully in competition with him.—Steinberg v. McKay, supra.

87. N.Y.—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 148 Misc. 529, affirmed Wollitzer v. Title Guarantee & Trust Co., 270 N.Y.S. 968, 241 App.Div. 757, leave to appeal denied 270 N.Y.S. 987, 241 App.Div. 817.

Suit by members of committee of bar association

Members of a committee of a bar association, suing for themselves and for the association, to enjoin advertising by defendant in violation of a statute, were not entitled to an injunction without a showing of special damage to their property rights as licensed practicing attorneys, and the showing was insufficient where it appeared that defendant had never practiced law and had never intended to practice.—Burch v. Mellor, 43 Pa.Dist. & Co. 597.

88. N.J.—Unger v. Landlords' Management Corporation, 168 A. 229, 114 N.J.Eq. 68.

Ohio.—Dworken v. Apartment House Owners' Ass'n of Cleveland, 176 N.E. 577, 38 Ohio App. 265—Goodman v. Western Bank & Trust Co., 28 Ohio N.P.,N.S., 272.

Okl.—State Bar of Oklahoma v. Retail Credit Ass'n, 37 P.2d 954, 170 Okl. 246.

Wash.—Paul v. Stanley, 12 P.2d 401, 168 Wash. 371.

Practice by judicial officer

An injunction was a proper remedy to prevent further violation by probate judge of statute making it unlawful for probate judges or justices of the peace to perform legal services in cases pending before them or be interested in profits arising out of any practice in their own courts, notwithstanding statute was a criminal statute prescribing fines.—Wheat v. Hilkey, 79 P.2d 865, 148 Kan. 60.

Injunction against criminal act in general see infra §§ 150–155.

89. Ohio.—Dworken v. Apartment House Owners' Ass'n of Cleveland, 176 N.E. 577, 38 Ohio App. 265—Goodman v. Western Bank & Trust Co., 28 Ohio N.P.,N.S., 272.

Sky Law,[90] and the court may also enjoin the guilty person from dealing in any securities within the state.[91]

The federal Securities Act of 1933 § 20 (b), 15 U.S.C.A. § 77 t (b), authorizes the Securities and Exchange Commission to maintain a suit for an injunction where a person is engaged in or about to engage in acts or practices which constitute or will constitute a violation of the provisions of such act or of any rule or regulation prescribed under the authority of such act,[92] and the federal Securities Exchange Act of 1934 § 21 (e), 15 U.S.C.A.

90. N.J.—Stevens v. Rayon Industries Corporation, 169 A. 717, 115 N.J.Eq. 92—Stevens v. Washington Loan Co., 152 A. 20, 107 N.J.Eq. 94, affirmed 156 A. 420, 109 N.J. Eq. 128.

N.Y.—People v. Photocolor Corporation, 281 N.Y.S. 130, 156 Misc. 47.

Showing required

The attorney general is entitled to an injunction on a showing that it appears to him that defendant has or is engaged, or is about to engage, in the sale of securities condemned by the statute, or that he believes it to be in the public interest that an investigation shall be made and that defendant refuses to make a report.—Attorney General v. Tomadelli Electronic Corporation, 140 A. 26, 102 N.J.Eq. 186, affirmed Katzenbach v. Tomadelli Electronic Corporation, 144 A. 920, 104 N.J.Eq. 217.

Transactions which may be enjoined

(1) Fraudulent issuance of certificate of membership in corporation selling sick and death benefit insurance.—Stevens v. Atlantic & Security Mut. Ass'ns, 174 A. 744, 116 N.J.Eq. 584.

(2) Selling, offering for sale, or recommending shares of a corporation by means of misrepresentations as to subsidiaries and as to past earnings.—Stevens v. Rayon Industries Corporation, 169 A. 717, 115 N. J.Eq. 92.

(3) Original sale of shares of corporate stock, where misrepresentation and concealment were shown.—Stevens v. Associated Mortg. Co. of New Jersey, 152 A. 461, 107 N.J.Eq. 297, affirmed 158 A. 343, 110 N.J.Eq. 70—Stevens v. Adelphia Finance Service, 152 A. 460, 107 N.J.Eq. 222.

(4) Sale of securities if it results in cheating buyers, regardless of seller's ignorance of falsity of his representations.—People v. Federated Radio Corporation, 214 N.Y.S. 670, 216 App.Div. 250, affirmed 154 N.E. 655, 244 N.Y. 33.

Blue Sky Law generally see C.J.S. title Licenses §§ 72–78, also 37 C.J. p 270 note 39–p 279 note 74.

91. N.Y.—People v. Photocolor Corporation, 281 N.Y.S. 130, 156 Misc. 47.

Who may be enjoined

(1) All participating in selling securities, illegal under Securities Act, may be enjoined from dealing in any securities in state.—Stevens v. Washington Loan Co., 152 A. 20, 107 N.J.Eq. 94, affirmed 156 A. 420, 109 N.J.Eq. 128.

(2) Officers and directors of corporation fraudulently selling securities, keeping false books of account, and issuing false prospectuses, who failed actively to participate in affairs of corporation and to prevent such fraudulent practices, were concerned in and with fraudulent practices within statute providing for injunction permanently restraining persons concerned in or with fraudulent practices from further dealings in securities, and such officers and directors could so be restrained.—People v. Photocolor Corporation, 281 N.Y.S. 130, 156 Misc. 47.

(3) In such case a corporate director may not sit idly by where he knows or should know that securities of the corporation are being fraudulently offered for sale to the public, and avoid liability to restraint by injunction by reason of supineness or dereliction, of duty.—People v. Photocolor Corporation, supra.

(4) In such case, however, an injunction should not be granted against salesmen who merely made sales in reliance on information furnished them by their superiors.—People v. Photocolor Corporation, supra.

92. U.S.—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602—Securities and Exchange Commission v. Otis & Co., D.C.Ohio, 18 F.Supp. 100, affirmed, C.C.A., Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579—Securities and Exchange Commission v. Crude Oil Corporation of America, D.C.Wis., 17 F.Supp. 164, affirmed, C.C.A., 93 F.2d 844—Securities and Exchange Commission v. Jones, D.C.N.Y., 15 F.Supp. 321, affirmed, C.C.A., 85 F. 2d 17, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

Construction of statute

The above-mentioned statutory provision should so be construed as to achieve the purpose of its enactment, which is to protect the investing public, if the language used is susceptible of such a construction.—Otis & Co. v. Securities and Exchange Commission, C.C.A.Ohio, 106 F.2d 579, affirming, D.C., Securities and Exchange Commission v. Otis & Co., 18 F.Supp. 100.

Security Act § 17, 15 U.S.C.A. § 77 q, as to fraudulent transactions

(1) Use of interstate facilities or mails in making fraudulent sales of securities in violation of Securities Act § 17 (a), 15 U.S.C.A. § 77 q (a), may be enjoined.—Otis & Co. v. Securities and Exchange Commission, supra—Securities and Exchange Commission v. Pyne, D.C.Mass., 39 F.Supp. 434—Securities and Exchange Commission v. Timetrust, Inc., D.C.Cal., 39 F.Supp. 145, remanded, C.C.A., 130 F.2d 214, and modified on other grounds 142 F.2d 744—Securities and Exchange Commission v. Pyne, D.C.Mass., 33 F. Supp. 988—Securities & Exchange Commission v. Timetrust, Inc., D.C. Cal., 28 F.Supp. 34—Securities and Exchange Commission v. Lawson, D. C.Md., 24 F.Supp. 360—Securities and Exchange Commission v. Torr, D.C. N.Y., 22 F.Supp. 602—Security and Exchange Commission v. Jones, D.C. N.Y., 15 F.Supp. 321, affirmed, C.C. A., 85 F.2d 17, certiorari denied Jones v. Security and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428—Securities and Exchange Commission v. Torr, D.C.N.Y., 15 F. Supp. 315, reversed on other grounds, C.C.A., 87 F.2d 446.

(2) The character of matters sent by mail is immaterial, as respects right of Securities and Exchange Commission to have defendant enjoined from engaging in fraudulent practices in sale of securities by use of mails in violation of such subsection.—Securities and Exchange Commission v. Timetrust, Inc., D.C. Cal., 28 F.Supp. 34.

(3) In suit to enjoin alleged violations of such subsection, defendants could not disclaim responsibility for untrue statements allegedly made to prospective purchasers of trust certificates on ground that entire transaction was contained in written certificate and agreement of trust.—Securities and Exchange Commission v. Timetrust, Inc., D.C. Cal., 39 F.Supp. 145, remanded, C.C. A., 130 F.2d 214, and modified on other grounds 142 F.2d 744.

(4) Injunction based on alleged violation of such subsection was denied as to certain defendants where there was no showing as to such de-

§ 78 u (e), confers like authority on such commission with respect to acts or practices which constitute or will constitute a violation of such act or of any rule or regulation under such act.[93] Failure to show threatened irreparable injury[94] or want of an adequate remedy at law[95] does not defeat the right to an injunction, in view of the fact that the statute expressly authorizes suit; nor does the fact that the suit was preceded by an illegal investigation by the Securities and Exchange Commission require the dismissal of the suit.[96] It has been held that such statutory provisions do not require that the condition of engaging, or of being about to engage, in illegal acts or practices should continue until the commencement of the suit in order to permit the grant of an injunction,[97] but it has also been held that an injunction should not be granted where the illegal acts or practices were discontinued before suit was brought and the circumstances do not support any reasonable inference that such acts or practices would be resumed.[98] An injunction may properly be granted under such statutory provisions where defendant was engaged in illegal acts or practices when suit was commenced,[99]

fendants' method of approach to customers.—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F. Supp. 602.

Securities Act § 5 (a), 15 U.S.C.A. § 77 e (a).

(1) Use of interstate facilities or mail in making sale of unregistered securities, in violation of Securities Act § 5 (a), 15 U.S.C.A. § 77 e (a), may be enjoined.—Securities and Exchange Commission v. Chinese Consol. Benev. Ass'n, C.C.A.N.Y., 120 F. 2d 738, reversing, D.C., 39 F.Supp. 85, and certiorari denied Chinese Consol. Benev. Ass'n v. Securities and Exchange Commission, 62 S.Ct. 106, 314 U.S. 618, 86 L.Ed. 497—Securities and Exchange Commission v. Pyne, D.C.Mass., 39 F.Supp. 434—Securities and Exchange Commission v. Pyne, D.C.Mass., 33 F.Supp. 988—Securities and Exchange Commission v. Associated Gas & Electric Co., D.C., 24 F.Supp. 899, affirmed, C.C.A., 99 F.2d 795—Securities and Exchange Commission v. Crude Oil Corporation of America, D.C.Wis., 17 F. Supp. 164, affirmed, C.C.A., 93 F.2d 844.

(2) Defendant may not dispute the apparent effect of language used in a letter of defendant on the question whether a particular act violated such subsection and, therefore, could be enjoined.—Securities and Exchange Commission v. Associated Gas & Electric Co., supra.

(3) Bill of complaint in suit by securities and exchange commission for injunction against corporation and its agents securing unregistered contracts for delivery of oil by it, in violation of such subsection, should be dismissed as against a defendant merely arranging for employment of codefendant as corporation's agent in procuring such contracts.—Securities and Exchange Commission v. Crude Oil Corporation of America, supra.

93. U.S.—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602—Securities and Exchange Commission v. Otis & Co., D.C.Ohio, 18 F.Supp. 100, affirmed, C.C.A., Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579.

Acts or practices which may be enjoined

(1) Solicitation by mail, in violation of Securities Exchange Act § 14, 15 U.S.C.A. § 78 n, of proxies for securities registered on a national securities exchange.—Securities and Exchange Commission v. O'Hara Re-Election (or Proxy) Committee, D.C.Mass., 28 F.Supp. 523.

(2) Act of broker transacting business in securities through the medium of a member of a national securities exchange, in contracting excessive indebtedness in violation of Securities Exchange Act § 8 b, 15 U.S.C.A. § 78 h (b).—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360.

(3) Use of facilities of interstate commerce, mails, and the facilities of a national securities exchange to broaden market in security registered on such an exchange, in violation of Securities Exchange Act § 9 (a) (2), 15 U.S.C.A. § 78 i (a) (2).—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602—Securities and Exchange Commission v. Torr, D.C.N.Y., 15 F.Supp. 315, reversed on other grounds, C.C.A., 87 F.2d 446.

94. U.S.—Securities and Exchange Commission v. Torr, C.C.A.N.Y., 87 F.2d 446, reversing, D.C., 15 F. Supp. 315.

95. U.S.—Securities and Exchange Commission v. Jones, D.C.N.Y., 15 F.Supp. 321, affirmed, C.C.A., 85 F.2d 17, certiorari denied Jones v. Securities & Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

96. U.S.—Securities and Exchange Commission v. Jones, supra.

97. U.S.—Otis & Co. v. Securities and Exchange Commission, C.C.A. Ohio, 106 F.2d 579, affirming, D.C., Securities and Exchange Commission v. Otis & Co., 18 F.Supp. 100.

Acts or practices prior to commencement of suit

(1) The view apparently was taken that an injunction might be granted if defendant was violating the statute when the Securities and Exchange Commission commenced its investigation on which the suit for injunction was based.—Otis & Co. v. Securities and Exchange Commission, supra.

(2) In the foregoing case, while an injunction was granted on the ground that certain acts or practices were violative of the securities act of 1933, the lower court refused an injunction sought on the ground that there was a violation of Securities and Exchange Act of 1934 § 9 (a) (2), 15 U.S.C.A. § 78 i (a) (2), against securities dealer on account of underwriting plan which contemplated sale of stock off the exchange at prices to be stabilized by exchange transactions, where all stock underwritten had been disposed of before bill was filed, commission had not prescribed regulations prohibiting transactions to stabilize prices, and commission had been informed of contemplated stabilization transactions.—Securities and Exchange Commission v. Otis & Co., D.C.Ohio, 18 F.Supp. 100, affirmed, C.C.A., Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579.

98. U.S.—Securities and Exchange Commission v. Torr, C.C.A.N.Y., 87 F.2d 446, reversing, D.C., 15 F. Supp. 315.

99. U.S.—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602.

Discontinuance after suit brought

(1) The fact that, after suit was commenced, defendant discontinued the illegal practices complained of does not necessarily prevent the grant of an injunction.—Securities and Exchange Commission v. Lawson, D.C.Md., 24 F.Supp. 360.

(2) The Securities and Exchange Commission was entitled to an injunction restraining a broker from certain practices which were violations both of the securities act and

or on the theory that defendant was about to engage in illegal acts or practices at the time suit was commenced, where, from the fact that he had previously engaged in such acts or practices, the inference can legitimately be drawn that, at the time suit was commenced, there was a probability of his continuing or resuming a like course of conduct.[1] Injunctions to prevent violations of the federal Public Utility Holding Act of 1935 are discussed in the C.J.S. title Public Utilities § 71.

By whom proceedings instituted. As a general rule if a mere public right is to be vindicated or the mere evasion of law is to be prevented, suit for injunction should be brought by some public officer or body especially charged with a duty in this regard and not by a private individual who is not especially authorized by statute to bring suit under the particular circumstances.[2] It has been stated broadly however that a court does not have jurisdiction to grant an injunction at the suit of public authorities except by virtue of express statutory authority or to abate a public nuisance.[3]

A suit to restrain a public wrong, when the individual complaining suffers only such injury as is common to the other members of the community, or when the suit is on behalf of the state, should be brought by the attorney general or some other public officer duly authorized,[4] or, under the laws of some states, by an individual with the consent of the attorney general,[5] or by the attorney general and a taxpayer,[6] or by the attorney general and public service commissioners;[7] but an attorney general cannot go beyond his statutory powers in this respect.[8] If the attorney general refuses to bring suit, it may be brought in the name of the state at the relation of a taxpayer and citizen thereof;[9] but relief will not be granted in such a suit if it is not in fact brought for the protection of public rights, but is brought in aid of a private enterprise.[10]

A proceeding on behalf of the United States for injunction may be brought by the attorney general by virtue of his office.[11]

of the securities exchange act, notwithstanding broker had wound up his business after filing of bill and had made restitution in part to his customers and provision for further payments to them, since the test in determining the propriety of an injunction was not whether the illegal practices had been discontinued and restitution had been made within the present ability of defendant, but was whether in the public interest plaintiff commission was entitled to an injunction on the proof; the court stated that, if plaintiff commission was otherwise entitled to an injunction, a reason for granting it was that an injunction might be the basis of further administrative action by the commission.—Securities and Exchange Commission v. Lawson, supra.

1. U.S.—Otis & Co. v. Securities and Exchange Commission, C.C.A.Ohio, 106 F.2d 579, affirming Security and Exchange Commission v. Otis & Co., D.C., 18 F.Supp. 100.

2. Wis.—McClutchey v. Milwaukee County, 300 N.W. 224, 239 Wis. 139, 137 A.L.R. 628, rehearing denied 300 N.W. 917, 239 Wis. 139, 137 A.L.R. 630.

3. Tex.—Foshee Refining Co. v. State, Civ.App., 73 S.W.2d 1098.

4. Ga.—Hart v. Atlanta Terminal Co., 58 S.E. 452, 128 Ga. 754.
Ill.—People ex rel. Terp v. Washingtonian Home of Chicago, 198 N.E. 721, 361 Ill. 522.
Ind.—Lake Sand Co. v. State, 120 N. E. 714, 68 Ind.App. 439.
Mass.—Mullholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.
Pa.—Cohn v. Nixon-Nirdlinger, 9 Pa. Dist. & Co. 543, 41 York Leg.Rec. 112, 75 Pittsb.Leg.J. 816.
S.C.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.
Tex.—Interstate Forwarding Co. v. Vineyard, Civ.App., 3 S.W.2d 947, reversed on other grounds Interstate Forwarding Co. v. Vinyard, 49 S.W.2d 403, 121 Tex. 289—State v. St. Louis Southwestern Ry. Co. of Texas, 197 S.W. 1006, reversed on other grounds St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570.
32 C.J. p 295 note 17—6 C.J. p 813 note 83 [e], [f].

Attorney general as coplaintiff

Under statutes authorizing pleading by making proper parties specifying the nature of suits and proceedings which the attorney general may conduct on his own information or on complaint of a private person, he may maintain, or be a coplaintiff in, an action by a certified public accountant to enjoin the state board of accountancy from examining applicants for certificates beyond the state.—McCullough v. Scott, 109 S.E. 789, 182 N.C. 865.

City could not enjoin corporation from operation of "bank night" as abuse of corporate franchise by operation of lottery, since such right was confided solely to attorney general.—City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 129 Tex. 40, reversing, Civ.App., 78 S.W. 2d 1065.

5. Pa.—Commonwealth v. Phoenixville & Bridgeport Electric R. Co., 27 Pa.Co. 123—Valley Forge Park Commission v. Phoenixville, 27 Pa. Co. 109.

6. N.D.—State v. Hall, 159 N.W. 281, 35 N.D. 34.

7. U.S.—St. Louis & S. F. R. Co. v. Hadley, C.C.Mo., 161 F. 419.

8. Ga.—Walker v. Georgia Ry. & Power Co., 92 S.E. 57, 146 Ga. 655.

9. N.D.—State v. Hall, 141 N.W. 124, 25 N.D. 85.

10. Ill.—People v. General Electric R. Co., 50 N.E. 158, 172 Ill. 129.

Corpus Juris cited in connection with holding as to right of theater operator suing as taxpayer to enjoin renting of school auditorium for theatrical entertainments.—Simmons v. Board of Education of Crosby, 237 N.W. 700, 703, 61 N.D. 212.

11. U.S.—Sanitary Dist. of Chicago v. U. S., Ill., 45 S.Ct. 176, 266 U. S. 405, 69 L.Ed. 352—U. S. v. American Bond & Mortgage Co., D.C.Ill., 31 F.2d 448, affirmed, C.C.A., American Bond & Mortgage Co. v. U. S., 52 F.2d 318, certiorari denied 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

The section of the Fair Labor Standards Act providing that litigation under the act shall be subject to direction and control of the attorney general does not require that he be a party to, or participate in, an action for an injunction against future violations of the act.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F. 2d 445.

§ 124. Public Safety, Health, and Convenience

Acts which endanger the public health or safety may be enjoined.

Acts which are a menace to the public health[12] or safety,[13] or, as sometimes stated in greater detail, acts which are dangerous to human life, detrimental to public health, and the occasion of great public inconvenience and damage,[14] may be enjoined. The power to issue an injunction in these circumstances belongs to the general powers possessed by courts of equity,[15] and is also conferred by some statutes[16] applicable to various situations or matters,[17] and a municipality is authorized to sue for an injunction to prevent or restrain the violation of municipal police and sanitary regulations by a constitutional provision authorizing municipalities to enforce such regulations.[18] In some cases, however, an injunction has been refused where there is another adequate remedy.[19]

According to some cases, the erection of a structure in a municipality which will not be unduly dangerous to life and property and which will not constitute a nuisance will not be enjoined.[20] In some

12. N.M.—State ex rel. Marron v. Compere, 103 P.2d 273, 44 N.M. 414.
N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704.
32 C.J. p 271 note 49.

Food supply
Injunctive process may be invoked when health or very existence of people is menaced by deprivation of essential food or by service of such food in contaminated state.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

Disease among domestic animals
Injunction may issue to compel observation of and enforce provisions of act providing for control and eradication of diseases among domestic animals.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270.

13. N.M.—State ex rel. Marron v. Compere, 103 P.2d 273, 44 N.M. 414.
N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704.
32 C.J. p 271 note 50.

Use of unsafe building may be prevented.—Cincinnati v. Moorman, 11 Ohio Dec., Reprint, 162, 25 Cinc.L. Bul. 126.

Injunction not authorized
Fact that erection of proposed grain loading elevator would tend to obstruct view of railroad track at street crossing in village did not entitle village to enjoin erection of elevator.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.
Injunction against criminal act see infra §§ 150–155.

14. N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704.

Water supply
(1) Injunction may be a proper remedy to prevent the shutting off of a water supply required for public or municipal purposes.—Bienville Water Supply Co. v. Mobile, 20 So. 742, 112 Ala. 260, 57 Am.S.R. 28, 33 L.R.A. 59.

(2) Thus a school board is entitled to an injunction to prevent a municipality or a municipal officer from shutting off the supply of water to the public schools because of failure to pay water rates.
N.J.—Board of Education of Borough of Glassboro v. Borough of Glassboro, 149 A. 820, 106 N.J.Eq. 38.
N.Y.—Board of Education of City of Lockport v. Richmond, 137 N.Y.S. 62.

(3) A municipality may enjoin a water company from shutting off a supply of water required for fire protection or for other municipal purposes.—Bienville Water Supply Co. v. Mobile, supra.

(4) In such case a preliminary injunction may be granted pending settlement of disputed questions as to rates.—Washington v. Washington Water Co., 62 A. 390, 70 N.J.Eq. 254.

(5) A municipality may restrain a company which has agreed to supply a distributing company with water from ceasing such supply.—City of Bayoune v. New Jersey Water Co., N.J.Ch., 108 A. 121.

(6) The commissioners of a water district may restrain a water company from discontinuing to supply water under a contract, notwithstanding the contract was one which the commissioners were not authorized to make, where defendant water company was a party to the formation of the water district, had given tacit approval to its formation, and had operated under, and received benefits from, the contract.—Salmon v. Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 120 Misc. 131.

Injunction against criminal act see infra §§ 150–155.

15. N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704—New York Health Dept. v. Purdon, 1 N.E. 687, 99 N.Y. 237, 52 Am.R. 22.

16. N.Y.—New York Health Dept. v. Purdon, supra.

17. Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind.App. 196.
Tex.—Nichols v. Park, Civ.App., 119 S.W.2d 1066.

18. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 Cal.App. 277.

19. Ohio.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.
32 C.J. p 271 note 53.

20. Pa.—Thomas v. Jacobs, 98 A. 863, 254 Pa. 255.

Ordinance fixing fire limits
(1) Injunction to restrain erection of building in municipality in violation of ordinance fixing fire limits has been denied where the building would not constitute a nuisance in fact.
Mich.—Village of St. Johns v. McFarlan, 33 Mich. 72.
N.H.—City of Manchester v. Smyth, 10 A. 700, 64 N.H. 380.
Pa.—Ellwood City v. Mani, 16 Pa. Co. 474.

(2) Such an injunction, sought by a municipal corporation, was denied, where there was no showing that the building would constitute a nuisance or that its construction would work irreparable injury to plaintiff, and the ordinance made provision for penalties which did not appear to be inadequate.—Williamsport v. McFadden, 15 Wkly.N.C., Pa., 269.

(3) Where, after an ordinance established a fire limit, an inspector of buildings issued a building permit, but prior to the publication of the ordinance revoked such permit on

jurisdictions, however, an injunction will lie to prevent the violation of an ordinance fixing fire limits,[21] at least where there is no other adequate remedy.[22]

Illegal practice of medicine and other professions. In some jurisdictions injunction has been regarded as a proper remedy to prevent the illegal practice of medicine or surgery,[23] dentistry,[24] pharmacy,[25] or optometry.[26] Some statutes, the validity of which has been upheld in various cases,[27] in terms authorize the grant of an injunction in this type of cases.[28]

the ground that the building covered thereby was within such fire limit, an injunction to prevent the holder of the permit from completing the building was denied, it having been substantially erected before the ordinance became operative by publication.—Reynolds v. Harris, 11 Ohio Dec., Reprint, 509, 27 Cinc.L.Bul. 229.
Injunction against criminal act see Infra §§ 150–155.

21. Kan.—City of Oberlin v. Keys, 215 P. 283, 113 Kan. 421.

22. Ky.—Galanty v. Maysville, 196 S.W. 169, 176 Ky. 523—Monticello v. Bates, 173 S.W. 159, 163 Ky. 38.
43 C.J. p 370 notes 90, 91.

23. Tenn.—State v. Anderson, 6 Tenn.Civ.A. 1.

Injunction refused
A physician, who was licensed in another state and who confined his practice to an area in Arkansas, which was owned by the federal government, furnishing services to employees of a construction company pursuant to a contract between the United States and such company, could not properly be enjoined on the ground that he was not licensed to practice under the laws of Arkansas.—Lynch v. Hammock, 165 S.W. 2d 369, 204 Ark. 911.

24. Ind.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485.
Ky.—Jones v. Commonwealth, 300 S. W. 346, 213 Ky. 648—Kentucky State Board of Dental Examiners v. Payne, 281 S.W. 188, 213 Ky. 382.

Practicing without obtaining license
(1) Injunction has been recognized as a proper remedy to prevent the practice of dentistry without a license.—Jones v. Commonwealth, 300 S.W. 346, 213 Ky. 648—Kentucky State Board of Dental Examiners v. Payne, 281 S.W. 188, 213 Ky. 382.

(2) Where provisions of original act, requiring license as prerequisite to practicing dentistry, in effect when judgment enjoining practice of dentistry without license was rendered, were repealed and simultaneously reënacted, the judgment was efficacious to prevent defendant from practicing dentistry.—Jones v. Kentucky State Board of Dental Examiners, 163 S.W.2d 297, 291 Ky. 186.

Failure to renew license
Commonwealth's suit on relation of attorney general and others, to enjoin dentist from practicing because of noncompliance with statute requiring annual renewal certificates was proper remedy, on principle that, where law is inadequate and general public welfare is involved, equity will grant relief.—Commonwealth ex rel. Attorney General v. Pollitt, 80 S. W.2d 543, 258 Ky. 489.

Practicing without payment of valid occupation tax
Practice of profession by dentist within corporate limits of city in open violation of valid ordinance imposing occupation tax would be enjoinable in suit by city on showing that dentist's continued refusal to comply with ordinance encouraged others to violate ordinance thereby depriving city of necessary income, and constituting nuisance.—City of Independence v. Hindenach, 61 P.2d 124, 144 Kan. 414, 107 A.L.R. 645.

Enjoining attempted amendment of charter of dental college
Where proposed charter amendment sought to confer on dental college and students thereof privilege of practicing dentistry without required examination and license, injunction would lie, since proposed amendment would authorize practice of dentistry in violation of statute.—Boykin v. Atlanta-Southern Dental College, 169 S.E. 361, 177 Ga. 1.

25. Ky.—Commonwealth ex rel. Attorney General v. Brown, 39 S.W. 2d 223, 239 Ky. 197.

26. Ariz.—Funk Jewelry Co. v. State ex rel. La Prade, 50 P.2d 945, 46 Ariz. 348.

Jurisdiction
Chancery court had jurisdiction of subject matter of suit to enjoin operation of department of optometry in department store in violation of statute.—Gainsburg v. Dodge, 101 S. W.2d 178, 193 Ark. 473.

Unfair trade and practice
Registered optometrist could maintain suit to enjoin unfair trade and practice which would be injurious to their interest, notwithstanding such practices were punishable by criminal penalties.—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692.

Violation of statute not criminal offense
In view of the fact that a violation of the statute regulating the practice of optometry is not made a criminal offense, the state, acting through the attorney general, may sue to enjoin such violation.—Funk Jewelry Co. v. State ex rel. La Prade, 50 P.2d 945, 46 Ariz. 348.

Practice by corporation enjoined
(1) In general.—Funk Jewelry Co. v. State ex rel. La Prade, supra.

(2) Corporation of another state. —Neill v. Gimbel Brothers, 199 A. 178, 330 Pa. 213.

Acts or practices not ground for injunction
(1) An injunction against a corporation to prevent it from practicing optometry was improper where its acts were not illegal.—Kindy Opticians v. Michigan State Board of Examiners in Optometry, 289 N.W. 112, 291 Mich. 152.

(2) Leasing of space by department store to optical company hiring licensed optometrists was not enjoinable as practicing optometry.—Golding v. Shubach Optical Co., 70 P.2d 871, 93 Utah 32.

(3) Corporation not enjoinable as practicing optometry because it employed a registered and licensed optometrist to furnish services to patrons.—Dvorine v. Castelberg Jewelry Corporation, 185 A. 562, 170 Md. 661.

Various acts enjoined
Ohio.—Rowe v. Burt's Inc., App., 31 N.E.2d 725.

27. Iowa.—State v. Howard, 241 N. W. 682, 214 Iowa 60.
Utah.—State Bd. of Medical Examiners v. Blair, 196 P. 221, 57 Utah 516.
32 C.J. p 275 note 11 [e].

Illegal practice also criminal offense
The validity of such a statute, applicable to the illegal practice of medicine, has been upheld notwithstanding such illegal practice is made a criminal offense.
Iowa.—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.
Utah.—Board of Medical Examiners v. Blair, 196 P. 221, 57 Utah 516.

28. **Medicine or surgery**
(1) The practice of medicine or surgery without the required license may be enjoined in a suit by the state under the terms of some statutes.
Ind.—State ex rel. Indiana State Board of Medical Registration and Examination v. Cole, 20 N.E.2d 972, 215 Ind. 562.
Iowa.—State v. Howard, 245 N.W. 871, 216 Iowa 545.

In some jurisdictions, in the absence of special authorization of an injunction, the mere violation of the statute regulating practice,[29] as, for example, merely practicing without the required license,[30] is not of itself ground for an injunction, but, in at least some of the jurisdictions in which this rule obtains, injunction is a proper remedy to prevent acts of an unlicensed and incompetent practitioner, which are injurious to the public health and constitute a public nuisance.[31]

Kan.—State ex rel. Beck v. Cooper, 78 P.2d 884, 147 Kan. 710.
Neb.—State ex rel. Johnson v. Wagner, 297 N.W. 906, 139 Neb. 471.
32 C.J. p 275 note 11 [e].

(2) A person purporting to practice "naprapathy" and, as a guide to treatment, to diagnose the ailments of his patients, without having obtained a license to practice medicine and surgery or any other recognized system of healing, could be enjoined, under the statute, in a suit to enjoin the practice of medicine and surgery without a license. —State v. Howard, supra.

(3) Fact that defendant, stating desire to be examined for license to practice "naprapathy," requested information from health board, which sent copy of examiners' rules, did not estop state and administrative officers from enjoining defendant's practice.—State v. Howard, supra.

(4) Fact that term "cancer" was not specifically mentioned in medical practice act did not preclude court from enjoining defendant from engaging in unlawful practice of medicine by treating cancer without a license.—State ex rel. Beck v. Cooper, supra.

(5) State is entitled to injunction to restrain a person from practicing medicine without license on showing existing practice, without showing that such person will continue, unless restricted.—State v. Howard, supra—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.

(6) It is not necessary to make a showing of threatened injury, procedure under the statute not being governed by general rule of chancery practice.—State v. Fray, supra.

(7) Statute authorizing injunction to prevent one practicing profession without license was not applicable where state board of medical examiners had issued physician's license and had not revoked it, even though act under which it was issued was claimed to be invalid.—State v. Hartley, 54 S.W.2d 960, 165 Tenn. 278.

(8) The reference, in Business Corp.L.1933 § 8 (c), Smith-Hurd St. Annot. c 32 § 157.8 (c), to the remedy by injunction to restrain a corporation from the transaction of unauthorized business did not apply to a case in which the state, by the attorney general, sought to test the right of a corporation to practice medicine, in view of the limitations on the operation of such § 8 contained in such section.—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.

Dentistry

(1) Under the terms of some statutes practicing dentistry without the required license may be enjoined.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485.

(2) The practice of dentistry without a license has been enjoined in a suit by the state brought under Code 1931 § 2519.—State v. Bailey Dental Co., 234 N.W. 260, 211 Iowa 781.

(3) Articles of incorporation adopted after enactment of statute requiring license to practice dentistry, authorizing corporation to manufacture and deal in dental supplies and other merchandise, did not preclude injunction against corporation, pursuant to statute, against practice without license on ground that such injunction would forfeit corporate franchise.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, supra.

(4) Particular acts or practices have been regarded as insufficient ground for an injunction.—State ex rel. Kennedy v. Lepon, 36 N.E.2d 276, 219 Ind. 1.

Pharmacy

In a suit by the state, corporation selling aspirin contrary to statute regulating practice of pharmacy could be restrained by injunction from making such sale, under Code 1927 § 2519.—State v. Jewitt Market Co., 228 N.W. 288, 209 Iowa 567.

Optometry

(1) The state may maintain a suit to enjoin the practice of optometry without a license, under Code 1931 § 2519.—State v. Kindy Optical Co., 248 N.W. 332, 216 Iowa 1157.

(2) Rule applies to practice by a corporation.—State v. Kindy Optical Co., supra.

29. Cal.—People ex rel. Chiropractic League of California v. Steele, 41 P.2d 946, 4 Cal.App.2d 206, denying rehearing 40 P.2d 959, 4 Cal.App.2d 206.
N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704.

Statute regulating practice of medicine
N.Y.—People ex rel. Bennett v. Laman, supra.

30. N.M.—State v. Johnson, 188 P. 1109, 26 N.M. 20.

In Mississippi

(1) An injunction will not be granted to restrain the practice of medicine without a license in view of the existence of the legal remedy of quo warranto.—Redmond v. State ex rel. Attorney General, 118 So. 360, 152 Miss. 54.

(2) In a suit by the state on the relation of the attorney general, an injunction on the alleged ground that practicing medicine without a license constitutes a nuisance was refused.—Redmond v. State ex rel. Attorney General, supra.

Practice of medicine without a license
Ariz.—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, reheard 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.
N.M.—State ex rel. Marron v. Compere, 103 P.2d 273, 44 N.M. 414—State v. Johnson, 188 P. 1109, 26 N. M. 20.
N.Y.—People ex rel. Bennett v. Laman, 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704, and reversed on other grounds 14 N.E.2d 439, 277 N.Y. 368.

Practices of osteopathy without a license
N.M.—State v. Johnson, 188 P. 1109, 26 N.M. 20.

Chiropractors

Refusal to enjoin chiropractors from practicing without a license was proper, the practice of chiropractic not being a menace to the public health, morals, safety or welfare.—People v. Universal Chiropractors' Assoc., 134 N.E. 4, 302 Ill. 228.

31. **Illegal practice of medicine**

(1) The rule stated in the text has been applied to the illegal practice of medicine.
Ariz.—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, reheard 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.
N.M.—State ex rel. Marron v. Compere, 103 P.2d 273, 44 N.M. 414.

(2) Injunction will lie to restrain practice of medicine by unlicensed person, on showing that defendant's acts imperil health of the people of

Usually the purpose of granting an injunction in this type of cases is to protect the public health or welfare,[32] but, according to some cases, injunction is a proper remedy to protect from encroachment by a person who practices illegally the valuable franchise or privilege of a duly authorized practitioner of medicine,[33] dentistry,[34] or optometry.[35] The rule has been announced, however, that whether the holder of a statutory license has such a property right as to permit him to seek relief in equity by injunction is determinable first by the construction of the statute and secondly by equitable principles.[36] In some cases the right of a duly licensed practitioner to an injunction against a person who practices without the required license has been denied in the case of the unlicensed practice of medicine,[37] optometry,[38] or chiropody.[39]

The fact that the illegal practice of medicine or surgery,[40] dentistry,[41] pharmacy,[42] or optome-

the community and will continue to cause irreparable injury to their health unless enjoined.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704.

(3) Attorney general, as legal adviser of state, may institute and prosecute suit.—State ex rel. La Prade v. Smith, supra.

32. Ariz.—Funk Jewelry Co. v. State ex rel. La Prade, 50 P.2d 945, 46 Ariz. 348—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, reheard 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.

Ky.—Commonwealth ex rel. Attorney General v. Pollitt, 80 S.W.2d 543, 258 Ky. 489—Kentucky State Board of Dental Examiners v. Payne, 281 S.W. 188, 213 Ky. 382.

33. W.Va.—Sloan v. Mitchell, 168 S.E. 800, 113 W.Va. 506.

Nature of right conferred by license to practice medicine see the C.J.S. title Physicians and Surgeons § 15, also 48 C.J. p 1095 notes 74–82.

34. Ohio.—Taylor v. The New System Laboratory, Inc., 29 Ohio N.P., N.S., 451.

35. **Property right**

Duly licensed practitioners of optometry may be entitled to an injunction to restrain the illegal practice of optometry by unlicensed persons, for the purpose of protecting the property right involved in the right to practice.—Ezell v. Ritholz, 198 S.E. 419, 188 S.C. 39.

36. N.H.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., 9 A.2d 513, 90 N.H. 368.

Limitations on right to injunction

Generally, a person holding a statutory license is entitled to injunctive relief only if a defendant's unlawful practice threatens irreparable injury to alleged right conferred by license or the unlawful intrusion is a series of acts from which the common-law remedies afford inadequate protection, or if the unlawful practice is regarded as a public nuisance injuring his property right, or if he is in a position to show damage.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., supra.

37. **In Ohio**

(1) It has been held that a person who was duly authorized to practice medicine could not invoke the remedy by injunction to prevent unlawful competition by an unlicensed practitioner, especially where illegal practice was a criminal offense.—Merz v. Murchison, 30 Ohio Cir.Ct. 646.

(2) Compare, however, Ohio cases supra § 123 as to illegal practice of law and supra this section as to illegal practice of dentistry.

38. **In New Hampshire**

(1) Whether duly licensed individual optometrists could enjoin alleged illegal practice of optometry by corporation which employed an optometrist depended on whether it was necessary for a court of equity to act in order to protect rights recognized in equity.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., 9 A.2d 513, 90 N.H. 368.

(2) In view of the facts that the statute regulating the practice of optometry was enacted purely for the public good, that the enforcement of the act was left to the normal action of public officials, and that any decreased competition resulting from the statute was merely incidental, licensed individual optometrists by virtue of license to practice optometry had no right to noncompetition by unlicensed persons or persons unlawfully practicing optometry as would entitle them to injunctive relief against such persons.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., supra.

39. N.J.—Mosig v. Jersey Chiropodists, 194 A. 248, 122 N.J.Eq. 382.

Reason for rule

Unlicensed practice of chiropody by corporation not enjoinable at suit of licensed chiropodists, since statute regulating practice of chiropody was not enacted for benefit of licensed chiropodists.—Mosig v. Jersey Chiropodists, supra.

40. N.M.—State ex rel. Marion v. Compere, 103 P.2d 273, 44 N.M. 414.

N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, and motion denied 298 N.Y.S. 995, 252 App.Div. 704.

Tenn.—State v. Anderson, 6 Tenn. Civ.A. 1.

Incompetent practitioner

Practice of medicine or surgery will be enjoined where acts of unlicensed and incompetent practitioner are injurious to public health and constitute existing or threatened public nuisance, although offender is amenable to criminal laws.—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, reheard 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.

Encroachment on rights of licensed physicians

Fact that practicing medicine without license is public offense does not prevent court from enjoining unlicensed person from encroaching on valuable franchise rights of licensed physicians.—Sloan v. Mitchell, 168 S.E. 800, 113 W.Va. 506.

Injunction against criminal act in general see infra §§ 150–155.

41. Ky.—Kentucky State Board of Dental Examiners v. Payne, 281 S.W. 188, 213 Ky. 382.

Ohio.—Taylor v. The New System Prosthetic Dental Laboratory, Inc., 29 Ohio N.P.,N.S., 451.

In Indiana after citing the statute, Burns St.Annot.1933 § 63-513, which specifically provides for an injunction to prevent the practice of dentistry without a license, it was stated that, even though an injunction were not specifically authorized, the situation presented brought the case within the rule that, where the protection of the public welfare is involved, equity will intervene notwithstanding the wrong complained of is also a crime.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485.

42. Ky.—Commonwealth ex rel. At-

try[43] is made a criminal offense does not, according to some cases, prevent the grant of an injunction, at least where a statute in terms authorizes an injunction;[44] the criminal prosecution does not necessarily constitute an adequate remedy at law so as to preclude resort to equity for an injunction.[45] According to some cases, however, injunction is not a proper remedy where a criminal prosecution constitutes an adequate remedy.[46] The fact that practicing without a license is a criminal offense is not of itself ground for an injunction.[47]

The application of requirements of license and the like to particular acts or practices is discussed in the C.J.S. title Physicians and Surgeons § 10, also 48 C.J. p 1073 note 5–p 1079 note 7.

§ 125. Public Property

Injunction is a proper remedy to protect public property.

An injunction is frequently a proper remedy for the protection of public property.[48] In general a private individual may not bring a suit for an injunction if he does not suffer a special injury.[49] An injunction has been refused in a suit by an individual, where an injunction, if granted, would permit him to determine how a public building should be decorated.[50]

§ 126. —— Disposition

The unlawful transfer of public property may be prevented by injunction.

The unlawful transfer of public property may be enjoined;[51] but an injunction will not be granted where the transfer is made by officers acting within the powers vested in them, and it does not appear that their action in so doing is arbitrary or an abuse of discretion.[52]

A private entity or individual who would sustain a special injury from the illegal transfer or sale of public property may maintain a suit to enjoin such transfer or sale.[53]

torney General v. Brown, 39 S.W. 2d 222, 239 Ky. 197.

43. Property right of licensed practitioner

Licensed practitioners of optometry have the right to protect their property right involved in the right to practice by obtaining an injunction to restrain illegal practice by unlicensed persons, notwithstanding such illegal practice is a ground for criminal prosecution.—Ezell v. Ritholz, 198 S.E. 419, 188 S.C. 39.

44. Illegal practice of medicine or surgery

Ind.—State ex rel. Indiana State Board of Medical Registration and Examination v. Cole, 20 N.E.2d 972, 215 Ind. 562.

Kan.—State ex rel. Beck v. Cooper, 78 P.2d 884, 147 Kan. 710.

32 C.J. p 275 note 11 [e].

Practice of dentistry without a license

Ind.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485.

45. N.M.—State ex rel. Marron v. Compere, 103 P.2d 273, 44 N.M. 414.

S.C.—Ezell v. Ritholz, 198 S.E. 419, 188 S.C. 39.

32 C.J. p 279 note 55 [c].

46. In New Hampshire

The state was not entitled to an injunction against the allegedly illegal practice of optometry by a corporation and by a licensed optometrist who was employed by such corporation, since, if such optometrist was practicing illegally, there was an adequate remedy as to him by prosecution under a penal statute or by revocation of his certificate, and, if prosecution under such statute did not constitute an adequate remedy as to the corporation, the state could resort to quo warranto proceedings to oust the corporation from the exercise of powers ultra vires if it was guilty of illegal practice.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., 9 A.2d 513, 90 N.H. 368.

Chiropractic

The state was not entitled to injunction against unlicensed practice of chiropractic.—State v. Mallby, 188 N.W. 175, 108 Neb. 578.

47. In Georgia it has been held that, if the statute requiring a license to practice medicine applied to the practice of chiropractic, an injunction to restrain the practice of chiropractic without a license would not be granted merely because practicing medicine without a license was made a criminal offense.—Dean v. State, 106 S.E. 792, 151 Ga. 371.

48. U.S.—Coosaw Min. Co. v. South Carolina, S.C., 12 S.Ct. 689, 144 U. S. 550, 36 L.Ed. 537, affirming, C. C., State v. Coosaw Min. Co., 47 F. 225.

N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

32 C.J. p 271 note 47.

Interference with removal of bridge

Injunction was proper remedy to restrain defendant from interfering with road district's officers in removing bridge formerly used on road which had been taken for drainage purposes.—Special Road Dist. No. 4 of Bolinger County v. Stepp, 4 S.W. 2d 480, 222 Mo.App. 1216.

Defenses

In suit to enjoin trespasses on reservoir property of water improvement district, if defendants' lands were riparian to river on which the reservoir was constructed, and defendants had right by reason thereof, or had rights by reason of reservations or otherwise, such matters constituted matters of defense, to be established by defendants.—Roberson v. Red Bluff Water Power Control Dist., Tex.Civ.App., 142 S.W.2d 248.

49. Ill.—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319.

Ohio.—Smith v. Heuston, 6 Ohio 101, 25 Am.D. 741.

Tex.—Hulse v. Powell, 51 S.W. 862, 21 Tex.Civ.App. 471.

50. In Pennsylvania sculptor who had designed sculptural groups for education building of school district of Philadelphia was not entitled to injunction against school district to compel removal of groups, to prevent declarations that work was done under plaintiff's contract, and to permit plaintiff to replace groups, in view of statute, Act of April 8, 1946, P.L. p 272, 17 P.S. § 299, limiting power to grant injunctions with respect to public works, and of the fact that plaintiff had an adequate remedy at law for any damage to his reputation.—Meliodon v. School Dist. of Philadelphia, 195 A. 905, 328 Pa. 457.

51. Fla.—Deering v. Martin, 116 So. 54, 95 Fla. 224, followed in Biscayne Co. v. Martin, 116 So. 66, 95 Fla. 259.

Ill.—McCord v. Pike, 12 N.E. 259, 121 Ill. 288, 2 Am.S.R. 85.

Mo.—Rutherford v. Taylor, 38 Mo. 315.

52. Ga.—Holt v. Smith, 99 S.E. 119, 149 Ga. 48.

53. Fla.—Deering v. Martin, 116 So.

§ 127. —— Use of Buildings and Other Property

Injunction will lie to restrain the unauthorized appropriation or use of public property.

An injunction is a proper remedy to prevent an unauthorized appropriation or use of public property,[54] as for instance an appropriation of public property for private uses,[55] such as the unauthorized erection of a building on public property,[56] or the use of a public building for the conducting of a private business for commercial purposes,[57] especially if the use tends materially to injure the property.[58] On the other hand an injunction will be denied where the use complained of may reasonably be said to come within the contemplated uses for which the building was erected.[59] The public officer or entity concerned is entitled to an injunction to prevent wrongful interference with the proper use of public property.[60]

In general the right to an injunction to prevent the illegal use of public property belongs to the people generally,[61] and a private entity or individual who would not suffer any special injury from such illegal use is not entitled to have such use enjoined.[62]

§ 128. —— Use of Streets and Other Public Places

Injunction is a proper remedy to restrain the illegal use of public places.

Injunction is a proper remedy to prevent the improper or illegal use of public places,[63] such as public ways[64] and the illegal use of public plac-

54. 95 Fla. 224, followed in Biscayne Co. v. Martin, 116 So. 66, 95 Fla. 259.

55. U.S.—Coosaw Min. Co. v. South Carolina, S.C., 12 S.Ct. 689, 144 U.S. 550, 36 L.Ed. 537, affirming, C.C., State v. Coosaw Min. Co., 47 F. 225.
N.H.—Leary v. City of Manchester, 21 A.2d 156, 91 N.H. 442.
Wyo.—School Dist. No. 11, Laramie County v. Donahue, 97 P.2d 663, 665, 55 Wyo. 220, quoting **Corpus Juris.**
32 C.J. p 272 note 60.

Dedicated property
An injunction may issue to prevent a diversion of the use of public property from the use to which it was dedicated.—School Dist. No. 11, Laramie County v. Donahue, supra, quoting **Corpus Juris**—32 C.J. p 271 note 56.
Injunction to restrain misappropriation of public funds see supra § 122.

56. Ala.—Town of Leeds v. Sharp, 118 So. 572, 218 Ala. 403.
N.J.—McCarter v. Dungan, 68 A. 1096, 74 N.J.Eq. 251.
N.Y.—Attorney General v. Cohoes Co., 6 Paige 133, 29 Am.D. 755.

Building
Where building in which village had a special interest by virtue of village taxes levied against the building was about to be removed from village by a company claiming ownership through a void sale of county tax title, injunction was the appropriate remedy to prevent the removal.—Village of Dasey v. Barnes County, 298 N.W. 13, 70 N.D. 752.

58. Pa.—Pittsburg v. Epping-Carpenter Co., 45 A. 129, 194 Pa. 318.
Tex.—Gulf View Courts v. Galveston County, Civ.App., 150 S.W.2d 872, error refused.
32 C.J. p 272 note 62.

57. N.J.—McCarter v. Dungan, 68 A. 1096, 74 N.J.Eq. 251.

58. N.J.—McCarter v. Dungan, Ch., 71 A. 537.

59. N.J.—McCarter v. Dungan, supra.

60. **School property**
(1) Persons dissatisfied with election of school directors, which was being contested, were properly enjoined from obtaining control of school buildings by force and intimidation and from excluding regularly appointed teachers, the injunction suit was not attempt to have court determine right and title to office of school directors collaterally, since injunction proceedings could not settle such question.—School Dist. of Kline Tp. v. McAloose, 176 A. 435, 317 Pa. 266.

(2) A school district, prevented from using its school building for school purposes by wrongful prevention of the removal of such building to place designated by district, with result that some two weeks' school was lost before another temporary structure could be put in such place, had right to sue for injunction restraining interference with removal of building, as irreparable damage to, and interference with use of, public property were established.—School Dist. No. 11, Laramie County, v. Donahue, 97 P.2d 663, 55 Wyo. 220.

61. Ill.—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319.

62. Ill.—Carstens v. City of Wood River, supra—Stevens Hotel Co. v. Chicago Yacht Club, 171 N.E. 560, 339 Ill. 468, certiorari denied 51 S. Ct. 79, 282 U.S. 875, 75 L.Ed. 773.
Ohio.—Smith v. Heuston, 6 Ohio 101, 25 Am.D. 741.

Officer permitting illegal use
A private corporation or individual who sustains or will sustain no special injury is not entitled to an injunction to restrain a public officer from permitting the allegedly illegal use of a public building.—New York League for Separation of Church and State v. Graves, 10 N.Y.S.2d 142, 170 Misc. 196.

63. Tex.—Gulf View Courts v. Galveston County, Civ.App., 150 S.W. 2d 872, error refused.

64. N.J.—McCarter v. Ludlum Steel & Spring Co., 63 A. 761, 71 N.J.Eq. 330.

Operating traction engine on street
(1) On an information by the attorney general to restrain a corporation from operating a traction engine and trailers in the streets of a city, it appearing that one street, occasionally used, had never been so constructed as to render it fit for heavy travel, the corporation may be enjoined from using such street without the consent of the city.—McCarter v. Ludlum Steel & Spring Co., supra.

(2) But a borough was not entitled to have the owner of a traction engine enjoined from using the streets of the borough where it appeared that it had become the usual and ordinary custom to make such use of the streets.—Middleburg Borough v. Kratzer, 23 Pa.Dist. 352, 41 Pa.Co. 370, 5 Mun.L.R. 164, 1 Northumb.Leg.J. 408, 28 York Leg.Rec. 135.

Injunction refused
(1) The owner of land adjoining street platted on map could not enjoin erection of buildings on land comprising street, where street had never been graded or used as such and had not been accepted by town

es such as parks.[65] An injunction may be refused where it would produce great public or private mischief and would merely protect technical rights.[66]

In general a private individual is not entitled to an injunction in this type of cases if he does not sustain any special injury from the act of which complaint is made.[67] In any event a private individual is not entitled to an injunction in the absence of a showing of irreparable injury and want of an adequate remedy at law.[68]

§ 129. Publication of Proceedings of Court

In some English cases, noted in 32 C.J. p 286 notes 56–62, injunction has been resorted to by the courts to prevent the publication of their proceedings pending litigation. No American cases on this question have been developed. The publication of reports of judicial decisions or proceedings as constituting a contempt, and punishable as such, is considered in Contempt § 30 d.

Examine Pocket Parts for later cases.

G. PERSONAL RIGHTS AND DUTIES

1. In General.

§ 130. Rights Protected in General

An injunction frequently is granted for the protection of purely personal rights where there is no other adequate remedy, although relief ordinarily is granted as to such rights only where the protection of a property right is also involved.

While it is a rule frequently stated that it is beyond the scope of the powers of a court of equity to enforce or protect by way of injunction mere personal rights as distinguished from property rights,[69] there are well recognized exceptions to this rule which are considered infra §§ 131–137, and purely personal rights have frequently been protected allegedly on the basis of invasion of property rights.[70] Further the principle is clearly recognized by some courts that injunctive relief is not limited to the protection of property rights but extends to the protection of personal rights in many fields where no adequate remedy at law is available,[71] and it has been stated that fundamental per-

or county, and street had been vacated by replatting, and owner had other access to her land which was farm land, the plat of which had been vacated.—Hunt v. Brewer, 91 P.2d 485, 104 Colo. 375.

(2) Where owner denied under oath that improvements were in street and alleged that he had been in quiet and peaceable possession of the premises in controversy for more than twenty years, denial of temporary mandatory injunction to compel owner to move improvements out of street was proper.—City of Beaumont v. Gibbs, Tex.Civ.App., 130 S.W.2d 372.

Injunction to prevent obstruction of:
Highway see Highways §§ 226, 227.
Streets in municipal corporation see the C.J.S. title Municipal Corporations § 1753, also 44 C.J. p 1016 note 47–p 1022 note 52.

65. Ala.—Town of Leeds v. Sharp, 118 So. 572, 218 Ala. 403.
Prevention or abatement of improper use of park in municipal corporation see the C.J.S. title Municipal Corporations § 1828, also 44 C.J. p 1106 note 78–p 1107 note 88.

66. Mich.—Kipp v. Van Wagoner, 281 N.W. 592, 286 Mich. 202.

67. Ill.—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319.
Ohio.—Smith v. Heuston, 6 Ohio 101, 25 Am.D. 741.

But there have been statements to the effect that a showing of special injury is not necessarily required.—Riverside v. MacLain, 71 N.E. 408, 210 Ill. 308, 102 Am.S.R. 164, 66 L.R.A. 288.

68. Tex.—Pope v. San Antonio, U. & G. Ry. Co., Civ.App., 20 S.W.2d 356.

69. Ala.—Woods v. Thompson, 175 So. 262, 264, 234 Ala. 523, citing Corpus Juris.
Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254.
Mass.—James R. Kirby Post No. 50, American Legion, Department of Massachusetts, v. American Legion, 155 N.E. 462, 258 Mass. 434.
Ohio.—Snedaker v. King, 145 N.E. 15, 111 Ohio St. 225—Tate v. Eidelman, 32 Ohio N.P.,N.S., 478.
Tex.—Bledsoe v. Wesley, Civ.App., 22 S.W.2d 718, error dismissed, citing Corpus Juris.
32 C.J. p 272 note 68.

Injunction not granted

(1) To restrain conduct merely injuring a person's feelings.—Baumann v. Baumann, 165 N.E. 819, 250 N.Y. 382, modifying 229 N.Y.S. 833, 224 App.Div. 719, affirming 228 N.Y.S. 539, 132 Misc. 217, reargument denied 166 N.E. 344, 250 N.Y. 612—Clere v. E. W. Edwards & Son, 1 N.Y.S.2d 244, 166 Misc. 26.

(2) To restrain conduct which produces discomfort which is purely mental.—Dulaney v. Fitzgerald, 13 S.W.2d 767, 227 Ky. 566, 63 A.L.R. 404.

(3) To enjoin impersonation of plaintiff's version of a dance, there being no claim of intention to ridicule plaintiff or that the public was deceived.—Murray v. Rose, 30 N.Y.S. 2d 6.

Injunction may be granted

To restrain defendants from holding themselves out as husband and wife, depriving plaintiff of opportunity to obtain gainful employment by reason of confusion of names and identities.—Kranz v. Kranz, 7 N.Y.S. 2d 330, 169 Misc. 658.

70. Tex.—Hawks v. Yancey, Civ. App., 265 S.W. 233.

71. U.S.—Committee for Industrial Organization v. Hague, D.C.N.J., 25 F.Supp. 127, modified on other grounds, C.C.A., Hague v. Committee for Industrial Organization, 101 F.2d 774, certiorari granted 59 S. Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S. Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.
Ala.—Henley v. Rockett, 8 So.2d 852, 243 Ala. 172.
32 C.J. p 272 note 70.

Personal liberty

"Personal liberty and private property are fundamental rights in this country. The very purpose of law is to protect these rights. Any unlawful interference with them by false statements, acts of coercion, in-

sonal rights are not less sacred and valuable rights or less subject to the protection of a court of equity in a proper case than are property rights.[72] Under a statute which provides for the issuance of an injunction where it shall appear that the person applying for such writ is entitled to the relief demanded and that such relief requires the restraint of some act prejudicial to applicant, the court is entitled to protect personal rights by injunction,[73] and the same is true under a statute providing for injunctive relief to prevent injury "to the plaintiff's rights respecting the subject of the action."[74]

§ 131. Protection from Physical Injury or Insult

Physical injury or insulting conduct cannot be enjoined where there is an adequate remedy at law.

A court of equity has no jurisdiction to prevent mere threatened physical injury, since the remedy at law by an action for damages or a criminal prosecution is adequate;[75] nor has it jurisdiction to enjoin parties from insulting conduct to complainant, as the law provides an adequate remedy and he must resort to it for his protection.[76]

§ 132. Right of Privacy

A right of privacy may be protected by injunction where there is no other adequate remedy or where the remedy is conferred by statute.

The right of personal privacy, where it is recognized under principles discussed in the C.J.S. title Right of Privacy §§ 1–6, also 54 C.J. p 816 note 6–p 822 note 89, may be protected by an injunction if there is no adequate remedy at law[77] or in cases wherein the remedy is specifically given by statute.[78] An injunction cannot issue on this

timidation, malice or covert implications that threaten mischief or injury to them may be enjoined."—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

Unreasonable search and seizure

Injunctive relief from unreasonable searches and seizures was properly granted where searches and seizures were made without probable cause, without personal knowledge on part of searching officer and without any crime or crimes having been committed.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Violation of natural rights

"Conduct such as threats resulting in intimidation or coercion to the injury of another and in violation of his natural or contractual rights may be enjoined."—Hotel & Restaurant Employees' International Alliance & Bartenders' International League of America v. Longley, Tex. Civ.App., 160 S.W.2d 124, 126.

72. Va.—Thompson v. Smith, 154 S. E. 579, 155 Va. 367, 71 A.L.R. 604. Acts of public officers see supra §§ 108–122.

Remedy at law inadequate

(1) Where municipal officials constantly disregarded basic civil rights of citizens, the threatened continuance of such tortious acts was sufficient ground for equitable injunctive relief, as against contention that there was full and adequate remedy at law.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

(2) Local law enforcement officers by threatening to continue to arrest, imprison, and prosecute members of Jehovah's Witnesses for selling, circulating, and distributing printed matter under color of Kentucky statutes relating to the offense of sedition, deprive members of rights, privileges, and immunities secured by the federal Constitution, and members were entitled to a permanent injunction restraining officers from continuing such deprivation, since they had no adequate remedy at law.—Beeler v. Smith, D.C.Ky., 40 F.Supp. 139.

73. Tex.—Hotel & Restaurant Employees' International Alliance & Bartenders' International League of America v. Longley, Civ.App., 160 S.W.2d 124—Hawks v. Yancey, Civ.App., 265 S.W. 233.

Rights protected

(1) Rights of teachers and officers of high school as to participation of twelfth-grade boys in interscholastic football games.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605.

(2) Breaking away from illicit relationships.—Hunt v. Hudgins, Tex. Civ.App., 168 S.W.2d 703.

(3) Right of woman to restrain person with whom she had had illicit relations from making statements against her, watching over her, imposing himself on her on public streets, and making false charges to public officials, preventing her marriage to another.—Hawks v. Yancey, Civ.App., 265 S.W. 233.

74. Okl.—Nation v. Chism, 6 P.2d 766, 154 Okl. 50.

75. U.S.—U. S. v. Marine Engineers' Ben. Assoc. No. 38, D.C.Wash., 277 F. 830.
32 C.J. p 272 note 71.

76. Pa.—Askinsky v. Levenson, 100 A. 491, 256 Pa. 14, L.R.A.1917D 994.

77. Ga.—Bazemore v. Savannah Hospital, 155 S.E. 194, 171 Ga. 257.
N.J.—Brex v. Smith, 146 A. 34, 104 N.J.Eq. 386.
54 C.J. p 823 note 4.

Particular matters enjoined

(1) Unauthorized use of person's photograph in connection with an advertisement or other commercial enterprise.—Flake v. Greensboro News Co., 195 S.E. 55, 212 N.C. 780.

(2) Submission to prosecutor for examination of all bank accounts of the members of the police department.—Brex v. Smith, 146 A. 34, 104 N.J.Eq. 386.

Photographs part of physician's medical record

A doctor may not, without the consent of a patient or her husband, take photographs of the patient showing facial disfigurement resulting from her illness, even as a part of his medical record, and, where such photographs have been taken, equity will enjoin their use and direct their return, as a violation of the right of privacy.—Clayman v. Bernstein, 38 Pa.Dist. & Co. 543.

78. N.Y.—Sarat Lahiri v. Daily Mirror, 295 N.Y.S. 382, 162 Misc. 776.

Absolute right

N.Y.—Garden v. Parfumerie Rigaud, 271 N.Y.S. 187, 151 Misc. 692.

After revocation of consent

Plaintiff could restrain company's

ground where, under the circumstances, the asserted right of privacy is not recognized.[79]

§ 133. Private Writings

Injunctive relief for protection and enforcement of common-law rights in intellectual property is discussed in Copyright and Literary Property § 16 c.

Examine Pocket Parts for later cases.

§ 134. Libel and Slander

Except as authorized by statute, a court of equity generally has no jurisdiction to enjoin a mere libel or slander where no breach of trust or of a contract is shown.

Remedy by injunction against words is exceptional and is to be reserved for those cases where the exigency is clear.[80] In the absence of statutory authorization,[81] a court of equity has no jurisdiction to restrain a mere libel or slander,[82] where no breach of trust or of a contract is shown,[83] whether the libel is against a public person, private person,

further use of her name and portrait, although company had trademarked its products and invested considerable money to popularize it. —Garden v. Parfumerie Rigaud, supra.

Particular matters enjoined

(1) Unauthorized use of radio broadcaster's name.—Uproar Co. v. National Broadcasting Co., D.C.Mass., 8 F.Supp. 358, modified on other grounds, C.C.A., 81 F.2d 373, certiorari denied 56 S.Ct. 835, 298 U.S. 670, 80 L.Ed. 1393.

(2) Use of plaintiff's picture for advertising purposes or for purposes of trade.—Bluemthal v. Picture Classics, 185 N.E. 713, 261 N.Y. 504, affirming 257 N.Y.S. 800, 235 App.Div. 570—Young v. Greneker Studios, 26 N.Y.S.2d 357, 175 Misc. 1027.

79. Alaska.—Smith v. Suratt, 7 Alaska 416.
N.Y.—Sarat Lahiri v. Daily Mirror, 295 N.Y.S. 382, 162 Misc. 776.
Injunctive relief with regard to fingerprints and Bertillon measurements see Arrest § 17 c (2).

Matters not within right of privacy statute

(1) Incidental use of plaintiff's name in connection with subject matter of book.—Kline v. Robert M. McBride & Co., 11 N.Y.S.2d 674, 170 Misc. 974.

(2) Use of a person's name, portrait, or picture which is not for "advertising purposes" or "purposes of trade."—Sarat Lahiri v. Daily Mirror, 295 N.Y.S. 382, 162 Misc. 776.

Matters of public interest

(1) North Pole explorers are not entitled to an injunction restraining defendant from taking moving pictures of their properties and movements since the enterprise itself is of public interest.—Smith v. Suratt, 7 Alaska 416.

(2) A public character cannot, in the absence of a breach of contract or violation of confidence in securing the picture from which the publication is made, enjoin its publication. —Corliss v. E. W. Walker Co., C.C. Mass., 64 F. 280, 31 L.R.A. 283—54 C.J. p 820 note 49.

80. N.Y.—Nann v. Raimist, 174 N.E 690, 255 N.Y. 307, 73 A.L.R. 669. affirming 241 N.Y.S. 832, 228 App. Div. 856, motion denied 175 N.E. 314, 255 N.Y. 564.

81. Tex.—Hawks v. Yancey, Civ. App., 265 S.W. 233.
32 C.J. p 272 note 73.

Remedy by criminal prosecution doubtful

An injunction to restrain picketing of dealers who entered into contract for construction of building with knowledge that contractor would not employ union labor could not be refused on ground of adequacy of remedy by criminal prosecution where there was no express malice shown and it was doubtful if law of criminal libel was breached, and hence dealers had no remedy adequate for their grievance as might be afforded by criminal prosecution.—Carter v. Bradshaw, Tex.Civ.App., 138 S.W.2d 187.

Remedy under civil libel statute inadequate

An injunction to restrain picketing of automobile dealers who entered into contract for construction of building with knowledge that contractor would employ nonunion labor could not be refused on ground that dealers had "adequate remedy at law" where their only remedy was under civil libel statute and union members were insolvent and suit for damages would have availed nothing and acts complained of were a violation of personal rights regardless of lack of any visible or measurable damages in dollars and cents.—Carter v. Bradshaw, supra.

Temporary injunction granted

Tex.—Gibraltar Sav. & Bldg. Ass'n v. Isbell, Civ.App., 101 S.W.2d 1029.

82. U.S.—Dehydro, Inc. v. Tretolite Co., D.C.Okl., 53 F.2d 273—Oil Conservation Engineering Co. v. Brooks Engineering Co., C.C.A. Ohio, 52 F.2d 783—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963—Chamber of Commerce of Minneapolis v. Federal Trade Commission, C.C.A., 13 F.2d 673—Kuhn v. Warner Bros. Pictures, D.C.N. Y., 29 F.Supp. 800—Starns v. Success Portrait Co., D.C.Tenn., 28 F. Supp. 711—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F. Supp. 799, affirmed, C.C.A.1934, Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S. Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963—People v. Armentrout, 1 P.2d 556, 118 Cal.App.Supp. 761.
Ga.—McFarlan v. Manget, 174 S.E. 712, 179 Ga. 17.
Ill.—Garicpy v. Springer, 48 N.E.2d 572, 318 Ill.App. 523—Lietzman v. Radio Broadcasting Station W. C. F. L., 282 Ill.App. 203.
Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.
N.J.—Weiss v. Levine, 32 A.2d 574, 133 N.J.Eq. 441—A. Hollander & Son v. Jos. Hollander, Inc., 177 A. 80, 117 N.J.Eq. 578.
N.Y.—Old Investors' & Traders' Corporation v. Jenkins, 232 N.Y.S. 245, 133 Misc. 213, affirmed 233 N.Y.S. 845, 225 App.Div. 860.
Ohio.—Yood v. Daly, 174 N.E. 779, 37 Ohio App. 574.
Tex.—Bledsoe v. Wesley, Civ.App., 22 S.W.2d 718, 720, error dismissed, citing **Corpus Juris.**
32 C.J. p 272 note 74.

Mere falsity

Equity does not intervene to restrain publication of words on mere showing of their falsity.
N.Y.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App. Div. 856, motion denied 175 N.E. 314, 255 N.Y. 564.
Tex.—Gibraltar Sav. and Bldg. Ass'n v. Isbell, Civ.App., 101 S.W.2d 1029.

83. Mass.—Finnish Temperance Soc. Sovittaja v. Raivaaja Pub. Co., 106 N.E. 561, 219 Mass. 28, Ann.Cas. 1916D 1087.

or corporation,[84] the remedy being by an action at law for damages or a criminal prosecution.[85] It has been said that the difficulties in the way of affording such relief are insurmountable, growing alike out of constitutional provisions,[86] and want of jurisdiction in the court of equity.[87] The operation of the rule is not affected because of plaintiff's inability to prove special damage,[88] or because a judgment could not be collected against defendant,[89] nor is the rule affected by the fact that the libel or slander was continuous.[90] However, after an action at law in which there is a verdict finding the statements published to be false, plaintiff on a proper showing may have an injunction restraining any further publication of the matter which the jury has found to be acts of libel or slander, and of slanders or libels of a like or similar purport.[91]

Existence of malice in publishing a libel or uttering slanderous words has been held not to make any difference in the jurisdiction of the court;[92] but there is a contrary view.[93]

Relatives of a deceased person may not sue to enjoin a libel of deceased where they do not show any damage to their reputation or property.[94]

§ 135. —— Injury to Business

Subject to some exceptions, the rule according to most authorities is that equity will not exercise its jurisdiction for injunctive relief against a slander or libel where business or property rights are affected thereby, in the absence of acts of conspiracy, intimidation, or coercion, or where no breach of trust or of contract appears.

The authorities are not uniform on the question whether equity will exercise its jurisdiction for injunctive relief against a slander or libel where property rights are affected thereby.[95] According to most authorities, the operation of the rule that equity will not restrain a mere libel or slander is not affected by the fact that the false statement may injure plaintiff in his business, profession, or trade, or as to his credit or property,[96] in the absence of acts of conspiracy, intimidation, or coercion,[97] or

84. Ill.—Gariepy v. Springer, 48 N.E.2d 572, 318 Ill.App. 523.
Mass.—Finnish Temperance Soc. Sovittaja v. Raivaaja Pub. Co., 106 N.E. 561, 219 Mass. 28, Ann.Cas.1916D 1087.

85. U.S.—Kuhn v. Warner Bros. Pictures, D.C.N.Y., 29 F.Supp. 800.
32 C.J. p 273 note 77.

86. Neb.—Howell v. Bee Pub. Co., 158 N.W. 358, 100 Neb. 39, L.R.A. 1917A 160, Ann.Cas.1917D 655.
32 C.J. p 273 note 78.
Interference with constitutional guaranties of freedom of speech and press see Constitutional Law § 213 i.

87. U.S.—Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., C.C.Ala., 171 F. 553.

88. N.Y.—Marlin Firearms Co. v. Shields, 64 N.E. 163, 171 N.Y. 384.

89. U.S.—Willis v. O'Connell, D.C. Ala., 231 F. 1004.
Mo.—Life Assoc. of America v. Boogher, 3 Mo.App. 173.
32 C.J. p 273 note 81.
Insolvency of the person making the false statement in such cases is not regarded as sufficient of itself to authorize a court of equity to enjoin the slander or libel.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

90. Ill.—Gariepy v. Springer, 48 N.E.2d 572, 318 Ill.App. 523—Lietzman v. Radio Broadcasting Station W.C.F.L., 282 Ill.App. 203.

91. Mo.—Wolf v. Harris, 184 S.W. 1139, 267 Mo. 405—Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804, 110 Mo. 492, 33 Am.S.R. 476, 16 L.R.A. 243.

92. U.S.—Kidd v. Horry, C.C.Pa., 28 F. 773.

93. Mass.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

94. N.Y.—Clere v. E. W. Edwards & Son, 1 N.Y.S.2d 244, 166 Misc. 26—Eagles v. Liberty Weekly, 244 N.Y.S. 430, 137 Misc. 575.
Persons entitled to injunctions generally see supra § 35.
Parties generally see infra §§ 173–178.

95. Ala.—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600, 144 A.L.R. 1177.

96. U.S.—Arrow Distilleries v. Alexander, D.C.D.C., 24 F.Supp. 880, affirmed 59 S.Ct. 489, 306 U.S. 615, 83 L.Ed. 1023—Robert E. Hicks Corporation v. National Salesmen Training Ass'n, C.C.A.Ind., 19 F.2d 963.
Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.
Ill.—Gariepy v. Springer, 48 N.E.2d 572, 318 Ill.App. 523.
Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.
N.J.—John R. Thompson Co. v. Delicatessen and Cafeteria Workers Union, Local 410, 8 A.2d 130, 126 N.J.Eq. 119.
Ohio.—Yood v. Daly, 174 N.E. 779, 37 Ohio App. 574.
32 C.J. p 273 note 84.
Representation as to character or quality of property
(1) Chancery court was without jurisdiction to restrain injury to business or property threatened by false representation as to character or quality of plaintiff's property.—A. Hollander & Son v. Jos. Hollander, Inc., 177 A. 80, 117 N.J.Eq. 578.
(2) In action by purchasers of house against vendor for fraud and deceit, wherein vendor interposed counterclaim for permanent injunction restraining purchasers from maintaining signs on their building and from making statements derogatory to quality of homes erected by vendor and for damages, trial court was without power to grant order restraining purchasers pendente lite from maintaining such signs and making such statements.—Singer v. Romerrick Realty Corporation, 5 N.Y.S.2d 607, 255 App.Div. 715.

97. U.S.—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
Ill.—Gariepy v. Springer, 48 N.E.2d 572, 318 Ill.App. 523.
32 C.J. p 273 note 85.
Coercion, conspiracy, or intimidation held not shown
Ill.—Lietzman v. Radio Broadcasting Station W.C.F.L., 282 Ill.App. 203.
Tex.—Houston v. Interstate Circuit, Civ.App., 132 S.W.2d 903.
Circumstances held to warrant injunction
Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Ware-

where no breach of trust or of contract appears,[98] because the party wronged has an adequate remedy at law[99] by action for damages or criminal prosecution.[1] A fortiori, the court will refuse to enjoin a publication which, although having a tendency to injure complainant's business, is not libel.[2]

According to other authorities exceptions are recognized to the rule that equity will not restrain false statements which may injure plaintiff's business or property,[3] or a different view is held,[4] and under some circumstances, especially in the absence of a complete, practical, and efficient remedy at law, an injunction will issue to restrain false statements which affect plaintiff's business or property.[5]

Equity intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with impairment by illegal combinations or by other tortious acts, the publication of the words being merely an instrument and incident,[6] and as otherwise stated, when there is other legitimate ground for equity to issue the injunction, the fact that the publication is also a libel will not prevent the injunction being issued.[7] Accordingly, if the circumstances are such that the publication tends to intimidate and by coercion prevent the public from trading with plaintiff and results in irreparable injury to his property rights, a court of equity may grant relief by injunction.[8]

The successful competitor for the premium offered by an agricultural society for the best machine exhibited cannot by injunction restrain a defeated party from publishing in a newspaper that he, and not complainant, received the premium.[9]

housemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

98. Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

Report by mercantile agency

A court of equity cannot restrain the publication in the reports of a mercantile agency of representations as to a person's character and standing or as to the value of his property, although such representations may be untrue, where no breach of trust or contract is involved.—Raymond v. Russell, 9 N.E. 544, 143 Mass. 295, 58 Am.R. 137.

99. U.S.—American Malting Co. v. Keitel, N.Y., 209 F. 351, 126 C.C.A. 277.

Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

N.Y.—Dartmore Corporation v. Columbia Products Corporation, 18 N.Y.S.2d 366.

1. U.S.—Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Co., C.C.Ala., 171 F. 553.

2. U.S.—Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n, C.C.S.D., 150 F. 413.

3. N.Y.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669.

4. Mass.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

Property rights protected

(1) The right to conduct one's business without wrongful interference and to enjoy good name and good will of such business is valuable "property right" and will be protected by injunctive process if necessary.—Lash v. State, Ala., 14 So.2d 229, answer to certified question conformed to, App., 14 So.2d 235, certiorari denied, Sup., 14 So.2d 242—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600, 144 A.L.R. 1177.

(2) Injunction will not be granted to restrain slander or libel, in absence of infringement of property right.—McFarlan v. Manget, 174 S.E. 712, 179 Ga. 17.

(3) Where there is a continuing cause of unjustified and wrongful attack on a business man motivated by actual malice and causing damage to property rights as distinguished from injury to the personality affecting feelings, sensibility, and honor, equity will take jurisdiction, even though false statements and announcements are the means employed, and conspiracy or unfair competition does not appear, since there is no adequate remedy at law.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

5. Ala.—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600, 144 A.L.R. 1177.

Mass.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

Picketing accompanied by false statements see infra §§ 144, 145.

Bad faith

A court of equity may issue an injunction against libel or slander provided it is in bad faith, for the sole purpose of injurying the trade of the person defamed.

U.S.—Starns v. Success Portrait Co., D.C.Tenn., 28 F.Supp. 711.

Mass.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

False statements made or published in connection with other conduct

Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

Tex.—Carter v. Bradshaw, Civ.App., 138 S.W.2d 187.

6. N.Y.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App. Div. 856, motion denied 175 N.E. 314, 255 N.Y. 564.

Tex.—Gibraltar Sav. & Bldg. Ass'n v. Isbell, Civ.App., 101 S.W.2d 1029.

Absence of adequate remedy at law

Where defendants are engaged in wrongful conduct irreparably harmful to complainant's business and good name of its products for sole purpose of forcing complainant to give defendants something for nothing which complainant is not obligated to do, in absence of adequate remedy at law, complainant is entitled to injunctive relief.—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600, 144 A.L.R. 1177.

7. Ohio.—Yood v. Daly, 174 N.E. 779, 37 Ohio App. 574.

8. Ohio.—Yood v. Daly, supra.

Restraining trade union from publication of libelous matter coercive in its nature see infra § 140.

Threats to customers

A court may grant injunctive relief where the words or writings complained of are not only libelous but are of such a nature as to threaten, intimidate, or coerce customers of complainant into discontinuing business relations.—Dittgen v. Racine Paper Goods Co., C.C.Wis., 164 F. 84—32 C.J. p 273 note 89.

9. Ga.—Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70, 15 Am.R. 674.

§ 136. —— Slander of Title

In the absence of a breach of trust or of contract, the mere fact that injury may result from the slander of one's title to property does not remove the case from the rule that mere slander or libel will not be enjoined by equity, although some authorities grant the injunction if the false statements were maliciously made.

In the absence of a breach of trust or of contract,[10] the mere fact that an injury may result from a slander of one's title to property does not take the case out of the general rule that mere slander or libel will not be enjoined;[11] plaintiff will be left to his remedy at law.[12] However, in some of the cases a distinction is made between false statements made maliciously, and those made in good faith, and this class of cases holds that the injunction will be granted where malice or a willful purpose to inflict injury is present,[13] but other decisions recognize no such distinction.[14]

An injunction will not be granted to restrain a person from notifying the public that a patent infringement suit has been brought,[15] or that an injunction has been granted to restrain another from using a patent,[16] except where the decree has been obtained by fraud[17] or where such notification misrepresents matters relating to the litigation or decree[18] and is intended to intimidate the trade.[19]

§ 137. Other Rights

The protection of equity has been granted or denied in various miscellaneous cases of personal rights.

As has been noted supra § 130, the protection of equity has frequently been extended to personal rights in many fields in which no adequate remedy at law has been available. These cases more frequently perhaps have arisen with reference to the acts of officers and other governmental agents in the enforcement of a void statute, ordinance, or regulation, and the power of equity to enjoin such acts has been considered supra §§ 108–122.

Political rights. Equity will not abridge political rights by injunction or restrain a citizen from petitioning the legislature or any public body on any subject of legislation in which he is interested,[20] unless his doing so would violate some covenant or agreement with others.[21] Whether injunction will lie to enforce purely political rights is considered supra § 119, and its use with reference to the acts of election officers and the conduct of elections supra § 115.

When obligations of state involved. When the state itself or any of its functions or obligations to the public or to an individual are involved, personal rights may receive protection by injunction.[22] Accordingly, it has been held that the district attorney of a county may maintain a bill for injunction to restrain an "evangelist" engaged in conducting revival meetings from delivering an advertised address purporting to be on the subject of who killed a particular person named where a prisoner indicted for this killing is awaiting trial.[23] Contrary to this view, however, it has been held that a court of equity had no jurisdiction to enjoin the presentation of a play based on the facts of a case established at a preliminary examination and coroner's inquest against defendant then on trial, although it may interfere with the administration of justice and deprive accused of a fair trial.[24]

Marital and domestic rights. In a proper case a court of equity will assume jurisdiction to protect marital rights by injunction.[25] It has been

10. Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

11. Ark.—Esskay Art Galleries v. Gibbs, supra.
N.J.—A. Hollander & Son v. Jos. Hollander, Inc., 177 A. 80, 117 N.J. Eq. 578.
32 C.J. p 273 note 92.

12. Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

13. U.S.—Oil Conservation Engineering Co. v. Brooks Engineering Co., C.C.A.Ohio, 52 F.2d 783.
32 C.J. p 274 note 93.

14. U.S.—Francis v. Flinn, La., 6 S.Ct. 1148, 118 U.S. 385, 30 L.Ed. 165.
32 C.J. p 274 note 94.

15. U.S.—Warren Featherbone Co. v. Landauer, C.C.Wis., 151 F. 130.
Md.—Meyer v. Devries, 2 A. 915, 64 Md. 532.

16. U.S.—Hobbs Mfg. Co. v. Gooding, Mass., 113 F. 615, 51 C.C.A. 335.
32 C.J. p 274 note 96.
Good faith
Where bill to enjoin infringement of patent was upheld, and patentee issued circular letter to trade in good faith, such issuance will not be enjoined, where letter expressed conclusions of court, although it was not wholly accurate and was rather strongly expressed.—National Metal Molding Co. v. Tubular Woven Fabric Co., R.I., 236 F. 745, 150 C.C.A. 77.

17. Mich.—Grand Rapids School Furniture Co. v. Haney School Furniture Co., 52 N.W. 1009, 92 Mich. 558, 31 Am.S.R. 611, 16 L.R.A. 721.

18. U.S.—Adjusta Co. v. Alma Mfg. Co., D.C.N.Y., 36 F.2d 105—Gerosa v. Apco Mfg. Co., C.C.A.R.I., 299 F. 19, affirming, D.C., Hudson Motor Specialties Co. v. Apco Mfg. Co., 288 F. 871.

19. U.S.—Rollman Mfg. Co. v. Universal Hardware Works, Pa., 238 F. 568, 151 C.C.A. 504.

20. N.J.—Story v. Jersey City & Bergen Point Plank R. Co., 16 N.J.Eq. 13, 84 Am.D. 134.
32 C.J. p 274 note 99.

21. N.Y.—People v. State Canal Bd., 55 N.Y. 390.

22. Pa.—Adams v. Stough, 43 Pa.Co. 617.
Injunctions in labor controversies see infra §§ 138–147.

23. Pa.—Adams v. Stough, supra.
32 C.J. p 275 note 7.

24. Cal.—Dailey v. San Francisco Super. Ct., 44 P. 458, 112 Cal. 94, 53 Am.S.R. 160, 32 L.R.A. 273.
32 C.J. p 275 note 8.

25. Ala.—Henley v. Rockett, 8 So. 2d 852, 243 Ala. 1.

held that a court of equity may extend injunctive relief to prevent an intrusion of a third person into family affairs destructive of the consortium between the spouses;[26] and a spouse may enjoin a third person from alienating the affections of the other spouse,[27] although there is authority to the contrary.[28] It has been held also that, in an action for divorce by a wife, she is not entitled to an injunction pendente lite restraining her husband from cohabiting with another woman, by reason of a statute providing that, where it appears from the complaint that plaintiff demands and is entitled to a judgment against defendant restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to plaintiff, an injunction order may be granted to restrain it, or a statute providing that, where it appears that defendant during the pendency of the action is doing or is about to do some act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgments ineffectual, since the statute gives the remedy by absolute divorce.[29] Various matters relating to domestic relations have been held not the subject of equity protection by way of injunction,[30] such, among others, as the custody of children,[31] and preventing a parent from acting or interesting himself in the marital affairs of his child.[32]

2. Interference with Trade, Business, or Occupation

§ 138. In General

a. General rules
b. Industrial disputes

a. General Rules

Acts committed without just cause which interfere with the carrying on of the plaintiff's business and destroy his custom, credit, or profits, to his irreparable injury, may be enjoined if there is no adequate remedy at law.

Since the right to carry on a lawful business without obstruction is a property right,[33] acts committed without just cause or excuse, which interfere with

Injunctions in divorce proceedings see Divorce § 103.

Wrong done or threatened

(1) Injunction may lie to restrain husband from contracting marriage after foreign divorce decree not binding on wife, where husband did not pay alimony, since property rights of wife were involved.—Richman v. Richman, 266 N.Y.S. 513, 148 Misc. 387.

(2) Where wife had obtained a judgment declaring husband's matrimonial status and there was no showing of wrong done to the wife or of any wrong threatened, wife was not entitled to enjoin her husband and the woman whom he married from holding themselves out as husband and wife, or to enjoin the other woman from representing herself to be the wife of the husband or from using his surname.—Marquis v. Marquis, 35 N.Y.S.2d 675, 178 Misc. 702.

26. Ala.—Henley v. Rockett, 8 So. 2d 852, 243 Ala. 172.

Defendant's rights not injured

Where plaintiff's physical condition was critical, and he was of a highly nervous and excitable nature, and for a long time objected to his wife keeping company with defendant, her employer, an order restraining defendant from associating with, calling on, or having anything whatever to do with the wife except as related to her duties as employee of defendant deprived defendant of no right to which he was entitled.—Witte v. Bauderer, Tex.Civ.App., 255 S.W. 1016.

27. Ala.—Henley v. Rockett, 8 So.2d 852, 243 Ala. 172.
Tex.—Smith v. Womack, Civ.App., 271 S.W. 209.
32 C.J. p 274 note 3.

Discretion of trial court

Whether the record presented a proper case for injunctive relief was, in the first instance, a question for the trial judge, but his judicial discretion was subject to review by the supreme court, not merely on the question of jurisdiction, but also on expediency and sound policy.—Henley v. Rockett, 8 So.2d 852, 243 Ala. 1.

Effect of abolition of action at law

The abolition by the legislature by statute of actions at law for damages for alienation of affections or criminal conversation does not strike down any other remedy, legal or equitable, such as a suit to enjoin alienation of affections.—Henley v. Rockett, supra.

Enjoining communication or visits

The injured spouse, to prevent a complete alienation of the other's affections, may invoke the restraining power of a court of equity, and enjoin defendant from communicating with or visiting such other.—Ex parte Warfield, 50 S.W. 933, 40 Tex. Cr. 413, 76 Am.S.R. 724.

28. Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254.

Reason for rule

In addition to the fact that legal and statutory remedies are already provided for, the opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of enforcement, and the very doubtful beneficial results to be obtained thereby warrant denial of an injunction.—Snedaker v. King, 145 N.E. 15, 111 Ohio St. 225.

29. N.Y.—Ellis v. Ellis, 106 N.Y.S. 217, 55 Misc. 34.

30. Ohio.—Snedaker v. King, 145 N. E. 15, 111 Ohio St. 225.

31. La.—Prescott v. Prescott, 141 So. 88, 174 La. 653.

32. Md.—Bank v. Bank, 23 A.2d 700, 180 Md. 254.

33. U.S.—Dehydro, Inc., v. Tretolite Co., D.C.Okl., 53 F.2d 273—United Chain Theatres v. Philadelphia Moving Picture Machine Operators Union, Local No. 307, D.C.Pa., 50 F.2d 189—Philadelphia Record Co. v. Leopold, D.C.N.Y., 40 F.Supp. 346.
Ala.—Lash v. State, 14 So.2d 229, answer to certified question conformed to, App., 14 So.2d 235, certiorari denied, Sup., 14 So.2d 242—Carter v. Knapp Motor Co., 11 So. 2d 383, 243 Ala. 600, 144 A.L.R. 1177—Walker v. Ferguson, 130 So. 64, 221 Ala. 549—Bowen v. Morris, 123 So. 222, 219 Ala. 689—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.
Cal.—Pasadena Ice Co. v. Reeder, 275

the carrying on of complainant's business and destroy his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of an injunction,[34] even though some of the acts con-

P. 944, 206 Cal. 697, rehearing denied 276 P. 955, 206 Cal. 697.
Ill.—Ossey v. Retail Clerks' Union, 158 N.E. 162, 326 Ill. 405.
Mo.—Purcell v. Journeymen Barbers and Beauticians International Union of America, Local 192-A, 133 S.W.2d 662, 670, 234 Mo.App. 843, quoting **Corpus Juris.**
N.Y.—Saxon Motor Sales v. Torino, 2 N.Y.S.2d 885, 886, 166 Misc. 863, quoting **Corpus Juris**—Mlle. Reif, Inc., v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247.
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.
Pa.—Harrisburg Dairies v. Elsaman, 45 Dauph.Co. 61, appeal dismissed 195 A. 337, 328 Pa. 195.
Tenn.—Lyle v. Local No. 452, Amalgamated Meat Cutters and Butchers Workmen of North America, 124 S.W.2d 701, 704, 174 Tenn. 222, quoting **Corpus Juris.**
Wash.—United Union Brewing Co. v. Beck, 93 P.2d 772, 781, 200 Wash. 474, citing **Corpus Juris.**
32 C.J. p 155 note 54, p 168 note 23.
Interference with conduct of business as tort generally see Torts § 43, also 62 C.J. p 1137 note 41—p 1141 note 63.

Right to earn living

Right of members of union to earn a living is such property right as equity in proper case has jurisdiction to protect from threatened irreparable injury.—Gurtov v. Williams, Tex.Civ.App., 105 S.W.2d 328, error dismissed.

34. U.S.—Paramount Pictures v. Leader Press, C.C.A.Okl., 106 F.2d 229, reversing, D.C., 24 F.Supp. 1004—Union Premier Food Stores v. Retail Food Clerks and Managers' Union, Local No. 1357, C.C.A. Pa., 98 F.2d 821—Dehydro, Inc., v. Tretolite Co., D.C.Okl., 53 F.2d 273—Standard Nut Margarine Co. v. Rose, D.C.Ga., 41 F.2d 385, reversed on other grounds Standard Nut Margarine Co. of Florida v. Rose, 49 F.2d 85, certiorari granted Rose v. Standard Nut Margarine Co. of Florida, 52 S.Ct. 23, 284 U.S. 603, 76 L.Ed. 517, affirmed 52 S.Ct. 288, 284 U.S. 498, 76 L.Ed. 422—Philadelphia Record Co. v. Leopold, D.C.N.Y., 40 F.Supp. 346—Mills Novelty Co. v. Farrell, D.C. Conn., 3 F.Supp. 555, affirmed, C.C.A., 64 F.2d 476—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
Ala.—Lash v. State, 14 So.2d 229, answer to certified question conformed to, App., 14 So.2d 235, certiorari denied, Sup., 14 So.2d 242—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600, 144 A.L.R. 1177—Walker v. Ferguson, 130 So. 64, 221 Ala. 549—Bowen v. Morris, 123 So. 222, 219 Ala. 689—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.
Cal.—Pasadena Ice Co. v. Reeder, 275 P. 944, 206 Cal. 697, rehearing denied 276 P. 955, 206 Cal. 697—California Grape Control Board v. California Produce Corp., 40 P.2d 846, 847, 4 Cal.App.2d 242, citing **Corpus Juris.**
Colo.—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.
D.C.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27.
Ga.—Gunnels v. Atlanta Bar Ass'n, 12 S.E.2d 602, 191 Ga. 366, 132 A.L.R. 1165.
Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 164 N.E. 393, 333 Ill. 225, 62 A.L.R. 157, reversing 244 Ill. App. 540—Naprawa v. Chicago Flat Janitors' Union, Local No. 1, 43 N.E.2d 198, 315 Ill.App. 328, appeal dismissed 46 N.E.2d 27, 382 Ill. 124.
Ky.—City of Louisville v. Lougher, 272 S.W. 748, 209 Ky. 299.
Mass.—Keegan v. O'Donnell, 37 N.E. 2d 995, 310 Mass. 346—Yankee Network v. Gibbs, 3 N.E.2d 228, 295 Mass. 56—Lawrence Trust Co. v. Sun-American Pub. Co., 139 N. E. 655, 245 Mass. 262.
Mo.—Purcell v. Journeymen Barbers and Beauticians International Union of America, Local 192-A, 133 S. W.2d 662, 670, 234 Mo.App. 843, quoting **Corpus Juris.**
N.J.—Russell v. Russell, 14 A.2d 540, 127 N.J.Eq. 555—Miller's, Inc., v. Journeymen Tailors Union Local No. 195, Ch., 15 A.2d 822, affirmed Miller's Inc., v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, reversed on other grounds Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's, Inc., 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106—Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey, Newark Local, Ch., 193 A. 806.
N.Y.—Wilner v. Bless, 154 N.E. 598, 243 N.Y. 544, affirming 214 N.Y.S. 939, 216 App.Div. 710—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 160, reversing 215 N.Y. S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651—Saxon Motor Sales v. Torino, 2 N.Y.S.2d 885, 886, 166 Misc. 863, quoting **Corpus Juris**—Mlle. Reif, Inc., v. Randau, 1 N. Y.S.2d 515, 166 Misc. 247—Willson & Adams Co. v. Pearce, 237 N.Y.S. 601, 135 Misc. 426, reversed on other grounds 265 N.Y.S. 624, 240 App. Div. 718, affirmed 191 N.E. 545, 264 N.Y. 521—People, on Complaint of Kettling, v. Holzer, 17 N.Y.S.2d 366.
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35—Crouch v. Central Labor Council of Portland and Vicinity, 293 P. 729, 134 Or. 612, 83 A.L.R. 193.
Pa.—Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187, 14 A.2d 438, 339 Pa. 353.
Tenn.—Lyle v. Local No. 452, Amalgamated Meat Cutters and Butchers Workmen of North America, 124 S.W.2d 701, 704, 174 Tenn. 222, quoting **Corpus Juris.**
Tex.—Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, Civ.App., 149 S.W.2d 694, error refused, certiorari granted 62 S.Ct. 111, 314 U.S. 595, 86 L.Ed. 480, affirmed 62 S.Ct. 807, 315 U.S. 722, 86 L.Ed. 1143, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.
Wash.—United Union Brewing Co. v. Beck, 93 P.2d 772, 780, 781, 200 Wash. 474, citing **Corpus Juris**—Fornili v. Auto Mechanics' Union

sidered in themselves may be lawful.[35] The jurisdiction of the court rests on the ground of injury to property rights,[36] but the protection of the court will extend to intangible as well as tangible property which forms a part of the business,[37] and even though the element of unfair trade competition does not appear.[38] In order to authorize the issuance of an injunction to protect a business or occupation, it is essential for complainant to show an established business;[39] the mere fact that he is willing to engage in such business is not enough.[40] The basis of permissible action by the court is the probability of interference in the future; and unless the need for protection appears the injunction should not be granted.[41]

The fact that an injury to business has been done will not alone warrant the granting of injunctive relief.[42] Relief will be denied where plaintiff is threatened with no irreparable injury,[43] where defendant is guilty of no wrongful and injurious invasion of some right existing in plaintiff,[44] or where plaintiff may be fully and adequately redressed by an action at law.[45] An injunction interfering with the right of an individual to earn a livelihood will be granted only when justice can be accomplished by no other means.[46]

Lawful interference with business as a result of the economic law of competition cannot be enjoined;[47] competition can be enjoined only to preserve an exclusive privilege or advantage which the law

Local No. 297 of International Ass'n of Machinists, 93 P.2d 422, 200 Wash. 283—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

32 C.J. p 155 note 55, p 168 note 23—21 C.J. p 80 note 64 [a] (4).

Injunction against use of corporate name see Corporations § 173.

Right to labor

Minn.—Standard Oil Co. v. Beretelsen, 243 N.W. 701, 186 Minn. 483.

Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—Mische v. Kaminski, 193 A. 410, 127 Pa.Super. 66.

Right to contract for work is an important property right, and hence power of court of equity may be invoked to restrain its impairment.—Heasley v. Operative Plasterers and Cement Finishers International Ass'n, Local No. 31, 188 A. 206, 324 Pa. 257.

Legality of business

Injunction may be granted to enjoin interference with operation of business by physical force on mere claim of violation of criminal law; and, where sheriff threatens to interfere with operation of business by extrajudicial methods, injunction will issue, if illegality of business is doubtful.—Ruty v. Huelsenbeck, 156 A. 922, 109 N.J.Eq. 273.

Operation without owner's consent

Where agent appointed by county board of supervisors, and mayor of city, operated hospital over protest and without consent of fraternal order which was owner thereof, acts of agent and mayor in exercising control over nurses and employees of hospital were continuing trespass, subject to be enjoined.—Ham v. Kings Daughters Circle No. 4 of Greenville, Miss., 155 So. 164, 170 Miss. 490.

35. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.

36. Ill.—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168.

37. U.S.—Paramount Pictures v. Leader Press, C.C.A.Okl., 106 F.2d 229, reversing, D.C., 24 F.Supp. 1004.

N.Y.—Esco Operating Corporation v. Kaplan, 258 N.Y.S. 303, 144 Misc. 646.

32 C.J. p 168 note 23.

Good name and good will

Ala.—Lash v. State, App., 14 So.2d 235, conforming to answer to certified question 14 So.2d 229, certiorari denied 14 So.2d 242—Carter v. Knapp Motor Co., 11 So.2d 383, 243 Ala. 600.

32 C.J. p 168 note 23.

38. Mass.—Lawrence Trust Co. v. Sun-American Pub. Co., 139 N.E. 655, 245 Mass. 262.

39. Cal.—Golden Gate Sightseeing Tours, Inc. v. City and County of San Francisco, 69 P.2d 899, 901, 21 Cal.App.2d 582, citing **Corpus Juris.**

Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 316, 205 Ind. 355, citing **Corpus Juris.**

N.J.—Van der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County, 62 A. 453, 70 N.J.Eq. 116.

40. Cal.—Golden Gate Sightseeing Tours, Inc. v. City and County of San Francisco, 69 P.2d 899, 901, 21 Cal.App.2d 582, citing **Corpus Juris.**

Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 316, 205 Ind. 355, citing **Corpus Juris.**

N.J.—Van der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County, 62 A. 453, 70 N.J.Eq. 116.

41. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 160, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

42. U.S.—Edelstein v. Gillmore, C.C.A.N.Y., 35 F.2d 723, reversing, D.C., and 36 F.2d 81, certiorari denied 50 S.Ct. 153, 280 U.S. 607, 74 L.Ed. 650.

43. U.S.—Wasil v. Knoll, D.C.Pa., 27 F.Supp. 524.

Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40.

Irreparable injury as basis of injunctive relief generally see supra § 23.

Manufacturers' association held not entitled to maintain suit, real parties in interest being its members as to whom the injury was threatened.—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168.

44. U.S.—Wasil v. Knoll, D.C.Pa., 27 F.Supp. 524.

Mo.—Howe v. Standard Oil Co. of Indiana, App., 150 S.W.2d 496.

45. U.S.—Francis v. Flynn, La., 6 S.Ct. 1148, 118 U.S. 384, 30 L.Ed. 165.

Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40.

Adequacy of remedy at law as ground for denial of injunctive relief generally see supra § 25.

46. Tex.—Byers v. Trans-Pecos Abstract Co., Civ.App., 18 S.W.2d 1096, error dismissed.

47. Colo.—Fort v. People, 256 P. 325, 81 Colo. 420.

N.Y.—Dunlap's Cable News Co. v. Stone, 15 N.Y.S. 2, 60 Hun 583, 39 N.Y.St. 237, affirming 27 Abb.N.C. 28.

gives,[48] as, for instance, that to a class of persons admitted to a business or profession by reason of special qualifications for it,[49] or to those who exercise a franchise from the government,[50] but this rule does not justify injunctive relief against an unlicensed or unlawful competitor in a calling not clothed with public interest or charged with public use,[51] such as that of one licensed to sell liquor.[52] The mere fact of competition does not entitle one whose rights are not invaded to enjoin the unlawful acts of a competitor;[53] and an unauthorized act which does not infringe on another's right may not be enjoined merely because it will enable a third person to enter into competition with that other.[54]

b. Industrial Disputes

(1) In general
(2) Statutes affecting right to injunction

(1) In General

(a) Right to injunctive relief generally
(b) Breach of contract
(c) Interference with contractual relations

(a) Right to Injunctive Relief Generally

Although the courts will not restrain conduct which is within the allowable area of economic conflict, improper and unlawful acts of defendant in an industrial dispute may be enjoined in the absence of applicable statutes denying the remedy.

Since the contests involve a conflict between what are regarded as inherent and inalienable rights and the right to their protection, the development of the law in respect of labor disputes and the use of injunctive processes has become rather complex.[55] As shown infra subdivision b (2) of this section, the issuance of injunctions in cases involving industrial disputes is now largely regulated by state and federal statutes. In the absence of such statutes, however, or in cases where they have no application, it may be stated as a general rule that it is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict,[56] but, if the object sought to be obtained by defendants is not a lawful labor object, the court is justified in exercising control of their acts,[57] and it is for the court to determine whether

48. Md.—Cook v. Normac Corporation, 4 A.2d 747, 176 Md. 394.
Mo.—Clark v. Crown Drug Co., 152 S.W.2d 145, 348 Mo. 91, certified 146 S.W.2d 98, 236 Mo.App. 206.

49. Md.—Cook v. Normac Corporation, 4 A.2d 747, 176 Md. 394.

50. Md.—Cook v. Normac Corporation, supra.
Owner of cotton gin, operating under permit after showing of public necessity, could resort to equity to restrain illegal operation of another gin.—Frost v. Corporation Commission of State of Oklahoma, 49 S.Ct. 235, 278 U.S. 515, 73 L.Ed. 483, reversing, D.C.Okl., 26 F.2d 508.
Injunction to protect exclusive right to maintain particular franchise see Bridges § 30 b; Ferries § 16 d; Franchises § 30.

51. Mo.—Clark v. Crown Drug Co., 152 S.W.2d 145, 348 Mo. 91, certified 146 S.W.2d 98, 236 Mo.App. 206.

52. Mo.—Clark v. Crown Drug Co., supra.

53. U.S.—Carolina Power & Light Co. v. South Carolina Public Service Authority, C.C.A.S.C., 94 F.2d 520, affirming, D.C., 20 F.Supp. 854, and certiorari denied 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, South Carolina Power Co. v. South Carolina Public Service Authority, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, and South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1541.

54. U.S.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665.

55. Ky.—Music Hall Theatre v. Moving Picture Mach. Operators Local No. 165, 61 S.W.2d 283, 249 Ky. 639.

56. U.S.—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 563.
Ill.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 4 L.R.A., N.S., 1001, 110 Am.S.R. 248, affirming 121 Ill.App. 647.
Minn.—Gray v. Building Trades Council, 97 N.W. 663, 91 Minn. 171, 103 Am.S.R. 477, 63 L.R.A. 753, 1 Ann.Cas. 275.
N.J.—Mayer v. Journeymen Stonecutters' Ass'n, 20 A. 492, 47 N.J. Eq. 519.
N.Y.—Stillwell Theatre v. Kaplan, 182 N.E. 63, 259 N.Y. 405, 84 A.L.R. 6, reversing 255 N.Y.S. 715, 235 App.Div. 738, which affirmed 249 N.Y.S. 122, 140 Misc. 142, and motions denied 184 N.E. 93, 260 N.Y. 563, 84 A.L.R. 6, certiorari denied 53 S.Ct. 397, 288 U.S. 606, 77 L.Ed. 981—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 63 N.E. 369, 170 N.Y. 315, 88 Am.S.R. 648, 58 L.R.A. 135, affirming 65 N.Y.S. 946, 53 App. Div. 227, 31 N.Y.Civ.Proc. 145—H. R. H. Construction Corporation v. Franklin, 261 N.Y.S. 43, 236 App. Div. 536—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819—Engelmeyer v. Simon, 265 N.Y.S. 636, 148 Misc. 621—Tallman v. Gaillard, 57 N.Y.S. 419, 27 Misc. 114—General Bottle Co. v. Oneto, 12 N.Y.S.2d 348.
Pa.—Kirmse v. Adler, 166 A. 566, 311 Pa. 78—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194.
Means permissible to effect purposes of trade union see the C.J.S. title Trade Unions § 15, also 63 C.J. p 664 note 50–p 670 note 24.

57. Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.
N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App. Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188, reversing 27 N.Y.S.2d 883, 262 App.Div. 769, reversing 24 N.Y.S.2d 923, appeal granted and question certified 29 N.Y.S.2d 718, 262 App.Div.

or not the labor objective is lawful.[58] A court of equity is open to employer and employee alike, since mutuality of obligation compels a mutuality of remedy,[59] but the interference of the court in labor disputes directed either against employer or employee should be exercised sparingly and with caution.[60] The tests applicable to other cases are to be applied.[61] An injunction does not issue as punishment for the past; its only legitimate end is protection for the future.[62]

The fact that an injury to business has been done will not alone warrant the granting of injunctive relief.[63] Thus the remedy will be withheld if the acts causing the injury in the course of industrial conflict are done for a justifiable purpose.[64] In the absence of strike or intimidation, or any threat of disorder, or interference with plaintiff's right to employ nonunion labor, an employer is not entitled to an injunction restraining the enforcement of union labor regulations affecting employment, working hours, and compensation,[65] and the fact that such plaintiff, when undertaking a job outside of his home city, is required to pay more for union labor than local employers under the regulations, does not render such regulations discriminatory, unreasonable, arbitrary, or oppressive so as to authorize an injunction.[66] So, in the absence of a showing of conspiracy, a labor union official will not be enjoined from fomenting discontent and discord among employees in an effort to organize them into a local union and demand recognition thereof by the employer.[67] A court is not justified in fettering

862—Irwin v. Possehl, 261 N.Y.S. 164, 145 Misc. 907—Traub Amusement Co. v. Macker, 215 N.Y.S. 397, 127 Misc. 335.

Pa.—Erdman v. Mitchell, 56 A. 327, 207 Pa. 79, 99 Am.S.R. 783, 63 L.R.A. 534—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay.L.J. 15—Stevens v. West Philadelphia Youth Civic League, 34 Pa.Dist. & Co. 612.

Civil liability of conspirators see Conspiracy §§ 10–15.

Acts in furtherance of illegal purpose

When purpose of combination is illegal every act in furtherance thereof is illegal, although act itself may be innocent, as respects right to injunction.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.

Employee's refusal to leave premises

(1) The persistent refusal of an employee who has been discharged, with or without cause, to leave the premises and take his personal goods may be the subject of injunctive relief.—Marshall v. Matthews, 100 S.E. 103, 149 Ga. 370.

(2) Where employer discharged employee, who continued to occupy a house furnished for use in connection with his employment, employer was entitled to an injunction notwithstanding employee alleged that he was discharged contrary to the terms of contract of employment.—Pita v. Whitney, 10 S.E.2d 851, 190 Ga. 810.

Aiding trespassers

Decree enjoining labor unions aiding or abetting persons withholding employees' houses of nonunion coal mine operators was held proper; such conduct constituting a trespass.—International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., C.C.A.W.Va., 18 F.2d 839, certiorari denied International Organization, United Mine Workers of America v. Carbon Fuel Co., 48 S.Ct. 31, 275 U.S. 536, 72 L.Ed. 413.

58. Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.

59. N.Y.—J. I. Hass Co. v. McNamara, 21 N.Y.S.2d 441—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y.S.2d 589.

60. N.Y.—Moran v. Lasette, 223 N.Y.S. 283, 221 App.Div. 118.

61. N.Y.—Rentner v. Sigman, 216 N.Y.S. 79, 126 Misc. 781, reversed on other grounds 215 N.Y.S. 323, 216 App.Div. 407.

62. N.Y.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App.Div. 856, motion denied 175 N.E. 314, 255 N.Y. 564—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819.

63. U.S.—United Chain Theatres v. Philadelphia Moving Picture Machine Operators Union, Local No. 307, D.C.Pa., 50 F.2d 189.

N.Y.—Stillwell Theatre v. Kaplan, 182 N.E. 63, 259 N.Y. 405, 84 A.L.R. 6, reversing 255 N.Y.S. 715, 235 App.Div. 738, which affirmed 249 N.Y.S. 122, 140 Misc. 142, and motions denied 184 N.E. 93, 260 N.Y. 563, 84 A.L.R. 6, certiorari denied 53 S.Ct. 397, 288 U.S. 606, 77 L.Ed. 981.

64. U.S.—United Chain Theatres v. Philadelphia Moving Picture Machine Operators Union, Local No. 307, D.C.Pa., 50 F.2d 189.

Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.

N.J.—Kingston Trap Rock Co. v. International Union of Operating Engineers, Local No. 825, 825-A and 825-B, 19 A.2d 661, 129 N.J.Eq. 570—Dora Lee Dress Co. v. International Ladies' Garment Workers Union Local No. 85, 19 A.2d 659, 129 N.J.Eq. 368, reversing 14 A.2d 46, 127 N.J.Eq. 564.

N.Y.—Stillwell Theatre v. Kaplan, 182 N.E. 63, 259 N.Y. 405, 84 A.L.R. 6, reversing 255 N.Y.S. 715, 235 App.Div. 738, which affirmed 249 N.Y.S. 122, 140 Misc. 142, and motions denied 184 N.E. 93, 260 N.Y. 563, 84 A.L.R. 6, certiorari denied 53 S.Ct. 397, 288 U.S. 606, 77 L.Ed. 981.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467.

65. D.C.—Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, 23 F.2d 743, 57 App.D.C. 322, certiorari denied 48 S.Ct. 324, 276 U.S. 631, 72 L.Ed. 741.

N.Y.—W. F. Const. Corporation v. Hanson, 293 N.Y.S. 170, 250 App.Div. 727.

66. D.C.—Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, 23 F.2d 743, 57 App.D.C. 322, certiorari denied 48 S.Ct. 324, 276 U.S. 631, 72 L.Ed. 741.

67. U.S.—El Paso Electric Co. v. Elliott, D.C.Tex., 15 F.Supp. 81, reversed on other grounds, C.C.A., Elliott v. El Paso Electric Co., 88 F.2d 505, certiorari denied El Paso Electric Co. v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363, and Perrin v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363.

N.Y.—Lifschitz v. Straughn, 27 N.Y.S.2d 193, 261 App.Div. 757, appeal denied 28 N.Y.S.2d 741, 262 App.

by injunction the bargaining power of workmen merely because they are organized in a union,[68] but, on the other hand, the right of employees to collective bargaining by representatives of their own choosing is a right of property which may be protected by injunction.[69] Competition for work being a lawful activity, whether the competing groups are unions or unions and individuals, a court of equity may not interfere by restraining the use of any lawful form of concerted action used in the struggle,[70] and the fact that employees suing a labor union for injunction against interference with plaintiffs' employment relations have established their own labor organization to bargain collectively with their employer does not render defendant's attempt to unionize plaintiffs improper so as to entitle plaintiffs to the injunction.[71] One labor union may not have the protection of equity against the lawful competitive activities of a rival union,[72] and a group of employees is not entitled to equitable protection from injury as a result of a true jurisdictional dispute between rival unions.[73]

Unless prevented by some valid law or by an existing contract, employers may discharge and hire employees at will, and discriminate against union men or against members of any particular union, and their conduct in so doing affords no ground for injunctive relief.[74]

The basis of permissible action by the court in labor disputes is the probability of threatened and unjustified interference with the rights of plaintiff,[75] even where the public has an interest in the outcome.[76] Acts of defendant for the purpose of inducing lawful action on the part of plaintiff's employees may be enjoined in so far as they involve improper acts,[77] such as trespass on plaintiff's prop-

Div. 849, reargument denied 29 N.Y.S.2d 725, 262 App.Div. 891.

68. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.

69. N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 960, 173 Misc. 911, reversed on other grounds 20 N.Y.S.2d 306.

70. Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

N.Y.—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 170 N.Y. 315, 63 N.E. 369, 88 Am.S.R. 648, 58 L.R.A. 135, affirming 65 N.Y.S. 946, 53 App.Div. 227, 31 Civ.Proc. 145.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467.

Dissemination of information

(1) The right of former employees to convey truthful information of their disputes with their employer to the public is proper and legal and will not be enjoined.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 128 N.J.Eq. 450—Perfect Laundry Co. v. Marsh, 186 A. 470, 120 N.J.Eq. 508, reversed on other grounds 191 A. 774, 121 N.J.Eq. 588.

(2) An employer which had no dispute with its employees but which refused to enter into contract with union was not entitled to injunction to restrain union from distributing circulars advertising fact that employer's beverages were nonunion made on theory that distribution was unwarranted and therefore illegal.—E. L. Kerns Co. v. Landgraf, 16 A.2d 623, 128 N.J.Eq. 441, 131 A.L.R. 1063, reversing 17 A.2d 479, 128 N.J.Eq. 520.

(3) The court should not enjoin a labor union from presenting its side of controversy with an employer to public by means of placards or circulars, unless language thereof is clearly false and used deceitfully; and placards stating that restaurant was unfair to union were not objectionable in this respect, even though reference to law of state was perhaps erroneous. So the mere fact that statements appearing on signs and handbills carried by agents of labor union in vicinity of employer's restaurant were false and libelous did not entitle employer to restrain the agents' activity.—John R. Thompson Co. v. Delicatessen and Cafeteria Workers Union, Local 410, 8 A.2d 130, 126 N.J.Eq. 119.

(4) A labor organization will not be enjoined from expressing freely in a radio broadcast its honest opinion as to the fairness or unfairness of the attitude of an employer toward organized labor.—Lietzman v. Radio Broadcasting Station W. C. F. L., 282 Ill.App. 203.

71. Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

N.Y.—National Protective Ass'n of Steam Fitters & Helpers, 63 N.E. 369, 170 N.Y. 315, 88 Am.S.R. 648, 58 L.R.A. 135, affirming 65 N.Y.S. 946, 53 App.Div. 227, 31 N.Y.Civ. Proc. 145.

72. Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

N.Y.—American Guild of Musical Artists v. American Federation of Musicians, 23 N.Y.S.2d 947.

73. Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

74. N.Y.—Sherman v. Abeles, 193 N.E. 241, 265 N.Y. 383, 95 A.L.R. 1384, reversing 269 N.Y.S. 864, 241 App.Div. 676, affirming 269 N.Y.S. 849, 150 Misc. 497.

Rights of employer with respect to employment and discharge of employees and conduct of his business generally see the C.J.S. title Master and Servant, § 5, also 63 C.J. p 658 note 50—p 659 note 54.

75. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

76. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.

77. N.J.—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586.

N.Y.—R. A. Freed & Co. v. Doe, 278 N.Y.S. 63, 154 Misc. 644, affirmed 283 N.Y.S. 186—Mutual Biscuit Co. v. Rudisch, 34 N.Y.S.2d 949.

erty[78] or injury thereto,[79] or malicious falsehood and deceit;[80] and the fact that a labor union's acts may have constituted a criminal offense does not preclude plaintiff from enjoining the union from interfering with its business by the commission of those acts.[81] The courts must exercise their full powers against the threatened use of force or fraud to destroy the privilege of freedom of contract.[82] So, where workmen seeking betterment of working conditions depart from the bounds of peaceful persuasion and resort to acts of violence, courts are authorized and required to enjoin acts of violence or acts which amount to physical intimidation,[83] but an injunction should not be granted because of isolated instances of violence and intimidation where there is no indication that such acts will be repeated.[84] A court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from defendant's conduct in the past.[85] In the absence of statute limiting the jurisdiction of the court in such cases, a party injured in property rights by an unlawful combination interfering with the right of nonunion men or their employers to engage in interstate commerce is entitled to injunctive relief.[86] An injunction restraining a labor union and its members from

78. U.S.—Coeur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

79. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.

80. N.J.—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586.
N.Y.—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188, reversing 27 N.Y.S.2d 883, 262 App. Div. 769, reversing 24 N.Y.S.2d 923, appeal granted and question certified 29 N.Y.S.2d 718, 262 App. Div. 862—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.

81. U.S.—Consolidated Steel & Wire Co. v. Murray, C.C.Ohio, 80 F. 811.
Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S. Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U. S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

82. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—Wilner v. Bless, 243 N.Y. 544, 154 N.E. 598, affirming 214 N.Y.S. 939, 216 App.Div. 710.

83. U.S.—International Organization, United Mine Workers of America, v. Leevale Coal Co., C.C. A.W.Va., 285 F. 32—Reinecke Coal Min. Co. v. Wood, C.C.Ky., 112 F. 477—Cœur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.
Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L. Ed. 1525.
Mass.—New England Wood Heel Co. v. Nolan, 167 N.E. 323, 268 Mass. 191, 66 A.L.R. 1079.
N.J.—Jersey City Printing Co. v. Cassidy, 53 A. 230, 63 N.J.Eq. 759—Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey, Newark Local, Ch., 193 A. 806.
N.Y.—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188, reversing 27 N.Y.S.2d 883, 262 App. Div. 769, reversing 24 N.Y.S.2d 923, appeal granted and question certified 29 N.Y.S.2d 718, 262 App. Div. 862—Wise Shoe Co. v. Lowenthal, 194 N.E. 749, 266 N.Y. 264, modifying 272 N.Y.S. 612, 242 App. Div. 660—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830—Master Horseshoers' Protective Ass'n v. Quinlivan, 82 N.Y.S. 288, 83 App.Div. 459—Beattie v. Callanan, 73 N.Y.S. 518, 67 App. Div. 14—Mlle. Reif, Inc. v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247—R. A. Freed & Co. v. Doe, 278 N.Y.S. 68, 154 Misc. 644, affirmed 283 N.Y.S. 186—L. Daitch & Co. v. Retail Grocery & Dairy Clerks Union of Greater New York, 221 N.Y.S. 446, 129 Misc. 343.
Pa.—Kirmse v. Adler, 166 A. 566, 311 Pa. 78—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745—Mische v. Kaminski, 193 A. 410, 127 Pa.Super. 66.

Acts of members as binding union

Acts committed by the individual defendants, pursuant to a common scheme known to many to break up plaintiff's business or unionize their shops, were held sufficient to bind defendant union, of which individual defendants were officers and members.—Altman v. Schlesinger, 198 N. Y.S. 128, 204 App.Div. 513.

Acts of union

In action by employer to enjoin labor organization and members thereof from coercing and intimidating employees and from enticing and attempting to persuade employer's customers not to deal with employer or the employees, judgment granting injunction was affirmed by an equally divided court.—Carpenter Baking Co. v. Bakery Sales Drivers Local Union No. 344, A. F. of L., 299 N.W. 30, 238 Wis. 367, rehearing denied 300 N.W. 225, 238 Wis. 367, certiorari denied Bakery Sales Drivers Local Union No. 344, (A. F. of L.) v. Carpenter Baking Co., 62 S.Ct. 904, 315 U.S. 817, 86 L.Ed. 1215.

84. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

85. U.S.—National Labor Relations Board v. Sunbeam Electric Mfg. Co., C.C.A., 133 F.2d 856.

86. U.S.—Æolian Co. v. Fischer, C. C.A.N.Y., 40 F.2d 189, reversing, D. C., 35 F.2d 34.

interfering with property and property rights will not be granted in an action by an employer who precipitated the alleged wrongful acts of the union by his conduct in violating a contract with the union, locking out employees, and wrongfully terminating the contract.[87]

Although violence and intimidation have accompanied past picketing, a labor union and its members should not be prohibited from doing acts which could be done peacefully without picketing,[88] and they should not be enjoined from peaceable discussion away from the situs of former violence,[89] or from maintaining inoffensive observers near the employer's premises.[90] If, however, defendant union puts in motion a policy which its members deem to be an invitation or license to injure persons and property, it cannot, in equity, claim that there can be a severance of the lawful acts from the unlawful ones, and thus, by disclaiming an illegal purpose, take advantage of illegal acts.[91]

The court will not enjoin arbitration proceedings properly instituted under a collective bargaining agreement.[92]

Combinations of employers. It has been held that a court of equity has no jurisdiction to enjoin the officers of a company whose workmen have struck from continuing a combination among themselves and with other employers not to hire them in order that the strikers may be forced to resume work for the company on its own terms.[93] On the other hand, it seems that a combination of employers to prevent the workmen of one of their number, who are on a strike, from obtaining any employment except from their former employer, by molesting, intimidating, or annoying other employers, who would, except for such acts, give employment to the striking employees, would constitute an unlawful conspiracy, which should be enjoined unless the more or less definite amount of damages suffered and the pecuniary responsibility of the members of the combination would relegate the parties injured to a court of law.[94] A seaman who has not sought or been refused employment is not entitled to restrain associations of shipowners from compelling all seamen desiring employment to register.[95]

(b) Breach of Contract

The breach of collective labor agreements, including agreements for a closed shop and agreements relating to seniority rights, will be enjoined under circumstances justifying the interposition of equity.

In the absence of statutes adversely affecting the right, as discussed infra subdivision b (2) of this section, as long as a collective labor agreement continues in force, it is the duty of the court in a proper case to enjoin any breach of it by either side.[96] Thus, where there is no adequate remedy at law and the damages are irreparable, a labor union is entitled to enjoin a threatened breach of a valid agreement made with an employer,[97] such as an agreement not to contract with other manufacturers for the manufacture of the employer's prod-

87. Wis.—David Adler & Sons Co. v. Mag'lio, 228 N.W. 123, 200 Wis. 153, 66 A.L.R. 1085.

88. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal.2d 676.

Injunction against picketing see infra § 143.

89. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, supra.

90. N.J.—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586.

91. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U. S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

92. N.Y.—President Self Service v. Affiliated Restaurateurs, 21 N.E.2d 188, 280 N.Y. 354, reversing 9 N.Y. S.2d 585, 256 App.Div. 907, motion denied 21 N.E.2d 693, 280 N.Y. 806.

93. Mass.—Worthington v. Waring, 32 N.E. 744, 157 Mass. 421, 34 Am. S.R. 294, 20 L.R.A. 342.

Right of employers to organize for their own personal benefit see the C.J.S. title Masters' and Employers' Associations § 2, also 39 C.J. p. 1382 notes 8, 9.

94. N.J.—Atkins v. W. A. Fletcher Co., 55 A. 1074, 65 N.J.Eq. 658.

95. U.S.—Street v. Shipowners' Ass'n of Pacific Coast, C.C.A.Cal., 299 F. 5, certiorari denied 45 S. Ct. 95, 266 U.S. 611, 69 L.Ed. 467.

96. Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236.

N.Y.—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y.S.2d 589.

Ohio.—Leveranz v. Cleveland Home Brewery Co., 24 Ohio N.P.,N.S., 193.

Pa.—Dorrington v. Manning, Com.Pl., 32 Luz.Leg.Reg. 417.

Restraining breach of contract in general see supra § 80.

97. La.—Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 So.2d 606, 201 La. 749.

N.Y.—Wasserstein v. Beim, 294 N.Y. S. 439, 163 Misc. 160.

Ohio.—Leveranz v. Cleveland Home Brewery Co., 24 Ohio N.P.,N.S., 193.

Agreement not to move factory

An employer's agreement with a workers' union not to move his factory outside the city during the life of the agreement would authorize the court to enjoin the employer from pursuing that same business at any other place, even though it might not, as contended by employer, authorize the court to require the employer to move an allegedly unprofitable business back to city after a move had been made.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

ucts,[98] an agreement fixing the scale of wages to be paid,[99] or an agreement that there shall be no lockout of employees,[1] although a lockout will not be enjoined if the agreement was essentially breached by the union, or if it did not prohibit a lockout;[2] and an injunction will not lie to prevent an employer from violating a wage scale agreement which was without mutuality of obligation and remedy.[3] While it has been held that the breach of a contract to employ only members of a certain union will not be enjoined,[4] modern authorities agree that an employer may be restrained from violating the terms of such a contract when there is no intent thereby to injure the members of other unions or to contravene public interests.[5] Seniority rights given under a collective bargaining contract between employers and employees are such property rights as will be protected by injunction, according to one view,[6] particularly where the employees are not undertaking to require the employer to retain them in his service, but only to have him recognize their seniority rights during such time as they might remain in his service,[7] but it has been held that members of a labor organization are not entitled to an injunction restraining an employer from violating a contract with the organization prescribing working conditions and seniority rights of employees,[8] particularly where the contract does not require the employer to employ such members.[9] Members of one labor organization are not entitled

98. Ind.—Janalene, Inc., v. Burnett, 41 N.E.2d 942, 220 Ind. 253.

99. N.Y.—Engelking v. Independent Wet Wash Co., 254 N.Y.S. 87, 142 Misc. 510.

Ohio.—Leveranz v. Cleveland Home Brewing Co., 24 Ohio N.P.,N.S., 193.

1. N.Y.—Goldman v. Cohen, 227 N.Y.S. 311, 222 App.Div. 631.

2. N.Y.—Moran v. Lasette, 223 N.Y.S. 283, 221 App.Div. 118.

3. Iowa.—Wilson v. Airline Coal Co., 246 N.W. 753, 215 Iowa 855.

Mutuality of remedy

Where labor union has power, through disciplinary proceedings, to enforce compliance by its members with its contracts, there is a "mutuality of remedy" for enforcement of contract between union and employer so as to authorize a court of equity to enjoin a breach by either party.—Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 So.2d 606, 201 La. 749.

4. Mich.—Schwartz v. Cigar Makers International Union, 189 N.W. 55, 219 Mich. 589.

32 C.J. p 199 note 92.

Legality of contract see Contracts § 267.

Refusal of preliminary restraint held warranted

N.J.—Upholsters' Carpet & Linoleum Mechanics' International Union, Local No. 76, New Jersey Section, v. Essex Reed & Fibre Co., 174 A. 207, 12 N.J.Misc. 637.

5. Cal.—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App.2d 642.

Miss.—Mississippi Theatres Corporation v. Hattiesburg Local Union No. 615, 164 So. 887, 174 Miss. 439.

N.Y.—Murphy v. Ralph, 299 N.Y.S. 270, 165 Misc. 335—Ribner v. Racso Butter & Egg Co., 238 N.Y.S. 132, 135 Misc. 616.

Pa.—Dorrington v. Manning, Com. Pl., 32 Luz.Leg.Reg. 417.

Contract held not for personal service, as respects right to enforce agreement by injunction.—Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, Tex.Civ.App., 48 S.W.2d 1033, error dismissed.

Remedy at law held inadequate as respects right to injunction.—Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, supra.

6. Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.

Ill.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill. App. 298.

Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 533.

N.Y.—Bucko v. Murray, 11 N.Y.S.2d 402, 170 Misc. 902, affirmed 16 N.Y.S.2d 537, 258 App.Div. 867, appeal denied 17 N.Y.S.2d 866, 258 App.Div. 943, affirmed 28 N.E.2d 35, 283 N.Y. 634.

W.Va.—Gleason v. Thomas, 186 S.E. 304, 117 W.Va. 550.

Proceedings before adjustment board

(1) Where machinist before labor union had requested a rehearing had no notice of union's National Railroad Adjustment Board proceedings against railroad for interpretation of employment contract as to machinist's seniority, and prior thereto machinist had invoked court's jurisdiction to restrain interference with his seniority status, machinist was not a party to the board proceedings and was entitled to maintain the injunction suit.—Watson v. Missouri-Kansas-Texas R. Co., of Texas, Tex.Civ.App., 173 S.W.2d 357.

(2) Award of National Railroad Adjustment Board, entered into as result of dispute arising over interpretation of schedule of regulations for government of switch tenders by which switch tender who was not party to proceedings, and of which he received no notice, was deprived of his seniority and hence precluded from continuing work, was held violative of due process, and hence authorized injunction to restrain enforcement of decree.—Nord v. Griffin, C.C.A.Ill., 86 F.2d 481, certiorari denied 57 S.Ct. 612, 300 U.S. 673, 81 L.Ed. 879.

Circumstances not warranting relief

In action by union members for damages from breach of agreement between union and corporate employer concerning seniority rights, and to enjoin further breach, temporary injunction would not be granted where primary issue, whether plaintiffs' seniority should be determined by length of service with corporate employers absorbed by defendant employer or by length of service with defendant employer and length of membership in union, depended on interpretation of arbitration award referring to "usual rules" of seniority, which were not described or identified.—Dobkowski v. Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, 1 N.Y.S.2d 774, 166 Misc. 277.

7. Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

8. Miss.—Chambers v. Davis, 91 So. 346, 128 Miss. 613, 22 A.L.R. 114.

9. Mich.—Mosshamer v. Wabash Ry. Co., 191 N.W. 210, 221 Mich. 407.

Contract for personal services

Bill by railroad freight brakeman to have court construe contracts respecting seniority rights and to enjoin running of trains manned by men without seniority rights to such runs was properly dismissed as to railroad, since mandatory injunction may not be issued to restrain breach of contract for personal services.—

to restrain an employer from depriving them of seniority rights claimed under an agreement with another labor organization to which the employer was not a party.[10] Under an agreement between a union and an employers' association which, on behalf of its members, agrees to submit disputes thereunder to an impartial chairman, the union is entitled to enforce injunctive relief granted in a common-law arbitration award by appropriate proceedings in equity.[11] A union suing as an unincorporated association for its members may have only such injunctive aid as its members could have.[12] Failure of plaintiff to invoke arbitration under a clause in the agreement providing for arbitration of questions arising in the construction of the agreement will not defeat the right to restrain a clear-cut breach of a fundamental, essential element of the contract.[13]

Breach by an employer of a contract between several employers whereby each agreed to operate his establishment on a nonunion basis will not be enjoined at the suit of other employers where the contract called for liquidated damages.[14]

An employer is entitled to restrain a trade union from carrying out a threat to submit testimony before the state labor relations board regarding unfair labor practices which allegedly occurred prior to an adjustment of a controversy between the employer and the union, where irreparable injury would result to the employer from the expense of defending itself at the hearing before the board and from injury to its business resulting from publicity attending the hearing of the charges,[15] and the filing of an answer to a complaint against the employer before the board does not constitute a waiver of his right to bring the action.[16]

(c) Interference with Contractual Relations

In the absence of statutes affecting the remedy, acts of third persons inducing the breach of contracts affecting labor will be enjoined in a proper case.

Courts of equity will, in proper cases affecting labor organizations or unions, grant protective injunctions where the relief is necessary to the continued preservation and enjoyment of an existing contract between parties having a legal right to make and live under it as against third persons who sustain no relation either to such parties thereto or to the contract itself.[17] So, where a jurisdictional dispute between two unions is involved, an employer of laborers belonging to one union is entitled to restrain officers of another union from interfering with him by coercion of a third person inducing the latter to break his contract with plaintiff;[18] and, where a labor union, because of the refusal of an employer of labor to recognize its association in a formal way, threatens strikes in the establishments of independent contractors who have engaged to do certain work for him, some of whom in consequence deliberately break their contracts, an injunction against the continuance of such acts will be awarded.[19]

Contracts of employment. In the absence of statute adversely affecting the right in the particular case, as discussed infra subdivision b (2) of this section, where a union or a union and others induce or seek to induce an employer, by threats of strikes, to procure the discharge of an employee in breach of a contract of employment, such employee[20] or employer[21] may be entitled to injunctive relief. So it has been frequently held that an injunction will

Ryan v. New York Cent. R. Co., 255 N.W. 365, 267 Mich. 202.

10. Pa.—Polanskey v. Monongahela Ry. Co., 19 A.2d 377, 342 Pa. 188.

11. Pa.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

12. N.Y.—McGrath v. Norman, 223 N.Y.S. 288, 221 App.Div. 804.

13. N.Y.—Engelking v. Independent Wet Wash Co., 254 N.Y.S. 87, 142 Misc. 510.

14. Ill.—American Dental Co. v. Central Dental Laboratory Co., 256 Ill.App. 279.

15. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199.

16. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, supra.

17. Tex.—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ. App., 152 S.W.2d 828, error refused —Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, Civ.App., 138 S.W.2d 223.

32 C.J. p 230 note 32 [a] (1)-(3).

Inducing breach of contract generally see supra § 89.

Implied contract held not to support relief.—Associated Flour Haulers & Warehousemen v. Hoffman, 26 N.E.2d 7, 282 N.Y. 173, reversing 13 N.Y.S.2d 112, 257 App.Div. 935, appeal granted 14 N.Y.S.2d 280, 257 App.Div. 959.

18. U.S.—O'Brien v. Fackenthal, C.C.A.Ohio, 5 F.2d 389.

Restraining secondary boycotts generally see infra § 140 a (2).

19. N.Y.—Beattie v. Callahan, 72 N.Y.S. 518, 67 App.Div. 14—Schlang v. Ladies' Waist Makers' Union Local 25, I. L. G. W. U., 124 N.Y.S. 289, 67 Misc. 221.

20. N.J.—Christiansen v. Local 680 of Milk Drivers and Dairy Employes of New Jersey, 12 A.2d 170, 127 N.J.Eq. 215.

32 C.J. p 230 note 29.

Rule held inapplicable in suit by employee to restrain a labor union of which she was a member from interfering with her employment under a contract between the union and her employer, providing for the discharge of married women employees. —Brisbin v. E. L. Oliver Lodge No. 385 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

21. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, D.C.Ill., 2 F.2d 993, affirmed, C.C.A., International Brotherhood of Electrical Workers, Local

issue on the application of an employer of labor, to prevent a combination of members or officers of a union from carrying into execution an agreement to procure his employees to quit his service in breach of their contracts of employment where the remedy at law would be inadequate,[22] regardless of whether the acts complained of constitute a criminal offense.[23] It is no justification that defendants acted without ill will, but in good faith in pursuance of the provisions of the constitution of the union prohibiting its members from working with nonunion men, the employer not being aware of, or a party to, such provisions;[24] and the fact that defendants acted on behalf of the members of a labor union of which they were officers for the purpose of enforcing a jurisdictional award by some labor board of a certain class of work to the members of such union, rather than to those of any other union, does not justify them in conspiring with others to prevent, by unlawful means, the performance of a contract by defendant.[25] However, the conduct of members of a labor union in urging employees to join such union, even though involving termination of their employment, will not be enjoined as malicious interference with the contract between employer and employee.[26] An injunction will not lie to restrain the publishers of a newspaper from advising and encouraging persons in the employment of others to violate their contract of employment.[27] Where a union has contracted with an employer to supply him with a certain number of employees, the union cannot be enjoined from terminating the services of those furnished and from furnishing others.[28] Where a contract between an employer and employees has been breached by the latter, and the situation is such that equity does not have power to compel the parties to carry out the contract, equity will not enjoin a third person from interfering with it.[29]

An injunction may be granted where the means to procure the breach of contract are mere molestation or annoyance,[30] payment of money or of transportation expenses,[31] threats of the imposition of fine,[32] abusive language and intimidation,[33] or violence or threats of violence;[34] and, where no justification is shown, it is applicable where the method employed to procure the breach of contract is persuasion.[35]

Contracts by employees not to join union; "yellow dog" contracts. Although it is now commonly provided by federal and state statutes that such contracts shall not form the basis for the granting of legal or equitable relief, in the absence of statute it was held that knowingly enticing and persuading employees, under contract with their employer not to join a union, to violate their contract in this regard was unlawful and would be restrained by injunction, where such interference if allowed to continue would ruin his business, and the damages were incapable of ascertainment at law.[36] It was held also that an injunction would be awarded to restrain officers of a union from inducing employees to break a contract, providing that the employees would not join a union, or that, if they did they would immediately withdraw from the service, the purpose of the conspiracy being to keep the employer in ignorance of the identity and number of those breaking their contracts until so many had joined that, by stopping work in a body, they could coerce

Union No. 134, v. Western Union Telegraph Co., 8 F.2d 444.

22. Mass.—Yankee Network v. Gibbs, 3 N.E.2d 228, 295 Mass. 56.
N.Y.—Vail-Ballou Press v. Casey, 212 N.Y.S. 113, 125 Misc. 689—Best Service Wet Wash Laundry Co. v. Dickson, 201 N.Y.S. 173, 121 Misc. 416.
Pa.—Flaccus v. Smith, 48 A. 894, 199 Pa. 128, 85 Am.S.R. 779, 54 L.R.A. 640.
32 C.J. p 194 note 33 [c], p 229 note 18.
Civil action for damages:
For conspiring to cause employees to break contract of employment see Conspiracy § 13.
For malicious interference with contractual relations see the C.J.S. title Torts § 44, also 62 C.J. p 1141 note 68–p 1147 note 88.

23. U.S.—Charleston Dry Dock & Machine Co. v. O'Rourke, D.C.S.C., 274 F. 811.

24. Cal.—Patterson Glass Co. v. Thomas, 183 P. 190, 41 Cal.App. 559.
32 C.J. p 230 note 21.

25. U.S.—Central Metal Products Corp. v. O'Brien, D.C.Ohio, 278 F. 827, appeal dismissed, C.C.A., 284 F. 850.

26. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.

27. N.Y.—Rogers v. Evart, 17 N.Y.S. 264.

28. Mass.—Chinese American Restaurant v. Finigan, 172 N.E. 510, 272 Mass. 360.

29. Ohio.—Lundoff-Bicknell Co. v. Smith, 156 N.E. 243, 24 Ohio App. 294.

30. N.J.—Jersey City Printing Co. v. Cassidy, 53 A. 230, 63 N.J.Eq. 759—Thomson Mach. Co. v. Brown, Ch., 108 A. 116.

31. N.J.—Jersey City Printing Co. v. Cassidy, 53 A. 230, 63 N.J.Eq. 759—Thomson Mach. Co. v. Brown, Ch., 108 A. 116.

32. Mass.—Yankee Network v. Gibbs, 3 N.E.2d 228, 295 Mass. 56.

33. U.S.—Charleston Dry Dock & Machine Co. v. O'Rourke, D.C.S.C., 274 F. 811—Knudsen v. Benn, C.C.Minn., 123 F. 636.
32 C.J. p 230 note 26.

34. U.S.—Kinloch Tel. Co. v. Local Union No. 2 I. B. E. W., C.C.A.Mo., 275 F. 241.
32 C.J. p 230 note 27.

35. U.S.—Kinloch Tel. Co. v. Local Union No. 2 I. B. E. W., supra.
32 C.J. p 230 note 28.

36. U.S.—Gasaway v. Borderland Coal Corp., C.C.A.Ind., 278 F. 56.
Pa.—Flaccus v. Smith, 48 A. 894, 199 Pa. 128, 85 Am.S.R. 779, 54 L.R.A. 640.
32 C.J. p 230 note 30.

the employer and the remaining employees to make an agreement that none but union men should be employed.[37]

Contracts with union. It has been held that an employer is not entitled to an injunction against a labor union on the ground that the acts of the latter would tend to bring about a breach of his contract with another union,[38] and that an attempted persuasion of the public by a labor union not to patronize an employer's business while it employs members of a rival union, by means of fair and true statements that the conduct of the employer is socially objectionable to the union, even though the collateral result may be to make it unprofitable for the employer to go on with his contract will not be restrained as persuasion to break the contract.[39] On the other hand, it has been held that the conduct of one union in inducing another union which was under contract with the employer to join in a combination to force an employer, who did not need or desire the services of members of the first union, either to employ such members or discontinue his business may be enjoined as in furtherance of an unlawful labor objective.[40] In an action brought by the rival union, a labor union will not be enjoined from interfering with employment relations between an employer and a rival union provided it does not resort to unlawful conduct, but illegal acts will be enjoined.[41] So, in the absence of statutes affecting the right, a labor union is entitled to maintain a bill to enjoin another union which has, by solicitation, intimidation, and show of force, sought to cause an employer under contract with plaintiff to repudiate his contracts[42] and to cause members of plaintiff union to repudiate their contracts with the employer, and has induced or coerced the employer to repudiate the contract or notify plaintiff of his intention to do so, plaintiff's remedy at law in such case being inadequate. In such case, specific performance not being asked, no question of mutuality of obligation or remedy is involved, and defendants, who are strangers to the contract between plaintiff and the employer, cannot attack its execution or validity as between the parties.[43]

(2) Statutes Affecting Right to Injunction
- (a) Federal statutes
- (b) State statutes

(a) Federal Statutes
- aa. In general
- bb. The Clayton Act
- cc. The Norris-La Guardia Act
- dd. The National Labor Relations Act
- ee. The Fair Labor Standards Act
- ff. The Railway Labor Act

aa. In General

The violation of rights arising under federal statutes will be restrained in a proper case.

In a proper case, the courts may restrain violations of federal labor laws.[44] In construing the

37. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C 497, Ann.Cas.1918B 461, reversing 214 F. 685, 131 C.C.A. 425—Hitchman Coal & Coke Co. v. Mitchell, C.C.W.Va., 172 F. 963, appeal dismissed 176 F. 549, 100 C.C.A. 137.
32 C.J. p 230 note 31.

38. W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.

39. N.Y.—Stillwell Theatre v. Kaplan, 182 N.E. 62, 259 N.Y. 405, 84 A.L.R. 6, reversing 255 N.Y.S. 715, 235 App.Div. 738, which affirmed 249 N.Y.S. 122, 140 Misc. 142, and motions denied 184 N.E. 93, 260 N.Y. 563, 84 A.L.R. 6, certiorari denied 53 S.Ct. 397, 288 U.S. 606, 77 L.Ed. 981.

40. Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.
N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App. Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649.

41. N.Y.—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819.

42. Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.
N.Y.—Wolchak v. Wiseman, 259 N.Y. S. 225, 145 Misc. 268.
Tex.—Texas Motion Picture and Vitaphone Operators, Union No. 56,-880, v. Galveston Motion Picture Operators, Local No. 305 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, Civ.App., 132 S.W.2d 299.

43. Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.

44. **Suits to enjoin violation of codes approved under National Industrial Recovery Act** prior to declaration of unconstitutionality of act.
U.S.—U. S. v. Houde Engineering Corporation, D.C.N.Y., 9 F.Supp. 836—U. S. v. Whitley, D.C.Ga., 8 F.Supp. 191—Progressive Miners of America Local Union No. 109 v. Peabody Coal Co., D.C.Ill., 7 F. Supp. 340, affirmed, C.C.A., 75 F.2d 460—Western Powder Mfg. Co. v. Interstate Coal Co., D.C.Ill., 5 F. Supp. 619—Stanley v. Peabody Coal Co., D.C.Ill., 5 F.Supp. 612—Purvis v. Bazemore, D.C.Fla., 5 F. Supp. 230—Starring v. Frazier, D. C.Tenn., 4 F.Supp. 818.
Ill.—Auto Mechanics Local 701, International Ass'n of Machinists v. Chicago Automobile Trade Ass'n, 278 Ill.App. 323.
N.J.—Adelman v. Universal Fur Dressing Co., 174 A. 523, 116 N.J. Eq. 511.
N.Y.—Sherman v. Abeles, 193 N.E. 241, 265 N.Y. 383, 95 A.L.R. 1384, reversing 269 N.Y.S. 864, 241 App. Div. 676, affirming 269 N.Y.S. 849, 150 Misc. 497.
Ohio.—Driggs Dairy Farms v. Milk Drivers & Dairy Employees' Local

United States Shipping Act against discrimination by carriers by water, it has been held that, where union laborers, including longshoremen and the like, with the acquiescence of shipping companies, conspired to prevent shipment of the products of plaintiff, an employer of nonunion labor, plaintiff may maintain an injunction to compel the shipping companies and their employees to cease discrimination, as, if the discrimination continued, plaintiff would suffer irreparable damage; and the injunction should extend not only to the shipping companies but to their agents, stevedores, and the like.[45] The power of a federal court to issue injunctions in cases involving labor disputes has been limited by congress in a series of statutes which will be considered in subsequent subdivisions of this section. The power of congress to define and limit the jurisdiction of inferior federal courts by restricting the issuance of injunctions in labor disputes is discussed in Federal Courts § 4 d.

bb. The Clayton Act

The Clayton Act affects the remedy of injunction, not the substantive rights of the parties, and does not confer jurisdiction on the courts but restricts the power of the courts to act in cases in which they have already acquired jurisdiction. The act applies only to cases of disputes contemplated by it, and does not affect the power of equity to grant relief for fraud and deception pursued by a labor union to destroy an employer's rights.

The Clayton Act, 29 U.S.C.A. § 52, the prohibitions of which, as shown infra subdivision b (2) (a) cc (aa) of this section, were further extended by the subsequently enacted provisions of the Norris-La Guardia Act, was intended by congress to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in the promotion of their side of a labor dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. It introduced no new principle into the equity jurisprudence of those courts, but was merely declaratory of what was always the best practice.[46] The statute did not affect the rights of the parties but only the relief which could be accorded them; and it did not purport to confer jurisdiction on the courts, but rather it restricted the power of the courts to act in cases in which they had already acquired jurisdiction.[47] It did not, however, modify or limit the power and the duty of the court to restrain destruction of the employer's property and interference with, and intimidation of, his patrons and the public even though a dispute contemplated by the statute was involved.[48] A dispute is not within the statute unless it involves a controversial discussion between the parties;[49] and the act has no application to a case growing out of a dispute between employers and persons who are neither ex-employees nor seeking employment.[50] Notwithstanding the act, equity will grant relief for fraud and deception pursued by a labor union to destroy an employer's rights,[51] and injunctive relief in case of labor disturbances will not be denied because the acts complained of do not constitute public disorder or threatened violence.[52] Furthermore the act does not prohibit the granting of an injunction forbidding the use of insulting epithets.[53] The words "terms and conditions of employment" as used in the act contemplate such things as hours of labor, wages, classification of employees, sanitary and physical conditions controllable by the employer, opportunities for reasonable redress of grievances, and for bargaining respecting the conditions of employment, whether collectively, as enlightened public sentiment as well as convenience approves, or individually.[54] Within the provision prohibiting injunctions in any case growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property or to a property right, property rights or interests include the right of the employees of a carrier to se-

Union No. 361, 197 N.E. 250, 49 Ohio App. 303.

45. N.Y.—Burgess Bros. Co. v. Stewart, 187 N.Y.S. 873, 114 Misc. 673.

46. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189.

47. U.S.—Moses Taylor Lodge No. 95 of Brotherhood of Railroad Trainmen v. Delaware, L. & W. R. Co., D.C.Pa., 39 F.Supp. 456.

48. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189—Vaughan v. Kansas City Moving Picture Operators' Union, Local No. 170, D.C.Mo., 36 F.2d 78.

32 C.J. p 170 note 49 [c] (4).

49. U.S.—Vaughan v. Kansas City Moving Picture Operators' Union, Local No. 170, supra.

50. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189—International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., C.C.A.W.Va., 18 F.2d 839, certiorari denied International Organization, United Mine Workers of America v. Carbon Fuel Co., 48 S.Ct. 31, 275 U.S. 536, 72 L.Ed. 413—Bittner v. West Virginia-Pittsburgh Coal Co., C.C.A.W. Va., 15 F.2d 652.

32 C.J. p 171 notes 51, 52–p 229 note 18 [c].

51. U.S.—Bittner v. West Virginia-Pittsburgh Coal Co., supra.

52. U.S.—Bittner v. West Virginia-Pittsburgh Coal Co., supra.

53. U.S.—U. S. v. Taliaferro, D.C. Va., 290 F. 214, affirmed, C.C.A., Taliaferro v. U. S., 290 F. 906.

54. U.S.—Vonnegut Machinery Co. v. Toledo Machine & Tool Co., D.C. Ohio, 263 F. 192, reversed on other grounds, C.C.A., 274 F. 66.

32 C.J. p 171 note 53.

lect representatives to confer with their employer[55] and the right to make contracts for the acquisition of property by the rendition of services and the right of an employee to money or other property exchanged or to be exchanged for his services.[56] An injunction may therefore be granted under the statute to restrain intimidation by a railroad to induce the forming of a company union to represent the employees.[57] The Clayton Act does not prevent an injunction restraining a railroad from violating the Railway Labor Act providing for the selection of representatives in labor disputes,[58] or restraining employees and their union from inducing or persuading other employees from continuing in their employment in connection with interstate commerce.[59]

cc. The Norris-La Guardia Act

(aa) In general
(bb) What constitutes a "labor dispute"
(cc) Adequacy of remedy at law
(dd) Substantial and irreparable injury to property
(ee) Resort to local peace officers
(ff) Failure to attempt settlement

(aa) In General

The Norris-La Guardia Act, which was intended to curtail drastically the equity jurisdiction of federal courts in the field of labor disputes, denies to such courts the power to grant an injunction in labor disputes where the requirements of the act have not been met, but does not forbid the granting of injunctions under the conditions set out in the act where there is fraud or violence or where unlawful acts have been threatened.

The Norris-La Guardia Act, 29 U.S.C.A. §§ 101-115, considered as a whole and in its various parts, was intended to curtail drastically the equity jurisdiction of federal courts in the field of labor disputes,[60] and to take the federal courts out of the business of granting injunctions in labor disputes except where violence or fraud is present.[61] Under its terms a federal district court has no jurisdiction to grant an injunction in a labor dispute where the requirements of the act have not been met,[62]

55. U.S.—Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, Tex., 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034, affirming, C.C.A., 33 F.2d 13, affirming, D.C., Brotherhood of Railway and Steamship Clerks v. Texas & N. O. R. Co., 24 F.2d 426, 25 F.2d 873, and 25 F.2d 876, certiorari granted Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608.

56. U.S.—Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, C.C.A.Tex., 33 F.2d 13, affirming, D.C., Brotherhood of Railway and Steamship Clerks v. Texas & N. O. R. Co., 24 F.2d 426, and 25 F.2d 873, 876, and certiorari granted Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

57. U.S.—Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, C.C.A.Tex., 33 F.2d 13, affirming, D.C., Brotherhood of Railway and Steamship Clerks v. Texas & N. O. R. Co., 24 F.2d 426, and 25 F.2d 873, 876, and certiorari granted Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

58. U.S.—Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas & Louisiana, v. Texas & N. O. R. Co., D.C. Tex., 25 F.2d 873, affirmed, C.C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

59. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, D.C.Ill., 2 F.2d 993, affirmed, C.C.A., International Brotherhood of Electrical Workers, Local Union No. 134, v. Western Union Telegraph Co., 8 F.2d 444.

60. U.S.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C.C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union, Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000—Brown v. Coumanis, C.C.A.Ala., 135 F.2d 163—Burlington Mills Corporation v. Textile Workers Union of America, D.C. Va., 44 F.Supp. 699—Keystone Freight Lines v. Pratt Thomas Truck Line, D.C.Okl., 37 F.Supp. 635—U. S. v. Drivers, Chauffeurs and Helpers Local Union No. 639 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.D.C., 32 F.Supp. 594—Wilson & Co. v. Birl, D.C.Pa., 27 F.Supp. 915, affirmed, C.C.A., 105 F.2d 948—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.
D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 287, reversing, D. C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

61. U.S.—Wilson & Co. v. Birl, C.C. A.Pa., 105 F.2d 948, affirming, D. C., 27 F.Supp. 915.

62. U.S.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U. S. 91, 85 L.Ed. 63, reversing, C.C. A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000—Brown v. Coumanis, C.C.A.Ala., 135 F.2d 163—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557—Lee Way Motor Freight v. Keystone Freight Lines, C.C.A.Okl., 126 F.2d 931—Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., C.C.A.Okl., 123 F.2d 262, reversing, D.C., Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., 35 F.Supp. 403—Blank-

and this rule applies even though under the law of the state plaintiff has a cause of action cognizable in equity with the right to injunctive relief.[63] The legislative history of the act demonstrates that it was the purpose of congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act;[64] and the provisions of the Norris-La Guardia Act, as far as they are applicable, displace the provisions of the Clayton Act.[65]

The Norris-La Guardia Act does not establish for employers any new substantive rights or put within the protection of the federal courts all labor disputes even though the conditions of the act are met,[66] nor was it intended to give labor unions the right to interfere by written contract with the enforcement of federal statutes.[67] On the other hand, the Norris-La Guardia Act does not forbid the granting of injunctions in all cases of labor disputes; in fact, it contemplates clearly that injunctions may be granted.[68] Thus an injunction will be granted in a labor dispute in cases involving fraud or violence where it is found that there was substantial and irreparable injury to plaintiff's property, that greater injury will follow the denial than will follow the granting of the relief, and that plaintiff is without adequate remedy at law and without adequate police protection.[69] The purpose of § 9, 29 U.S.C.A. § 109, specifying what the restraining order granted in the case shall include was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, and to confine the injunction to the particular acts complained of and found by the court.[70] Acts of violence and breaches

enship v. Kurfman, C.C.A.Ill., 96 F.2d 450—Grace Co. v. Williams, C.C.A.Mo., 96 F.2d 478, affirming, D.C., 20 F.Supp. 263—U. S. v. American Federation of Musicians, D.C.Ill., 47 F.Supp. 304—Peterson v. Master Plumbers' Ass'n, D.C. Nev., 44 F.Supp. 908—Burlington Mills Corporation v. Textile Workers Union of America, D.C.Va., 44 F.Supp. 699—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, D.C.Colo., 35 F.Supp. 155—Southeastern Motor Lines v. Hoover Truck Co., D. C.Tenn., 34 F.Supp. 390—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D.C.Mo., 29 F.Supp. 15, reversed on other grounds, C.C.A., International Ass'n of Bridge, Structural and Ornamental Iron Workers v. Pauly Jail Bldg. Co., 118 P.2d 615—Rohde v. Dighton, D.C.Mo., 27 F.Supp. 149—Sharp & Dohme v. Storage Warehouse Employees Union, Local No. 18571, D.C.Pa., 24 F.Supp. 701—Oberman & Co. v. United Garment Workers of America, D. C.Mo., 21 F.Supp. 20—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F.Supp. 894—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, appeal dismissed, C.C.A., 99 F.2d 1001—Cole v. Atlanta Terminal Co., D.C.Ga., 15 F.Supp. 131—United Electric Coal Companies v. Rice, D.C.Ill., 9 F.Supp. 635, reversed on other grounds, C.C.A., 80 F.2d 1, certiorari denied Rice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D. C.Mich., 6 F.Supp. 184.

D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 287, reversing, D. C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

63. U.S.—Tri-Plex Shoe Co. v. Cantor, D.C.Pa., 25 F.Supp. 996.

64. U.S.—U. S. v. Hutcheson, Mo., 61 S.Ct. 463, 312 U.S. 219, 85 L. Ed. 788—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C. C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000—Wilson & Co. v. Birl, C.C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619—Grace Co. v. Williams, D.C.Mo., 20 F. Supp. 263, affirmed, C.C.A., 96 F.2d 478.

Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

D.C.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524.

Or.—George B. Wallace Co. v. International Ass'n of Mechanics, Mount Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283.

65. U.S.—Wilson & Co. v. Birl, C. C.A.Pa., 105 F.2d 948, affirming, D. C., 27 F.Supp. 915.

66. U.S.—Brown v. Coumanis, C.C. A.Ala., 135 F.2d 163.

Substantive law created

It has been said, however, that the Norris-La Guardia Act created substantive and not purely procedural law.—Oregon Shipbuilding Corporation v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386.

67. U.S.—Keystone Freight Lines v. Pratt Thomas Truck Line, D.C. Okl., 37 F.Supp. 635.

68. U.S.—Grace Co. v. Williams, C. C.A.Mo., 96 F.2d 478, affirming, D. C., 20 F.Supp. 263.

69. U.S.—Grace Co. v. Williams, supra—Tri-Plex Shoe Co. v. Cantor, D.C.Pa., 25 F.Supp. 996—Lake Charles Stevedores v. Mayo, D.C. La., 20 F.Supp. 698.

70. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389.

of the peace in connection with labor disputes, and not the disputes themselves, are enjoinable under the act.[71]

The exceptions which have been left open to injunctive process by the Norris-La Guardia Act may not be treated lightly, but should be viewed restrainedly, as a narrow field of permissive jurisdiction.[72] So, although the act does not place any limitation on the court's authority to enjoin all unlawful acts complained of and found to exist,[73] and injunctions may be granted under the conditions set out in the act where there is fraud or violence[74] or to protect property from willful destruction,[75] an injunction will not be granted against labor unions or officers thereof because of violence in the absence of a showing that the union or officers committed such acts or authorized or ratified them after knowledge thereof.[76] Furthermore expressions of opinion, although inaccurate and even misrepresentative in character, or isolated acts apparently lacking in good faith, or accusations of unfairness against an employer, ordinarily do not constitute fraud so as to authorize an injunction under the exception in the act.[77] A claim of the union that it represented a majority of plaintiff's employees cannot be regarded as fraudulent within the meaning of the act where the employer, before filing the petition for the injunction had recognized the union as the employee's exclusive bargaining agency.[78] The fact that there has been violence in the labor dispute justifies the inference that there will be violence.[79]

To accomplish the purpose of the act, congress enumerated in § 4, 29 U.S.C.A. § 104, various types of conduct as to which jurisdiction to enjoin was taken away, covering a wide field of labor conflict activities.[80] Under the act the peaceful and orderly dissemination of information by persons interested in a labor dispute concerning terms and conditions of employment in an industry or a place of business will not be enjoined in the absence of fraud, breach of the peace, violence, or other unlawful conduct,[81] and an injunction will not be granted to restrain violations of a union's contract with employers,[82] to declare a union's contract with employers to be in full force and effect, requiring specific enforce-

71. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557.

72. U.S.—International Ass'n of Bridge, Structural and Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, reversing, D.C., Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 29 F.Supp. 15.

73. U.S.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F.Supp. 807, vacated on other grounds, C.C.A., International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

Held not unlawful act authorizing relief

Refusal of members of plumbers' and steamfitters' union to perform further labor for plumbing subcontractor because of general contractor's refusal to pay fee for the privilege of installing plumbing equipment in accordance with agreement. —Peterson v. Master Plumbers' Ass'n, D.C.Nev., 44 F.Supp. 908.

74. U.S.—Grace Co. v. Williams, C.C.A.Mo., 96 F.2d 478, affirming, D.C., 20 F.Supp. 263.

Violence in accomplishment of lawful purpose

Even though a labor dispute is involved, the court has jurisdiction to issue an injunction where a union seeks to accomplish a lawful purpose by violence.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971.

75. U.S.—United Electric Coal Companies v. Rice, C.C.A.Ill., 80 F.2d 1, reversing, D.C., 9 F.Supp. 635, and certiorari denied Rice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

76. U.S.—Heintz Mfg. Co. v. Local No. 515 of United Automobile Workers, D.C.Pa., 20 F.Supp. 116.

77. U.S.—International Ass'n of Bridge, Structural and Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, reversing, D.C., Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 29 F.Supp. 15.

78. U.S.—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., supra.

79. U.S.—Tri-Plex Shoe Co. v. Cantor, D.C.Pa., 25 F.Supp. 996.

80. U.S.—Wilson & Co. v. Birl, D.C.Pa., 27 F.Supp. 915, affirmed, C.C.A., 105 F.2d 948.

81. U.S.—Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., C.C.A.O'kl., 123 F.2d 262, reversing, D.C., Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., 35 F. Supp. 403—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D.C.Mo., 29 F.Supp. 15, reversed on other grounds, C.C.A., International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A., 118 F.2d 615—Wilson & Co. v. Birl, D.C.Pa., 27 F.Supp. 915, affirmed, C.C.A., 105 F.2d 948.

Who are "persons interested" within statute

An association of colored persons and its officers seeking to have retail grocery store company adopt policy of employing negro clerks in certain of its stores were "persons interested" in a labor dispute between them and the company within meaning of Norris-La Guardia Act, notwithstanding absence of employer-employee relationship, and that association and its officers were not engaged in the same business as company, or a competing business.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524.

82. U.S.—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, D.C.Colo., 35 F.Supp. 155.

ment thereof, and ordering union officers and members not to restrain or coerce employees to join any particular labor organization,[83] or to compel defendants to refrain from attempting to force any of the employers to sign a closed shop contract.[84] The power of the court under the act to restrain boycotts is treated infra § 140 b, picketing infra § 143 b (1), and strikes infra § 147 b (1). In the enumeration of the various types of conduct as to which jurisdiction to enjoin was taken away, the act is wholly objective. It is not concerned with the purpose for which the acts are done, and makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object.[85] The court cannot enforce a decree in so far as it enjoins trade unions from the exercise of free speech, since the right to free speech in the future cannot be forfeited because of dissociated acts of past violence.[86]

The limitations of the Norris-La Guardia Act on the jurisdiction of the federal courts with respect to the issuance of an injunction in a controversy involving a labor dispute are not affected by the fact that a federal receivership is involved,[87] by the fact that defendant labor union may have breached a contract not to press for a closed shop,[88] or by the provisions of the Motor Carrier Act placing on interstate freight carriers certain duties and responsibilities toward the public.[89] The act applies even where injunctions are sought against labor unions charged with violating the Sherman Anti-Trust Act,[90] and accordingly federal courts do not have jurisdiction to grant injunctions in cases growing out of labor disputes merely because alleged violations of the Sherman Anti-Trust Act are involved.[91] Where no labor dispute within the meaning of the statute exists, however, the act does not apply, and an injunction may be granted in a proper case irrespective of compliance with its terms.[92]

Temporary injunction. A court which has authority to decide whether a suit for injunction arises under the Norris-La Guardia Act so as to be within its jurisdiction can, by temporary injunction, preserve the business which is the subject of the litigation until a hearing can be had.[93]

(bb) What Constitutes a "Labor Dispute"

The definition of "labor dispute" in the Norris-La Guardia Act cannot be construed literally but must be read in its entirety, and the term should be broadly and liberally construed to include controversies on which the employer-employee relationship has bearing, but no others.

The term "labor dispute" as used in the Norris-La Guardia Act is defined in § 13 thereof, 29 U.S.C.A. § 113. What ordinarily would be understood by the term is greatly enlarged by the statutory defi-

83. U.S.—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, supra.

84. U.S.—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, supra.

85. U.S.—Wilson & Co. v. Birl, D.C.Pa., 27 F.Supp. 915, affirmed, C.C.A., 105 F.2d 948.

86. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.
Constitutional guaranty of freedom of speech generally see Constitutional Law § 213.

87. U.S.—Anderson v. Bigelow, C.C.A.Nev., 130 F.2d 460, reversing, D.C., In re Virginia & Truckee Ry., 36 F.Supp. 119.

88. U.S.—Wilson & Co. v. Birl, D.C.Pa., 27 F.Supp. 915, affirmed, C.C.A., 105 F.2d 948.

89. U.S.—Lee Way Motor Freight v. Keystone Freight Lines, C.C.A.Okl., 126 F.2d 931—Southeastern Motor Lines v. Hoover Truck Co., D.C.Tenn., 34 F.2d 390.

90. U.S.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C.C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000.

91. U.S.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, supra—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, reversing, D.C., Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 29 F.Supp. 15—U.S. v. American Federation of Musicians, D.C.Ill., 47 F.Supp. 304.

92. U.S.—Columbia River Packers Ass'n v. Hinton, Or., 62 S.Ct. 520, 315 U.S. 143, 86 L.Ed. 750, reversing, C.C.A., Hinton v. Columbia River Packer's Ass'n, 117 F.2d 310, reversing, D.C., 34 F.Supp. 970, certiorari granted 62 S.Ct. 123, 314 U.S. 600, 86 L.Ed. 483—Bowe v. Judson C. Burns, Inc., D.C.Pa., 46 F.Supp. 745, affirmed, C.C.A., 137 F.2d 37—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F.Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.
What constitutes "labor dispute" within act see infra subdivision b (2) (a) cc (bb) of this section.

93. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

nition which cannot be construed literally but which must be read in its entirety although grammatically its parts are independent.[94] The statutory declaration of policy contained in the act does not narrow the definition of a labor dispute as found therein,[95] although the general provisions of the act must be construed in conformity with the public policy thus expressed.[96] The term "labor dispute" as used in the statute must be broadly and liberally construed.[97] By the terms of the statute there may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee,[98] and the act is intended to embrace controversies other than those between labor unions seeking to represent employees and employers, and between persons seeking employment and employers;[99] but the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the act to include controversies on which the employer-employee relationship has no bearing.[1] In the enactment of the statute the attention of con-

94. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 20 F. Supp. 767.
"Labor dispute" defined generally see 27 C.J.S. p 352 note 26.

95. U.S.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C. A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L. Ed. 516.

96. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F. Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U. S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C. C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

97. U.S.—United Electric Coal Companies v. Rice, 80 F.2d 1, reversing, D.C., 9 F.Supp. 635, and certiorari denied Rice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Reasonable interpretation should be applied to the term.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, D.C.N.Y., 41 F.Supp. 727.

98. U.S.—Columbia River Packers Ass'n v. Hinton, Or., 62 S.Ct. 520, 315 U.S. 143, 86 L.Ed. 750, reversing, C.C.A., Hinton v. Columbia River Packer's Ass'n, 117 F.2d 310, reversing, D.C., 34 F.Supp. 970, certiorari granted 62 S.Ct. 123, 314 U.S. 600, 86 L.Ed. 483—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U. S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524—Brown v. Coumanis, C.C.A.Ala., 135 F.2d 163—Lee Way Motor Freight v. Keystone Freight Lines, C.C.A.Okl., 126 F.2d 931—Blankenship v. Kurfman, C.C.A.Ill., 96 F.2d 450—Consolidated Terminal Corporation v. Drivers, Chauffeurs and Helpers Local Union 639, D.C.D.C., 33 F. Supp. 645—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 20 F. Supp. 767—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, appeal dismissed, C.C.A., 99 F.2d 1001—Grace Co. v. Williams, D.C.Mo., 20 F.Supp. 263, affirmed, C.C.A., 96 F.2d 478.
D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 287, reversing, D. C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

However, in an early case it was said that the statute usually applies where the dispute originates directly between employer and employee although it is specifically not so limited.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.

Only indirect interest required

The Norris-La Guardia Act was intended to remove the barriers raised in former decisions of the supreme court of the United States which required the relationship of employer and employee in order to constitute a labor dispute and to provide that only an indirect interest was necessary in order to include a party within the meaning of a labor dispute.—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619.

99. U.S.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L. Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L. Ed. 524.

1. U.S.—Columbia River Packers Ass'n v. Hinton, Or., 62 S.Ct. 520, 315 U.S. 143, 86 L.Ed. 750, reversing, C.C.A., Hinton v. Columbia River Packer's Ass'n, 117 F.2d 310, reversing, D.C., 34 F.Supp. 970, certiorari granted 62 S.Ct. 123, 314 U.S. 600, 86 L.Ed. 483—Converse v. Highway Const. Co. of Ohio, C.C.A. Ohio, 107 F.2d 127—United Electric Coal Companies v. Rice, C.C. A.Ill., 80 F.2d 1, reversing, D.C., 9 F.Supp. 635, and certiorari denied ltice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Bowe v. Judson C. Burns, Inc., D.C.Pa., 46 F. Supp. 745, affirmed, C.C.A., 137 F. 2d 37—Loew's Inc. v. Basson, D. C.N.Y., 46 F.Supp. 66—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, D.C.N.Y., 41 F. Supp. 727—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F. Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 1316 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

Held to constitute or involve "labor dispute" within act

(1) Controversy between association of colored persons and retail grocery store company which was requested by association to adopt policy of employing negro clerks in certain stores, although controversy involved two different **races**.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524.

(2) Dispute between employer and union which demanded that employer recognize union as bargaining agents for employer's employees.
U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871,

gress was focused on disputes affecting the employ- | er-employee relationship, and the act was not in-

reversing, D.C., International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, 25 F.Supp. 870—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F.Supp. 894.

D.C.—Fur Workers Union, Local No. 72 v. Fur Workers Union, Local 21238, 105 F.2d 1, 70 App.D.C. 122, certiorari granted Fur Workers Union No. 21238 v. Fur Workers Union, Local No. 72, 60 S.Ct. 78, 308 U.S. 537, 84 L.Ed. 453, affirmed 60 S.Ct. 292, 308 U.S. 522, 84 L.Ed. 443.

(3) Controversy between labor union and employers growing out of owners' refusal to discharge nonunion worker.—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.

(4) Controversy between union and employers growing out of employer's refusal to reinstate discharged union members.—L. L. Coryell & Son v. Petroleum Workers Union, Local No. 18281, D.C.Minn., 19 F.Supp. 749.

(5) Dispute between labor union and employer growing out of union's demand that the employer require employees to join the union.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C.A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619.

Contra Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 20 F.Supp. 767.

(6) Dispute between employer and defendants who demanded that employer sign a closed shop contract with defendants.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557—Grace Co. v. Williams, C.C.A.Mo., 96 F.2d 478, affirming, D.C., 20 F.Supp. 263—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, D.C.Colo., 35 F.Supp. 155.

(7) Dispute between employer and defendants, who did not represent employer's employees but who demanded that employer sign a closed shop contract with defendants.—Brown v. Coumanis, C.C.A.Ala., 135 F.2d 163.

Contra Lauf v. E. G. Shinner & Co., C.C.A.Wis., 82 F.2d 68.

(8) Dispute between motor carriers who regularly exchanged freight, where defendants terminated traffic relations with plaintiff on being notified by union of declaration of unfairness against plaintiff.—Lee Way Motor Freight v. Keystone Freight Lines, C.C.A.Okl., 126 F.2d 931—Southeastern Motor Lines v. Hoover Truck Co., D.C.Tenn., 34 F.Supp. 390.

(9) Dispute between company and union respecting proposed contract covering additional employees of company.—Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., C.C.A. Okl., 123 F.2d 262, reversing, D.C., Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., 35 F.Supp. 403.

(10) Jurisdictional dispute between unions.

U.S.—Blankenship v. Kurfman, C.C.A.Ill., 96 F.2d 450—U. S. v. Hutcheson, D.C.Mo., 32 F.Supp. 600.

D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 287, reversing, D. C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

(11) Controversy between two groups of clerical workers of terminal company engaged in interstate commerce as to which group represented majority of employees so as to justify issuance to one group of certificate by mediation board to that effect and hence entitle such group to negotiate with employer.—Cole v. Atlanta Terminal Co., D.C.Ga., 15 F. Supp. 131.

(12) Controversy between dairies, co-operative association, and vendors of milk on the one hand and members of milk wagon drivers' union on the other.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C.C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, C.C.A., 108 F.2d 436, certiorari granted Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000.

(13) Action by general contractor to restrain master plumbers' association and local union of plumbers and steamfitters from calling union labor from plumbing work and otherwise delaying performance of contract because of contractor's refusal to pay fee for the privilege of installing plumbing equipment in accordance with agreement.—Peterson v. Master Plumbers' Ass'n, D.C.Nev., 44 F.Supp. 908.

(14) Employer's action to restrain union which had been designated as employees' bargaining agent at election held under the National Labor Relations Act from filing charges before the National Labor Relations Board on employer's refusal to bargain with union pending determination of employer's action to have election declared invalid.—Burlington Mills Corporation v. Textile Workers Union of America, D.C.Va., 44 F.Supp. 699.

(15) Suit to enjoin proceedings before National Labor Relations Board see infra subdivision b (2) (a) dd (bb) of this section.

(16) Suit to restrain defendants individually and as representatives of labor organization from interfering with operation of theater owned by plaintiffs, on ground that plaintiffs operated theater without services of employees.—Rohde v. Dighton, D.C.Mo., 27 F.Supp. 149.

(17) Suit to enjoin labor union members picketing closed mill of employer, claimed to have locked them out, from interfering with shipment to plaintiff of machines purchased from such employer.—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, appeal dismissed, C.C.A., 99 F.2d 1001.

(18) Where labor organization seeking to induce employer of nonunion employees to establish union scale of wages and conditions of employment commenced picketing of place of business of employer's customer.—Consolidated Terminal Corporation v. Drivers, Chauffeurs and Helpers Local Union 639, D.C.D.C., 33 F.Supp. 645.

Held not to constitute or involve "labor dispute" within act

(1) Dispute between rival labor unions which sought to represent employees in collective bargaining, where employers took no part in the difficulty.—Union Premier Food Stores v. Retail Food Clerks and Managers Union, Local No. 1357, C. C.A.Pa., 98 F.2d 821—United Electric Coal Companies v. Rice, C.C.A.Ill., 80 F.2d 1, reversing, D.C., 9 F.Supp. 635, and certiorari denied Rice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

tended to have application to disputes over the sale of commodities.[2] To be a labor dispute under the statute, it must concern either terms or conditions of employment or representation of persons in negotiating terms or conditions of employment.[3] The act includes a case where one employer in an industry seeks an injunction against the employees of another employer in the same industry who are engaged in a labor dispute with their own employer.[4] The act does not concern itself with the background or the motives of the dispute.[5]

(cc) Adequacy of Remedy at Law

An injunction will be denied where an adequate remedy at law exists.

Under the Norris-La Guardia Act, an injunction will be denied where plaintiff has an adequate remedy at law.[6]

(dd) Substantial and Irreparable Injury to Property

An injunction will not be granted under the act in a case involving a labor dispute unless substantial and irreparable injury to plaintiff's property will follow its denial.

An injunction will not be granted under the Norris-La Guardia Act in any case involving or growing out of a labor dispute unless substantial and irreparable injury to plaintiff's property will follow the failure to grant it.[7] Injury to plaintiff's business is injury to his property within the rule,[8] and so is a deprivation of the right to use or dispose of his property.[9]

(ee) Resort to Local Peace Officers

Acts of violence will not be restrained under the act unless the local peace officers have been resorted to and have failed or refused to keep the peace.

Under the Norris-La Guardia Act, acts of violence and breaches of the peace in connection with labor disputes ought not to be relieved against by injunction unless the local authorities whose duty it is to keep the peace have first been resorted to, and have either advised that they could not or would not keep the peace, or have failed to do so after advising that they could and would.[10] The protec-

(2) Action by employees who were engaged in interstate commerce, and who had worked overtime but had not been paid overtime rate required by Fair Labor Standards Act, to recover such pay from employer, and suit by employees to enjoin employer and labor union from conspiring to force employees to withdraw previously instituted action against employer for failure to pay overtime wage rate.—Bowe v. Judson C. Burns, Inc., D.C.Pa., 46 F.Supp. 745, affirmed, C.C.A., 137 F.2d 37.

(3) Where labor union, while negotiating with motion picture film producer, injected demands having no relation to conditions of employment of producer's employees and designed to compel producer to force independent exhibitors licensed by producer to employ only union's members.—Loew's Inc. v. Basson, D.C.N.Y., 46 F.Supp. 66.

(4) Suit by scavenger corporation to enjoin alleged conspiracy between scavenger association and local labor union to prevent corporation's entry into scavenger business in city by preventing corporation from obtaining workmen.—Scavenger Service Corporation v. Courtney, C.C.A. Ill., 85 F.2d 825.

(5) Action under Sherman Act to enjoin labor union from interfering with plaintiff's interstate transportation business on ground that defendants had refused to admit plaintiff's employees to membership in union and had maliciously conspired to restrain movement of merchandise in interstate commerce.—Hunt v. Crumboch, D.C.Pa., 44 F.Supp. 796.

(6) Proceeding by Delaware corporation to restrain local bakers' union in Louisiana from interference with sale and distribution in Louisiana of complainant's bakery products which were shipped in from Texas.—Fehr Baking Co. v. Bakers' Union, D.C.La., 20 F.Supp. 691.

2. U.S.—Columbia River Packers Ass'n v. Hinton, Or., 62 S.Ct. 520, 315 U.S. 143, 86 L.Ed. 750, reversing, C.C.A., Hinton v. Columbia River Packer's Ass'n, 117 F.2d 310, reversing, D.C., 34 F.Supp. 970, certiorari granted 62 S.Ct. 123, 314 U.S. 600, 86 L.Ed. 483.

3. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 20 F. Supp. 767.

4. U.S.—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, appeal dismissed, C. C.A., 99 F.2d 1001.

5. U.S.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524—Lee Way Motor Freight v. Keystone Freight Lines, C.C.A.Okl., 126 F.2d 931—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C. C.A.Mo., 99 F.2d 309, reversing, D. C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U. S. 662, 83 L.Ed. 430.

6. U.S.—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F.Supp. 876.
Adequacy of other remedies as precluding injunctive relief generally see supra § 25.

7. U.S.—Peterson v. Master Plumbers' Ass'n, D.C.Nev., 44 F.Supp. 908.
Existence of irreparable injury as requisite to injunctive relief generally see supra § 23.

Held not injury authorizing relief

(1) Refusal of union laborers to perform further labor on plumbing subcontract unless holder of general contract for construction of building to cost more than two hundred fifty thousand dollars paid a fee of approximately seven hundred dollars for the privilege of installing plumbing equipment in accordance with agreement.—Peterson v. Master Plumbers' Ass'n, supra.

(2) Unlawful detainer.—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F.Supp. 876.

8. U.S.—Tri-Plex Shoe Co. v. Cantor, D.C.Pa., 25 F.Supp. 996.

9. U.S.—Knapp-Monarch Co. v. Anderson, D.C.Ill., 7 F.Supp. 332.

10. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F. 2d 557—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of

tion contemplated by the statute is such protection as would enable the employer to proceed with the work,[11] or protection against injury to physical property;[12] it does not contemplate protection against losses which the exercise of the powers of the police cannot be calculated to prevent, such as loss of business with the employer's customers.[13] The provision that an injunction may be granted only where unlawful acts have been threatened and will be committed unless restrained must be construed with the remaining part of the act and held to refer specifically to the acts of violence which the authority of the executive is calculated to control.[14]

(ff) Failure to Attempt Settlement

An injunction will be denied under the Norris-La Guardia Act where plaintiff failed to make every reasonable effort to settle the dispute either by negotiation, mediation, or voluntary arbitration.

The provision of the Norris-La Guardia Act that no restraining order or injunctive relief shall be granted to any complainant who has failed to make every reasonable effort to settle the dispute either by negotiation, mediation, or voluntary arbitration limits the jurisdiction of the federal courts,[15] and under it an injunction will be denied where plaintiff failed to make every reasonable effort to settle the dispute,[16] even though his conduct in that regard was correct under the National Labor Relations Act.[17] There is, however, no compulsion on plaintiff to settle the differences between the parties or to enter into any agreement, but merely to make a reasonable effort to compose differences,[18] and he is not compelled to avail himself of all three methods, but any one of them will fulfill the requirements.[19] Furthermore, where violence and threats of violence are committed, the provision has no application.[20]

America, C.C.A.Cal., 106 F.2d 871, reversing, D.C., International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, 25 F.Supp. 870—Wilson & Co. v. Birl, C.C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F. Supp. 915—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F.Supp. 876—Heintz Mfg. Co. v. Local No. 515 of United Automobile Workers, D. C.Pa., 20 F.Supp. 116—Knapp-Monarch Co. v. Anderson, D.C.Ill., 7 F. Supp. 332.

Who are "public officers" within statute

(1) The term "public officers," as used in statute, means local law enforcing officers; that is, state, county, or city.—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F. Supp. 894.

(2) It includes only county and city officials, and not the governor of the state.—Laclede Steel Co. v. Newton, D.C.Ill., 6 F.Supp. 625, affirmed, C.C.A., Newton v. Laclede, 80 F.2d 636.

11. U.S.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971.

12. U.S.—Wilson & Co. v. Birl, C.C. A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915.

13. U.S.—Wilson & Co. v. Birl, supra.

14. U.S.—Wilson & Co. v. Birl, supra.

15. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

16. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F. 2d 557—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F. Supp. 876—Cole v. Atlanta Terminal Co., D.C.Ga., 15 F.Supp. 131—United Electric Coal Companies v. Rice, D.C.Ill., 9 F.Supp. 635, reversed on other grounds, C.C.A., 80 F.2d 1, certiorari denied Rice v. United Electric Coal Companies, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.

Statutory requirement held met

U.S.—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D. C.Mo., 29 F.Supp. 15, reversed on other grounds, C.C.A., International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., 118 F.2d 615.

17. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F. 2d 557.

Statute held inapplicable

(1) Statute is inapplicable to the extent that it requires negotiations or dealings with others than employees' authorized representatives, in violation of the National Labor Relations Act.—Grace Co. v. Williams, D.C.Mo., 20 F.Supp. 263, affirmed, C.C.A., 96 F.2d 478.

(2) But inapplicability of such provision would not render entire act inapplicable.—Cupples Co. v. American Federation of Labor, D.C. Mo., 20 F.Supp. 894.

18. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C. A.Ill., 132 F.2d 265.

No duty to make unreasonable efforts

U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

19. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A. Ill., 132 F.2d 265—Mayo v. Dean, C.C.A.La., 82 F.2d 554, affirming, D.C., Dean v. Mayo, 9 F.Supp. 459.

20. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A.Ill., 132 F.2d 265—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971.

dd. The National Labor Relations Act
(aa) In general
(bb) Proceedings of National Labor Relations Board

(aa) In General

The National Labor Relations Act does not give the federal courts power to enjoin in labor disputes greater than that permitted by the Norris-La Guardia Act except in certain instances, and does not give state courts power to enjoin a union from entering into a contract with an employer on the ground that such contract would violate an order of the National Labor Relations Board.

The National Labor Relations Act, 29 U.S.C.A. §§ 151–166, does not give the federal courts power to enjoin in labor disputes greater than that permitted by the Norris-La Guardia Act except in certain instances involving the granting of relief appropriate and incidental to proceedings in the courts concerning orders theretofore made by the National Labor Relations Board.[21] Under the provision authorizing the court to grant a restraining order on application of the board to enforce its order or grant like relief to persons aggrieved by the final orders of the board, the court has no power to grant such relief in cases involving a labor dispute until the board has filed its order;[22] and under the provision giving exclusive supervision and control to the National Labor Relations Board to prevent any person from engaging in any unfair labor practice, a state court has no power to enjoin a union from entering into a contract with an employer concerning wages and employment of employees on the ground that such contract would violate an order of the board.[23] If the National Labor Relations Board has power to act in a dispute between an employer and former employees, the federal district court will not interfere with or hamper its action by granting an injunction no matter how long delayed.[24] Relief by injunction against enforcement of the act will not be granted before proceedings under the act are begun, since no injury is done until then.[25] The mere filing of charges against an employer before the National Labor Relations Board for failure to bargain with the union selected at an election held under the act would not cause damage so as to authorize an injunction restraining the union from filing such charges pending an action to have the election declared invalid, particularly in view of the employer's right to judicial review of any order the board might make on such charges.[26] An employer's right to perform his statutory duty to contract with but one agency as his employees' representative in collective bargaining may be enforced in equity by injunction against interference with the performance thereof without a specific statutory provision to that effect.[27]

(bb) Proceedings of National Labor Relations Board

The federal district court has no jurisdiction to intervene for the sole purpose of depriving the National Labor Relations Board of power to hear and determine a case properly before it, but if the board or its agents are acting beyond the limits of their authority and thereby inflict or threaten to inflict irreparable injury to plaintiff, and plaintiff is without adequate remedy at law, equity may restrain such unlawful conduct.

Since by the terms of the National Labor Relations Act opportunity for judicial review of proceedings of the National Labor Relations Board has been provided in another tribunal, the federal dis-

21. U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871, reversing, D.C., International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, 25 F.Supp. 870—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Burlington Mills Corporation v. Textile Workers Union of America, D.C.Va., 44 F.Supp. 699—Sharp & Dohme v. Storage Warehouse Employees Union, Local No. 18571, D. C.Pa., 24 F.Supp. 701—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D. C.Mo., 20 F.Supp. 767.

When injunction granted

Federal district court could issue restraining order and injunction against unlawful acts of members of union which claimed right to represent employees, where National Labor Relations Board had previously adjudicated question of right to represent employees adversely to such union and had issued unchallenged certificate accordingly.—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.

22. U.S.—Union Premier Food Stores v. Retail Food Clerks and Managers Union, Local No. 1357, C. C.A.Pa., 98 F.2d 821.

23. Tex.—Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees of America, Division 1142, v. McDowell, Civ.App., 150 S.W.2d 866.

24. U.S.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.

25. U.S.—John Blood & Co. v. Madden, D.C.Pa., 15 F.Supp. 779.

No rights waived

Employer does not lose or waive any rights by failing to proceed, in anticipation of action by board, by suit to obtain injunction against enforcement of act.—Jamestown Veneer & Plywood Corporation v. Boland, D.C.N.Y., 15 F.Supp. 28.

26. U.S.—Burlington Mills Corporation v. Textile Workers Union of America, D.C.Va., 44 F.Supp. 699.

27. U.S.—Grace Co. v. Williams, D. C.Mo., 20 F.Supp. 263, affirmed, C. C.A., 96 F.2d 478.

trict court has no jurisdiction to intervene for the sole purpose of depriving the board of power to hear and determine a case properly before it,[28] or to restrain the regional director designated by the board from ordering a consolidated hearing against an employer and another.[29] If the board or its agents are acting beyond the limits of their authority and thereby inflict, or threaten to inflict, great and irreparable injury to plaintiff, and plaintiff is without adequate remedy at law, however, equity may intervene to restrain such unlawful conduct;[30] and under the National Labor Relations Act, the federal district court has jurisdiction of the subject matter of a proceeding by a labor union to restrain the National Labor Relations Board from carrying into effect its direction that an election be held to determine the appropriate representative of the employees for collective bargaining.[31]

Courts will not enjoin the board from holding hearings where there is no claim that the statutory provisions and rules of procedure for such hearings are illegal, or that plaintiff was not accorded ample opportunity to answer the complaint, or that opportunity to introduce evidence will be denied;[32] and the board will not be enjoined from proceeding to hear and pass on a complaint where plaintiff has not exhausted the administrative remedy provided by the act, since such legal remedy is adequate.[33] To warrant an injunction, some irreparable injury resulting to, or threatened against, plaintiff must be shown,[34] but in view of the easy access to the court

28. U.S.—Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 58 S.Ct. 466, 303 U.S. 54, 82 L.Ed. 646, affirming, C.C.A., 91 F.2d 730, certiorari granted 58 S.Ct. 43, 302 U.S. 673, 82 L.Ed. 519—Myers v. Bethlehem Shipbuilding Corporation, 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515—Lyons v. Eagle-Picher Lead Co., C.C.A.Okl., 90 F.2d 321, remanding Eagle-Picher Lead Co. v. Madden, D.C., 15 F.Supp. 407—Oregon Shipbuilding Corporation v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666.

29. U.S.—Sanco Piece Dye Works v. Herrick, D.C.N.Y., 33 F.Supp. 80.

30. U.S.—Precision Castings Co. v. Boland, D.C.N.Y., 13 F.Supp. 877, affirmed, C.C.A., 85 F.2d 15.

31. U.S.—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417—International Brotherhood of Electrical Workers v. National Labor Relations Board, D.C.Mich., 41 F.Supp. 57.

32. U.S.—Myers v. Bethlehem Shipbuilding Corporation, 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515.

33. U.S.—Myers v. Bethlehem Shipbuilding Corporation, 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515—Myers v. Cocheco Woolen Mfg. Co., C.C.A.N.H., 94 F.2d 590, vacating, D.C., Cocheco Woolen Mfg. Co. v. Myers, 16 F.Supp. 788—Newport News Shipbuilding & Dry Dock Co. v. Schauffler, C.C.A.Va., 91 F.2d 730, certiorari granted 58 S.Ct. 43, 302 U.S. 673, 82 L.Ed. 519, affirmed 58 S.Ct. 466, 303 U.S. 54, 82 L.Ed. 646—Beman v. Bendix Products Corporation, C.C.A.Ill., 89 F.2d 661, reversing, D.C., Bendix Products Corporation v. Beman, 14 F.Supp. 58—Elliott v. El Paso Electric Co., C.C.A.Tex., 88 F.2d 505, reversing, D.C., El Paso Electric Co. v. Elliott, 15 F.Supp. 81, certiorari denied El Paso Electric Co. v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363, and Perrin v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Clark v. Lindemann & Hoverson Co., C.C.A.Wis., 88 F.2d 59, certiorari denied Marathon Electric Mfg. Corporation v. Clark, 57 S.Ct. 752, 300 U.S. 681, 81 L.Ed. 885—Beman v. Independent Workers of Clayton Mark & Co., C.C.A.Wis., 88 F.2d 59, certiorari denied Independent Workers of Clayton Mark Co. v. Beman, 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361—Alexander Smith & Sons Carpet Co. v. Herrick, C.C.A.N.Y., 85 F.2d 16—Precision Castings Co. v. Boland, C.C.A.N.Y., 85 F.2d 15, affirming, D.C., 13 F.Supp. 877—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F.2d 12—Sanco Piece Dye Works v. Herrick, D.C.N.Y., 33 F.Supp. 80—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776—Washington Mills Co. v. Schauffler, D.C.N.C., 18 F.Supp. 397—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

Intra-state transactions

If National Labor Relations Board attempts to regulate intra-state transactions, remedy is by statutory appeal from board's order rather than injunction against board's proceedings.—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

34. U.S.—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F.2d 12—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417—Washington Mills Co. v. Schauffler, D.C.N.C., 18 F.Supp. 397—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666—Jamestown Veneer & Plywood Corporation v. Boland, D.C.N.Y., 15 F.Supp. 28—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

D.C.—Heller Bros. Co. v. Lind, 86 F.2d 862, 66 App.D.C. 306, certiorari denied Heller Bros. Co. of Newcomerstown v. Lind, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Brown Shoe Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Bethlehem Shipbuilding Corporation v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Beaver Mills v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Pilgrim v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Lawrence Leather Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Cabot Mfg. Co. v. Madden, 57 S.Ct. 612, 300 U.S. 672, 81 L.Ed. 878, and Hatfield Wire and Cable Co. v. Herrick, 57 S.Ct. 613, 300 U.S. 672, 81 L.Ed. 878.

provided by the act whenever there is believed to be an arbitrary exercise by the board of any of its powers, no irreparable injury will ordinarily result from the procedure authorized by the act.[35] Thus the mere expense and inconvenience of the investigation do not constitute irreparable damage,[36] and neither does the mere certification by the board of representatives selected by the employees for collective bargaining,[37] or the board's issuance of an order directing complainant to reinstate a discharged employee,[38] or the issuance of subpœnas to complainant's employees,[39] or threats of the board to enter complainant's office, inspect its records, and interview its employees,[40] or the threat of damage by imposition of fine and imprisonment for willfully resisting, preventing, impeding, or interfering with members or agents of the board.[41] That plaintiff would be held up as an object of ill will and scorn affords no ground for equitable relief in the absence of a showing that plaintiff will suffer any irreparable loss on this account.[42] So proceedings by the board will not be enjoined where counsel for the board has announced the intention of postponing further action in the controversy until after the filing of a supreme court decision in other litigation, since injury does not follow on inaction.[43] Equity jurisdiction cannot be supported by imputing to the board an intention to exercise its powers in an arbitrary or improper manner,[44] and the fear that the board's anticipated decision would precipitate a strike hindering the successful prosecution of a war in which the nation is engaged will not warrant the intervention of the court.[45] In suits to enjoin the administrative acts of the board, the rules by which the court is limited in granting injunctive relief are strictly observed.[46] Even the fact that the act is inapplicable to plaintiff furnishes no ground for injunction.[47]

In determining the relation of restrictions imposed on the jurisdiction of the court by the Norris-La Guardia Act in a suit to enjoin further proceedings before the board involving the legality of a closed shop agreement with one of two rival labor unions, the court should consider not only strictly legal rights but the attitudes and positions of the embattled unions, the situation of the employer, and the convenience, safety, and well-being of the people of the state.[48] By bringing suit to enjoin fur-

Cloud on title

Suit to restrain trial examiner and attorney for National Labor Relations Board from proceeding in connection with hearing as to whether corporation had engaged in labor practices condemned by National Labor Relations Act on ground of unconstitutionality of statute was not sustainable as suit to remove cloud from corporation's title.—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201.

35. D.C.—Heller Bros. Co. v. Lind, 86 F.2d 862, 66 App.D.C. 306, certiorari denied Heller Bros. Co. of Newcomerstown v. Lind, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Brown Shoe Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Bethlehem Shipbuilding Corporation v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Beaver Mills v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Pilgrim v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, A. C. Lawrence Leather Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Cabot Mfg. Co. v. Madden, 57 S.Ct. 612, 300 U.S. 672, 81 L.Ed. 878, and Hatfield Wire & Cable Co. v. Herrick, 57 S.Ct. 613, 300 U.S. 672, 81 L.Ed. 878.

36. U.S.—Elliott v. El Paso Electric Co., C.C.A.Tex., 88 F.2d 505, reversing, D.C., El Paso Electric Co. v. Elliott, 15 F.Supp. 81, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363 and Perrin v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411—Condenser Corporation of America v. Delaney, D.C.N.J., 18 F.Supp. 611—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

D.C.—Heller Bros. Co. v. Lind, 86 F.2d 862, 66 App.D.C. 306, certiorari denied Heller Bros. Co. of Newcomerston v. Lind, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Brown Shoe Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Bethlehem Shipbuilding Corporation v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Beaver Mills v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Pilgrim v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Lawrence Leather Co. v. Madden, 57 S.Ct. 611, 300 U.S. 672, 81 L.Ed. 878, Cabot Mfg. Co. v. Madden, 57 S.Ct. 612, 300 U.S. 672, 81 L.Ed. 878, and Hatfield Wire and Cable Co. v. Herrick, 57 S.Ct. 613, 300 U.S. 672, 81 L.Ed. 878.

Slowing of essential production by trials and hearings incident to proceedings before National Labor Relations Board on complaint charging employer with unfair labor practices did not warrant intervention of district court to enjoin further proceedings before the board.—Oregon Shipbuilding Corporation v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386.

37. U.S.—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

38. U.S.—Associated Press v. Herrick, supra.

39. U.S.—Associated Press v. Herrick, supra.

40. U.S.—Associated Press v. Herrick, supra.

41. U.S.—Jamestown Veneer & Plywood Corporation v. Boland, D.C.N.Y., 15 F.Supp. 28—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

42. U.S.—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

43. U.S.—Condenser Corporation of America v. Delaney, D.C.N.J., 18 F.Supp. 611.

44. U.S.—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F.2d 12—Oregon Shipbuilding Corporation v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386.

45. U.S.—Oregon Shipbuilding Corporation v. National Labor Relations Board, supra.

46. U.S.—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

47. U.S.—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633.

48. U.S.—Oregon Shipbuilding Cor-

ther proceedings before the board involving the legality of a closed shop agreement with one of two rival labor unions, the employer becomes a party to a labor dispute within the Norris-La Guardia Act.[49]

The board's regional director, attorney, and trial examiner, performing their official duties in good faith, will not be enjoined from conducting hearings on such director's complaint.[50]

ee. The Fair Labor Standards Act

Even though no irreparable injury is shown, violations or threatened violations of the Fair Labor Standards Act will be enjoined at the suit of the Administrator of Wage and Hour Division for such a cause as would move a court of equity to protect employees.

Under the provision of the Fair Labor Standards Act, 29 U.S.C.A. § 217, authorizing an injunction for cause shown to restrain violations of the act, equity will promptly respond to meet a violation or a threatened violation of the act,[51] but will refuse its aid where none is made to appear.[52] An employer whose employees are entitled to the benefit of wage and hour provisions of the act will be enjoined from further violations of such provisions,[53] even though no irreparable injury is shown,[54] the objective of the section of the statute authorizing such injunction being the protection of the employees.[55] The injunction should not be granted unless there is adequate cause shown therefor in accordance with applicable principles of equity,[56] that is, such a cause as would move a court of equity to protect employees against future violations or threats to violate,[57] and the usual equity rules applicable to injunctions are to be regarded.[58] Thus, under the rule that he who seeks equity must do equity, the administrator is not entitled to an injunction until and unless he performs the duties imposed on him by the act.[59] An injunction will not be employed to punish past violations of the act or to establish that violations had occurred, its function being to stop existing violations or prevent further infractions if there is reason to believe that they may occur.[60] Whether an

poration v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386.

49. U.S.—Oregon Shipbuilding Corporation v. National Labor Relations Board, supra.
What constitutes "labor dispute" within Norris-La Guardia Act generally see supra subdivision b (2) (a) cc (bb) of this section.

50. U.S.—El Paso Electric Co. v. Elliott, D.C.Tex., 15 F.Supp. 81, reversed on other grounds, C.C.A., Elliott & El Paso Electric Co., 88 F.2d 505, certiorari denied El Paso Electric Co. v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363, and Perrin v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363.

51. U.S.—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306.

52. U.S.—Walling v. T. Buettner & Co., supra—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 609—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

Reorganization to avoid impact of act

Where there was no evidence of fraud or evasion in formation of partnership among former employees and executive officers of a small manufacturing corporation to avoid the impact on the business of the corporation of the act injunctive relief was not authorized.—Walling v. Plymouth Mfg. Corporation, D.C.Ind., 46 F.Supp. 433, affirmed, C.C.A., 139 F.2d 178, certiorari denied 64 S.Ct. 1144.

53. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirming, D.C., 38 F.Supp. 204, certiorari granted A. B. Kirschbaum Co. v. Fleming, 62 S.Ct. 800, 315 U.S. 792, 86 L.Ed. 1195, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op. v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739—Flemong v. Alderman, D.C.Conn., 51 F.Supp. 800—Walling v. L. J. Mueller Furnace Co., D.C.Wis., 50 F.Supp. 561—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Walling v. James V. Reuter, Inc., D.C.La., 49 F.Supp. 485, reversed on other grounds, C.C.A., James V. Reuter, Inc. v. Walling, 137 F. 2d 315, certiorari granted 64 S.Ct. 205, 320 U.S. 731, 88 L.Ed. —, vacated on other grounds 64 S.Ct. 826—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 649—Walling v. Sanders, D.C.Tenn., 48 F.Supp. 9, affirmed, C.C.A., 136 F.2d 78—Walling v. Higgins, D.C.Pa., 47 F.Supp. 856—Walling v. Allied Messenger Service, D.C.N.Y., 47 F.Supp. 773—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445—Walling v. American Needlecrafts, D.C.Ky., 46 F.Supp. 16—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825.

54. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F. Supp. 808—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.
Existence of irreparable injury as requisite to injunctive relief generally see supra § 23.

55. U.S.—Fleming v. Miller, D.C.Minn., 47 F.Supp. 1004.

56. U.S.—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

57. U.S.—Walling v. T. Buettner & Co., C.C.A.Ill., 133 F.2d 306.

58. D.C.—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

59. **Definition of terms**

Administrator of Wage and Hour Division was not entitled to enjoin alleged violation of Fair Labor Standards Act until establishment of a valid definition of "area of production," which duty is imposed on him by the act.—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900.

60. U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833—Fleming v. Phipps, D.C.Md., 35 F.Supp. 627.

Back wages

(1) It has been held that there is no distinction between jurisdiction to grant injunctive relief with respect to back wages and jurisdiction with respect to future wages, since the employer's obligation under the

injunction should be granted depends on whether the employer in good faith was attempting to comply with the act, and on what he has done to effect compliance since he acquired knowledge of its violation,[61] and it will not be granted where the few violations that occurred after the matter was first called to defendant's attention were due solely to his ignorance, inexperience, and inability as a layman to comprehend the technicalities of the act.[62] So an injunction should not be granted against an employer where there has been a bona fide attempt to comply with the act, and where his attitude has been coöperative and the injunction would have no value in securing future compliance.[63] Nevertheless voluntary compliance is not ground for denying injunctive relief where it was not commenced until after suit was instituted where defendant in his answer and at the trial denied that the operations of his employees were subject to the act.[64] Where past violations have occurred the court may retain jurisdiction until it is satisfied that no injunctive relief will be necessary.[65]

Who may institute proceedings. Employees are not authorized under the Fair Labor Standards Act to bring an action to restrain labor union and employer from violating the provisions of the act,[66] the action being properly instituted and maintained by the Administrator of Wage and Hour Division[67] whose right to bring actions for injunctive relief is exclusive under the act.[68]

ff. The Railway Labor Act

Notwithstanding the Clayton Act and the Norris-La Guardia Act, interference with rights arising under the Railway Labor Act will be restrained in the discretion of the court.

The provisions of the Railway Labor Act, 45 U.S.C.A. § 152, directing the railway to treat with authorized representatives of the employees for the purpose of negotiating labor disputes cannot be rendered nugatory by earlier and more general provisions of the Norris-La Guardia Act specifying what the restraining order granted in a case involving a labor dispute shall include.[69] So interference by a railway employer with the right of collective bargaining on the part of its employees may be restrained in an action brought by the labor organization validly certified by the National Mediation Board under the act as the bargaining representative; and such organization is also entitled to a mandatory injunction requiring the employer to recognize and treat with it as the exclusive representative of the employees under the certification of the board.[70] On application for a mandatory injunction in such case, however, the court may exercise a sound discretion, and refuse the injunction where it should not be issued,[71] as where the certification of the board was based on an unfair election.[72] The provision in the act that employees shall have the right to organize and bargain collectively through representatives of their own choosing creates a property right, interference with which may be enjoined.[73] Neither the Clayton Act nor

Act to pay specified minimum wages is not discharged until payment is completed, and hence an employer's failure to pay is a continuing violation within the purview of the section authorizing injunctions to restrain violations of section relating to minimum wages.—Fleming v. Alderman, D.C.Conn., 51 F.Supp. 800.

(2) To a contrary effect, however, it has been held that the court does not possess power to order payment of back wages as incidental relief.—Fleming v. Miller, D.C.Minn., 47 F. Supp. 1004.

61. U.S.—Walling v. Woodruff, D.C. Ga., 49 F.Supp. 52—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808.

62. U.S.—Walling v. Lacy, D.C.Colo., 51 F.Supp. 1002.

63. U.S.—Walling v. Woodruff, D. C.Ga., 49 F.Supp. 52—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833.

64. U.S.—Walling v. Higgins, D.C. Pa., 47 F.Supp. 856—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808.

65. U.S.—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192.

66. U.S.—Bowe v. Judson C. Burns, Inc., C.C.A.Pa., 137 F.2d 37, affirming, D.C., 46 F.Supp. 745.

67. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825.

68. U.S.—Bowe v. Judson C. Burns, Inc., C.C.A.Pa., 137 F.2d 37, affirming, D.C., 46 F.Supp. 745.

69. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389.

70. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C. C.A.Va., 125 F.2d 853.

Representation by chairman

Members of Order of Railway Conductors are entitled to appear through general chairman thereof as complainants in suit to enjoin railway company from interfering with their selection of representative and compel it to confer with representative selected on matters affecting parties' relations.—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 92.

71. U.S.—McNulty v. National Mediation Board, D.C.N.Y., 18 F.Supp. 494.

72. U.S.—McNulty v. National Mediation Board, supra.

73. U.S.—Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas & Louisiana, v. Texas & N. O. R. Co., D.C. Tex., 25 F.2d 873, affirmed, C.C.A.,

the Norris-La Guardia Act apply to a situation created by a railroad company's alleged interference with the employees in selection of a representative and by the company's alleged abrogation without notice of an agreement with an association of such employees,[74] particularly where the association has invoked the jurisdiction of the National Mediation Board created by the Railway Labor Act.[75] Thus an injunction will lie at the instance of such association after the jurisdiction of the board has been invoked if it appears that the interference is beyond the protection of the board, but the court will refrain from prejudging issues which should properly be passed on in the first instance by the board.[76] The requirement of the statute that, after jurisdiction of the board has been invoked, the parties must give notice of any intended changes of pay, rules, and working conditions confers a property right which can be enforced by mandatory injunction if necessary,[77] and the parties may be restrained from abrogating an agreement or altering the rates of pay, rules, or working conditions in effect when the board assumed jurisdiction until the board has determined what organization was the true representative of the employees.[78] Violations of the statute will not be enjoined at the instance of a labor union whose only interest is that some employees of the railroad are members of a subordinate body affiliated with the union.[79]

(b) State Statutes

aa. In general

bb. Acts modeled on the Clayton Act

cc. Acts modeled on the Norris-La Guardia Act

dd. State Labor Relations Acts

aa. In General

In a proper case the courts may enjoin violations of a state labor law and may issue injunctions where industrial disputes are involved and a state statute authorizes the remedy or does not forbid it under the particular circumstances.

In a proper case the courts may enjoin violations of a state labor law,[80] and breach of a collective bargaining agreement between an employer and a labor organization may be enjoined under statutes so providing.[81] A statute which provides that no agreement between two or more persons concerning an act in furtherance of any trade dispute shall be deemed criminal if such act committed by one person would not be a crime and forbids issuance of any restraining order or injunction with relation thereto, and provides further that nothing therein shall be construed to authorize force or violence, does not preclude the granting of an injunction in an employer's suit to restrain an employee conducting a one-man sit-down strike because of inability of the parties to agree as to the terms of the employment; the mere fact that an employer and an employee are involved in the case does not forbid the issuance of an injunction in the absence of conditions prescribed by the statute.[82] An injunction will not be denied on the ground that the case involves a labor dispute within the meaning of a statute providing for the mediation of such disputes where the object sought to be accomplished by defendant labor union is an unlawful labor objective.[83]

bb. Acts Modeled on the Clayton Act

State statutes modeled on the federal Clayton Act are constitutional and forbid the issuance of injunctions in cases involving disputes between the parties specifically named therein relative to terms and conditions of employment, but not in other cases.

In some states anti-injunction acts modeled on the federal Clayton Act which is discussed supra subdivision b (2) (a) bb of this section have been enacted. Such statutes prohibit injunctions restraining persons from committing certain acts[84]

Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.

74. U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.

75. U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., supra.

76. U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., supra.

77. U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., supra.

78. U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., supra.

79. U.S.—McNulty v. National Mediation Board, D C.N.Y., 18 F.Supp. 494.

80. Wis.—State ex rel. Attorney General v. Noyes, 269 N.W. 710, 223 Wis. 378.

81. Cal.—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App. 2d 642.

82. Okl.—Holland v. Minnehoma Oil & Gas Co., 89 P.2d 764, 184 Okl. 640.

83. Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.

84. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 193 N.E. 112, 358 Ill. 239, 97 A.L.R. 1318, certiorari denied 55 S.Ct. 645, 295 U.S. 734, 79 L.Ed. 1682—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.

N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307.

"The Supreme Court of the United States . . . held that the statute in question as applied by this court

and manifest a legislative intention to legalize the acts mentioned,[85] so that it is error to restrain the doing of the things embraced therein.[86] The power to determine whether the acts complained of were within the terms of the statute is properly left to the courts.[87] The mere fact that acts of violence have been previously committed during a labor dispute would not of itself furnish justification for enjoining legal acts of peaceable persuasion.[88] In the absence of any specific provision in the statute to that effect, the issuance of an injunction to restrain interference with contract relations other than employment contracts is not prohibited,[89] and it is immaterial whether the acts complained of constitute a secondary boycott or whether they are simply illegal acts which justify the injunctive process to protect plaintiff's rights.[90]

Such statutes do not prohibit injunctions in all matters which affect employment,[91] but apply only in cases where employees have a dispute with their own employer relative to terms and conditions of employment,[92] or where similar questions are involved in a labor dispute between several groups of employees and employers.[93] The statutes apply only to cases between the parties specifically named therein, that is, between employers and employees, between employees, and between persons employed and persons seeking employment, and not to actions between employers and labor organizations not employed by the employer or seeking to be employed by him.[94]

cc. Acts Modeled on the Norris-La Guardia Act

(aa) In general

(bb) What constitutes a "labor dispute"

(cc) Resort to local peace officers

(dd) Attempt to settle dispute

(aa) In General

State statutes patterned on the federal Norris-La Guardia Act are constitutional, and are intended to place limitations on the power of courts to grant injunctions in cases involving labor disputes where the requirements of the statute have not been met, but do not forbid the granting of injunctions under the conditions set out in the statutes where there is fraud or violence or where unlawful acts have been threatened.

In a number of states, statutes patterned on the federal Norris-La Guardia Act, which is discussed supra subdivision b (2) (a) cc of this section, have been enacted. Such statutes are constitutional[95]

violated . . . the Constitution of the United States. Truax v. Corrigan, Ariz., 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375. That court, however, has recently reconsidered the entire question of picketing, so-called, in a number of cases. . . . They, in effect reversed the judgment of the supreme court in Truax v. Corrigan, supra, and by inference hold that our statute . . . is constitutional."—Culinary Workers and Bartenders Local Union No. 631 A. F. of L. v. Busy Bee Cafe, 115 P.2d 246, 248, 157 Ariz. 514.

Statute held unconstitutional in form but sustainable as a declaration that certain acts are not tortious.—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 274.

85. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 193 N.E. 112, 358 Ill. 239, 97 A.L.R. 1318, certiorari denied 55 S.Ct. 645, 295 U.S. 734, 79 L.Ed. 1682.

86. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, supra.

87. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, supra.

88. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, supra.

89. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

90. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, supra.

Effect of anti-injunction acts on power of courts to restrain secondary boycotts see infra § 140 b.

91. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago No. 753, supra.

92. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago No. 753, supra—Hendrickson Motor Truck Co. v. International Ass'n of Machinists, Automobile Mechanics Local No. 701, 22 N.E.2d 969, 301 Ill.App. 608.

Held not labor dispute within statute

Ill.—2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 27 N.E.2d 478, 305 Ill.App. 486.

93. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers' Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 479, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

94. Kan.—Bull v. International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators of United States and Canada, Local No. 414, 241 P. 459, 119 Kan. 713.

95. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

Ind.—Local Union No. 26, National

at least in so far as they do not attempt to abridge the jurisdiction of courts guaranteed by the Constitution.[96] The broad purpose of a statute of this character is to declare the public policy of the state with respect to controversies between employers and their employees,[97] to preserve the status quo during labor disputes,[98] to place limitations on the jurisdiction of courts to grant injunctions in such cases,[99] and to stop abuses of the injunctive process which had been employed to discourage unionization.[1] The statute permits of conditions which would have been considered intolerable under the ancient concept of what was an invasion of property rights.[2] Under its terms the state courts are without jurisdiction to grant an injunction in labor disputes where the requirements of the statute have not been met.[3] It was not designed to impair, and does not impair, the inherent power of

Brothers of Operative Potters v. City of Kokomo, 5 N.E.2d 624, 211 Ind. 72, 108 A.L.R. 1111.

N.Y.—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N.Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806.

Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

Provision limiting duration of injunction

The statute restricting injunction in labor dispute cases to six months is not unconstitutional.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N.E.2d 210, 282 N.Y. 804.

96. N.Y.—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744, affirming 8 N.Y.S.2d 819, 255 App.Div. 970, affirming 5 N.Y.S.2d 575, 168 Misc. 224, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706.

Power of legislature to confer or withdraw jurisdiction or judicial power generally see Courts §§ 121–124.

In Washington

The portions of the statute which impose on courts a method of procedure and conditions for injunctive relief which infringe and curtail the judicial power of a constitutional court have been held unconstitutional. Thus the sections which require a finding that the public officers charged with the duty of protecting complainant's property are unable or unwilling to furnish adequate protection and which make the issuance of a restraining or injunctive order dependent on a preliminary negotiation or voluntary arbitration are vicious, since one faced with irreparable injury by invasion of his rights is not required to seek grace or await pleasure of public officers or to negotiate or attempt to arbitrate before issuance of restraining or injunctive order, but has right to seek intervention of equity court.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

97. Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363.

N.J.—Isolantite Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

98. Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146.

99. Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363.

N.Y.—People v. Ribinovich, 13 N.Y.S.2d 135, 171 Misc. 569.

Purpose to prevent granting of remedy lightly or informally

N.Y.—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y.S.2d 589.

1. N.Y.—Coward Shoe v. Retail Shoe Salesmen's Union Local 1115 F. R. C. I. P. A., 31 N.Y.S.2d 781, 177 Misc. 708—La Rose v. Possehl, 282 N.Y.S. 332, 156 Misc. 476.

Or.—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mount Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146.

2. N.Y.—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750.

3. La.—Johnson v. Milk Drivers and Dairy Employees Union, Local No. 854, App., 195 So. 791—Dehan v. Hotel and Restaurant Employees and Beverage Dispensers, Local Union No. 183, App., 159 So. 637.

Minn.—Lichterman v. Laundry and Dry Cleaning Drivers Union, Local No. 131, 283 N.W. 752, 204 Minn. 75, denying rehearing 282 N.W. 689, 204 Minn. 75.

N.Y.—Boro Park Sanitary Live Poultry Market v. Heller, 21 N.E.2d 687, 280 N.Y. 481, affirming 11 N.Y.S.2d 164, 256 App.Div. 588, motion granted 21 N.E.2d 207, 280 N.Y. 705, refusing to answer question certified 12 N.Y.S.2d 762, 257 App.Div. 833—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N.Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806—Lifschitz v. Straughn, 27 N.Y.S.2d 193, 261 App.Div. 757, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 849, reargument denied 29 N.Y.S.2d 725, 262 App.Div. 891—De Neri v. Gene Louis, Inc., 25 N.Y.S.2d 463, 261 App.Div. 920, affirming 21 N.Y.S. 993, 174 Misc. 1000, appeal denied 27 N.Y.S.2d 459, 261 App.Div. 1078, motion denied 35 N.E.2d 940, 286 N.Y. 603, modified on other grounds 42 N.E.2d 602, 288 N.Y. 592—Stalban v. Friedman, 19 N.Y.S.2d 978, 259 App Div. 520, reversing 11 N.Y.S.2d 343, 171 Misc. 106—Holland Laundry v. Lindquist, 16 N.Y.S.2d 140, 173 Misc. 121—Abeles v. Friedman, 14 N.Y.S.2d 253, 171 Misc. 1042—Davega-City Radio v. Randau, 1 N.Y.S.2d 514, 166 Misc. 246—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750—Fromer v. Winokur, 27 N.Y.S.2d 10—Brook-Maid Food Co. v. Goldberg, 24 N.Y.S.2d 572.

Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

Pa.—DeWilde v. Scranton Bldg. Trades and Construction Council, 22 A.2d 897, 343 Pa. 224—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283—Atlantic Refining Co. v. Cohen, 34 Pa.Dist. & Co. 582—Bulkin v. Sacks, 31 Pa.Dist. & Co. 591—Tobin v. Shapiro, Com.

the court to issue injunctions, but was designed merely to regulate the procedure which must be followed to obtain the injunctive relief and to limit the scope of the relief which may be granted,[4] and interference with the conduct of plaintiff's business may be enjoined where there is sufficient compliance with the statute.[5] The essence of the act is not to take away jurisdiction, in the usual meaning of that word, from courts, but to forbid them to issue injunctions of a certain character or unless certain conditions are found to exist.[6] The statute does not deprive the court of the power to enjoin, formerly possessed by it, where a breach of any contract not contrary to public policy has been threatened or committed,[7] provided the other requisite facts are found to exist.[8] The statute does not declare to be either legal or illegal the acts against which an injunction is prohibited,[9] nor does it affect other remedies;[10] it merely denies the particular remedy of injunction in certain cases and restricts it in others.[11] The statute must be read with the rights and claims of the public and of business men in mind, as well as the rights and claims of labor unions.[12]

The restraint imposed by the statute is intended to aid working men in their efforts to reach a plane of bargaining equality with employers by making their combination extend beyond one shop, and so to raise the standard of wages and improve working conditions throughout an entire industry, and it is not intended to leave unions free by the use of these economic weapons to inflict wanton injury on fellow workers and to accomplish the building of a monopoly of labor;[13] nor was the act designed as an instrument to promote and protect strife between rival labor groups or to injure or destroy the good will and business of innocent employers against whom there was no complaint concerning wages or working conditions solely because they refused to take sides with one group as against the other.[14] Its objectives relate solely to industrial disputes.[15] The statute does not deprive the court of jurisdiction to enjoin dangerous, illegal acts which constitute disorderly conduct and breach of the peace,[16] or acts of violence or threatened violence where it was impossible to supply adequate police protection.[17] The fact that an injunction will be difficult to enforce is not controlling in de-

Pl., 45 Dauph.Co. 300—Revetta v. International Chauffeurs, Teamsters and Helpers, Local No. 158, Brounsville, Com.Pl., 5 Fay.L.J. 209.

4. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.
N.J.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A. 2d 796, 130 N.J.Eq. 506—Newark Milk & Cream Co. v. Milk Drivers & Dairy Employees Local No. 680 of Newark, A. F. of L., 19 A.2d 232, 19 N.J.Misc. 468.
N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N. E.2d 210, 282 N.Y. 804—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N. Y.S.2d 771, 259 App.Div. 818—Stalban v. Friedman, 11 N.Y.S.2d 343, 171 Misc. 106, reversed on other grounds 19 N.Y.S.2d 978, 259 App.Div. 520.
Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62—Blanchard v. Golden Age Brewing Co., 63 P. 2d 397, 188 Wash. 396.

5. N.Y.—Falciglia v. Gallagher, 299 N.Y.S. 899, 164 Misc. 838—Royal Wood Products Mfg. Co. v. Doe, 22 N.Y.S.2d 333.

6. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.
Pa.—Main Cleaners & Dyers v. Columbia Super Cleaners, 2 A.2d 750, 332 Pa. 71.

7. N.Y.—F. Everett, Inc., v. Penna, 6 N.Y.S.2d 630, 168 Misc. 589—J. I. Hass Co. v. McNamara, 21 N. Y.S.2d 441—Greater City Master Plumbers Ass'n v. Kahme, 6 N. Y.S.2d 589.

8. N.Y.—Holland Laundry v. Lindquist, 16 N.Y.S.2d 140, 173 Misc. 121—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y.S.2d 589.

9. Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283.

10. Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

11. Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283.

12. N.Y.—Jewish Hospital of Brooklyn v. Doe, 300 N.Y.S. 1111, 252 App.Div. 581—Thompson v. Boekhout, 291 N.Y.S. 572, 249 App.Div. 77, affirmed 7 N.E.2d 674, 273 N. Y. 390.

13. Or.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.

14. N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115 F, R.C.I.P.A., 35 N.Y.S.2d 598, 264 App.Div. 375.

15. Minn.—State v. Cooper, 285 N. W. 903, 205 Minn. 333, 122 A.L.R. 727.
Public nonprofit charitable hospitals were not an "industry" and their employees were not engaged in a single "trade," "craft," or "occupation," within Labor Anti-Injunction Act.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146.

16. N.Y.—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744, affirming 8 N.Y.S.2d 819, 255 App.Div. 970, affirming 5 N.Y.S.2d 575, 168 Misc. 224, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706—Lilly Dache, Inc. v. Rose, 28 N. Y.S.2d 303.

17. N.Y.—Miller v. Gallagher, 28 N. Y.S.2d 606, 176 Misc. 647—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819—Grandview Dairy v. O'Leary, 285 N.Y.S. 841, 158 Misc. 791.
Pa.—Davis v. McGuigan, 36 Pa.Dist. & Co. 554.

termining whether it should be granted.[18] Only unlawful acts, however, may be restrained.[19]

Where no labor dispute within the meaning of the statute exists, the statute does not apply, and an injunction may be granted in a proper case irrespective of compliance with its terms.[20] Furthermore, the statute is inapplicable where a preëxisting dispute has ceased to exist, as where it has been settled by a contract lawfully executed between the employer and legal representative of a majority of the employees.[21]

The statute affects a remedy, and applies to all matters covered by it, whether or not pending in court at the time of its becoming a law,[22] and its enactment was not within the provision of a general statute that the passage or repeal of an act shall not affect any action then pending.[23] It is applicable to an action instituted prior to its enactment, notwithstanding a contention that its application would affect substantive rights.[24]

A provision exempting from the operation of the statute cases involving certain specified classes of labor disputes leaves the equity jurisdiction in such cases exactly as it was prior to the passage of the act,[25] and the courts are free to use their equitable powers in such cases.[26] A provision exempting from the operation of the statute cases involving labor disputes in disregard, breach, or violation of valid subsisting labor agreements between employers and employees' collective bargaining representatives does not permit an employer to terminate or avoid a labor dispute by refusing to recognize or bargain with his disputants and exempt himself from the operation of the statute by entering into an agreement with another association of employees.[27]

(bb) What Constitutes a "Labor Dispute"

The definition of "labor disputes" in state anti-injunction statutes is generally construed broadly and liberally to include controversies on which the employer-employee relationship has bearing, and no others.

The question of what constitutes a labor dispute, even under the statutory definition thereof, admits of no generally applicable and definitive answer,[28] but is governed by the circumstances in the individual case.[29] Some decisions seem to indicate that the statute should receive a literal construction;[30] but other authority holds that in construing the statute for the purpose of determining whether a labor dispute exists, the court must be governed, not by the letter, but by the spirit of the law,[31] and is not precluded from looking at the

18. N.Y.—Miller v. Gallagher, 28 N.Y.S.2d 606, 176 Misc. 647.

19. N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945 and reargument denied 27 N.E.2d 210, 282 N.Y. 804.

20. Mass.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135.
N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115 F, R.C.I.P.A., 35 N.Y.S.2d 598, 264 App.Div. 375—Wishny v. Jones, 8 N.Y.S.2d 2, 169 Misc. 459—Associated Flour Haulers & Warehousemen v. Sullivan, 5 N.Y.S.2d 982, 168 Misc. 315—Mlle. Reif, Inc. v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247—Kraushaar v. Krug, 16 N.Y.S.2d 661.
Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 306, 340 Pa. 382, 132 A.L.R. 1146—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—Dorrington v. Manning, Com.Pl., 32 Luz. Leg.Reg. 417—Stein v. McNeil, Com.Pl., 87 Pittsb.Leg.J. 39.
What constitutes "labor dispute" within statute see infra subdivision b (2) (b) cc (bb) of this section.

21. Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

22. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.
La.—Dehan v. Hotel and Restaurant Employees and Beverage Dispensers, Local Union No. 183, App., 159 So. 637.

23. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.

24. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, supra.
N.Y.—Aberdeen Restaurant Corporation v. Gottfried, 285 N.Y.S. 832, 158 Misc. 785.
Contra Micamold Radio Corporation v. Beedie, 282 N.Y.S. 77, 156 Misc. 390.

25. Pa.—Hagan Ice Cream Co. v. Ice Cream Workers' Union No. 245, 45 Pa.Dist. & Co. 337, 5 Fay.L.J. 147—Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, 37 Pa.Dist. & Co. 337.

26. Pa.—Hagan Ice Cream Co. v. Ice Cream Workers' Union No. 247, 45 Pa.Dist. & Co. 337, 5 Fay.L.J. 147—Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, 37 Pa.Dist. & Co. 337—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay.L.J. 15.

27. Pa.—DeWilde v. Scranton Bldg. Trades and Construction Council, 22 A.2d 897, 343 Pa. 224—Tankin v. Hotel & Restaurant Workers Industrial Union, Local No. 356, C. I. O., 36 Pa.Dist. & Co. 537.

28. N.Y.—Baillis v. Fuchs, 27 N.E.2d 812, 283 N.Y. 133, modifying 16 N.Y.S.2d 724, 258 App.Div. 919, reargument denied 17 N.Y.S.2d 878, 258 App.Div. 965—Petrucci v. Hogan, 27 N.Y.S.2d 718.

29. N.Y.—Baillis v. Fuchs, 27 N.E.2d 812, 283 N.Y. 133, modifying 16 N.Y.S.2d 724, 258 App.Div. 919, reargument denied 17 N.Y.S.2d 878, 358 App.Div. 965—Gips v. Osman, 9 N.Y.S.2d 828, 170 Misc. 53, affirmed 16 N.Y.S.2d 101, 258 App. Div. 789—Petrucci v. Hogan, 27 N.Y.S.2d 718.

30. N.Y.—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App.Div. 818—Petrucci v. Hogan, 27 N.Y.S.2d 718.

31. Or.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Mov-

end sought to be accomplished by defendants;[32] and, as shown supra subdivision b (2) (a) cc (bb) of this section, the latter view, rather than the former, is the one which seems to have been adopted by the federal courts in construing the federal act. The statutory declaration of policy in a labor code does not narrow the definition of a labor dispute as found therein.[33] The definition of "labor dispute" in such statutes is inclusive, not exclusive.[34] It includes all legitimate labor controversies involving all terms and conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[35] A labor dispute may exist between an employer and a labor union, even though there is no controversy between such employer and his own employees,[36] and

ing Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.

Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146, affirming 49 Dauph.Co. 326.

Statute broadly construed

The definition of "labor dispute," within statute, should be given a broad interpretation, consistent with the purposes of the act.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194.

32. Or.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.

33. U.S.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C.A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516.

34. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

35. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, supra.

Minn.—Lichterman v. Laundry and Dry Cleaning Drivers Union Local No. 131, 282 N.W. 689, 204 Minn. 75, rehearing denied 283 N.W. 752, 204 Minn. 75.

N.J.—Kohn v. Local No. 195, Amalgamated Clothing Workers of America, 29 A.2d 141, 132 N.J.Eq. 512.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945 and reargument denied 27 N.E.2d 210, 282 N.Y. 804—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N.Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806—People v. Masiello, 31 N.Y.S.2d 512, 177 Misc. 608—Brayer v. Charton, 37 N.Y.S.2d 326—Bushell v. Zukor, 28 N.Y.S.2d 79—Silver Dollar Bake Shop v. Weissman, 27 N.Y.S.2d 744—Petrucci v. Hogan, 27 N.Y.S.2d 718—Brook-Maid Food Co. v. Goldberg, 24 N.Y.S.2d 572.

Pa.—Revetta v. International Chauffeurs, Teamsters and Helpers, Local No. 158, Brounsville, Com.Pl., 5 Fay.L.J. 209.

Craft viewed as entity

Under statute, workers are to be considered by occupation, that they follow, and to determine whether a labor dispute is involved, question is not to be decided by conditions obtaining within the group of employees of any one firm, but unit to be reckoned with embraces all workers engaged in particular occupation, even though they have different employers, since whole craft or trade is to be viewed as one entity in so far as employees are concerned.—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App. Div. 818.

In Indiana

The statute applies only to actions between employers and employees or between employees and employees and has no application where there is no labor relationship whatever between plaintiffs and defendants; and, where the suit is brought by a proper person, the jurisdiction of the court cannot be attacked on the ground that it was brought in behalf of persons with whom defendants have a labor dispute to circumvent the provisions of the statute, in the absence of evidence that plaintiffs are acting for anyone but themselves.—Muncie Building Trades Council v. Umbarger, 17 N.E.2d 828, 215 Ind. 13.

In Oregon

(1) The rule of the text prevails since the enactment in 1933 of the so-called Oregon Norris-La Guardia Act.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mount Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

(2) This was not the law of this state prior to the 1933 enactment.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, supra.

36. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Buckingham Transp. Co. of Colorado, 118 P.2d 1088, 108 Colo. 419.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945 and reargument denied 27 N.E.2d 210, 282 N.Y. 804—Lifshitz v. Straughn, 27 N.Y.S.2d 193, 261 App.Div. 757, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 849, reargument denied 29 N.Y.S.2d 725, 262 App.Div. 891—Stalban v. Friedman, 19 N.Y.S.2d 978, 259 App.Div. 520, reversing 11 N.Y.S.2d 343, 171 Misc. 106—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App.Div. 818—Fairfield Bar & Restaurant v. Friedman, 14 N.Y.S.2d 709, 172 Misc. 146—Bent Steel Sections v. Doe, 10 N.Y.S.2d 920, 170 Misc. 736—K. & O. Trucking Co. v. Pappas, 28 N.Y.S.2d 82—Petrucci v. Hogan, 27 N.Y.S.2d 718—Brook-Maid Food Co. v. Goldberg, 21 N.Y.S.2d 984—Bergman v. Levenson, 13 N.Y.S.2d 955.

Or.—George B. Wallace Co. v. International Ass'n of Mechanics, Mount Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599—Peak v. McElroy, 33 Pa. Dist. & Co. 556.

Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

However, facts that some of salesmen had been or were members of other unions none of which was engaged in any controversy with sales-

even though the labor relations board has approved an employer's contract with a rival union.[37] It has been held, however, that an employer's refusal to abrogate a collective bargaining contract with a labor union and execute a contract proposed by a rival union did not give rise to a labor dispute within the statute.[38] The number of employees involved is of no significance; a labor dispute may exist regardless of whether the employer hires one worker or a great many;[39] but a controversy on which the employer-employee relationship has no bearing is not a labor dispute within the act.[40] Thus, although

men's employer, which was being picketed by a union which desired to unionize employer's business, and that employer which sought an injunction to restrain picketing had sold its products at some prior time through an agent employing union men, did not present a labor dispute within statute.—S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, Local No. 353, 118 P.2d 962, 11 Wash.2d 262.

37. N.Y.—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750.

38. N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., 35 N.Y.S.2d 598, 264 App.Div. 375.

39. N.Y.—Gips v. Osman, 9 N.Y.S.2d 828, 170 Misc. 53, affirmed 16 N.Y.S.2d 101, 258 App.Div. 789.

40. N.J.—Kohn v. Local No. 195, Amalgamated Clothing Workers of America, 29 A.2d 141, 132 N.J.Eq. 512.

N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649—Baillis v. Fuchs, 27 N.E.2d 812, 283 N.Y. 133, modifying 16 N.Y.S.2d 724, 258 App.Div. 919, reargument denied 17 N.Y.S.2d 878, 258 App.Div. 965—People v. Masiello, 31 N.Y.S.2d 512, 177 Misc. 608—Stolper v. Straughn, 23 N.Y.S.2d 604, 175 Misc. 87—Gips v. Osman, 9 N.Y.S.2d 828, 170 Misc. 53, affirmed 16 N.Y.S.2d 101, 258 App.Div. 789—La Rose v. Possehl, 282 N.Y.S. 332, 156 Misc. 476—Lyons v. Meyerson, 18 N.Y.S.2d 363, affirmed 23 N.Y.S.2d 557, 260 App.Div. 863—Kershnar v. Heller, 14 N.Y.S.2d 595, modified on other grounds 15 N.Y.S.2d 451, 258 App.Div. 751, 804.

Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—Dorrington v. Manning, Com.Pl., 32 Luz.Leg. Reg. 417.

"There can be no labor dispute within the meaning of section 876-a unless there is employment."—Angelos v. Mesevich, 46 N.E.2d 903, 905, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L.Ed. 1724 and motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868, reversed on other grounds 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. ——.

Held to constitute or involve "labor dispute" within statute

(1) Dispute between employer and union seeking to unionize employees.

U.S.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C.A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516.

Ind.—Spickelmier v. Chambers, 47 N.E.2d 189, 113 Ind.App. 470.

N.Y.—Lifshitz v. Straughn, 27 N.Y.S.2d 193, 261 App.Div. 757, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 849, reargument denied 29 N.Y.S.2d 725, 262 App.Div. 891—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App.Div. 818—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

Wis.—Senn v. Tile Layers Protective Union Local No. 5, 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383, affirmed 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.

(2) Controversy between employer and labor union claiming that it, rather than another union, was proper bargaining agent for employees.—J. Rabinowitz & Sons v. Devery, 33 N.Y.S.2d 752—Johnson v. Bee Line, 28 N.Y.S.2d 18.

(3) Controversy between union and employer who entered into a closed-shop agreement with another union.

N.Y.—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750.

Pa.—Tankin v. Hotel & Restaurant Workers Industrial Union, Local No. 356, C. I. O., 36 Pa.Dist. & Co. 537.

(4) Controversy between union and employer, employing some union members, but not paying union wage scale.—Edwards v. Teamsters Local Union No. 313, 113 P.2d 28, 8 Wash.2d 492.

(5) Controversy between employer and discharged employees demanding that employer recognise union.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

(6) Controversy over whether contract should require work to be performed by union labor.—Atlantic Refining Co. v. Cohen, 34 Pa.Dist. & Co. 582.

(7) Dispute between trucking company and teamster union asserting that all it was endeavoring to do was to bring about better wage and working conditions in the craft organization and prevent other non-teamster local unions from engaging other classes of help to drive trucks.—K. & O. Trucking Co. v. Pappas, 28 N.Y.S.2d 82.

(8) Controversy between unions over right to supply labor for certain work.—Miller v. Gallagher, 28 N.Y.S.2d 606, 176 Misc. 647.

(9) Dispute between members of different unions, in which their common employers became involved.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

(10) Dispute resulting from bakery's refusal to cease selling merchandise to another bakery not in good standing with union as allegedly required by contract.—Marvel Baking Co. v. Teamsters' Union Local No. 524, 105 P.2d 46, 5 Wash.2d 346.

(11) Suit to restrain union with which employer had dispute from peacefully picketing employer's customers.

La.—Johnson v. Milk Drivers and Dairy Employees Union, Local No. 854, App., 195 So. 791.

N.Y.—People v. Muller, 36 N.E.2d 206, 286 N.Y. 281, 136 A.L.R. 1450, reversing 21 N.Y.S.2d 1003, 174 Misc. 872—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N.Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806—Hydrox Ice Cream Co. v. Doe, 289 N.Y.S. 683, 159 Misc. 642, affirmed 293 N.Y.S. 1013, 250 App.Div. 770.

Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283.

(12) Picketing by employees for purpose of causing an employer to desist from an unfair labor practice.—Stone Logging & Contracting Co. v. International Woodworkers of

America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

(13) Controversy between plaintiffs who had work done by contractors and defendant unions which plaintiff sought to restrain from picketing of, and interfering with, plaintiff's business.—Abeles v. Friedman, 14 N.Y.S.2d 252, 171 Misc. 1042.

(14) Controversy between persons and associations acting as independent contractors in washing of windows in retail establishments.—Brayer v. Charton, 37 N.Y.S.2d 326.

(15) Refusal of corporation to renew prior contract with labor union.—Boro Park Sanitary Live Poultry Market v. Heller, 21 N.E.2d 687, 280 N.Y. 481, affirming 11 N.Y.S.2d 164, 256 App.Div. 588, motion granted 21 N.E.2d 207, 280 N.Y. 705, refusing to answer question certified 12 N.Y.S.2d 762, 257 App.Div. 833.

(16) Suit to enjoin employees from violating provisions of their contracts under which employees agreed to do nothing prejudicial to employer's business during their employment and for specified time thereafter, the purpose of which was to enjoin employees from continuing a strike.—Mengel v. Justices of Superior Court, 47 N.E.2d 3, 313 Mass. 238.

(17) Strike of employees relating to terms of employment.—Baillis v. Fuchs, 27 N.E.2d 812, 283 N.Y. 133, modifying 16 N.Y.S.2d 724, 258 App. Div. 919, reargument denied 17 N.Y. S.2d 878, 258 App.Div. 965.

(18) Threat by union, to which most of employer's employees belonged, to resort to picketing because of employer's proposal to reduce prices charged his customers and thereby lessen compensation of numerous employees working on commission.—Lichterman v. Laundry and Dry Cleaning Drivers Union Local No. 131, 282 N.W. 689, 204 Minn. 75, rehearing denied 283 N.W. 752, 204 Minn. 75.

Held not to constitute or involve "labor dispute" within statute

(1) Controversy between union and factory owner discontinuing factory.—Wishny v. Jones, 8 N.Y.S.2d 2, 169 Misc. 459—Paul v. Mencher, 7 N.Y.S.2d 821, 169 Misc. 657, affirmed 6 N.Y.S.2d 379, 254 App.Div. 851.

(2) Dispute between union and person claiming or desiring membership or other rights therein.

N.J.—Kohn v. Local No. 195, Amalgamated Clothing Workers of America, 29 A.2d 141, 132 N.J.Eq. 512.

N.Y.—Meltzer v. Siegelman, 22 N.Y. S.2d 235, 174 Misc. 994—John F. Trommer, Inc. v. Brotherhood of Brewery Workers of Greater New York, 8 N.Y.S.2d 782, 167 Misc. 197.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194.

(3) Refusal of employer to sign a closed-shop agreement with union, of which none of its employees was a member and which employees did not wish to join.

N.Y.—Bond Stores v. Turner, 14 N. Y.S.2d 705, 258 App.Div. 769—Nicholaus v. Doe, 24 N.Y.S.2d 258, 175 Misc. 530, appeal dismissed 25 N. Y.S.2d 989, 261 App.Div. 1020—Kraushaar v. Krug, 16 N.Y.S.2d 661—Spinner v. Doe, 13 N.Y.S.2d 449.

Wash.—Adams v. Building Service Employees International Union, Local No. 6, 84 P.2d 1021, 197 Wash. 242—Safeway Stores v. Retail Clerks' Union, Local No. 148, 51 P.2d 372, 184 Wash. 322.

(4) Picketing of employer by union, not for purpose of unionizing the employer or for gaining converts among its employees, but to retaliate against another union with which the employer had contract.—Regal Shoe Co. v. Doyle, 39 N.Y.S. 2d 666, 179 Misc. 696—Coward Shoe v. Retail Shoe Salesmen's Union Local 1115F, R.C.I.P.A., 31 N.Y.S.2d 781, 177 Misc. 708—London Character Shoe Corporation v. Davis, 31 N.Y. S.2d 807, affirmed 32 N.Y.S.2d 793, 263 App.Div. 865.

(5) Picketing by labor union after election was held and rival union which was selected as bargaining agent made closed-shop agreement with employer.

N.Y.—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188, reversing 27 N.Y.S.2d 883, 262 App.Div. 769, reversing 24 N.Y.S.2d 923, appeal granted 29 N.Y.S.2d 718, 262 App.Div. 862.

Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

(6) Picketing by a union against a product of a manufacturer with which it is engaged in a labor dispute where there was no unity of interest between the manufacturer and the person whose premises are picketed.—Elizabeth Arden Sales Corporation v. Hawley, 28 N.Y.S.2d 936, 176 Misc. 821, affirmed 27 N.Y. S.2d 423, 261 App.Div. 953.

(7) Picketing of store by union because owner bought a sign which was allegedly manufactured and installed by nonunion labor.—American Gas Stations v. Doe, 293 N.Y.S. 1019, 250 App.Div. 227—Silverglate v. Kirkman, 13 N.Y.S.2d 505, 171 Misc. 1051—Weil & Co. v. Doe, 5 N. Y.S.2d 559, 168 Misc. 211.

(8) Action by plaintiff to restrain unlawful acts connected with picketing of plaintiff's business by striking newspaper workers, because of newspaper advertising by plaintiff.—Mlle. Reif, Inc., v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247—B. Gertz, Inc., v. Randau, 295 N.Y.S. 871, 162 Misc. 786.

Contra Davega-City Radio v. Randau, 1 N.Y.S.2d 514, 166 Misc. 246.

(9) Suit by employer to restrain former employee from engaging in competing business in violation of contract.

Mass.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135.

N.Y.—Holland Furnace Co. v. Beers, 29 N.Y.S.2d 876, 177 Misc. 29.

(10) Controversy between musicians' union and opera association which sought to produce orchestral accompaniment for its performances from recordings of the operatic score instead of employing live musicians.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U. S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649.

(11) Controversy between employer and striking employees, who refused to join another union than that of which they were members, pursuant to contract of both unions and employer, after National Labor Relations Board certified that such other union was designated in employees' election as their sole collective bargaining agent.—Euclid Candy Co. of New York v. Summa, 19 N.Y.S.2d 382, 174 Misc. 19, affirmed Euclid Candy Co. of New York v. Suma, 21 N.Y.S.2d 614, 259 App.Div. 1081.

(12) Strike to compel an employer to accede to union demands for a closed shop.—Fashioncraft, Inc. v. Halpern, 48 N.E.2d 1, 313 Mass. 385.

(13) Refusal of employer substantially conforming to union requirements, as to wages, hours of work, etc., to sign contract with union because of its insistence that he discharge his present employees and hire members of union in their places.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.

(14) Controversies involving revocation of charters of subsidiaries of labor organization by parent unions, even though the incidental effect of the revocation of the charter was

the contrary view has been taken,[41] the statute has been held inapplicable in cases where the owner of a small business seeks to avoid labor disputes as defined in the act by running his business without any employees,[42] but this doctrine does not extend to a case where the business of a corporation is conducted by its stockholders,[43] or where the owner of the business was a member of an association of employers negotiating with the union.[44] The statute has been held not to apply to a nonprofit charitable corporation which operates a public hospital,[45] particularly where the hospital accepted patients from the city or state, and was, therefore, a governmental agency performing a governmental function;[46] but there is authority to the contrary.[47] Unless the objective of defendant union is a lawful one, the controversy is not a labor dispute in the sense of the statute.[48] A labor dispute is an economic dispute,

to imperil employment of members of the subsidiary.—Tucker v. Gillmore, 14 N.Y.S.2d 221, 172 Misc. 132.

(15) Dispute between newspapers and newsdealers whose relationship was that of vendor and vendee.—People v. Masiello, 31 N.Y.S.2d 512, 177 Misc. 608.

(16) Action by jobber to restrain members of the union from boycotting plaintiff and from picketing his customers.—Fertel v. Rosenzweig, 28 N.Y.S.2d 6.

(17) Demand of unincorporated association of negroes that employer discharge a satisfactory white employee and replace him with a negro.—Stevens v. West Philadelphia Youth Civic League, 34 Pa.Dist. & Co. 612.

(18) Controversy between theater owner and members of negro youth association picketing theater because of rejection of their demand that negroes be hired for some positions therein.—Anora Amusement Corporation v. Doe, 12 N.Y.S.2d 400, 171 Misc. 279.

(19) Controversy between association of negroes and owner of store in negro neighborhood, who on request of association employed a negro furnished by a union but was picketed by association because negro employed was not a resident in the neighborhood and a member of the association.—Stoller v. Citizens' Civic Affairs Committee, 19 N.Y.S.2d 597.

(20) Injunction suit by employees, members of one labor union, against employer and another labor union, involving construction of a contract between the employer and the other union.—Ralston v. Cunningham, 18 A.2d 108, 143 Pa.Super. 412.

(21) Claim for damages for past breach of contract.—Jensen v. St. Paul Moving Picture Mach. Operators' Local Union No. 856, 259 N.W. 811, 194 Minn. 58.

(22) Where it appeared that meat wholesalers' employees were completely unionized, that wholesalers sold their by-products and waste materials to another company engaged in manufacturing tallow, grease, and glue, that a union was attempting to organize employees of the other company and that union had caused pickets to patrol in front of wholesalers' place of business on wholesalers' refusal to cease selling products to the other company.—Feldman v. Weiner, 17 N.Y.S.2d 730, 173 Misc. 461.

41. Pa.—Steerman v. Krouse, 36 Pa.Dist. & Co. 475.

42. N.Y.—Thompson v. Boekhout, 7 N.E.2d 674, 273 N.Y. 390, affirming 291 N.Y.S. 572, 249 App.Div. 77—Miller v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 278, 170 Misc. 713—Gips v. Osman, 9 N.Y.S.2d 828, 170 Misc. 53, affirmed 16 N.Y.S.2d 101, 258 App.Div. 789—Bieber v. Bininbaum, 6 N.Y.S.2d 63, 168 Misc. 943—Feinberg v. Pappas, 30 N.Y.S.2d 5—Comen v. Osman, 27 N.Y.S.2d 353—Rubin v. Choina, 26 N.Y.S.2d 10—Greenberg v. Halpern, 23 N.Y.S.2d 903—Anastasiou v. Supran, 21 N.Y.S 2d 541—Zweibon v. Goldberg, 20 N.Y.S.2d 272.

Partnership

N.Y.—Angelos v. Mesevich, 46 N.E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L.Ed. 1724, and motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868, reversed on other grounds 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. —— ——Lyons v. Meyerson, 18 N.Y.S.2d 363, affirmed 23 N.Y.S.2d 557, 260 App.Div. 863—Kershnar v. Heller, 14 N.Y.S.2d 595, modified on other grounds 15 N.Y.S.2d 451, 258 App.Div. 751, 804.

Assistance of members of owner's family

(1) It has been held that no labor dispute exists within statute where after discharging employees business was operated by owners and members of their family.—Anastasiou v. Supran, 21 N.Y.S.2d 541—Pitter v. Kaminsky, 7 N.Y.S.2d 10.

(2) The same rule has been applied where partners run their business without outside assistance except from the wife of one of them.—Botnick v. Winokur, 7 N.Y.S.2d 6.

(3) On the other hand, it has been held that, where, during the course of negotiations for renewal of labor union contract and for increase in wages to two employees, employers notified union that because of business conditions the two employees were being laid off and that business would be continued without employees except for wife of one of employers, the statute relating to issuance of injunctions in "labor disputes" was applicable, since wife took the place of at least one of employees discharged as result of a "labor dispute."—Greenberg v. Halpern, 23 N.Y.S.2d 903.

43. N.Y.—Boro Park Sanitary Live Poultry Market v. Heller, 21 N.E.2d 687, 280 N.Y. 481, affirming 11 N.Y.S.2d 164, 256 App.Div. 588, motion granted 21 N.E.2d 207, 280 N.Y. 705, refusing to answer question certified 12 N.Y.S.2d 762, 257 App.Div. 833.

44. N.Y.—Schwartz v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 283, 170 Misc. 566.

45. N.Y.—Jewish Hospital of Brooklyn v. Doe, 300 N.Y.S. 1111, 252 App.Div. 581.

Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146, affirming 49 Dauph.Co. 326.

46. N.Y.—Jewish Hospital of Brooklyn v. Doe, 300 N.Y.S. 1111, 252 App.Div. 581.

Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146, affirming 49 Dauph.Co. 326.

47. Minn.—Northwestern Hospital, Minneapolis v. Public Building Service Employes' Union Local No. 113, 294 N.W. 215, 208 Minn. 389.

48. N.Y.—American Guild of Musical Artists v. Petrillo, 36 N.E.2d 123, 286 N.Y. 226, reversing 24 N.Y.S.2d 854, 261 App.Div. 272—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion

but not all economic disputes are labor disputes.[49] The statute affords a remedy that was not available to common law, and those seeking the benefit of it must bring themselves clearly within its terms.[50] There being no definition of the word "employee" in the statute, it must be given its usual and ordinary meaning,[51] and a workman who temporarily suspends work in an effort to compel the employer to increase wages or improve working conditions remains an employee while making such effort, or at least until it becomes apparent that the employer has weathered the attack and has resumed business in a normal manner.[52] The statutory definition of a labor dispute as including a dispute involving employers and an association of employees presupposes the existence of an association lawfully transacting business within the state, and a union affiliated with a labor federation which had been denied a certificate of authority to do business within the state is not an association of employees within the statute.[53]

(cc) Resort to Local Peace Officers

Under the requirement of a finding that peace officers have failed or are unable to furnish protection, an injunction can be granted only when acts of violence are so manifold and recurrent that they constitute a persistent threat to future peace and order.

Under the requirement that before an injunction can be granted it must be found that the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection, the interposition of an injunction is justified only when acts of violence are so manifold and recurrent that they constitute a continuing and persistent threat to the future peace and order, with imminent injury to person or property;[54] and the record must show that acts of repeated violence have gone unpunished or undealt with because of the lethargy or inability of the police to deal therewith.[55] Sporadic acts of violence must be referred to the protection of the police authorities to the fullest extent possible, and an injunction can be granted only when such protection has proved inadequate.[56] Equity will act, however, when violence has been proved away from the scene of the dispute, and cannot be adequately dealt with by the police authorities.[57] Where plaintiffs are peacefully attempting to prevent a violation of their contractual rights by appeal to the judiciary, the public officers are unable to furnish protection, within the meaning of the statute.[58]

(dd) Attempt to Settle Dispute

Under the statutory requirements, plaintiff must, as a condition precedent to his suit, attempt to settle the dispute in one of the ways specified by the statute, provided such attempt would not be an idle ceremony.

The statutory provision denying relief to any plaintiff who has failed to make every reasonable effort to settle the dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration requires plaintiff to make such effort as a condition to bringing his suit for injunction.[59] It does not require plaintiff to avail himself of all three methods, however, but any one of them will fulfill the requirements.[60] Furthermore, it does not require negotiation which, under the circumstances of the particular case, would be an idle and futile ceremony.[61] It is not incumbent on an employer to stand idly by, making repeated efforts to negotiate, mediate, or arbitrate while his business is being destroyed.[62]

denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649—Coward Shoe v. Retail Shoe Salesmen's Union Local 1115F, R. C. I. P. A., 31 N.Y.S.2d 781, 177 Misc. 708.

49. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, 136 A.L.R. 267, reversing 17 N.Y.S.2d 144, 258 App.Div. 516, reversing 10 N.Y.S.2d 83, 170 Misc. 272, motion denied 19 N.Y.S.2d 1020, 259 App. Div. 806, reargument denied 35 N. E.2d 920, 286 N.Y. 565, certiorari denied Weber v. Opera on Tour, 62 S.Ct. 96, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570, and motion denied Opera on Tour v. Weber, 39 N.E.2d 277, 287 N.Y. 649.

50. Ind.—Muncie Building Trades Council v. Umbarger, 17 N.E.2d 828, 215 Ind. 18.

51. Mass.—Mengel v. Justices of Superior Court, 47 N.E.2d 3, 313 Mass. 238.

52. Mass.—Mengel v. Justices of Superior Court, supra.

53. N.Y.—Hoffman's Vegetarian Restaurant Co. v. Lee, 10 N.Y.S.2d 287, 170 Misc. 815.

54. N.Y.—Miller v. Gallagher, 28 N. Y.S.2d 606, 610, 176 Misc. 647.

55. N.Y.—Miller v. Gallagher, supra.

56. N.Y.—Miller v. Gallagher, supra.

"Criminal courts as an original matter, are the proper forum in which defendants, who have breached the peace, must be charged and heard."—Miller v. Gallagher, supra.

57. N.Y.—Miller v. Gallagher, supra —Grandview Dairy v. O'Leary, 285 N.Y.S. 841, 158 Misc. 791.

58. N.Y.—Murphy v. Ralph, 299 N. Y.S. 270, 165 Misc. 335.

59. Pa.—Bulkin v. Sacks, 31 Pa. Dist. & Co. 501.

60. N.J.—Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

Held sufficient compliance with statute

N.Y.—Murphy v. Ralph, 299 N.Y.S. 270, 165 Misc. 335.

61. N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237 256 App.Div. 945, reargument denied 27 N.E.2d 210, 282 N.Y. 804.

62. N.Y.—Grandview Dairy v. O'Leary, 285 N.Y.S. 841, 158 Misc. 791.

The provision was held not to apply to an action which was commenced before adoption of the statute.[63]

dd. State Labor Relations Acts

(aa) In general

(bb) Proceedings of state labor relations board

(aa) In General

Unfair labor practices will not be enjoined where plaintiffs have not exhausted their remedies before a state labor relations board.

A court has no jurisdiction to enjoin unfair practices charged against an employer in the face of an election ordered by a state labor relations board where plaintiff employees have not exhausted their remedies before the board.[64] So, where a proceeding is pending before the board on the complaint of a union charging an employer with unfair labor practices, the relief which the board has the power to afford constitutes the employees' exclusive remedy, and they cannot maintain an action for an injunction against the alleged unfair labor practices until the board determines the proceedings pending before it,[65] and no action in equity should be entertained which would disturb the subject matter within the jurisdiction of the board.[66] Neither can the action be brought as ancillary to the proceeding pending before the board for the purpose of preserving the status quo, where the employees could secure adequate relief in the proceeding before the board, even if the employer should commit all the acts sought to be enjoined.[67] These statutes have been held not intended to apply to public nonprofit charitable hospitals, however, and not to bar a preliminary injunction to restrain a union from asserting rights against such hospitals.[68]

(bb) Proceedings of State Labor Relations Board

An employer within the purview of a state Labor Relations Act cannot obtain an injunction to restrain proceedings of a labor relations board under such act.

An employer cannot obtain an injunction to restrain the state labor relations board from hearing a complaint charging unfair labor practices,[69] even though the alleged unfair practices occurred prior to a contract entered into by a trade union and the employer adjusting the controversy,[70] and even though the employer has previously initiated legal proceedings against the union proposing the charges before the board.[71] However, where public nonprofit charitable hospitals involved in a controversy with their employees are not within the purview of the state Labor Relations Act, the labor relations board may be enjoined from proceeding against the hospitals, even though administrative remedies under the act were not exhausted.[72]

§ 139. Boycotts

Acts pursuant to an illegal agreement in restraint of trade in the nature of a boycott may be restrained.

Acts pursuant to an illegal agreement in restraint of trade in the nature of a boycott may be restrained,[73] as where newspaper publishers combine to prevent news dealers from selling a particular newspaper by threatening to refuse to sell to dealers handling such newspaper.[74] Where the acts complained of do not amount to an unlawful boycott or constitute an unreasonable restraint of trade, however, an injunction will not be granted.[75] Whether or not an injunction will be granted against boycotts arising out of industrial disputes is discussed infra §§ 140–142.

A boycott is defined in Conspiracy § 12, where

63. N.Y.—National House Cleaning Contractors v. Bobaluc, 296 N.Y.S. 673, 251 App.Div. 401, appeal dismissed 12 N.E.2d 563, 276 N.Y. 533.

64. N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

65. N.Y.—Domanick v. Triboro Coach Corporation, 20 N.Y.S.2d 306, 259 App.Div. 657, reversing 18 N.Y.S.2d 960, 173 Misc. 911.

66. N.Y.—Domanick v. Triboro Coach Corporation, 20 N.Y.S.2d 306, 259 App.Div. 657, reversing 18 N.Y.S.2d 960, 173 Misc. 911.

67. N.Y.—Domanick v. Triboro Coach Corporation, 20 N.Y.S.2d 306, 259 App.Div. 657, reversing 18 N.Y.S.2d 960, 173 Misc. 911.

68. Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146, affirming 49 Dauph.Co. 326.

Not "employers" within statute

Public nonprofit charitable hospitals were impressed with a public interest as agencies obligated to care for the indigent sick and, as such, were not "employers" within purview of Pennsylvania Labor Relations Act.—Western Pennsylvania Hospital v. Lichliter, supra.

69. N.Y.—The Nevins, Inc. v. Boland, 3 N.Y.S.2d 323, 167 Misc. 428.

70. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199.

71. N.Y.—The Nevins, Inc. v. Boland, 3 N.Y.S.2d 323, 167 Misc. 428.

72. Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146, affirming 49 Dauph.Co. 326.

73. Ga.—Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 S.E. 822, 181 Ga. 105.

N.Y.—Peekskill Theatre v. Advance Theatrical Co. of New York, 200 N.Y.S. 726, 206 App.Div. 138.

Tex.—Walker v. Fort Worth Ins. Underwriters' Ass'n, Civ.App., 79 S.W.2d 661, error dismissed.

74. N.Y.—Finnegan v. Butler, 182 N.Y.S. 671, 112 Misc. 280.

75. N.Y.—Wolfenstein v. Fashion Originators' Guild of America, 280 N.Y.S. 361, 244 App.Div. 656.

the liability of members of a boycotting combination for resulting damages is discussed. Criminal liability for boycotts is considered in Conspiracy § 71; and whether or not boycotts are violations of antitrust laws is discussed in the C.J.S. title Monopolies § 79, also 12 C.J. p 610 notes 24-27, and 41 C.J. p 170 notes 17-22.

§ 140. —— Boycott of Capital

a. In general
b. Under statutes
c. Who entitled to injunction
d. Against whom injunction granted

a. In General

(1) Primary boycott
(2) Secondary boycott
(3) Combinations in nature of primary boycott

(1) Primary Boycott

A primary boycott, being lawful, will not be enjoined.

The primary boycott, as defined in Conspiracy § 12 a, is very generally held to be a lawful combination which will not be enjoined, even though the execution of its object may tend to diminish the profits of the party against whom such act is aimed.[76]

(2) Secondary Boycott

(a) Jurisdiction to restrain
(b) Particular combinations

(a) Jurisdiction to Restrain

In the absence of statutes providing otherwise, courts have power to restrain secondary boycotts where the circumstances warrant equitable intervention.

As shown infra subdivision b of this section, the jurisdiction of the courts to restrain boycotts in cases arising out of labor disputes has been drastically limited by the Norris-La Guardia Act and similar statutes. In the absence of statute, however, the jurisdiction of courts of equity to restrain boycotts is well settled;[77] but to give courts of equity jurisdiction to restrain a secondary boycott it must contain the element of coercion, by threats, intimidation or violence.[78] Jurisdiction usually is upheld on one or more of the following grounds: Injury irreparable in its nature;[79] the difficulty of ascertaining the measure of damages according to legal principles;[80] the continuing nature of the injury;[81] or the necessity for a multiplicity of suits, if plaintiff is restricted to his remedy at law.[82] Where the purpose of the boycott is unlawful, it may be enjoined in a state court.[83] The remedy by injunction is entirely independent of the remedy by action at law for damages and arises out of the conditions of the inadequacy of the latter remedy,[84] but it has been declared in some cases that equity will not enjoin a boycott unless it appears that the remedy at law is inadequate.[85] In an action to enjoin a boycott a court of equity has jurisdiction to award the damages resulting therefrom;[86] and this is so although it may be impossible to determine the total amount of plaintiff's loss and although it may be difficult to ascertain with certainty the money value of the damages that are capable of proof.[87]

As affected by criminality of acts. The fact that the acts constituting a boycott, or some of them, are punishable criminally does not divest a court of equity of jurisdiction to enjoin their commission.[88]

76. Mass.—Robitaille v. Morse, 186 N.E. 78, 283 Mass. 27.
N.Y.—Blumenthal v. Feintuch, 273 N.Y.S. 660, 153 Misc. 40.
32 C.J. p 167 note 19.
Combinations in nature of primary boycott see infra subdivision a (3) of this section.

77. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, D.C.Ill., 2 F.2d 993, affirmed, C.C.A., International Brotherhood of Electrical Workers, Local Union No. 134, v. Western Union Telegraph Co., 8 F.2d 444—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, D.C. N.Y., 41 F.Supp. 727.
Cal.—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal.App.2d 137.
Wash.—United Union Brewing Co, v. Beck, 93 P.2d 772, 780, 200 Wash. 474, citing **Corpus Juris.**
32 C.J. p 168 note 24.

78. Ill.—2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 35 N.E. 2d 373, 377 Ill. 37—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 38 N. E.2d 972, 313 Ill.App. 24.

79. Cal.—Goldberg Co. v. Stablemen's Union, 86 P. 806, 149 Cal. 429, 117 Am.S.R. 145, 8 L.R.A.,N.S., 460, 9 Ann.Cas. 1219.
32 C.J. p 168 note 25.

80. Cal.—Goldberg v. Stablemen's Union, supra.
32 C.J. p 168 note 26.

81. Cal.—Goldberg v. Stablemen's Union, supra.
32 C.J. p 169 note 27.

82. U.S.—Cœur D'Alene Consolidated & Mining Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.
32 C.J. p 169 note 28.

83. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

84. U.S.—Southern R. Co. v. Machinists' Local Union No. 14, C. C.Tenn., 111 F. 49.
32 C.J. p 169 note 31 [b].

85. N.J.—Atkins v. W. A. Fletcher Co., 55 A. 1074, 65 N.J.Eq. 658.
Or.—Longshore Printing Co. v. Howell, 38 P. 547, 26 Or. 527, 46 Am. S.R. 640, 28 L.R.A. 464.

86. Mich.—Baldwin v. Escanaba Liquor Dealers' Assoc., 130 N.W. 214, 165 Mich. 98.
32 C.J. p 169 note 32.

87. Mass.—Burnham v. Dowd, 104 N.E. 841, 217 Mass. 351, 51 L.R.A., N.S., 778.

88. U.S.—Southern R. Co. v. Machinists' Local Union No. 14, C.C. Tenn., 111 F. 49.
32 C.J. p 169 note 36.

The enforcement of the criminal law is for the criminal court, but where the breach of the criminal law is also a violation of a property right and threatens irreparable injury the chancellor may interpose by injunction to protect property.[89] So inasmuch as it affords no reason to deny an injunction that the acts complained of are criminal, it necessarily follows that an injunction should not be refused because the acts done or threatened, although merely unlawful, may lead to the commission of other acts purely criminal.[90]

Mere apprehension of injury. While ground is present for injunctive relief whenever there is an actual or threatened injury to property, coupled with allegations of facts bringing the case within one of the recognized grounds of equitable jurisdiction,[91] the mere apprehension of some future acts of a wrongful nature, which might be injurious to plaintiffs, is not a sufficient basis for insisting on the preventive remedy of injunction.[92]

Necessity for established business. To authorize the issuance of an injunction against a boycott, complainant must show that he has an established business.[93]

Cessation of acts complained of. The fact that the acts complained of have ceased pending the filing of the bill and the hearing furnishes no ground for denying an injunction,[94] especially where there has been no disclaimer of the right to do such acts.[95] So the fact that the acts complained of have ceased after the granting of an interlocutory judgment against their continuance may not prevent the allowance of a permanent injunction against such acts.[96] Where, however, in addition to the cessation of the acts complained of, there is a failure on final hearing to make out a case sufficiently strong to move the court to exercise its extraordinary equitable powers, the bill should be dismissed.[97] It has been held that where all the acts complained of were committed prior to the commencement of the action and there is no evidence that further acts of the same character are to be anticipated, an injunction against such acts will not be granted because an injunction lies only to prevent threatened injury.[98]

Discharge by complainant of members of defendant union. The fact that one seeking relief by injunction against the acts of a union alleged to have been injurious to his business has declared war on the union by discharging all members found in his shop does not deprive him of the aid of equity.[99]

(b) Particular Combinations

aa. Coercing workmen not to enter into or continue in one's employ

bb. Coercing customers or prospective customers to withhold patronage

cc. Coercing dealers not to sell materials

aa. Coercing Workmen Not to Enter into or Continue in One's Employ

In the absence of statute, coercion of workmen not to enter into or continue in employment may be restrained.

In the absence of statutes limiting its power, see infra subdivision b of this section, a court of equity will restrain by injunction the execution of a conspiracy, or the continuance of acts commenced in furtherance thereof, to injure a person's business by the use of such means as force, violence, or intimidation to prevent those in his employ from working for him or others, not in his service but willing to accept employment from him, from doing so;[1] and a suit of the character under consideration, it has been said, cannot be successfully de-

Injunction to restrain commission of crime generally see infra § 150.

89. Ky.—Underhill v. Murphy, 78 S. W. 482, 117 Ky. 640, 25 Ky.L. 1731, 111 Am.S.R. 262, 4 Ann.Cas. 780.
Mo.—Hamilton-Brown Shoe Co. v. Saxey, 32 S.W. 1106, 131 Mo. 212, 52 Am.S.R. 622.

90. U.S.—Cœur D'Alene Consolidated & Mining Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.

91. U.S.—Sailors' Union of the Pacific v. Hammond Lumber Co., Cal., 156 F. 450, 85 C.C.A. 16, certiorari denied 28 S.Ct. 567, 208 U.S. 615, 52 L.Ed. 646.
32 C.J. p 169 note 39.

92. N.J.—Van der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County, 62 A. 453, 70 N.J. Eq. 116.
N.Y.—Thomas Russel & Sons v. Stampers' & Gold Leaf Local Union, No. 22, 107 N.Y.S. 303, 57 Misc. 96.
32 C.J. p 169 note 40.

93. N.J.—Van der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County, 62 A. 453, 70 N.J. Eq. 116.
32 C.J. p 170 note 41.

94. U.S.—U. S. v. Workingmen's Amalgamated Council of New Orleans, C.C.La., 54 F. 994, 26 L.R.A. 158, affirmed 57 F. 85, 6 C.C.A. 258.
32 C.J. p 170 note 43.

95. U.S.—U. S. v. Workingmen's Amalgamated Council of New Orleans, supra.

96. Ill.—Piano & Organ Workers International Union of America v. Piano & Organ Supply Co., 124 Ill. App. 353.
32 C.J. p 170 note 45.

97. N.Y.—Reynolds v. Everett, 39 N.E. 72, 144 N.Y. 189.

98. Cal.—J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council, 98 P. 1027, 154 Cal. 581, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165.
Pa.—Anderson v. Amalgamated Ass'n, etc., 29 Pa.Dist. 617.

99. U.S.—Gill Engraving Co. v. Doerr, D.C.N.Y., 214 F. 111.
32 C.J. p 171 note 54.

1. Pa.—Murdock v. Walker, 25 A. 492, 152 Pa. 595, 34 Am.S.R. 678.
32 C.J. p 171 note 55, p 172 note 60 [a].

fended by showing a combination between complainant and other employers to depreciate the market value of defendants' labor,[2] or by showing that those committing the acts complained of were in turn subjected to rough treatment.[3]

bb. Coercing Customers or Prospective Customers to Withhold Patronage

(aa) In general

(bb) Refusal to handle materials or supplies purchased by customers

(cc) Publication of libelous matter coercive in nature

(dd) Publication as "unfair"

(aa) In General

In the absence of statute, and except where such combinations are lawful, a conspiracy to coerce plaintiff's customers into withholding their patronage from him by injury or threatened injury to their business if they fail to comply with defendants' demands may be restrained.

Although, as shown infra subdivision b of this section, the power of the courts to restrain boycotts in cases involving or arising out of labor disputes has been greatly limited by the Norris-La Guardia Act and similar state statutes, in the absence of applicable statutes it has been generally held, except where combinations of this kind are regarded as lawful,[4] that an injunction will issue to restrain the execution of a conspiracy or the continuance of acts commenced in furtherance thereof, formed for the purpose of injuring a person's business by coercing his customers or prospective customers into withholding their patronage from him, by injury or threatening injury to their business, on their failure to comply with the demands of the conspirators.[5] Physical force or violence were said not to be necessary factors in the right to the remedy,[6] although intimidation, coercion, or threats of injury to person or property were necessary to justify an injunction.[7] So injunctions were granted where the injury so inflicted or threatened was the withholding or threats of withholding of the patronage of the conspirators from customers or prospective customers,[8] or the coercion of others to withhold patronage from them,[9] or the prevention of their obtaining or keeping in their employ the labor essential to the carrying on of their business,[10] but the mere fact that union members singly or in concert voluntarily refrain from, or refuse to work for, customers of a particular employer will not warrant an injunction without proof of coercion by the union,[11] and, as

2. N.Y.—New York Central Iron Works Co. v. Brennan, 116 N.Y.S. 457.

3. Mo.—Berry Fdy. Co. v. International Moulders Union, 164 S.W. 245, 177 Mo.App. 84.

4. Wash.—United Union Brewing Co. v. Beck, 93 P.2d 772, 780, 200 Wash. 474, citing **Corpus Juris.**
32 C.J. p 172 note 61 [a].

5. U.S.—Oxley Stave Co. v. Coopers' International Union of North America, C.C.Kan., 72 F. 695—Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., C.C.Ohio, 54 F. 746, 19 L.R.A. 395, appeal dismissed Ex parte Lennon, 14 S.Ct. 123, 150 U.S. 393, 37 L.Ed. 1120.
Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
Ill.—2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 35 N.E.2d 373, 377 Ill. 37.
Md.—Blandford v. Duthie, 128 A. 138, 147 Md. 388.
Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.
N.J.—Van Buskirk v. Sign Painters Local No. 1231, 14 A.2d 45, 127 N.J.Eq. 533—Mitnick v. Furniture Workers Union, Local No. 66, C. I. O. of City of Newark, 200 A. 553, 124 N.J.Eq. 147, appeal dismissed 4 A.2d 277, 125 N.J.Eq. 142—Martin v. McFall, 55 A. 465, 65 N.J. Eq. 91.
N.Y.—George F. Stuhmer & Co. v. Korman, 269 N.Y.S. 788, 241 App. Div. 702, affirmed 193 N.E. 281, 265 N.Y. 481—Elizabeth Arden Sales Corporation v. Hawley, 28 N.Y.S.2d 936, 176 Misc. 821, affirmed 27 N.Y.S.2d 423, 261 App Div. 953—Feldman v. Weiner, 17 N.Y.S 2d 730, 173 Misc. 461—Back v. Kaufman, 22 N.Y.S.2d 449.
Ohio.—Driggs Dairy Farms v. Milk Drivers & Dairy Employees' Local Union No. 361, 197 N.E. 250, 49 Ohio App. 303—Beckerman v. Bakery & Confectionery Workers International Union, 28 Ohio N.P.,N.S., 550—H. R. Brown & Son v. United Mine Workers of America, 25 Ohio N.P.,N.S., 485.
Wash.—United Union Brewing Co. v. Beck, 93 P.2d 772, 780, 200 Wash. 474, citing **Corpus Juris.**
32 C.J. p 172 notes 62-64, p 173 note 75.
Coercing breach of contract by independent contractor see supra § 138 b (1) (c).

6. Mich.—Beck v. Railway Teamsters' Protective Union, 77 N.W. 13, 118 Mich. 497, 74 Am.S.R. 421, 42 L.R.A. 407.
N.J.—Barr v. Essex Trades Council, 30 A. 881, 53 N.J.Eq. 101.
N.Y.—Matthews v. Shankland, 56 N.Y.S. 123, 25 Misc. 604.

7. Minn.—Gray v. Building Trades Council, 97 N.W. 663, 91 Minn. 171, 103 Am.S.R. 477, 63 L.R.A. 753, 1 Ann.Cas. 172.
N.Y.—Mills v. U. S. Printing Co., 91 N.Y.S. 185, 99 App Div. 605—Cohen v. United Garment Workers, 72 N.Y.S. 341, 35 Misc. 748—Butterick Pub. Co. v. Typographical Union No. 6, 100 N.Y.S. 292, 50 Misc. 1.
Ohio.—Riggs v. Cincinnati Waiters Alliance, 8 Ohio S. & C. Pl.Dec. 565, 5 Ohio N.P. 386.

Irreparable injury requisite to relief

Or.—Longshore Printing & Publishing Co. v. Howell, 38 P. 547, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.

8. U.S.—Oxley Stave Co. v. Coopers' International Union of North America, C.C.Kan., 72 F. 695.
32 C.J. p 230 note 32 [a] (2).

9. N.J.—Barr v. Essex Trades Council, 30 A. 881, 53 N.J.Eq. 101.
32 C.J. p 173 note 70.

10. Minn.—Gray v. Building Trades Council, 97 N.W. 663, 91 Minn. 171, 103 Am.S.R. 477, 63 L.R.A. 753, 1 Ann.Cas. 172.
32 C.J. p 173 note 71.

11. N.J.—Kingston Trap Rock Co. v. International Union of Operating Engineers, Local No. 825, 825-A and 825-B, 19 A.2d 661, 129 N.J. Eq. 570.

shown infra subdivision a (3) of this section, acts of peaceable persuasion and argument to persuade his customers not to deal with plaintiff will not be restrained. A labor union carrying on a secondary boycott of plaintiff's business relations with its customers for the purpose of coercing plaintiff to persuade its employees to join the union, which would have rendered the employer guilty of unfair labor practices under the National Labor Relations Act is guilty of an unlawful practice which may be enjoined.[12] Where boycotting by labor unions not representing a majority of plaintiff's employees was unlawful, the employer is entitled to an injunction restraining the unions from such activities during the pendency of proceedings before the National Labor Relations Board for investigation and certification of a bargaining agent for the employees.[13]

Use of force or violence. An injunction will be granted to restrain the members of a combination engaged in a boycott from congregating around the place of business of the person against whom the boycott is declared and using force or threats thereof to prevent his customers from dealing with him;[14] and the fact that the acts complained of constitute a public nuisance does not affect the right of an individual to an injunction where he has sustained injury different in kind and degree from that suffered by the public generally.[15]

(bb) Refusal to Handle Materials or Supplies Purchased by Customers

In the absence of statutes precluding the remedy, and where such acts are not regarded as lawful, acts committed pursuant to a conspiracy to refuse to handle materials purchased by customers of a person with whom defendants have a trade dispute will be enjoined.

Although, as shown infra subdivision b of this section, the power of courts to restrain boycotts in cases involving or arising out of labor disputes has been greatly limited by the Norris-La Guardia Act and similar state statutes, in the absence of applicable statutes precluding the remedy, it has been held that acts committed in pursuance of an unlawful conspiracy between a union and its members to threaten to strike or to refuse to handle or work on materials or supplies purchased by customers of the person with whom a trade dispute exists will be enjoined;[16] and where acts of this character constitute a violation of the Sherman Anti-Trust Act they may be enjoined in a suit brought by the United States.[17] Where it is lawful, however, for a union or its members who have a dispute with an employer to notify his customers or prospective customers that members of the union will not handle or work on material or supplies purchased from the employer, an injunction will not issue to prevent the continuance of such acts;[18] nor will an injunction issue where a union, without being inspired or moved by malice toward plaintiff, and without intimidation or threats of violence to plaintiff's customers, enacts a rule prohibiting its members from handling goods not bearing the union label and its enforcement was attempted without recourse to unlawful means.[19]

(cc) Publication of Libelous Matter Coercive in Nature

Although there is authority to the contrary, it has been held in the absence of statutes limiting the right to injunctive relief in such cases that an injunction may be granted to prevent a union or its members from publishing defamatory matter about a person with the intent to coerce others into refraining from having business relations with him.

Although as shown supra § 134 the rule is well settled that a court of equity has no jurisdiction to restrain a mere libel or slander, it has been held, in the absence of statutes limiting the right to injunctive relief in such cases, that an injunction may be granted to prevent a union or its members from uttering or publishing slanderous or libelous matter concerning a person, where its nature and purpose is to intimidate and coerce others into refraining

12. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

13. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., supra.

14. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676.
32 C.J. p 174 note 83.

15. Mont.—Iverson v. Dilno, 119 P. 219, 44 Mont. 270.

16. Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.
32 C.J. p 173 note 78.

17. U.S.—Payne Lumber Co. v. Neal, D.C.N.Y., 212 F. 259, affirmed 214 F. 82, 130 C.C.A. 522, affirmed 37 S.Ct. 718, 244 U.S. 459, 61 L.Ed. 1256.

18. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

Iowa.—Smythe Neon Sign Co. v. Local Union No. 405 of International Brotherhood of Electrical Workers of Cedar Rapids, 284 N.W. 126, 226 Iowa 191.
N.Y.—Bossert v. Dhuy, 117 N.E. 582, 221 N.Y. 342, Ann.Cas.1918D 661, reversing 151 N.Y.S. 877, 166 App. Div. 251.
32 C.J. p 174 notes 81, 82.

19. Mo.—Frank Schmidt Planing Mill Co. v. Mueller, App., 154 S.W.2d 610, transferred, see 147 S.W.2d 670, 347 Mo. 466—Crescent Planing Mill Co. v. Mueller, 123 S.W.2d 193, 234 Mo.App. 1243, transferred, see, Sup., 117 S.W.2d 247, 118 A.L.R. 709.

from having business relations with him, the view being taken that suits of this character are not suits to enjoin a libel or slander, but to enjoin acts the effect of which is to injure a person's business by coercing others, through fear of loss to themselves, to refrain from having any business relations with him, and that the issuance of an injunction to prevent such acts does not infringe constitutional guaranties.[20] On the other hand, there are decisions which maintain the contrary view and hold that the issuance of such an injunction is in violation of such guaranties,[21] and which hold further that no exception can be made to the rule by reason of the fact that defendants are financially irresponsible.[22]

(dd) Publication as "Unfair"

In the absence of statutes limiting the remedy, publication of a person as "unfair" if portending a threat to, or intimidation of, his customers may be enjoined.

A notification to customers or prospective customers that a person is "unfair" may portend a threat or intimidation, in which case it constitutes a boycott, and is unlawful, and, in the absence of statutes limiting the remedy, may be enjoined.[23] It has been held, however, that the publication of a party as "unfair" does not of itself constitute a threat or intimidation, and, in the absence of any showing that it was intended as such, such publication will not be enjoined;[24] and it has also been held that the use of the words "unfair to organized labor," if truthful, will not be enjoined, but the use of expressions which convey covert implications calculated to defame, coerce, or intimidate will be enjoined.[25] So, where the publication of plaintiff as "unfair" is untrue, deceptive, and dishonest, it will be enjoined.[26] Ordinarily false or fraudulent statements may not be disassociated from boycotting when made in connection or combination with boycott activities.[27] Where the object sought to be attained is unlawful, an injunction will be granted to restrain the "bannering" of his plant as "unfair" for the purpose of preventing the public from patronizing him;[28] and it has been held that a preliminary injunction will be issued restraining strikers from denominating an employer as "unfair to labor" and his employees as "scabs" by means of a posted placard, cards handed out to prospective employees, and communications to users of the machine manufactured by the employer and to labor unions whose members work thereon and in repair thereof.[29] It has also been held that an attempt by officers and members of a labor union to hold an employer up to public condemnation by use of unfair, and to a large degree misleading, statements of the origin and scope of the controversy between him and the union, and thereby force him to yield or take the risk of impairment and loss of the good will and patronage of customers on which his business to an appreciable extent rests, is a wrong for which a court of equity will grant redress by injunction.[30]

cc. Coercing Dealers Not to Sell Materials

In the absence of applicable statute limiting the right to injunction, acts of workmen intended to coerce dealers not to sell materials to an employer with whom the defendants have an industrial dispute may be restrained.

In the absence of a statute limiting the right to injunction in such case, it has been held that, where a combination of workmen, for the purpose of injuring a person's business, threatens strikes in the establishments of those dealing in material or products necessary to his business, in case they have any dealings with him, he will be entitled to an injunction against the continuance of such acts.[31]

20. U.S.—Chamber of Commerce of Minneapolis v. Federal Trade Commission, C.C.A., 13 F.2d 673.
32 C.J. p 174 note 89.
Injunction as not denying due process of law generally see Constitutional Law § 613.
Restraint as abridging freedom of speech and of the press see Constitutional Law § 213 1.

21. Mo.—Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 891, 168 Mo. 133, 90 Am.S.R. 440, 56 L.R.A. 951.
32 C.J. p 175 notes 91-92.

22. Mo.—Marx & Haas Jeans Clothing Co. v. Watson, supra.
32 C.J. p 175 notes 91, 93.

23. D.C.—American Federation of Labor v. Buck's Stove & Range Co., 33 App.D.C. 83, 32 L.R.A.,N.S., 743.
32 C.J. p 175 notes 94, 95.

24. Minn.—Gray v. Building Trades Council, 97 N.W. 663, 91 Minn. 171, 103 Am.S.R. 477, 63 L.R.A. 753, 1 Ann.Cas. 172.
Mont.—Iverson v. Dilno, 119 P. 219, 44 Mont. 270.
32 C.J. p 175 note 97.

25. Idaho.—Robison v. Hotel & Restaurant Employees, Local No. 782, 207 P. 132, 35 Idaho 418.

26. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
Ohio.—Driggs Dairy Farms v. Milk Drivers & Dairy Employees' Local Union No. 361, 197 N.E. 250, 49 Ohio App. 303—Wills v. Local No. 106 of the Hotel and Restaurant Employees International Alliance, 26 Ohio N.P.,N.S., 435.

27. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

28. Mass.—Folsom Mfg. Engraving Co. v. McNeil, 126 N.E. 479, 235 Mass. 269.
Minn.—Roraback v. Motion Picture Mach. Operators' Union, 168 N.W. 766, 140 Minn. 481, 3 A.L.R. 1290, rehearing denied 169 N.W. 529, 140 Minn. 481.
32 C.J. p 175 note 99.

29. N.J.—Thomson Mach. Co. v. Brown, 104 A. 129, 89 N.J.Eq. 326.

30. Mass.—Hotel & Railroad News Co. v. Leventhal, 137 N.E. 534, 243 Mass. 317.

31. N.Y.—Schlang v. Ladies' Waist Makers' Union Local 25, I. L. G.

(3) Combinations in Nature of Primary Boycott

Combinations in the nature of a primary boycott, when considered lawful, will not be restrained.

Members of a labor union, as long as they refrain from acts of violence, may not be enjoined from using, in aid of a justifiable strike or other lawful union activity, peaceable argument and persuasion to induce customers or other persons having, or who might have, beneficial business relations with the employer to abstain from dealing with him, although their purpose in so doing is to injure his business and constrain him to yield to their demands,[32] even though substantial loss results to the employer boycotted,[33] and it is immaterial that the employer is unable to grant the demands made on him by the union[34] or that none of the union's members was in his employ.[35] Where, however, such activity was considered unlawful, it was held that an injunction would be granted against a labor union and its officers to restrain them from persuading or inducing persons or corporations not to deal with plaintiff because it employed nonunion men or refused to recognize the union.[36]

b. Under Statutes

Although state and federal anti-injunction statutes ordinarily do not preclude the restraining of unlawful acts committed in the prosecution of a boycott arising out of a labor dispute, the power of a court to issue the injunction may depend on compliance with all statutory requirements.

It is not to be presumed, in the absence of any specific provision relating thereto, that an anti-injunction statute prohibits issuance of an injunction to restrain boycotting,[37] nor is an injunction against the use of violence prohibited by a statute legalizing combinations for peaceful persuasion.[38] Under the Norris-La Guardia Act, and state statutes, similar thereto, however, which are considered generally supra § 138 b (2) (a) cc, (b) (cc), where the requirements of the act have not been met a court has no jurisdiction in a case arising out of or involving a labor dispute to restrain a peaceful boycott[39] or a secondary boycott,[40] even though such

W. U., 124 N.Y.S. 289, 67 Misc. 221.
Ohio.—Moores v. Bricklayers' Union, 10 Ohio Dec., Reprint, 665, 23 Cinc.L.Bul. 48.

32. Ky.—Blanford v. Press Pub. Co., 151 S.W. 440, 286 Ky. 657.
N.J.—Kingston Trap Rock Co. v. International Union of Operating Engineers, Local No. 825, 825-A and 825-B, 19 A.2d 661, 129 N.J.Eq. 570—E. L. Kerns Co. v. Landgraf, 16 A.2d 623, 626, 128 N.J.Eq. 441, 131 A.L.R. 1063, citing **Corpus Juris**, and reversing 17 A.2d 479, 128 N.J.Eq. 520—John R. Thompson Co. v. Delicatessen and Cafeteria Workers Union, Local 410, 8 A.2d 130, 126 N.J.Eq. 119.
Ohio.—S. A. Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local 106, 154 N.E. 362, 22 Ohio App. 265.
Pa.—Kirmse v. Adler, 166 A. 566, 311 Pa. 78.
Wash.—S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, Local No. 353, 118 P.2d 962, 11 Wash.2d 262.
32 C.J. p 176 note 4.
Injunction against primary boycott generally see supra subdivision a (1) of this section.
Granting of injunction where coercion employed generally see supra subdivision a (2) of this section.

33. Ohio.—S. A. Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local 106, 154 N.E. 362, 22 Ohio App. 265.

34. Ky.—Blanford v. Press Pub. Co., 151 S.W.2d 440, 286 Ky. 657.

35. Ky.—Blanford v. Press Pub. Co., supra.

36. N.J.—George Jonas Glass Co. v. Glass Bottle Blowers' Assoc., 66 A. 953, 72 N.J.Eq. 653—Martin v. McFall, 55 A. 465, 65 N.J.Eq. 91.

37. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S. Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor, 60 S.Ct. 1092, 310 U.S. 655, 84 L. Ed. 1419, certiorari granted 60 S. Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.
32 C.J. p 171 note 55 [a] (1).

38. N.Y.—Jones v. Maher, 116 N. Y.S. 180, 62 Misc. 388.
32 C.J. p 171 note 55 [a] (2).

39. U.S.—Anderson v. Bigelow, C.C. A.Nev., 130 F.2d 460, reversing, D. C., In re Virginia & Truckee Ry., 36 F.Supp. 119—Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., C.C.A.Okl., 123 F.2d 262, reversing, D.C., Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., 35 F.Supp. 403.
La.—Johnson v. Milk Drivers and Dairy Employees Union, Local No. 854, App., 195 So. 791.

40. U.S.—Milk Wagon Drivers' Union, Local No. 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C. C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union, Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, reversing, D.C., Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 29 F.Supp. 15—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A. Cal., 106 F.2d 871, reversing, D. C., International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, 25 F.Supp. 870—Wilson & Co. v. Birl, C.C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915.
N.Y.—Davega-City Radio v. Randau, 1 N.Y.S.2d 514, 166 Misc. 246.
Lawfulness of acts
(1) Where union, in seeking to

boycott constituted a violation of the Sherman Anti-Trust act[41] or state law,[42] nor can the court enforce an injunctive decree entered prior to passage of the statute.[43] Where the conditions of the statute have been complied with, however, a secondary boycott involving fraud, violence, or breach of the peace may be restrained.[44] The statute does not affect the right to an injunction in a case not involving a labor dispute as defined therein.[45]

The Clayton Act, which is considered generally supra § 138 b (2) (a) bb, does not legalize the secondary boycott and nothing contained in the act prohibits a court of the United States from enjoining a secondary boycott which constitutes an interference with interstate commerce.[46]

A state statute which assumes to exempt employees from restraint by injunction when committing irreparable injury to the business of a former employer by acts of the character under consideration has been held in violation of the federal Constitution,[47] although subsequent decisions, as shown supra § 138 b (2) (b) bb, by inference reversed this view.

c. Who Entitled to Injunction

The injunction must be obtained at the suit of the party properly entitled to bring it, as determined by the applicable law.

Although the operator is not the owner of a plant, he is nevertheless entitled to an injunction to restrain a boycott which seriously interferes with the carrying on of his business;[48] and it is not material whether the corporation as such aided him in the prosecution of his suit or not.[49] So it has been held that bondholders of a mining company secured by a trust deed on its property, the value of which depends on the ability of the company to operate at a profit the mining of its coal and the meeting of its interest charges, and the payment of the principal of its indebtedness when due, have such interest in the property as entitles them to maintain a bill to enjoin a boycott executed by preventing employees of the company, or those willing to work for it, from so doing by violence or intimidation.[50] A suit to enjoin a boycott, if based on the Sherman Anti-Trust Act, cannot be maintained by an individual injured by a violation thereof, but must be brought by the federal government.[51] It has

compel garment manufacturers to force their employees against their will to join union, allegedly sought to organize a customer boycott, such acts were unlawful, as respects right of manufacturers to injunctive relief against those acts.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F.Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S. Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

(2) The picketing of a place of business of transportation company by trade union which was attempting to unionize company was not an illegal secondary boycott notwithstanding one of the causes of picketing was fact that truck of transportation company was driven through picket line established by another union at another company's warehouse.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Buckingham Transp. Co. of Colorado, 118 P. 2d 1088, 108 Colo. 419.

41. U.S.—Milk Wagon Drivers' Union, Local No. 757, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Lake Valley Farm Products, Ill., 61 S.Ct. 122, 311 U.S. 91, 85 L.Ed. 63, reversing, C. C.A., Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local 753, 108 F.2d 436, certiorari granted Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products, 60 S.Ct. 723, 309 U.S. 649, 84 L.Ed. 1000—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, reversing, D.C., Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 29 F.Supp. 15.

Boycott as violation of federal or state anti-trust acts generally see the C.J.S. title Monopolies § 79, also 41 C.J. p 170 notes 18–22.

42. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.

43. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, supra.

44. N.Y.—Grandview Dairy v. O'Leary, 285 N.Y.S. 841, 158 Misc. 791.

Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283, reversing 35 Pa.Dist. & Co. 373.

45. U.S.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, D.C.N.Y., 41 F.Supp. 727.

N.Y.—Elizabeth Arden Sales Corporation v. Hawley, 28 N.Y.S.2d 936, 176 Misc. 821, affirmed 27 N.Y.S. 2d 423, 261 App.Div. 953—Feldman v. Weiner, 17 N.Y.S.2d 730, 173 Misc. 461—Fertel v. Rosenzweig, 28 N.Y.S.2d 6.

Pa.—Dorrington v. Manning, 32 Luz. Leg.Reg. 417.

46. U.S.—Duplex Printing Co. v. Deering, N.Y., 41 S.Ct. 172, 254 U. S. 443, 471, 472, 65 L.Ed. 349, reversing 252 F. 722, 164 C.C.A. 562, affirming, D.C., 247 F. 192.

32 C.J. p 170 notes 49, 50, p 171 notes 51, 52, 55 [a] (3), p 172 note 67.

47. U.S.—Truax v. Corrigan, 42 S. Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7.

As violation of equal protection clause see Constitutional Law § 559.

Withdrawal or change of remedy as violation of due process clause generally see Constitutional Law § 614.

48. U.S.—Fortney v. Carter, W.Va., 203 F. 454, 121 C.C.A. 514—Goldfield Cons. Mines Co. v. Goldfield Miners' Union No. 220, C.C.Nev., 159 F. 500.

49. U.S.—Fortney v. Carter, W.Va., 203 F. 454, 121 C.C.A. 514.

50. U.S.—Carter v. Fortney, C.C.W. Va., 170 F. 463.

51. U.S.—National Fire Proofing Co.

been held that a suit to enjoin a boycott based on the New York Business Law can be brought only by the state of New York.[52]

d. Against Whom Injunction Granted

All who aid and abet in the unlawful conspiracy to boycott may be enjoined.

The fact that some of the members of a combination, formed for an unlawful purpose, did not engage in the commission of the acts complained of constitutes no reason for denying an injunction against the latter.[53] Hence if a combination is formed by striking employees to boycott the employer by coercing other employees to join in the strike, and some of them use violence or intimidation to effect this purpose, all should be enjoined,[54] and where it is shown that there is a common united purpose on the part of the members of several unions to boycott a party, the members of each union are liable for the acts of the members of one of them done in furtherance of the boycott.[55] Also, all who aid and abet in a conspiracy, being, as shown in Conspiracy § 18, equally liable with the principals, may be enjoined.[56] Hence a trade council occupying the relation of a coöperative organization composed of delegates of several unions is liable as an accessary where by official action it gives its moral countenance and support and furnishes money to a union in aid of a strike which they seek to render effective by a boycott.[57] So a labor union whose officers as such were advisers, counselors, organizers, and supporters of the strikers, is, as well as its officers, properly a party to an order enjoining a boycott.[58] It has also been held that, where several local unions order a strike and encourage it by the payment of wages to individuals to carry it on, they are liable for all the results that can properly be traced to their original action, and they will be held chargeable with the acts of intimidation, violence, and coercion employed by the strikers, and will be enjoined from the further commission of such acts. Without proof that a national union as a body encouraged the unlawful acts of local unions in connection with a strike ordered by them, however, an injunction should not be granted against it; although its president should be enjoined when, notwithstanding his public utterances against unlawful disturbances in connection therewith, he has encouraged the same, and is, in fact, in charge of the strike, and his utterances have also been at variance with those in which he counseled peace.[59] On the other hand, where the purpose for which a combination of workmen is formed is lawful, and some of them do unlawful acts in furtherance of such purpose, the injunction should go against those alone of the combination who committed the unlawful acts.[60]

§ 141. —— Boycott of Labor

The right to labor will be protected in a proper case by injunction against wanton interference.

Even though the employee's right to labor is terminable at will, he is entitled to protection against wanton interference, although the right is not so valuable as a valid contract for continued service for a definite period;[61] and the courts will protect this right by injunction in a proper case,[62] and damages for the injury sustained may be awarded in the same suit.[63] It has been held that, in a suit in equity against the officers and members of a union for unlawfully causing the discharge of plaintiff as foreman of a granite company, if it appears that

v. Mason Builders' Assoc., N.Y., 169 F. 259, 94 C.C.A. 535, 26 L.R.A., N.S., 148—Southern Indiana Express Co. v. U. S. Express Co., C. C Ind., 88 F. 659, affirmed 92 F. 1022, 35 C.C.A. 172.

52. U.S.—Paine Lumber Co. Ltd. v. Neal, N.Y., 37 S.Ct. 718, 244 U.S. 459, 61 L.Ed. 1256, affirming, C.C. A., 214 F. 82, 130 C.C.A. 522, affirming, D.C., 212 F. 259—Irving v. Neal, D.C.N.Y., 209 F. 471.

53. Ohio.—Dayton Mfg. Co. v. Metal Polishers, etc. Union, 11 Ohio S. & C.P. 643, 8 Ohio N.P. 574.
32 C.J. p 176 note 17.

54. Ohio.—New York, Lake Erie & Western R. R. Co. v. Wenger, 9 Ohio Dec., Reprint, 815, 17 Cinc.L. Bul. 306.

55. N.Y.—Matthews v. Shankland, 56 N.Y.S. 123, 25 Misc. 604.

56. D.C.—American Federation of Labor v. Buck's Stove & Range Co., 33 App.D.C. 83, 32 L.R.A.,N.S., 748.
32 C.J. p 177 note 21.

57. Ohio.—Hillenbrand v. Building Trades Council, 14 Ohio S. & C. P. 628.

58. Ill.—Piano & Organ Workers' Int. Union of America v. Piano & Organ Supply Co., 124 Ill.App. 353.
D.C.—American Federation of Labor v. Buck's Stove & Range Co., 33 App.D.C. 83, 32 L.R.A.,N.S., 748.

59. N.J.—Connett v. United Hatters of North America, 74 A. 188, 76 N. J.Eq. 202.

60. Ind.—Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 75 N.E. 877, 165 Ind. 421, 2 L.R.A.,N.S., 788, 6 Ann. Cas. 829.
32 C.J. p 177 note 27.

61. Mass.—Minasian v. Osborne, 96 N.E. 1036, 210 Mass. 250, 37 L.R. A.,N.S., 179, Ann.Cas.1912C 1299.
Rights of employer with respect to employment and discharge of employees and conduct of his business generally see the C.J.S. title Master and Servant § 5, also 63 C.J. p 658 note 50—p 659 note 54.

62. Ill.—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 164 N.E. 393, 333 Ill. 225, 63 A.L.R. 157, reversing 244 Ill.App. 540.
Pa.—Dorrington v. Manning, 32 Lux. Leg.Reg. 417.
32 C.J. p 177 note 33, p 230 note 32 [a] (1).

63. Mass.—Shinsky v. Tracey, 114 N.E. 957, 226 Mass. 21, L.R.A.1917C 1053.
Pa.—Dorrington v. Manning, 32 Lux. Leg.Reg. 417.

defendants instituted and continued an unlawful strike which compelled the superintendent of the company, as a last resort, to leave the question whether he should discharge plaintiff to a vote of the workmen, and, that on a majority of such workmen voting against the retention of plaintiff, he was discharged, he is entitled to relief against defendants who instituted and maintained the strike and not merely against those workmen who voted for his discharge.[64] An injunction should not be awarded, however, against one who it appears was not a member of the combination and did not commit any of the acts complained of.[65]

§ 142. —— Disciplinary Measures to Compel Withholding Patronage

In the absence of applicable statutes precluding the remedy, an injunction will lie to restrain a union using coercive methods to compel its members to withhold patronage.

Although as shown supra § 140 b, the power of courts to restrain boycotts in cases involving or arising out of labor disputes has been greatly limited by the Norris-La Guardia Act and state statutes similar to it, it has been held, in the absence of applicable statutes precluding the remedy, that an injunction will lie to restrain a union using coercive methods such as the threat of fine or expulsion to compel its members to withhold patronage.[66]

§ 143. Picketing

a. In general
b. Effect of statutory regulation of right
c. Protection of right of union to employ pickets
d. Who entitled to injunction
e. Against whom injunction granted

a. In General

(1) Peaceful picketing generally
(2) Unlawful purpose
(3) Unlawful conduct

(1) Peaceful Picketing Generally

The modern view is that peaceful picketing may not be enjoined if carried on for a lawful purpose and by lawful means even though there is no dispute over conditions of employment between an employer and his employees and no strike has been called.

In some cases when essentially different views were entertained by the courts concerning the relative rights of capital and labor, it was held that even peaceful picketing was unlawful and could be enjoined,[67] but the modern view is that peaceful picketing may not be enjoined[68] if carried on for

64. Mass.—Hanson v. Innis, 97 N.E. 756, 211 Mass. 301.

65. Mass.—Pickett v. Walsh, 78 N. E. 753, 192 Mass. 572, 116 Am.S.R. 272, 6 L.R.A.N.S., 1067, 7 Ann.Cas. 638.

66. N.J.—Barr v. Essex Trades Council, 30 A. 881, 53 N.J.Eq. 101. 32 C.J. p 179 note 49 [a].

67. Ill.—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.
N.J.—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586.
32 C.J. p 181 notes 69–71.
Lawfulness of picketing by labor union generally see Master and Servant § 28 (19).
Picketing as actionable conspiracy see Conspiracy § 12 c, f.
Picketing as nuisance see the C.J.S. title Nuisances § 75, also 46 C.J. p 718 notes 65–66.
Picketing defined see Conspiracy § 12 c Pocket Parts.
Rights of employer with respect to employment and discharge of employees and conduct of his business generally see the C.J.S. title Master and Servant § 5, also 63 C.J. p 658 note 50–p 659 note 54.

68. U.S.—Cafeteria Employees Union, Local 302, v. Angelos, 64 S. Ct. 126, 320 U.S. 293, 88 L.Ed. ——, reversing Angelos v. Mesevich, 46 N.E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L. Ed. 1724. Motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868.
Cal.—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 129.
Ill.—Naprawa v. Chicago Flat Janitors' Union, Local No. 1, 43 N.E.2d 198, 315 Ill.App. 328, appeal dismissed 46 N.E.2d 27, 382 Ill. 124.
Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363—Vonderschmitt v. McGuire, 195 N.E. 585, 100 Ind. App. 632.
Ky.—Blanford v. Press Pub. Co., 151 S.W.2d 440, 286 Ky. 657.
N.J.—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 132 A. 202, 99 N.J.Eq. 230.
N.Y.—Edjomac Amusement Corporation v. Empire State Motion Picture Operators' Union, 8 N.E.2d 329, 278 N.Y. 647, reversing 288 N.Y.S. 756, 247 App.Div. 879, affirming 283 N.Y.S. 6, 156 Misc. 856—Wise Shoe Co. v. Lowenthal, 194 N.E. 749, 266 N.Y. 264, modifying 272 N.Y.S. 612, 242 App.Div. 660—J. H. & S. Theatres v. Fay, 183 N.E. 509, 260 N.Y. 315, reversing 258 N.Y.S. 993, 236 App.Div. 744—Stillwell Theatre, Inc. v. Kaplan, 182 N.E. 63, 259 N.Y. 405, 84 A.L. R. 6—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651—Federal Hats v. Golden, 226 N. Y.S. 747, 223 App.Div. 701—Anora Amusement Corporation v. Doe, 12 N.Y.S.2d 400, 171 Misc. 279—Buy-Wise Markets v. Winokur, 2 N.Y.S. 2d 854, 167 Misc. 235—Spivak v. Wankofsky, 278 N.Y.S. 562, 155 Misc. 530—Paylay Hats v. Zaritsky, 271 N.Y.S. 786, 151 Misc. 569—N. & R. Theaters v. Basson, 215 N.Y.S. 157, 127 Misc. 271—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964.
Ohio.—La France Electrical Construction & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 8, 140 N.E. 899, 108 Ohio St. 61—Wiley v. Retail Clerk's Assn. Union, 32 Ohio N.P.,N.S., 257—Bernstein v. Retail Cleaners' & Dyers' Assn., 31 Ohio N.P.,N.S., 433—Finke v.

a lawful purpose[69] and by lawful means,[70] and it is immaterial that union rules were not observed before calling the strike.[71] A state may not enjoin peaceful picketing merely because it may provoke violence in others.[72] In some jurisdictions the rule is that peaceful picketing for a purpose reasonably connected with a controversy affecting workers in an industry generally as well as those employed by the person against whom the picketing is directed may not be enjoined,[73] and in such case the deter-

Schwartz, 28 Ohio N.P.,N.S., 407—Brost Pattern Works Co. v. Reid, 24 Ohio N.P.,N.S., 60.

Pa.—Kirmse v. Adler, 166 A. 566, 311 Pa. 78.

Tex.—The Fair, Inc., v. Retail Clerks International Protective Ass'n, Local No. 131, Civ.App., 157 S.W.2d 716—Carter v. Bradshaw, Civ.App., 138 S.W.2d 187, 191, quoting **Corpus Juris**—Thomas v. International Seamen's Union of America, Civ. App., 101 S.W.2d 328—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ.App., 95 S.W.2d 1346, 1348, citing **Corpus Juris.**

Wash.—S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, Local No. 353, 118 P.2d 962, 11 Wash.2d 262—Kimbel v. Lumber & Saw Mill Workers Union No. 2575, 65 P.2d 1066, 189 Wash. 416.

W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.

Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21—Senn v. Tile Layers Protective Union, Local No. 5, 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383, affirmed 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

32 C.J. p 182 notes 73-76, p 183 note 95.

Picketing by de facto employees

Where temporary contract was entered into between union and an unauthorized representative of employer who was ill, and subsequently the union and the employer in negotiations concerning execution of a new contract could not agree on union's demand for closed shop, and a strike was called and the employer's place of business was peacefully picketed, members of the union who worked under the temporary contract and with whom the employer negotiated in regard to the new contract were at least employees de facto of the employer, in determining whether trial court abused its discretion in refusing to grant temporary injunction restraining the picketing.—San Angelo v. Amalgamated Meat Cutters & Butchers Workmen of North America, Local 103, Tex.Civ.App., 139 S.W.2d 843.

Matter not arising out of labor dispute

(1) Picketing of meat market with placards which truthfully stated that sale of kosher poultry by poultry stand in such meat market was no indication that other meat sold there was kosher, could not be enjoined, the right of giving the public information of such character in a forcible manner not being limited to labor disputes.—Rosman v. United Strictly Kosher Butchers U. V. Local No. 1, Bronx, 298 N.Y.S. 343, 164 Misc. 378.

(2) Peaceful picketing by a neighborhood organization against a bakery in protest against allegedly extortionate prices for necessities will not be enjoined.—Julie Baking Co. v. Graymond, 274 N.Y.S. 250, 152 Misc. 846.

69. U.S.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C. A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516.

N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307.

Or.—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Tex.—San Angelo v. Amalgamated Meat Cutters & Butchers Workmen of North America, Local 103, Civ.App., 139 S.W.2d 843—Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, Civ.App., 138 S.W.2d 223—International Ass'n of Machinists Union, Local No. 1488, v. Federated Ass'n of Accessory Workers, Civ.App., 109 S.W.2d 301, appeal dismissed International Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory Workers, 130 S.W.2d 282, 133 Tex. 624.

Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L. v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21.

Injunction of picketing for unlawful purpose generally see infra subdivision a (2) of this section.

70. Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N. E.2d 280, 216 Ind. 363.

N.Y.—J. H. & S. Theatres v. Fay, 183 N.E. 509, 260 N.Y. 315, reversing 258 N.Y.S. 993, 236 App.Div. 744—Anora Amusement Corporation v. Doe, 12 N.Y.S.2d 400, 171 Misc. 279—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964.

Ohio.—La France Electrical Construction & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 8, 140 N.E. 899, 108 Ohio St. 61.

Tex.—The Fair, Inc., v. Retail Clerks International Protective Ass'n, Local No. 131, Civ.App., 157 S.W.2d 716—Thomas v. International Seamen's Union of America, Civ.App., 101 S.W.2d 328.

Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L. v. Wisconsin Employment Relations Board, 6 N.W. 2d 698, 242 Wis. 21.

Injunction of unlawful conduct in picketing generally see infra subdivision a (3) of this section.

71. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651.

72. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145, and affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L. Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U. S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419.

73. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.

Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.

To secure closed shop contract

Cal.—General Distillers v. Wholesale Liquor Drivers-Salesmen Union, Local 109, 135 P.2d 592, 57 Cal.App.2d 908.

minative issue is whether the workmen are demanding something reasonably related to employment and to the purposes of collective bargaining.[74] The mere fact that plaintiff has sustained and will continue to sustain a loss if picketing is continued is not sufficient to entitle him to injunctive relief;[75] it must also appear that the pickets are not entitled to perform the acts complained of, or that their performance constitutes an invasion of plaintiff's rights.[76] Each case must be decided on its own facts by a balancing of those considerations which make for a sound public policy.[77]

Existence of dispute between employer and employees. The United States supreme court and other courts have held that constitutional guarantees are infringed by the policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute.[78] Accordingly, the modern view is that peaceful picketing will not be enjoined, even though there is no dispute over conditions of employment between an employer and his employees[79] and no strike has been called.[80] In a large number of cases decided prior to the pronouncements of the supreme court on this question, however, it was held that peaceful picketing would be enjoined in the ab-

74. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.

75. Ind.—Scofes v. Helmar, 187 N.E. 662, 205 Ind. 596, vacating 153 N. E. 802.
Or.—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.
Wis.—Senn v. Tile Layers Protective Union Local No. 5, 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383, affirmed 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.

76. Ind.—Scofes v. Helmar, 187 N. E. 662, 205 Ind. 596, vacating 153 N.E. 802.

77. N.Y.—A. S. Beck Shoe Corporation v. Johnson, 274 N.Y.S. 946, 153 Misc. 363.

78. U.S.—Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 62 S.Ct. 807, 315 U.S. 722, 86 L.Ed. 1143, affirming, Tex.Civ.App., 149 S.W.2d 694, error refused, certiorari granted 62 S.Ct. 111, 314 U.S. 595, 86 L.Ed. 480, and rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L Ed. 1775—Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's Inc., 61 S.Ct. 732, 312 U. S. 658, 85 L.Ed. 1106, reversing Miller's, Inc., v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, affirming Miller's, Inc. v. Journeymen Tailors Union Local No. 195, Ch., 15 A.2d 822—American Federation of Labor v. Swing, 61 S.Ct. 568, 312 U.S. 321, 85 L.Ed. 855, reversing Swing v. American Federation of Labor, 22 N.E.2d 857, 372 Ill. 91, affirming 18 N.E.2d 258, 298 Ill.App. 63, certiorari denied American Federation of Labor v. Swing, 60 S.Ct. 514, 309 U.S. 659, 84 L.Ed. 1007, certiorari granted 60 S.Ct. 1081, 310 U.S. 620, 84 L. Ed. 1393, and rehearing denied 61 S.Ct. 735, 312 U.S. 715, 85 L.Ed. 1145.
Ill.—Naprawa v. Chicago Flat Janitors' Union, Local No. 1, 43 N.E. 2d 198, 315 Ill.App. 328, appeal dismissed 46 N.E.2d 27, 382 Ill. 124.
Ky.—Blanford v. Press Pub. Co., 151 S.W.2d 440, 286 Ky. 657.
Tex.—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ.App., 152 S.W.2d 828, error refused.
Wash.—S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, Local No. 353, 118 P.2d 962, 11 Wash.2d 262.
Injunction against peaceful picketing as violation of constitutional guarantee of freedom of speech see Constitutional Law § 213 i and Pocket Parts.

Peaceful picketing not enjoinable

While a state, notwithstanding the federal Constitution, is not required to tolerate in all places and all circumstances even peaceful picketing by an individual, where independent peddlers who bought baked goods from bakeries and sold them to small retailers worked seven days a week and refused to join a truck drivers' union or to employ relief men, the union's peaceful and orderly picketing of the bakeries and retailers with whom the peddlers did business could not be enjoined, since such injunction would violate rights guaranteed by the federal Constitution.—Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 62 S.Ct. 816, 315 U.S. 769, 86 L.Ed. 1178, reversing Wohl v. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters, 31 N.E.2d 765, 284 N.Y. 788, affirming 19 N.Y.S.2d 811, 259 App.Div. 868, affirming 14 N.Y.S.2d 198, certiorari denied Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 61 S.Ct. 960, 313 U.S. 572, 85 L.Ed. 1530, order vacated and certiorari granted 61 S.Ct. 1108, 313 U.S. 548, 85 L.Ed. 1513, vacated 62 S.Ct. 118, 314 U.S. 704, 86 L.Ed. 563. Amended 35 N.E.2d 506, 285 N.Y. 843.

79. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 129.
Ky.—Blanford v. Press Pub. Co., 151 S.W.2d 440, 286 Ky. 657.
N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 19 A.2d 786, 129 N.J.Eq. 424, reversing 15 A.2d 826, 128 N.J.Eq. 41—Feller v. Local 144, International Ladies Garment Workers Union, 19 A.2d 784, 129 N.J.Eq. 421—Lora Lee Dress Co. v. International Ladies' Garment Workers Union Local No. 85, 19 A.2d 659, 129 N.J.Eq. 368, reversing 14 A. 2d 46, 127 N.J.Eq. 564—Heine's Inc., v. Truck Drivers' & Helpers' Union, Local No. 676, 19 A.2d 204, 129 N.J.Eq. 308, reversing 14 A.2d 262, 127 N.J.Eq. 514—Newark Milk & Cream Co. v. Milk Drivers & Dairy Employees Local No. 680 of Newark, A. F. of L., 19 A.2d 232, 19 N.J.Misc. 468.
N.Y.—De Agostina v. Holmden, 285 N.Y.S. 909, 157 Misc. 819.
Pa.—Friedman v. Blumberg, 23 A.2d 412, 342 Pa. 387—Try-Me Bottling Co. v. Lawlor, Com.Pl., 18 Lehigh Co.L.J. 243.
Wash.—S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, Local No. 353, 118 P.2d 962, 11 Wash.2d 262.

80. N.Y.—Angelos v. Mesevich, 46 N. E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 88 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L.Ed. 1724, and motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868, reversed on other grounds 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. —.

sence of a controversy between the employees and the management,[81] or of a strike,[82] but would not be enjoined while a strike was in progress.[83]

(2) Unlawful Purpose

Picketing for an unlawful purpose may be restrained.

Picketing for an unlawful purpose may be restrained,[84] as where the picketing is not in furtherance of a dispute with plaintiff as to wages, hours, or other conditions of employment, but is conducted solely to compel plaintiff to enter into an agreement with his competitors to fix a minimum price for certain services,[85] or where its purpose is not to advance the cause of labor, but to injure plaintiff's business by diverting his trade to defendants.[86] A similar rule has been applied where the question was considered a racial or social one, the picketing being done by colored people to compel white mer-

81. U.S.—Lauf v. E. G. Shinner & Co., C.C.A.Wis., 82 F.2d 68.
Fla.—Retail Clerks Union Local 799, of Miami v. Lerner Shops of Florida, 193 So. 529, 140 Fla. 865.
Ill.—Hendrickson Motor Truck Co. v. International Ass'n of Machinists, Automobile Mechanics Local No. 701, 22 N.E.2d 969, 301 Ill.App. 608—Maywood Farms Co. v. Milk Wagon Drivers Union of Chicago, Local 753, 22 N.E.2d 962, 301 Ill. App. 607.
Ky.—Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller, 114 S.W.2d 501, 272 Ky. 466.
Me.—Keith Theatre v. Vachon, 187 A. 692, 134 Me. 392.
Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 303 Mass. 315—Simon v. Schwachman, 18 N.E. 2d 1, 301 Mass. 573.
N.J.—Suchodolski v. American Federation of Labor, 14 A.2d 51, 127 N.J.Eq. 511—Uiram v. Local 362, Journeymen Barbers International Union of America, 194 A. 263, 122 N.J.Eq. 464, affirmed 196 A. 739, 123 N.J.Eq. 231—Gevas v. Greek Restaurant Workers' Club, 134 A. 309, 99 N.J.Eq. 770.
Tex.—Culinary Workers' Union No. 331 v. Fuller, Civ.App., 105 S.W. 2d 295.
Wash.—Shively v. Garage Employees Local Union No. 44, 108 P.2d 354, 6 Wash.2d 560—United Union Brewing Co. v. Beck, 93 P.2d 772, 200 Wash. 474—Fornili v. Auto Mechanics' Union Local No. 297 of International Ass'n of Machinists, 93 P.2d 422, 200 Wash. 283—Adams v. Building Service Employees International Union Local No. 6, 84 P.2d 1021, 197 Wash. 242—Safeway Stores v. Retail Clerks' Union Local No. 148, 51 P.2d 372, 184 Wash. 322.

Rule held inapplicable

(1) To entitle an employer to injunction restraining union from distributing circulars advertising fact that employer's beverages were non-union made, where proof disclosed that distribution was made miles away from employer's place of business.—E. L. Kerns Co. v. Landgraf, 16 A.2d 623, 128 N.J.Eq. 441, 131 A. L.R. 1063, reversing 17 A.2d 479, 128 N.J.Eq. 520.

(2) To enjoin action of agents of labor union in carrying signs and distributing handbills relating to controversy between union and employer in neighborhood of employer's restaurant, but not near enough to enable them to single out for attention persons entering or leaving restaurant.—John R. Thompson Co. v. Delicatessen and Cafeteria Workers Union, Local 410, 8 A.2d 130, 126 N.J.Eq. 119.

82. N.J.—Feller v. Local 144, International Ladies Garment Workers Union, 191 A. 111, 121 N.J.Eq. 452—Snead & Co. v. Local No. 7, International Molders' Union of North America, 143 A. 331, 103 N.J. Eq. 332.
N.Y.—L. Daitch & Co. v. Cohen, 217 N.Y.S. 817, 218 App.Div. 80—Public Baking Co. v. Stern, 215 N.Y.S. 537, 127 Misc. 229—Cushman's Sons v. Amalgamated Food Workers' Bakers, Local No. 164, 215 N. Y.S. 401, 127 Misc. 152—Traub Amusement Co. v. Macker, 215 N. Y.S. 397, 127 Misc. 335—Bolivian Panama Hat Co., Inc. v. Finkelstein, 215 N.Y.S. 157, 127 Misc. 271.

Picketing after termination of strike restrained

N.J.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 10 A.2d 274, 126 N.J.Eq. 520—Heyl v. Culinary Alliance, Local 611, 9 A. 2d 331, 126 N.J.Eq. 384, reversed on other grounds 8 A.2d 809, 126 N.J.Eq. 320—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318—Mode Novelty Co. v. Taylor, 195 A. 819, 122 N.J.Eq. 593—G. Loewus & Co. v. Wine, Liquor and Distillery Workers' Union, Local 20244, of American Federation of Labor, Ch., 9 A.2d 134.
N.Y.—Yablonowitz v. Korn, 199 N.Y. S. 769, 205 App.Div. 440.
32 C.J. p 184 notes 3, 4.

83. N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 128 N.J.Eq. 450—McPherson Hotel Co. v. Smith, 12 A. 2d 136, 127 N.J.Eq. 167.
Restraining acts in furtherance of strike generally see infra § 147 a (5).

84. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 303 Mass. 315—Simon v. Schwachman, 18 N.E.2d 1, 301 Mass. 573.
N.Y.—Regal Shoe Co. v. Doyle, 39 N.Y.S.2d 666, 179 Misc. 696—Coward Shoe v. Retail Shoe Salesmen's Union Local 1115 F. R. C. I. P. A., 31 N.Y.S.2d 781, 177 Misc. 708—Meltzer v. Siegelman, 22 N.Y.S.2d 235, 174 Misc. 994—Miller v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 278, 170 Misc. 713—Edelman, Edelman & Berrie v. Retail Grocery and Dairy Clerks' Union of Greater New York, 198 N.Y.S. 17, 119 Misc. 618—Back v. Kaufman, 22 N.Y.S. 2d 449—Anastasiou v. Supran, 21 N.Y.S.2d 541—Lyons v. Meyerson, 18 N.Y.S.2d 363, affirmed 23 N.Y.S. 2d 557, 260 App.Div. 863.
Or.—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.
Pa.—Hagan Ice Cream Co. v. Ice Cream Workers' Union No. 247, 45 Pa.Dist. & Co. 337, 5 Fay.L.J. 147—Hudson Recreation Co. v. Bowling, Billiard & Athletic Employes' Union, Local 209, 39 Pa.Dist. & Co. 655—Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, 37 Pa.Dist. & Co. 337—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay.L.J. 15.
Tenn.—Lyle v. Local No. 452, Amalgamated Meat Cutters and Butchers Workmen of North America, 124 S.W.2d 701, 174 Tenn. 222.

85. Mo.—Purcell v. Journeymen Barbers and Beauticians International Union of America, Local 192-A, 133 S.W.2d 662, 234 Mo.App. 843.

86. N.Y.—Fillet v. Bartolomio, 1 N. Y.S.2d 316, 253 App.Div. 815.

chants to employ colored clerks.[87] Picketing to persuade or induce an employer to do an unlawful act, such as one condemned by statute as an unfair labor practice and contrary to the defined public policy of the state, will be enjoined;[88] and when linked with a purpose inimical to the welfare and health of an entire community, picketing will be enjoined, irrespective of what may be the right or wrong of the wage controversy in furtherance of which it is conducted.[89]

Inducing breach of contract. According to one view, picketing of the place of business of an employer by a labor union will not be enjoined on the ground that it tends, or is intended, to cause the breach of a labor contract between such employer and another labor organization, when such picketing is not otherwise unlawful.[90] On the other hand, there is authority to the effect that inducing breaches of contract by picketing an employer's place of business will be enjoined.[91]

Furtherance of unlawful strike. In the absence of statutes affecting the remedy, which are discussed infra subdivision b of this section, picketing, although peaceful, will be enjoined when it is conducted in furtherance of an unlawful strike.[92] A fortiori picketing in aid of an unlawful strike will be enjoined where the picketing is conducted by such numbers as will cause intimidation.[93]

(3) Unlawful Conduct
- (a) In general
- (b) False or fraudulent statements
- (c) Force, violence, or intimidation

(a) In General

In the absence of statutes affecting the right, picketing may be restrained where it involves illegal conduct or violation of law.

In the absence of statutes affecting the right, such as those considered infra subdivision b of this section, picketing may be restrained where it involves such illegal conduct as the state is authorized to and has declared unlawful,[94] or where it involves violation of a constitutional law.[95] Picketing ac-

87. Md.—Green v. Samuelson, 178 A. 109, 168 Md. 421, 99 A.L.R. 528.
N.Y.—A. S. Beck Shoe Corporation v. Johnson, 274 N.Y.S. 946, 153 Misc. 363.

88. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

89. N.Y.—Gottlieb v. Matckin, 191 N.Y.S. 777, 117 Misc. 128.
32 C.J. p 181 note 67.

90. W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.
Inducing breach of contract in labor disputes generally see supra § 138 b (1) (c).

91. Alaska.—Pacific American Shipowners Ass'n v. Alaska Salmon Purse Seiners Union, 9 Alaska 509.
N.Y.—Euclid Candy Co. of New York v. Summa, 19 N.Y.S.2d 382, 174 Misc. 19, affirmed Euclid Candy Co. of New York v. Suma, 21 N.Y.S.2d 614, 259 App.Div. 1081—B. Gertz, Inc., v. Randau, 295 N.Y.S. 871, 162 Misc. 786—London Character Shoe Corporation v. Davis, 31 N.Y.S.2d 807, affirmed 32 N.Y.S.2d 793, 263 App.Div. 865.
Ohio.—United Tailors Co. v. Joint Board of Amalgamated Workers of America, 26 Ohio N.P.,N.S., 439—Brost Pattern Works v. Reid, 24 Ohio N.P.,N.S., 60.
Pa.—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay.L.J. 15.
Tex.—Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, Civ.App., 138 S.W.2d 223.
32 C.J. p 183 note 94.

92. Del.—Sarros v. Nouris, 138 A. 607, 15 Del.Ch. 391.
Mass.—Fashioncraft, Inc., v. Halpern, 48 N.E.2d 1, 313 Mass. 385.
N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318—Canter Sample Furniture House v. Retail Furniture Employees Local No. 109, 196 A. 210, 122 N.J.Eq. 575—International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J.Eq. 222, affirmed 196 A. 474, 123 N.J.Eq. 172—218-220 Market St. Corporation v. Delicatessen and Cafeteria Workers' Local 410, 179 A. 689, 118 N.J.Eq. 448—Wasilewski v. Bakers' Union, Local No. 64, Elizabeth, N. J., 179 A. 284, 118 N.J.Eq. 349—J. Lichtman & Sons v. Leather Workers' Industrial Union, 169 A. 498, 114 N.J.Eq. 596—Elkind & Sons v. Retail Clerks' International Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586.
32 C.J. p 183 note 87.

Strike held lawful and continuing
Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.

93. U.S.—Kinloch Tel. Co. v. Local Union No. 2, I. B. E. W., D.C. Mo., 265 F. 312, reversed on other grounds, C.C.A., 275 F. 241.

94. U.S.—Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, 62 S.Ct. 807, 315 U.S. 722, 86 L.Ed. 1148, affirming, Tex.Civ.App., 149 S.W.2d 694, error refused, certiorari granted 62 S.Ct. 111, 314 U.S. 595, 86 L.Ed. 480, and rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.
Cal.—Magill Bros. v. Building Service Employees' International Union, 127 P.2d 542, 20 Cal.2d 506.
N.Y.—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N.Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806—Mutual Biscuit Co. v. Kudisch, 34 N.Y.S.2d 949.
Tex.—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ.App., 152 S.W.2d 828, error refused—Carter v. Bradshaw, Civ.App., 138 S.W.2d 187.

95. U.S.—Carpenters and Joiners Union of America, Local No. 213, v. Ritter's Cafe, 62 S.Ct. 807, 315 U.S. 722, 86 L.Ed. 1148, affirming, Tex.Civ.App., 149 S.W.2d 694, error refused, certiorari granted 62 S.Ct. 111, 314 U.S. 595, 86 L.Ed. 480, and rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L. Ed. 1775.
Tex.—Borden Co. v. Local No. 133 of International Brotherhood of

companied by the obstruction of access to the premises picketed by any physical means is unlawful and may be enjoined,[96] although defendant's use of the sidewalk in front of plaintiff's place of business may not be prohibited even though such use interferes to some extent with that of customers entering and leaving the premises.[97] So pickets have no right to go upon premises picketed for the purpose of interfering with customers, and the continuance of such acts may be enjoined.[98]

(b) False or Fraudulent Statements

Picketing by carrying false placards or making false or fraudulent statements may be enjoined, but the mere use of loose language which does not falsify facts does not justify an injunction.

Picketing by carrying false placards or making false or fraudulent statements may be enjoined,[99] but peaceful picketing will not be enjoined because coupled with the use of loose language and undefined slogans which do not falsify facts but are part of the conventional give-and-take in economic and political controversies,[1] like "unfair"[2] or "fascist."[3] If employees, or a labor union, have a controversy with an employer, and picket the retail outlets where the product made by that employer is sold, in order to induce consumers not to purchase it, to the extent to which they merely publicize by true and fair statements, the facts of a labor dispute, they are within the protection given by the federal Constitution, and an injunction will not be granted.[4] This protection does not extend to advertising that the retailer himself is unfair to labor or to urging that the public refrain from purchasing other merchandise from him.[5]

Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ.App., 152 S.W.2d 828, error refused.

96. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App. 2d 129.
N.J.—Dolan Dining Co. v. Cooks' and Assistants' Union, Local No. 399, A. F. of L., 4 A.2d 5, 124 N.J.Eq. 584, reversed on other grounds 8 A.2d 809, 126 N.J.Eq. 321.
Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A. L.R. 335.
32 C.J. p 184 note 99.

97. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120.

98. N.Y.—Foster v. Retail Clerks' International Protective Assoc., 78 N.Y.S. 860, 39 Misc. 48.

99. Cal.—Magill Bros. v. Building Service Employees' International Union, 127 P.2d 542, 20 Cal.2d 506—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal. App.2d 137.
Mass.—Olympia Operating Co. v. Costello, 179 N.E. 804, 278 Mass. 126.
N.J.—Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey, Newark Local, Ch., 193 A. 806.
N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115 F, R. C.I.P.A., 35 N.Y.S.2d 598, 264 App. Div. 375—Schwartz v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 283, 170 Misc. 566—John F. Trommer, Inc., v. Brotherhood of Brewery Workers of Greater New York, 3 N.Y.S. 2d 782, 167 Misc. 197—A. S. Beck Shoe Corporation v. Johnson, 274 N.Y.S. 946, 153 Misc. 363—Zweibon v. Goldberg, 20 N.Y.S.2d 272.
Ohio.—Driggs Dairy Farms v. Milk Drivers & Dairy Employees' Local Union No. 361, 197 N.E. 250, 49 Ohio App. 303.
Pa.—Comerford-Publix Theatres Corporation v. United Theatrical Alliance of C. I. O., Local 997, 39 Pa.Dist. & Co. 699, 42 Lack.Jur. 150—Davis v. McGuigan, 36 Pa. Dist. & Co. 554.

Libelous statement

On issue whether automobile dealers who entered into contract for construction of building were entitled to injunction to restrain picketing of dealers' business, dealers had a constitutional right to contract for such construction notwithstanding dealers knew that contractor would not use union labor in construction work, and, where dealers had no control over contractor's employees, picketing by charging that dealers were unfair to organized labor was not lawful within statute authorizing picketing by peaceable and lawful means, in view of fact that such charge constituted civil libel.—Carter v. Bradshaw, Tex.Civ.App., 138 S. W.2d 187.

1. U.S.—Cafeteria Employees Union Local 302 v. Angelos, 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. ——, reversing Angelos v. Mesevich, 46 N.E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L. Ed. 1724. Motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868.

2. U.S.—Cafeteria Employees Union, Local 302 v. Angelos, supra.
Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.
Pa.—Try-Me Bottling Co. v. Lawlor, 18 Leh.L.J. 243.
Tex.—The Fair, Inc., v. Retail Clerks International Protective Ass'n, Local No. 131, Civ.App., 157 S.W.2d 716.
W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.

Charge of unfairness held untruthful and enjoinable

Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

3. U.S.—Cafeteria Employees Union, Local 302 v. Angelos, 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. ——, reversing Angelos v. Mesevich, 46 N.E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L. Ed. 1724. Motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868.

4. Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283.

5. Pa.—Alliance Auto Service v. Cohen, supra.

(c) Force, Violence, or Intimidation

An injunction may be granted to restrain picketing accompanied by force, violence, threats, physical assault, abusive and insulting language, coercion, or intimidation; and, where future picketing would have a coercive influence because of a background of violence in the controversy, the court may enjoin future picketing in any form, but such drastic relief may not be based on isolated acts of violence or other unlawful conduct. In a proper case a limitation may be placed on the number of pickets employed.

An injunction may be granted to restrain picketing if it is accompanied by force, violence, threats, physical assault, abusive and insulting language, coercion, or intimidation, designed to prevent workmen from working, or from continuing in, or accepting employment with, the person against whom the acts are designed to operate, or to induce his customers and the general public to withhold patronage from him.[6] This is so, even though the parties to the conspiracy are liable to a criminal prosecution,[7] and also even though workmen against whom the acts are directed are not bound by contract to enter into or continue in the employ of the party whose property is picketed.[8] Such relief presup-

6. U.S.—U. S. v. Railway Employees' Department of American Federation of Labor, D.C.Ill., 290 F. 978—Southern R. Co. v. Machinists' Local Union No. 14, C.C.Tenn., 111 F. 49.

Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676—Lisse v. Local Union No. 31, Cooks, Waiters, and Waitresses, 41 P.2d 314, 2 Cal.2d 312—Pesold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App. 2d 120—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal.App. 2d 137—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 123.

Ill.—Ellingsen v. Milk Wagon Drivers' Union of Chicago, Local 753, 35 N.E.2d 349, 377 Ill. 76—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U. S. 596, 84 L.Ed. 449, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U. S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S. Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 110 Am.S.R. 248, 4 L.R.A.,N.S., 1001.

Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363—Scofes v. Helmar, 187 N.E. 662, 205 Ind. 596, vacating 153 N.E. 802—Thomas v. City of Indianapolis, 145 N.E. 550, 195 Ind. 1194, 35 A.L.R. 1194.

Kan.—Bull v. International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators of United States and Canada, Local No. 414, 241 P. 459, 119 Kan. 713.

Ky.—Music Hall Theatre v. Moving Picture Mach. Operators Local No. 165, 61 S.W.2d 283, 249 Ky. 639.

Mo.—Purcell v. Journeymen Barbers and Beauticians International Union of America, Local 192-A, 133 S. W.2d 662, 234 Mo.App. 843.

N.J.—International Ticket Co. v. Wendrich, 196 A. 474, 123 N.J.Eq. 172, affirming 193 A. 808, 122 N. J.Eq. 222—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N. J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307—Gevas v. Greek Restaurant Workers' Club, 134 A. 309, 99 N.J.Eq. 770—Frank v. Herold, 52 A. 152, 63 N.J.Eq. 443—Blakely Laundry Co. v. Cleaners' and Dyers' Union, Local No. 18422, 169 A. 541, 11 N.J.Misc. 915.

N.Y.—Angelos v. Mesevich, 46 N.E. 2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L. Ed. 1724, and motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868, reversed on other grounds 64 S.Ct. 126, 320 U.S. 293, 88 L.Ed. —— ——Wise Shoe Co. v. Lowenthal, 194 N.E. 749, 266 N.Y. 264, modifying 272 N.Y.S. 612, 242 App.Div. 660—People v. Masiello, 31 N.Y.S. 2d 512, 177 Misc. 608—Mlle. Reif, Inc. v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247—Esco Operating Corporation v. Kaplan, 258 N.Y.S. 303, 144 Misc. 646—Schwartz & Benjamin v. Alexanderson, 246 N.Y.S. 419, 138 Misc. 917—Hammer v. Baum, 240 N.Y.S. 145, 136 Misc. 490—L. Daitch & Co. v. Retail Grocery & Dairy Clerks Union of Greater New York, 221 N.Y.S. 446, 129 Misc. 343—Mutual Biscuit Co. v. Kudisch, 34 N.Y.S.2d 949—Lilly Dache, Inc. v. Rose, 28 N.Y.S.2d 303—R. A. Freed & Co. v. Doe, 283 N.Y.S. 186, adhering to original determination 278 N.Y.S. 68, 154 Misc. 644.

Ohio.—Driggs Dairy Farms v. Milk Drivers & Dairy Employees' Local Union No. 361, 197 N.E. 250, 49 Ohio App. 303—United Tailors Co. v. Joint Board of Amalgamated Workers of America, 26 Ohio N.P., N.S., 439—H. R. Brown & Son v. United Mine Workers of America, 25 Ohio N.P.,N.S., 485—Brost Pattern Works v. Reid, 24 Ohio N.P., N.S., 60.

R.I.—Bomes v. Providence Local No. 223 of Motion Picture Mach. Operators of U. S. and Canada, 155 A. 581, 51 R.I. 499.

Tex.—Carter v. Bradshaw, Civ.App., 138 S.W.2d 187, 191, quoting **Corpus Juris**—International Ass'n of Machinists Union, Local No. 1488, v. Federated Ass'n of Accessory Workers, Civ.App., 109 S.W.2d 301, appeal dismissed International Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory Workers, 130 S.W.2d 282, 133 Tex. 624.

32 C.J. p 179 note 54, p 183 note 96, p 185 note 21.

Civil and criminal liability for interference by third person with employment relation generally see the C.J.S. title Master and Servant §§ 624-639, also 39 C.J. p 1370 note 12 et seq.

Use of offensive language against defendant

In suit to enjoin picketing, plaintiff was not barred from equitable relief because he posted bulletins using offensive language directed to members of picketing organization. —Joe Dan Market v. Wentz, 20 S. W.2d 567, 223 Mo.App. 772, transferred, see 13 S.W.2d 641, 321 Mo. 943.

7. Mass.—Vegelahn v. Guntner, 44 N.E. 1077, 167 Mass. 92, 57 Am. S.R. 443, 35 L.R.A. 722.

N.Y.—Heitkamper v. Hoffman, 164 N.Y.S. 533, 99 Misc. 543.

32 C.J. p 180 note 55.

8. Mass.—Vegelahn v. Guntner, 44

poses acts designed to create a nuisance and calculated to work irreparable injury.[9] The commission of such acts will be enjoined as irreparable interference,[10] and in order to avoid a multiplicity of suits.[11] The fact that pickets are serving under appointment and instructions from their union adds nothing to their rights and privileges as affecting third persons.[12] Those engaged in doing duty as pickets can go no further than peaceable persuasion and the offering of inducements not to work;[13] and those whom they seek to persuade cannot be compelled against their will to listen to persuasion.[14] However, an injunction against picketing should not be awarded where there is no evidence that picketing is threatened.[15] An injunction restraining picketing is justified only by the violence that induced it, and only as long as it counteracted a continuing intimidation.[16]

Even though acts of actual physical assault and damage were rare, an injunction may be warranted by the use of vile and abusive language and threats of violence[17] or menacing and insulting gestures or attitude.[18] So it has been held that conduct of pickets shouting in unison in a loud and boisterous manner and disturbing the peace and quiet of the neighborhood[19] and other acts invading plaintiffs' right to peace, quiet, and peaceful enjoyment of their properties[20] may be enjoined. Intimidation by persons other than defendants, however, will not entitle plaintiff to relief in the absence of a conspiracy or ratification of the acts by defendant.[21]

As affected by numbers. In the absence of statute affecting the remedy, since the mere number of the pickets may in itself constitute intimidation, although no acts of violence are committed, where large numbers of pickets are so disposed as to constitute a show of force or an act of intimidation, an injunction may be granted;[22] and a limitation may be placed on the number of pickets using the sidewalk in front of plaintiff's place of business, and the manner of its use, so as to prevent intimidation of, or undue interference with, its use by plaintiff's customers.[23]

Restraint of all picketing. Where future pick-

N.E. 1077, 167 Mass. 92, 57 Am.S.R. 443, 35 L.R.A. 722.

9. Mo.—F. C. Church Shoe Co. v. Turner, 279 S.W. 232, 218 Mo.App. 516.

Profane language of picket in presence of ladies held insufficient to create nuisance, justifying injunction against picketing.—F. C. Church Shoe Co. v. Turner, supra.

10. Ky.—Music Hall Theatre v. Moving Picture Mach. Operators Local No. 165, 61 S.W.2d 283, 249 Ky. 639.

11. Ky.—Music Hall Theatre v. Moving Picture Mach. Operators Local No. 165, supra.

12. Ind.—Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 75 N.E. 877, 165 Ind. 421, 2 L.R.A.,N.S., 788, 6 Ann. Cas. 829.

13. U.S.—Alaska SS. Co. v. International Longshoremen's Ass'n, D.C. Wash., 236 F. 964.

14. N.J.—Frank v. Herold, 52 A. 152, 63 N.J.Eq. 443.
32 C.J. p 181 note 65.

15. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A. 1918C, 497, Ann.Cas.1918B 461.

16. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145, and affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419.

17. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal.2d 676.

18. Cal.—Lisse v. Local Union No. 31, Cooks, Waiters, and Waitresses, 41 P.2d 314, 2 Cal.2d 312.
Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 114 Conn. 319.
32 C.J. p 180 notes 60, 61, p 181 notes 62, 63.

19. Cal.—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 129.

20. Cal.—Chrisman v. Culinary Workers' Local Union No. 62, supra.

However, loud talking by pickets is too vague a concept to be of any value, standing alone, by which court may judge whether misconduct has occurred which will entitle employer to an injunction against picketing.—Schwartz v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 283, 170 Misc. 566.

21. Mo.—F. C. Church Shoe Co. v. Turner, 279 S.W. 232, 218 Mo.App. 516.

22. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120.
Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 796, 114 Conn. 319, citing **Corpus Juris.**
N.J.—J. Lichtman & Sons v. Leather Workers' Industrial Union, 169 A. 498, 114 N.J.Eq. 596—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 133 A. 202, 99 N.J.Eq. 230.
Ohio.—H. R. Brown & Son v. United Mine Workers of America, 25 Ohio N.P.,N.S., 485.
32 C.J. p 182 notes 83–85.
Power of court under Norris-La Guardia Act to restrain mass picketing see infra subdivision b (1) of this section.

23. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120.
N.Y.—Anora Amusement Corporation v. Doe, 12 N.Y.S.2d 400, 171 Misc. 279—Julie Baking Co. v. Graymond, 274 N.Y.S. 250, 152 Misc. 846—Mutual Biscuit Co. v. Kudisch, 34 N.Y.S.2d 949—Lilly Dache, Inc. v. Rose, 28 N.Y.S.2d 303.
Ohio.—Brost Pattern Works v. Reid, 24 Ohio N.P.,N.S., 60.
Pa.—Davis v. McGuigan, 36 Pa.Dist. & Co. 554.
Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauf-

eting would have a coercive influence because of a background of violence in the controversy, the court may enjoin future picketing in any form,[24] and is not limited to imposition of a restraining order against violent and unlawful conduct.[25] This rule is particularly applicable where violent picketing was continued in defiance of a previous injunction;[26] in such case whether defendant should be given another chance to picket peacefully is for the discretion of the trial court.[27] However, an injunction prohibiting all picketing may not be based on isolated acts of violence or other unlawful conduct,[28] and, where picketing has been generally lawful, although accompanied by infrequent illegal acts not of a serious character, only the unlawful conduct will be enjoined.[29] To enjoin all picketing it must be found that violence has given the picketing a coercive effect whereby it would operate destructively as a force and intimidation.[30] In determining the propriety of an injunction prohibiting all picketing, no logical distinction may be drawn between picketing enmeshed with actual violence and picketing carried on with threatened violence and physical intimidation.[31] Where the owner of premises picketed offers in open court to furnish to the union to which the strikers belong the names of those working for him, and states that he has no objection to one picket addressing them in a peaceable manner, a temporary injunction restraining all picketing will be modified so as to permit an acceptance of this offer.[32]

b. Effect of Statutory Regulation of Right

(1) Norris-La Guardia Act and state statutes similar thereto

(2) Clayton Act and state statutes similar thereto

(3) Other statutes

(1) Norris-La Guardia Act and State Statutes Similar Thereto

Under the Norris-La Guardia Act and state statutes similar thereto, picketing not involving fraud or violence cannot be enjoined in cases arising out of labor disputes, and no picketing will be enjoined in such cases without plaintiff's compliance with the statutory requirements. The statutes do not affect the power of the court to restrain acts of fraud or violence in cases involving labor disputes where the statutes have been fully complied with, however; and do not affect the power of the court to enjoin wrongful picketing in cases not arising out of or involving labor disputes even though there has been no compliance with the statutory requirements.

The federal Norris-La Guardia Act, which is considered generally supra § 138 b (2) (a) cc, is intended to limit and circumvent the power of federal courts of equity to enjoin the acts of labor organizations in furtherance of the right of peaceful picketing.[33] The provisions of the statute that no court shall have jurisdiction in a labor dispute to restrain any persons from giving publicity to the existence of, or the facts involved in, any labor dispute,

feurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

24. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal.2d 676—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal. App.2d 137.
Ind.—Scofes v. Helmar, 187 N.E. 662, 205 Ind. 596, vacating 153 N. E. 802.
N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reversing 215 N.Y.S. 753, 216 App.Div. 663, and reargument denied 157 N.E. 895, 245 N.Y. 651—R. A. Freed & Co. v. Doe, 278 N. Y.S. 68, 154 Misc. 644, original determination adhered to 283 N.Y.S. 186—A. S. Beck Shoe Corporation v. Johnson, 274 N.Y.S. 946, 153 Misc. 363—Schwartz & Benjamin v. Alexanderson, 246 N.Y.S. 419, 138 Misc. 917.
Pa.—Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, 37 Pa. Dist. & Co. 337.

25. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676.
Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 114 Conn. 319.
Ga.—Mason and Dixon Lines v. Odom, 18 S.E.2d 841, 193 Ga. 471.

26. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676.
N.Y.—R. A. Freed & Co. v. Doe, 283 N.Y.S. 186, adhering to original determination 278 N.Y.S. 68, 154 Misc. 644.

27. N.Y.—Nann v. Raimist, 174 N. E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App.Div. 856, motion denied 175 N. E. 314, 255 N.Y. 564.

28. U.S.—Cafeteria Employees Union, Local 302, v. Angelos, 64 S. Ct. 126, 320 U.S. 293, 88 L.Ed. ——, reversing Angelos v. Mesevich, 46 N.E.2d 903, 289 N.Y. 498, affirming 34 N.Y.S.2d 408, 264 App.Div. 708, certiorari denied Cafeteria Employees Union Local 302 v. Angelos, 63 S.Ct. 1166, 319 U.S. 753, 87 L.Ed. 1707, certiorari granted 63 S.Ct. 1432, 319 U.S. 778, 87 L. Ed. 1724. Motion for stay denied and motion for remittitur granted 50 N.E.2d 249, 290 N.Y. 868.
Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676.
Ind.—Scofes v. Helmar, 187 N.E. 662, 205 Ind. 596, vacating 153 N.E. 802.
N.J.—McPherson Hotel Co. v. Smith, 12 A.2d 136, 127 N.J.Eq. 167.

29. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal.2d 676.
N.J.—McPherson Hotel Co. v. Smith, 12 A.2d 136, 127 N.J.Eq. 167.

30. Ill.—2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 35 N.E. 2d 373, 377 Ill. 37.

31. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal. 2d 676.

32. Ohio.—Eureka Fdy. Co. v. Lehker, 13 Ohio S. & C. P. 398.

33. U.S.—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619.

whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence, or from assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute, do not make the lawfulness of the act the test of whether an injunction may be granted,[34] and the advertising of a labor dispute by picketing not involving fraud or violence cannot be enjoined by a federal district court[35] irrespective of whether it may be mass picketing and as such illegal under the state law.[36] So an injunction will not be granted to restrain peaceful picketing of an employer's plant and of the employer's customers in order to obtain a closed shop[37] or to restrain pickets from carrying misrepresentative but not fraudulent placards stating that the employer was unfair to organized labor,[38] it being held that such a statement, even if untrue, does not involve fraud within the meaning of the statute.[39] The act is not intended to deprive the courts of jurisdiction to restrain, if necessary, picketing of a coercive, intimidating character, however,[40] and where all the requirements of the statute have been met, picketing accompanied by violence may be restrained;[41] but the courts are without jurisdiction to enjoin picketing in labor disputes where the requirements of the statute have not been met.[42] The requirement that it must be shown that public officers required to protect complainant's property were unable or unwilling to furnish adequate protection is satisfied where it is shown that it was well known by the city and county authorities that a strike existed, no effort was made by them to stop it, and no authority would be exercised until it was shown that banners carried by pickets contained statements which were untrue and damaging to complainant.[43] A union and other defendants enjoined from unjustifiable picketing will not be enjoined from spending any sum of money in the possession of the union where the sum shown to be in the union's possession was not in excess of the amount necessary for its usual and ordinary operations.[44] Unlawful picketing in a case not involving

34. U.S.—Wilson & Co. v. Birl, C.C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915.

35. U.S.—Anderson v. Bigelow, C.C.A.Nev., 130 F.2d 460, reversing, D.C., In re Virginia & Truckee Ry., 36 F.Supp. 119—Consolidated Terminal Corporation v. Drivers, Chauffeurs and Helpers Local Union 639, D.C.D.C., 33 F.Supp. 645—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D.C.Mo., 29 F.Supp. 15, reversed on other grounds, C.C.A., International Ass'n of Bridge Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., 118 F.2d 615—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okl., 24 F.Supp. 619—Diamond Full Fashioned Hosiery Co. v. Leader, D.C.Pa., 20 F.Supp. 467, appeal dismissed, C.C.A., 99 F.2d 1001—L. L. Coryell & Son v. Petroleum Workers Union, Local No. 18281, D.C.Minn., 19 F.Supp. 749—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.

What constitutes a labor dispute within the statute see supra § 138 b (2) (a) cc (bb).

Word "patroling" in act means picketing

N.J.—Wucker Furniture Co. v. Furniture Salesmen's Union, C. I. O. Local 853, 8 A.2d 275, 126 N.J.Eq. 145.

36. U.S.—Wilson & Co. v. Birl, C.C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915.

37. U.S.—Wilson & Co. v. Birl, supra.

38. U.S.—Wilson & Co. v. Birl, supra.

39. U.S.—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.

40. U.S.—Knapp-Monarch Co. v. Anderson, D.C.Ill., 7 F.Supp. 332.

41. U.S.—Newton v. Laclede Steel Co., C.C.A.Ill., 80 F.2d 636, affirming, D.C., Laclede Steel Co. v. Newton, 6 F.Supp. 625.

42. U.S.—New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012, reversing 92 F.2d 510, 67 App.D.C. 359, certiorari granted 58 S.Ct. 270, 302 U.S. 679, 82 L.Ed. 524—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C.A., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516—Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., C.C.A.Okl., 123 F.2d 262, reversing, D.C., Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, 35 F.Supp. 403—Grace Co. v. Williams, C.C.A.Mo., 96 F.2d 478, affirming, D.C., 20 F.Supp. 263.

Failure to show any efforts to settle dispute

U.S.—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.

Picketing after choice of bargaining agency

That one union continued to picket employer's place of business after a majority of employees had chosen another union as their bargaining agency did not give district court jurisdiction to enjoin picketing, in absence of making complete findings required by Norris-La Guardia Act on ground that picketing was unlawful as an interference with the vindicable right of employees to self-organization and collective bargaining and as an attempt to compel employer to commit an unfair labor practice.—Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238, 105 F.2d 1, 70 App.D.C. 122, certiorari granted Fur Workers Union No. 21238 v. Fur Workers Union, Local No. 72, 60 S.Ct. 78, 308 U.S. 537, 84 L.Ed. 453, affirmed 60 S.Ct. 292, 308 U.S. 522, 84 L.Ed. 443.

Hardship

Where the controversy involved in a suit to enjoin picketing was a labor dispute which only the National Labor Relations Board could end by certification in the first instance, and no injunction could issue in absence of findings required by the Norris-La Guardia Act, the court was required to enforce the plain intent of the act without regard to hardship on the employer.—Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238, supra.

43. U.S.—Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, D.C.Okl., 35 F.Supp. 403, reversed on other grounds, C.C.A., Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., 123 F.2d 262.

44. U.S.—Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, D.C.Okl., 35 F.Supp. 403, reversed on other

a labor dispute within the statute will be restrained although there was no compliance with the act.[45]

State statutes. Under state statutes modeled on the federal Norris-La Guardia Act, picketing not involving fraud or violence cannot be enjoined in cases arising out of labor disputes,[46] and no picketing will be enjoined in such cases without plaintiff's compliance with the statutory requirements,[47] or simply on the theory that the prohibition of unlawful acts does no harm to any one.[48] Where all the requirements of the statute have been met, however, wrongful and oppressive picketing[49] and violence[50] may be enjoined; and when necessary the court may authorize a prohibition of all picketing in enjoining violence in a labor dispute,[51] but in the

grounds, C.C.A., Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl. v. Yellow Cab Operating Co., 123 F.2d 262.

45. U.S.—Union Premier Food Stores v. Retail Food Clerks and Managers Union, Local No. 1357, C.C.A.Pa., 98 F.2d 821.

46. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Buckingham Transp. Co. of Colorado, 118 P.2d 1088, 108 Colo. 419.

Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.

La.—Dehan v. Hotel and Restaurant Employees and Beverage Dispensers, Local Union No. 183, App., 159 So. 637.

Minn.—Lichterman v. Laundry and Dry Cleaning Drivers Union Local No. 131, 282 N.W. 689, 204 Minn. 75, rehearing denied 283 N. W. 752, 204 Minn. 75.

N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 128 N.J.Eq. 450—Newark Milk & Cream Co. v. Milk Drivers & Dairy Employees Local No. 680 of Newark, A. F. of L., 19 A.2d 232, 19 N.J.Misc. 468.

N.Y.—Boro Park Sanitary Live Poultry Market v. Heller, 21 N.E.2d 687, 280 N.Y. 481, affirming 11 N. Y.S.2d 164, 256 App.Div. 588, motion granted 21 N.E.2d 207, 280 N.Y. 705, refusing to answer question certified 12 N.Y.S.2d 762, 257 App.Div. 833—Goldfinger v. Feintuch, 11 N.E.2d 910, 276 N.Y. 281, 116 A.L.R. 477, modifying 295 N. Y.S. 753, 250 App.Div. 751, reversing 288 N.Y.S. 855, 159 Misc. 806—Stalban v. Friedman, 19 N.Y.S. 2d 978, 259 App.Div. 520, reversing 11 N.Y.S.2d 343, 171 Misc. 106—Abeles v. Friedman, 14 N.Y.S.2d 252, 171 Misc. 1042—Wishnetzky Food Products v. Osman, 27 N.Y.S. 2d 750—Silver Dollar Bake Shop v. Weissman, 27 N.Y.S.2d 744.

Or.—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

Pa.—Alliance Auto Service v. Cohen, 19 A.2d 152, 341 Pa. 283, reversing 35 Pa.Dist. & Co. 373—Steerman v. Krouse, 36 Pa.Dist. & Co. 475—Revetta v. International Chauffeurs, Teamsters and Helpers, Local No. 158, Brounsville, Com.Pl., 5 Fay.L.J. 209.

Wash.—Edwards v. Teamsters Local Union No. 313, 113 P.2d 28, 8 Wash. 2d 492.

Wis.—Senn v. Tile Layers Protective Union, Local No. 5, 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383, affirmed 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

What constitutes a labor dispute within the statute see supra § 138 b (2) (b) cc (bb).

Right to use sidewalk

A sidewalk furnished by storekeeper for the public in lieu of regular space utilized by his customers for parking automobile was a "place where any person may lawfully be" within statute prohibiting the issuance of an injunction restraining the publicizing of a labor dispute by patrolling any place where any person may lawfully be without intimidation, fraud, or violence.—Johnson v. Milk Drivers and Dairy Employees Union, Local No. 854, La. App., 195 So. 791.

47. N.Y.—Lifshitz v. Straughn, 27 N.Y.S.2d 193, 261 App.Div. 757, appeal denied 28 N.Y.S.2d 741, 262 App.Div. 849, reargument denied 29 N.Y.S.2d 725, 262 App.Div. 891—Hydrox Ice Cream Co. v. Doe, 293 N.Y.S. 1013, 250 App.Div. 770, affirming 289 N.Y.S. 683, 159 Misc. 642—Strauss v. Steiner, 18 N.Y.S. 2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App.Div. 818—Bent Steel Sections v. Doe, 10 N.Y.S.2d 920, 170 Misc. 736—Hydrox Ice Cream Co. v. Doe, 289 N.Y.S. 683, 159 Misc. 642, affirmed 293 N.Y.S. 1013, 250 App. Div. 770—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750—Brook-Maid Food Co. v. Goldberg, 21 N.Y.S.2d 984—Yonkers New System Laundry v. Simon, 18 N. Y.S.2d 73, modified on other grounds 20 N.Y.S.2d 74, 259 App. Div. 912—J. Rabinowitz & Sons v. Devery, 33 N.Y.S.2d 752—Botnick v. Winokur, 7 N.Y.S.2d 6.

Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

48. N.Y.—Remington Rand v. Crofoot, 289 N.Y.S. 1025, 248 App.Div. 356, affirmed 18 N.E.2d 37, 279 N. Y. 635, answering question certified 292 N.Y.S. 701, 249 App.Div. 706.

49. Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363.

N.Y.—Bond Stores v. Turner, 14 N.Y. S.2d 705, 258 App.Div. 769—Remington Rand v. Crofoot, 289 N.Y.S. 1025, 248 App.Div. 356, affirmed 18 N.E.2d 37, 279 N.Y. 635, answering question certified 292 N.Y.S. 701, 249 App.Div. 706.

Only illegal acts restrained

(1) Some authorities hold to the view that, under the statute, picketing in a labor dispute cannot be restrained even though it is accompanied by illegal acts, but only the illegal acts may be enjoined.—Peak v. McElroy, 33 Pa.Dist. & Co. 556.

(2) Thus, in case of bona fide labor dispute where peaceful picketing is carried on, court may prescribe only number of pickets, place or places where they may be, and manner in which picketing may rightfully and lawfully be conducted.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

50. N.Y.—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744, affirming 8 N.Y.S.2d 819, 255 App.Div. 970, affirming 5 N.Y.S.2d 575, 168 Misc. 224, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706—Miller v. Gallagher, 28 N.Y.S.2d 606, 176 Misc. 647.

Disorderliness held insufficient to justify injunction

N.Y.—Strauss v. Steiner, 18 N.Y.S. 2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App.Div. 818.

51. N.Y.—Baillis v. Fuchs, 27 N.E.

absence of a showing that it was necessary to enjoin all picketing as the only practical method of assuring continuance of order, only such picketing as is violent and in breach of the peace will be restrained.[52] Picketing accompanied by false statements or misrepresentations of fact concerning the controversy may be enjoined;[53] but placards carried by pickets declaring plaintiff unfair to a particular union will not authorize an injunction on the ground of fraud or misrepresentation, as these are merely statements of opinion.[54] The legitimacy of the acts in dispute are to be measured by their scope and effect apart from their willfulness or unwillfulness.[55] Where there was no labor dispute within the meaning of the statute, the statute is inapplicable, and an injunction may be granted in a proper case although there has been no compliance with its requirements;[56] and the same rule applies where the facts of the case bring it within a provision exempting from the operation of the statute certain

2d 812, 283 N.Y. 133, modifying 16 N.Y.S.2d 724, 258 App.Div. 919, reargument denied 17 N.Y.S.2d 878, 258 App.Div. 965—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744, affirming 8 N.Y.S.2d 819, 255 App. Div. 970, affirming 5 N.Y.S.2d 575, 168 Misc. 224, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706.

52. N.Y.—Baillis v. Fuchs, 27 N.E. 2d 812, 283 N.Y. 133, modifying 16 N.Y S.2d 724, 258 App.Div. 919, reargument denied 17 N.Y.S.2d 878, 258 App.Div. 965—Silver Dollar Bake Shop v. Weissman, 27 N.Y.S. 2d 744.

Wash.—Weyerhaeuser Timber Co. v. Everett Dist. Council of Lumber & Sawmill Workers, 119 P.2d 643, 11 Wash.2d 503.

Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

"To justify such sweeping relief, the picketing must be so permeated with lawlessness as to offer no hope of any peaceful activities in the future—so varied and persistent as to justify beyond possibility of doubt, apprehension of the continuance and diffusion of violence to the exclusion of lawful conduct in the future."—Miller v. Gallagher, 28 N.Y. S.2d 606, 609, 176 Misc. 647.

53. Ind.—Wiest v. Dirks, 20 N.E. 2d 969, 215 Ind. 568—Spickelmier v. Chambers, 47 N.E.2d 189, 113 Ind.App. 470.

Pa.—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay.L.J. 15.

Signs held not misleading or misrepresenting facts

(1) Signs containing word "unfair."—Johnson v. Milk Drivers and Dairy Employees Union, Local No. 854, La.App., 195 So. 791.

(2) Signs stating that there is a "strike."—Tankin v. Hotel & Restaurant Workers Industrial Union, Local No. 356, C. I. O., 36 Pa.Dist. & Co. 537.

54. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

Ind.—Spickelmier v. Chambers, 47 N.E.2d 189, 113 Ind.App. 470.

Contra Davis v. McGuigan, 36 Pa. Dist. & Co. 554—Peak v. McElroy, 33 Pa.Dist. & Co. 556.

Restraining peaceful picketing because of characterization of plaintiff as "unfair" generally see supra subdivision a (3) (b) of this section.

55. N.Y.—Busch Jewelry Co. v. United Retail Employees' Union Local 830, 5 N.Y.S.2d 575, 168 Misc. 224, affirmed 8 N.Y.S.2d 819, 255 App.Div. 970, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706, affirmed Busch Jewelry Co. v. United Retail Employees Union Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744.

56. Mass.—Quinton's Market v. Patterson, 23 N.E.2d 546, 303 Mass. 315—Simon v. Schwachman, 18 N. E.2d 1, 301 Mass. 573.

Minn.—Jensen v. St. Paul Moving Picture Mach. Operators' Local Union No. 356, 259 N.W. 811, 194 Minn. 58.

N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115 F., R.C.I.P.A., 35 N.Y.S.2d 598, 264 App.Div. 875—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N. Y. 188, reversing 27 N.Y.S.2d 883, 262 App.Div. 769, reversing 24 N. Y.S.2d 923, appeal granted and question certified 29 N.Y.S.2d 718, 262 App.Div. 862—Regal Shoe Co. v. Doyle, 39 N.Y.S.2d 666, 179 Misc. 696—Coward Shoe v. Retail Shoe Salesmen's Union Local 1115 F. R. C.I.P.A., 31 N.Y.S.2d 781, 177 Misc. 708—Elizabeth Arden Sales Corporation v. Hawley, 28 N.Y.S.2d 936, 176 Misc. 821, affirmed 27 N.Y. S.2d 423, 261 App.Div. 953—Nicholaus v. Doe, 24 N.Y.S.2d 258, 175 Misc. 530, appeal dismissed 25 N. Y.S.2d 989, 261 App.Div. 1020—Stolper v. Straughn, 23 N.Y.S.2d 604, 175 Misc. 87—Back v. Kaufman, 22 N.Y.S.2d 449, 175 Misc. 169—Meltzer v. Siegelman, 22 N.Y.S. 2d 235, 174 Misc. 994—Euclid Candy Co. of New York v. Summa, 19 N.Y.S.2d 382, 174 Misc. 19, affirmed Euclid Candy Co. of New York v. Suma, 21 N.Y.S.2d 614, 259 App. Div. 1081—Feldman v. Weiner, 17 N.Y.S.2d 730, 173 Misc. 461—Silverglate v. Kirkman, 12 N.Y.S.2d 505, 171 Misc. 1051—Miller v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 278, 170 Misc. 713—Hoffman's Vegetarian Restaurant Co. v. Lee, 10 N. Y.S.2d 287, 170 Misc. 815—Gips v. Osman, 9 N.Y.S.2d 828, 170 Misc. 53, affirmed 16 N.Y.S.2d 101, 258 App.Div. 789—Weil & Co. v. Doe, 5 N.Y.S.2d 559, 168 Misc. 211—John F. Trommer, Inc. v. Brotherhood of Brewery Workers of Greater New York, 3 N.Y.S.2d 782, 167 Misc. 197—Mlle. Reif, Inc., v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247—R. Gertz, Inc. v. Randau, 295 N. Y.S. 871, 162 Misc. 786—London Character Shoe Corporation v. Davis, 31 N.Y.S.2d 807, affirmed 32 N.Y.S.2d 793, 263 App.Div. 865—Fertel v. Rosenzweig, 28 N.Y.S.2d 6—Comen v. Osman, 27 N.Y.S.2d 353—Rubin v. Choina, 26 N.Y.S.2d 10—Anastasiou v. Supran, 21 N. Y.S.2d 541—Zweibon v. Goldberg, 20 N.Y.S.2d 272—Stoller v. Citizens' Civic Affairs Committee, 19 N.Y.S.2d 597—Sol Katzman & Co. v. Kirkman, 18 N.Y.S.2d 903—Lyons v. Meyerson, 18 N.Y.S.2d 363, affirmed 23 N.Y.S.2d 557, 260 App. Div. 863—Spinner v. Doe, 13 N.Y. S.2d 449—Pitter v. Kaminsky, 7 N. Y.S.2d 10—Botnick v. Winokur, 7 N.Y.S.2d 6.

Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517—Schwab v. Moving Picture Machine Operators Local No. 159 of International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of U. S. and Canada, 109 P.2d 600, 165 Or. 602.

specified classes of labor disputes.[57]

(2) Clayton Act and State Statutes Similar Thereto

Under the Clayton Act and state statutes similar thereto, peaceful picketing of an employer against whom a lawful strike is in operation cannot be restrained, but an injunction may be granted to restrain picketing which is not peaceful or peaceful picketing in furtherance of an unlawful strike.

Under the Clayton Act, which is considered generally supra § 138 b (2) (a) bb, the federal court would not grant an injunction to prevent peaceful picketing and efforts made by persuasion by striking workmen to prevent others from working for complainant, against whom a lawful strike is in operation,[58] but the rule was inapplicable where physical force or intimidation of any sort, or abuse, or duress, or any threat of physical force was employed.[59] Where there was no dispute between plaintiff and his employees, and no strike, an injunction against peaceful picketing by a labor union did not violate the act,[60] and, where a manufacturing plant was successfully operating at full capacity, with more men employed than when a strike had been called over seven months previously, and the strike had become a dead issue, the continued picketing of the plant became a mere annoyance and nuisance which could be restrained.[61] The Clayton Act did not affect the operation of the rule, stated supra subdivision a (2) of this section, that peaceful picketing in furtherance of an unlawful strike may be enjoined,[62] or the rule, stated supra subdivision a (3) (c) of this section, authorizing restraint on picketing in such numbers as constitutes an act of intimidation.[63] A fortiori picketing in aid of an unlawful strike could be enjoined under the statute where the picketing was conducted in such numbers as would cause intimidation.[64]

Under state statutes similar to the Clayton Act, which are treated generally supra § 138 b (2) (b) bb, it has been held that the courts will not restrain peaceable picketing[65] or picketing which is not unlawful,[66] although injunctive relief may be granted to restrain picketing which is not peaceable in its nature,[67] or where the picketing is in furtherance of an unlawful purpose.[68] So statutes of this nature do not affect the operation of the rule, stated supra subdivision a (2) of this section, that peaceful picketing in furtherance of an unlawful strike may be enjoined.[69] The statute does not forbid an

57. Pa.—Hagan Ice Cream Co. v. Ice Cream Workers' Union No. 247, 45 Pa.Dist. & Co. 337, 5 Fay. L.J. 147—Comerford-Publix Theatres Corporation v. United Theatrical Alliance of C. I. O., Local 997, 39 Pa.Dist. & Co. 699, 42 Lack. Jur. 150—Hudson Recreation Co. v. Bowling, Billiard & Athletic Employes' Union, Local 209, 39 Pa. Dist. & Co. 655—Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, 37 Pa.Dist. & Co. 337—Pando v. Bartenders' International Alliance, 37 Pa.Dist. & Co. 169, 3 Fay. L.J. 15.

58. U.S.—Duplex Printing Press Co. v. Deering, D.C.N.Y., 247 F. 192, affirmed 252 F. 722, 164 C.C.A. 562, and reversed on other grounds 41 S.Ct. 172, 254 U.S. 443, 65 L.Ed. 349.

59. U.S.—Kinloch Telephone Co. v. Local Union No. 2 of International Brotherhood of Electrical Workers, D.C.Mo., 265 F. 312, reversed on other grounds, C.C.A., 275 F. 241, certiorari denied Local Union No. 2 of International Brotherhood of Electrical Workers v. Kinloch Tel. Co., 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.
32 C.J. p 179 note 54 [a].

60. U.S.—Waitresses' Union, Local No. 249, v. Benish Restaurant Co., C.C.A.Mo., 6 F.2d 568.

61. U.S.—Dail-Overland Co. v. Willys-Overland, Inc., D.C.Ohio, 263 F. 171, affirmed, C.C.A., 274 F. 56.

62. U.S.—Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., D.C., 263 F. 192, reversed on other grounds, C.C.A., Gable v. Vonnegut Mach. Co., 274 F. 66.
32 C.J. p 183 note 88.

63. U.S.—Kinloch Tel. Co. v. Local Union No. 2 I. B. E. W., D.C.Mo., 265 F. 312, reversed on other grounds, C.C.A., 275 F. 241, certiorari denied 42 S.Ct. 270, 257 U.S. 662, 66 L.Ed. 423.
32 C.J. p 183 note 86.

64. U.S.—Kinloch Tel. Co. v. Local Union No. 2 I. B. E. W., supra.

65. Ariz.—Culinary Workers and Bartenders, Local Union No. 631, A. F. of L. v. Busy Bee Cafe, 115 P.2d 246, 57 Ariz. 514.
Ill.—Wagner v. Milk Wagon Drivers' Union, Local 753, 50 N.E.2d 865, 320 Ill.App. 341—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.
N.J.—McPherson Hotel Co. v. Smith, 12 A.2d 136, 127 N.J.Eq. 167.
32 C.J. p 182 note 77.

66. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 193 N.E. 112, 358 Ill. 239, 97 A.L.R. 1318, certiorari denied 55 S.Ct. 645, 295 U.S. 734, 79 L.Ed. 1682—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.

Distance separating pickets

The statute prohibiting injunction provided pickets are ten paces apart does not make peaceable picketing, where pickets are closer to each other than ten paces, either lawful or unlawful, but the common law controls.—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 274.

67. Ariz.—Culinary Workers and Bartenders, Local Union No. 631, A. F. of L. v. Busy Bee Cafe, 115 P.2d 246, 57 Ariz. 514.
Ill.—Swing v. American Federation of Labor, 18 N.E.2d 258, 298 Ill. App. 63, affirmed 22 N.E.2d 857, 372 Ill. 91, certiorari denied American Federation of Labor v. Swing, 60 S.Ct. 514, 309 U.S. 659, 84 L.Ed. 1007, certiorari granted 60 S.Ct. 1081, 310 U.S. 620, 84 L.Ed. 1393, reversed on other grounds 61 S. Ct. 568, 312 U.S. 321, 85 L.Ed. 855, rehearing denied 61 S.Ct. 735, 312 U.S. 715, 85 L.Ed. 1145.
N.J.—McPherson Hotel Co. v. Smith, 12 A.2d 136, 127 N.J.Eq. 167.

68. N.J.—Gevas v. Greek Restaurant Workers' Club, 134 A. 309, 99 N.J.Eq. 770.

69. N.J.—Wasilewski v. Bakers Union, Local No. 64, Elizabeth, N. J., 179 A. 284, 118 N.J.Eq. 349—Elkind & Sons v. Retail Clerks' Interna-

injunction to restrain picketing of the place of business of a customer of the employer against whom a strike is directed,[70] or to restrain picketing in a case not involving a dispute between employer and employees.[71] In determining whether acts complained of may be restrained, each case must be decided on its own particular facts and circumstances.[72]

(3) Other Statutes

Various other statutes have been held not to preclude or authorize an injunction against picketing under the circumstances of the particular cases in which the statutes were applied.

An injunction against picketing of a violent character is not forbidden by a statute which prohibits the granting of an injunction against soliciting others by "peaceful or lawful means" to cease patronizing a party concerning terms or conditions of employment.[73] A statute, providing that no combination between two or more persons to do or procure to be done any act in contemplation or furtherance of any trade dispute between employers and employees shall be deemed criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall any restraining order or injunction be issued with relation thereto, provided nothing in the act shall be construed to authorize force or violence or threats thereof, does not prohibit an injunction against acts which have the effect of intimidating plaintiff's customers resulting in the withdrawal of their patronage.[74] The operation of the rule, stated supra subdivision a (2) of this section, that peaceful picketing in aid of an unlawful strike may be enjoined is not affected by a statute declaring that it shall not be unlawful for members of trade unions or other organizations to induce by peaceable means any person to accept or relinquish any employment.[75] Under constitutional and statutory civil service provisions, where a city acquired a transit system and the employees of the system, on being classified in civil service, resigned from a union, it has been held that picketing to coerce them into resuming union membership could be enjoined, especially where the picketing was done at the employees' homes.[76] In a suit by an employer engaged in interstate commerce, who had entered into a union shop contract with one union, to enjoin picketing by a competing union, injunctive relief will be denied where the National Labor Relations Board has not determined under the National Labor Relations Act which union was the exclusive representative of the employees for the purpose of collective bargaining.[77]

c. Protection of Right of Union to Employ Pickets

The right to employ pickets in carrying on industrial warfare is not a proper subject of protection by means of an injunction.

The right of a voluntary association, engaged in supporting a strike but which is not conducting a business or trade of any kind, to freedom in the labor market, so that the association can readily employ pickets and other agents in carrying on industrial warfare, is not a proper subject of protection by means of an injunction.[78]

d. Who Entitled to Injunction

Where the circumstances justify an injunction, it may be obtained at the suit of the injured party.

Where the circumstances justify an injunction against picketing, it may be obtained at the suit of the injured party.[79] Thus a corporation's subsidiary which owned the premises picketed was not precluded from maintaining the injunction suit, not-

tional Protective Ass'n, 169 A. 494, 114 N.J.Eq. 586—J. Lichtman & Sons v. Leather Workers' Industrial Union, 169 A. 498, 114 N.J.Eq. 596.

Or.—Heitkemper v. Portland Cent. Labor Council, 192 P. 765, 99 Or. 1.

70. N.J.—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 195 A. 378, 122 N.J. Eq. 545, modified on other grounds 199 A. 598, 124 N.J.Eq. 71.

71. Ill.—Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L. Ed. 449, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, affirmed 61 S.Ct. 552, 312 U. S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

72. Ill.—Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 193 N.E. 112, 358 Ill. 239, 97 A.L.R. 1318, certiorari denied 55 S.Ct. 645, 295 U.S. 734, 79 L.Ed. 1682.

73. Or.—Greenfield v. Portland Cent. Labor Council, 207 P. 168, 104 Or. 236.

74. Cal.—Goldberg v. Stablemen's Union, 86 P. 806, 149 Cal. 429, 117 Am.S.R. 145, 8 L.R.A.,N.S., 460, 9 Ann.Cas. 1219.

75. Tex.—Cooks', Waiters' & Waitresses' Local Union v. Papageorge, Civ.App., 230 S.W. 1086.

76. N.Y.—Petrucci v. Hogan, 27 N. Y.S.2d 718.

77. Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

78. N.J.—Atkins v. W. A. Fletcher Co., 55 A. 1074, 65 N.J.Eq. 658. 32 C.J. p 184 note 9.

79. Mass.—Samuel Hertzig Corporation v. Gibbs, 3 N.E.2d 831, 295 Mass. 229.

withstanding the relationship between the subsidiary and the corporation was allegedly a pretense and sham, where the corporation would be entitled to freedom from picketing had it continued to operate the business.[80]

e. Against Whom Injunction Granted

Where the circumstances justify an injunction, it may issue against the person or persons who are committing or threatening to commit the acts complained of, or who are responsible for their commission.

Where the circumstances justify an injunction against picketing, the writ may issue against the person or persons who are committing or threatening to commit the acts complained of, or who are or may be responsible for their commission,[81] and this may include the offending union,[82] the officers of the union,[83] the members of the union,[84] their agents or servants,[85] and persons who aid or abet them in their unlawful acts or conduct.[86]

§ 144. —— To Impede Patronage

The law with respect to injunctions against picketing, where the primary purpose of the picketing was to impede patronage, as well as in other cases has been considered supra § 143.

Examine Pocket Parts for later cases.

§ 145. —— To Interfere with Workmen

The law of injunctions against picketing where the primary purpose of the picketing was to interfere with workmen as well as where other purposes were involved has been considered supra § 143.

Examine Pocket Parts for later cases.

§ 146. Publication of Black List

A combination to blacklist may be enjoined in a proper case.

An employer acting within his rights will not be enjoined from keeping a book showing that he had discharged employees therein named for belonging to the union, or from notifying other employers that he keeps such a book and that they can inspect it.[87] On the other hand, a combination to blacklist may be enjoined when directed against persons with whom those combining have no trade dispute,[88] and this rule applies whether the combination is one of employers[89] or of laborers.[90] So the concerted action of a combination of employers which coerces the individual members, by threats or implied threats, or otherwise, to withhold employment from those whom ordinarily they would employ, may be enjoined.[91] The right to relief by injunction may be barred by misconduct.[92]

§ 147. Strikes

a. In general
b. Effect of statutory regulation of right
c. Who may be enjoined

a. In General

(1) Preventing strikes generally
(2) Compelling performance of services by employees remaining in service
(3) Restraining union from inducing or consenting to strike
(4) Restraining intermeddlers
(5) Restraining acts in furtherance of strike

(1) Preventing Strikes Generally

As a general rule the courts have no power by injunction to prevent an individual or a group of workmen from withdrawing from the service of his or their employer as long as the act is committed in a lawful manner, or to require men who cease work to go back.

80. Mass.—Samuel Hertzig Corporation v. Gibbs, supra.

81. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J. Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307.
32 C.J. p 184 note 12, p 185 notes 13-16.

82. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, supra.
32 C.J. p 184 note 12.

83. Ark.—Local Union No. 313 H. R. E. I. A. v. Stathakis, 205 S.W. 450, 135 Ark. 861, 6 A.L.R. 894.
Wash.—St. Germain v. Seattle Bakery and Confectionery Workers' Union No. 9, 166 P. 665, 97 Wash. 252, L.R.A.1917F 824.
32 C.J. p 185 note 13.

84. Wash.—St. Germain v. Seattle Bakery and Confectionery Workers' Union No. 9, supra.
32 C.J. p 185 note 14.

85. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N. J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307.
32 C.J. p 185 note 15.

86. N.Y.—Jones v. Maher, 116 N. Y.S. 180, 62 Misc. 388.
Wash.—St. Germain v. Seattle Bakery and Confectionery Workers' Union No. 9, 166 P. 665, 97 Wash. 252, L.R.A.1917F 824.

87. U.S.—Boyer v. Western Union Tel. Co., C.C.Mo., 124 F. 248.

88. Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263—Cornellier v. Haverhill Shoe Mfrs.' Ass'n, 109 N.E. 643, 221 Mass. 554, L.R.A.1916 C 218.
"Blacklist" defined see the C.J.S. definition 11 C.J.S. p 354.
Combination to blacklist as conspiracy generally see Conspiracy § 15.

89. Mass.—Cornellier v. Haverhill Shoe Mfrs.' Ass'n, supra.

90. Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

91. Mass.—Cornellier v. Haverhill Shoe Mfrs.' Ass'n, 79 N.E. 643, 221 Mass. 554, L.R.A.1916C 218.
32 C.J. p 186 note 31.

92. Mass.—Cornellier v. Haverhill Shoe Mfrs.' Ass'n, supra.
32 C.J. p 186 note 32.

A court of equity will not by injunction prevent one individual from quitting the personal service of another.[93] Accordingly, although there is some contrary authority,[94] it has been held that the courts have no power to enjoin workmen from withdrawing in a body from the service of their employer,[95] as long as they do this in their own interest[96] and in a manner not in itself unlawful,[97] and as long as the refusal to work is not connected with an illegal combination to prevent another from securing workers;[98] and it is immaterial that such withdrawal involves a breach of contract to work for a definite period of time rendering those withdrawing liable in damages to the person injured[99] or to a criminal prosecution.[1] A departure from the rule is not justified by the fact that the employees sought to be enjoined are in the service of a receiver or a quasi-public corporation,[2] or that they may cease work under circumstances that would show bad faith on their part, or a reckless disregard of their contract or of the convenience and interest of both the employer and the public.[3] The motive actuating a strike is immaterial.[4] Further, an injunction is not justified by the fact that the strike hampers or threatens to stop the employer's interstate commerce, as long as it is but an unintended consequence of the lawful exercise of defendant's rights.[5] A court of equity is without power to make an order that men who quit work in violation of their contracts shall go back to work.[6]

Workmen employed in war industries. An exception to the general rule has been made in the case of workers employed in war industries, and an injunction granted providing that "strikes for any cause whatever to be enjoined for the duration of the war."[7]

(2) Compelling Performance of Services by Employees Remaining in Service

Employees who remain in the service of their employer may be compelled by injunction to perform the duties incident thereto.

While a court of equity, as shown supra subdivision a (1) of this section, has no power to compel employees to continue in the service of the employer, if the employees elect to remain in the service, performance of the duties incident thereto may be compelled by injunction.[8]

93. U.S.—Arthur v. Oakes, Wis., 63 F. 310, 11 C.C.A. 209, 25 L.R.A. 414.
Cal.—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal.App. 159.
Ill.—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill.App. 435.
32 C.J. p 162 note 28.

94. Ga.—Burgess v. Georgia, F. & A. R. Co., 96 S.E. 864, 148 Ga. 415.
32 C.J. p 162 note 29.

95. U.S.—Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.Pa., 15 F.2d 16, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 871—Peterson v. Master Plumbers' Ass'n, D.C.Nev., 44 F. Supp. 908, 911, citing **Corpus Juris.**
Cal.—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal.App. 159.
Ill.—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill. App. 435.
N.J.—C. B. Rutan Co. v. Local Union No. 4, Hatters' Union of America, 128 A. 622, 97 N.J.Eq. 77—New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators and Paper Hangers of America, 126 A. 399, 96 N.J.Eq. 632, 47 A.L.R. 384, reversing 122 A. 622, 95 N.J.Eq. 108.
32 C.J. p 162 note 30.
Effect of statutory regulation of right see infra subdivision b of this section.
Rights of employer with respect to employment and discharge of employees and conduct of his business generally see the C.J.S. title Master and Servant § 5, also 63 C.J. p 658 note 50–p 659 note 54.
Strike:
Defined see Conspiracy § 11 a.
As:
Means permissible to effect purpose of union generally see Master and Servant § 28 (19).
Monopoly see the C.J.S. title Monopolies § 79, also 41 C.J. p 169 note 4 et seq.

96. U.S.—Barber Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.Pa., 15 F.2d 16, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 871.
N.J.—New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators and Paper Hangers of America, 126 A. 399, 96 N.J.Eq. 632, 47 A.L.R. 384, reversing 122 A. 822, 95 N.J.Eq. 108.

97. U.S.—Barber Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.Pa., 15 F.2d 16, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 871.
N.J.—New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators and Paper Hangers of America, 126 A. 399, 96 N.J.Eq. 632, 47 A.L.R. 384, reversing 122 A. 822, 95 N.J.Eq. 108.

98. Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

99. Ill.—Kemp v. Division No. 241, Amalgamated Ass'n of Street & Electric R. Employés of America, 99 N.E. 389, 255 Ill. 213, Ann.Cas. 1913D 347.
32 C.J. p 162 note 31.

1. U.S.—Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., C.C.Ohio, 54 F. 730, 19 L.R.A. 387, affirmed 17 S.Ct. 658, 166 U.S. 548, 41 L.Ed. 1110.

2. U.S.—Arthur v. Oakes, Wis., 63 F. 310, 11 C.C.A. 209, 5 L.R.A. 414.

3. U.S.—Arthur v. Oakes, supra.

4. Cal.—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal.App. 159.

5. U.S.—Great Northern R. Co. v. Local Great Falls Lodge I. A. M., No. 287, D.C.Mont., 283 F. 557.
32 C.J. p 162 note 37.

6. Ohio.—Lundoff-Bicknell Co. v. Smith, 156 N.E. 243, 24 Ohio App. 294.

7. N.Y.—Rosenwasser v. Pepper, 172 N.Y.S. 310, 104 Misc. 457.
32 C.J. p 162 note 39.

8. U.S.—Southern California R. Co. v. Rutherford, C.C.Cal., 62 F. 796.
32 C.J. p 162 note 42.

(3) Restraining Union from Inducing or Consenting to Strike

(a) In general

(b) Disciplinary measures of union to compel members to strike

(a) In General

Courts have no power to enjoin union officers acting in good faith from calling a lawful strike, but such officers may be restrained from calling an unlawful strike, as where the object to be attained by the strike is unlawful or where the means employed are not lawful.

Courts have no power to enjoin officers vested with the requisite authority and acting in good faith from calling a lawful strike by the members of the union which they represent, that is to say, a strike, the object of which the law regards as lawful, and which involves no breach of contract on the part of those called out.[9] The rule is in no way restricted or limited by the fact that the strike might incidentally interrupt the passage of the mails,[10] or the transportation of interstate commerce,[11] or by the fact that the employer is a receiver managing property under the direction of the court.[12] Especially should the rule not be denied or restricted where it is shown that the members have voted to strike, and that under the constitution and by-laws of the union no strike can be declared without the sanction of the officers.[13] So a labor union conducting a lawful strike for the benefit of its members will not be enjoined because of unlawful acts of its individual members which neither its officers nor committees directed or approved, unless such acts were committed in carrying out their orders.[14] Where a court of equity is without power to order strikers to resume work, the court will not, by mandatory injunction, compel officers of their union to make the men return to work.[15]

Unlawful strike. Although, as shown supra subdivision a (1) of this section, a combination of workmen cannot as a general rule be enjoined from striking, it does not follow, in the absence of statutes affecting the right, that officers of a union cannot be enjoined from calling a strike.[16] Officers of a union may be restrained from ordering a strike by its members, where their compliance with the order would constitute a breach of their contracts of employment,[17] or of the employer's agreement with the union,[18] or of a contract by which the employer and employees agreed to submit matters of difference to arbitration,[19] or where the object to be attained by the strike is unlawful[20] or in contraven-

9. N.Y.—Willson & Adams Co. v. Pearce, 265 N.Y.S. 624, 240 App. Div. 718, reversing 237 N.Y.S. 601, 135 Misc. 426, and affirmed 191 N. E. 545, 264 N.Y. 521.
32 C.J. p 163 note 43.
Civil and criminal liability for interference with relation of master and servant by third persons generally see the C.J.S. title Master and Servant §§ 624–639, also 39 C.J. p 1370 note 12 et seq.

10. U.S.—In re Grand Jury, D.C. Cal., 62 F. 834.

11. U.S.—Thomas v. Cincinnati, N. O. & T. P. R. Co., C.C.Ohio, 62 F. 803—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 563.

12. U.S.—Thomas v. Cincinnati, N. O. & T. P. R. Co., C.C.Ohio, 62 F. 803.

13. U.S.—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 563.
32 C.J. p 163 note 47.

14. U.S.—Aluminum Castings Co. v. Local No. 84 of International Molders' Union of North America, D.C.N.Y., 197 F. 221.

15. Ohio.—Lundoff-Bicknell Co. v. Smith, 156 N.E. 243, 24 Ohio App. 294.

16. U.S.—Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., C.C.Ohio, 54 F. 730, 19 L.R.A. 387, affirmed 17 S.Ct. 658, 166 U.S. 548, 41 L.Ed. 1110.
Ill.—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill.App. 435.
Effect of statutory regulation of right see infra subdivision b of this section.

17. N.Y.—Goldman v. Cohen, 227 N. Y.S. 311, 222 App.Div. 631—Meltzer v. Kaminer, 227 N.Y.S. 459, 131 Misc. 813—Best Service Wet Wash Laundry Co. v. Dickson, 201 N.Y.S. 173, 121 Misc. 416.
32 C.J. p 163 note 50.

18. Tex.—Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, Civ.App., 48 S.W.2d 1033, error dismissed.

19. U.S.—Portland Terminal Co. v. Foss, D.C.Me., 283 F. 204.
Pa.—Public Service Taxi Co. v. Local Union No. 229, International Brotherhood of Teamsters, Com. Pl., 40 Lack.Jur. 141.

Inadequacy of remedy at law
There is no adequate remedy at law for labor union's breach of agreement not to call strike until disputed matter is submitted to arbitration, and injunction should be granted to restrain breach.—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill.App. 435.

20. U.S.—Alco-Zander Co. v. Amalgamated Clothing Workers of America, D.C.Pa., 35 F.2d 203—U. S. v. Elliott, C.C.Mo., 64 F. 27.
Md.—Blandford v. Duthie, 128 A. 138, 147 Md. 388.
Mass.—Pickett v. Walsh, 78 N.E. 753, 192 Mass. 572, 6 L.R.A.,N.S., 1067, 116 Am.S.R. 272, 7 Ann.Cas. 638.
N.Y.—Falciglia v. Gallagher, 299 N. Y.S. 890, 164 Misc. 838—Best Service Wet Wash Laundry Co. v. Dickson, 201 N.Y.S. 173, 121 Misc. 416.
Ohio.—Drake Bakeries, Inc. v. Bowles, 31 Ohio N.P.,N.S., 425.
32 C.J. p 163 note 52.

Illegal purposes authorizing injunction

(1) Interference with plaintiff by inducing customer to breach his contract with plaintiff.—O'Brien v. Fackenthal, C.C.A.Ohio, 5 F.2d 389.

(2) Protection of union laborers in distant markets, who have no prospect of employment or direct interest in the wages paid, by preventing the shipment of goods produced by nonunion labor to markets of other states where they will compete with goods manufactured by union labor.—Alco-Zander Co. v. Amalgamated Clothing Workers of America, D.C.Pa., 35 F.2d 203.

(3) Furtherance of illegal combination to prevent another from securing workers.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

(4) Other illustrations see 32 C.J. p 163 note 52 [a].

tion of public policy.[21] So a combination to bring about a strike may be enjoined where the means employed are not lawful,[22] as where the strike is accompanied by violence.[23] An exception to the rule affirming the power of a court of equity to enjoin officers of a union from calling an unlawful strike has been recognized in a case where the members of a union have, in accordance with their constitution decided on a strike, and under the constitution and by-laws the consent of a designated officer must be obtained before the decision to strike can be carried into effect;[24] but such an exception to the rule also has been denied.[25]

(b) Disciplinary Measures of Union to Compel Members to Strike

Although circumstances may arise where the employment of such measures are improper and will be enjoined, disciplinary measures of a union to compel its members to strike will not ordinarily be restrained.

Officers and members of a union may be enjoined from attempting to coerce into striking members in the employ of persons with whom they have no trade dispute, by threats of fine and expulsion, for the purpose of coercing such employers into refraining from purchasing materials manufactured by a person with whom the union has a trade dispute.[26] An injunction has been granted in such a case to complainants who were members of defendant's union and also public officers.[27]

While there are some decisions to the contrary,[28] it is very generally held that, since, in furtherance of a lawful strike, labor unions may use such coercive measures as the imposition of fines, suspensions, or expulsions on their members, or threats to impose such penalties on them for disobedience of orders to strike or to continue on strike after going out, such acts will not be enjoined at the suit of the employer against whom the strike is called.[29] The operation of this rule is not affected by a statute which makes it a misdemeanor for a person by threats, force, or intimidation to prevent an employee from continuing or performing his work;[30] nor by the fact that the members against whom the disciplinary measures are directed are employees of a railroad operated by a receiver.[31]

Where members under contract for definite time. Where penalties, such as fines, suspension, or expulsion, are imposed or threatened to cause members to join in or continue on strike, and such members are under contracts to work for a definite time for the employer against whom the strike has been declared, such acts may be enjoined.[32]

(4) Restraining Intermeddlers

Intermeddlers may be restrained from inciting or coercing strikes where it is necessary to prevent irreparable injury.

When necessary to prevent irreparable injury, an injunction will be granted to prevent third persons having no connection with employer or employees, and no interest in the relations existing between them, from inciting or coercing strikes among employees who are not dissatisfied with the terms of their employment and are not seeking an increase of wages.[33] Thus persons not employed by plaintiff may be enjoined from soliciting his employees to strike in breach of their contract of employment.[34]

(5) Restraining Acts in Furtherance of Strike

(a) In general

Sympathetic strike

Company manufacturing and installing roofing material was held entitled to enjoin illegal methods of union by sympathetic strikes, to obtain all roofing work for its members.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

21. N.Y.—Falciglia v. Gallagher, 299 N.Y.S. 899, 164 Misc. 838.
32 C.J. p 164 note 53.

22. U.S.—U. S. v. Railway Employees' Department of American Federation of Labor, D.C.Ill., 290 F. 978.
N.J.—Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey, Newark Local, Ch., 193 A. 806.

23. U.S.—U. S. v. Railway Employees' Department of American Federation of Labor, D.C.Ill., 290 F. 978.

24. U.S.—Delaware, L. & W. R. Co. v. Switchmen's Union of North America, C.C.N.Y., 158 F. 541.
32 C.J. p 164 note 55.

25. U.S.—Portland Terminal Co. v. Foss, D.C.Me., 283 F. 204.

26. Mass.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.
Pa.—Purvis v. Local No. 500 United Brotherhood of Carpenters, etc., 63 A. 585, 214 Pa. 348, 112 Am.S.R. 757, 12 L.R.A. 642, 6 Ann.Cas. 275.

27. La.—Schneider v. Local Union No. 60, U. J. P. & U. S., 40 So. 700, 116 La. 270, 114 Am.S.R. 549, 5 L.R.A.,N.S., 891.
32 C.J. p 178 note 40.

28. Mass.—Wilcutt v. Driscoll, 85 N. E. 897, 200 Mass. 110, 23 L.R.A., N.S., 1236.
32 C.J. p 178 note 41.

29. Minn.—Scott-Stafford Opera House Co. v. Minneapolis Musicians' Assoc., 136 N.W. 1092, 118 Minn. 410.
32 C.J. p 179 note 42.

30. Or.—Longshore Printing Co. v. Howell, 38 P. 547, 26 Or. 527, 46 Am.S.R. 640, 28 L.R.A. 464.
Effect of statutory regulation of right generally see infra subdivision b of this section.

31. U.S.—Thomas v. Cincinnati, N. O. & T. P. R. Co., C.C.Ohio, 62 F. 803.

32. U.S.—Barnes & Co. v. Berry, C. C.Ohio, 156 F. 72—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 562.
32 C.J. p 179 note 47.

33. Me.—Keith Theatre v. Vachon, 187 A. 692, 697, 134 Me. 392, quoting Corpus Juris.
32 C.J. p 164 note 57.

34. U.S.—Armstrong v. U. S., C.C.A. Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 413.

(b) Persuading others to join strike
(c) Persuading others not to accept employment
(d) Fraud to induce others to strike
(e) Force, violence, or intimidation to prevent others from working
(f) Payment of benefits to members or nonmembers

(a) In General

Unlawful acts in furtherance of a lawful or unlawful strike may be enjoined if the conditions which make an injunction proper are present, and any acts in furtherance of an unlawful strike may likewise be restrained; but lawful acts in furtherance of a lawful strike will not be enjoined.

An injunction will not lie to prevent lawful acts in aid of a lawful strike.[35] On the other hand, where the strike is unlawful, acts done in furtherance thereof, although innocent in themselves, are necessarily of the same character and may be enjoined if the conditions which call for equitable relief by injunction are present;[36] and this doctrine is not affected by a statute making it lawful to persuade or attempt to persuade another to do anything not unlawful, actionable, or in violation of duty, etc.[37] Unlawful acts in furtherance of a strike, whether it is lawful or unlawful, may be enjoined if the conditions which make an injunction proper are present;[38] and this is so although the acts are punishable criminally.[39] The means employed in aid of a lawful strike must be free from falsehood, libel, or defamation, and from physical violence, coercion, or moral intimidation.[40] It has been held, however, that unlawful acts to effectuate a lawful strike do not taint the lawful purpose of the strike so as to justify an injunction against lawful acts to accomplish such purpose.[41] If, however, one purpose of the strike is lawful and another purpose unlawful, all acts of whatever character in furtherance of such strike are unlawful and will be enjoined.[42] It has been held that the drawing of wagons through the streets carrying placards announcing the existence of a strike long after the strike has terminated will be enjoined.[43]

(b) Persuading Others to Join Strike

Peaceful persuasion to procure workmen to join a lawful strike will not be enjoined, but the rule is otherwise where the strike is unlawful, or where the persuasion is so persistent as to constitute unlawful coercion.

An injunction will not lie to restrain strikers in the furtherance of a lawful strike from using peaceful persuasion, argument, or entreaty to procure other workmen to join them in the strike.[44] Persuasion too emphatic or too long and persistently continued, however, may itself become a nuisance and its use a form of unlawful coercion, restrainable by injunction.[45] It has been held that a final order enjoining peaceful persuasion is not improper

35. N.Y.—Mlle. Reif, Inc., v. Randau, 1 N.Y.S.2d 515, 166 Misc. 247.
Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745.
32 C.J. p 164 note 60.
Restraining:
Boycotts see supra §§ 139–142.
Picketing see supra § 143.

36. N.J.—Canter Sample Furniture House v. Retail Furniture Employees Local No. 109, 196 A. 210, 122 N.J.Eq. 575—Wasilewski v. Bakers Union, Local No. 64, Elizabeth, N. J., 179 A. 284, 118 N.J.Eq. 349.
N.Y.—J. I. Hass Co. v. McNamara, 21 N.Y.S.2d 441.
32 C.J. p 164 note 61.

37. Mass.—Rice, Barton & Fales Machine & Iron Co. v. Willard, 136 N.E. 629, 242 Mass. 566.
32 C.J. p 164 note 62.
Effect of statutory regulation of right generally see infra subdivision b of this section.

38. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092—Allis Chalmers Co. v. Reliable Lodge, C.C.Ill., 111 F. 264—Southern R. Co. v. Machinists' Local Union No. 14, C.C.Tenn., 111 F. 49.
Idaho.—Robinson v. Hotel & Restaurant Employees Local No. 782, 207 P. 132, 35 Idaho 418.
N.Y.—W. P. Davis Mach. Co. v. Robinson, 84 N.Y.S. 837, 41 Misc. 329.
Ohio.—Perkins, Campbell & Co. v. Rogg, 11 Ohio Dec., Reprint, 585, 28 Cinc.L.Bul. 32.
Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745—State Line & Sullivan R. Co. v. Brown, 11 Pa.Dist. 509.
32 C.J. p 164 note 64.
Discontinuance of strike
(1) The discontinuance of a strike has been held not to be sufficient ground for refusing an injunction to prevent illegal acts on the part of the strikers.—U. S. v. Workingmen's Amalgamated Council, C.C.La., 54 F. 994, 26 L.R.A. 158, affirmed 57 F. 85, 6 C.C.A. 258.

(2) But a contrary view has also been taken.—Reynolds v. Everett, 39 N.E. 72, 144 N.Y. 189, affirming 22 N.Y.S. 306, 67 Hun 294.

A preliminary injunction to prevent illegal acts by strikers will not be refused merely because it will have the practical effect of ending the strike and be equivalent to final relief.—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 2, C.C.Ohio, 90 F. 598.

39. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.
Kan.—State v. Howat, 198 P. 686, 109 Kan. 376.

40. Idaho.—Robinson v. Hotel & Restaurant Employees Local No. 782, 207 P. 132, 35 Idaho 418.
32 C.J. p 165 note 66.

41. U.S.—Tri-City Central Trades Council v. American Steel Foundries, Ill., 238 F. 728, 151 C.C.A. 518, certiorari granted 38 S.Ct. 190, 245 U.S. 670, 62 L.Ed. 539, and modified on other grounds 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, 27 A.L.R. 360, motion granted 42 S.Ct. 271.
32 C.J. p 165 note 67.

42. Mass.—Baush Mach. Tool Co. v. Hill, 120 N.E. 188, 231 Mass. 30.

43. Mass.—Steinert v. Tagen, 93 N. E. 584, 207 Mass. 394, 32 L.R.A., N.S., 1013.

44. N.Y.—Reynolds v. Everett, 39 N. E. 72, 144 N.Y. 189, affirming 22 N.Y.S. 306, 67 Hun 294.
32 C.J. p 165 note 71.

45. Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 433, 287 Pa. 171, 47 A.L.R. 745, citing **Corpus Juris.**
32 C.J. p 165 notes 75 [a], 76.

when at the time there was no longer a controversy between complainant and its employees respecting terms and conditions of employment, and it appeared that the strike had long ceased to exist except for certain annoying manifestations on the part of a comparatively few people.[46] The fact that interstate commerce may be incidentally interrupted thereby does not affect the operation of the rule.[47]

Unlawful strike. If the strike is itself unlawful, even peaceable persuasion in furtherance of it will be enjoined if the conditions which call for equitable relief by injunction are present.[48]

(c) Persuading Others Not to Accept Employment

Strikers will not be restrained from using peaceful persuasion to induce other workmen not to accept employment from the employer against whom a lawful strike is in operation.

An injunction will not lie to restrain strikers from using peaceful persuasion and argument to induce other workmen not to accept employment from the employer against whom a lawful strike is in operation,[49] provided the persuasion used is of such a nature as not to amount to coercion.[50]

(d) Fraud to Induce Others to Strike

Procuring workmen by means of fraud to join a strike may be enjoined.

Procuring workmen to quit their employment and join in a strike, by means of fraud, is unlawful and in a proper case may be enjoined.[51]

(e) Force, Violence, or Intimidation to Prevent Others from Working

The use of force, violence, coercion, or intimidation to prevent employees from working or other workmen from accepting employment from the employer against whom a strike is in operation may be enjoined.

The use of force, violence, coercion, or intimidation to prevent employees from working for the employer against whom the strike is in operation, or to prevent other workmen from accepting employment from him, is not permissible and an injunction will be granted to prevent the commission of such acts,[52] and it is immaterial that the strike is for a lawful purpose.[53] It is not necessary that there should have been actual violence or physical assaults, but it will be sufficient if threats, abusive language, or other acts amounting to intimidation and depriving those against whom the acts were directed of the power to exercise their own will in determining whether or not they should work, were used.[54] An injunction restraining continuance of unlawful practices by strikers will not be denied because of the discontinuance of such practices shortly before issuance of the injunction, where the strike is still in progress and the recurrence of the unlawful acts is probable.[55] In the absence of statutes affecting the right, see infra subdivision b of this section, refusal of an employer to arbitrate differences with his employees furnishes no ground for refusal by a court of equity to enjoin acts of this character committed in aid of the strike.[56]

(f) Payment of Benefits to Members or Nonmembers

A union ordinarily will not be restrained from rendering financial assistance to striking workmen, whether or not they are members of the union.

While there is some authority apparently to the contrary,[57] it generally is held that no injunction will be granted at the instance of a person against whom a strike is directed to prevent a union from rendering financial assistance, in furtherance of a lawful strike, to its members who have gone out on a strike by giving them strike pay;[58] nor has

46. U.S.—Quinlivan v. Dail-Overland Co., C.C.A.Ohio, 274 F. 56.
47. U.S.—Great Northern R. Co. v. Local Great Falls Lodge I. A. M., No. 287, D.C.Mont., 283 F. 557.
48. U.S.—U. S. v. Railway Employees' Dept. A. F. L., D.C.Ill., 283 F. 479.
32 C.J. p 165 note 79.
49. Ga.—Jones v. E. Van Winkle Gin & Machine Works, 62 S.E. 236, 131 Ga. 336, 127 Am.S.R. 235, 17 L.R.A.,N.S., 848.
32 C.J. p 165 note 82.
50. Ga.—McMichael v. Atlanta Envelope Co., 108 S.E. 226, 151 Ga. 776.
Idaho.—Robinson v. Hotel & Restaurant Employees Local No. 782, 207 P. 132, 35 Idaho 418.
32 C.J. p 165 note 84.
51. Tex.—Thomas v. International Seamen's Union of America, Civ. App., 101 S.W.2d 328.
32 C.J. p 165 note 85.
52. Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 796, 114 Conn. 319, citing **Corpus Juris.**
N.Y.—Master Horseshoers' Protective Assoc. v. Quinlivan, 82 N.Y.S. 288, 83 App.Div. 459.
Ohio.—Perkins, Campbell & Co. v. Rogg, 11 Ohio Dec., Reprint, 585, 28 Cinc.L.Bul. 32.
Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745—State Line & Sullivan R. Co. v. Brown, 11 Pa.Dist. 509.
32 C.J. p 156 note 56, p 166 note 86.
Effect of statutory regulation of right see infra subdivision b of this section.
53. U.S.—Aluminum Castings Co. v. Local No. 84 International Molders of North America, D.C.N.Y., 197 F. 221.
54. Conn.—Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 796, 114 Conn. 319, citing **Corpus Juris.**
32 C.J. p 166 note 94.
55. N.J.—Thomson Mach. Co. v. Brown, 104 A. 129, 89 N.J.Eq. 326.
56. N.J.—Thomson Mach. Co. v. Brown, supra.
57. Ga.—McMichael v. Atlanta Envelope Co., 108 S.E. 226, 151 Ga. 776.
58. Va.—Everett Waddey Co. v. Richmond Typographical Union No. 90, 53 S.E. 273, 105 Va. 188, 5 L.R.A.,N.S., 792.
32 C.J. p 166 note 98.

an employer any standing to enjoin a union, to which the strikers belong, from giving financial assistance,[59] such as the payment of weekly benefits and the expenses of transportation from place to place[60] to nonunion workmen, to induce them to quit the employer's service. The rule enunciated applies equally whether those to whom the assistance is rendered merely join in the strike,[61] or in addition thereto join the union.[62]

According to some authorities an employer may have a right to an injunction to prevent the payment of strike benefits in aid of an unlawful strike[63] although the opposite view has also been taken.[64]

b. Effect of Statutory Regulation of Right

(1) Norris-La Guardia Act and state statutes similar thereto

(2) Clayton Act and state statutes similar thereto

(1) Norris-La Guardia Act and State Statutes Similar Thereto

Under the Norris-La Guardia Act and state statutes, similar in nature, general injunctions cannot be issued against striking whether or not the strike is illegal, although the strike is subject to some restraint where unlawful acts have been threatened and committed and the requirements of the statute have been fully complied with.

Under the provision of the Norris-La Guardia Act denying to the federal courts jurisdiction in cases growing out of labor disputes to prohibit any person or persons, whether singly or in concert, from ceasing or refusing to perform any work or to remain in any relation of employment, general injunctions cannot be issued against striking.[65] The test is no longer given the uncertain elasticity of "illegality,"[66] and whether or not the strike is illegal, because of its purpose, is immaterial.[67] A strike is subject to some restraint, however, where unlawful acts have been threatened and committed and will be committed and continued unless restrained;[68] but only specific acts of individuals, and not the strike itself, can be enjoined.[69] Furthermore, violence or fraud in the conduct of a strike cannot be enjoined unless there has been a compliance with the requirements of the act,[70] such as the requirement that a showing that the local law enforcement agencies were unable or unwilling to furnish adequate protection to the employer[71] and the requirement of a bond.[72]

Under state statutes patterned on the federal Norris-La Guardia Act, which are considered generally supra § 138 b (2) (b) cc, a strike for a lawful purpose, conducted in a lawful manner, cannot be enjoined;[73] but, where the statutory requirements have been complied with, violence, intimidation, and coercion in the conduct of a strike may be restrained.[74] Under a statute providing that no injunction shall issue in any case involving a labor dispute except after a finding that unlawful acts have "or a breach of any contract not contrary to public policy has" been threatened or committed, and that such acts or breach will be executed or continued unless restrained, the quoted section, which is not to be found in the federal statute, indicates that the legislature had no intention of depriving the court of the power formerly possessed by it to enjoin a strike where a breach of any contract not contrary to public policy has been threatened or committed, provided the other requisite facts are found to exist.[75] Accordingly, where all the requirements of the statute have been met, a strike characterized by acts of violence and called without cause in violation of a collective bargaining agreement may be enjoined.[76] Such an injunction, it has been said, does not compel the men in

59. N.Y.—Rogers v. Evarts, 17 N.Y. S. 264.
32 C.J. p 166 note 99.

60. Va.—Everett Waddey Co. v. Richmond Typographical Union No. 90, 53 S.E. 273, 105 Va. 188, 5 L.R.A.,N.S., 792, 8 Ann.Cas. 798.

61. N.Y.—Rogers v. Evarts, 17 N. Y.S. 264—Johnston Harvester Co. v. Meinhardt, 9 Abb.N.Cas. 393, 60 How.Pr. 168, affirmed 24 Hun 489.

62. Va.—Everett Waddey Co. v. Richmond Typographical Union No. 90, 53 S.E. 273, 105 Va. 188, 5 L.R.A.,N.S., 792, 8 Ann.Cas. 798.

63. Mass.—Reynolds v. Davis, 84 N. E. 457, 198 Mass. 294, 17 L.R.A., N.S., 162.
32 C.J. p 167 note 6.

64. U.S.—A. R. Barnes & Co. v. Berry, C.C.Ohio, 157 F. 883, affirmed 169 F. 225, 94 C.C.A. 501.
32 C.J. p 167 notes 7–10.

65. U.S.—Wilson & Co. v. Birl, C. C.A.Pa., 105 F.2d 948, affirming, D.C., 27 F.Supp. 915—Colorado-Wyoming Express v. Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stable Men and Helpers of America, D.C.Colo., 35 F.Supp. 155—U. S. v. Hutcheson, D.C.Mo., 32 F.Supp. 600.
Norris-La Guardia Act generally see supra § 138 b (2) (a) cc.

66. U.S.—Wilson & Co. v. Birl, C.C. A.Pa., 105 F.2d 948.

67. U.S.—Wilson & Co. v. Birl, supra.

68. U.S.—Lake Charles Stevedores v. Mayo, D.C.La., 20 F.Supp. 698.

69. U.S.—Wilson & Co. v. Birl, C. C.A.Pa., 105 F.2d 948.

70. U.S.—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F.Supp. 984.

71. U.S.—Cupples Co. v. American Federation of Labor, supra.

72. U.S.—Cupples Co. v. American Federation of Labor, supra.

73. Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

74. Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, supra.

75. N.Y.—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y. S.2d 589.

76. N.Y.—Nevins, Inc., v. Kasmach, 18 N.E.2d 294, 279 N.Y. 323, revers-

the union to return to work, but merely enjoins the union from calling or continuing a strike in violation of its contractual obligation and doing acts which might be legal were a strike actually in existence.[77] No injunction will be granted in a case involving a labor dispute unless there has been a full compliance with the statutory requirements.[78]

(2) Clayton Act and State Statutes Similar Thereto

The Clayton Act and state statutes of similar nature prohibit injunctions to restrain strikers in the furtherance of a lawful strike from using peaceful persuasion but do not affect the power of the court to enjoin the use of violence or intimidation, or from restraining acts committed in furtherance of an unlawful strike; and furthermore such statutes do not apply to disputes between an employer and persons who are neither past, present, nor prospective employees.

Under the Clayton Act, which is considered generally supra § 138 b (2) (a) bb, and which provides that employees shall not be restrained from recommending, advising, or persuading others by peaceful means to quit work, an injunction will not lie to restrain strikers in the furtherance of a lawful strike from using peaceful persuasion, argument, or entreaty to procure other workmen to join them in the strike;[79] but the statute does not in any way affect the power of a court of equity to enjoin the use of force, violence, or intimidation to prevent others from working.[80] The provisions of the Clayton Act apply only in cases growing out of the disputes between employer and employee or persons seeking employment, and not to disputes between an employer and persons who are neither ex-employees nor seeking employment,[81] and do not prohibit a federal court from restraining persons who were not past, present, or prospective employees of plaintiff from seeking to induce employees to strike in breach of their contracts of employment[82] or for the purpose of gaining recognition of the union.[83] Notwithstanding the act, if the strike is itself unlawful even peaceable persuasion in furtherance of it will be enjoined if the conditions which call for equitable relief by injunction are present.[84] The provision of the act prohibiting the issuance of injunctions unless necessary to prevent irreparable injury refers not to such irreparable injury as is the natural and inevitable result of the strike, but embraces only direct injuries to new employees or to the property of the employer by acts of trespass or violence, or obstruction of the employer in obtaining new employees by means of threats, abuse, or violence.[85] So it has been held that the act prohibited an injunction restraining railroad employees from striking in a peaceable manner, even though their strike would be a breach of an agreement entered into under the Transportation Act, since such breach would not be irreparable injury within the meaning of the Clayton Act.[86]

State statutes similar to the Clayton Act, which are considered generally supra § 138 b (2) (b) bb, do not in any way affect the power of a court of equity to enjoin officers of a union from calling an unlawful strike[87] to enjoin acts done in furtherance of an unlawful strike although innocent in themselves,[88] or to enjoin the use of force, violence, or intimidation to prevent others from working.[89]

c. Who May Be Enjoined

Where the circumstances justify an injunction, it may issue against the persons who are committing or threatening to commit the acts complained of, or who are responsible for their commission.

Officers and members of a labor union and all persons acting under the authority or control of the

ing 300 N.Y.S. 64, 252 App.Div. 890, motion denied 16 N.E.2d 852, 278 N.Y. 705—In re State Labor Relations Board, 22 N.Y.S.2d 40, 175 Misc. 88—Euclid Candy Co. of New York v. Summa, 19 N.Y.S.2d 382, 174 Misc. 19, affirmed Euclid Candy Co. of New York v. Suma, 21 N.Y.S.2d 614, 259 App.Div. 1081—Greater City Master Plumbers Ass'n v. Kahme, 6 N.Y.S.2d 589.

77. N.Y.—Greater City Master Plumbers Ass'n v. Kahme, supra.

78. Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

79. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, modifying 238 F. 728, 151 C.C.A. 518, certiorari granted 38 S.Ct. 190, 245 U.S. 670, 62 L.Ed. 539, and motion granted 42 S.Ct. 271—Great Northern R. Co. v. Local Great Falls Lodge I. A. M., No. 287, D.C.Mont., 283 F. 557.

32 C.J. p 165 note 72.

80. U.S.—Charleston Dry Dock & Machine Co. v. O'Rourke, D.C.S.C., 274 F. 811.

32 C.J. p 166 note 88.

81. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, modifying 238 F. 728, 151 C.C.A. 518, certiorari granted 38 S.Ct. 190, 245 U.S. 670, 62 L.Ed. 539, and motion granted 42 S.Ct. 271.

82. U.S.—Armstrong v. U. S., C.C.A. Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

83. U.S.—Montgomery v. Pacific Electric Ry. Co., C.C.A.Cal., 293 F. 680, certiorari denied 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862.

84. U.S.—U. S. v. Railway Employees' Dept. A. F. L., D.C.Ill., 283 F. 479.

85. U.S.—Great Northern Ry. Co. v. Brosseau, D.C.N.D., 286 F. 414.

86. U.S.—Foss v. Portland Terminal Co., C.C.A.Me., 287 F. 33, reversing, D.C., Portland Terminal Co. v. Foss, 283 F. 204.

87. Kan.—State v. Howat, 198 P. 686, 109 Kan. 376.

88. Wis.—A. J. Monday Co. v. Automobile, Aircraft & Vehicle Workers of America, Local No. 25, 177 N.W. 867, 171 Wis. 532.

89. Wash.—Pacific Coast Coal Co. v. District No. 10, U. M. W. A., 210 P. 953, 122 Wash. 428.

union or its officers may be enjoined from interfering by force, violence, intimidation, or threats with the peaceful operation of the business of an individual or corporation.[90] Although there is authority holding that all the members of a union cannot be enjoined because certain members of the union committed unlawful acts,[91] it has been held that it is not sufficient to prevent an injunction for a labor union, whose members are on a strike, to repudiate their acts in the conduct of the strike, where it does not discipline them sufficiently to prevent a repetition of the acts.[92]

§ 148. Trade Secrets

a. In general
b. Information as to customers

a. In General

(1) Definition and nature
(2) Protection by injunction in general
(3) Persons protected
(4) Persons enjoined

(1) Definition and Nature

A trade secret is a new process, mechanism, or compound known only to its owner and those employees to whom it has necessarily been confided. To be subject to protection by injunction it must be kept in substantial, although not absolute, secrecy, but it need not be patented or patentable.

A trade secret, within the rules pertaining to the rights which can be protected by injunction, is a plan, process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it must be confided in order to apply it to the uses intended.[93] It differs from a patent in that as soon as the secret is discovered, either by an examination of the product or in any other honest way, the discoverer has the full right to use it,[94] and it may be protected by injunction irrespective of whether the process or plan constituting the secret is or is not a patentable invention.[95] Further a trade secret need not be protected by patent,[96] copyright,[97] or registered trade-mark[98] to enable its owner to enjoin its unauthorized use or disclosure; and, indeed, a claim that an invention is protected as a trade secret is incompatible with a claim that it is protected under the patent law, since protection to a trade secret is afforded only if there has been no public disclosure whereas a patented invention must have been clearly described in the application for the patent.[99] To constitute a new process subject to protection by injunction there must be employed creative faculties in originating it amounting to a meritorious discovery or invention,[1]

90. N.Y.—United Traction Co. v. Droogan, 189 N.Y.S. 39, 115 Misc. 672.
Puerto Rico.—Compagnies des Sucreries v. Iglesias, 2 Porto Rico Fed. 16.
32 C.J. p 167 note 11.

91. Ohio.—Perkins, Campbell & Co. v. Rogg, 11 Ohio Dec., Reprint, 585, 28 Cinc.L.Bul. 32.

92. U.S.—Great Northern R. Co. v. Local Great Falls Lodge I. A. M. No. 287, D.C.Mont., 283 F. 557.
32 C.J. p 167 note 12.

93. U.S.—Briggs v. Boston, D.C. Iowa, 15 F.Supp. 763, 767, quoting Corpus Juris.
Ill.—Victor Chemical Works v. Iliff, 132 N.E. 806, 299 Ill. 532.
Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.
Mich.—Glucol Mfg. Co. v. Schulist, 214 N.W. 152, 239 Mich. 70.
32 C.J. p 156 note 65.

Other definition

"The term 'trade secret,' as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on."—Glucol Mfg. Co. v. Schulist, 214 N. W. 152, 153, 239 Mich. 70.

Formula as property within constitutional provision

The discoverer of a secret formula may obtain protection even though the formula may not constitute property within the terms of a particular constitutional provision.—Glass v. Kottwitz, Tex.Civ.App., 297 S.W. 573.

94. U.S.—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F.2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623—Tower Mfg. Co. v. Monsanto Chemical Works, D.C.N. Y., 20 F.2d 386.
Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.
Ohio.—National Tube Co. v. Eastern Tube Co., 23 Ohio CirCt. 468.
Parties enjoined from using trade secret see infra subdivision a (4) of this section.

95. U.S.—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F. 2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623.
Conn.—Schavoir v. American Rebonded Leather Co., 133 A. 582, 104 Conn. 472.
Mo.—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140.
N.J.—Club Razor & Blade Mfg. Corporation v. Bindzsus, 25 A.2d 31, 131 N.J.Eq. 283, affirmed 30 A.2d 31, 133 N.J.Eq. 38.
32 C.J. p 157 note 67.

96. Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.
Tex.—Glass v. Kottwitz, Civ.App., 297 S.W. 573.

97. Tex.—Glass v. Kottwitz, supra.

98. Tex.—Glass v. Kottwitz, supra.

99. Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

1. Ill.—Victor Chemical Works v. Iliff, 132 N.E. 806, 299 Ill. 532.
Pa.—Pittsburgh Cut Wire v. Sufrin's Inc., 91 Pittsb.Leg.J. 427.
"The basis of the protection of a trade secret is that its owner, because of his ingenuity in inventing and appropriating it, has acquired a property right therein and which presupposes the exercising of some business faculty not usually possessed by others engaged in a like business."—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 835, 208 Ky. 348.

Alloy with new properties

Where an alloy is entirely different in the matter of uniformity of color and freedom from imperfections from any other metal manufactured, the right to protect the process for its production as a secret

and a mere mechanical advance in the use of a process is not a new process or discovery which will be so protected.[2] A secret formula need not be in writing to be protected by injunction.[3]

Secrecy. While it is not necessary, in order to justify relief by injunction, that a formula or process be wholly secret, qualified secrecy being sufficient,[4] nevertheless there must be a substantial element of secrecy so that, except by the use of improper means, third persons would have difficulty in acquiring the information needed for making the product.[5] A process or formula disclosed by its originator to numerous persons or commonly known to the trade is not a trade secret and will not be protected by injunction,[6] although the mere fact that there are secret processes of a different kind accomplishing the same result will not prevent the granting of an injunction.[7] Matters which are completely disclosed by the articles themselves are not secret after the articles are put on the market,[8] but owners of a trade secret will not be deprived of their remedy because they necessarily made a disclosure to the court for the purpose of a suit to protect it.[9]

(2) Protection by Injunction in General

Injunction is a proper remedy to protect use or disclosure of a trade secret in violation of trust and confidence where the remedy at law is inadequate. Such relief is available only to the extent of actual infringement, although a use which in fact infringes is not protected by the fact that there is some slight difference in detail.

A trade secret is a property right which equity will protect by injunction against unwarranted disclosure and unauthorized use by others than the rightful owner.[10] The general requirement for relief is a violation of trust and confidence,[11] and in-

process does not depend on whether the result was within the expected mechanical skill of a foundryman or was achieved by experimentation with known factors, or on whether the means by which the discovery was made were obvious.—Dirigold Metals Corporation v. Ernst Kern Co., D.C.Mich., 40 F.Supp. 146, conforming to mandate, C.C.A., American Dirigold Corporation v. Dirigold Metals Corporation, 104 F.2d 863.

2. Ill.—Victor Chemical Works v. Iliff, 132 N.E. 806, 299 Ill. 532.

3. Tex.—Glass v. Kottwitz, Civ. App., 297 S.W. 573.

4. Minn.—Radium Remedies Co. v. Weiss, 217 N.W. 339, 173 Minn. 342.
N.J.—Vulcan Detinning Co. v. American Can Co., 67 A. 339, 72 N.J.Eq. 387, 12 L.R.A.,N.S., 102.

5. N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.
Vt.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

Effect of "No Admittance" signs

A method of making a particular product does not become a secret entitled to protection by injunction against use by a former employee by the fact that "No Admittance" signs are placed about the premises where the product is manufactured.—Peerless Roll Leaf Co. v. Lange, C.C.A. N.J., 20 F.2d 801.

6. Ill.—Victor Chemical Works v. Iliff, 132 N.E. 806, 299 Ill. 532.
Kan.—Southwest Specialties Co. v. Eastman, 286 P. 225, 130 Kan. 443.
Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.
32 C.J. p 157 note 74.

7. Ind.—Westervelt v. National Paper & Supply Co., 57 N.E. 552, 154 Ind. 673.

8. N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.
Tex.—Brown & Root v. Jaques, Civ. App., 98 S.W.2d 257.

9. N.J.—Stone v. Goss, 55 A. 736, 65 N.J.Eq. 756, 103 Am.S.R. 794, 63 L.R.A. 344.
32 C.J. p 157 note 78.

10. U.S.—John T. Lloyd Laboratories v. Lloyd Bros., Pharmacists, C.C.A.Ohio, 131 F.2d 703—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A. Mich., 125 F.2d 446—Allen-Qualley Co. v. Shellmar Products Co., D.C. Ill., 31 F.2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U. S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.
Cal.—Holley v. Hunt, 56 P.2d 1240, 13 Cal.App.2d 335.
Conn.—Schavoir v. American Rebonded Leather Co., 133 A. 582, 104 Conn. 472.
Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 835, 208 Ky. 348, citing **Corpus Juris.**
Mich.—Glucol Mfg. Co. v. Schulist, 214 N.W. 152, 239 Mich. 70.
Minn.—Radium Remedies Co. v. Weiss, 217 N.W. 339, 173 Minn. 342—Boone v. Krieg, 194 N.W. 92, 156 Minn. 83.
Mo.—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140—Germo Mfg. Co. v. Combs, 240 S. W. 872, 209 Mo.App. 651, transferred, see 229 S.W. 1072, 287 Mo. 273.
N.J.—Club Razor & Blade Mfg. Corporation v. Bindzsus, 25 A.2d 31, 131 N.J.Eq. 283, affirmed 30 A.2d 31, 133 N.J.Eq. 38—Kellems Products v. Coley, 160 A. 639, 10 N.J. Misc. 695.
N.Y.—Sachs v. Cluett, Peabody & Co., 31 N.Y.S.2d 718, 177 Misc. 695, reversed on other grounds 39 N. Y.S.2d 853, 265 App.Div. 597, affirmed 53 N.E.2d 241, 291 N.Y. 772.
Pa.—Belmont Laboratories v. Heist, 151 A. 15, 300 Pa. 542, modified on other grounds 154 A. 19, 303 Pa. 7—Chatfield v. Washeim, 26 North. Co. 275.
Tenn.—Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.
Tex.—Brown & Root v. Jaques, Civ. App., 98 S.W.2d 257, 258, citing **Corpus Juris.**
32 C.J. p 156 note 66.

Protection will be afforded all applied methods, formulas, and processes in which a proprietary interest may be acquired in connection with the manufacture, and even marketing, of a product.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.

Scope of injunction

Manufacturer attempting unauthorized use of trade secrets should be restrained from using the secret formulas, processes, and other trade secrets of complainant and from representing to the trade that he can manufacture according to those formulas, but should not be restrained from representing that he can furnish articles equal in quality, or from soliciting business from the trade generally.—Maas & Waldstein Co. v. Walker, 135 A. 275, 100 N.J. Eq. 224, affirmed 140 A. 921, 102 N. J.Eq. 328.

11. U.S.—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F.2d 293, affirmed, C.C.A., Shellmar

junction is a proper remedy because an action at law does not furnish an adequate remedy.[12] On broad equitable principles and in consideration of public policy, relief by injunction should not be granted unless the claim that the plan or process is a trade secret is clearly established;[13] especially must there be a strong case before the court will enjoin the use of information honestly obtained.[14] The obligation of one bound not to disclose a secret process, or not to use a secret process that has been improperly disclosed, may be violated by using a process differing only slightly in detail, to produce an identical result[15] although if there are several steps in making a particular product, some of which are not secret but are well known to, and used by, others in making competing products, injunction will lie only as to the steps involving the use of the trade secret.[16]

(3) Persons Protected

Injunctive protection for a trade secret is afforded only to the discoverer of the secret or to a purchaser or assignee thereof who has acquired the sole right to its use.

One who is not the discoverer and has acquired no right to the trade secret cannot maintain a suit for an injunction,[17] the right to such injunction being limited to one who owns a secret process of manufacture which was discovered and invented by himself or by another for him,[18] or to one who has acquired the sole right to use such secret.[19] The purchaser or assignee of the exclusive property in the secret may have an injunction to prevent the disclosure of the secret by the assignor or third persons who have acquired a knowledge of the secret in confidence,[20] but he will not be protected against the assignor where the conditions of the assignment have not been performed.[21] One who has purchased a trade secret cannot enjoin another to whom the discoverer has subsequently sold the same secret without showing that defendant has been guilty of a breach of confidence or contract with complainant.[22] The owner of a secret process does not lose the right to enjoin the use thereof by another in violation of trust by subsequently granting to a third person the exclusive right to make the product.[23]

(4) Persons Enjoined

Injunction against disclosure of a trade secret may be had against employees or other persons whose knowledge thereof was acquired by improper means, or, although properly acquired, was obtained in trust and confidence or under an express promise not to divulge it to others; and where such employees or other persons have disclosed their knowledge to third persons having notice of the violation of duty such third persons may also be enjoined. On the other hand, protection is not afforded against persons who have discovered the secret fairly and by independent means.

One who by reason of confidential business relations with the discoverer or owner has gained possession of his trade secret will be restrained by a court of equity from betraying the trust imposed in him by using the secret for his own gain,[24] a confidential relation within this rule being one which

Products Co. v. Allen-Qualley Co., 36 F.2d 623.

N.Y.—Barnard Bakeshops v. Dirig, 19 N.Y.S.2d 224, 173 Misc. 862.

Tenn.—The Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428, 433, citing Corpus Juris.

32 C.J. p 157 note 69.

12. N.Y.—McCall Co. v. Wright, 91 N.E. 516, 198 N.Y. 143, 31 L.R.A., N.S., 249, affirming 117 N.Y.S. 775, 133 App.Div. 62.

32 C.J. p 157 note 68.

Existence of adequate remedy at law

Where the inventor of a machine proposed to disclose his secret for a consideration consisting of the profit he would receive from the sale of the number of such machines needed by a prospective purchaser for a particular undertaking, and where the prospective purchaser began to construct a similar machine, but there was no intimation that such purchaser intended to manufacture the machine for sale to the public or for any purpose other than for the particular undertaking, the inventor was not entitled to an injunction since, in the absence of any showing of insolvency on the part of the prospective purchaser, the inventor had an adequate remedy at law for damages.—Brown & Root v. Jaques, Tex.Civ.App., 98 S.W.2d 257.

13. Mich.—Dow Chemical Co. v. American Bromine Co., 177 N.W. 996, 210 Mich. 262.

Pa.—Macbeth-Evans Glass Co. v. Schnelbach, 86 A. 688, 239 Pa. 76.

14. N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.

15. U.S.—Tower Mfg. Co. v. Monsanto Chemical Works, D.C.N.Y., 20 F.2d 386.

Conn.—Schavoir v. American Rebonded Leather Co., 133 A. 582, 104 Conn. 472.

16. N.Y.—Lamont, Corliss & Co. v. Bonnie Blend Chocolate Corporation, 238 N.Y.S. 78, 135 Misc. 537.

17. N.Y.—G. F. Harvey Co. v. National Drug Co., 77 N.Y.S. 674, 75 App.Div. 103—Kaumagraph Co. v. Stampagraph Co., 188 N.Y.S. 678, 197 App.Div. 66.

18. Mass.—Wireless Specialty Apparatus Co. v. Mica Condenser Co., Ltd., 131 N.E. 307, 239 Mass. 158.

32 C.J. p 157 note 79.

19. N.Y.—Kaumagraph Co. v. Stampagraph Co., 188 N.Y.S. 678, 197 App.Div. 66, affirmed 138 N.E. 485, 235 N.Y. 1.

32 C.J. p 157 note 81.

20. N.J.—Pomeroy Ink Co. v. Pomeroy, 78 A. 698, 77 N.J.Eq. 293.

32 C.J. p 158 note 84.

21. N.Y.—Chemical Co. v. Halleck, 15 N.Y.S. 517.

22. Ga.—Stewart v. Hook, 45 S.E. 369, 118 Ga. 445, 63 L.R.A. 255.

23. U.S.—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F. 2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623.

24. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F.2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623.

Mo.—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140.

32 C.J. p 158 note 87.

Manufacturer

Discoverer of a distinctive formu-

gives rise to a duty not to use or divulge the secret to the detriment of the owner.[25] A fortiori, injunction will lie against one whose use or disclosure of the secret would constitute not only a breach of confidence but also a violation of contract.[26] One whose knowledge of a trade secret is originally acquired by improper means,[27] as in the case of a person who has obtained a knowledge of a secret process of manufacture through fraud or bad faith,[28] will be enjoined from using it. On the other hand, trade secrets are not given protection against all the world or persons who have not learned the secret by improper means or by virtue of a confidential relation;[29] all that the owner of a trade secret is entitled to is protection from a breach of contract or confidence against one to whom he has confided the secret and those to whom such person may divulge it,[30] and anyone who honestly and fairly comes into possession of the secret has the right to use, disclose, or sell it without being subject to restraint by injunction.[31] Where the originator of a formula turns it over to a manufacturer but makes no agreement granting the manufacturer the exclusive right to manufacture and sell and does not obligate himself not to disclose the formula to others or to refrain from competing in business, an injunction seeking to prevent him from using the formula or disclosing it to others and from competing in business is properly refused.[32]

Employees. An employee who from a confidential relation to his employer has acquired knowledge of his employer's trade secrets, or other secrets important to the business of the employer, is under a duty or implied obligation not to divulge or use such knowledge to the injury of the employer, and he may be enjoined from any violation of such duty;[33]

la can restrain a manufacturer to whom he has disclosed the formula under a promise of secrecy.—Schavoir v. American Rebonded Leather Co., 133 A. 582, 104 Conn. 472.

Selling agent

Where agent was hired to sell machine which was a trade secret and it became necessary for him, in order to sell the machine, to become familiar with the secret and he would not otherwise have known it, he will not be permitted to make use of this knowledge for his own use or disclose it to third persons.—Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.

Manager of corporation

Where plaintiff employed a corporation to construct automatic welding machine according to ideas conceived by plaintiff's officers, and corporation gave a pledge of secrecy as to design of the machine, plaintiff was entitled to injunction restraining manager of the corporation, and another company of which the manager had become president, from constructing a similar machine for plaintiff's competitor.—Mitchell Metal Products v. Berkeley Equipment Co., D.C.Pa., 36 F.Supp. 1010.

25. N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.

Confidential relation held shown

Where one informed another of a secret process and machine, pending contract negotiations under which the one informed was to be a licensee, a relation of trust and confidence was held to exist so as to warrant injunctive relief.—Allen-Qualley Co. v. Shellmar Products Co., D.C.Ill., 31 F.2d 293, affirmed, C.C.A., Shellmar Products Co. v. Allen-Qualley Co., 36 F.2d 623.

Confidential relation held not shown

(1) Generally.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446.

(2) Where a person designed and furnished drawings for a machine and the machine was made under his supervision in the machine shop of a third person, the owner of the machine shop was held not to bear a confidential relationship to the one ordering the machine so as to prevent him from using the knowledge acquired in building the machine.—King v. Gannon, 158 N.E. 346, 261 Mass. 94, 54 A.L.R. 1215.

26. N.J.—Club Razor & Blade Mfg. Corporation v. Bindzsus, 25 A.2d 31, 131 N.J.Eq. 283, affirmed 30 A. 2d 31, 133 N.J.Eq. 38.

27. N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.

28. Pa.—Belmont Laboratories v. Heist, 151 A. 15, 19, 300 Pa. 542, citing **Corpus Juris,** and modified on other grounds 154 A. 19, 303 Pa. 7.

32 C.J. p 158 note 88.

29. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446.

N.J.—Carver v. Harr, 27 A.2d 895, 132 N.J.Eq. 207.

32 C.J. p 157 note 71.

30. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446.

32 C.J. p 157 note 70.

31. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, supra.

Conn.—Schavoir v. American Rebonded Leather Co., 133 A. 582, 104 Conn. 472.

Mo.—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140.

Vt.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

32 C.J. p 157 note 72.

32. Kan.—Southwest Specialties Co. v. Eastman, 286 P. 225, 130 Kan. 443.

33. U.S.—Witherow Steel Corporation v. Donner Steel Co., D.C.N.Y., 31 F.2d 157, 186, citing **Corpus Juris.**

Cal.—Riess v. Sanford, 117 P.2d 694, 47 Cal.App.2d 244—Santa Monica Ice & Cold Storage Co. v. Rossier, 109 P.2d 382, 42 Cal.App.2d 467—Germo Mfg. Co. of Missouri v. McClellan, 290 P. 534, 107 Cal. App. 532.

Minn.—Radium Remedies Co. v. Weiss, 217 N.W. 339, 173 Minn. 342.

N.Y.—Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 235 N.Y. 1, affirming 188 N.Y.S. 678, 197 App.Div. 66—Ward Baking Co. v. Tolley, 225 N.Y.S. 75, 222 App. Div. 653, affirmed 162 N.E. 542, 248 N.Y. 603—Barnard Bakeshops v. Dirig, 19 N.Y.S.2d 224, 173 Misc. 862.

Pa.—Belmont Laboratories v. Heist, 151 A. 15, 300 Pa. 542, modified on other grounds 154 A. 19, 303 Pa. 7.

R.I.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.

S.D.—Jewel Tea Co. v. Grissom, 279 N.W. 544, 66 S.D. 146.

Tenn.—The Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.

32 C.J. p 158 note 91.

"Equity will, at the instance of a former employer, enjoin competition by former employees when such competition involves the unfair or fraudulent use of trade secrets which constitute a valuable part of the good will of the employer's business."—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 491, 218 Cal. 568.

a fortiori, such injunction will lie against an employee who is under express contract not to divulge such secrets.[34] Injunction will lie against the employee regardless of the character of the secret, if peculiar and important to the business of the employer,[35] and irrespective of whether the manufacture by complainant of the article to which the secret relates was ultra vires.[36] One who, on the termination of his employment, carries away records or documents containing trade secrets or other confidential matters relating to the employer's business will be enjoined from using such records in a similar business for the purpose of taking away business from his former employer for himself or others.[37] Injunctive relief may be had before or after the employee has left the employ of the one in whose service he acquired knowledge of the trade secret.[38] One who has employed an independent contractor under a pledge of secrecy can have injunctive relief against a person employed by the independent contractor who has obtained his knowledge from the independent contractor in violation of the pledge;[39] and it is immaterial whether the independent contractor's violation of his pledge was intentional or otherwise.[40]

The equitable power to restrain a former employee from using or disclosing an alleged trade secret will be exercised with great caution,[41] and the circumstances of the particular case may be such as not to justify the granting of injunction.[42] Thus such injunction will not lie where the use or disclosure sought to be enjoined is one that the employee has a right to make,[43] as where it pertains to a formula or compound which, although developed by the employee during the period of his employment, was not the property of the employer under the terms of the employment contract;[44] nor will such injunction lie where the complainant has not taken proper precautions to protect his secret,[45] as where the claimed secret is as to methods or practices in open usage at the employer's place of business and the employee was not employed in a confidential capacity or bound by agreement not to make any disclosures.[46] An employer cannot have injunctive relief against a former employee to prohibit him from entering into a business in which work of a similar nature is to be done by a third person in a manner entirely independent of any trade secrets or secret processes developed by the employer.[47] An injunction restraining a former employee from violating a contract not to use a secret process may be refused where the employer has ceased to use the process before bringing its suit and there is no irreparable injury.[48]

Third persons with knowledge. Where there is a contract or duty on the part of an employee or other person not to disclose a trade secret intrusted to him, equity will restrain the use of information acquired in violation of that contract or duty by persons having notice or knowledge of it;[49] and this is so although such persons might in time have reached the same result by their own independent

34. Mass.—Club Aluminum Co. v. Young, 160 N.E. 804, 263 Mass. 223.
Mich.—Glucol Mfg. Co. v. Schulist, 214 N.W. 152, 239 Mich. 70.
N.Y.—Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 235 N.Y. 1, affirming 188 N.Y.S. 678, 197 App.Div. 66.
Ohio.—Briggs v. Butler, 47 N.E.2d 812, 71 Ohio App. 48, reversed on other grounds 45 N.E.2d 757, 140 Ohio St. 499.
32 C.J. p 158 note 90.

35. Cal.—Riess v. Sanford, 117 P. 2d 694, 47 Cal.App.2d 244—Santa Monica Ice & Cold Storage Co. v. Rossier, 109 P.2d 382, 42 Cal.App. 2d 467.
32 C.J. p 159 note 95.

36. U.S.—S. S. White Dental Mfg. Co. v. Mitchell, C.C.N.Y., 188 F. 1017.
32 C.J. p 159 note 96.

37. S.D.—Jewel Tea Co. v. Grissom, 279 N.W. 544, 66 S.D. 146.
32 C.J. p 160 notes 16, 17.

38. N.Y.—Little v. Gallus, 38 N.Y. S. 487, 4 App.Div. 569.
32 C.J. p 159 note 92.

39. N.Y.—Lamont, Corliss & Co. v. Bonnie Blend Chocolate Corporation, 238 N.Y.S. 78, 135 Misc. 537.
Employee not innocent purchaser for value
The person employed by the contractor, having paid no consideration for his information as to the secret process, is not in the position of being an innocent purchaser for value.—Lamont, Corliss & Co. v. Bonnie Blend Chocolate Corporation, supra.

40. N.Y.—Lamont, Corliss & Co. v. Bonnie Blend Chocolate Corporation, supra.

41. Cal.—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 218 Cal. 568.

42. U.S.—S. S. White Dental Mfg. Co. v. Mitchell, C.C.N.Y., 188 F. 1017.
32 C.J. p 159 note 97.
Contract not completed
N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N. Y. 312, 29 A.L.R. 1325, reversing 184 N.Y.S. 914, 193 App.Div. 924, affirming 177 N.Y.S. 614, 108 Misc. 399, and reargument denied 142 N. E. 316, 236 N.Y. 638.

43. Mass.—Wireless Specialty Apparatus Co. v. Mica Condenser Co. Ltd., 131 N.E. 307, 239 Mass. 158.
32 C.J. p 159 note 1.

44. Ind.—Central Pharmacal Co. v. Salb, 13 N.E.2d 875, 106 Ind.App. 495.

45. U.S.—Excelsior Steel Furnace Co. v. Williamson Heater Co., C.C. A.Ohio, 269 F. 614.
There is no implied contract on the part of an employee not to use or disclose a formula where such formula is not a secret one and has been disclosed to many others.—Southwest Specialties Co. v. Eastman, 286 P. 225, 130 Kan. 443.

46. U.S.—Excelsior Steel Furnace Co. v. Williamson Heater Co., C. C.A.Ohio, 269 F. 614.

47. Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

48. Ill.—Victor Chemical Works v. Iliff, 132 N.E. 806, 299 Ill. 532.

49. N.J.—Maas & Waldstein Co. v. Walker, 135 A. 275, 100 N.J.Eq. 224, affirmed 140 A. 921, 102 N.J. Eq. 328.
32 C.J. p 159 note 4.

experiments or efforts.[50] Nevertheless, in an action to enjoin a defendant from using a secret process disclosed to him by such an employee, complainant must prove the existence of such process, its value in his business, his right to the use of the secret, and that the secret was communicated to the employee while in a position of trust, so as to make it inequitable for him to disclose it to the prejudice of his employer.[51]

b. Information as to Customers

While the authorities are not unanimous, the general rule is that an ordinary employee who does not hold a position of trust or confidence cannot be enjoined, after the termination of his employment, from soliciting his former employer's customers, particularly where in so doing he relies only on his memory or where the number of customers is limited and readily ascertainable; but knowledge of the names and requirements of customers gained in confidence and not available to the public generally cannot be disclosed, and particularly will he be enjoined from an unauthorized use of a former employer's written list of customers.

The law has been said to be in confusion regarding the right of an employee to quit his employment, engage in business for himself, or enter the employment of another, in competition with his former employer, and to solicit business from the customers of the latter, where knowledge of those customers has been obtained by the employee during the course of his employment, and there is no contract prohibiting the employee from engaging in such business, taking such employment, or soliciting such customers.[52] In most jurisdictions it has been held that an employee's knowledge of his employer's customers, acquired by him as an ordinary employee and not by virtue of any peculiar trust or confidence placed in him, is not a trade secret against the use of which injunction will lie, and that where there is no express contract prohibiting the solicitation of such customers by the employee after the termination of his employment he cannot be enjoined from such solicitation as long as he proceeds on his memory rather than by the unauthorized use of a list of customers;[53] but in the view of some authorities the names of the customers of a business concern whose trade and patronage have been secured by business effort and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce,[54] and following this view it has been held that an employee delivering a commodity or service at retail to the public on a particular route may be enjoined from soliciting such customers after terminating his employment.[55] It is generally agreed that injunction will lie to prevent use or disclosure by an agent or employee of knowledge of the names of the cus-

50. U.S.—Herold v. Herold China & Pottery Co., Ohio, 257 F. 911, 169 C.C.A. 61.
N.J.—Stone v. Grasseli Chemical Co., 55 A. 736, 65 N.J.Eq. 756, 103 Am.S.R. 794, 63 L.R.A. 344.

51. Pa.—Macbeth-Evans Glass Co. v. Schnelbach, 86 A. 688, 239 Pa. 76.
32 C.J. p 160 note 9 [a].

52. Kan.—Garst v. Scott, 220 P. 277, 114 Kan. 676, 34 A.L.R. 395.
N.M.—Excelsior Laundry Co. v. Diehl, 252 P. 991, 32 N.M. 169.
Express contract not to solicit orders from employer's customers see infra § 84.

53. Ark.—El Dorado Laundry Co. v. Ford, 294 S.W. 393, 174 Ark. 104.
Ill.—Capitol Dairy Co. v. Meyer, 13 N.E.2d 91, 293 Ill.App. 632—American Cleaners & Dyers v. Foreman, 252 Ill.App. 122.
Kan.—Garst v. Scott, 220 P. 277, 114 Kan. 676, 34 A.L.R. 395.
Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.
Mass.—Woolley's Laundry v. Silva, 23 N.E.2d 899, 304 Mass. 383, 126 A.L.R. 752—Horn Pond Ice Co. v. Pearson, 166 N.E. 640, 267 Mass. 256.
Minn.—Boone v. Krieg, 194 N.W. 92, 156 Minn. 83.
Mo.—Kansas City Laundry Service Co. v. Jeserich, 247 S.W. 447, 213 Mo.App. 71.
N.J.—Lewitter v. Adler, 137 A. 541, 101 N.J.Eq. 74.
N.M.—Excelsior Laundry Co. v. Diehl, 252 P. 991, 32 N.M. 169.
Ohio.—Curry v. Marquart, 11 N.E.2d 868, 133 Ohio St. 77—Inboden v. L. W. Hawker, Inc., App., 41 N.E.2d 271.
Contra French Bros. Bauer Co. v. Townsend Bros. Milk Co., 152 N.E. 675, 21 Ohio App. 177—White Baking Co. v. Snell, 28 Ohio N.P.,N.S., 172.
S.D.—Jewel Tea Co. v. Grissom, 279 N.W. 544, 66 S.D. 146.
Wash.—City Ice & Cold Storage Co. v. Kinnee, 249 P. 782, 140 Wash. 381—Ice Delivery Co. of Spokane v. Davis, 243 P. 842, 137 Wash. 649.
32 C.J. p 161 note 21.

Absence of misrepresentation
Employer is not entitled to relief against former salesman on the ground that the salesman delivered a similar product to some of his old customers without stating whose product it was, in the absence of proof that the salesman thereby falsely represented that he was selling his former employer's product. —Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

54. Cal.—Empire Steam Laundry Co. v. Lozier, 130 P. 1130, 165 Cal. 95, 44 L.R.A.,N.S., 1159, Ann.Cas. 1914C 628.
N.Y.—Witkop & Holmes Co. v. Boyce, 112 N.Y.S. 874, 61 Misc. 126.

Utmost fairness required
An employee who leaves his employer to go to work for a competitor must, as respects his dealings with former customers, act with the utmost fairness, resolving every doubt in favor of his former employer, rather than against him.—New Method Laundry Co. v. MacCann, 161 P. 990, 176 Cal. 26, Ann.Cas.1918C 1022.

55. Cal.—Gloria Ice Cream & Milk Co. v. Cowan, 41 P.2d 340, 2 Cal.2d 460—Golden State Milk Products Co. v. Brown, 20 P.2d 657, 217 Cal. 570—Dairy Dale Co. v. Azevedo, 295 P. 10, 211 Cal. 344—Pasadena Ice Co. v. Reeder, 275 P. 944, 206 Cal. 697, rehearing denied 276 P. 995, 206 Cal. 697—Mackechnie Bread Co. v. Huber, 213 P. 285, 60 Cal.App. 539.

tomers of his former principal or employer, or of the customs, requirements, and preferences of such customers, where such information is of a confidential nature, not ordinarily ascertainable by the general public, and was obtained by the agent or employee for a specific purpose or by virtue of a fiduciary or confidential relation between him and his principal or employer;[56] and in such cases injunction will lie notwithstanding the employee knows the names of the customers from memory and has not compiled a written list thereof.[57] On the other hand, in the absence of express contract, equity will not enjoin an agent or servant, after termination of his employment, from soliciting business from the customers or patrons of his former principal or employer, where by so doing no business secret or trust which has been reposed in him because of his relation as agent or servant is violated.[58]

Where the employee is under a duty not to disclose or use the names of customers the injunction may run against his new employer, particularly if the new employer has caused, or knowingly participates in, the employee's violation of duty.[59] On the other hand, the new employer may not be enjoined from using his knowledge of the former employer's customers, acquired by the employee while in the former employment, where no breach of confidence is involved.[60]

Use of lists. It is generally agreed that an employee or agent can be restrained from using any list of customers, or copy thereof, made surreptitiously by him during his employment without the knowledge or consent of the employer or principal, or a list compiled by and belonging to the employer or principal and furnished to the employee in connection with his employment, at least where the list is a confidential one;[61] and this is so although new

56. Cal.—George v. Burdusis, 130 P. 2d 399, 21 Cal.2d 153, prior opinion, App., 123 P.2d 134—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 218 Cal. 568—Santa Monica Ice & Cold Storage Co. v. Rossier, 109 P.2d 382, 42 Cal.App.2d 467.
Mo.—Southwest Pump & Machinery Co. v. Forslund, 29 S.W.2d 165, 225 Mo.App. 262.
N.J.—Haut v. Rossbach, 15 A.2d 227, 128 N.J.Eq. 77, affirmed 17 A.2d 165, 128 N.J.Eq. 478—Abalene Exterminating Co. v. Oser, 5 A.2d 738, 125 N.J.Eq. 329—Golden Cruller & Doughnut Co. v. Manasher, 123 A. 150, 95 N.J.Eq. 537.
R.I.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.
Wash.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.

Creditor as manager

A creditor's knowledge of the names and addresses of his debtor's customers acquired as a result of being permitted to keep the debtor's books, manage his office, and collect sums due him constituted confidential business information which the creditor could be restrained from using to solicit such customers for himself.—Barnes v. Cahill, 133 P.2d 433, 56 Cal.App.2d 780.

Circumstances held not to affect rule

An employee's confidential knowledge of the names of his employer's customers is not rendered less confidential, or his use of such knowledge rendered less an abuse of confidence, merely because a spy might have discovered the same information or because the employer could have protected himself by special contract.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.

57. Ill.—Boylston Coal Co. v. Rautenbush, 237 Ill.App. 550.
R.I.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.
Wash.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.
32 C.J. p 158 note 87 [b].

58. Cal.—Avocado Sales Co. v. Wyse, 10 P.2d 485, 487, 122 Cal. App. 627, quoting Corpus Juris.
N.Y.—Morrison v. Phillips, 263 N.Y. S. 816, 147 Misc. 238.
32 C.J. p 161 note 21.

59. Cal.—George v. Burdusis, 130 P.2d 399, 21 Cal.2d 153, prior opinion, App., 123 P.2d 134—Gloria Ice Cream & Milk Co. v. Cowan, 41 P. 2d 340, 2 Cal.2d 460.
Ill.—Messenger Pub. Co. v. Mokstad, 257 Ill.App. 161.
N.J.—Abalene Exterminating Co. v. Oser, 5 A.2d 738, 125 N.J.Eq. 329.
N.Y.—Conviser v. J. C. Brownstone & Co., 205 N.Y.S. 82, 209 App.Div. 584—Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co., 124 N.Y.S. 956, 69 Misc. 90—Friedman v. Stewarts Credit Corporation, 26 N.Y.S.2d 529, affirmed 26 N.Y.S.2d 533, 261 App.Div. 990, reargument denied 28 N.Y.S.2d 156, 262 App.Div. 746.
Wash.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.

60. N.Y.—Peerless Pattern Co. v. Pictorial Review Co., 132 N.Y.S. 37, 147 App.Div. 715.

61. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U. S. 615, 78 L.Ed. 1491.
Cal.—George v. Burdusis, 130 P.2d 399, 21 Cal.2d 153, prior opinion, App., 123 P.2d 134—Adkins v. Model Laundry Co., 268 P. 939, 92 Cal. App. 575—Olschewski v. Hudson, 262 P. 43, 87 Cal.App. 242.
Ill.—Messenger Pub. Co. v. Mokstad, 257 Ill.App. 161—Boylston Coal Co. v. Rautenbush, 237 Ill.App. 550.
Mo.—Charles Reilly Optical Co. v. Burke, 41 S.W.2d 909, 911, citing Corpus Juris.
N.Y.—Kremer v. Kremer, 225 N.Y.S. 260, 221 App.Div. 747—Conviser v. J. C. Brownstone & Co., 205 N.Y.S. 82, 209 App.Div. 584.
Ohio.—Briggs v. Butler, 47 N.E.2d 812, 71 Ohio App. 48, reversed on other grounds 45 N.E.2d 757, 140 Ohio St. 499.
Okl.—Brenner v. Stavinsky, 88 P.2d 613, 615, 184 Okl. 509, quoting Corpus Juris.
Or.—Port Inv. Co. v. Oregon Mut. Fire Ins. Co., 94 P.2d 734, 163 Or. 1, 124 A.L.R. 1342.
R.I.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.
S.D.—Jewel Tea Co. v. Grissom, 279 N.W. 544, 66 S.D. 146.
32 C.J. p 160 notes 15, 17, 18.

Rule unaffected by provision for liquidated damages

That salesman's contract provides for liquidated damages for failure to return secret trade list does not warrant salesman in turning list over to business rival.—Messenger Pub. Co. v. Mokstad, 257 Ill.App. 161.

Agreement made after termination of employment

The fact that the employee has al-

customers have been added to the list by the employee.[62] On the other hand, it has been held that possession by a former employee of a written list of names of the customers of his former employer is not ground for the issuance of an injunction where, although the employee obtained such names in part from records of a former employee and in part from his own work as employee, such names were not derived from any confidential information and did not constitute a trade secret;[63] and it has also been held that the fact that an employee has secretly copied from his employer's books the names of his customers, although tending to show bad faith, does not of itself authorize an injunction completely restraining the employee from entering into the same kind of business.[64]

Limited number of customers. An employer cannot have injunctive relief based on the alleged use of a list of customers by a former employee where because of the nature of the business the number of prospective customers is limited or readily discovered, as where the customers are wholesale buyers or retail dealers whose places of business are recognizable by any one and whose identities and addresses can be ascertained by simple observation or by reference to telephone or business directories.[65] However, even in cases in which the customers are wholesale buyers or easily ascertainable concerns, injunction may lie against a former employee or agent where in soliciting such customers he acts pursuant to a deliberate, preconceived plan to injure the business of his former employer over a well established route which such employer has built up,[66] or where he seeks to take advantage of his former employment not only with respect to the identity of customers but also the personal acquaintance and friendly contact established between them and himself as well as his knowledge of their places of residence and their peculiar likes or other characteristics.[67]

Information improperly acquired by employer seeking injunction. One who engages individuals to follow employees of his competitor to secure the names and addresses of the competitor's customers for the purpose of inducing a switch of business is not entitled to an injunction protecting the information so gathered on the theory of a trade secret.[68]

§ 149. Other Matters Connected with Trade, Business, or Employment

a. Assertion of business affiliation
b. Claims of patent infringement
c. Miscellaneous

a. Assertion of Business Affiliation

Injunction will lie to prevent an individual from wrongfully holding himself out as the partner of another to the latter's injury. A partner or employee who enters business for himself will not be enjoined from announcing his former affiliation, provided he does not thereby mislead the public.

A person will be restrained from holding himself out as a partner, where such representation may cause injury to complainant, and such claim has no foundation in fact.[69] One who has formerly been associated in business with another as a partner

ready left his former employer at the time he agrees with his new employer to use the list does not prevent the injunction, since the implied contract of an employee that he will not divulge confidential knowledge gained in the course of his employment exists as well after the employment is terminated as during its continuance.—Friedman v. Stewarts Credit Corporation, 26 N.Y.S.2d 529, affirmed 26 N.Y.S.2d 533, 261 App.Div. 990, reargument denied 28 N.Y.S.2d 156, 262 App.Div. 746.

62. R.I.—Colonial Laundries v. Henry, 138 A. 47, 48 R.I. 332, 54 A.L.R. 343.
32 C.J. p 161 note 19.

63. Mass.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

64. Fla.—Simms v. Burnette, 46 So. 90, 55 Fla. 702, 127 Am.S.R. 201, 16 L.R.A.,N.S., 389, 15 Ann.Cas. 690.
32 C.J. p 160 note 14.

65. Cal.—George v. Burdusis, 130 P.2d 399, 21 Cal.2d 153, prior opinion, App., 128 P.2d 134—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 218 Cal. 568—Avocado Sales Co. v. Wyse, 10 P.2d 485, 122 Cal.App. 627.
Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.
Mo.—Kansas City Laundry Service Co. v. Jeserich, 247 S.W. 447, 213 Mo.App. 71.
N.J.—Haut v. Rossbach, 15 A.2d 227, 128 N.J.Eq. 77, affirmed 17 A.2d 165, 128 N.J.Eq. 478.
Sales to factory workmen
One engaged in the box lunch business and selling principally to factory workmen could not enjoin former routemen from competing since the existence and location of large factories is easily discovered by anyone and the knowledge gained by the routemen in their employment therefore not a trade secret.—Haut v. Rossbach, supra.
List of tailors
In the absence of fraud, or of an express contract not to go into business or to solicit the employer's customers, a driver for a dyer and cleaner, whose business it is to deliver to and solicit tailors' trade, has a right on leaving the employment to try to build up his own business by direct solicitation of the former employer's customers and others, there being nothing secret about getting up a list of tailors, and injunctive relief should have been denied employer.—Goldberg v. Goldberg, 200 N.Y.S. 3, 205 App.Div. 435, modified on other grounds 200 N.Y.S. 925, 206 App.Div. 769.

66. Cal.—Gloria Ice Cream & Milk Co. v. Cowan, 41 P.2d 340, 2 Cal.2d 460.

67. Cal.—George v. Burdusis, 130 P.2d 399, 21 Cal.2d 153, prior opinion, App., 123 P.2d 134.

68. N.Y.—Unity Coat & Apron Co. v. Battist, 264 N.Y.S. 801, 148 Misc. 411.

69. Cal.—De Groot v. Peters, 57 P. 209, 124 Cal. 406, 71 Am.S.R. 91.
32 C.J. p 186 note 36.

or employee may, on setting up a separate business for himself, make a public announcement of this fact, as by putting up a sign so stating, and an injunction will not lie to restrain him from doing so.[70] However, he will be restrained from doing this in a manner calculated to lead to the belief that he is carrying on the business of the old firm.[71] A vendor of a business cannot enjoin another from holding himself out as his successor where the vendor has ceased doing business for a long time and hence suffers no injury from the acts of the other.[72]

b. Claims of Patent Infringement

Unwarranted claims of patent infringement, misrepresentations as to decrees rendered in a patent suit, and threats of infringement suits, made in bad faith and for the purpose of diverting business from a competitor, ordinarily will be enjoined. On the other hand, injunction will not lie against a patentee for statements made by him truthfully and in good faith.

While there is some authority to the effect that injunction will not lie to restrain a patentee from circulating among the customers of another notices falsely stating that such other cannot manufacture and sell a particular product because it infringes the patent, even if such statements are made without intent to follow them with infringement suits,[73] it is generally considered that a person or corporation can be restrained from injuring the business of a competitor by making claims of patent infringement and threats of suit therefor to the trade generally or to customers of the rival concern where the claims or threats are made in bad faith and without adequate basis,[74] and that such person or corporation can in this connection be particularly restrained from misusing or misrepresenting orders or decrees of the court in a patent litigation.[75] On the other hand, where the owner of a patent, in good faith, makes truthful statements concerning his patent and warns and notifies persons against infringement, he does not thereby render himself liable to an injunction,[76] and an injunction may not be granted where there is a reasonable doubt as to the propriety of the patentee's actions.[77] Injunction will not issue where the representations have been made in only a single instance and there is no unusual circumstance or clear proof of bad faith, and no show-

70. U.S.—Lone Ranger v. Cox, D.C. S.C., 39 F.Supp. 487, 493, quoting **Corpus Juris,** and reversed on other grounds, C.C.A., 124 F.2d 650.
Tex.—Burrus Mill & Elevator Co. v. Wills, Civ.App., 85 S.W.2d 851, 853, quoting **Corpus Juris.**
32 C.J. p 161 notes 24, 25.

71. U.S.—Lone Ranger v. Cox, D.C. S.C., 39 F.Supp. 487, 493, quoting **Corpus Juris,** and reversed on other grounds, C.C.A., 124 F.2d 650.
Tex.—Burrus Mill & Elevator Co. v. Wills, Civ.App., 85 S.W.2d 851, 853, quoting **Corpus Juris.**
32 C.J. p 162 note 26.

72. Ill.—Shonk Tin Printing Co. v. Shonk, 27 N.E. 529, 138 Ill. 34, affirming 37 Ill.App. 20.

73. N.Y.—Zenie v. Miskend, 284 N.Y.S. 63, 245 App.Div. 634, affirmed 1 N.E.2d 367, 270 N.Y. 636.
Injunction against suit see supra § 41.

74. U.S.—U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., C.C.A.W.Va., 104 F.2d 856, modifying, D.C., Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, 24 F.Supp. 249—Aleograph Co. v. Electrical Research Products, C.C.A.Tex., 82 F.2d 625, certiorari denied 57 S. Ct. 13, 299 U.S. 551, 81 L.Ed. 405, rehearing denied 57 S.Ct. 108, 299 U.S. 620, 81 L.Ed. 457—Gardner Sign Co. v. Claude Neon Lights, D.C.Pa., 36 F.2d 827—Powell v. Pratt Chuck Co., D.C.N.Y., 24 F.2d 255—Man-Sew Pinking Attachment Corporation v. Chandler Mach. Co., D.C.Mass., 33 F.Supp. 950—Stadium Mfg. Co. v. Plymouth Pajama Corporation, D.C.Mass., 24 F.Supp. 779—B. F. Goodrich Co. v. American Lakes Paper Co., D.C.Del., 23 F.Supp. 682—Everybody's Tool & Die Works v. Costa, D.C.N.Y., 9 F.Supp. 440—H. W. Peters Co. v. MacDonald, D.C.Conn., 5 F.Supp. 692, reversed on other grounds, C.C.A., 72 F.2d 670.
48 C.J. p 418 note 91.

"Should it appear that, under pretense of giving notice of patent rights, a patentee, or one claiming under him, is pursuing a course which is calculated to injure unnecessarily a competitor's business and with the plain intention of so doing, his conduct will be deemed malicious. Such a patentee brings himself within the rule of law obtaining in cases of unfair competition in trade, and is subject to injunction."—Gibson v. Smoot Engineering Corporation, D.C.Del., 50 F.2d 203, 204.

Injunction pending determination of infringement action

Plaintiffs in patent infringement action were restrained from addressing circulars and communications to manufacturers' customers about the litigation, pending determination of the infringement action or a similar action pending in another court, where plaintiffs had twice represented to court that action could not proceed to trial because of unavailability of witnesses and statements by a responsible officer of one plaintiff indicated an intention to bring, for coercive reasons, other actions against dealers or customers of manufacturers defending the action.—Thomas French & Sons v. Carleton Venetian Blind Co., D.C.N.Y., 34 F. Supp. 850.

75. U.S.—United Kingdom Optical Co. v. American Optical Co., C.C. A.Mass., 68 F.2d 637, affirming, D. C., 2 F.Supp. 174—Gardner Sign Co. v. Claude Neon Lights, D.C.Pa., 36 F.2d 827—H. W. Peters Co. v. MacDonald, D.C.Conn., 5 F.Supp. 692, reversed on other grounds, C. C.A., 72 F.2d 670.

76. U.S.—U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., C. C.A.W.Va., 104 F.2d 856, modifying, D.C., Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, 24 F.Supp. 249—Gibson v. Smoot Engineering Corporation, D.C.Del., 50 F.2d 203—Cridlebaugh v. Rudolph, D.C.N. J., 40 F.Supp. 393—Cheney Co. v. Cunningham, D.C.Pa., 37 F.Supp. 224, affirmed, C.C.A., 127 F.2d 294—Dorr Co. v. Poplar Grove Planting & Refining Co., D.C.La., 32 F. Supp. 193—Everybody's Tool & Die Works v. Costa, D.C.N.Y., 9 F. Supp. 440.
48 C.J. p 418 note 93.

77. U.S.—Davison v. National Harrow Co., C.C.N.Y., 103 F. 360.
48 C.J. p 418 note 92.

ing of conspiracy, intimidation, or coercion.[78] Where a machine or process is patented, although the product thereof is not, the owner of the patent may, as long as he acts fairly and honestly, notify customers of another concern that such concern is guilty of infringement and that litigation is being brought against such concern to protect the patent rights; and this is so notwithstanding the patentee does not await the outcome of the infringement suit and notwithstanding the customers incur no legal liability to the patentee by virtue of their purchases of the product;[79] but injunction will lie to restrain the patentee from sending communications to the customers which are so worded as to carry the thought of threatened litigation against them.[80] Injunction will lie to enjoin one from representing or advertising, without adequate basis, that the patent of a rival concern is invalid.[81]

c. Miscellaneous

The right to injunctive relief as to matters connected with trade, business, or employment, other than those already considered in the preceding sections, has been adjudicated in a variety of cases, and relief held available or not depending on the particular circumstances.

The general rule which has been stated supra § 138, to the effect that in a proper case equity will enjoin an illegal interference with the right of a person to carry on a lawful business, has been applied under many and various circumstances; other matters in addition to those specifically considered supra subdivisions a and b of this section have been held proper subjects of injunction[82] or not to be such subjects.[83] An injunction will issue to restrain one engaged in selling goods similar to those

78. U.S.—U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., C.C.A.W.Va., 104 F.2d 856, modifying, D.C., Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, 24 F. Supp. 249—Steward Davit & Equipment Corporation v. Welin Davit & Boat Corporation, D.C.N.Y., 299 F. 610.

79. U.S.—American Ball Co. v. Federal Cartridge Corporation, C.C.A. Minn., 70 F.2d 579, 98 A.L.R. 665.

80. U.S.—Metro-Goldwyn-Mayer Corporation v. Fear, C.C.A.Cal., 104 F.2d 892—American Ball Co. v. Federal Cartridge Corporation, C. C.A.Minn., 70 F.2d 579, 98 A.L.R. 665.

81. U.S.—Millburn Mills v. Meister, D.C.N.Y., 37 F.Supp. 231.

82. **Injunction granted to prevent**

(1) Enforcement of laws and ordinances fixing unreasonably low rates for service by quasi-public corporations.—Tampa Waterworks Co. v. Tampa, C.C.Fla., 124 F. 932—New Memphis Gas & Light Co. v. Memphis, C.C.Tenn., 72 F. 952—32 C.J. p 156 note 58.

(2) Improper use of photographs of particular event.—The Telegraph Press v. Lewis, 29 Pa.Dist. & Co. 393, 43 Dauph.Co. 237.

(3) Individuals from holding themselves out as officers and representatives of trade union.—Reinlib v. Lubliner, 12 N.Y.S.2d 24.

(4) Interference by threats of prosecution with the distribution of a publication deemed by complainant to be improper.—American Mercury, Inc., v. Chase, D.C.Mass., 13 F.2d 224.

(5) Interference by university president with renting a business property surrounded by university campus.—McGinnis v. Walker, App., 40 N.E.2d 488.

(6) Interference with a water supply.—Hagerman Irr. Co. v. McMurray, 113 P. 823, 16 N.M. 172, 183.

(7) Interference with complainant's business by enforcement of an inoperative stock law.—Holman v. Cowden, Tex.Civ.App., 158 S.W. 571.

(8) Interference with exclusive garbage collection privilege.

Mo.—Harper v. Richardson, 297 S.W. 141, 222 Mo.App. 331.

Wash.—City Sanitary Service Co. v. Rausch, 117 P.2d 225, 10 Wash.2d 446.

(9) Interference with trading stamp business.—Sperry & Hutchinson Co. v. Boardman, 33 Pa.Dist. & Co. 572, 46 Dauph.Co. 145.

(10) Obstruction of, or interference with the use of, highways, wharves, and docks.—Indian River Steamboat Co. v. East Coast Transp. Co., 10 So. 480, 28 Fla. 387, 29 Am.S.R. 258—32 C.J. p 156 note 60.

(11) Publication of inaccurate telephone directory.—Mutual Telephone Co. v. Nippu Jiji Co., 24 Hawaii 156.

(12) Soliciting of participants in a puzzle contest to buy purported solutions of the puzzles.—Philadelphia Record Co. v. Leopold, D.C.N.Y., 40 F.Supp. 346.

(13) Threatened seizure and removal of telephone equipment used in receiving and distributing information as to sporting events.—Hagerty v. Coleman, 182 So. 776, 133 Fla. 363.

(14) Use of firm name by retiring partner to take trade away from the continuing partner.—Steinfeld v. Nat. Shirt Waist Co., 90 N.Y.S. 964, 99 App.Div. 286.

(15) Use of rights in quotations collected by exchange.—Moore v. New York Cotton Exch., C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, and affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.

(16) Use or publication of information procured by a mercantile agency by a nonsubscriber.—Jewelers' Mercantile Agency v. Rothschild, 39 N.Y.S. 700, 6 App.Div. 499.

83. **Injunction refused**

(1) In behalf of a member of the public to prevent interference with his use of a dock where defendants had a right to forbid the use thereof.—Berger v. Ohlson, C.C.A.Alaska, 120 F.2d 56.

(2) To interfere with management of business.—Witbeck v. Niagara Lockport & Ontario Power Co., 218 N.Y.S. 339, 218 App.Div. 377, affirmed 161 N.E. 192, 247 N.Y.S. 586.

(3) To prevent baseball club from refusing tickets purchased from speculators.—Levine v. Brooklyn National League Baseball Club, 36 N.Y. S.2d 474, 179 Misc. 22.

(4) To prevent enforcement of a valid marketing agreement under the Agricultural Adjustment Act.—Yarnell v. Hillsborough Packing Co., C. C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475.

(5) To prevent members of county agricultural conservation association from exercising authority under Agricultural Adjustment Act.—Hawthorne v. Fisher, D.C.Tex., 33 F.Supp. 891.

(6) To prevent members of wholesale dealers association from watching the business place of a wholesale dealer to determine who was furnishing him with goods in violation of their contract with the manufacturer.—Park v. National Wholesale Druggists' Assoc., 67 N.E. 136, 175 N.Y. 1, 96 Am.S.R. 587, 62 L.R.A. 632.

(7) To prevent motion picture producer from distributing picture

dealt in by a merchant next door from interfering with his neighbor's business by keeping a number of employees standing about, who molest and interfere with customers, actual or prospective, who are looking into his neighbor's show window.[84] A corporation claiming the right to furnish gas under an unconstitutional act may be enjoined from asserting those rights where the effect of such assertion is to prevent another company from selling its stock and receiving commissions for the purpose of supplying the gas.[85] It has been held that the enforcement of a tax, although it may compel the suspension of plaintiff's business, is not what is known to the law as irreparable injury.[86]

The rights of duly licensed practitioners of law to protection against interference with such rights by unlicensed practitioners are considered supra § 123, and the similar rights of practitioners of medicine and allied professions to protection are discussed supra § 124.

H. CRIMINAL ACTS AND CONSPIRACIES

§ 150. In General

A violation of the criminal laws will not, as a general rule, be enjoined.

Except where there is express statutory authority therefor,[87] equity has no criminal jurisdiction, and acts or omissions will not be enjoined merely on the ground that they constitute a violation of law and are punishable as crimes.[88] Under ordinary

where bottle and box of perfume manufactured by plaintiff were shown in a scene in association with circumstances depicting squalor, sordidness, and depravity.—Caron Corporation v. R. K. O. Radio Pictures, 21 N.Y.S.2d 983, affirmed 24 N.Y.S. 2d 1005, 260 App.Div. 1016.

(8) To prevent person for all time from conducting business or being employed in public stockyards.—Carnes v. St. Paul Union Stockyards Co., 221 N.W. 20, 175 Minn. 294.

(9) To prevent sale of theater tickets by licensed broker at more than box office prices.—Harris v. Jack's Theatre Ticket Service, 246 N.Y.S. 396, 139 Misc. 111.

(10) To protect temporary administratrix against tenants of her successor as administrator.—Hancock v. Watt, 169 So. 704, 233 Ala. 29.

(11) To restrain bar association from conducting an alleged campaign against usurious money lenders.—Gunnels v. Atlanta Bar Ass'n, 12 S.E.2d 602, 191 Ga. 366, 132 A.L.R. 1165.

(12) To restrain dissemination over telephone wires of play-by-play description of baseball game.—National Exhibition Co. v. Teleflash, D.C.N.Y., 24 F.Supp. 488.

(13) To compel delivery of newspapers to plaintiff for resale to public.—Lepler v. Palmer, 270 N.Y.S. 440, 150 Misc. 546.

84. La.—Gilly v. Hirsh, 48 So. 422, 122 La. 966, 20 L.R.A.,N.S., 972.

85. Ky.—Citizens Gaslight Co. v. Louisville Gas Co., 81 Ky. 263.

86. Mich.—Youngblood v. Sexton, 32 Mich. 406, 20 Am.R. 654.

87. Mont.—Grady v. City of Livingston, 141 P.2d 346—State v. District Court, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.
N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.
N.Y.—People v. Gilberg, 21 N.Y.S.2d 920.
R.I.—State v. Conragan, 171 A. 326, 327, 54 R.I. 256, citing **Corpus Juris.**
Tex.—Braden v. State, Civ.App., 108 S.W.2d 314.
32 C.J. p 275 note 11.

Gambling

A statute authorizing any citizen to institute suit to enjoin the habitual use of any premises for gaming or keeping or exhibiting games prohibited by law does not authorize a citizen to maintain suit to enjoin the legal operation of a horse-race track where betting was conducted under the certificate system.—Panas v. Texas Breeders & Racing Ass'n, Tex.Civ.App., 80 S.W.2d 1020, error dismissed.

Repeal of such a statute, without a saving clause, constitutes a withdrawal of the statutory authority. —International Ass'n of Cleaning and Dye House Workers v. Landowitz, 126 P.2d 609, 20 Cal.2d 418.

Validity of statutes

Ordinarily the legislature has the right to empower a court of equity to prevent the commission of a crime which is not a nuisance.
Mont.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.
Tex.—State ex rel. Shook v. All Texas Racing Ass'n, 97 S.W.2d 669, 128 Tex. 384, affirming All Texas Racing Ass'n v. State, by Shook, Civ.App., 82 S.W.2d 151, and rehearing overruled State ex rel. Shook v. All Texas Racing Ass'n, 100 S.W.2d 348, 128 Tex. 384—City of Wink v. Griffith Amusement Co., Civ.App., 78 S.W.2d 1065, reversed on other grounds 100 S.W.2d 695, 129 Tex. 40.

Past or future acts

(1) Statute authorizing commission to procure injunction against any public service company violating the law manifests intent that injunction is to be obtained to restrain an existing or threatened specific violation and cannot be used as a correction for past abuses nor to enjoin a future general course of conduct.—State ex rel. Department of Public Works of Washington v. Skagit River Navigation & Trading Co., 45 P.2d 27, 181 Wash. 642.

(2) Where it is the purpose of the provisions of the constitution to keep civil and criminal remedies in their separate channels, a statute requiring an injunction against further violation on a conviction of violating it is void.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.

88. U.S.—Milliken v. Stone, D.C.N.Y., 7 F.2d 397, affirmed, C.C.A., 16 F.2d 981—U. S. v. Seibert, D.C.W.Va., 2 F.2d 80—International Union of Mine, Mill and Smelter Workers v. Tennessee Copper Co., D.C.Tenn., 31 F.Supp. 1015.
Ala.—Try-Me Bottling Co. v. State, 178 So. 231, 235 Ala. 207—Farrell v. City of Mobile, 156 So. 635, 229 Ala. 294.
Ariz.—Takiguchi v. State, 55 P.2d 802, 47 Ariz. 302—Funk Jewelry Co. v. State ex rel. La Prade, 50 P.2d 945, 46 Ariz. 348—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, modified on other grounds 31 P.2d 102, 43 Ariz. 342, 92 A.L.R. 168.
Ark.—Hill v. Crater, 33 S.W.2d 371, 182 Ark. 1007—Ward v. City of Little Rock, 41 Ark. 526, 48 Am. R. 46.
Cal.—International Ass'n of Cleaning and Dye House Workers v. Landowitz, 126 P.2d 609, 20 Cal.2d 418.

circumstances a complete and adequate remedy for the violation of the criminal statutes of a state and of municipal ordinances is afforded by the courts of law;[89] and, if a criminal prosecution will con-

—People v. Lim, 118 P.2d 472, 18 Cal.2d 872, prior opinion, App., 111 P.2d 429—Perrin v. Mountain View Mausoleum Ass'n, 275 P. 787, 206 Cal. 669—Ex parte Wood, 227 P. 908, 194 Cal. 49—People v. Brophy, 120 P.2d 946, 49 Cal.App.2d 15—Monterey Club v. Superior Court of Los Angeles, 119 P.2d 349, 48 Cal.App.2d 131—People ex rel. Chiropractic League of California v. Steele, 41 P.2d 946, 4 Cal.App.2d 206, denying rehearing 40 P.2d 959, 4 Cal.App.2d 206—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180—People v. Seccombe, 284 P. 725, 103 Cal.App. 306.

Colo.—State v. Tolbert, 56 P.2d 45, 47, 98 Colo. 433, citing **Corpus Juris.**

Fla.—Philbrick v. City of Miami Beach, 3 So.2d 144, 147 Fla. 538—Lansky v. State ex rel. Gibbs, 199 So. 46, 145 Fla. 301—Hagerty v. Coleman, 182 So. 776, 133 Fla. 363—Pompano Horse Club v. State, 111 So. 801, 93 Fla. 415, 52 A.L.R. 51.

Ga.—Moon v. Clark, 14 S.E.2d 481, 192 Ga. 47.

Ill.—People ex rel. Kerner v. Huls, 189 N.E. 346, 355 Ill. 412—Vulcan Detinning Co. v. St. Clair, 145 N. E. 657, 315 Ill. 40—Baker v. Retail Clerks' International Protective Ass'n, Local Union No. 1000, Eldorado, 40 N.E.2d 571, 313 Ill. App. 432—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168—People ex rel. Martin v. Kuca, 245 Ill.App. 202.

Iowa.—Farmers Co-op. Ass'n v. Quaker Oats Co., 7 N.W.2d 906—Town of Grundy Center v. Marion, 1 N. W.2d 677, 231 Iowa 425.

Kan.—State v. Iola Theater Corporation, 15 P.2d 459, 136 Kan. 411.

Ky.—Nevels v. Commonwealth ex rel. Johnson, 160 S.W.2d 351, 290 Ky. 181—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739—Kentucky State Board of Dental Examiners v. Payne, 281 S.W. 188, 213 Ky. 382—Robinson v. Town of Paintsville, 250 S.W. 972, 199 Ky. 247.

La.—City of New Orleans v. Liberty Shop, 101 So. 798, 799, 157 La. 26, 40 A.L.R. 1136, quoting **Corpus Juris.**

Md.—Dvorine v. Castelberg Jewelry Corporation, 185 A. 562, 170 Md. 661—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Mass.—Commonwealth v. Stratton Finance Co., 38 N.E.2d 640, 310 Mass. 469—Barrows v. Farnum's Stage Lines, 150 N.E. 206, 254 Mass. 240—New York, N. H. & H. R. Co. v. Deister, 148 N.E. 590, 253 Mass. 178.

Mich.—Township of Warren v. Raymond, 289 N.W. 201, 202, 291 Mich. 426, citing **Corpus Juris**—United-Detroit Theaters Corporation v. Colonial Theatrical Enterprise, 273 N.W. 756, 280 Mich. 425.

Mo.—Clark v. Crown Drug Co., 152 S.W.2d 145, 348 Mo. 91, certified 146 S.W.2d 98, 236 Mo.App. 206.

Mont.—Grady v. City of Livingston, 141 P.2d 346—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418—Stoner v. Underseth, 277 P. 437, 85 Mont. 11—State v. District Court, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.

Neb.—State v. Heldt, 218 N.W. 578, 115 Neb. 435.

N.H.—New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., 9 A.2d 513, 90 N.H. 368.

N.J.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J. Eq. 91—Baird v. Board of Recreation Com'rs of Village of South Orange, 160 A. 537, 110 N.J.Eq. 603, reversing 154 A. 204, 108 N. J.Eq. 91—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506—Dinkins v. Kip, 160 A. 676, 110 N.J.Eq. 486—Healy v. Sidone, Ch., 127 A. 520.

N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N. Y.S. 995, 252 App.Div. 704—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869—People v. Gilberg, 21 N. Y.S.2d 920—Village of Brockport v. Johnston, 13 Abb.N.Cas. 468.

N.C.—City of Fayetteville v. Spur Distributing Co., 5 S.E.2d 838, 216 N.C. 596—Matthews v. Lawrence, 193 S.E. 730, 212 N.C. 537—Carolina Motor Service v. Atlantic Coast Line R. Co., 185 S.E. 479, 210 N.C. 36, 104 A.L.R. 1165—Chappell v. Mowery, 163 S.E. 565, 202 N.C. 584—Elizabeth City v. Aydlett, 152 S.E. 681, 683, 198 N.C. 585, citing **Corpus Juris.**

N.D.—Richmond v. Miller, 292 N.W. 633, 634, 70 N.D. 157, quoting **Corpus Juris.**

Okl.—Hewes v. State, 80 P.2d 233, 234, 183 Okl. 93, citing **Corpus Juris.**

R.I.—State v. Conragan, 171 A. 326, 327, 54 R.I. 256, citing **Corpus Juris.**

Tenn.—Caldwell v. Spicer & McEvoy, 19 S.W.2d 238, 239, 159 Tenn. 465, citing **Corpus Juris.**

Tex.—Ex parte Steele, 155 S.W.2d 355, 137 Tex. 508—Ex parte Hughes, 129 S.W.2d 270, 133 Tex. 505—City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 129 Tex. 40, reversing, Civ.App., 78 S.W.2d 1065—Woods v. Kiersky, Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518—Walker v. State, Civ.App., 173 S.W.2d 741—Corchine v. Henderson, Civ. App., 70 S.W.2d 766—State v. Publix Theater Corporation of New York, Civ.App., 37 S.W.2d 248—Vera v. Robinson, Civ.App., 16 S. W.2d 860—Featherstone v. Independent Service Station Ass'n of Texas, Civ.App., 10 S.W.2d 124.

Va.—Mears v. Colonial Beach, 184 S. E. 175, 176, 166 Va. 278, citing **Corpus Juris**—Drummond v. Rowe, 156 S.E. 442, 155 Va. 725—Long's Baggage Transfer Co. v. Burford, 132 S.E. 355, 144 Va. 339.

Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 2 Wash.2d 523—Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co., 222 P. 611, 128 Wash. 267, 36 A.L.R. 493.

Wis.—State ex rel. Cowie v. La Crosse Theaters Co., 286 N.W. 707, 232 Wis. 153—Olson v. City of Platteville, 251 N.W. 245, 213 Wis. 344, 91 A.L.R. 308—President and Trustees of Village of Waupon v. Moore, 34 Wis. 450, 17 Am.R. 446.

Wyo.—Eckdahl v. Hurwitz, 103 P.2d 161, 162, 56 Wyo. 19, quoting **Corpus Juris.**

32 C.J. p 276 note 12.

Right to enjoin public injury generally see supra § 22.

Whether fact that illegal practice of law is criminal offense precludes grant of injunction against such practice see supra § 123.

Whether fact that illegal practice of medicine or like professions is criminal offense precludes grant of injunction to prevent such practice see supra § 123.

"In the earliest period of its history the court of chancery assumed to exercise the power of preventing crimes, but this was because the ordinary courts were unable to protect the rights of the poor and weak from the encroachments of the powerful nobles."—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 139, 77 Mont. 361, 49 A.L.R. 627, citing **Corpus Juris**—32 C.J. p 275 notes 9, 10.

89. Fla.—**Lansky** v. State ex rel. Gibbs, 199 So. 46, 145 Fla. 301.

Ky.—Robinson v. Town of Paintsville, 250 S.W. 972, 199 Ky. 247.

stitute an effectual protection against the acts or omissions complained of, no grounds exist for relief by injunction.[90] The objections to "criminal equity" are that it deprives defendant of his jury trial;[91] that it deprives him of the protection of the higher burden of proof required in criminal prosecutions;[92] that, after imprisonment and fine for violation of an equity injunction, defendant may be subjected under the criminal law to punishment for the same acts;[93] that it substitutes for the definite penalties fixed by the legislature whatever punishment for contempt a particular judge may see fit to exact;[94] that it is often no more than an attempt to overcome by circumvention the supposed shortcomings of jurors;[95] and that it may result, or induce the public to believe that it results, in the arbitrary exercise of power and in government by injunction.[96] The possibility that many persons will violate the law and that many suits will be required to enforce it,[97] the mere fact that the officers charged with the duty of enforcing the provisions of the criminal law neglect or refuse to perform their duty in this regard,[98] the failure of local juries to convict,[99] or the fact that the punishment for the crime is inadequate[1] does not warrant relief by injunction.

§ 151. Acts Affecting Civil or Property Rights

Injunction will issue to inhibit a criminal act when that act invades civil or property rights and where there is no other adequate remedy available.

Where the intervention of equity by injunction is warranted by the necessity of protection to civil rights or property interests and the inadequacy of a criminal prosecution to effect this purpose, the mere fact that a crime or statutory offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction.[2] The power of equity to enjoin the doing of acts threatening ir-

Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
Mass.—Commonwealth v. Stratton Finance Co., 38 N.E.2d 640, 310 Mass. 469.
N.C.—Matthews v. Lawrence, 193 S. E. 730, 212 N.C. 537.
Tex.—Angelo v. Brown, Civ.App., 139 S.W.2d 197—Corchine v. Henderson, Civ.App., 70 S.W.2d 766—City of San Antonio v. Schutte, Civ.App., 246 S.W. 413.
Va.—Mears v. Colonial Beach, 184 S.E. 175, 166 Va. 278.
Wis.—Olson v. City of Platteville, 251 N.W. 245, 213 Wis. 344, 91 A.L.R. 308.
32 C.J. p 276 note 13.

Delay

The presumption will prevail that, when a case is appealed from the corporation court to the county court, the latter will not dismiss it without reason, or unnecessarily or arbitrarily postpone or delay hearing on such case, and such an allegation forms no basis for the issuance of a writ of injunction against those violating the law.—City of San Antonio v. Schutte, Tex.Civ.App., 246 S.W. 413.

Fact that it costs money or effort or time to enforce the criminal laws is not ground to support a contention that adequate relief cannot be granted at law.—People ex rel. Barrett v. Fritz, 45 N.E.2d 48, 316 Ill.App. 217.

Multiplicity of suits

Injunction will lie to prevent the repeated and continuous violation of a penal statute and to avoid multiplicity of criminal prosecutions.—Commonwealth ex rel. Grauman v. Continental Co., 121 S.W.2d 49, 275 Ky. 238.

Where there is adequate police force to prevent crime, the presumption prevails that the criminal statutes are adequate.—State v. Publix Theater Corporation of New York, Tex.Civ.App., 37 S.W.2d 248.

90. Mich.—Township of Warren v. Raymond, 289 N.W. 201, 291 Mich. 426.
N.C.—Matthews v. Lawrence, 193 S. E. 730, 212 N.C. 537.
Tex.—City of Wink v. Griffith Amusement Co., Civ.App., 78 S.W. 2d 1065, reversed, other grounds 100 S.W.2d 695, 129 Tex. 40—City of San Antonio v. Schutte, Civ. App., 246 S.W. 413.
Va.—Mears v. Colonial Beach, 184 S. E. 175, 166 Va. 278.
32 C.J. p 276 note 14.

Criminal remedies held inadequate

Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49.
Ill.—People ex rel. Kerner v. Huls, 189 N.E. 346, 355 Ill. 412.

91. Cal.—People v. Lim, 118 P.2d 472, 18 Cal.2d 872, prior opinion, App., 111 P.2d 429.
Mass.—Commonwealth v. Stratton Finance Co., 38 N.E.2d 640, 310 Mass. 469.
Mont.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.

It is not the intention of the law that constitutional provisions shall be evaded by substituting a civil for a criminal procedure or a single judge for a jury.
Minn.—Higgins v. Lacroix, 137 N.W. 417, 119 Minn. 145, 41 L.R.A.,N.S., 737.
Mo.—State ex rel. Alton v. Salley, App., 190 S.W. 940.

92. Cal.—People v. Lim, 118 P.2d 472, 18 Cal.2d 872, prior opinion, App., 111 P.2d 429.

93. Cal.—People v. Lim, supra.

94. Mass.—Commonwealth v. Stratton Finance Co., 38 N.E.2d 640, 310 Mass. 469.

95. Mass.—Commonwealth v. Stratton Finance Co., supra.

96. Mass.—Commonwealth v. Stratton Finance Co., supra.

97. Ill.—People v. Universal Chiropractors' Ass'n, 134 N.E. 4, 302 Ill. 228—People ex rel. Barrett v. Fritz, 45 N.E.2d 48, 316 Ill.App. 217.

98. Tenn.—Caldwell v. Spicer & McEvoy, 19 S.W.2d 238, 239, 159 Tenn. 465, citing **Corpus Juris.**
32 C.J. p 276 note 16.

No presumption of failure to enforce

"The state has supplied all machinery required to enforce its criminal laws, and the different counties elect officers to whom are intrusted the enforcement of all laws against crime. We cannot presume that such officers will fail and refuse to secure the enforcement of criminal laws."—Vera v. Robinson, Tex.Civ. App., 16 S.W.2d 860.

99. N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704.

1. Neb.—State v. Maltby, 188 N.W. 175, 108 Neb. 578.

2. U.S.—Reed v. Lehman, C.C.A.N.Y., 91 F.2d 919—Newfield v. Ryan, C.C.A.Fla., 91 F.2d 700, certiorari

reparable injury to property rights is inherent and has been exercised by courts of chancery since their evolution as a distinct tribunal and this power cannot be divested because the performance of such acts may be a violation of the criminal law.[3] The criminality of the act, it has been said, neither gives nor ousts jurisdiction in chancery.[4] Especially are the foregoing principles applicable where a statute

denied Ryan v. Newfield, 58 S.Ct. 54, two cases, 302 U.S. 729, 82 L. Ed. 563, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 138, 302 U.S. 777, 82 L. Ed. 601, and 58 S.Ct. 262, two cases, 302 U.S. 650, 82 L.Ed. 504—Ballentine v. Florida Tex. Oil Co., C.C.A.Fla., 91 F.2d 700, certiorari denied Florida Tex Oil Co. v. Ballentine, 58 S.Ct. 54, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, 302 U.S. 650, 82 L.Ed. 504—Schwartzman Service v. Stahl, D.C.Mo., 60 F.2d 1034—U. S. v. American Bond & Mortgage Co., D.C.Ill., 31 F.2d 448, affirmed, C.C.A., 52 F.2d 318, certiorari denied 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931—Milliken v. Stone, D.C.N.Y., 7 F.2d 397, affirmed, C.C.A., 16 F.2d 981—International Union of Mine, Mill and Smelter Workers v. Tennessee Copper Co., D.C.Tenn., 31 F.Supp. 1015—Coty v. Prestonettes, Inc., C.C.A.N.Y., 285 F. 501, certiorari granted Prestonettes, Inc., v. Coty, 43 S.Ct. 250, 260 U.S. 720, 67 L.Ed. 480, and reversed on other grounds 44 S.Ct. 350, 264 U.S. 359, 68 L.Ed. 731.

Ala.—Try-Me Bottling Co. v. State, 178 So. 231, 235 Ala. 207.

Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49.

Fla.—Philbrick v. City of Miami Beach, 3 So.2d 144, 147 Fla. 538.

Ill.—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N. E.2d 927, 312 Ill.App. 179.

Iowa.—Farmers Co-op. Ass'n v. Quaker Oats Co., 7 N.W.2d 906, 909, quoting **Corpus Juris.**

La.—City of New Orleans v. Liberty Shop, 101 So. 798, 799, 157 La. 26, 40 A.L.R. 1136, quoting **Corpus Juris.**

Md.—Dvorine v. Castelberg Jewelry Corporation, 185 A. 562, 170 Md. 661.

Mass.—New York, N. H. & H. R. Co. v. Deister, 148 N.E. 590, 253 Mass. 178.

Mich.—Township of Warren v. Raymond, 289 N.W. 201, 291 Mich. 426—United-Detroit Theaters Corporation v. Colonial Theatrical Enterprise, 273 N.W. 756, 280 Mich. 425—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692—Glover v. Malloska, 213 N.W. 107, 238 Mich. 216, 52 A.L.R. 77.

Minn.—Fitchette v. Taylor, 254 N. W. 910, 911, 191 Minn. 582, 94 A. L.R. 356, citing **Corpus Juris**—State v. Nelson, 248 N.W. 751, 752, 189 Minn. 87, citing **Corpus Juris.**

Miss.—Wood v. Ratliff, 103 So. 356, 138 Miss. 783.

Mo.—National Pigments & Chemical Co. v. Wright, App., 118 S.W.2d 20—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.

Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 154, 112 Mont. 418, citing **Corpus Juris**—Stoner v. Underseth, 277 P. 437, 443, 85 Mont. 11, citing **Corpus Juris.**

Neb.—State ex rel. Spillman v. Heldt, 213 N.W. 578, 580, 115 Neb. 435, quoting **Corpus Juris**—Chicago, B. & Q. R. Co. v. Davis, 197 N. W. 599, 111 Neb. 737.

N.Y.—Faerman v. Feely, 277 N.Y.S. 446, 243 App.Div. 733, affirmed 2 N.E.2d 692, 271 N.Y. 555—Roock v. Womer, 253 N.Y.S. 357, 233 App. Div. 566—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirming 229 N.Y.S. 32, 132 Misc. 82, and affirmed 175 N.E. 304, 255 N.Y. 541—Crolius v. Douglas Boat Club, 247 N.Y.S. 1, 139 Misc. 29.

N.D.—Richmond v. Miller, 292 N.W. 633, 635, 70 N.D. 157, citing **Corpus Juris.**

Okl.—Hewes v. State, 80 P.2d 233, 234, 183 Okl. 93, citing **Corpus Juris**—State Bar of Oklahoma v. Retail Credit Ass'n, 37 P.2d 954, 170 Okl. 246—Choctaw Pressed Brick Co. v. Townsend, 236 P. 46, 108 Okl. 235.

R.I.—Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139, 141, 55 R.I. 122, citing **Corpus Juris.**

Tex.—McCloskey v. San Antonio Public Service Co., Civ.App., 51 S. W.2d 1088—Featherstone v. Independent Service Station Ass'n of Texas, Civ.App., 10 S.W.2d 124.

Va.—Mears v. Colonial Beach, 184 S.E. 175, 166 Va. 278—Turner v. Hicks, 180 S.E. 543, 164 Va. 612—Long's Baggage Transfer Co. v. Burford, 132 S.E. 355, 144 Va. 339.

Wash.—State ex rel. Pay Less Drug Stores v. Sutton, 98 P.2d 680, 685, 2 Wash.2d 523, citing **Corpus Juris.**

Wyo.—Public Service Commission of Wyoming v. Grimshaw, 53 P.2d 1, 12, 49 Wyo. 158, citing **Corpus Juris.**

32 C.J. p 277 note 39.

"Where the enforcement of criminal law is merely incidental to general relief sought in equity, it is well settled that a court of equity may grant relief by injunction. . . . But the converse is not true. If the property right was merely incidental and the political question predominate, the court of equity would have no power to grant an injunction."—People ex rel. Barrett v. Fritz, 45 N.E.2d 48, 56, 316 Ill.App. 217.

Acts enjoined

Where statute or ordinance makes it penal to violate its provisions, injunction against person threatening violation of statute or ordinance runs against commission of acts prohibited by measure, not against mere violation of law.—Sapiro v. Frisbie, 270 P. 280, 93 Cal.App. 299.

Aiders and abettors

A suit to enjoin persons who are aiding and abetting the commission of unlawful acts is valid.—Securities and Exchange Commission v. Timetrust, Inc., D.C.Cal., 28 F. Supp. 34—Board of Trade of City of Chicago v. Price, C.C.A.Mo., 213 F. 336.

An individual can enjoin the violation of a city ordinance resulting in injury to the individual.—Bailer v. Ringe, 8 N.Y.S.2d 99, 255 App.Div. 976, reargument denied 9 N.Y.S.2d 581, 256 App.Div. 818.

Invalid ordinance

Violation of an invalid ordinance will not be enjoined.—Maplewood Tp. v. Margolis, 136 A. 707, 5 N.J.Misc. 359, affirmed 138 A. 924, 101 N.J. Eq. 778, certiorari denied 48 S.Ct. 212 (first case), 276 U.S. 617, 72 L.Ed. 734.

There is a manifest distinction between enjoining an individual from committing a crime and enjoining the owner of property, or its possessor, from allowing his property to injure others.

Fla.—Pompano Horse Club v. State, 111 So. 801, 93 Fla. 415, 52 A.L.R. 51.

Ky.—Respass v. Commonwealth, 115 S.W. 1131, 131 Ky. 807, 21 L.R.A., N.S., 836.

3. La.—City of New Orleans v. Liberty Shop, 101 So. 798, 799, 157 La. 26, 40 A.L.R. 1136, quoting **Corpus Juris.**

32 C.J. p 278 note 40.

4. Ga.—Dean v. State, 106 S.E. 792, 151 Ga. 371.

Personal and property rights

It is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act.

Cal.—People v. Secombe, 284 P. 725, 103 Cal.App. 306.

W.Va.—State v. Ehrlick, 64 S.E. 935, 65 W.Va. 700, 23 L.R.A.,N.S., 691.

on which the suit is based contains a provision for its enforcement by injunction.[5] In granting the injunction the court acts solely for the purpose of protecting property rights from damage and in no way interferes with the enforcement of the criminal laws.[6] The remedy given is purely preventive; defendant is not punished for what he has done; this is left to the criminal courts.[7] Private persons may not resort to equity to prevent criminal acts unless they are threatened with irreparable injury to their property[8] distinct from that suffered by the public generally,[9] and the relief must be such as only equity can give.[10]

§ 152. —— Affecting Public Property or Rights

Injunction will issue to protect public rights, property, or welfare notwithstanding the acts enjoined may also constitute crimes.

Where an injunction is necessary for the protection of public rights, property or welfare, the criminality of the acts complained of does not bar the remedy by injunction,[11] and the court will consider the criminality of the act only to determine

5. Pa.—Mahon v. Pennsylvania Coal Co., 118 A. 491, 274 Pa. 489.
Tex.—Lambert v. City of Port Arthur, Civ.App., 22 S.W.2d 320, error refused.

6. La.—City of New Orleans v. Liberty Shop, 101 So. 798, 799, 157 La. 26, 40 A.L.R. 1136, quoting **Corpus Juris.**
N.D.—Richmond v. Miller, 292 N.W. 633, 635, 70 N.D. 157, citing **Corpus Juris.**
32 C.J. p 278 note 43.

7. Del.—State v. Maury, 2 Del.Ch. 141.
Ky.—Respass v. Commonwealth, 115 S.W. 1131, 131 Ky. 807, 21 L.R.A., N.S., 836.

8. Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40—Baker v. Retail Clerks' International Protective Ass'n, Local Union No. 1000, Eldorado, 40 N.E.2d 571, 313 Ill.App. 432—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179—Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union, 280 Ill.App. 168—Jennings v. Calumet Nat. Bank, 262 Ill.App. 189, affirmed 180 N.E. 811, 348 Ill. 108.
Mich.—United-Detroit Theaters Corporation v. Colonial Theatrical Enterprise, 273 N.W. 756, 280 Mich. 425.
Mo.—Clark v. Crown Drug Co., 152 S.W.2d 145, 348 Mo. 91, certified 146 S.W.2d 98, 236 Mo.App. 206.
N.Y.—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 148 Misc. 529, affirmed Wollitzer v. Title Guaranty & Trust Co., 270 N.Y.S. 968, 241 App.Div. 757.
N.C.—Carolina Motor Service v. Atlantic Coast Line R. Co., 185 S. E. 479, 210 N.C. 36, 104 A.L.R. 1165.
Tex.—State v. Publix Theater Corporation of New York, Civ.App., 37 S.W.2d 248.

Business competitors had no such right in observance of Sunday closing law as to impede its violation, through equity, by injunction restraining defendant from keeping business place open.—Corchine v. Henderson, Tex.Civ.App., 70 S.W.2d 766.

9. Cal.—Marini v. Graham, 7 P. 442, 67 Cal. 130—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180.
Ga.—Warren Co. v. Dickson, 195 S. E. 568, 185 Ga. 481.
Iowa.—Farmers Co-op. Ass'n v. Quaker Oats Co., 7 N.W.2d 906.
Tex.—Woods v. Kiersky, Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518.

10. Ga.—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551.

11. U.S.—U. S. v. American Bond & Mortgage Co., D.C.Ill., 31 F.2d 448, affirmed, C.C.A., American Bond & Mortgage Co. v. U. S., 52 F.2d 318, certiorari denied 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
Ala.—Farrell v. City of Mobile, 156 So. 635, 229 Ala. 294.
Ariz.—State ex rel. La Prade v. Smith, 29 P.2d 718, 720, 43 Ariz. 131, 92 A.L.R. 168, citing **Corpus Juris,** and modified on other grounds 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.
Cal.—People v. Lim, 118 P.2d 472, 18 Cal.2d 872, prior opinion, App., 111 P.2d 429—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186—People v. Brophy, 120 P.2d 946, 49 Cal.App.2d 15.
Colo.—State v. Tolbert, 56 P.2d 45, 98 Colo. 433.
Conn.—Point O'Woods Ass'n v. Busher, 167 A. 546, 117 Conn. 247.
Fla.—Philbrick v. City of Miami Beach, 3 So.2d 144, 147 Fla. 538—Tampa Jockey Club v. State, 111 So. 816, 93 Fla. 459—Pompano Horse Club v. State, 111 So. 801, 93 Fla. 415, 52 A.L.R. 51.
Ill.—People ex rel. Kerner v. Huls, 189 N.E. 346, 349, 355 Ill. 412, citing **Corpus Juris.**
Ind.—State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949, 215 Ind. 485—Jansen Farms v. City of Indianapolis, 171 N.E. 199, 202 Ind. 138, 72 A.L.R. 514.
Kan.—State v. Cooper, 78 P.2d 884, 889, 147 Kan. 710, citing **Corpus Juris**—State v. McMahon, 280 P. 906, 128 Kan. 772, 66 A.L.R. 1072—State v. Industrial Workers of the World, 214 P. 617, 113 Kan. 347.
La.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491—State v. Tri-State Transit Co. of Louisiana, 155 So. 233, 179 La. 811.
Mich.—Township of Warren v. Raymond, 289 N.W. 201, 291 Mich. 426.
Miss.—State ex rel. Rice v. Allen, 177 So. 763, 180 Miss. 659.
Neb.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270—State v. Ak-Sar-Ben Exposition Co., 236 N.W. 736, 121 Neb. 248—State v. Heldt, 213 N.W. 578, 580, 115 Neb. 435, quoting **Corpus Juris.**
N.J.—Stokes v. Jenkins, 152 A. 383, 107 N.J.Eq. 318.
N.M.—State v. Compire, 103 P.2d 273, 276, 277, 44 N.M. 414, citing and quoting **Corpus Juris.**
N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704—People v. Teuscher, 221 N.Y.S. 20, 129 Misc. 94, conditionally suspended 223 N.Y.S. 650, 130 Misc. 177, and affirmed 226 N.Y.S. 881, 222 App.Div. 791, affirmed 162 N. E. 484, 248 N.Y. 454—Gray v. Gill, 210 N.Y.S. 658, 125 Misc. 70, affirmed 211 N.Y.S. 915, 214 App. Div. 838—Village of Herkimer v. Potter, 207 N.Y.S. 35, 124 Misc. 57.
N.D.—Richmond v. Miller, 292 N.W. 633, 70 N.D. 157.
Okl.—State ex rel. King v. H. F. Wilcox Oil & Gas Co., 19 P.2d 572, 162 Okl. 237.
S.C.—State v. Kizer, 162 S.E. 444, 164 S.C. 383, 81 A.L.R. 722.
32 C.J. p 279 note 55.

Building inspector's order for owner of building to cease prohibited use affording owner an opportunity to appeal is not prerequisite to town's injunction to restrain such use.—Town of Darien v. Webb, 162 A. 690, 115 Conn. 581.

In supreme court
A wrong arising out of repeated violations of a penal statute and

whether, under the particular circumstances, equitable intervention is necessary.[12] Such an injunction ought not to be granted, however, except for the prevention of serious and irreparable injury,[13] and cannot be demanded as a matter of right, but rests in the sound discretion of the court.[14] For a discussion of equitable relief against nuisances see the C.J.S. title Nuisances §§ 109–138, also 46 C.J. p 759 note 75–p 802 note 44.

§ 153. Criminal Conspiracies and Combinations

A criminal conspiracy threatening irreparable injury to the property of a complainant who has no other available remedy may be enjoined.

A criminal conspiracy or combination which threatens the property of complainant with irreparable injury may be enjoined, where complainant has no other available remedy.[15] In order for an injunction to issue, however, the thing which is done or is threatened must in itself be unlawful, or, if lawful, it must be carried out by unlawful means.[16]

§ 154. Preventing Enforcement of Rights Acquired by Crime

The prevention of enforcement of rights acquired by crime is discussed supra § 32.

Examine Pocket Parts for later cases.

§ 155. Other Acts

The rule that injunction will not issue to restrain criminal acts unless necessary to protect civil or property rights has been widely applied.

The general rule, discussed supra § 150, that injunction will not issue to restrain criminal acts has been widely applied, and courts have refused to grant injunctions to restrain the erection of a livery stable in a city;[17] to restrain the maintenance of a slaughterhouse on a stream flowing through a city;[18] to restrain the permitting of stock and cattle to run at large within the city limits;[19] to

harmfully affecting the rights and interests of people generally throughout the state, when committed by a corporation engaged in the public service, is a public wrong which, under some state constitutions, may be enjoined by the supreme court in an original suit in equity wherein the state is plaintiff.—State v. Ak-Sar-Ben Exposition Co., 226 N.W. 705, 118 Neb. 851.

Publication

Although a publication cannot be enjoined solely because of its libelous character, where it threatens irreparable injury to property rights and other grounds of equitable jurisdiction exist it will be enjoined, regardless of its character as libelous or otherwise.—Ex parte Wood, 227 P. 908, 194 Cal. 49.

12. N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App.Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704.

13. Conn.—Point O'Woods Ass'n v. Busher, 167 A. 546, 117 Conn. 247.

Mich.—Township of Warren v. Raymond, 289 N.W. 201, 291 Mich. 426.

"Bank night"

The conducting by a theatre of a legal "bank night," which is not a lottery, will not be enjoined, and the burden of showing illegality is on the state.—State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 132 P.2d 689, 114 Mont. 52.

Criminal penalty held not to be an adequate remedy.—State ex rel. Rice v. Allen, 177 So. 763, 180 Miss. 659.

14. Conn.—Point O'Woods Ass'n v. Busher, 167 A. 546, 117 Conn. 247.

War effort

(1) Injunction may be denied where granting of it would interfere with the war effort of the nation.—Koppelman v. Sunset Wine Co., 44 N.Y.S.2d 225, 180 Misc. 812.

(2) Injunction should not be denied, however, where the effect on the war effort would be unconsequential.—Kane v. Lapre, R.I., 33 A. 2d 218.

15. U.S.—Duplex Printing Press Co. v. Deering, N.Y., 41 S.Ct. 172, 254 U.S. 443, 65 L.Ed. 349, 16 A.L.R. 196.

To violate injunctions

An action for injunction against alleged conspiracy by defendants to violate injunctions was not precluded by availability to plaintiff of contempt proceedings for violation of the injunctions.—LaFrance v. LaFrance, 14 A.2d 739, 127 Conn. 149.

State was not precluded from maintaining suit to enjoin conspiracy not to pay a tax and make reports as required by statute, on ground that state was not damaged, where state was hindered in collection of funds and penalty imposed for failure to pay, and was put to trouble and expense of filing suit, and by conspiracy of defendants others were encouraged not to pay such tax.—State ex rel. Rice v. Hasson Grocery Co., 170 So. 234, 177 Miss. 264, 107 A.L.R. 663.

Defenses

In action against labor union to restrain conspiracy to ruin plaintiff's business, alleged violation of constitutional rights of third persons was not defense for defendant union, even though some of third parties were members of union; nor was complainant's alleged fraud in procuring Blue Eagle.—J. & T. Cousins Co. v. Shoe & Leather Workers' Industrial Union of New York, 268 N.Y.S. 547, 150 Misc. 575, affirmed 270 N.Y.S. 973, 241 App.Div. 760.

16. U.S.—Pennsylvania Railroad System and Allied Lines Federation No. 90 v. Pennsylvania R. Co., Pa., 45 S.Ct. 307, 267 U.S. 203, 69 L.Ed. 574, affirming, C.C.A., 1 F.2d 171, affirming, D.C., Pennsylvania R. R. System and Allied Lines Federation No. 90 v. Pennsylvania R. Co., 296 F. 220, and followed in Pennsylvania System Board of Adjustment of Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express and Station Employees v. Pennsylvania R. Co., Pa., 45 S.Ct. 312, 267 U.S. 219, 69 L.Ed. 581—Pennsylvania System Board of Adjustment of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Pennsylvania R. Co., D. C.Pa., 294 F. 556.

Wis.—Bump Pump Co. v. Waukesha Foundry Co., 300 N.W. 500, 238 Wis. 643.

17. Mo.—Mason v. Deitering, 111 S. W. 862, 136 Mo.App. 26.

18. Wis.—Tiede v. Schneidt, 74 N.W. 798, 99 Wis. 201.

19. Ark.—DeQueen v. Fenton, 136 S.W. 945, 98 Ark. 521.

restrain the transactions of banking business in contravention of law;[20] to restrain a violation of city ordinances, where the acts complained of do not amount to such a nuisance as equity would restrain;[21] to restrain the violation of civil rights statutes which provide both a civil and criminal remedy for their violation;[22] to restrain the violation of a statute prohibiting certain aliens from possessing realty;[23] to restrain the violation of a statute limiting the hours of work on public improvements;[24] to restrain the violation of liquor laws;[25] to restrain the violation of a statute declaring that navigable waters belong to the people as a common for fowling;[26] to restrain the violation of a statute requiring the manufacturer and seller of an article of food or drink to furnish samples of the article manufactured or sold for analysis;[27] to restrain violations of licensing statutes,[28] and to restrain the violation of Sunday laws.[29] It has also been held that injunction will not lie to restrain the keeping of a gambling house,[30] a bucket shop,[31] or a bawdyhouse,[32] no special injury to plaintiff's property rights being shown, or to restrain gambling on public fair grounds,[33] or the maintenance of a race track and poolroom,[34] or to prevent a prize fight[35] or the carrying on of the business of knowingly purchasing stolen ores from plaintiff's employees,[36] although there is also authority directly to the contrary of this last proposition.[37]

On the other hand, under the exceptions to the general rule, discussed supra §§ 151, 152, that injunction will issue to protect civil or property rights notwithstanding the acts enjoined also constitute crimes, injunctions have been issued to prevent acts in furtherance of a strike which caused great private injury;[38] to prevent the giving or receiving of rebates;[39] to prevent interference with church property;[40] to prevent the maintenance of a bawdyhouse adjoining complainant's premises and interfering with the use and enjoyment of the latter;[41] to prevent the maintenance of a conspiracy to commit fraudulent acts which will result in the perversion of an election;[42] to prevent the running of a corner on the board of trade by which an exorbitant and fictitious price is fixed on grain, which

20. N.Y.—Attorney General v. Utica Ins. Co., 2 Johns.Ch. 371.

21. Cal.—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180.
Fla.—Philbrick v. City of Miami Beach, 3 So.2d 144, 147 Fla. 538.
Ill.—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179—Jennings v. Calumet Nat. Bank, 262 Ill.App. 189, affirmed 180 N.E. 811, 348 Ill. 108.
Ky.—Robinson v. Town of Paintsville, 250 S.W. 972, 199 Ky. 247.
Mich.—Township of Warren v. Raymond, 289 N.W. 201, 291 Mich. 426.
N.J.—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506—Dinkins v. Kip, 160 A. 676, 110 N.J.Eq. 486—Healy v. Sidone, Ch., 127 A. 520.
N.Y.—Coley v. Campbell, 215 N.Y.S. 679, 126 Misc. 869.
N.C.—Elizabeth City v. Aydlett, 152 S.E. 681, 198 N.C. 585.
Pa.—Township of Haverford v. Bruno, 29 Del.Co. 307, 31 Mun.L.R. 152.
Va.—Mears v. Colonial Beach, 184 S.E. 175, 166 Va. 278.
Wis.—Olson v. City of Platteville, 251 N.W. 245, 213 Wis. 344, 91 A.L.R. 308.
32 C.J. p 277 note 24.
Equitable relief against nuisances see the C.J.S. title Nuisances §§ 109–138, also 46 C.J. p 759 note 75–p 802 note 44.

22. Ill.—White v. Pasfield, 212 Ill. App. 72.
N.Y.—Woollcott v. Shubert, 154 N.Y.S. 643, 169 App.Div. 194, reversing 154 N.Y.S. 754, 90 Misc. 474.
32 C.J. p 277 note 25.

23. Ariz.—Takiguchi v. State, 55 P.2d 802, 47 Ariz. 302.

24. Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

25. Okl.—State v. Journal Co., 105 P. 655, 25 Okl. 180.
32 C.J. p 277 note 26.
"While a court of equity may abate a nuisance, such as a place where liquor is being sold illegally, it will not restrain by injunction the commission of illegal or immoral acts and equity will not enjoin one engaged in the sale of liquor, from making sales which are punishable by criminal act."—People ex rel. Barrett v. Fritz, 45 N.E.2d 48, 56, 316 Ill.App. 217.

26. Va.—Meredith v. Triple Island Gunning Club, 73 S.E. 721, 113 Va. 80, 38 L.R.A.,N.S., 286, Ann.Cas. 1913E 531.

27. Ohio.—State v. Capitol City Dairy Co., 57 N.E. 62, 62 Ohio St. 350, 57 L.R.A. 181, affirmed 22 S.Ct. 120, 183 U.S. 238, 46 L.Ed. 171.

28. Tex.—Vera v. Robinson, Civ. App., 16 S.W.2d 860.

29. Pa.—Commonwealth v. Sherman, 14 Pa.Dist. & Co. 4.
Tex.—State v. Publix Theater Corporation of New York, Civ.App., 37 S.W.2d 248.
32 C.J. p 277 note 29.

30. Colo.—People v. Lake County Dist. Ct., 58 P. 604, 26 Colo. 386, 46 L.R.A. 580.
32 C.J. p 277 note 30.

31. Ill.—Christensen v. Kellogg, 110 Ill.App. 61—Christie St. Commn. Co. v. Chicago Bd. of Trade, 92 Ill. App. 604.

32. Ky.—Neaf v. Palmer, 45 S.W. 506, 103 Ky. 496, 20 Ky.L. 176, 41 L.R.A. 319.
32 C.J. p 277 note 32.

33. Ill.—Cope v. Flora Dist. Fair Assoc., 99 Ill. 489, 39 Am.R. 30.

34. Ind.—State v. O'Leary, 58 N.E. 703, 155 Ind. 526.

35. Ky.—Commonwealth v. McGovern, 75 S.W. 261, 116 Ky. 212, 25 Ky.L. 414, 66 L.R.A. 280.

36. Colo.—Heber v. Portland Gold Min. Co., 172 P. 12, 64 Colo. 352, L.R.A.1918D 681.
32 C.J. p 277 note 36.

37. U.S.—Goldfield Cons. Mines Co. v. Richardson, C.C.Nev., 194 F. 198.
32 C.J. p 277 note 37.

38. Kan.—State v. Howat, 198 P. 686, 109 Kan. 376.

39. U.S.—U. S. v. Milwaukee Refrigerator Transit Co., C.C.Wis., 145 F. 1007.

40. Ala.—Blount v. Sixteenth St. Baptist Church, 90 So. 602, 206 Ala. 423.
32 C.J. p 278 note 48.

41. Wash.—Ingersoll v. Rousseau, 76 P. 513, 35 Wash. 92, 1 Ann.Cas. 35.
32 C.J. p 278 note 49.

42. Colo.—People v. Tool, 86 P. 224, 229, 231, 35 Colo. 225, 117 Am.S.R. 198, 6 L.R.A.,N.S., 822.

acts will result in depriving another of his property;[43] to prevent the serving of liquor by a lodge to its members in violation of an ordinance;[44] and to prevent the use of force and violence to prevent complainant from working land where the result would be that, if the land were not planted at that time, no crop could be raised thereon during the season.[45]

Zoning laws. In a number of jurisdictions the courts have refused to grant injunctions to restrain the erection or location of wooden buildings within the fire limits of a municipality,[46] but there is also authority to the contrary,[47] at least where ordinance does not furnish a full, complete, and adequate remedy.[48] Where the remedy by continuous prosecutions is adequate, injunction will be denied.[49] Where the remedy by prosecution for violations of a zoning law or ordinance is adequate, it has been held that a violation will not be restrained,[50] but injunctions have been granted to restrain violations of zoning ordinances,[51] particularly where such remedy is made available by statute.[52] Property owners cannot maintain suit to restrain an adjacent owner's violation of a zoning ordinance unless their personal or property rights will be injured[53] and unless there is no other available remedy.[54] The legality of the zoning law must be established before a violation thereof will be enjoined.[55]

43. Ill.—Alton Grain Co. v. Norton, 105 Ill.App. 385—Montreal Bank v. Waite, 105 Ill.App. 373.

44. Cal.—Herald v. Glendale Lodge No. 1289, B. P. O. E., 189 P. 329, 46 Cal.App. 325.
32 C.J. p 278 note 52.

45. Tex.—Ramon v. Saenz, Civ.App., 122 S.W. 928.

46. Tex.—City of Odessa v. Halbrook, Civ.App., 103 S.W.2d 223.
32 C.J. p 276 note 19.

47. Kan.—City of Oberlin v. Keys, 215 P. 283, 113 Kan. 421.
Ky.—Galanty & Alper v. City of Maysville, 196 S.W. 169, 176 Ky. 523.
Me.—City of Lewiston v. Grant, 113 A. 181, 120 Me. 194—Inhabitants of Town of Skowhegan v. Heselton, 102 A. 772, 117 Me. 17—Inhabitants of Houlton v. Titcomb, 66 A. 733, 102 Me. 272, 10 L.R.A.,N.S., 580, 120 Am.S.R. 492.
N.M.—Town of Gallup v. Constant, 11 P.2d 962, 36 N.M. 211.

At suit of property owner
Where the violation of a fire limits ordinance consists of a building within the prohibition of the ordinance to be located dangerously near plaintiff's house, it may be restrained.—Kaufman v. Stein, 37 N.E. 333, 138 Ind. 49, 46 Am.S.R. 368.

48. Ky.—City of Monticello v. Bates, 173 S.W. 159, 163 Ky. 38.
N.D.—Village of Ashley v. Ashley Lumber Co., 169 N.W. 87, 40 N. D. 515.

49. Ky.—Robinson v. Town of Paintsville, 250 S.W. 972, 199 Ky. 247.

50. N.J.—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506—Dinkins v. Kip, 160 A. 676, 110 N.J. Eq. 486—Srager v. Mintz, 158 A. 471, 109 N.J.Eq. 544.

51. La.—City of New Orleans v. Liberty Shop, 101 So. 799, 157 La. 26, 40 A.L.R. 1136.
Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.
N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325, reversing 16 N.Y.S.2d 626, 258 App. Div. 328—City of Utica v. Ortner, 10 N.Y.S.2d 729, 256 App.Div. 1039—Kaltenbach v. Benisch, 299 N.Y. S. 276, 252 App.Div. 788—Town of Ramapo v. Bockar, 273 N.Y.S. 452, 151 Misc. 613.
Ohio.—Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287.

Failure to proceed against others
Injunction suit against carrying on restaurant or commercial business in residence district is not wanting in equity because of failure to proceed against school maintaining cafeterias.—City of Lincoln v. Foss, 230 N.W. 592, 119 Neb. 666.

No penalty
Where the statute or ordinance contains no provision for a penalty for a violation thereof, injunction is a proper remedy to prevent substantial public injury.
Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 Cal.App. 277.
Conn.—Town of Darien v. Webb, 162 A. 690, 115 Conn. 581—Coombs v. Larson, 152 A. 297, 112 Conn. 236.

Prior permit holder
Holder of building permit who has commenced construction and incurred liabilities before adoption of zoning ordinance cannot be restrained.—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirming 229 N.Y.S. 32, 132 Misc. 82, and affirmed 175 N.E. 304, 255 N.Y. 541.

Unreasonable ordinance
Zoning ordinance held unreasonable, and injunction was denied.—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App.Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

52. Mass.—Pitman v. City of Medford, 45 N.E.2d 973, 312 Mass. 618—Town of Lexington v. Govenar, 3 N.E.2d 19, 295 Mass. 31.
N.C.—Elizabeth City v. Aydlett, 156 S.E. 163 (first case), 200 N.C. 58, followed in 156 S.E. 163 (second case), 200 N.C. 796.

No private right
A town seeking an injunction to prevent violation of its zoning by-law is not asserting any private right but is merely seeking compliance with its local regulations adopted in furtherance of public interest.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.

Such jurisdiction must be exercised in accordance with well settled principles granting such form of equitable relief.—Town of Saugus v. B. Perini & Sons, supra.

Tenant's use of building in violation of zoning by-laws with consent of landlord having right to terminate tenancy could be enjoined.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

53. N.Y.—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirming 229 N.Y.S. 32, 132 Misc. 82, and affirmed 175 N.E. 304, 255 N.Y. 541—Keenly v. McCarty, 244 N.Y.S. 63, 137 Misc. 524.
Tex.—City of Graham v. Wheeless, Civ.App., 89 S.W.2d 792.

No nuisance
Violation of zoning ordinance infringing on property rights may be enjoined, although no nuisance is shown.—Bouchard v. Zetley, 220 N. W. 209, 196 Wis. 635—Holzbauer v. Ritter, 198 N.W. 852, 184 Wis. 35.

Refusal of injunction held proper
Pa.—Duty v. Vacuum Oil Co., 175 A. 522, 317 Pa. 15.

54. Demand on authorities
Plaintiffs, before seeking equitable relief with respect to violation of zoning ordinance, should allege and prove demand on municipal authorities.—Keenly v. McCarty, 244 N.Y. S. 63, 137 Misc. 524.

55. N.Y.—Village of Granville v. Krause, 228 N.Y.S. 204, 131 Misc. 752.

I. CRIMINAL PROSECUTIONS, ARRESTS, AND JUDGMENTS

§ 156. In General

As a general rule, an injunction will not be granted to stay criminal or quasi-criminal proceedings.

The general rule, sometimes by virtue of statutory provisions, is that an injunction will not be granted to stay criminal or quasi-criminal proceedings, whether the prosecution is for the violation of the common law or the infraction of statutes or municipal ordinances,[56] or to stay the enforcement of

56. U.S.—Douglas v. City of Jeannette (Pennsylvania), Pa., 63 S. Ct. 877, 319 U.S. 157, 87 L.Ed. 1324, affirming, C.C.A., 130 F.2d 652, reversing, D.C., 39 F.Supp. 32, certiorari granted 63 S.Ct. 660, 318 U.S. 749, 87 L.Ed. 1125—Beal v. Missouri Pac. R. R. Corporation, Neb., 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577, reversing, C.C.A., Beal v. Missouri Pac. R. Corporation in Nebraska, 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396—Whisler v. City of West Plains, Mo., C.C.A.Mo., 137 F.2d 938, affirming, D.C., 43 F. Supp. 654—Spence v. Cole, C.C.A. N.C., 137 F.2d 71—Eastus v. Bradshaw, C.C.A.Tex., 94 F.2d 788, certiorari denied Bradshaw v. Eastus, 58 S.Ct. 1045, 304 U.S. 576, 82 L. Ed. 1539—Whitehead v. Cheves, C. C.A.Ga., 67 F.2d 316, reversing Cheves v. Whitehead, D.C., 1 F. Supp. 321, and certiorari denied 54 S.Ct. 371, 290 U.S. 704, 78 L.Ed. 605—Pictorial Review Co. v. City of Alexandria, D.C.La., 46 F.2d 337 —Beatrice Creamery Co. v. Cline, D.C.Colo., 9 F.2d 176, affirmed in part and reversed in part on other grounds Cline v. Frink Dairy Co., 47 S.Ct. 681, 274 U.S. 445, 71 L.Ed. 1146—Ritholz v. Bailey, D.C.Ark., 46 F.Supp. 48—Bevins v. Prindable, D.C.Ill., 39 F.Supp. 708, affirmed 62 S.Ct. 116, 314 U.S. 573, 86 L.Ed. 465—Reid v. Borough of Brookville, D.C.Pa., 39 F.Supp. 30—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F.Supp. 607—Rebhuhn v. Cahill, D.C.N.Y., 31 F.Supp. 47—Carolene Products Co. v. Wallace, D.C.D.C., 30 F.Supp. 266, affirmed 60 S.Ct. 113, 308 U.S. 506, 84 L.Ed. 433—Dartmouth Woolen Mills v. Myers, D.C.N.H., 16 F.Supp. 633—Spiegel v. Ford, D. C.Mass., 5 F.Supp. 456.

Ala.—Montiel v. Holcombe, 199 So. 245, 240 Ala. 352.

Alaska.—P. E. Harris & Co. v. O'Malley, 7 Alaska 201.

Ark.—Van Hovenberg v. Holeman, 144 S.W.2d 718, 201 Ark. 370—Gordon v. Smith, 120 S.W.2d 325, 196 Ark. 926—Beard v. Fox, 90 S.W. 2d 212, 192 Ark. 1177, citing **Corpus Juris**—Merritt v. Gravenmier, 277 S.W. 526, 169 Ark. 779.

Cal.—Gray v. Justice's Court of Williams Judicial Tp., Colusa County, 63 P.2d 1160, 18 Cal.App.2d 420.

Colo.—Walker v. Begole, 63 P.2d 1224, 1225, 99 Colo. 471, citing **Corpus Juris**—Averch v. City and County of Denver, 242 P. 47, 78 Colo. 246.

Conn.—Scudder v. Town of Greenwich, 14 A.2d 728, 730, 127 Conn. 71, citing **Corpus Juris.**

Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.

Fla.—Taylor v. Trianon Amusement Co., 200 So. 912, 146 Fla. 447—Stocks v. Lee, 198 So. 211, 144 Fla. 627—Merry-Go-Round v. State ex rel. Jones, 186 So. 538, 136 Fla. 278—Gulf Theatres v. State ex rel. Ferguson, 182 So. 842, 133 Fla. 634.

Ga.—Braddy v. City of Macon, 22 S. E.2d 801, 194 Ga. 871—Speed Oil of Atlanta v. City of Rome, 18 S.E.2d 628, 193 Ga. 327—City of Abbeville v. Renfroe, 15 S.E.2d 782, 192 Ga. 467—City of Atlanta v. Miller, 13 S.E.2d 814, 191 Ga. 767—City of Albany v. Lippitt, 13 S.E.2d 807, 191 Ga. 756—Anthony v. City of Atlanta, 11 S.E.2d 197, 190 Ga. 841—Powell v. Hartafield, 11 S.E. 2d 33, 190 Ga. 839—Southern Theatres Corporation v. Martin, 5 S.E. 2d 39, 188 Ga. 852—Mather Bros. v. City of Dawson, 4 S.E.2d 165, 188 Ga. 450—Walker v. Mayor and Council of Carrollton, 200 S.E. 268, 187 Ga. 237—Coker v. City of Atlanta, 198 S.E. 74, 186 Ga. 473—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720—Hornsby v. Bristow, 196 S. E. 25, 185 Ga. 577—Hodges v. State Revenue Commission, 190 S. E. 36, 183 Ga. 832—Jewel Tea Co. v. City Council of Augusta, 190 S.E. 1, 183 Ga. 817—Smith v. Town of Carlton, 185 S.E. 777, 182 Ga. 494—Chivilis v. West, 185 S.E. 348, 182 Ga. 379—Sosebee v. City of Demorest, 185 S.E. 330, 182 Ga. 338—City of Atlanta v. State, 182 S.E. 184, 181 Ga. 346—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657—Sparks v. Georgia Public Service Commission, 172 S.E. 15, 178 Ga. 51 —City Council of Augusta v. Congdon, 156 S.E. 212, 171 Ga. 572—Duncan v. City of Dalton, 150 S.E. 837, 169 Ga. 530—Chaires v. City of Atlanta, 139 S.E. 559, 164 Ga. 755, 55 A.L.R. 230—Bennett v. Kimmel, 137 S.E. 60, 163 Ga. 725 —Town of Lilburn v. Alford Bros., 136 S.E. 65, 163 Ga. 282—Gore v. Humphries, 135 S.E. 481, 163 Ga. 106—Burton v. City of Toccoa, 122 S.E. 603, 158 Ga. 63—Brown v. City of Thomasville, 118 S.E. 854, 156 Ga. 260.

Ill.—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see 20 N.E.2d 568, 371 Ill. 261—Hawthorne Kennel Club v. Swanson, 257 Ill.App. 499, transferred, see 171 N.E. 140, 339 Ill. 220.

Ind.—State ex rel. Egan v. Superior Court of Lake County, 6 N.E.2d 945, 211 Ind. 303—State ex rel. Feeney v. Superior Court of Marion County, 188 N.E. 486, 206 Ind. 78—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550—Cook v. Davis, 252 N.W. 754, 218 Iowa 335.

Kan.—Jones v. City of Coffeyville, 18 P.2d 174, 175, 136 Kan. 796, citing **Corpus Juris.**

Ky.—Martin v. Wyatt, 7 S.W.2d 1048, 225 Ky. 212—Johnson v. Tartar, 250 S.W. 498, 199 Ky. 45.

La.—Godfrey v. Ray, 124 So. 151, 169 La. 77.

Mass.—Slome v. Godley, 23 N.E.2d 133, 304 Mass. 187—Harmon v. Commissioner of Police of Boston, 174 N.E. 198, 274 Mass. 56.

Miss.—Edwards v. DeVance, 103 So. 194, 138 Miss. 580.

Mo.—Hann v. Fitzgerald, 119 S.W.2d 808, 342 Mo. 1166—State ex rel. Igoe v. Joynt, 110 S.W.2d 737, 341 Mo. 788—Wellston Kennel Club v. Castlen, 55 S.W.2d 288, 331 Mo. 798—State ex rel. Chase v. Hall, 250 S.W. 64, 297 Mo. 594—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

Mont.—State v. Carroll, 279 P. 234, 85 Mont. 439—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 251 P. 137, 77 Mont. 361, 49 A.L.R. 627.

N.Y.—Reed v. Littleton, 9 N.E.2d 814, 275 N.Y. 150, affirming 292 N.Y.S. 363, 249 App.Div. 310, reversing 289 N.Y.S. 798, 159 Misc. 853—Mellon v. Geoghan, 266 N.Y. S. 759, 240 App.Div. 841—Greenwald v. Noyes, 17 N.Y.S.2d 707, 172 Misc. 780—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103—Hitchcock v. Foote, 246 N.Y.S. 554, 140 Misc. 554—Monroe Greyhound Ass'n v. Quigley, 228 N.Y.S. 830, 130 Misc. 357—Fusaro v. McKennell, 198 N.Y.S. 719, 120 Misc. 434.

orders of a board or commission.[57] This general rule is based, in addition to other considerations,[58] on the principle that equity is concerned only with the protection of civil and property rights,[59] and

N.C.—McCormick v. Proctor, 6 S.E.2d 870, 217 N.C. 23.
N.D.—Lockwood v. Baird, 231 N.W. 851, 59 N.D. 713.
Ohio.—Monfrino v. Gutelius, 33 N.E.2d 1003, 66 Ohio App. 293—Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 64 Ohio App. 105, affirmed 30 N.E.2d 799, 137 Ohio St. 460—Mayer v. Ames, 16 N.E.2d 498, 58 Ohio App. 295, affirmed 14 N.E.2d 617, 133 Ohio St. 458, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 396.
Okl.—Rogers v. Douglass, 72 P.2d 823, 181 Okl. 32.
Pa.—Meadville Park Theatre Corporation v. Mook, 10 A.2d 437, 337 Pa. 21—Long v. Metzger, 152 A. 572, 573, 301 Pa. 449, quoting **Corpus Juris**—Independent Coal Dealers Protective Ass'n v. Logue, 25 Pa.Dist. & Co. 476, 42 Dauph.Co. 6—Cohen v. Schofield, 13 Pa.Dist. & Co. 145, affirmed 149 A. 710, 299 Pa. 496—Ford v. Cary, 52 York Co. 7—Park Theatre Corporation v. Mook, 87 Pittsb.Leg.J. 101—Dixon v. Van Dyke, 45 Dauph.Co. 424.
R.I.—Conte v. Roberts, 192 A. 814, 818, 58 R.I. 353, citing **Corpus Juris.**
S.C.—Baker v. State Highway Department, 165 S.E. 197, 166 S.C. 481—Harvie v. Heise, 148 S.E. 66, 150 S.C. 277, appeal dismissed Wilson v. McLane, 49 S.Ct. 351, 279 U.S. 822, 73 L.Ed. 976, appeal dismissed and certiorari denied Superior Confection Co. v. Craig, 49 S.Ct. 478, 279 U.S. 824, 73 L.Ed. 977, and appeal dismissed Adler v. Rector, 49 S.Ct. 480, 279 U.S. 876, 73 L.Ed. 1010—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347.
Tenn.—Earhart v. Young, 124 S.W.2d 693, 174 Tenn. 198—Frankland Carriage Co. v. City of Jackson, 28 S.W.2d 343, 160 Tenn. 649—Henderson v. Henderson, 1 S.W.2d 526, 156 Tenn. 430—Erwin Billiard Parlor v. Buckner, 300 S.W. 565, 156 Tenn. 278—Lindsey v. Drane, 285 S.W. 705, 154 Tenn. 458—Windrow v. Stephens, 103 S.W.2d 584, 20 Tenn.App. 647—V. E. Schevenell Const. Co. v. City of Memphis, 8 Tenn.App. 22.
Tex.—Ex parte Sterling, 53 S.W.2d 294, 112 Tex. 103—Kemp Hotel Operating Co. v. City of Wichita Falls, Com.App., 170 S.W.2d 217, affirming City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 162 S.W.2d 150—Bielecki v. City of Port Arthur, Com.App., 12 S.W.2d 976, reversing, Civ.App., 2 S.W.2d 1001—City of Ballinger v. Boyd, Civ.App., 173 S.W.2d 363—Brazell v. Gault, Civ.App., 160 S.W.2d 540—Angelo v. Brown, Civ.App., 139 S.W.2d 197—Whitehead v. Richardson, Civ.App., 127 S.W.2d 512—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—Gurtov v. Williams, Civ.App., 105 S.W.2d 328, error dismissed—Barkley v. Conklin, Civ.App., 101 S.W.2d 405—Kampmann v. Stappenbeck, Civ.App., 45 S.W.2d 761, error dismissed—City of Port Arthur v. Young, Civ.App., 264 S.W. 924.
Wash.—State v. Maybury, 296 P. 566, 161 Wash. 142, appeal dismissed Potter v. Maybury, 52 S.Ct. 202, 284 U.S. 593, 76 L.Ed. 511.
W.Va.—Cambria v. Bachmann, 118 S.E. 336, 93 W.Va. 463.
Wis.—Rust v. State Board of Dental Examiners of Wisconsin, 256 N.W. 919, 216 Wis. 127.
32 C.J. p 279 note 56.

To prevent admission of evidence

Where evidence is legally competent, the fact that it was obtained unlawfully, in violation of plaintiff's rights, does not warrant injunctive relief to prevent its admission in a criminal prosecution against plaintiff.—Fusaro v. McKennell, 198 N.Y.S. 719, 120 Misc. 434.

Probability of erroneous decision

Probability that judge of county court would render erroneous decision would not authorize circuit court to enjoin him from proceeding with prosecution under warrants for failing to work public road.—Pelfry v. Spencer, 265 S.W. 4, 204 Ky. 578.

Searches

(1) Owners of premises were not entitled to injunction restraining interference by police officers in respect of searches of premises.
Mass.—Harmon v. Commissioner of Police of Boston, 174 N.E. 198, 274 Mass. 56.
N.Y.—Kalwin Business Men's Ass'n v. McLaughlin, 214 N.Y.S. 99, 126 Misc. 698, reversed on other grounds 214 N.Y.S. 507, 216 App. Div. 6.

(2) Equity would not enjoin city officials from molesting the operation of a "bank night" in theater or from making searches and seizures, or enjoin individual and his attorney from filing affidavits for searches for, and seizures of, "bank night" equipment.—Troy Amusement Co. v. Attenweiler, 28 N.E.2d 207, 64 Ohio App. 105, affirmed 30 N.E.2d 799, 137 Ohio St. 460.

Seizure or forfeiture of property

(1) An injunction will not lie to restrain proceedings which have for their object the seizure or forfeiture of property used in violation of law.—State v. Carroll, 279 P. 234, 85 Mont. 439.

(2) The giving of notice by police to persons in possession of machines in violation of gambling statute that continued unlawful possession and use would subject them to seizure and forfeiture as prescribed by statute was not unlawful action authorizing issuance of restraining order against police officials from further proceeding under statute.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.

(3) Where pinball machines might have been gaming devices, the owner and distributor was not entitled to injunctive relief as against officers seeking seizure of machines, on ground that machines were not gaming devices and were to be used for amusement purposes only.—Earhart v. Young, 124 S.W.2d 693, 174 Tenn. 198.

(4) However, absence of evidence that liquor-laden vessel seized on high seas was unlawfully engaged was held to warrant injunction against institution of any proceedings against it, or its cargo, master, or crew.—The Evelyn D., D.C.Ga., 14 F.2d 321.

Construction of statute

Statute providing that equity will neither aid criminal courts in exercise of jurisdiction, nor restrain them, does not imply that court is without jurisdiction to render judgment in suit to restrain enforcement of criminal law, but provides that equity will take no part in administration of criminal law.—McCullough Bros. v. City of Griffin, 184 S.E. 599, 181 Ga. 832.

57. Pa.—Meadville Park Theatre Corporation v. Mook, 10 A.2d 437, 337 Pa. 21.
32 C.J. p 280 note 57.

58. State not made party defendant

The reason for the rule that court cannot enjoin the enforcement of criminal law by interference with an illegal business is not based on any distinction between powers of courts of law as distinguished from courts of equity, but is that criminal prosecution is carried on in the name of the people, and the state may not be made a party defendant.—Kent v. City of Chicago, 22 N.E.2d 799, 301 Ill.App. 312.

No interference with public

As a matter of public policy the court should not interfere with the rights of the public seeking the enforcement of the law.—Foley v. Ham, 169 P. 183, 102 Kan. 66, L.R.A.1918C 204.

59. Tex.—City of Breckenridge v. McMullen, Civ.App., 258 S.W. 1099.
32 C.J. p 280 note 63.

is intended to supplement, and not usurp, the functions of the courts of law,[60] and on the fact that the party has an adequate remedy at law[61] by establishing as a defense to the prosecution that he did not commit the act charged,[62] or that the statute or ordinance on which the prosecution is based is invalid,[63] and, in case of conviction, by taking an appeal.[64]

Application and extent of rule. The rule applies whether the prosecution is by indictment or by summary process,[65] and applies to prosecutions which are merely threatened or anticipated as well as to those which have already been commenced,[66] and also to grand jury investigations.[67] In the absence of other circumstances justifying interference by a court of equity, the rule also applies, even though the ordinance or statute on which the prosecution is based is void,[68] although the party seeking the in-

60. Ga.—Hodges v. State Revenue Commission, 190 S.E. 36, 183 Ga. 832.
Tex.—City of Breckenridge v. McMullen, Civ.App., 258 S.W. 1099—Tyler v. Story, 97 S.W. 856, 44 Tex.Civ.App. 250.

Invasion of courts of common law
To sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses would constitute an invasion of the courts of common law.
U.S.—In re Sawyer, Neb., 8 S.Ct. 482, 124 U.S. 200, 31 L.Ed. 402.
Kan.—Foley v. Ham, 169 P. 183, 102 Kan. 66, L.R.A.1918C 204.

61. U.S.—Eastus v. Bradshaw, C.C.A.Tex., 94 F.2d 788, certiorari denied Bradshaw v. Eastus, 58 S.Ct. 1045, 304 U.S. 576, 82 L.Ed. 1539—Whitehead v. Cheves, C.C.A.Ga., 67 F.2d 316, reversing, D.C., Cheves v. Whitehead, 1 F.Supp. 321, and certiorari denied 54 S.Ct. 371, 290 U.S. 704, 78 L.Ed. 605.
Alaska.—Anderson v. Smith, 8 Alaska 470.
Ark.—Gordon v. Smith, 120 S.W.2d 325, 196 Ark. 926.
Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.
D.C.—McKee v. Rudolph, 12 F.2d 148, 56 App.D.C. 207, certiorari denied 47 S.Ct. 101, 273 U.S. 710, 71 L.Ed. 852.
Ga.—City of Albany v. Lippitt, 13 S.E.2d 807, 191 Ga. 756—Sparks v. Georgia Public Service Commission, 172 S.E. 15, 178 Ga. 51—Bowden v. Georgia Public Service Commission, 153 S.E. 42, 170 Ga. 505—Hughes v. State Board of Medical Examiners, 123 S.E. 879, 158 Ga. 602.
N.Y.—Cowan v. City of Buffalo, 282 N.Y.S. 880, 157 Misc. 71, affirmed 288 N.Y.S. 239, 247 App.Div. 591—Fusaro v. McKennell, 198 N.Y.S. 719, 120 Misc. 434.
Ohio.—Troy Amusement Co. v. Attenweiler, 30 N.E.2d 799, 137 Ohio St. 460, affirming 28 N.E.2d 207, 64 Ohio App. 105.
R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.
Tex.—Whitehead v. Richardson, Civ. App., 127 S.W.2d 512—City of Breckenridge v. McMullen, Civ. App., 258 S.W. 1099.
32 C.J. p 280 note 66.

62. Ala.—Brown v. Birmingham, 37 So. 173, 140 Ala. 590.
Kan.—Foley v. Ham, 169 P. 183, 102 Kan. 66, L.R.A.1918C 204.

63. D.C.—Cave v. Rudolph, 287 F. 989, 53 App.D.C. 12.
Tex.—City of Ranger v. Southern Ice & Utilities Co., Civ.App., 262 S.W. 839.
32 C.J. p 280 note 68.

64. U.S.—Abe Rafelson Co. v. Tugwell, C.C.A.Ill., 79 F.2d 653.
D.C.—McKee v. Rudolph, 12 F.2d 148, 56 App.D.C. 207, certiorari denied 47 S.Ct. 101, 273 U.S. 710, 71 L.Ed. 852.
Ga.—Hodges v. State Revenue Commission, 190 S.E. 36, 183 Ga. 832.
32 C.J. p 281 note 69.

However, it has been held that injunction to restrain the prosecution under unconstitutional ordinance would not be denied on ground that plaintiff had an adequate remedy at law by appeal from judgment of conviction.—Boxer v. Town of Harrison, 22 N.Y.S.2d 501, 175 Misc. 249.

65. U.S.—In re Sawyer, Neb., 8 S.Ct. 482, 124 U.S. 200, 31 L.Ed. 402.

66. Ark.—Gordon v. Smith, 120 S.W.2d 325, 196 Ark. 926.
Ga.—Burton v. City of Toccoa, 122 S.E. 603, 158 Ga. 63.
Tenn.—Earhart v. Young, 124 S.W. 2d 693, 174 Tenn. 198—Henderson v. Henderson, 1 S.W.2d 526, 156 Tenn. 430.
32 C.J. p 281 note 73.
Injunction by federal court against criminal proceeding in state court see Courts § 543 a.

67. U.S.—Application of Texas Co., D.C.Ill., 27 F.Supp. 847.

Previous conviction or indictment
The fact that indictments were pending against certain of those being investigated by the grand jury would not require the enjoining of the grand jury investigation by the federal district court, and there was no question of previous conviction, previous acquittal, or res judicata, since a grand jury investigation is an ex parte proceeding and the grand jury merely makes an accusation.—Application of Texas Co., supra.

68. U.S.—Watson v. Buck, Fla., 61 S.Ct. 962, 313 U.S. 387, 85 L.Ed. 1416, modifying, D.C., Buck v. Gibbs, 34 F.Supp. 510—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437—Hygrade Provision Co. v. Sherman, N.Y., 45 S.Ct. 141, 266 U.S. 497, 69 L.Ed. 402—Argonaut Mining Co. v. McPike, C.C.A.Cal., 78 F.2d 584—Boynton v. Fox West Coast Theatres Corporation, C.C.A. Kan., 60 F.2d 851—Lee v. City of El Campo, Tex., D.C.Tex., 50 F. Supp. 411, affirmed, C.C.A., 135 F. 2d 740—Carolene Products Co. of Litchfield, Ill. v. Wallace, D.C.D.C., 27 F.Supp. 110, affirmed Carolene Products Co. v. Wallace, 59 S.Ct. 1033, 307 U.S. 612, 83 L.Ed. 1495—U. S. v. Buck, D.C.Mo., 18 F. Supp. 213, affirmed, C.C.A., Walker v. U. S., 93 F.2d 383, certiorari denied 58 S.Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 755, 303 U.S. 668, 82 L.Ed. 1124, certiorari denied Drummond v. U. S., 58 S.Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124, affirmed, C.C.A., Luterman v. U. S., 93 F.2d 395, certiorari denied 58 S.Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 756, 303 U. S. 668, 82 L.Ed. 1124, certiorari denied Adams v. U. S., 58 S. Ct. 643, 303 U.S. 644, 82 L.Ed. 1104, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124, certiorari denied Wells v. U. S., 58 S.Ct. 643, two cases, 303 U.S. 644, 82 L.Ed. 1104, rehearing denied 58 S.Ct. 756, two cases, 303 U.S. 668, 82 L.Ed. 1124, certiorari denied Roach v. U. S., 58 S. Ct. 643, 303 U.S. 644, 82 L.Ed. 1104, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124—McDermott v. Hamilton, D.C.Wash., 11 F. Supp. 235—Quaker Baking Co. v. Herring, D.C.Iowa, 3 F.Supp. 118.
Ala.—Farrell v. City of Mobile, 156 So. 635, 229 Ala. 294.
Alaska.—Anderson v. Smith, 8 Alaska 470.
Ark.—Beard v. Fox, 90 S.W.2d 212, 192 Ark. 1177.
Colo.—Averch v. City and County of Denver, 242 P. 47, 78 Colo. 246.
D.C.—Cave v. Rudolph, 287 F. 989, 53 App.D.C. 12.
Ga.—Speed Oil of Atlanta v. City

junction is not guilty of a violation of the ordinance or statute;[69] although the complaint states no cause of action;[70] although the municipality, under the authority of which prosecutions under an alleged void ordinance are to be instituted, and its officers proceeding therein are insolvent so that damages cannot be recovered from them;[71] although the fact that the fines to which the party may be subjected if found guilty amount to less than will permit an appeal;[72] or although the statute on which the prosecution is based is not enforced against some violators.[73]

Erroneous interpretation of statute. It is not a ground for injunctive relief that the prosecuting officer has erroneously construed the statute on which the prosecution is based so as to include the act or acts which it is the purpose of the prosecution to punish.[74]

Motives of the officers instituting the prosecution are immaterial.[75]

Offense malum prohibitum not malum in se. The fact that the operation of the act in question amounts to a crime which is only such because it is prohibited and may not in itself indicate moral depravity does not in any way affect the operation of this rule.[76]

Injury to business or property. If the statute, or interpretation thereof, on which the prosecution is based is valid, the fact that the enforcement thereof would materially injure complainant's business or property constitutes no ground for equitable interference,[77] and is not sufficient reason for asking a court of equity to ascertain in advance whether the business as conducted is in violation of a penal statute, and to enjoin a prosecution thereunder.[78]

Waiver of want of jurisdiction. It is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause.[79]

of Rome, 18 S.E.2d 628, 193 Ga. 327—City of Abbeville v. Renfroe, 15 S.E.2d 782, 192 Ga. 467—Powell v. Hartsfield, 11 S.E.2d 33, 190 Ga. 839—Jewel Tea Co. v. City of Cartersville, 196 S.E. 712, 185 Ga. 799—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657—City Council of Augusta v. Congdon, 156 S.E. 212, 171 Ga. 572.

Ind.—Goldblatt Bros. Corporation v. City of East Chicago, 6 N.E.2d 331, 211 Ind. 621—Lickey v. City of South Bend, 190 N.E. 858, 206 Ind. 636.

Iowa.—Cook v. Davis, 252 N.W. 754, 218 Iowa 335.

Ky.—Stephens v. McCreary County, 80 S.W.2d 592, 258 Ky. 516—Pelfry v. Spencer, 265 S.W. 4, 204 Ky. 578—Johnson v. Tartar, 250 S.W. 498, 199 Ky. 45.

La.—Leesville Club v. Town of Leesville, 125 So. 125, 169 La. 284.

Me.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

Mo.—State ex rel. Chase v. Hall, 250 S.W. 64, 297 Mo. 594.

N.Y.—Cowan v. City of Buffalo, 288 N.Y.S. 239, 247 App.Div. 591, affirming 282 N.Y.S. 880, 157 Misc. 71—Farrell v. City of Syracuse, 242 N.Y.S. 316, 137 Misc. 472—Monroe Greyhound Ass'n v. Quigley, 223 N.Y.S. 830, 130 Misc. 357—People on Complaint of Jones, v. Mestichelli, 18 N.Y.S.2d 406.

Okl.—City of Blackwell v. Griffith Amusement Co., 16 P.2d 233, 160 Okl. 264—Wright v. City of Guthrie, 1 P.2d 162, 150 Okl. 171.

Tex.—Kemp Hotel Operating Co. v. City of Wichita Falls, Com.App., 170 S.W.2d 217, affirming City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 162 S.W.2d 150—Townsend v. McDonald, Civ. App., 149 S.W.2d 1038, error refused—Roberts v. Gossett, Civ. App., 88 S.W.2d 507—City of Port Arthur v. Young, Civ.App., 264 S. W. 924.

32 C.J. p 281 note 74, p 283 note 20.

69. Cal.—Los Angeles Title Ins. Co. v. Los Angeles, 198 P. 1001, 52 Cal.App. 152.

Ill.—Poyer v. Des Plaines, 13 N.E. 819, 123 Ill. 111, 5 Am.S.R. 494.

Determination of illegality

Equity will not, through medium of injunction, determine whether a given act violates a criminal statute, but whether the act violates a criminal statute must first be tested in criminal courts before equity can be called on to intervene through medium of injunction.—Angelo v. Brown, Tex.Civ.App., 139 S.W.2d 197.

70. Ind.—Schwab v. Madison, 49 Ind. 329.

71. Ala.—Brown v. Birmingham, 37 So. 173, 140 Ala. 590.

72. Ky.—Hieatt v. Settle, 195 S.W. 420, 176 Ky. 160—Commonwealth v. McCann, 94 S.W. 645, 123 Ky. 247, 29 Ky.L. 707.

73. S.C.—Cain v. Daly, 55 S.E. 110, 74 S.C. 480.

74. U.S.—P. E. Harris & Co. v. O'Malley, C.C.A., 2 F.2d 810, affirming 7 Alaska 201.

Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.

N.Y.—Monroe Greyhound Ass'n v. Quigley, 223 N.Y.S. 830, 130 Misc. 357.

32 C.J. p 281 note 82.

75. N.Y.—Monroe Greyhound Ass'n v. Quigley, supra.

32 C.J. p 281 note 83.

76. Minn.—Cobb v. French, 127 N. W. 415, 111 Minn. 429.

77. U.S.—Stone v. Christensen, D C.Or., 36 F.Supp. 739—Bradford v Hurt, D.C.Tex., 15 F.Supp. 426, affirmed, C.C.A., 84 F.2d 722.

Mont.—State v. Carroll, 279 P. 234, 85 Mont. 439.

N.Y.—Monroe Greyhound Ass'n v. Quigley, 223 N.Y.S. 830, 130 Misc. 357.

R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.

S.C.—Harvie v. Heise, 148 S.E. 66, 150 S.C. 277, appeal dismissed Wilson v. McLane, 49 S.Ct. 351, 279 U.S. 822, 73 L.Ed. 976, appeal dismissed and certiorari denied Superior Confection Co. v. Craig, 49 S.Ct. 478, 279 U.S. 824, 73 L.Ed. 977, and appeal dismissed Adler v. Rector, 49 S.Ct. 480, 279 U.S. 876, 73 L.Ed. 1010.

Tex.—Love v. Worsham, Civ.App., 101 S.W.2d 598.

32 C.J. p 280 note 58.

78. U.S.—Cullen v. Esola, D.C.Cal., 21 F.2d 877.

Ind.—State ex rel. Egan v. Superior Court of Lake County, 6 N.E.2d 945, 211 Ind. 303.

Mass.—Shuman v. Gilbert, 118 N.E. 254, 209 Mass. 225, L.R.A.1918C 135, Ann.Cas.1918E 793.

Mont.—State v. Carroll, 279 P. 234, 235, 85 Mont. 439, citing Corpus Juris.

N.Y.—Monroe Greyhound Ass'n v. Quigley, 223 N.Y.S. 830, 130 Misc. 357.

79. Ill.—Yates v. Batavia, 79 Ill. 500.

§ 157. Exceptions to Rule

a. In general
b. Vexatious prosecutions; multiplicity
c. Suit relating to same matters pending in equity

a. In General

Injunction to restrain criminal proceeding may issue when the circumstances are exceptional and the danger of irreparable loss is both great and immediate as where the criminal law is used as a club to take or injure private property.

An exception to the general rule, stated supra § 156, exists when the circumstances are exceptional and the danger of irreparable loss is both great and immediate,[80] or when the criminal law is used as a club to take or injure private property,[81] or where a statute authorizes injunctive relief.[82] Also, unlawful proceedings in a criminal prosecution may be restrained.[83]

b. Vexatious Prosecutions; Multiplicity

While there is some authority to the contrary, injunction may issue to restrain a criminal prosecution for the purpose of avoiding a multiplicity of suits, especially where such prosecutions would be vexatious and oppressive.

In some cases an exception to the general rule has been made on the ground that the prosecutions sought to be enjoined were vexatious and oppressive,[84] as where the statute or ordinance, whose enforcement is sought, imposes such restrictive or cumulative penalties that the persons affected are practically prevented from resorting to the courts to determine the validity or the applicability of the law.[85] Further, it has even been held or said in some decisions that, where prosecutions under an invalid law are vexatious and oppressive, they may be enjoined, even though no property rights are involved,[86] and even though no property rights are threatened.[87]

It has also been held that an injunction will be granted to stay a criminal prosecution where the validity of a statute or ordinance is involved, for the purpose of avoiding a multiplicity of suits,[88] especially where the prosecutions would be vexa-

80. U.S.—Cline v. Frink Dairy Co., Colo., 47 S.Ct. 681, 274 U.S. 445, 71 L.Ed. 1146—Campbell v. Medalie, C.C.A.N.Y., 71 F.2d 671, affirming, D.C., Campbell v. Chase Nat. Bank of City of New York, 5 F.Supp. 156, appeal dismissed U. S. v. Campbell, 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, and certiorari denied Campbell v. Medalie, 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686.

Injunction denied

U.S.—Argonaut Mining Co. v. McPike, C.C.A.Cal., 78 F.2d 584—Rebhuhn v. Cahill, D.C.N.Y., 31 F.Supp. 47.

Maintenance of status quo

Order restraining state tax officials from interfering with certain cigarette purchasers in collecting cigarette tax was not void as attempt to prevent enforcement of criminal laws, since it was merely to maintain status quo until final hearing could be had.—Ex parte Kimberlin, 86 S.W.2d 717, 126 Tex. 60.

81. U.S.—Whitehead v. Cheves, C.C.A.Ga., 67 F.2d 316, reversing, D.C., Cheves v. Whitehead, 1 F.Supp. 321, and certiorari denied 54 S.Ct. 371, 290 U.S. 704, 78 L.Ed. 605.
Ga.—Brown v. City of Thomasville, 118 S.E. 354, 156 Ga. 260.
32 C.J. p 284 notes 32, 33.

82. **Construction or validity of statute**

Under a statute providing that any person interested under a deed, etc., or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising thereunder, it has been held that injunction may issue to restrain the enforcement of an ordinance and to have it declared void.—Webber v. City of Scottsbluff, 3 N.W.2d 635, 141 Neb. 363.

83. **Unlawful appeal**

An application to a coördinate term of the supreme court by special assistant attorney general for an order directing that petitioner be tried together with several other defendants was in effect an unlawful appeal from an order of severance of the special term, and would be restrained.—People ex rel. Singer v. Rogers, 4 N.Y.S.2d 905, 254 App.Div. 865, followed in Kleinman v. Supreme Court of New York, 4 N.Y.S.2d 907, 254 App.Div. 865.

84. Pa.—Sachs v. Ginsburg, 91 Pittsb.Leg.J. 217—Richards v. Johns, 88 Pittsb.Leg.J. 351, appeal dismissed 13 A.2d 59, 338 Pa. 232.
Tex.—Yellowstone Kit v. Wood, 43 S.W. 1068, 19 Tex.Civ.App. 683.

85. U.S.—Terrace v. Thompson, D.C. Wash., 274 F. 841.
Cal.—Los Angeles Title Ins. Co. v. Los Angeles, 198 P. 1001, 52 Cal. App. 152.

86. Kan.—Foley v. Ham, 169 P. 183, 102 Kan. 66, L.R.A.1918C 204—Brown v. Nichols, 145 P. 561, 93 Kan. 737, L.R.A.1915D 327.

87. Kan.—Foley v. Ham, 169 P. 183, 102 Kan. 66, L.R.A.1918C 204.

88. U.S.—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F. Supp. 607.
Ky.—City of Harrodsburg v. Southern Ry. Co. in Kentucky, 128 S.W. 2d 233, 278 Ky. 10.
Pa.—Druckenmiller v. Pfeifle, 28 North.Co. 179—Park Theatre Corporation v. Mook, 87 Pittsb.Leg.J. 101.
Tex.—Davis v. City of Houston, Civ. App., 264 S.W. 625—City of Breckenridge v. McMullen, Civ.App., 258 S.W. 1099.
32 C.J. p 285 note 45, p 281 note 81.

Indictments involving different defendants

An injunction will not issue to enjoin prosecution of indictments, involving different defendants but similar questions of law, on the ground of prevention of multiplicity of suits.—U. S. v. Buck, D.C.Mo., 18 F.Supp. 213, affirmed, C.C.A., Walker v. U. S., 93 F.2d 383, certiorari denied 58 S. Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 755, 303 U.S. 668, 82 L.Ed. 1124, certiorari denied Drummond v. U. S., 58 S.Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124, affirmed, C.C.A., Luterman v. U. S., 93 F.2d 395, certiorari denied 58 S.Ct. 642, 303 U.S. 644, 82 L.Ed. 1103, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124, certiorari denied Adams v. U. S., 58 S.Ct. 643, 303 U.S. 644, 82 L. Ed. 1104, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124 certiorari denied Wells v. U. S., 58 S.Ct. 643, two cases, 303 U.S. 644, 82 L.Ed. 1104, rehearing denied 58 S.Ct. 756, two cases, 303 U.S. 668, 82 L.Ed. 1124,

tious and oppressive,[89] or an invasion of complainant's property rights.[90] However, it has also been held that an injunction will be denied, where sought on the ground of avoidance of a multiplicity of suits,[91] at least where there has been no adjudication in a law court concerning the legality or illegality of the statute or conduct on which such proceedings are based.[92]

c. Suit Relating to Same Matters Pending in Equity

Injunction may issue to restrain a criminal prosecution begun while there is pending in equity a suit to try the same right between the same parties.

Another exception to the general rule is that a court of equity will restrain a criminal prosecution begun while there is pending in equity a suit to try the same right between the same parties.[93] It has been stated that this rule is limited to cases where the parties sought to be enjoined have as plaintiffs submitted themselves to the court in the equity proceeding.[94] The suit must be pending in equity when the injunction is sought,[95] and the subject matter of the two proceedings must be identical.[96]

§ 158. —— Invalidity of Statute or Ordinance

Generally where criminal proceedings would involve a direct invasion of property rights and result in irreparable injury thereto, an injunction may be granted to restrain such proceedings based either on an unconstitutional or otherwise invalid statute or ordinance, or on a misinterpretation of a valid law if, at least as so interpreted, the law would be invalid.

As an exception to the general rule, stated supra § 156, it is quite generally held that, where the proceedings would involve a direct invasion of property rights and result in irreparable injury thereto, an injunction may be granted to restrain criminal proceedings based either on an unconstitutional or otherwise invalid statute or ordinance,[97] or on a misinterpretation of a valid law if, at least as so

certiorari denied Roach v. U. S., 58 S. Ct. 643, 303 U.S. 644, 82 L.Ed. 1104, rehearing denied 58 S.Ct. 756, 303 U.S. 668, 82 L.Ed. 1124.

89. Ariz.—Corbin v. Rodgers, 85 P. 2d 59, 61, 53 Ariz. 35, citing **Corpus Juris.**
Cal.—Bueneman v. City of Santa Barbara, 65 P.2d 884, 8 Cal.2d 405, 109 A.L.R. 895.
Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.
Ga.—Great Atlantic & Pacific Tea Co. v. City of Columbus, 6 S.E.2d 320, 189 Ga. 458—Walker v. Mayor and Council of Carrollton, 200 S.E. 268, 187 Ga. 237.
Ill.—De Luxe Motor Cab Co. v. Dever, 252 Ill.App. 156.
Ky.—Stephens v. McCreary County, 80 S.W.2d 592, 258 Ky. 516.
La.—Dumestre v. Police Jury, Parish of Jefferson, 197 So. 209, 195 La. 492.
Miss.—Knight v. Johns, 137 So. 509, 161 Miss. 519.
Neb.—Hoyt Bros. v. City of Lincoln, 268 N.W. 898, 130 Neb. 79.
Pa.—Edmundson v. Johns, 89 Pittsb. Leg.J. 215.
Wis.—Sentinel-News Co. v. City of Milwaukee, 250 N.W. 511, 212 Wis. 618.
32 C.J. p 284 note 40.

90. U.S.—Missouri Pac. R. Co. v. Norwood, D.C.Ark., 42 F.2d 765, affirmed 51 S.Ct. 458, 283 U.S. 249, 75 L.Ed. 1010, modified on other grounds 51 S.Ct. 652, 283 U.S. 809, 75 L.Ed. 1428—Missouri-Kansas-Texas R. Co. v. Williamson, D.C. Okl., 36 F.Supp. 607.
Ky.—Johnson v. Tartar, 250 S.W. 498, 199 Ky. 45.
Tex.—Bielecki v. City of Port Arthur, Com.App., 12 S.W.2d 976, reversing, Civ.App., 2 S.W.2d 1001—City of Dallas v. Urbish, Civ. App., 252 S.W. 258.

91. Alaska.—Anderson v. Smith, 8 Alaska 470.
D.C.—Rudolph v. Lockwood, 2 F.2d 319, 55 App.D.C. 101—Cave v. Rudolph, 287 F. 989, 53 App.D.C. 12.
Ga.—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657.
N.J.—Moresh v. O'Regan, 192 A. 831, 833, 122 N.J.Eq. 388, quoting **Corpus Juris,** reversing 187 A. 619, 120 N.J.Eq. 534, and dissenting opinion 194 A. 156, 122 N.J.Eq. 388.
32 C.J. p 281 note 80.

92. N.J.—Moresh v. O'Regan, 192 A. 831, 122 N.J.Eq. 388, reversing 187 A. 619, 120 N.J.Eq. 534, and dissenting opinion 194 A. 156, 122 N.J.Eq. 388.
32 C.J. p 281 note 80.

93. U.S.—Packard v. Banton, N.Y., 44 S.Ct. 257, 264 U.S. 140, 68 L.Ed. 596—Fox Film Corporation v. Trumbull, D.C.Conn., 7 F.2d 715—Mestre v. Russell & Co., C.C.A. Puerto Rico, 279 F. 44.
Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.
D.C.—Cave v. Rudolph, 287 F. 989, 53 App.D.C. 12.
Fla.—Gulf Theatres v. State ex rel. Ferguson, 182 So. 842, 133 Fla. 634.
S.C.—Folsom v. South Carolina State Highway Department, 13 S.E.2d 180, 196 S.C. 167—Stovall v. Sawyer, 187 S.E. 821, 181 S.C. 379—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347.
Tenn.—Henderson v. Henderson, 1 S.W.2d 526, 156 Tenn. 430—V. E. Schevenell Const. Co. v. City of Memphis, 8 Tenn.App. 22.
Tex.—Anderson, Clayton & Co. v. State ex rel. Allred, 62 S.W.2d 107, 112, 122 Tex. 530, citing **Corpus Juris.**
32 C.J. p 284 note 35.

94. Fla.—Gulf Theatres v. State ex rel. Ferguson, 182 So. 842, 133 Fla. 634.
32 C.J. p 284 note 35.

95. U.S.—Harkrader v. Wadley, Va., 19 S.Ct. 119, 172 U.S. 148, 43 L. Ed. 399.

96. Fla.—Coleman v. Greene, 186 So. 541, 136 Fla. 276.
32 C.J. p 284 note 37.

97. U.S.—Watson v. Buck, Fla., 61 S.Ct. 962, 313 U.S. 387, 85 L.Ed. 1416, modifying, D.C., Buck v. Gibbs, 34 F.Supp. 510—Hygrade Provision Co. v. Sherman, N.Y., 45 S.Ct. 141, 266 U.S. 497, 69 L.Ed. 402—Packard v. Banton, N.Y., 44 S.Ct. 257, 264 U.S. 140, 68 L.Ed. 596—Beal v. Missouri Pac. R. Corporation in Nebraska, C.C.A.Neb., 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396, and reversed on other grounds Beal v. Missouri Pac. R. Corporation, 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577—Eastus v. Bradshaw, C. C.A.Tex., 94 F.2d 788, certiorari denied Bradshaw v. Eastus, 58 S. Ct. 1045, 304 U.S. 576, 82 L.Ed. 1539—Reed v. Lehman, C.C.A.N. Y., 91 F.2d 919—Board of Trade of Kansas City v. Milligan, C.C.A.Mo., 90 F.2d 855, affirming, D.C., 16 F. Supp. 859, certiorari denied 58 S. Ct. 40, 302 U.S. 710, 82 L.Ed. 549—Argonaut Mining Co. v. McPike,

C.C.A.Cal., 78 F.2d 584—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695—Richmond Hosiery Mills v. Camp, C.C.A.Ga., 74 F.2d 200, affirming, D.C., 7 F.Supp. 139—Schwartzman Service v. Stahl, D.C.Mo., 60 F.2d 1034—Boynton v. Fox West Coast Theatres Corporation, C.C.A.Kan., 60 F.2d 851—Oklahoma City, Okl. v. Dolese, C.C.A.Okl., 48 F.2d 734—Pictorial Review Co. v. City of Alexandria, D.C.La., 46 F.2d 337—Missouri Pac. R. Co. v. Norwood, D.C.Ark., 42 F.2d 765, affirmed 51 S.Ct. 458, 283 U.S. 249, 75 L.Ed. 1010, modified on other grounds 51 S.Ct. 652, 283 U.S. 809, 75 L.Ed. 1428—Standard Oil Co. of New Jersey v. City of Charlottesville, C.C.A.Va., 42 F.2d 88—Ross v. Goodwin, D.C.N.H., 40 F.2d 532—Gallardo v. Questell, C.C.A.Puerto Rico, 29 F.2d 897—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Fox Film Corporation v. Trumbull, D.C.Conn., 7 F.2d 715—Wilder v. Reno, D.C.Pa., 43 F.Supp. 727—Birch v. McColgan, D.C.Cal., 39 F.Supp. 358—Stone v. Christensen, D.C.Or., 36 F.Supp. 739—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F.Supp. 607—Carolene Products Co. of Litchfield, Ill. v. Wallace, D.C.D.C., 27 F.Supp. 110, affirmed Carolene Products Co. v. Wallace, 59 S.Ct. 1033, 307 U.S. 612, 83 L.Ed. 1495—Beranek v. Wallace, D.C.Ind., 25 F.Supp. 841—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361—Pughe v. Patton, D.C.Tex., 21 F.Supp. 182—Stout v. Pratt, D.C.Mo., 12 F.Supp. 864, affirmed, C.C.A., Pratt v. Stout, 85 F.2d 172—Cleveland v. Davis, D.C.Ala., 9 F.Supp. 337—Spiegel v. Ford, D.C.Mass., 5 F.Supp. 456—Ratta v. Healy, D.C.N.H., 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459, and affirmed, C.C.A., 67 F.2d 554, reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—Wabash Ry. Co. v. O'Bryan, D.C.Mo., 285 F. 583.

Ala.—Davidson v. Phelps, 107 So. 86, 214 Ala. 236.

Cal.—Bueneman v. City of Santa Barbara, 65 P.2d 884, 8 Cal.2d 405, 109 A.L.R. 895—Jones v. City of Los Angeles, 295 P. 14, 211 Cal. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 Cal. 778, Stern v. City of Los Angeles, 295 P. 23, 211 Cal. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 Cal. 777.

Colo.—Walker v. Begole, 63 P.2d 1224, 1225, 99 Colo. 471, citing **Corpus Juris.**

Conn.—Scudder v. Town of Greenwich, 14 A.2d 728, 127 Conn. 71.

Del.—Economy Cleaners v. Green, 184 A. 225, 226, 21 Del.Ch. 170, citing **Corpus Juris.**

D.C.—Federal Trade Commission v. Millers' Nat. Federation, 23 F.2d 968, 57 App.D.C. 360—Cave v. Rudolph, 287 F. 989, 53 App.D.C. 12.

Fla.—Pohl Beauty School v. City of Miami, 159 So. 789, 118 Fla. 664—L. Maxcy, Inc., v. Mayo, 139 So. 121, 103 Fla. 552.

Ga.—Braddy v. City of Macon, 22 S.E.2d 801, 194 Ga. 871—Speed Oil Co. v. City of Dublin, 18 S.E.2d 627, 193 Ga. 325—City of Albany v. Lippitt, 13 S.E.2d 807, 191 Ga. 756—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551—City Council of Augusta v. Southern Grocery Stores, 7 S.E.2d 181, 189 Ga. 618—Great Atlantic & Pacific Tea Co. v. City of Columbus, 6 S.E.2d 320, 189 Ga. 458—Sosebee v. City of Demorest, 185 S.E. 330, 182 Ga. 338—City of Atlanta v. State, 182 S.E. 184, 181 Ga. 346—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657—City of Atlanta v. Kirk, 164 S.E. 64, 174 Ga. 763—City of Newnan v. Atlanta Laundries, 162 S.E. 497, 174 Ga. 99, 87 A.L.R. 507, appeal dismissed Atlanta Laundries, Inc. v. City of Newnan, 52 S.Ct. 495, 286 U.S. 526, 76 L.Ed. 1269—Dasher v. City of Valdosta, 158 S.E. 34, 172 Ga. 539—Wofford Oil Co. v. City of Boston, 154 S.E. 145, 170 Ga. 624—Chaires v. City of Atlanta, 139 S.E. 559, 164 Ga. 755, 55 A.L.R. 230—Bennett v. Kimmel, 137 S.E. 60, 163 Ga. 725—Morrow v. City of Atlanta, 133 S.E. 345, 162 Ga. 228—Smith v. City of Atlanta, 132 S.E. 66, 161 Ga. 769, 54 A.L.R. 1001, certiorari denied City of Atlanta v. Smith, 46 S.Ct. 486, 271 U.S. 672, 70 L.Ed. 1144.

Ind.—Department of State v. Kroger Grocer & Baking Co., 46 N.E.2d 237—State ex rel. Feeney v. Superior Court of Marion County, 188 N.E. 486, 206 Ind. 78—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

Kan.—Jones v. City of Coffeyville, 18 P.2d 174, 175, 136 Kan. 796, citing **Corpus Juris.**

La.—Dumestre v. Police Jury, Parish of Jefferson, 197 So. 209, 195 La. 492—Leesville Club v. Town of Leesville, 125 So. 125, 169 La. 284.

Me.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

Mo.—Sampson Distributing Co. v. Cherry, 156 S.W.2d 596, 597, citing **Corpus Juris**—Hann v. Fitzgerald, 119 S.W.2d 808, 342 Mo. 1166—Park Transp. Co. v. Missouri State Highway Commission, 60 S.W.2d 388, 332 Mo. 592—Wellston Kennel Club v. Castlen, 55 S.W.2d 288, 290, 331 Mo. 798, quoting **Corpus Juris.**

Mont.—State v. Carroll, 279 P. 234, 235, 85 Mont. 439, citing **Corpus Juris.**

N.H.—Woolf v. Fuller, 174 A. 193, 195, 87 N.H. 64, 94 A.L.R. 1067, citing **Corpus Juris.**

N.M.—Simon v. Gallegos, 99 P.2d 451, 44 N.M. 127.

N.Y.—Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 786, affirming 203 N.Y.S. 920, 208 App.Div. 790—Cowan v. City of Buffalo, 288 N.Y.S. 239, 247 App.Div. 591, affirming 282 N.Y.S. 880, 157 Misc. 71—Boxer v. Town of Harrison, 22 N.Y.S.2d 501, 175 Misc. 249—Farrell v. City of Syracuse, 242 N.Y.S. 316, 137 Misc. 472.

Ohio.—Olds v. Klotz, 3 N.E.2d 371, 131 Ohio St. 447—Nickles v. Echelberger, App., 31 N.E.2d 474.

Okl.—Board of Trustees of Town of Canton v. Gunning, 130 P.2d 817, 191 Okl. 448—Whitson v. City of Cherokee, 46 P.2d 907, 173 Okl. 208—Nation v. Chism, 6 P.2d 766, 154 Okl. 50—Wright v. City of Guthrie, 1 P.2d 162, 150 Okl. 171.

Or.—American Federation of Labor v. Bain, 106 P.2d 544, 165 Or. 183, 130 A.L.R. 1278.

Pa.—Long v. Metzger, 152 A. 572, 573, 301 Pa. 449, quoting **Corpus Juris,** and certiorari denied 51 S.Ct. 346, 283 U.S. 822, 75 L.Ed. 1437—McGuire v. Dexter, 46 Dauph.Co. 226—Dixon v. Van Dyke, 45 Dauph. Co. 424.

R.I.—Conte v. Roberts, 192 A. 814, 818, 58 R.I. 353, citing **Corpus Juris.**

S.C.—Folsom v. South Carolina State Highway Department, 13 S.E.2d 130, 196 S.C. 167—Stovall v. Sawyer, 187 S.E. 821, 181 S.C. 379—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347.

S.D.—Mundell v. Graph, 256 N.W. 121, 62 S.D. 631.

Tenn.—Earhart v. Young, 124 S.W.2d 693, 174 Tenn. 198—Frankland Carriage Co. v. City of Jackson, 28 S.W.2d 343, 160 Tenn. 649.

Tex.—Ex parte Sterling, 53 S.W.2d 294, 295, 112 Tex. 108, citing **Corpus Juris**—Kemp Hotel Operating Co. v. City of Wichita Falls, Com. App., 170 S.W.2d 217, affirming City of Wichita Falls v. Kemp Hotel Operating Co., Civ.App., 162 S.W.2d 150—Bielecki v. City of Port Arthur, Com.App., 12 S.W.2d 976, reversing, Civ.App., 2 S.W.2d 1001—City of Ballinger v. Boyd, Civ.App., 173 S.W.2d 363—Angelo v. Brown, Civ.App., 139 S.W.2d 197—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—Love v. Worsham, Civ.App., 101 S.W.2d 598—Barkley v. Conklin, Civ.App., 101 S.W.2d 405—Roberts v. Gossett, Civ.App., 88 S.W.2d 507, 510, citing **Corpus Juris**—Hurt v.

interpreted the law would be invalid,[98] except where complainant's defense thereto in a court having jurisdiction of the offense is adequate and unembarrassed,[99] and the same principle extends to

Oak Downs, Inc., Civ.App., 85 S.W. 2d 294, appeal dismissed Oak Downs v. Hurt, 97 S.W.2d 673, 128 Tex. 218—City of San Antonio v. Teague, Civ.App., 54 S.W.2d 566, error refused—Phares v. Emerson, Civ.App., 54 S.W.2d 261—Box v. Newson, Civ.App., 43 S.W.2d 981, 983, citing **Corpus Juris**—Warren v. Gau, Civ.App., 18 S.W.2d 768, error dismissed—Wichita Falls Traction Co. v. Raley, Civ.App., 17 S.W.2d 157, 160, citing **Corpus Juris**—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed—City of Port Arthur v. Young, Civ.App., 264 S.W. 924—City of Dallas v. Urbish, Civ. App., 252 S.W. 258—Neal v. Boog-Scott, Civ.App., 247 S.W. 689.

Utah.—Broadbent v. Gibson, 140 P. 2d 939.

Wash.—State v. Maybury, 296 P. 566, 567, 161 Wash. 142, quoting **Corpus Juris**, and appeal dismissed Potter v. Maybury, 52 S.Ct. 202, 284 U. S. 593, 76 L.Ed. 511.

32 C.J. p 282 note 14, p 280 note 59, p 265 note 72.

Declaratory proceeding

Ordinarily, equity will not entertain a proceeding to enjoin the enforcement of a penal statute, but this rule is subject to an exception in favor of a declaratory proceeding to test validity of a criminal statute which affects one in his trade, business, or occupation, although such an action will not operate to stay enforcement of statute during pendency thereof.—Doyle v. Clark, 41 N.E.2d 949, 220 Ind. 271.

Pending prosecutions not enjoined

It has been broadly stated or held that a pending prosecution will not be restrained by injunction.

U.S.—Campbell v. Chase Nat. Bank of City of New York, D.C.N.Y., 5 F.Supp. 156, appeal dismissed U. S. v. Campbell, 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, and affirmed, C.C.A., 71 F.2d 669, 94 A.L.R. 708, certiorari denied 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686. Affirmed, C.C.A., Campbell v. Medalie, 71 F.2d 671, certiorari denied 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686.

Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.

Injunction by federal court against criminal proceeding in state court see Courts § 543 a.

Prosecutions enjoined under statutes or ordinances

(1) Prescribing the requirements as to the location and construction of ditches.—Platte & D. Canal & Milling Co. v. Lee, 29 P. 1036, 2 Colo.App. 184—32 C.J. p 284 note 22.

(2) Prohibiting a dealer in wearing apparel from making numerous daily sales.—Weed v. Lockwood, D.C. N.Y., 266 F. 785—32 C.J. p 284 note 23.

(3) Prohibiting a gas company from carrying on its business except on certain conditions.—Rushville v. Rushville Natural Gas Co., 28 N.E. 553, 132 Ind. 575, 15 L.R.A. 321.

(4) Prohibiting the maintenance of a hospital for tuberculosis.—San Diego Tuberculosis Assoc. v. East San Diego, 200 P. 393, 186 Cal. 252.

(5) Prohibiting sales in violation of the Interstate Commerce Act.—M. Schandler Bottling Co. v. Welch, C.C.Kan., 42 F. 561—32 C.J. p 284 note 26.

(6) Prohibiting the erection or operation of baseball parks within certain limits.—New Orleans Baseball & Amusement Co. v. City of New Orleans, 42 So. 784, 118 La. 228, 118 Am.S.R. 366, 7 L.R.A.,N.S., 1014, 10 Ann.Cas. 757—32 C.J. p 284 note 27.

(7) Prohibiting unjust or unreasonable charges for necessaries.—Detroit Creamery Co. v. Kinnane, D.C.Mich., 264 F. 845, affirmed 41 S. Ct. 304, 255 U.S. 102, 65 L.Ed. 531.

(8) Regulating the furnishing of certain services by landlords to their tenants.—Marcus Brown Holding Co. v. Feldman, D.C.N.Y., 269 F. 306, affirmed 41 S.Ct. 465, 256 U.S. 170, 65 L.Ed. 877—32 C.J. p 284 note 29.

(9) Regulating hackmen at passenger stations.—City Cab, Carriage & Transfer Co. v. Hayden, 131 P. 472, 73 Wash. 24, L.R.A.1915F 726, Ann.Cas.1914D 731—32 C.J. p 284 note 30.

(10) Regulating pool halls.—Fearis v. Gafford, Tex.Civ.App., 204 S.W. 675.

32 C.J. p 284 note 31.

98. U.S.—Beal v. Missouri Pac. R. R. Corporation, Neb., 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577, reversing, C.C.A., Beal v. Missouri Pac. R. Corporation in Nebraska, 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396—Utah Fuel Co. v. National Bituminous Coal Commission, 59 S. Ct. 409, 306 U.S. 56, 83 L.Ed. 483, affirming 101 F.2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362—Shields v. Utah Idaho Cent. R. Co., Utah, 59 S.Ct. 160, 305 U.S. 177, 83 L.Ed. 111, reversing, C.C.A., 95 F.2d 911, certiorari granted 58 S.Ct. 1055, 304 U.S. 556, 82 L.Ed. 1524—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695—Whitehead v. Cheves, C.C.A.Ga., 67 F.2d 316, reversing, D.C., Cheves v. Whitehead, 1 F.Supp. 321, and certiorari denied 54 S.Ct. 371, 290 U.S. 704, 78 L.Ed. 605—Boynton v. Ellis, C. C.A.Kan., 57 F.2d 665—Essman v. Hood, D.C.Tex., 45 F.2d 881—Gulf & I. Ry. Co. of Texas v. Davis, D.C.Tex., 26 F.2d 930, affirmed, C. C.A., Davis v. Gulf & I. Ry. Co. of Texas, 31 F.2d 109—Ashcraft v. Healey, C.C.A.La., 23 F.2d 189—Borchert v. City of Ranger, D.C.Tex., 42 F.Supp. 577—Beeler v. Smith, D.C.Ky., 40 F.Supp. 139—Reid v. Borough of Brookville, D.C.Pa., 39 F.Supp. 30—Utility Investing Corporation v. Stuart, D.C.Pa., 11 F.Supp. 391, affirmed, C.C.A., Stuart v. Utility Investment Corporation, 78 F.2d 279—Pope v. Blanton, D.C.Fla., 10 F.Supp. 15, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384—Mississippi Valley Hardwood Co. v. McClanahan, D.C.Tenn., 8 F.Supp. 388.

Conn.—Scudder v. Town of Greenwich, 14 A.2d 728, 127 Conn. 71.

D.C.—Lukens Steel Co. v. Perkins, 107 F.2d 627, 70 App.D.C. 354, certiorari granted Perkins v. Lukens Steel Co., 60 S.Ct. 513, 309 U.S. 643, 84 L.Ed. 997, reversed on other grounds 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

Ga.—Butler v. City of Dublin, 13 S.E 2d 362, 191 Ga. 551—Town of Lilburn v. Alford Bros., 136 S. E. 65, 163 Ga. 282—Upchurch v. City of LaGrange, 125 S.E. 47, 159 Ga. 113.

Ill.—Rosehill Cemetery Co. v. City of Chicago, 8 N.E.2d 664, 366 Ill. 207—De Luxe Motor Cab Co. v. Dever, 252 Ill.App. 156.

Mo.—Park Transp. Co. v. Missouri State Highway Commission, 60 S. W.2d 388, 332 Mo. 592.

N.C.—McCormick v. Proctor, 6 S.E. 2d 870, 217 N.C. 23.

Pa.—Green v. Milk Control Commission of Pennsylvania, 48 Dauph. Co. 385—McGuire v. Dexter, 46 Dauph.Co. 226.

Tenn.—Earhart v. Young, 124 S.W.2d 693, 174 Tenn. 198.

Tex.—Garrett v. Rose, Civ.App., 161 S.W.2d 893—Brazell v. Gault, Civ. App., 160 S.W.2d 540—Hurt v. Oak Downs, Inc., Civ.App., 85 S.W.2d 294, appeal dismissed Oak Downs v. Hurt, 97 S.W.2d 673, 128 Tex. 218—Wichita Falls Traction Co. v. Raley, Civ.App., 17 S.W.2d 157.

Wis.—Sentinel-News Co. v. City of Milwaukee, 250 N.W. 511, 212 Wis. 618.

32 C.J. p 282 note 14.

99. Tenn.—Kelly v. Conner, 123 S. W. 622, 122 Tenn. 339, 25 L.R.A., N.S., 201.

32 C.J. p 282 note 12.

prosecutions under invalid orders of boards or commissions.[1] Under these circumstances, the injunction is not merely to enjoin a criminal proceeding,[2] but is simply incidental to the main grounds of equitable jurisdiction to protect property rights from threatened irreparable and unlawful injury,[3] and this jurisdiction is not ousted by the fact that the state had chosen to assert its power to enforce the law by indictment or other criminal proceedings.[4] Nevertheless, the mere invalidity of an ordinance under which prosecutions are brought, without additional circumstances bringing the case under some recognized head of equity jurisdiction, affords no ground for the issuance of an injunction to restrain such prosecution;[5] and there must be an impending or imminent prosecution[6] and the threatened injury to property rights must be one naturally and necessarily growing out of the threatened prosecution.[7] In order to be entitled to an injunction, both invalidity of the statute and irreparable injury are indispensable.[8] Thus, as shown supra § 156, the general rule applies notwithstanding the statute or ordinance is invalid, and similarly, if the law is valid, the fact that enforcement thereof will materially injure complainant's business or property constitutes no ground for equitable interference. Irreparable injury must be clearly shown;[9] and it is not sufficient that the injury or loss to plaintiff's business or rights of property would be only such as would incidentally flow from the arrest and prosecution thereunder,[10] as courts will not interfere by injunction where the injury inflicted or threatened is merely the vexation of arrest and punishment of complainant who is left free to litigate the questions of unconstitutionality of the statute or ordinance or its construction or application in making his defense at the trial or prosecution for its violation.[11] Further, injunction will not lie where there is a remedy

1. U.S.—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825—Louisville & N. R. Co. v. Railroad Commission of Alabama, C.C.Ala., 191 F. 757.
N.Y.—Darweger v. Staats, 196 N.E. 61, 267 N.Y. 290, affirming 278 N.Y.S. 87, 243 App.Div. 380, which affirmed 275 N.Y.S. 394, 153 Misc. 522, leave to appeal granted 278 N.Y.S. 94, 243 App.Div. 825 and followed in People v. Greenbaum, 280 N.Y.S. 771, 244 App.Div. 778.

2. Ga.—Great Atlantic & Pacific Tea Co. v. City of Columbus, 6 S.E.2d 320, 189 Ga. 458.
32 C.J. p 283 note 16.

3. Ga.—Great Atlantic & Pacific Tea Co. v. City of Columbus, supra—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.
Ind.—Department of State v. Kroger Grocer & Baking Co., 46 N.E.2d 237—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.
Tex.—Wichita Falls Traction Co. v. Raley, Civ.App., 17 S.W.2d 157.
32 C.J. p 283 note 17.

4. U.S.—Davis & Farnum Mfg. Co. v. City of Los Angeles, Cal., 23 S.Ct. 498, 189 U.S. 207, 47 L.Ed. 778—Lindsley v. Natural Carbonic Gas Co., C.C.N.Y., 162 F. 954.

Actual arrest

Enforcement of criminal ordinance may be enjoined without showing actual arrest for violation.—City of Beaumont v. Sam's Loan Office, Inc., Tex.Civ.App., 4 S.W.2d 586.

5. Ga.—Sosebee v. City of Demorest, 185 S.E. 330, 182 Ga. 338.
Ill.—Jackie Cab Co. v. Chicago Park Dist., 9 N.E.2d 213, 366 Ill. 474, 112 A.L.R. 1410—Chicago v. Chicago City R. Co., 78 N.E. 890, 222 Ill. 560.
N.Y.—Alexander v. Enright, 206 N.Y.S. 785, 211 App.Div. 146—Erie R. Co. v. Village of Elmira Heights, 211 N.Y.S. 688, 125 Misc. 441.

6. Ga.—City of Hartwell v. Old South Lines, 177 S.E. 340, 179 Ga. 820.
32 C.J. p 266 note 74.

7. Ky.—Burden v. Hendrix, 265 S.W. 493, 205 Ky. 167.
32 C.J. p 266 note 75.

8. Colo.—Walker v. Begole, 63 P.2d 1224, 1225, 90 Colo. 471, citing **Corpus Juris.**
Mo.—Hann v. Fitzgerald, 119 S.W.2d 808, 809, 342 Mo. 1166, quoting **Corpus Juris.**
N.Y.—Monroe Greyhound Ass'n v. Quigley, 223 N.Y.S. 830, 130 Misc. 357.
Okl.—Rogers v. Douglass, 72 P.2d 823, 181 Okl. 32.
Or.—American Federation of Labor v. Bain, 106 P.2d 544, 165 Or. 183, 130 A.L.R. 1278.
Pa.—Meadville Park Theatre Corporation v. Mook, 10 A.2d 437, 337 Pa. 21.
R.I.—Conte v. Roberts, 192 A. 814, 818, 58 R.I. 353, citing **Corpus Juris.**
32 C.J. p 280 note 60.

9. U.S.—Beal v. Missouri Pac. R. R. Corporation, Neb., 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577, reversing, C.C.A., Beal v. Missouri Pac. R. Corporation in Nebraska, 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396—Board of Trade of Kansas City v. Milligan, C.C.A.Mo., 90 F.2d 855, affirming, D.C., 16 F.Supp. 859, certiorari denied 58 S.Ct. 40, 302 U.S. 710, 82 L.Ed. 549—Boynton v. Fox West Coast Theatres Corporation, C.C.A.Kan., 60 F.2d 851—Lee v. City of El Campo, Tex., D.C.Tex., 50 F.Supp. 411, affirmed, C.C.A., 135 F.2d 740—Carolene Products Co. of Litchfield, Ill. v. Wallace, D.C.D.C., 27 F.Supp. 110, affirmed Carolene Products Co. v. Wallace, 59 S.Ct. 1033, 307 U.S. 612, 83 L.Ed. 1495—Meyers v. Bennett, D.C.N.Y., 22 F.Supp. 357.
Del.—Economy Cleaners v. Green, 184 A. 225, 21 Del.Ch. 170.
Ga.—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.
N.Y.—Mills Novelty Co. v. Sunderman, 193 N.E. 541, 266 N.Y. 32, reversing 271 N.Y.S. 1077, 242 App.Div. 617—In re B. Turecamo Contracting Co., 21 N.Y.S.2d 270, 260 App.Div. 253, appeal denied Turecamo v. Bennett, 22 N.Y.S.2d 123, 259 App.Div. 1094.
32 C.J. p 283 note 19.

10. U.S.—Campbell v. Medalie, C.C.A.N.Y., 71 F.2d 671, affirming, D.C., Campbell v. Chase Nat. Bank of City of New York, 5 F.Supp. 156, appeal dismissed U. S. v. Campbell, 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, and certiorari denied Campbell v. Medalie, 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686.
Ind.—Lickey v. City of South Bend, 190 N.E. 858, 206 Ind. 636—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.
Mo.—Hann v. Fitzgerald, 119 S.W.2d 808, 809, 342 Mo. 1166, quoting **Corpus Juris.**
R.I.—Conte v. Roberts, 192 A. 814, 818, 58 R.I. 353, citing **Corpus Juris.**
32 C.J. p 280 note 60.

11. U.S.—Douglas v. City of Jeannette (Pennsylvania), Pa., 63 S.Ct.

by defense on the prosecution or by an action for damages.[12] It is also necessary to show that the probable and direct injury to property is entirely distinct from the proceedings to punish personally for the commission of the offense.[13]

Under statute declared invalid. Prosecution under a statute which had been declared invalid by a higher court or court of last resort may be enjoined[14] as where the purpose is expressed by a citizen instituting such prosecutions to continue such prosecutions indefinitely and in large numbers if money unlawfully demanded by him is not paid.[15]

§ 159. Particular Prosecutions

In accordance with the general rule, injunction to restrain criminal prosecutions under various statutes and ordinances has been refused.

In accordance with the rules, stated supra § 156, it has been held that an injunction does not lie to restrain a prosecution for a violation of statutes or ordinances: Forbidding property owners to permit shade trees to project on sidewalks;[16] forbidding the use of certain apparatus for testing the quality of milk by any person who has not obtained a license;[17] making it an offense to fish with a seine of more than fifty feet in the lakes and bayous of a parish where plaintiff had no vested or proprietary right to take fish from such lakes and bayous;[18] prohibiting the carrying on of a designated business within certain limits in the municipality;[19] prohibiting telegraph companies from knowingly receiving for transmission messages relating to futures or furnishing leased wires for that purpose;[20] prohibiting gaming[21] or the playing of pool in social clubs;[22] prohibiting the obstruction of streets;[23] regulating the occupation of a tunnel;[24] regulating private banking;[25] regulating or prohibiting traffic in intoxicating liquors;[26] requiring a citizen to perform road duty or pay a fixed sum;[27] requiring hackney carriers to be numbered;[28] requiring the payment to road commissioners of a compensation tax or to appear at the time and place appointed to work;[29] or requiring persons engaged in certain lines of business to take out licenses[30] or to pay an occupa-

877, 319 U.S. 157, 87 L.Ed. 1324, affirming, C.C.A., 130 F.2d 652, reversing, D.C., 39 F.Supp. 32, certiorari granted 63 S.Ct. 660, 318 U.S. 749, 87 L.Ed. 1125, and rehearing denied 63 S.Ct. 1170, 319 U.S. 782, 87 L.Ed. 1726—Spence v. Cole, C.C.A.N.C., 137 F.2d 71—Eastus v. Bradshaw, C.C.A.Tex., 94 F.2d 788, certiorari denied Bradshaw v. Eastus, 58 S.Ct. 1045, 304 U.S. 576, 82 L.Ed. 1539—Abe Rafelson Co. v. Tugwell, C.C.A.Ill., 79 F.2d 653—Richmond Hosiery Mills v. Camp, C.C.A.Ga., 74 F.2d 200, affirming, D.C., 7 F.Supp. 139—Boynton v. Fox West Coast Theatres Corporation, C.C.A.Kan., 60 F.2d 851—Carolene Products Co. v. Wallace, D.C.D.C., 30 F.Supp. 266, affirmed 60 S.Ct. 113, 308 U.S. 506, 84 L.Ed. 433—Meyers v. Bennett, D.C.N.Y., 22 F.Supp. 357.

Ala.—Giglio v. Barrett, 92 So. 668, 207 Ala. 278.

Ga.—Snow's Laundry v. City of Dublin, 185 S.E. 343, 182 Ga. 316—Sparks v. Georgia Public Service Commission, 172 S.E. 15, 178 Ga. 51—Bowden v. Georgia Public Service Commission, 153 S.E. 42, 170 Ga. 505.

Mo.—Sampson Distributing Co. v. Cherry, 156 S.W.2d 596.

R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.

Tex.—City of Ranger v. Southern Ice & Utilities Co., Civ.App., 262 S.W. 839.

When penalties are so severe that citizen as a practical proposition cannot run risk of asserting his constitutional rights in court, equity has power to protect citizen while he has his day in court.—Modern Woodmen of America v. Casados, D.C.N.M., 15 F.Supp. 483.

12. Ga.—Jones v. City of Moultrie, 27 S.E.2d 39.
N.C.—Turner v. City of New Bern, 122 S.E. 469, 187 N.C. 541.
Ohio.—East Hill Coal & Supply Co. v. City of Cincinnati, 19 Ohio App. 396.

13. Minn.—Cobb v. French, 127 N.W. 415, 111 Minn. 429, 432.
32 C.J. p 283 note 21.

14. Tex.—Martin v. Railroad Commission, 106 S.W.2d 653, 130 Tex. 153, reversing, Civ.App., 93 S.W.2d 1155.

15. Tenn.—Alexander v. Elkins, 179 S.W. 310, 132 Tenn. 663, L.R.A. 1916C 261.
32 C.J. p 284 note 34.

16. Ky.—Franklin v. Lacey, 162 S.W. 1126, 157 Ky. 261.

17. Minn.—Cobb v. French, 127 N.W. 415, 111 Minn. 429, 432.
32 C.J. p 282 note 89.

18. La.—Louisiana Oyster & Fish Co. v. Assumption Parish Police Jury, 52 So. 685, 126 La. 522.

19. La.—Hottinger v. New Orleans, 8 So. 575, 42 La.Ann. 620.

20. U.S.—Logan v. Postal Telegraph & Cable Co., C.C.Ark., 157 F. 570.

21. Ala.—Moses v. Mobile, 52 Ala. 198, appeal dismissed 15 Wall. 387, 21 L.Ed. 176.
Ark.—Portis v. Fall, 34 Ark. 375.
Ill.—Hawthorne Kennel Club v. Swanson, 257 Ill.App. 499, transferred, see 171 N.E. 140, 339 Ill. 220.
Ohio.—Troy Amusement Co. v. Attenweiler, 30 N.E.2d 799, 137 Ohio St. 460, affirming 28 N.E.2d 207, 64 Ohio App. 105.
Tex.—Barkley v. Conklin, Civ.App., 101 S.W.2d 405—Adams v. Antonio, Civ.App., 88 S.W.2d 503, error refused.

Pending injunction against place
That suit in equity by state on relation of private citizen was brought to enjoin plaintiffs' place of business from operating as gambling house did not bar institution of criminal prosecution against plaintiffs, and hence plaintiffs were not entitled to injunction to restrain sheriff from arresting and prosecuting them for operating a gambling house.—Coleman v. Greene, 186 So. 541, 136 Fla. 276.

22. Ala.—Franklin Social Club v. Campbell, 85 So. 527, 204 Ala. 259.

23. Ga.—Pope v. Savannah, 74 Ga. 365.

24. Tex.—Robinson v. Galveston, 111 S.W. 1076, 51 Tex.Civ.App. 292.

25. N.Y.—Lee v. O'Malley, 125 N.Y.S. 772, 140 App.Div. 595, reversing 126 N.Y.S. 775, 69 Misc. 215.

26. Tex.—Greiner-Kelley Drug Co. v. Truett, 79 S.W. 4, 97 Tex. 377.
32 C.J. p 282 note 98.

27. La.—Mathews v. Farmerville, 46 So. 339, 121 La. 313.

28. Pa.—McLaughlin v. Jones, 3 Wkly.N.C. 203.

29. Ga.—Rowland v. Johnson County Roads & Revenues Comrs., 65 S.E. 404, 133 Ga. 190.

30. Tex.—Kissinger v. Hay, 113 S.W. 1005, 52 Tex.Civ.App. 295.
32 C.J. p 282 note 3.

tion tax.[31] So an injunction will not lie to restrain prosecutions for violation of Sunday laws,[32] food laws,[33] statutes regulating railroad rates,[34] tick eradication statutes,[35] or an order by fish commissioners made in pursuance of a statute closing a stream against fishing on penalty of criminal prosecution,[36] or to restrain a prosecution of a merchant for alleged disturbance of the peace in using a megaphone to call attention to a clearance sale.[37] It has been held that a court of equity has no power to enjoin proceedings to remove a state officer on charges filed against him for malfeasance in office.[38]

§ 160. Arrests

Ordinarily, an injunction will not issue to restrain officers from making an arrest for an alleged violation of law.

An injunction will not issue to restrain officers from making an arrest for an alleged violation of law,[39] and it is immaterial that the party asserts his innocence,[40] or that the officers are mistaken in their opinion as to what constitutes a crime.[41] The appropriate remedy in case the arrest is unlawful is by action for damages against the individual officers,[42] or by indictment.[43]

Also, repeated arrests, or threats thereof, for failure to observe exactions of a valid ordinance will not be restrained by injunction,[44] but in the case of repeated arrests indicating a purpose to persecute an innocent person, an injunction will be granted.[45]

Where irreparable injury to property rights certainly will accompany or result from an arrest which is illegal, complainant may be entitled to injunctive relief.[46]

§ 161. Execution of Judgments

Ordinarily, courts of equity have no jurisdiction to stay or prevent the execution of a judgment in a criminal case.

Ordinarily, courts of equity have no jurisdiction to stay or prevent the execution of a judgment in a criminal case,[47] since there are other adequate remedies.[48] However, where the statutory pro-

31. Okl.—Turner v. Ardmore, 130 P. 1156, 41 Okl. 660.
Tex.—Yellowstone Kit v. Wood, 43 S.W. 1068, 18 Tex.Civ.App. 683.

32. S.C.—Palmetto Golf Club v. Robinson, 141 S.E. 610, 143 S.C. 347.
32 C.J. p 282 note 5.

33. Ohio.—Predigested Food Co. v. McNeal, 4 Ohio S. & C. P. 356, 1 Ohio N.P. 266.

34. N.C.—State v. Southern R. Co., 59 S.E. 570, 145 N.C. 495, 13 L.R.A., N.S., 966.

35. Tex.—Lewis v. Harrison, Civ. App., 229 S.W. 691.

36. Or.—Portland Fish Co. v. Benson, 108 P. 122, 56 Or. 147.

37. Miss.—Pleasants v. Smith, 43 So. 475, 90 Miss. 440, 122 Am.S.R. 317, 9 L.R.A.,N.S., 773.

38. U.S.—In re Sawyer, Neb., 8 S. Ct. 482, 124 U.S. 200, 31 L.Ed. 402.

39. U.S.—Cullen v. Esola, D.C.Cal., 21 F.2d 877, 880, citing **Corpus Juris.**
Ga.—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657.
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
N.Y.—Kalwin Business Men's Ass'n v. McLaughlin, 214 N.Y.S. 99, 126 Misc. 698, reversed on other grounds 214 N.Y.S. 507, 216 App. Div. 6.
Tex.—State v. Ferguson, 125 S.W.2d 272, 276, 133 Tex. 60, citing **Corpus Juris**—Brazell v. Gault, Civ. App., 160 S.W.2d 540.
32 C.J. p 285 note 49.

Release of person in custody
A writ of injunction will not lie for the release of a person in custody on a criminal charge.—Knight v. Johns, 137 So. 509, 161 Miss. 519.

Sunday baseball
N.Y.—Capital City Athletic Ass'n v. Greenbush Police Com'rs, 29 N.Y.S. 804, 9 Misc. 189.
32 C.J. p 285 note 49 c.

Temporary restraining order
Police officers are without cause to complain of temporary restraining order forbidding arrest without warrant or probable cause.—Godfrey v. Ray, 124 So. 151, 169 La. 77.

40. N.Y.—Colby v. Bingham, 116 N.Y.S. 705, 62 Misc. 396.

41. Tex.—De Shong Motor Freight Line v. Whisnand, 98 S.W.2d 389, 393, quoting **Corpus Juris.**
32 C.J. p 285 note 51.

42. Tex.—De Shong Motor Freight Line v. Whisnand, Civ.App., 98 S.W.2d 389.
32 C.J. p 285 note 52.

43. N.Y.—Chadwick Park Athletic Club v. Peasley, 142 N.Y.S. 586, affirmed 145 N.Y.S. 1117, 161 App. Div. 907.

44. Ala.—Barrett v. Rietta, 93 So. 636, 207 Ala. 651.
Ga.—City of Douglas v. South Georgia Grocery Co., 174 S.E. 127, 178 Ga. 657.
Tex.—Brazell v. Gault, Civ.App., 160 S.W.2d 540.

45. Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

46. Pa.—Mahoning & S. R. & Light Co. v. City of New Castle, 82 A. 501, 233 Pa. 413, Ann.Cas.1913B 658.
32 C.J. p 285 note 55.

47. Cal.—People v. Superior Court of City and County of San Francisco, 213 P. 945, 190 Cal. 624.
Colo.—City of Idaho Springs v. Coleman, 30 P.2d 861, 94 Colo. 418.
D.C.—Clawans v. Newman, 135 F.2d 833, 77 U.S.App.D.C. 385.
N.D.—State v. Lowe, 210 N.W. 501, 54 N.D. 637.
Tenn.—Windrow v. Stephens, 103 S.W.2d 584, 586, 20 Tenn.App. 647, quoting **Corpus Juris.**
32 C.J. p 285 note 56.

Collection of fine and costs, assessed for violation of a city ordinance, will not be enjoined on the ground that there was no offense charged.
Ind.—Schwab v. Madison, 49 Ind. 329.
Tenn.—Windrow v. Stephens, 103 S.W.2d 584, 586, 20 Tenn.App. 647, quoting **Corpus Juris.**

Independent or concurrent sentence
Mandatory injunction would not lie to grant relief to federal prisoner from order of a District Court requiring sentence imposed on him to run independently of another sentence which was allegedly void because the case was pending on appeal when order was entered and the District Court was without jurisdiction over the case.—U. S. v. Rollnick, D.C.Pa., 33 F.Supp. 863.

48. Cal.—People v. Superior Court of City and County of San Francisco, 213 P. 945, 190 Cal. 624.
32 C.J. p 286 note 57.

visions permit a suspension of execution of judgment pending an appeal in certain cases a mandatory injunction may issue to compel such a stay.[49]

IV. APPLICATIONS AND SUITS FOR INJUNCTION

A. IN GENERAL

§ 162. Nature, Form, and Scope of Action or Proceeding

A suit for injunction is a civil suit, governed by rules of procedure applicable to other civil suits; more particularly, it is an equitable remedy, and governed by the rules of procedure governing equity proceedings generally. It is an action in personam and not an action in rem.

A suit for an injunction is a civil suit, and is controlled and limited by the rules of procedure and statutes applicable to other civil suits.[50] More particularly, an injunction suit is one of equity,[51] and the principles, practice, and procedure governing courts of equity are, under statutory provisions in some jurisdictions, made to govern proceedings in injunctions.[52]

The remedies of injunction and specific performance are compared supra § 79.

Action in personam. A suit for an injunction is an action in personam,[53] and not an action in rem.[54]

As separate or ancillary proceeding. Where it is sought to restrain an action at law, the prevailing practice is for the defendants in the law action to ask for the preliminary injunction in a separate suit, rather than in the law action;[55] but it has also been held that, where an injunction is sought to stay a proceeding pending before the same court, the injunction proceeding is regarded as ancillary to the pending proceeding, and not as a separate suit.[56]

§ 163. Rights of Action

The question of the right to maintain a suit for an injunction is in general considered in connection with the discussion of the subjects of protection and relief supra §§ 36–161, and the question of what persons are entitled to sue is treated generally supra § 35.

Examine Pocket Parts for later cases.

§ 164. Conditions Precedent in General

Any condition imposed by statute as to the maintenance of suit must be complied with.

Conditions to the right to injunctive relief, as distinguished from conditions precedent to the right to sue, are considered in connection with the discussion of the subjects of protection and relief supra §§ 36–161.

Under a statute so providing, before a temporary injunction may be granted an affidavit must be filed stating that the injunction had not previously been refused by the court or any judge;[57] but under or apart from such statute such affidavit has been held not to be required as a condition precedent to the granting of a final injunction.[58]

§ 165. Bond, Undertaking, or Other Security

a. As condition of granting permanent injunction

b. As condition of granting restraining order

49. Ky.—Davis v. Stoll, 281 S.W. 512, 213 Ky. 499.

50. Tex.—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused.

Law of state

The Emergency Price Control Act, 50 U.S.C.A.Appendix § 901 et seq, confers on the court the right to issue injunctions to restrain violations of the act, but the proceedings in the state court must be according to the laws of the state.—Brown v. Swartz, Pa.Com.Pl., 54 Dauph.Co. 80.

Possessory action

An action wherein plaintiff seeks to restrain the defendant from trespassing on, and taking possession of, his property, without praying for recognition as owner of the property, is not a petitory action but a possessory action, within the terms of a statute setting out the elements of such actions.—Collins v. McLemore, La.App., 177 So. 502, followed in McLemore v. Collins, 177 So. 506.

Whether or not injunction is a possessory remedy is considered supra § 52.

51. Tex.—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed.

32 C.J. p 287 note 88.

52. Tex.—Edelstein v. Edelstein, Civ.App., 76 S.W.2d 400, error dismissed.

Grounds of relief are not limited by such a statute.—Edelstein v. Edelstein, supra—Birchfield v. Bourland, Tex.Civ.App., 187 S.W. 422.

53. U.S.—Armour & Co. v. Miller, C.C.A.N.D., 91 F.2d 521.

54. Pa.—Lunine v. Pennsylvania Alcohol Permit Board, 157 A. 470, 305 Pa. 162.

55. Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Neb. 301.

56. Tex.—Beck v. Priddy, Civ.App., 249 S.W. 1105, reversed on other grounds, Com.App., 252 S.W. 476.

57. Ky.—Pilcher v. Stadler, 124 S.W.2d 475, 276 Ky. 450.

Former injunction or application therefor as affecting right to injunction see supra §§ 27, 28.

58. Ky.—Pilcher v. Stadler, supra. Pa.—Hopko v. Stefchak, 18 Lehigh Co.L.J. 92.

a. As Condition of Granting Permanent Injunction

A bond is not in the absence of statute required as a condition of granting a permanent injunction.

An injunction bond is not in the absence of statute required as a condition of granting a permanent injunction;[59] and statutes requiring a bond have no application to final injunctions which settle conclusively the rights of the parties, leaving no question of future damages.[60]

b. As Condition of Granting Restraining Order

Authorities differ as to whether, under a statute requiring a bond in the case of an injunction, a bond or undertaking is required as a condition of granting a restraining order.

In some states in which an undertaking is expressly required as a condition of issuing an injunction, a distinction is made between injunctions and restraining orders, and no bond is required before issuing a restraining order;[61] but even in these jurisdictions it is proper for the court in its discretion to require a bond.[62]

In other jurisdictions, unless the case falls within one of the contemplated exceptions to the statutory requirement,[63] a bond is required for a restraining order either under statutes expressly so providing or under the statutes as to injunctions.[64] However, while it has been held that the court has no power to grant a restraining order in the first instance and then allow time in which to file the bond,[65] it has also been held that such an order is not void, but the bond may be furnished subsequently and the order validated as of that time.[66]

§ 166. —— Preliminary Injunction

a. Necessity
b. Purpose
c. Parties from whom required
d. Consideration
e. Requisites and sufficiency
f. To whose benefit bond inures
g. New or additional security
h. Effect of defects or irregularities
i. Effect of failure to give bond
j. Estoppel and waiver of defects

59. Cal.—Shhen v. Superior Court of San Bernardino County, 115 P.2d 516, 46 Cal.App.2d 187.
Ky.—Pilcher v. Stadler, 124 S.W.2d 475, 276 Ky. 450—Wilburn v. North Jellico Coal Co., 115 S.W.2d 288, 272 Ky. 749—Cossar v. Klein, 36 S.W.2d 833, 237 Ky. 555—Cossar v. Klein, 14 S.W.2d 160, 227 Ky. 768—Jones v. Commonwealth, 300 S.W. 346, 222 Ky. 173—Marion Electric Light & Ice Co. v. Rochester, 149 S.W. 977, 149 Ky. 810.
La.—Hankins v. Police Jury, Natchitoches Parish, 95 So. 102, 152 La. 1000—Bogalusa Ice Co. v. Moffett, App., 179 So. 327.
Okl.—School Board of Consol. Dist. No. 36, Stephens County, v. Edwards, 87 P.2d 962, 968, 184 Okl. 384, quoting **Corpus Juris.**
Pa.—Hopko v. Stefchak, 18 Lehigh Co.L.J. 92.

Requiring security
Under statute requiring complainant seeking a permanent injunction in a case involving or growing out of a labor dispute to file a bond or undertaking in favor of the persons enjoined or restrained, it is within the discretion of the court whether or not to require security.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 182, 132 N.J.Eq. 613.

60. Cal.—Shahen v. Superior Court of San Bernardino County, 115 P. 2d 516, 46 Cal.App.2d 187.
Ill.—Chicago Title & Trust Co. v. De Lasaux, 168 N.E. 640, 336 Ill. 522.
Mass.—Simon v. Schwachman, 18 N. E.2d 1, 301 Mass. 573.
Okl.—School Board of Consol. Dist. No. 36, Stephens County, v. Edwards, 87 P.2d 962, 968, 184 Okl. 384, quoting **Corpus Juris.**
32 C.J. p 312 note 23.

61. Cal.—Biasca v. Superior Court of Humboldt County, 228 P. 861, 194 Cal. 366—Yellen v. Fidelity & Casualty Co. of New York, 1 P. 2d 1019, 115 Cal.App. 434.
S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
32 C.J. p 312 note 18.

Continuance of hearing on order to show cause
Bond is not essential to restraining order pending hearing on order to show cause why temporary injunction should not issue; and failure to require bond on continuance of hearing on order to show cause why temporary injunction should not issue did not deprive court of jurisdiction where plaintiff had complied with statute and continuance was not requested by him.—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, 21 P.2d 643, 131 Cal.App. 365.

62. Cal.—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, supra—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.
32 C.J. p 312 note 19.

Under statute so providing, a court or judge may require a bond when a restraining order is allowed.—Hall v. Eells, 124 P.2d 444, 155 Kan. 307.

63. Fla.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
La.—Bogalusa Ice Co. v. Moffett, 177 So. 679, 188 La. 598.

Case held not exception
In suit for appointment of a receiver and an accounting, wherein a temporary restraining order was asked and it did not appear in the bill or the accompanying affidavit that plaintiff was unable to give bond of indemnity or other security, the court should have required plaintiff to file a bond of indemnity before issuing the restraining order.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.

64. Fla.—Dixie Music Co. v. Pike, supra—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
La.—Bogalusa Ice Co. v. Moffett, 177 So. 679, 188 La. 598—Meine v. City of New Orleans, 89 So. 882, 149 La. 640.
Mass.—Simon v. Schwachman, 18 N. E.2d 1, 301 Mass. 573.
Pa.—Bowman v. Gum, Inc., 193 A. 271, 327 Pa. 403.
32 C.J. p 312 note 20.

65. Fla.—Gillespie v. Chapline, 52 So. 722, 59 Fla. 500.
32 C.J. p 312 note 21.

66. Pa.—Bowman v. Gum, Inc., 193 A. 271, 327 Pa. 403.

a. Necessity
(1) Bond
(2) Other security

(1) Bond
(a) Statutory requirements
(b) Discretion and power of court

(a) Statutory Requirements

In general, under statutes to that effect, a bond is required as a condition of granting a preliminary injunction.

Under the codes and statutes of most states expressly so providing, it is generally held that, except where the case falls within one of the exceptions to the statute,[67] a bond is required as a condition of granting a preliminary injunction, either in all or in designated classes of injunction suits.[68] Under these statutes it has been held that a bond is necessary whether the injunctional order is made on an ex parte application or on an order to show cause previously made,[69] whether an injunction is the main purpose of the bill or is merely ancillary thereto,[70] and whether the injunction is granted by

67. Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
Mich.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648.
Tex.—Oak Downs v. Schmid, Civ. App., 95 S.W.2d 1040, reversed on other grounds 97 S.W.2d 671, 128 Tex. 214.
32 C.J. p 310 note 8 [a].

In Louisiana

(1) Under statute so providing, when a defendant in executory proceedings for the seizure and sale of mortgaged property sets up a plea in compensation of the debt, and makes the requisite affidavit, he is entitled to a preliminary injunction, as of right and without a bond.—Newman v. Frevlin, 7 So. 799, 42 La. Ann. 720.

(2) But where an application for injunction does not come within the purview of the statute relative to enjoining executory process in certain instances, the issuing of a restraining order without bond pending the court's determination whether it will grant the preliminary injunction prayed for is unauthorized.—Meine v. New Orleans, 89 So. 882, 149 La. 640.

(3) Petition to enjoin foreclosure on wife's separate land did not on its face present case in which injunction could issue without bond under such statute.—Mayweather v. Long, 129 So. 151, 170 La. 747.

68. U.S.—Utah Radio Products Co. v. Boudette, C.C.A.Mass., 69 F.2d 973—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680—Tri-Plex Shoe Co. v. Cantor, D.C. Pa., 25 F.Supp. 996—Robinson v. Benbow, C.C.A.N.C., 298 F. 561.
Ala.—Grooms v. Brown-Marx Co., 184 So. 698, 236 Ala. 655—Morris v. Sartain, 140 So. 373, 224 Ala. 313.
Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
Ill.—Rossman v. Chapman, 37 N.E. 2d 911, 312 Ill.App. 185—Stankiewicz v. Irvine, 35 N.E.2d 433, 310 Ill.App. 673—Guarantee Trust & Savings Bank of Chicago v. Carlson, 240 Ill.App. 36.
La.—Bogalusa Ice Co. v. Moffett, App., 179 So. 327.
Mass.—Simon v. Schwachman, 18 N. E.2d 1, 301 Mass. 573.
Mich.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648—Chamberlain v. Durfee, 249 N.W. 486, 264 Mich. 194—Wayne Colorplate Co. v. Wayne Circuit Judge, 235 N.W. 804, 253 Mich. 666.
Miss.—Morris v. Trussell, 109 So. 854, 144 Miss. 343.
Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406—State ex rel. St. Ferdinand Sewer Dist. of St. Louis County v. McElhinney, 52 S.W.2d 400, 330 Mo. 1068, 83 A.L. R. 202—Ex parte Dillon, App., 96 S.W.2d 1095.
N.Y.—Huppuch v. Spring Brook Water Co., 201 N.Y.S. 590, 207 App. Div. 871.
Ohio.—State v. Atcherson, 24 Ohio N.P.,N.S., 265.
Pa.—Mintzer v. Turnbach, 172 A. 162, 113 Pa.Super. 113—Clause v. Hoppes, 8 Sch.Reg. 262.
S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
Tex.—Yount-Lee Oil Co. v. Federal Crude Oil Co., Civ.App., 82 S.W. 2d 987—White v. Perkins, Civ.App., 65 S.W.2d 423—Corzelius v. Cosby Producing & Royalty Co., Civ.App., 52 S.W.2d 270—Bettinger v. North Fort Worth Ice Co., Civ.App., 278 S.W. 466—American Rio Grande Land & Irrigation Co. v. Ford, Civ. App., 260 S.W. 277, error dismissed Ford v. American Rio Grande Land & Irrigation Co., Com.App., 285 S. W. 814—Cole v. Varner, Civ.App., 246 S.W. 410.
Wash.—U. S. Fidelity & Guaranty Co. v. Barrow, 99 P.2d 949, 3 Wash. 2d 89.
32 C.J. p 310 note 9.
Effect of failure to give bond see infra subdivision i of this section.
Giving of bond as condition of refusing injunction see infra § 202.

Construction

The provision of the National Labor Relations Act for giving of bond as condition of issuance of temporary restraining order or injunction should be liberally construed to accomplish its purpose.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262.

Duration of liability

Where temporary injunction is granted, court, in entering decree on merits granting permanent injunction, may properly discharge sureties on bond for temporary injunction from further liability, but, where decree is reversed on appeal, bond for temporary injunction remains in force until final decree determining whether plaintiffs were entitled to temporary injunction.—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492.

Ex parte writs

Statutes making a bond a prerequisite to the issuance of a writ of injunction have been held to refer to temporary writs of injunction, granted ex parte.—Oak Downs, Inc. v. Schmid, Tex.Civ.App., 95 S.W.2d 1040, reversed on other grounds 97 S.W.2d 671, 128 Tex. 214.

In surrogate's courts

Surrogate's power to issue injunction for protection of decedent's estate is no broader than power of supreme court, and requires security. —In re Ashner's Estate, 246 N.Y.S. 129, 231 App.Div. 127.

Order held to comply with statute

Pa.—Nesbit v. Riesenman, 90 Pa.Super. 545.

"Eventual condemnation money"

As the term is used with reference to an injunction bond, it is the amount ultimately fixed and settled by the judgment or decree of the court in the case.—Lockwood v. Saffold, 1 Ga. 72, 74.

69. Cal.—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.

70. Ala.—Grooms v. Brown-Marx Co., 184 So. 698, 236 Ala. 655.

the court on application therefor or on its own motion;[71] and it has been held that statutes authorizing suits in forma pauperis do not obviate the necessity of giving bond,[72] as the statutes do not embrace injunctions.[73]

The statutes have no application to injunctions issued by the court, in lieu of proceedings for contempt of court, to prevent the impairment and defeat of the just exercise of its undoubted jurisdiction to protect and enforce its lawful orders and to preserve the title made by it under these orders,[74] although the court may require a bond to be filed in such case;[75] nor do they apply to an injunction restraining all actions against an insolvent company or interference with its assets until further order of court, where such injunction is incidental to a receivership.[76] It has been held that a bond is not required where an injunction, against the collection of a judgment, was only to prohibit the parties from violating the terms of a contract executed after the judgment, so that the court's jurisdiction to issue the injunction is found in the terms of the contract.[77] It has also been held that a bond is not required where property rights are not involved and cannot be impaired or otherwise affected.[78]

Restraining proceedings at law. Under the provisions of many statutes an injunction may not be granted to restrain proceedings at law unless a bond is given;[79] but injunctions granted simply to restrain the forced sale of property claimed to be exempt from sale under the constitution of a state are not injunctions to stay proceedings at law within the meaning of such a statute.[80]

Mandatory character of statute. Statutes providing for the giving of a bond as security for the issuance of an injunction usually are mandatory in character and are so construed;[81] and, where this is the case, the court cannot dispense with the filing of a bond as preliminary to the issuance of a temporary injunction.[82] However, as appears infra subdivision a (1) (b) of this section, under some statutes the requirement of a bond is a matter for the court's discretion.

Mo.—C. H. Albers Commn. Co. v. Spencer, 139 S.W. 321, 236 Mo. 608, Ann.Cas.1912D 705.

71. Or.—Henderson v. Tillamook Hotel Co., 148 P. 57, 149 P. 473, 76 Or. 379.

72. La.—Muller v. Johnson, 74 So. 189, 140 La. 902.
N.C.—Howze v. Green, 62 N.C. 250.

73. N.C.—Howze v. Green, supra.

74. U.S.—Doyne v. Saettele, C.C.A. Mo., 112 F.2d 155—Guaranty Trust Co. of New York v. Broadway & S. A. R. Co., D.C.N.Y., 43 F.2d 130—Harvey Brokerage Co. v. Ambassador Hotel Corporation, D.C. N.Y., 6 F.Supp. 345—Swift v. Black Panther Oil & Gas Co., Okl., 244 F. 20, 156 C.C.A. 448.
Ala.—Grooms v. Brown-Marx Co., 184 So. 698, 701, 236 Ala. 655, citing **Corpus Juris.**
Tex.—Vinson v. McPherson, Civ.App., 54 S.W.2d 829, citing **Corpus Juris**—Bowlen v. Bowlen, Civ.App., 1 S.W.2d 355.
However, it has been held that, in a proceeding for contempt in preparing to sell land under deed of trust pending suit to cancel the secured notes, the court had adequate power to protect its jurisdiction without granting a temporary injunction, and its doing so, without requiring the statutory bond, petition, or affidavit, as required by statute, was an abuse of discretion.—American Rio Grande Land & Irrigation Co. v. Ford, Tex.Civ.App., 260 S.W. 277, error dismissed Ford v. American Rio Grande Land & Irrigation Co., Com.App., 285 S.W. 814.

75. U.S.—Doyne v. Saettele, C.C.A. Mo., 112 F.2d 155.
Ala.—Grooms v. Brown-Marx Co., 184 So. 698, 236 Ala. 655.
Restraining other proceeding
In suit to declare a deed to be a mortgage and to redeem wherein injunction was sought to restrain respondent from proceeding in justice court to dispossess complainants, requiring injunction bond of complainants was not error.—Taylor v. Federal Land Bank of New Orleans, 191 So. 211, 238 Ala. 366.

76. Ill.—Collins v. Pratt, 273 Ill. App. 461, 469, citing **Corpus Juris.**
Mich.—Attorney General ex rel. State Banking Com'r v. Hyde, 251 N.W. 570, 265 Mich. 363.
N.Y.—Phœnix Foundry & Machine Co. v. North River Constr. Co., 6 N.Y.Civ.Proc. 106, 33 Hun 156.

77. Ariz.—Bank of Arizona v. Superior Court of Yavapai County, 245 P. 366, 30 Ariz. 72.

78. **Injunction against taking children**
Plaintiff in divorce was held not required to file bond for issuance of injunction restraining defendant from taking children from plaintiff's custody and out of court's jurisdiction, since such injunction, although wrongful, could not damage defendant except for costs, which could be secured independently of injunction.—Bowlen v. Bowlen, Tex.Civ.App., 1 S.W.2d 355.

79. Fla.—Smith v. Gufford, 18 So. 717, 36 Fla. 481, 51 Am.S.R. 37, 32 C.J. p 311 note 14.

80. Fla.—Smith v. Gufford, supra—Lewton v. Hower, 18 Fla. 872.

81. Mich.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648—Chamberlain v. Durfee, 249 N.W. 486, 264 Mich. 194.
N.C.—McAden v. Watkins, 131 S.E. 375, 191 N.C. 105.
N.D.—Murphy v. Swanson, 198 N.W. 116, 50 N.D. 788, 32 A.L.R. 82.
Okl.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.
S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.
Tex.—Corzelius v. Cosby Producing & Royalty Co., Civ.App., 52 S.W. 2d 270—Johnson v. McMahan, Civ. App., 40 S.W.2d 920, error refused—American Rio Grande Land & Irrigation Co. v. Ford, Civ.App., 260 S.W. 277, error dismissed Ford v. American Rio Grande Land & Irrigation Co., Com.App., 285 S.W. 814—West Texas Abstract & Guaranty Co. v. Stolte, Civ.App., 256 S. W. 632—Farb v. Theis, Civ.App., 250 S.W. 290.
32 C.J. p 312 note 24.
Enjoining judgment
Under statute to that effect, the requirement of a bond is not mandatory except where a judgment is enjoined.—Lincoln Trust & Savings Bank v. Nelson, 261 Ill.App. 370.

82. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.
Tex.—Alpha Petroleum Co. v. Railroad Commission, Civ.App., 59 S.W. 2d 374, 376, error dismissed, citing **Corpus Juris.**
32 C.J. p 312 note 25.

(b) Discretion and Power of Court

Apart from statutes, and under statutes to that effect, whether a bond must be given as a condition of granting the injunction is a matter for the discretion of the court.

If there is no statute requiring bond, or if the statute providing for bond expressly or by implication confers discretion on the courts in enforcing the provisions thereof, the giving of a bond is not an absolute condition precedent to the issuance of an injunction, and the court may or may not require a bond as in its discretion it sees fit.[83] However, under statute to that effect, a sufficient showing of the facts constituting good cause why the bond is not necessary in the discretion of the court, judge, or master must be set forth in the record;[84] and a mere recital of a finding of good cause is insufficient.[85]

On the other hand, it has been held that before requiring a bond the court must be reasonably certain that a genuine danger of loss and injury exists and that injustice may follow the denial of an application to require the furnishing of a bond.[86] It has been held to be within the discretion of the court to grant an injunction without a bond in a case where the public interest is involved.[87]

The court's order requiring a bond must give the party seeking the injunction the option of taking it on the condition imposed or of refusing it.[88]

Power of court to require bond. As appears infra, § 202, a court may impose any legal conditions it deems just in granting an injunction; and there is no question that, independent of any statutory provision on the subject, courts of equity have the power, on application for a preliminary injunction, to require from complainant a bond to indemnify defendant against whom the injunction is sought, as a condition precedent to granting the injunction,[89] whether the injunction is granted on notice or in the absence of notice;[90] and it has been held, apart from statute, that no preliminary injunction should issue without security to the party enjoined,[91] in

83. Ill.—Grossman v. Grossman, 26 N.E.2d 678, 304 Ill.App. 507—Bahr Cheese Co. v. Renter, 5 N.E.2d 109, 287 Ill.App. 635.
Puerto Rico.—People v. New York & P. R. Steamship Co., 1 Puerto Rico Fed. 242.
32 C.J. p 312 note 26.

Refusal to require bond held proper
(1) In suit to determine ownership of fund in complainant's hands.—Lincoln Trust & Savings Bank v. Nelson, 261 Ill.App. 370.
(2) On restraining lessor from leasing adjoining property, contrary to terms of complainant's lease.—Skelers v. Meyer, 246 Ill.App. 18.
(3) On restraining defendants from transferring certain corporate stock.—Loftis v. Loftis, 225 Ill.App. 478.
(4) Other cases see 32 C.J. p 312 note 26 [b].

Refusal to require bond held improper
Ill.—Johnson v. Crouch, 224 Ill.App. 105.

84. Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Nu-Enamel Nortown Distributors v. Nu-Enamel Corporation, 43 N.E.2d 205, 315 Ill.App. 494—Grossman v. Grossman, 26 N.E.2d 678, 304 Ill.App. 507—Kellogg v. Kellogg, 14 N.E.2d 960, 295 Ill.App. 386.

Showing held insufficient
Ill.—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill.App. 307—Kessie v. Talcott, 27 N.E.2d 857, 305 Ill.App. 627.

85. Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill.App. 307.

86. To protect party not enjoined
Since it is unlikely that a party who is not enjoined will suffer loss or be greatly inconvenienced by the injunction, the court should be satisfied that the application by such party is not merely a move to harass the party seeking the injunction.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App. Div. 371.

87. Ill.—Kerz v. Galena Water Co., 139 Ill.App. 598.

88. Mich.—Barkovits v. Veres, 236 N.W. 857, 254 Mich. 543.

89. U.S.—United Motors Service v. Tropic-Aire, C.C.A.Minn., 57 F.2d 479—Becker v. Stander, D.C.La., 17 F.2d 772.
Md.—Joseph F. Moreland, Inc., v. Moreland, 199 A. 871, 175 Md. 145.
Mich.—Barkovits v. Veres, 236 N.W. 857, 254 Mich. 543.
N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371—Reinlib v. Lubliner, 12 N.Y.S.2d 24.
Okl.—First Nat. Bank v. Duncan, 285 P. 957, 959, 142 Okl. 121, quoting **Corpus Juris.**
32 C.J. p 310 note 6.

Origin of rule
(1) In the early stages of equity jurisprudence temporary injunctions were often issued simply on an ex parte showing by plaintiff, without requiring any bond or other security, and if on a final hearing it transpired that the injunction was issued without just cause, and it was therefore dissolved, the party enjoined could not recover damages occasioned thereby either in an action at law or a suit in equity, unless it was shown that the injunction was sued out through malice and without probable cause; in other words, the only relief for injury, however grievous or oppressive, which defendant had on defeating a wrongful writ of injunction was an action as in other cases for malicious prosecution, to sustain which it was necessary to allege and prove that the injunction was sued out through malice and without probable cause.—State v. Atcherson, 24 Ohio N.P., N.S., 265—32 C.J. p 310 note 2.
(2) The injustice which so often resulted from hasty and unfounded orders for injunction, for the consequences of which the courts alone were responsible under the law, induced them to adopt as far as was in their power such measures and safeguards as might afford defendant an indemnity against loss and injury from injunctions which ought never to have been granted; hence arose the doctrine which recognized in courts of equity the inherent power of exacting bonds from plaintiff before awarding him an injunction, which should in one way or another indemnify defendant for damages suffered by him in consequence of the process discontinued or dissolved by the court at final hearing.—St. Louis v. St. Louis Gaslight Co., 82 Mo. 349—32 C.J. p 310 note 5.

90. Fla.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
32 C.J. p 310 note 7.

91. U.S.—Selchow & Righter Co. v.

the absence of a specific showing of some good and sufficient cause why security for the protection of the enjoined defendant should not be exacted in accordance with the prevailing equity practice.[92]

(2) Other Security

The courts may provide for any adequate method of protecting the party against whom an injunction is sought.

In addition to the power to require a bond as a condition of granting a preliminary injunction, discussed supra subdivision a (1) (b) of this section, the courts may provide for any other adequate method of protecting the party against whom the injunction is granted if it is improvidently issued;[93] and it has been held in general terms that the courts may require security to protect the defendant in case the complainant ultimately fails.[94] In some cases the courts have dispensed with the necessity of giving a formal injunction bond and imposed as a condition for the granting of the injunction that complainant shall pay any damages sustained by defendant in case it be determined that the injunction should not have issued; and in such case, if complainant avails himself of the writ, he is bound by the condition, and on dissolution of the injunction damages may be awarded defendant.[95] In other cases it has been held proper to require plaintiff to make a deposit in court instead of giving a bond.[96]

b. Purpose

The purpose of an injunction bond is to secure the defendant against damages if the injunction was improvidently issued.

An injunction bond is intended as security for damages suffered by defendant in case it is finally decided that the injunction ought not to have been granted.[97] It is designed to indemnify against immediate and actual loss, but not against remote injuries.[98]

The liability imported by an injunction bond would seem to depend on the purpose of the injunction proceedings in which it was given, for, where the bond is given to secure an injunction of a judgment, the obligor will be liable for the amount of the judgment;[99] but, where a bond is given to obtain an injunction against the sale of property to enforce a debt, the purpose of the bond is to secure the party enjoined against any loss that may be suffered because of the holding up of the sale, and not to secure such party for the amount of the debt;[1] and the bond ordinarily does not have any limiting effect on the amount of a debt, the present and immediate collection of which has been restrained by the injunction.[2]

Western Printing & Lithographing Co., C.C.A.Wis., 112 F.2d 430, affirming, D.C., 29 F.Supp. 569—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Pennsylvania R. Co., D.C.Pa., 296 F. 218.

Ky.—Wilburn v. North Jellico Coal Co., 115 S.W.2d 288, 272 Ky. 749.

Absence of special statute requiring injunction bonds in all cases does not warrant interlocutory injunction where complainant seeks to destroy, for period of injunction's duration, valuable rights claimed by defendant contrary to alleged equity of complainant's adverse pleading.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.

Where damage is likely

N.J.—Sayre & Fisher Land Co. v. R. U. Rue Co., 128 A. 862, 2 N.J. Misc. 1081.

92. Fla.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.

93. U.S.—United Motors Service v. Tropic-Aire, C.C.A.Minn., 57 F.2d 472.

94. U.S.—McLure v. Sherman, C.C. Mont., 70 F. 190.

32 C.J. p 126 note 5.

95. U.S.—Mica Insulator Co. v. Commercial Mica Co., C.C.Ill., 157 F. 90, reversed on other grounds 166 F. 440, 92 C.C.A. 292, certiorari denied 30 S.Ct. 405, 215 U.S. 604, 54 L.Ed. 345.

96. U.S.—Amarillo v. Southwestern Telegraph & Telephone Co., Tex., 253 F. 638, 165 C.C.A. 264.

32 C.J. p 313 note 30.

Sufficiency of deposit

Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406.

97. U.S.—Brashear Freight Lines v. Public Service Commission of Missouri, D.C.Mo., 41 F.Supp. 952, conforming to mandate Public Service Commission of State of Missouri v. Brashear Freight Lines, 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., Public Service Commission of State of Missouri v. Brashear Freight Lines, 114 F. 2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and 61 S.Ct. 938, 313 U.S. 598, 85 L. Ed. 1551.

Iowa.—Green v. Hanna, 8 N.W.2d 613.

Okl.—Whitehead v. Cook, 229 P. 254, 100 Okl. 282.

Pa.—Romano, for Use of Romano, v. Loeb, 192 A. 100, 326 Pa. 272—Azar v. Markle, 166 A. 889, 311 Pa. 296.

Tex.—Bowlen v. Bowlen, Civ.App., 1 S.W.2d 355, 356, citing Corpus Juris.

32 C.J. p 313 note 31.

98. Ill.—Brown v. Gorton, 31 Ill. 416—Hibbard v. McKindley, 28 Ill. 240.

99. Ky.—Hunt v. Scobie, 6 B.Mon. 469.

Damages allowed or recoverable in action on bond see infra §§ 309–316.

1. Tenn.—Da Foe v. Starek, 9 Tenn. App. 668.

A bond given by a stranger to a judgment to secure an injunction against the sale of a particular article of property, whatever may be its conditions, would seem to operate in equity only as a security to the party enjoined, for any injury that may accrue, and not for the amount of the debt.—Hanley v. Wallace, 3 B.Mon., Ky., 184.

2. U.S.—Brashear Freight Lines v. Public Service Commission of Missouri, D.C.Mo., 41 F.Supp. 952, conforming to mandate Public Service Commission of State of Missouri v. Brashear Freight Lines, 61 S.Ct. 784, 312 U.S. 621, 85 L. Ed. 1083, reversing, C.C.A., Public Service Commission of State of Missouri v. Brashear Freight Lines, 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85

c. Parties from Whom Required

Under or apart from statutes to that effect, certain parties, such as municipal corporations, public officers, states, and the United States, ordinarily are not required to furnish an injunction bond.

In some states, under or apart from statutes to that effect, certain parties are not required to give security as a condition to the granting of an injunction.[3] Thus it has been held that a municipal corporation is not required to give a bond[4] and the exemption has been applied to public officers.[5] Under statute with respect to bonds in judicial proceedings generally, boards and commissions which exercise public functions may not be required to furnish bond for a restraining order.[6]

States. While in some jurisdictions statutes requiring the giving of a bond as a condition to the allowance of an injunction are held to apply to the state as well as to other suitors,[7] the contrary view is more commonly held, under or apart from statutes providing that the state is not required to furnish a bond in any proceeding,[8] although it has been held that it is within the power of the chancellor to require a bond, notwithstanding plaintiff in the action is the state.[9] In some jurisdictions the statutes requiring bond expressly except the state from their operation,[10] provided, however, that the suit is instituted by the state in its own behalf.[11]

The United States may sue for an injunction without giving a bond as a private suitor must do.[12]

In England, where a suit is brought in behalf of the crown in which application is made for a preliminary injunction, it is not according to the ordinary practice of the court to require any undertaking as to damages to be given as a condition of obtaining the injunction.[13]

Citizen or taxpayer. The statutes requiring a bond where an injunction or restraining order is sought have been held to apply where a private citizen or taxpayer sues to restrain a violation of a statute, even though a bond would not have been required had the suit been brought by a state agency, or by an authorized public officer in his official capacity;[14] but there is also some authority to the contrary.[15]

L.Ed. 410, and 61 S.Ct. 938, 313 U. S. 598, 85 L.Ed. 1551.

3. In court's discretion

Under statute to that effect, the court has the power to grant an injunction without requiring bond where the person to whom the injunction is granted is a person from whom, in the opinion of the court or judge awarding the same, it may be improper to require bond; but such exception should ordinarily be limited to a personal representative or some other person suing in a similar representative capacity.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

4. Idaho.—Doyle v. City of Sandpoint, 112 P. 204, 18 Idaho 654, 32 L.R.A.,N.S., 34, Ann.Cas.1912A 210.

Tex.—Smith v. City of Dallas, Civ. App., 36 S.W.2d 547, error dismissed.

32 C.J. p 313 note 35 [b].

5. Ohio.—Forsythe v. Winans, 7 N. E. 13, 44 Ohio St. 277.

32 C.J. p 313 note 35 [a].

6. Police juries; department of conservation

La.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491.

7. Pa.—Commonwealth v. Franklin Canal Co., 21 Pa. 117.

8. Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.

Minn.—State v. Nelson, 248 N.W. 751, 189 Minn. 87.

Puerto Rico.—People v. New York, etc., Steamship Co., 1 Puerto Rico Fed. 242.

Tex.—American Rio Grande Land & Irrigation Co. v. Ford, Civ.App., 260 S.W. 277, error dismissed Ford v. American Rio Grande Land & Irrigation Co., Com.App., 285 S.W. 814.

32 C.J. p 313 note 37.

In railroad commission's suit to enjoin violation of oil production proration order, no injunction bond is required as prerequisite to temporary injunction.—Alpha Petroleum Co. v. Railroad Commission, Tex.Civ. App., 59 S.W.2d 374, error dismissed.

9. Kan.—Clay Center v. Williamson, 100 P. 59, 79 Kan. 485.

10. N.Y.—Herkimer Lumber Co. v. State, 131 N.Y.S. 22, 73 Misc. 501.

32 C.J. p 313 note 39.

11. To protect private property rights

Injunction "suits instituted by state in its own behalf" in which bond is unnecessary are those in which public rights or interests are involved; and injunction suits filed in state's name against sewer district on behalf of taxpayers to protect their property rights were not "suits instituted by state in its own behalf," and bonds were required.—State ex rel. St. Ferdinand Sewer Dist. of St. Louis County v. McElhinney, 52 S.W.2d 400, 330 Mo. 1063, 83 A.L.R. 202.

12. U.S.—U. S. v. Jellico Mountain Coke & Coal Co., C.C.Tenn., 43 F. 898.

Statute not repealed

Statute exempting government from giving bond for injunction in federal court proceedings was held not impliedly repealed by statute prohibiting issuance of injunctions without bond.—U. S. v. McIntosh, D. C.Va., 57 F.2d 573.

Need for injunction

United States was held entitled to injunction without bond against prosecution of ejectment suit against officers thereof in state court for possession of land condemned for marine corps base as against contention that bill showed no real need for injunction.—U. S. v. McIntosh, supra.

13. Mich.—Attorney General ex rel. State Banking Com'r v. Hyde, 251 N.W. 570, 571, 265 Mich. 363, citing **Corpus Juris.**

32 C.J. p 313 note 41.

14. Fla.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.

15. Statute requiring hearing

Statute permitting private citizen to maintain suit to enjoin use of premises for gambling without showing that he was injured by such use was held not to require such citizen to give injunction bond, since statute making bond a prerequisite to issuance of injunction related to temporary writs of injunction granted ex parte under general injunction statute, and not to writ granted under statute permitting private citizen to maintain suit, and did not apply where defendants were accorded full hearing and were adjudged guilty of maintaining a nuisance.—Oak Downs, Inc. v. Schmid, Civ.App., 95 S.W.2d 1040, reversed on other grounds 97 S.W.2d 671, 128 Tex. 214.

Administrators or other fiduciaries. In some cases, statutes with reference to bonds as a condition to the issuance of an injunction have been held to embrace executors, administrators, and other fiduciaries.[16] In others the contrary has been held.[17]

Receivers. It is erroneous to grant an injunction at the suit of a receiver without requiring him to give the usual injunction bond, and the bond given by him, as a receiver for the purpose of his general duties, is not sufficient.[18]

Person not a party to legal proceedings. A bond is required for a temporary injunction to enjoin pending legal proceedings even where the one seeking the injunction is not a party to the legal proceedings.[19]

Exempt and nonexempt parties joined. Parties who are exempt, under or apart from statute, from the requirement of furnishing bond as a condition of granting an injunction do not lose their exemption because of their joinder, as coplaintiffs, with other parties who are not exempt;[20] and, conversely, even though one of the parties seeking the injunction is not required under the statute to give bond, the other parties will not thereby be exempted from the requirement.[21]

d. Consideration

No consideration is necessary where an injunction bond is required by statute; but a bond may be void for lack of consideration where it is not required by statute.

In accordance with the rules governing the necessity of consideration for bonds generally, discussed in Bonds §§ 22, 23, where an injunction bond is required by statute as a condition of the issuance of a preliminary injunction no consideration for the bond is necessary;[22] but an injunction bond, not required by statute, may be void for want of consideration.[23]

It is the stoppage or suspension of the acts sought to be enjoined which constitutes the consideration for the bond,[24] so that a bond is supported by consideration even though the injunction was signed before the bond was filed.[25]

e. Requisites and Sufficiency

(1) In general
(2) Amount
(3) To whom payable
(4) Security or sureties
(5) Execution, signature, and approval
(6) Filing

(1) In General

Where conditions are prescribed by statute, the bond must conform to the statutory requirements, although substantial compliance is sufficient. In the absence of statute prescribing conditions, the conditions are within the sound discretion of the court.

Where the statutes requiring a bond as a condition precedent to an order of injunction prescribe conditions of such bond, the bond must conform in terms or substantially to the statutory requirements;[26] but a bond in substantial compliance with the statute is valid.[27] It has been held that a bond,

16. Ind.—Osborn v. Ellis, 1 Ind. 451, 32 C.J. p 314 note 42.

17. Va.—Lomax v. Picot, 2 Rand. 247, 23 Va. 247.
W.Va.—State v. Johnson, 28 W.Va. 56.

18. Wash.—Cherry v. Western Washington Industrial Exposition Co., 40 P. 136, 11 Wash. 586—Keeler v. White, 38 P. 1134, 10 Wash. 420.

Special statute
General statute relating to injunctions is inapplicable in determining necessity of bond as condition to temporary injunction pending application for receiver's appointment, where a special statute relating to that question exists; and a special statute requiring bond was held mandatory.—Truesdell v. Johnson, 142 S.E. 343, 144 S.C. 188.

19. Mich.—Wayne Colorplate Co. v. Wayne Circuit Judge, 235 N.W. 804, 253 Mich. 666—Boinay v. Coats, 17 Mich. 411.

20. La.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491.

21. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

22. Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.

23. Cal.—Alaska Impr. Co. v. Hirsch, 51 P. 340, 119 Cal. 249.
32 C.J. p 314 note 47.

24. Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.

Injunction against enforcement of judgment
In the case of an injunction against a judgment, the suspension and delay of execution to be produced by the injunction have been held to be, prima facie at least, a sufficient consideration for the execution of the bond.—Mahan v. Tydings, 10 B.Mon., Ky., 351—32 C.J. p 314 note 48.

25. Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.

26. U.S.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.
Mo.—Ex parte Dillon, App., 96 S.W. 2d 1095.
32 C.J. p 314 note 50.

Claim and delivery bond
An undertaking in the form of a statutory claim and delivery bond, which contains no reference to any promise or obligation on the part of plaintiff or his surety that he or it will pay to the party enjoined such damages as may be sustained by reason of the injunction, does not meet the statutory requirements of an injunction bond.—Lamb v. National Surety Co., 291 P. 647, 108 Cal. App. 297.

Bond for judgment and damages
Court was unauthorized to compel plaintiff to furnish bond requiring bondsmen to pay defendant such sum as may be determined to be payable by reason of defendant's judgment, plus damages.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.

27. Ky.—Strong v. Duff, 15 S.W.2d

defective in not securing the damages according to the conditions prescribed in the statute, is ground for dissolving the injunction, although not for dismissing the bill.[28] It has been held that, although the conditions of an injunction bond are not as extensive as the statute requires, yet, if it contains a material part of the conditions required, the bond is not void but binds the obligors to the extent of such condition or conditions;[29] and the fact that it is so worded as to leave the obligors bound, notwithstanding they may pay all damages that plaintiff may sustain, does not avoid the bond.[30] It has been held that liability may be predicated on a bond, good as a common-law bond, although the requirements of the statute were not followed.[31]

The sufficiency of a bond given in connection with a restraining order or a preliminary injunction to support a subsequent preliminary injunction is considered infra subdivision g of this section.

Discretion of court. In the absence of a specific statutory provision relating thereto, the form and substance of the bond must necessarily be such as the well established principles of equity require;[32] and the determination and application of these principles are matters resting in the sound discretion of the court,[33] subject to the limitations that the court should prescribe the form applicable to the facts of the particular case.[34] Under a rule of practice to that effect, a federal court sitting as a court of equity has the right to mold its injunctive orders, including provision for a bond, to fit the facts before it.[35] If unreasonable terms are prescribed, the bond is not obligatory in equity to the extent that it is unreasonable as being without consideration;[36] but the fact that a bond required is more comprehensive than it need be does not render it illegal and void or without consideration.[37] It has been held that the court has no power to compel the giving of a bond to pay accrued damages.[38]

When the terms of the bond are prescribed by the court, the bond must comply with the court's order.[39]

(2) Amount

Except in so far as the amount of the bond is controlled by statute, the amount should be fixed by the court or judge in the exercise of his sound discretion.

Except in so far as a statutory provision is controlling as to the amount of the bond, see infra note 45, the amount to be named as penalty in the bond should be fixed by the court or judge,[40] in the exercise of his sound discretion,[41] which discretion, however, is a legal and not an arbitrary one.[42]

517, 519, 228 Ky. 615, 70 A.L.R. 56, citing **Corpus Juris.**
32 C.J. p 314 note 51.

Bond held valid
Injunction bond requiring plaintiffs to pay all money, damages, and costs adjudged against them if injunction shall be resolved was held sufficient as complying with statute; and statutory provision that injunction bond shall secure payment of damages caused by injunction referred to matter to be considered by court in determining amount of bond, not contents thereof.—Linneman v. Hawkins, Mo.App., 27 S.W.2d 1046.

28. Tex.—Pillow v. Thompson, 20 Tex. 206.

29. W.Va.—Holliday v. Myers, 11 W.Va. 276.

30. Ala.—Washington v. Timberlake, 74 Ala. 259.

31. Ala.—Babcock v. Reeves, 43 So. 21, 149 Ala. 665.
Tenn.—Martin Furniture Co. v. Maasey, 186 S.W. 451, 135 Tenn. 338.

32. Hawaii.—Young Chun v. Robinson, 21 Hawaii 193.

33. Md.—American Bonding Co. v. State, 87 A. 922, 120 Md. 305.
32 C.J. p 314 note 58.

34. Tenn.—Pyott Land & Mining Co. v. Tarwater, 150 S.W. 539, 126 Tenn. 601—Staples v. White, 12 S. W. 339, 88 Tenn. 30.

35. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F.Supp. 476, affirmed, C.C.A., American Employer's Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, two cases, and U. S. Casualty Co. v. Montgomery, 59 S.Ct. 833.

36. Ky.—Hanley v. Wallace, 3 B. Mon. 184.
32 C.J. p 314 note 60.

37. Ky.—Mahan v. Tydings, 10 B. Mon. 351.

38. N.Y.—Ginn v. Everton Realty Corp., 223 N.Y.S. 868, 221 App.Div. 766.

39. La.—Speyer v. Miller, 32 So. 524, 108 La. 204, 61 L.R.A. 781.
32 C.J. p 314 note 61.

Bond more comprehensive than order
The fact that the bond is more comprehensive than the order awarding the injunction does not render it invalid, and it is a good common-law bond.—State v. Harris, 119 S.E. 879, 94 W.Va. 624.

40. U.S.—Detroit Trust Co. v. Campbell River Timber Co., C.C.A. Wash., 98 F.2d 389—Philadelphia Record Co. v. Leopold, D.C.N.Y., 40 F.Supp. 346—Tri-Plex Shoe Co. v. Cantor, D.C.Pa., 25 F.Supp. 996.
N.C.—McAden v. Watkins, 131 S.E. 375, 191 N.C. 105.
32 C.J. p 315 note 63.

Mandatory statute
Statutory provision requiring the judge to specify, in the order directing the issuance of the injunction, the amount of the bond to be given by the applicant is mandatory.—Clements v. Murphy, Tex.Civ.App., 54 S.W.2d 1047—Holland Texas Hypotheek Bank of Amsterdam, Holland, v. Linscome, Tex.Civ.App., 87 S.W.2d 268.

41. U.S.—Detroit Trust Co. v. Campbell River Timber Co., C.C.A. Wash., 98 F.2d 389—Philadelphia Record Co. v. Leopold, D.C.N.Y., 40 F.Supp. 346—Marine Midland Trust Co. of New York v. Allegheny Corporation, D.C.N.Y., 28 F. Supp. 680.
La.—Reynolds v. Louisiana Highway Commission, 111 So. 622, 163 La. 125.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N. W. 856, 169 Minn. 15.
S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384.
32 C.J. p 315 note 64.

42. Wash.—Swope v. Seattle, 76 P. 517, 35 Wash. 69.
32 C.J. p 315 note 65.

Review
Where no proof was offered to establish insufficiency of injunction bond, trial court will not be reversed

The amount fixed should be large enough to cover all costs and damages that may reasonably be expected to accrue, in case complainant is not entitled to the injunction,[43] so as to insure with all practicable certainty that he may sustain no ultimate loss, in case the injunction should be dissolved.[44]

Amount prescribed by statute. It has been held in at least one jurisdiction, under statute to that effect, that if the injunction is to restrain the execution of a money judgment or the collection of a debt the bond shall be fixed in double the amount of such judgment or debt.[45]

Bond too small. The fact that the amount fixed was too small does not constitute reversible error where the injunction was properly granted;[46] nor does it render the injunction void and authorize its disobedience with impunity.[47] The remedy is by timely application for its increase,[48] and the amount of the undertaking may be raised on a showing of good cause.[49]

Bond too large. The fact that the bond exceeds the statutory amount slightly will not destroy its validity and effect as a statutory bond.[50]

The order may be amended in case it fails to fix the amount of the bond.[51]

(3) To Whom Payable

Under statutes so providing, the bond must be made payable to the adverse party, and, it has been held, to interested parties; but substantial compliance with the requirement is sufficient.

Under statutes so providing, the bond must be made payable to the adverse party,[52] but a substantial compliance with this requirement will be sufficient.[53] Under statute to that effect it has been held that the bond must also be made payable to interested parties.[54] It has been held that the failure to name in the bond one of the parties enjoined is not a ground for objection,[55] since, as appears infra subdivision f of this section, such person nevertheless has full recourse against the bond.

Under some statutes an injunction bond, given to indemnify those against whom injunctive relief is sought, may be made payable either to the state or to the parties entitled to its benefit and protection.[56] Under a statute providing that no injunction shall operate until an undertaking is given to secure the damages incurred by the party enjoined, and that the county and prosecuting attorney shall prosecute or defend for the state or county in all civil suits or proceedings at law in which the state or county is a party, where an injunction was issued restraining the county and prosecuting attorney from pros-

for failing to sustain motion to increase it.—Alabama Water Co. v. City of Jasper, 100 So. 486, 211 Ala. 280.

Discretion held not abused

La.—Reynolds v. Louisiana Highway Commission, 111 So. 622, 163 La. 125.

43. U.S.—Detroit Trust Co. v. Campbell River Timber Co., C.C. A.Wash., 98 F.2d 389—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680.
32 C.J. p 315 note 66.

Attorney's fees

When a temporary writ is issued in an injunction suit, the law provides indemnity by way of an injunction bond to cover reasonable attorney's fees incurred in case the injunction is dissolved, and judges issuing such temporary writ of injunction should be careful to require an adequate bond.—City of Birmingham v. Wilkinson, 194 So. 548, 239 Ala. 199—32 C.J. p 315 note 66 [b].

Amount held sufficient

Under provision of Anti-Injunction Act requiring plaintiff seeking injunction in case involving a labor dispute to file a bond or undertaking in favor of the persons restrained, an order requiring an employer to file a bond of five hundred dollars on securing a restraining order against one of two rival unions involved in a jurisdictional labor dispute in employer's plant, was a sufficient bond under the circumstances. —Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

44. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.
32 C.J. p 315 note 67.

45. Tex.—City of Breckenridge v. Pierce, Civ.App., 251 S.W. 316.

Statute held inapplicable

Tex.—Porter v. Guggenheim, Civ. App., 107 S.W.2d 891, error dismissed—City Nat. Bank of Corpus Christi v. Barbee, Civ.App., 255 S. W. 1023—City of Breckenridge v. Pierce, Civ.App., 251 S.W. 316.
32 C.J. p 314 note 62 [a].

46. Ill.—Drake v. Phillips, 40 Ill. 388.
Tex.—Mansfield v. Ramsey, Civ.App., 196 S.W. 330.

47. Tex.—Lindley v. Easley, Civ. App., 59 S.W.2d 927.

48. Pa.—Azar v. Markle, 166 A. 889, 311 Pa. 296.
S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
Waiver of defects by failure to make timely objection see infra subdivision j of this section.

49. N.C.—McAden v. Watkins, 131 S.E. 375, 191 N.C. 105.

50. Ala.—Buckner v. Stewart, 84 Ala. 529.

51. Tex.—Dickenson v. McDermott, 13 Tex. 248.

52. Tex.—Parker v. Boyd, Civ.App., 42 S.W. 1031.

53. Kan.—Kennedy v. Liggett, 295 P. 675, 677, 132 Kan. 413, quoting Corpus Juris.
32 C.J. p 315 note 72.

54. **Injunction held invalid**

Where receiver was appointed for property which was subject of litigation and injunction restraining withholding of possession from receiver was issued, defective injunction bond which failed to indemnify persons other than parties to litigation was held to invalidate injunction.—Ex parte Dillon, Mo.App., 96 S. W.2d 1095.

55. La.—St. Landry Lumber Co. v. Town of Bunkie, 99 So. 687, 206 Ala. 439.

56. W.Va.—State ex rel. A. L. Black Coal Co. v. U. S. Fidelity & Guaranty Co., 108 S.E. 271, 88 W. Va. 665.

ecuting a party for violating the anti-gambling law the undertaking properly ran to the attorney individually, as neither the state nor county was a party.[57]

(4) Security or Sureties

The necessity and sufficiency of security or sureties depend on the requirements of the statutes.

Whether security[58] or sureties,[59] are necessary on bonds required by statute is to be determined by the particular statute.

Sufficiency of sureties. The amounts in which sureties must justify vary from the amount of the penalty in the bond[60] to double that amount;[61] but in no case can the sureties justify in a sum less than that named as a penalty in the bond.[62] In some jurisdictions the surety must be a householder or a freeholder;[63] in others it is not necessary that he should own real estate to qualify as a surety.[64]

Objection may be made by defendant to the sufficiency of the sureties,[65] on the ground of lack of financial responsibility or lack of legal capacity;[66] and the sureties may be required to justify on notice or request.[67]

(5) Execution, Signature, and Approval

Statutory and other requirements as to execution and approval of injunction bonds must be complied with.

The statutory and other requirements as to execution and acknowledgment of the bond must be complied with.[68]

Execution by complainant. In some jurisdictions the statutory requirement of giving bond is satisfied if the party obtaining the injunction gives or furnishes the bond, and he himself need not sign it.[69] In other jurisdictions, however, the statutes require the bond to be executed by complainant,[70] or by either the complainant or some one for him;[71] and, if the bond is not so signed, no liability for damages can be predicated thereon, either against complainant or his sureties.[72] However, it has been held that, if the bond is sufficient as to sureties and amount, the signing thereof by one of several plaintiffs will be sufficient.[73] Where plaintiff is required to execute the bond, it has been held in some jurisdictions that it may be signed for him by his attorney;[74] but in others it has been held that the signing of the bond by plaintiff's attorney in his behalf renders the bond a nullity.[75] The withdrawal from the case of the party furnishing the bond may render the bond ineffective;[76] but a declaration by other parties that the party furnishing the bond has withdrawn from the case will not render the bond ineffective where the record does not show such withdrawal.[77]

The names of the sureties need not appear in the body of the bond;[78] and it has been held that the bond may be signed by a surety in blank and afterward filled up.[79]

57. Wyo.—Littleton v. Burgess, 91 P. 832, 16 Wyo. 58, 16 L.R.A.,N.S., 49.

58. **Discretionary**

Under statute requiring complainant seeking a temporary injunction in a case involving or growing out of a labor dispute to file a bond or undertaking in favor of the persons enjoined or restrained, it is within the discretion of the court whether or not to require security.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

59. **In New York,** under a rule of court it has been held that the officer granting an injunction may, under certain circumstances, dispense with sureties and allow complainant to give his own bond, where, in the opinion of such officer, the personal responsibility of complainant will afford ample protection to defendant. —Leavitt v. Dabney, 32 N.Y.Super. 613, 9 Abb.Pr.,N.S., 373, 40 How.Pr. 277—Carroll v. Sand, 10 Paige 293.

In South Carolina, under statute to that effect, it is discretionary with the judge whether to require sureties.—Meinhard v. Strickland, 7 S.E. 838, 29 S.C. 491.

60. La.—Tinney v. Vittur, 64 So. 407, 134 La. 549.
32 C.J. p 316 note 79.

61. N.Y.—Sheldon v. Allerton, 3 N. Y.Super. 700, 1 Code Rep. 93.
32 C.J. p 316 note 79.

62. Idaho.—Dangel v. Levy, 1 Idaho 722.

63. N.Y.—Sheldon v. Allerton, 3 N. Y.Super. 700, 1 Code Rep. 93.
32 C.J. p 316 note 81.

64. La.—Tinney v. Vittur, 64 So. 407, 134 La. 549.

65. Puerto Rico.—Central Altagracia v. Otero, 13 Puerto Rico 108.

66. Puerto Rico.—Central Altagracia v. Otero, supra.

67. Idaho.—Wilson v. Eagleson, 71 P. 613, 3 Idaho 17.
32 C.J. p 316 note 78.

68. N.Y.—Harrington v. American L. Ins. & Trust Co., 1 Barb. 244.
32 C.J. p 316 note 83.

69. Iowa.—Brown v. Melloon, 152 N.W. 79, 170 Iowa 49, Ann.Cas. 1917C 1070.
32 C.J. p 316 note 84.

70. Ohio.—State v. Atcherson, 24 Ohio N.P.,N.S., 265.
32 C.J. p 316 note 84.

71. Mo.—Losee v. Crawford, 5 S.W. 2d 105, 222 Mo.App. 683.

72. Mo.—Losee v. Crawford, supra.
N.Y.—Patterson v. Bloomer, 9 Abb. Pr.,N.S., 27.
Ohio.—State v. Atcherson, 24 Ohio N.P.,N.S., 265.

73. Ill.—Mohr v. Smith, 176 Ill.App. 64, 72.
32 C.J. p 316 note 87.

74. Fla.—Cunningham v. Tucker, 14 Fla. 251.
N.Y.—Leffingwell v. Chave, 18 N.Y. Super. 703, 10 Abb.Pr. 472, 19 How. Pr. 54.

75. La.—Luchini v. Police Jury, 53 So. 68, 126 La. 972, 21 Ann.Cas. 59.

76. Ark.—M. W. Elkins & Co. v. Ashby, 112 S.W.2d 627, 195 Ark. 313.

77. Ark.—M. W. Elkins & Co. v. Ashby, supra.

78. Ind.—Griffin v. Wallace, 66 Ind. 410.
32 C.J. p 316 note 90.

79. La.—Eyssallenne v. Citizens' Bank, 3 La.Ann. 663.

Place of execution. It has been held that the bond should be executed before the clerk of the court granting the injunction;[80] but under certain circumstances even that is unnecessary.[81]

Approval. Consent and acceptance of defendant are not requisite to the validity of the bond.[82] The approval of the bond by the proper court or officer is essential to give it validity.[83] However, it has been held that absence of a formal approval of a bond will not vitiate it if the bond was in form and substance the bond required by the court; and also that a refusal of the court to dissolve the injunction is a sufficient approval of the bond.[84] The court is not bound to approve of sureties whose solvency and sufficiency are unknown to the court.[85]

(6) Filing

An injunction bond should be filed with the clerk after being approved, the bond being a perfect obligation as soon as filed.

An injunction bond should be filed with the clerk after being approved;[86] and the bond is a perfect obligation as soon as filed.[87]

It has been held to be irregular for plaintiff to file an injunction bond unless its execution has been duly proved or acknowledged.[88] Filing the bond in the wrong case and with the wrong case number does not invalidate the bond where the style of the proper case is shown on its face.[89]

Time of filing. It has been held that the order should require the filing of a bond within a reasonable time and should specify the time so that the matter would not be left to the discretion of the applicant.[90] The bond need not be tendered along with the bill, because no bond can be tendered until the court has fixed the amount of the penalty;[91] but it has been held that a bond posted before the order requiring it was formally made is a sufficient compliance with the order where the language of such bond was prospective.[92]

f. To Whose Benefit Bond Inures

An injunction bond has been held to protect all defendants, whether served or not served, and, under statute, any person in interest.

An injunction bond, at least where the injunction is granted before service of process, is for the benefit of all defendants who are enjoined, whether served or not served; and if a defendant, without any service of the summons or injunction on him, obeys the injunction, he is entitled to damages on the dissolution of the injunction.[93] Under a statute providing that any person in interest may sue on any bond furnished in connection with any judicial proceeding, a party enjoined has full recourse to the bond even though he is not named therein.[94]

Intervener. It has been held that one who intervenes in the action after it has been instituted is not entitled to the benefit of the bond executed to the original defendant, since such intervention does not relate back to the beginning of the action.[95]

g. New or Additional Security

Additional security may be required where the security given appears to be inadequate. In general, a bond given for a restraining order cannot be continued for the subsequent injunction, and a new bond is required.

Additional security may be required on the insolvency of a surety,[96] or when for any other reason

80. Ky.—Cobb v. Curts, 4 Litt. 235.
32 C.J. p 316 note 92.

81. La.—Catalogne v. Bauries, 4 La.Ann. 567.
32 C.J. p 316 note 92 [b].

82. La.—Pargoud v. Morgan, 2 La. 99.
32 C.J. p 316 note 93.

83. Ill.—Rutan v. Lagonda Nat. Bank, 72 Ill.App. 35.
32 C.J. p 316 note 94.

Under a federal statute providing that where an interlocutory injunction is sought to restrain the enforcement of a statute on the ground of its unconstitutionality the application must be presented to a statutory three-judge court, where the issuance of the injunction has been authorized by the statutory court a district judge acting alone may approve the bond required for such injunction.—Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission, D.C.Mich., 292 F. 139.

Presumption as to approval

(1) Where clerk took verification of bond for injunction and delivered papers to sheriff inference was warranted that he approved bond, even though no formal entry was made. —Standard Bonded Warehouse Co. v. Cooper & Griffin, D.C.N.C., 30 F.2d 842.

(2) Other cases see 32 C.J. p 316 note 94 [d].

Acceptance may be evidenced by circumstances, such as the place where the bond is found, the indorsements on it, and inferences fairly deducible from the facts of the transaction.—Burgess v. Lloyd, 7 Md. 178.

84. Ill.—St. John v. North Utica, 157 Ill.App. 504.

85. La.—Mourain v. Devall, 12 La. 93.

86. N.Y.—O'Donnell v. McMurn, 3 Abb.Pr. 391.
32 C.J. p 317 note 99.

87. Mich.—Lothrop v. Southworth, 5 Mich. 436.

88. N.Y.—Harrington v. American L. Ins. & Trust Co., 1 Barb. 244.

89. Okl.—First Nat. Bank v. Duncan, 285 P. 957, 142 Okl. 121.

90. Ill.—Scott v. Hatch, 280 Ill.App. 269.

91. Md.—Negro Charles v. Sheriff, 12 Md. 274.

92. Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal.2d 244.

93. N.Y.—Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 39 Barb. 16.

94. Ala.—St. Landry Lumber Co. v. Town of Bunkie, 99 So. 687, 206 Ala. 439.

95. Ky.—Watkins v. Mowbray & Robinson Co., 278 S.W. 557, 212 Ky. 118.

96. N.Y.—Randall v. Carpenter, 22 Hun 571.
32 C.J. p 317 note 5.

the security appears to be inadequate.[97] The court should not dissolve the injunction without first giving complainant reasonable time to procure additional sureties, or to present a sufficient bond.[98] Where plaintiff applies for leave to amend by substituting another name for defendant, bond in favor of the new defendant must be given before an injunction can issue.[99]

Sufficiency of former bond. While there is some authority to the contrary,[1] it is generally held that unless the terms and conditions of the bond so provide,[2] or the sureties expressly consent thereto,[3] a bond given for a restraining order cannot be continued so as to protect defendant where the restraining order is continued as an injunction pendente lite;[4] and where an injunction has issued subsequent to a temporary restraining order or to a former injunction that has been dissolved a new bond should be filed.[5]

h. Effect of Defects or Irregularities

Mere defects and irregularities of form may be cured by construction or amendment, or may even be overlooked; and unnecessary conditions will be regarded merely as surplusage.

The undertaking is to be considered in the light of the order requiring it;[6] and, while a bond which fails to comply with the statutory requirements is invalid,[7] so that one violating the injunction will not be held in contempt therefor,[8] mere defects and irregularities of form ordinarily are not fatal to the injunction, for they may be cured by construction or amendment, or even overlooked when unimportant.[9]

Unnecessary conditions; surplusage. The insertion in an injunction bond of conditions not required by law, but not against law, will not vitiate those that are required by law,[10] and the conditions not required will be regarded merely as surplusage.[11]

i. Effect of Failure to Give Bond

While there is some contrary authority, according to the weight of authority an injunction issued without the bond or undertaking required by statute as a condition precedent is void.

According to the weight of authority, where the statute requires that the party applying for an injunction shall, as a condition precedent to its issuance, execute a bond or undertaking, with sufficient sureties, an injunction issued without such bond or undertaking is inoperative and void;[12] the omission cannot be cured by a subsequent order of the court

97. Ky.—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.
32 C.J. p 317 note 6.

Rule as justifying overruling of objections to bond

In power company's suit to enjoin city from engaging in production and sale of domestic and commercial electricity, order overruling motion and objections to bond filed by company prior to granting of injunction, and overruling motion to require additional bond thereafter, were not error, where court had jurisdiction of subject matter and city did not heed injunction, since court could at any time require additional bond if bond filed were defective.—City of Huntington v. Northern Indiana Power Co., 5 N.E.2d 889, 6 N.E.2d 335, 211 Ind. 502.

98. N.Y.—Yonkers v. Federal Sugar Refining Co., 116 N.E. 998, 221 N. Y. 206, 209, reversing 164 N.Y.S. 516, 177 App.Div. 728.
32 C.J. p 317 note 7.

99. La.—Netherlin v. Big Pine Lumber Co., 60 So. 637, 131 La. 981.

1. N.C.—Preiss v. Cohen, 17 S.E. 520, 112 N.C. 278.

An order continuing an injunction pending appeal continues the injunction bond already executed.—Davis v. Connolly, 46 S.W. 679, 104 Ky. 87, 20 Ky.L. 411.

2. Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.

3. D.C.—Moulton v. Cornish, 33 App.D.C. 228.

4. Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Tex.—San Felipe Independent School Dist. v. Nelson, Civ.App., 74 S.W. 2d 136.

On the other hand, it has been held that a bond given as condition precedent to issuance of a restraining order continued in force and effect when restraining order was continued on hearing as temporary injunction as against contention that on hearing bond became functus officio and that temporary injunction was issued without bond.—Porter v. Guggenheim, Tex.Civ.App., 107 S.W.2d 891, error dismissed.

5. Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Neb.—Harbin v. Love, 227 N.W. 145, 119 Neb. 76.
32 C.J. p 317 note 8.

Supplemental injunction

Where temporary injunction had been issued after posting of bond, granting of so-called supplemental injunction in same case, giving similar relief to newly added plaintiffs against newly added defendants, was improper without additional bond.—Love v. Worsham, Tex.Civ.App., 101 S.W.2d 598.

6. La.—Mason v. Fuller, 12 La.Ann. 68.
N.Y.—American Exch. Nat. Bank v. Goubert, 120 N.Y.S. 397, 135 App. Div. 371.

7. Mo.—Ex parte Dillon, App., 96 S.W.2d 1095.

8. Mo.—Ex parte Dillon, supra.

9. N.Y.—American Exch. Nat. Bank v. Goubert, 120 N.Y.S. 397, 135 App.Div. 371.
32 C.J. p 318 note 12.

Amendment held not prejudicial

Where injunction bond as originally written was sufficient, permitting amendment showing that signers were sureties and making condition accord with statutory requirement was not prejudicial.—Davis v. Natchez Hotel Co., 128 So. 871, 158 Miss. 43.

10. Ky.—Strong v. Duff, 15 S.W.2d 517, 519, 228 Ky. 615, 70 A.L.R. 56, quoting **Corpus Juris.**
32 C.J. p 318 note 13.

11. Ky.—Strong v. Duff, supra, quoting **Corpus Juris.**
32 C.J. p 318 note 14.

12. Ark.—Harrahan Viaduct Improvement Dist. v. Martineau, 288 S.W. 10, 172 Ark. 189.
Cal.—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.
Mich.—Chamberlain v. Durfee, 249 N. W. 486, 264 Mich. 194.
Miss.—Morris v. Trussell, 109 So. 854, 144 Miss. 343.
Mo.—State ex rel. St. Ferdinand Sewer Dist. of St. Louis County

requiring a bond to be filed as of the date of the order of issuance of the injunction;[13] and, as appears in § 259 infra, the injunction may be disobeyed without danger of punishment for contempt.

On the other hand, many decisions hold that an injunction so awarded is irregular but not void;[14] that the subsequent execution of a proper bond will cure the irregularity and render the proceeding valid;[15] and that, if defendant waits an unreasonable time before making his objection, he will be presumed to have waived the irregularity.[16]

Some cases have held that the lack of a bond or undertaking is good ground for a motion to dissolve the injunction, but that the proper order in such case is that a bond be executed within a reasonable time or the injunction be dissolved in default thereof;[17] and, according to some decisions, if complainant offers to supply the omission this may be allowed even in the court of last resort.[18]

j. Estoppel and Waiver of Defects

The party awarded an injunction is estopped to deny the validity of the bond. The party enjoined may also lose the right to object by estoppel or waiver.

Persons who are awarded an injunction on giving bond are estopped to deny that the bond was proper in form or substance.[19] On the other hand, persons in whose favor the bond is given cannot at the same time question its sufficiency and attempt to hold the obligors thereon;[20] and they waive objections for defects in the bond by failure to make timely objections thereto,[21] or by entering into an express agreement that it should be considered sufficient.[22] It has been held that where the party enjoined fails to obey the injunction, such party ordinarily will not be permitted to object to the form and sufficiency of the bond.[23]

§ 167. Defenses

Only matters germane to the cause of action pleaded may constitute a defense to a suit for injunction.

In general, matters which may constitute a defense in a suit for an injunction must be germane to

v. McElhinney, 52 S.W.2d 400, 330 Mo. 1063, 83 A.L.R. 202—State ex rel. Becker v. Westhues, 286 S.W. 882.

Ohio.—State v. Atcherson, 24 Ohio N.P.,N.S., 265.

Okl.—Walbridge-Aldinger Co. v. City of Tulsa, 233 P. 171, 107 Okl. 259.

Or.—Kerns v. Couch, 12 P.2d 1011, 141 Or. 147, opinion adhered to 17 P.2d 328, 141 Or. 147.

Pa.—Mintzer v. Turnbach, 172 A. 162, 113 Pa.Super. 113.

32 C.J. p 318 note 15.

Restraining order continued as injunction

Temporary injunction, providing that restraining order theretofore issued be continued in effect during pendency of action and until further order of court, is inoperative, in absence of proper undertaking.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.

Injunction pending appointment of receiver

Failure of court to require bond as condition precedent to temporary injunction pending application for appointment of receiver was held to render temporary injunction void.—Truesdell v. Johnson, 142 S.E. 343, 144 S.C. 188.

Effect on right to relief

Failure to give stay bond justified relief from injunction against summary proceeding, but not dismissal of bill to have the amount due made certain.—Siegmeyer v. Small, 236 N.W. 904, 254 Mich. 679.

In Texas

(1) The text rule is followed.—Railroad Commission of Texas v. Burkett, Civ.App., 66 S.W.2d 448—Alpha Petroleum Co. v. Railroad Commission, Civ.App., 59 S.W.2d 374, error dismissed—Corzelius v. Cosby Producing & Royalty Co., Civ.App., 52 S.W.2d 270—Holland Texas Hypotheek Bank of Amsterdam, Holland, v. Linscome, Civ.App., 37 S.W.2d 268—West Texas Abstract & Guaranty Co. v. Stolte, Civ.App., 256 S.W. 632—Farb v. Theis, Civ.App., 250 S.W. 290—32 C.J. p 318 note 15 [e] (1).

(2) But it has been held that, while it is frequently said that an injunction issued without a bond is void, the expression used is in the sense of voidable rather than void, and it was held sufficient that the bond was filed pursuant to court order after the issuance of the injunction.—Bettinger v. North Fort Worth Ice Co., Civ.App., 278 S.W. 466.

(3) And it has been said that "the . . . [statutory] provisions seem to relate to injunctions granted upon sworn petitions alone."—Oil Lease & Royalty Syndicate v. Beeler, Civ. App., 217 S.W. 1054, 1058.

13. Ill.—Kessie v. Talcott, 27 N.E. 2d 857, 305 Ill.App. 627.

14. U.S.—Standard Bonded Warehouse Co. v. Cooper & Griffin, D.C. N.C., 30 F.2d 842.

Ala.—Morris v. Sartain, 140 So. 373, 224 Ala. 318.

32 C.J. p 318 note 17.

Not a jurisdictional defect

S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

15. U.S.—Standard Bonded Warehouse Co. v. Cooper & Griffin, D. C.N.C., 30 F.2d 842.

S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

32 C.J. p 319 note 18.

16. Ill.—Kerz v. Galena Water Co., 139 Ill.App. 598.

32 C.J. p 319 note 20.

Seven years

City which stipulated for granting of "preliminary injunction pendente lite" was not entitled to complain seven years later that no bond was filed at time injunction order was entered.—City of Los Angeles v. Superior Court in and for Los Angeles County, 98 P.2d 207, 15 Cal.2d 16.

17. Miss.—Smith v. Harrington, 49 Miss. 771.

32 C.J. p 319 note 19.

18. N.C.—McKay v. Chapin, 26 S. E. 701, 120 N.C. 159.

32 C.J. p 319 note 21.

19. Va.—Columbia Amusement Co. v. Pine Beach Inv. Corp., 63 S.E. 1002, 109 Va. 325, 16 Ann.Cas. 1120.

32 C.J. p 319 note 22.

20. La.—Walters v. Faulk, McG. p 236.

21. Pa.—Azar v. Markle, 166 A. 889, 311 Pa. 296.

32 C.J. p 319 note 24.

22. N.Y.—Hathorn v. Natural Carbonic Gas Co., 121 N.Y.S. 683, 137 App.Div. 557.

23. Ind.—City of Huntington v. Northern Indiana Power Co., 5 N. E.2d 889, 6 N.E.2d 335, 211 Ind. 502.

the cause of action pleaded,[24] and since, as a rule, they go to negative the existence of the grounds for protection and relief they have been considered in connection with the discussion of such grounds supra §§ 36–161 and of the general principles governing the issuance of injunctions supra §§ 12–33.

Laches and limitations as grounds for denying an injunction are considered infra §§ 171, 172.

Defenses to counterclaims. Delay on the part of a defendant in a suit for an injunction in asserting a claim which he has interposed as a counterclaim in the injunction proceeding may constitute a valid defense to such counterclaim on the ground of laches.[25]

§ 168. Jurisdiction

a. In general
b. As affected by parties; territorial limits
c. As depending on amount in controversy
d. As affected by agreement of parties
e. Allowance in vacation or at chambers
f. Particular courts
g. Federal three-judge court

a. In General

An injunction issued by a court without jurisdiction is void.

Jurisdiction of a court sufficient to justify the issuance of an injunction involves both jurisdiction over the cause as well as over the parties.[26] In this and the following sections the discussion of "jurisdiction" is confined to a discussion of the power to hear and determine the application for an injunction, and the inquiry is directed to the ascertainment of the court, judicial officer, or tribunal, before whom the proceedings may be instituted. "Jurisdiction" as it rests on the facts which may appear as presenting a particular case for the proper exercise of the power of a court of equity is considered supra §§ 12–161 in the discussion of the grounds and subjects of injunction.

The fact that the court is without jurisdiction to grant some of the relief sought in the petition does not deprive it of its jurisdiction to determine a prayer for an injunction,[27] nor does the existence of facts constituting a good defense on the merits to an application for a writ of injunction oust the court of the power to hear and decide the case.[28]

An injunction granted by the court without jurisdiction is void.[29]

b. As Affected by Parties; Territorial Limits

Jurisdiction of the necessary parties is essential to the power of a court to issue an injunction; but, where such parties are within, or subject to, its jurisdiction, its injunction may operate outside its territorial limits.

Generally the right of a court to issue injunctions is only coextensive with the limits of its territorial jurisdiction.[30] It is also a general rule that an injunction operates in personam,[31] and not against the

24. Prior suit for injunction
Fact that defendants were named in an earlier suit for an injunction to restrain the violation of an order of an administrative agency, which suit is still pending, is not a defense in a later suit, where the acts complained of in the latter suit are not those involved in the earlier one, and the order sought to be enforced has been materially altered since the first suit was instituted.—U. S. v. Andrews, D.C.Mass., 26 F.Supp. 123.

25. Delay of sixteen years
In razor blade manufacturer's suit, brought in federal court in Virginia, to enjoin prosecution of a patent infringement suit by patentee against retailer of manufacturer's razor blades, counterclaim for damages for alleged breach of contract on part of manufacturer in appropriating patentee's idea of a type of safety razor, which was filed approximately sixteen years after discovery of the alleged use of the patentee's idea, was barred by laches.—Fretwell v. Gillette Safety Razor Co., C.C.A.Va., 106 F.2d 728, certiorari denied 60 S.Ct. 978, 310 U.S. 627, 84 L.Ed. 1398, rehearing denied 61 S.Ct. 55, 311 U.S. 724, 85 L.Ed. 472, and 61 S.Ct. 1106, 313 U.S. 600, 85 L.Ed. 1552.

26. Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
Conditions on granting or refusing injunction see infra § 202.

27. Tex.—Ladonia State Bank v. McDonald, Civ.App., 7 S.W.2d 161.

28. Cal.—Yolo Water & Power Co. v. Lake County Super. Ct., 185 P. 195, 43 Cal.App. 332.

29. Ill.—Bottom v. City of Edwardsville, 139 N.E. 5, 308 Ill. 68.
Neb.—State v. Carlson, 101 N.W. 1004, 72 Neb. 837.
Tex.—Royal Petroleum Corporation v. McCallum, 135 S.W.2d 958, 134 Tex. 543.

30. U.S.—Guaranty Trust Co. of New York v. Fentress, C.C.A.Ill., 61 F.2d 329.
Ark.—Gainsburg v. Dodge, 101 S.W.2d 178, 193 Ark. 473.
N.C.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.
Pa.—Lunine v. Pennsylvania Alcohol Permit Board, 157 A. 470, 305 Pa. 162—Donley v. Semans, 26 Pa. Dist. 235.
15 C.J. p 817 notes 56–58.
Injunction against corporation directors does not extend beyond such court's jurisdiction.—In re Bankshares Corporation of U. S., C.C.A.N.Y., 50 F.2d 94.

31. U.S.—Armour & Co. v. Miller, C.C.A.N.D., 91 F.2d 521.
Ark.—Gainsburg v. Dodge, 101 S.W.2d 178, 193 Ark. 473.
Cal.—Comfort v. Comfort, 112 P.2d 259, 17 Cal.2d 736, prior opinion, App., 105 P.2d 166—Cohan v. Shibley, App., 289 P. 169, 172, citing **Corpus Juris.**
Mo.—Gorka v. Gorka, 295 S.W. 515, 221 Mo.App. 1033.
N.C.—Southern Mills, Inc. v. Armstrong, 27 S.E.2d 281, 223 N.C. 495.
Okl.—Howard v. Berryman, 288 P. 605, 607, 143 Okl. 258, 69 A.L.R. 1035, quoting **Corpus Juris.**
Tenn.—Smalling v. Cox, 13 Tenn.App. 425.
Tex.—Railroad Commission of Texas v. A. H. McDonald Motor

property involved,[32] jurisdiction over the person being a prerequisite to, and a basis for, the issuance of an injunction against such person.[33] Accordingly, an injunction will not issue against one not within, or subject to, the jurisdiction of the court,[34] nor will a person be enjoined from taking certain action unless he himself is before the court as defendant,[35] except where he is an attorney, agent, servant, or successor in office.[36]

Freight Lines, Civ.App., 127 S.W. 2d 932.
Wis.—In re Zur Ruhe Cemetery, 213 N.W. 657, 193 Wis. 108.
32 C.J. p 33 note 51, p 286 note 69.

Proceeding in personam
Mich.—Eisner v. Williams, 298 N.W. 507, 298 Mich. 215.

32. Mich.—Dunnebacke v. Detroit, G. H. & M. Ry. Co., 227 N.W. 811, 812, 248 Mich. 450, quoting **Corpus Juris.**
32 C.J. p 286 note 69.

33. Cal.—Park & Tilford Import Corp. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.
N.J.—De Geeter v. Bennett, 32 A.2d 335, 133 N.J.Eq. 349.
N.Y.—Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, reversing 239 N.Y.S. 889, 228 App.Div. 875, motion granted 177 N.E. 134, 256 N.Y. 546.
Tex.—Royal Petroleum Corporation v. McCallum, 135 S.W.2d 958, 134 Tex. 543.

Indispensable parties
Jurisdiction must exist as to all indispensable parties.—Tobin v. Walkinshaw, C.C.Cal., 23 F.Cas.No. 14,068, McAll. 26.

Codefendants
Jurisdiction as to codefendants resident within the state and outside of the territorial jurisdiction of the court may, under the statutes of some states, be acquired by the issuance and service of process, where jurisdiction has been obtained of one defendant.
Ind.—Ilvmston v. Evans, 37 N.E. 792, 138 Ind. 285.
W.Va.—Toledo Tie & Lumber Co. v. Thomas, 11 S.E. 37, 33 W.Va. 566, 25 Am.S.R. 925.
32 C.J. p 287 note 77.

Jurisdiction by appearance
The court may obtain jurisdiction by a voluntary appearance.
U.S.—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F.2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444.
Wash.—State v. Kennan, 76 P. 516, 35 Wash. 52.

Preliminary injunction
As a general rule, no preliminary injunction can be awarded against persons who are not parties to the suit.—Marty v. Marty, 73 N.Y.S. 369, 66 App.Div. 527—32 C.J. p 375 note 57.

Submission to jurisdiction
(1) Jurisdiction of the person may exist from the fact that defendants have submitted to its jurisdiction in a pending suit with relation to the same subject matter.—Marco v. Low, 55 Me. 549—32 C.J. p 287 note 79.
(2) A plaintiff in a law action, who abandoned his appeal from determination of court of chancery in refusing to strike defendant's bill to restrain prosecution of the law action, and filed an answer and counterclaim alleging that plaintiff was a partner engaged in joint adventure with defendant, was held to have submitted himself to jurisdiction of chancery.—De Geeter v. Bennett, 32 A. 2d 335, 133 N.J.Eq. 349.

Jurisdiction of res
(1) In some cases jurisdiction of the res has been held to confer jurisdiction of the parties.—Mossy v. Gordy, 28 La.Ann. 585—32 C.J. p 287 note 74.
(2) Where the res was within the jurisdiction and the order could be made effective, one not personally within the jurisdiction of the court was held to be properly enjoined.—Moors v. Ladenburg, 59 N.E. 676, 178 Mass. 272.
Necessary parties to suit for injunction see infra §§ 173–178.
Process and appearance in suits for injunctions see infra §§ 179, 180.

Dismissal after cross complaint
In suit to enjoin enforcement of order of National Mediation Board, with cross complaint for mandatory injunction enforcing such order, when suit was dismissed as to the board, no order directly affecting it could be made.—McNulty v. National Mediation Board, D.C.N.Y., 18 F. Supp. 494.

34. U.S.—Guaranty Trust Co. of New York v. Fentress, C.C.A.Ill., 61 F.2d 329—Clarke v. Boysen, C. C.A.Wyo., 39 F.2d 800, certiorari denied Clark v. Boysen, 51 S.Ct. 75, 282 U.S. 869, 75 L.Ed. 768.
Ark.—Gainsburg v. Dodge, 101 S.W. 2d 178, 180, citing **Corpus Juris.**
Okl.—Howard v. Berryman, 288 P. 605, 607, 143 Okl. 258, 69 A.L.R. 1035, quoting **Corpus Juris.**
Tex.—National Life Co. v. Thomason, Civ.App., 160 S.W.2d 582.
Wis.—In re Zur Ruhe Cemetery, 213 N.W. 657, 193 Wis. 108.
32 C.J. p 83 note 52.

Service outside state
(1) The court acquires no jurisdiction over a nonresident, in an injunction case, on the basis of service outside the state.—Howard v. Berryman, 288 P. 605, 143 Okl. 258, 69 A.L.R. 1035.
(2) Injunction cannot be issued against nonresident on whom no service can be had except by some form of constructive service.—Gainsburg v. Dodge, 101 S.W.2d 178, 193 Ark. 473.
(3) Jurisdiction over nonresident defendant could not be obtained in suit for injunction by joinder of superintendent of banks as party defendant, over whom court had no jurisdiction.—Askew v. Bassett Furniture Co., 158 S.E. 577, 172 Ga. 700.

Foreign corporation not served or appearing
Mo.—State ex rel. Hog Haven Farms v. Pearcy, 41 S.W.2d 403, 328 Mo. 560.

Mandatory injunction
Court of equity will ordinarily not grant an injunction compelling action by a nonresident in a foreign state or country.—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, 148 N.E. 797, 241 N.Y. 85, modifying 209 N.Y. S. 79, 212 App.Div. 705.

County limits
Where process of the county court cannot be served outside the county in a personam proceeding, such a court is without jurisdiction in an injunction proceeding against one outside the county.—Lunine v. Pennsylvania Alcohol Permit Board, 157 A. 470, 305 Pa. 162.

Potential jurisdiction
Where court of chancery acquired potential jurisdiction to grant preliminary temporary injunction, but actual jurisdiction was not subsequently acquired, failure relates back to inception of cause in so far as affecting jurisdiction to adjudicate right to permanent injunction on merits.—Iron City Sav. Bank v. Isaacsen, 164 S.E. 520, 158 Va. 609.
Persons who may be restrained in general see supra § 34.
Parties in proceedings for injunctions see infra §§ 173–178.

35. N.Y.—Dixon v. Talerico, 217 N. Y.S. 482, 217 App.Div. 191.
Tex.—Kunschik v. Nichols, 137 S.W. 2d 1000, 135 Tex. 1, reversing, Civ. App., 133 S.W.2d 209.
32 C.J. p 83 note 53.

36. N.J.—Schalk v. Schmidt, 14 N. J.Eq. 268.
N.Y.—Dixon v. Talerico, 217 N.Y.S. 482, 217 App.Div. 191.

On the other hand, and in accordance with the general rule, stated in Equity § 81, that a court of equity having jurisdiction of the person of defendant may render any appropriate decree acting directly on the person, even though the subject matter affected is outside the jurisdiction, a court having jurisdiction of the parties may grant and enforce an injunction, although the subject matter affected is beyond its territorial jurisdiction, or requires defendant to do or refrain from doing anything beyond its territorial jurisdiction which it could require him to do or refrain from doing within the jurisdiction.[37] Of course, where neither defendants nor the subject matter are within the territorial jurisdiction of the court, an injunction cannot issue.[38]

Injunction against receiver. An injunction against the acts of a receiver should be sought in the court appointing him.[39]

c. As Depending on Amount in Controversy

A power to issue an injunction is not limited by general requirements as to the amount in controversy unless the statutory intent is clearly apparent.

A general power conferred on a court to issue injunctions is not subject to a limitation as to the amount in controversy applicable to other powers of the court unless the intent to provide such a limitation is clearly apparent.[40]

d. As Affected by Agreement of Parties

Jurisdiction not otherwise existing to issue an injunction cannot be conferred by consent of the parties.

In accordance with general rules, it is held that jurisdiction to grant an injunction cannot be conferred by a stipulation of parties where the facts are not such as to give the court jurisdiction.[41] However, where there is otherwise jurisdiction to restrain by injunction, the parties in a proper case may agree on the terms of restraint,[42] and, where the subject matter of a proceeding for an injunction is within the court's jurisdiction, a bill is not subject to a general demurrer for want of equity be-

37. Mich.—Dunnebacke v. Detroit, G. H. & M. Ry. Co., 227 N.W. 811, 812, 248 Mich. 450, quoting **Corpus Juris.**
Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.
Mo.—Burroughs v. Lasswell, App., 86 S.W.2d 962, transferred, see 79 S.W.2d 107, 336 Mo. 463.
N.Y.—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, 148 N.E. 797, 241 N.Y. 85, modifying 209 N.Y.S. 79, 212 App.Div. 705.
Tenn.—Smalling v. Cox, 13 Tenn.App. 425.
32 C.J. p 286 note 70—p 83 note 54—15 C.J. p 818 notes 60–66.

Outside county, district, or circuit

Court has power to issue injunction where it has personal jurisdiction of defendant.
Md.—Sun Cab Co. v. Cloud, 159 A. 922, 162 Md. 419.
Mich.—Dunnebacke v. Detroit, G. H. & M. Ry. Co., 227 N.W. 811, 812, 248 Mich. 450, quoting **Corpus Juris**—Roger v. Merriam, 221 N.W. 19, 243 Mich. 703.
Mo.—State ex rel. Walker v. Locust Creek Drainage Dist., 67 S.W.2d 840, 228 Mo.App. 438, transferred, see, Sup., 58 S.W.2d 452.
32 C.J. p 286 note 71.

Effect of statute

(1) Statute empowering circuit judge to issue injunctions at any place in the circuit to be effective in any place therein, does not limit the power of the judge to issue an injunction against one within the court's jurisdiction, although involving action beyond the circuit.—Sun Cab Co. v. Cloud, 159 A. 922, 162 Md. 419.

(2) Under a statutory provision that equity causes are to be tried in the county of the residence of defendant against whom substantial relief is prayed, an action for an injunction against waste may be tried in the county of the residence of defendant, although the land is situated in another county and another statute provides that cases respecting titles to land must be tried where the land lies.—Powell v. Cheshire, 70 Ga. 357, 48 Am.R. 572.

(3) A judge may be authorized by statute to award injunctions with respect to judgments rendered or proceedings apprehended out of his own circuit, with a limitation excluding the right of such judge to hear and determine the cause.—Randolph v. Tucker, 10 Leigh 655, 37 Va. 655.

Outside state

Mo.—Burroughs v. Lasswell, App., 86 S.W.2d 962, transferred, see 79 S.W.2d 107, 336 Mo. 463.
32 C.J. p 286 note 72.

In foreign country

U.S.—Marshall v. Turnbull, C.C.N.Y., 32 F. 124.
N.Y.—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, 148 N.E. 797, 241 N.Y. 85, modifying 209 N.Y.S. 79, 212 App.Div. 705.

Enjoining foreign corporation

Where Canada and New York by statute gave a Canadian and a New York corporation power to unite in building a bridge between the two countries to be owned partly by each, thereby creating rights that crossed the international border, the courts of either sovereignty may, in the absence of contrary legislation, protect rights within the jurisdiction by prohibiting unlawful acts outside its territorial jurisdiction.—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, supra.

Rule of county is not violated thereby.—Smalling v. Cox, 13 Tenn. App., 425.

38. U.S.—Guaranty Trust Co. of New York v. Fentress, C.C.A.Ill., 61 F.2d 329.
32 C.J. p 287 note 75.

39. U.S.—McCoy v. Marietta & C. R. Co., C.C.Ohio, 15 F.Cas.No.8,730b.
32 C.J. p 287 note 80.

40. Tex.—Stein v. Frieburg, 64 Tex. 271.
32 C.J. p 287 note 81.
Amount in controversy as affecting equity jurisdiction generally see Equity § 15.
Jurisdiction independent of amount in controversy generally see Courts § 52.

41. N.Y.—Daly v. Smith, 38 N.Y. Super. 158, 49 How.Pr. 150.
32 C.J. p 287 note 83.

Contra authority

N.Y.—Strawberry Island Co. v. Cowles, 140 N.Y.S. 333, 339, 79 Misc. 279.
32 C.J. p 287 note 82.
Consent as conferring jurisdiction generally see Courts § 85.

42. N.Y.—Daly v. Smith, 38 N.Y. Super. 158, 49 How.Pr. 150.

cause the suit is filed by the parties' agreement.[43]

e. Allowance in Vacation or at Chambers

Statutory or constitutional authority must exist before a judge may issue an injunction, temporary or permanent, in vacation or at chambers. Such authority is frequently conferred.

In the absence of statutory or constitutional authority, a judge at chambers[44] or in vacation[45] cannot issue an injunction. However, by statute, jurisdiction to issue injunctions at chambers, as well as in court,[46] and in vacation as well as in term,[47] is generally conferred. The power to grant injunctions in term time or vacation carries with it the power to refuse such writs in term time or vacation.[48]

It has been held that a requirement that equity cases shall be heard in the county where defendant resides does not require that an application for a temporary injunction made ex parte to the judge at chambers must be made in such county.[49]

Passing on the merits. The sole question before the judge is to determine whether in the exercise of discretion he will grant or refuse the application,[50] and hence, except in so far as necessary to examine into the merits for a proper exercise of his discretion,[51] a judge in vacation or at chambers may not on application for a temporary injunction try the case on the merits and make a final order,[52] or pass on exceptions to the petition,[53] which can be acted on only by the court,[54] and it has been held improper to grant a temporary injunction at chambers on disputed material facts.[55]

Mandatory injunction will not ordinarily be granted at chambers,[56] and the same is true as to a mandatory injunction in vacation.[57]

The rule that a preliminary mandatory injunction will not issue for the purpose of compelling the transfer of property from one litigant to another, as considered supra § 52, applies with full force and effect where the hearing is before a judge at chambers.[58]

In case in another court. A judge of one court has no power to grant in vacation or at chambers an injunction in a cause pending in another court,[59] unless he is expressly vested with such power by constitution or statute.[60]

When a judge is vested by statute or constitution merely with the power to issue an injunction in an action pending in another court, such judge may grant an injunction in an action pending outside his own judicial district only when the office of judge of that district is absent or unable to act.[61]

f. Particular Courts

The jurisdiction of particular courts in injunction cases is generally defined by the constitutional or statutory provisions creating them, the power to issue injunctions being usually confined to courts having general equity jurisdiction.

Since the jurisdiction of particular courts is, as a general rule, expressly defined by the constitutions or statutes creating them, see Courts § 15, their jurisdiction of matters relating to injunctions as a rule must be determined by the existence and construction of such constitutions or statutes.[62] In-

43. Ala.—Ray v. Hillman, 157 So. 676, 229 Ala. 424.

44. S.C.—Atlantic Coast Line R. Co. v. Moise, 67 S.E. 785, 85 S.C. 530.
32 C.J. p 290 note 41.

45. Ind.—State v. Michaels, 8 Blackf. 436.

46. S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
32 C.J. p 290 note 44.

47. N.M.—In re Sloan, 25 P. 930, 5 N.M. 590.
32 C.J. p 290 note 45.

Preliminary injunction
Statute permitting, a judge may issue a preliminary or temporary injunction during vacation.—Bell v. Walkley, Mo.App., 27 S.W.2d 456.
Prayer for preliminary injunction as prerequisite to issuance of such injunction in vacation see infra § 182.

48. Tex.—Elder v. Hamilton, Civ. App., 227 S.W. 248.

49. Ga.—Burchard v. Boyce, 21 Ga. 6.
32 C.J. p 290 note 48.

50. S.C.—Kinder v. Atlantic Coast Lumber Corp., 93 S.E. 7, 107 S.C. 404.

51. S.C.—Alston v. Charleston Bd. of Health, 77 S.E. 727, 93 S.C. 533.
32 C.J. p 290 note 50.

52. S.C.—Northwestern R. Co. v. Colclough, 65 S.E. 950, 84 S.C. 37.
32 C.J. p 291 note 51.

53. Tex.—Lane v. Jones, Civ.App., 167 S.W. 177.

54. Tex.—El Campo Light, Ice & Water Co. v. El Campo Water & Light Co., 132 S.W. 868, 63 Tex.Civ. App. 393.

55. Neb.—Calvert v. State, 52 N.W. 687, 34 Neb. 616.

56. Ga.—Georgia Pac. R. Co. v. Douglasville, 75 Ga. 828.

57. Ky.—Hager v. New South Brewing Co., 90 S.W. 608, 28 Ky.L. 895.
32 C.J. p 291 note 56.

58. Neb.—State v. Graves, 92 N.W. 144, 66 Neb. 17—Calvert v. State, 52 N.W. 687, 34 Neb. 616.

59. Mont.—Wallace v. Helena Electric R. Co., 24 P. 626, 10 Mont. 24, opinion adhered to 25 P. 278, 10 Mont. 24.
32 C.J. p 291 note 59.

60. Ind.—Columbus v. Hydraulic Woolen Mills Co., 33 Ind. 435.
N.C.—Mauney v. Montgomery County, 71 N.C. 486.
32 C.J. p 291 note 60.

61. Neb.—Ellis v. Karl, 7 Neb. 381.

62. Pa.—St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa.Super. 146.
Va.—Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corporation, 133 S.E. 812, 145 Va. 317.
32 C.J. p 287 note 37.

Aiding enforcement of judgment
Under the section of the Uniform Stock Transfer Act declaring that a creditor whose debtor is owner of a certificate of stock shall be entitled to such aid from "courts of appropriate jurisdiction" by injunction and otherwise in attaching the certificate as is allowed at law and in equity in regard to property which cannot readily be attached or levied

junctions, however, being matters of purely equitable cognizance,[63] are, in the absence of express statutory provision,[64] within the jurisdiction only of courts possessing general equitable powers.[65] The power does not generally exist in courts of limited jurisdiction,[66] as, for example, courts limited to probate jurisdiction.[67] Where a court is not clothed with chancery jurisdiction and there is no statute authorizing it to grant injunctions, a statute authorizing the judge thereof to allow injunctions does not bestow like power on the court,[68] nor does a grant of special chancery powers, not including the power to issue injunctions, confer the power to grant an injunction.[69] On the other hand, if a court has general chancery jurisdiction, the mere fact that it has common-law jurisdiction as

on by ordinary legal process, the quoted phrase was intended to include the court in which judgment was entered.—Trade Bond & Mortgage Co. v. Schwartz, 24 N.E.2d 892, 303 Ill.App. 165.

In California superior court has jurisdiction of injunction suit.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

In North Carolina

(1) The general county court may issue injunctions in actions within the county only.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.

(2) However, the superior court has extraterritorial powers with regard to issuing temporary and permanent restraining orders and injunctions, since it is a court of general jurisdiction.—Essex Inv. Co. v. Pickelsimer, supra.

In Texas

(1) The judge of any court controlled by the Practice Act may issue restraining orders and injunctions returnable to any other judge or court.—De Witt v. Republic Nat. Bank of Dallas, Civ.App., 168 S.W. 2d 710.

(2) District courts can issue writs of injunction in all cases in which chancery court would have power to issue them under established rules of equity.—City of Dallas v. Wright, 36 S.W.2d 973, 120 Tex. 190, 77 A.L.R. 709—McAllen & Harlingen Local No. 688 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U. S. & Canada v. Publix Theatres Corporation, Civ.App., 51 S.W. 2d 1090—Leslie v. Griffin, Civ.App., 23 S.W.2d 535, reversed on other grounds, Com.App., 25 S.W.2d 820.

In Washington, notwithstanding Water Code, which set up a distinct procedure for dealing with public waters, superior court had jurisdiction of action by owners of water rights to enjoin interference therewith.—State v. Mohar, 13 P.2d 454, 169 Wash. 368.

62. U.S.—Fleming v. Peavy-Wilson Lumber Co., D.C.La., 38 F.Supp. 1001—Utilities Production Corporation v. Carter Oil Co., D.C.Okl., 2 F.Supp. 81, affirmed, C.C.A., 72 F.2d 655.

Cal.—Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., App., 139 P.2d 963.

Miss.—Welch v. Bryant, 128 So. 734, 157 Miss. 559.

Tex.—Levy v. Rivaux, Civ.App., 84 S.W.2d 847.

32 C.J. p 287 note 88.

64. In Oklahoma court of common pleas of Tulsa County was held to have jurisdiction to issue writ of injunction.—City of Tulsa v. Bishop's Restaurant No. 4, 65 P.2d 436, 179 Okl. 290.

65. U.S.—Fleming v. Peavy-Wilson Lumber Co., D.C.La., 38 F.Supp. 1001.

Ala.—Campbell v. State, 5 So.2d 466, 242 Ala. 215.

Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 183 So. 759, 134 Fla. 1, 119 A.L.R. 956.

Ind.—Buck v. Indiana Const. Co., 138 N.E. 356, 79 Ind.App. 329.

Mo.—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652.

N.J.—Miller v. Bond & Mortgage Co., 188 A. 678, 121 N.J.Eq. 197—Falcon Building & Loan Ass'n v. Schwartz, 186 A. 696, 121 N.J.Eq. 27.

32 C.J. p 287 note 89.

Courts of general jurisdiction

(1) Indiana circuit courts have jurisdiction of injunction suits.—Public Service Co. of Indiana v. City of Lebanon, Ind., 46 N.E.2d 480—Coleman v. City of Gary, 44 N.E.2d 101, 220 Ind. 446—State v. Marion Circuit Court, 176 N.E. 626, 202 Ind. 501.

(2) Where a suit to enjoin city from taking possession of electric system, and the city's action to restrain utility from interfering with city's possession, were considered before special judges of circuit court independent of case wherein city sought to acquire the system, such judges had no jurisdiction to issue injunctions in such case, notwithstanding circuit court may grant injunctions.—Public Service Co. of Indiana v. City of Lebanon, supra.

(3) New York supreme court has jurisdiction to issue an injunction.—Colson v. Pelgram, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App.Div. 137—Travelers Indemnity Co. v. Burg, 1 N.Y.S.2d 172, 253 App.Div. 43—Boyajian v. Boyajian, 43 N.Y.S.2d 643.

As to interlocutory injunction see infra § 169.

Preventive relief by bill quia timet see Equity § 40 a.

66. County court

(1) No power to grant permanent injunction.—State ex rel. Association for Convalescent Crippled Children v. Corneli, 152 S.W.2d 83, 347 Mo. 1164.

(2) County court of Cameron County at law had no jurisdiction of action to enforce specific performance of contract by means of injunction.—McAllen and Harlingen Local No. 688 of International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators of U. S. and Canada v. Publix Theatres Corporation, Tex.Civ.App., 51 S.W.2d 1090.

Criminal district court

Tex.—Ex parte Richards, 155 S.W. 2d 597, 137 Tex. 520—Willacy County Water Control & Improvement Dist. No. One v. Nussbaum, Civ.App., 155 S.W.2d 1023.

67. Mo.—Creech v. Bunch, App., 193 S.W. 603.

32 C.J. p 288 note 92—15 C.J. p 1014 note 93 [a].

Power under particular statutes

N.Y.—Aldinger v. Pugh, 30 N.E. 745, 132 N.Y. 403, affirming 10 N.Y.S. 684, 57 Hun 181.

Pa.—In re Heinz's Estate, 169 A. 365, 313 Pa. 6.

32 C.J. p 288 note 92 [b].

Equity powers of probate courts generally see Courts § 302.

68. Iowa.—Cummings v. Des Moines, W. & S. W. R. Co., 36 Iowa 173.

32 C.J. p 288 note 90.

69. Iowa.—Cummings v. Des Moines, W. & S. W. R. Co., supra.

Enjoining law action

Although, under the statute, circuit courts have chancery powers in mortgage foreclosure suits, they do not have power independent of foreclosure proceedings to enjoin prosecution of law action.—Miller v. Bond & Mortgage Guaranty Co., 188 A. 678, 121 N.J.Eq. 197.

well in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restriction.[70]

It has been held that where a court has power to issue a temporary injunction, it has also the power to make such an injunction permanent.[71]

Appellate court and judges thereof. Except where such jurisdiction has been conferred by constitutional provisions, appellate courts have no original jurisdiction to issue writs of injunction.[72] In some jurisdictions, the power must be conferred by organic and not by statutory provisions,[73] and when so conferred, the power cannot be limited, abridged, and enlarged or interfered with in any manner by legislation.[74]

When power to issue injunctions has been conferred on an appellate court, such jurisdiction cannot be exercised with regard to actions still pending and undetermined in other courts,[75] or in cases not of equity jurisdiction,[76] nor will it be exercised where the extreme shortness of time is likely to render a suit for injunction ineffective.[77]

Individual judges of appellate courts have no jurisdiction to issue writs of injunction in the absence of express authority therefor.[78] Nevertheless, this power may be conferred on them,[79] but it can be exercised only under the conditions prescribed by the statutes conferring the power.[80] Authority so given to a judge of an appellate court cannot be exercised by the court collectively.[81]

Federal courts. The power of federal courts generally to issue injunctions is considered in Federal Courts §§ 14, 286, 311. The special three-judge district court provided for by several acts of congress in injunction cases of a specified nature is considered infra subdivision g of this section.

g. Federal Three-Judge Court

(1) In general
(2) When required
(3) Nature; extent of power

(1) In General

Under the provisions of some federal statutes no interlocutory or permanent injunction may be issued in specified instances by a district court or judge, unless the application therefor is heard and determined by three judges convened in the manner provided.

As considered in Federal Courts § 14, the federal courts have power to issue writs of injunction within the equity jurisdiction of the court. In appropriate cases this power may be exercised by the supreme court, as considered in Federal Courts § 196 a, the circuit court of appeals, as considered in Federal Courts § 286, and district courts, as considered in Federal Courts § 311. However, a limitation on this power to issue injunctions is imposed by several acts of congress which prohibit the issuance of an interlocutory or permanent injunction by a district judge or court in certain cases unless a three-judge court is convened, in the manner provided, to hear and determine the application therefor.[82] Apart from, and in the absence of, such

70. Utah.—Bailey v. Stevens, 39 P. 828, 11 Utah 175.

71. Tex.—Stein v. Frieberg, 64 Tex. 271.

72. Ky.—Bennett v. Blankenship, 197 S.W. 967, 177 Ky. 499.
32 C.J. p 288 note 95.

73. Ill.—Campbell v. Campbell, 22 Ill. 664.
32 C.J. p 288 note 97.

74. Ill.—Campbell v. Campbell, supra.

75. Philippine.—Diokno v. Reyes, 7 Philippine 385.
Wis.—Cooper v. Mineral Point, 34 Wis. 181.

76. Me.—Smith v. Ellis, 29 Me. 422.
32 C.J. p 288 note 1.

77. Wis.—Anderson's Petition, 159 N.W. 559, 164 Wis. 1.

78. Ky.—Bennett v. Blankenship, 197 S.W. 967, 177 Ky. 499.
Pa.—Riley v. Ellmaker, 6 Whart. 545.

79. Ill.—Hall v. O'Brien, 5 Ill. 410.
32 C.J. p 288 note 4.

80. Ala.—Zimmern v. Southern R. Co., 89 So. 171, 206 Ala. 69.
32 C.J. p 288 note 5.

81. Ill.—Hall v. O'Brien, 5 Ill. 410.
Iowa.—Reed v. Murphy, 2 Greene 568.
Va.—Mayo v. Haines, 2 Munf. 423, 16 Va. 423.

82. **Orders of secretary of agriculture**

Under Packers and Stockyards Act, 7 U.S.C.A. § 217, and Urgent Deficiencies Act, 28 U.S.C.A. § 47, an application for an interlocutory injunction in a proceeding to annul the orders of the secretary of agriculture is within the jurisdiction of a three-judge court, which must be convened to hear such application.—Tagg Bros. & Moorhead v. U. S., Neb., 50 S.Ct. 220, 280 U.S. 420, 74 L.Ed. 524, affirming, D.C., 29 F.2d 750.

Federal Alcohol Administration Act

Where complaint attempted to restrain enforcement of Federal Alcohol Administration Act as well as regulations thereunder on the ground that they were repugnant to the Constitution, the case was properly heard by a three-judge court.—William Jameson & Co. v. Morgenthau, D.C.D.C., 25 F.Supp. 771, vacated on other grounds 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189.

Validity of federal tax

(1) A suit in statutory three-judge court to enjoin collector of internal revenue from collecting tax on gross sales of bituminous coal production, under a federal statute, is appropriate to test validity of the tax.—Sunshine Anthracite Coal Co. v. Adkins, D.C.Ark., 31 F.Supp. 125.

(2) In such a suit, such court had no jurisdiction to try de novo the fact question of such company's status under the Bituminous Coal Act or the character of the coal produced by it, or to reconsider evidence taken in prior proceedings.—Sunshine Anthracite Coal Co. v. Adkins, supra.

Application of statute to proceedings for modification of injunctions see infra § 238.

Direct appeal to supreme court from determination of three-judge court see Federal Courts § 220.

Mandamus by supreme court to compel assembly of court see Federal Courts § 199.

Three-judge court in proceeding to restrain order of Interstate Com-

statutory provisions, a three-judge court is not a proper forum for the hearing of a suit for injunction in the federal courts.[83]

The requirement for, and jurisdiction of, a three-judge court in an action to enjoin enforcement of an order of the Interstate Commerce Commission, is discussed in Commerce § 148 d (3).

(2) When Required

The three-judge court is required, and takes jurisdiction only, in cases coming strictly within the provisions of the particular statute governing.

Under Judicial Code § 266, 28 U.S.C.A. § 380, a three-judge court must be convened, and may take jurisdiction, in a case where an application is made for an interlocutory injunction to restrain enforcement of a state statute, or order of an administrative board or commission acting under such a statute, on the ground of its unconstitutionality.[84] Under 28 U.S.C.A. § 380 a, such a court must be

merce Commission see Commerce § 148 d (3).

83. Reason for rule

The federal courts are constitutionally or by statute courts of limited jurisdiction as to subject matter, and their composition is prescribed by statute.—Hudson & Manhattan R. Co. v. Hardy, D.C.N.Y., 22 F.Supp. 105, reversed on other grounds, C.C.A., 103 F.2d 327.

Enjoining order of National Mediation Board

U.S.—Hudson & Manhattan R. Co. v. Hardy, supra.

Number of judges necessary to adjudication generally see Courts § 183.

84. U.S.—Query v. U. S., S.C., 62 S.Ct. 1122, 316 U.S. 486, 86 L.Ed. 1616, vacating, C.C.A., 121 F.2d 631, affirming, D.C., U. S. v. Query, 37 F.Supp. 972, certiorari denied 62 S.Ct. 295, 314 U.S. 685, 86 L. Ed. 548, vacated 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733, certiorari granted 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733—Jacoby v. Bond & Mortgage Guarantee Co., 72 F.2d 420, C.C.A.N.Y., certiorari denied 55 S.Ct. 216, 293 U.S. 619, 79 L.Ed. 707—Durant v. Bennett, D.C.S.C., 54 F.2d 634—McCormick & Co. v. Brown, C.C.A.W.Va., 52 F.2d 934—Wolfe v. Hurley, D.C.La., 46 F. 2d 515, affirmed 51 S.Ct. 493, 283 U.S. 801, 75 L.Ed. 1423—Columbia Ry., Gas & Electric Co. v. Blease, D.C.S.C., 42 F.2d 463—Greencastle Water Works Co. v. Public Service Commission of Indiana, D.C. Ind., 31 F.2d 600—Suncrest Lumber Co. v. North Carolina Park Commission, C.C.A.N.C., 29 F.2d 823—Southern Ry. Co. v. Query, D.C.S. C., 21 F.2d 333—Connecting Gas Co. v. Imes, D.C.Ohio, 11 F.2d 191—Bay Petroleum Corporation v. Corporation Commission of State of Kansas, D.C.Kan., 36 F.Supp. 66—Sovereign Camp, W. O. W., v. Murphy, D.C.Iowa, 17 F.Supp. 650—Seelig v. Baldwin, D.C.N.Y., 7 F.Supp. 776, affirmed Baldwin v. G. A. F. Seelig, Inc., 55 S.Ct. 120, 293 U.S. 522, 79 L.Ed. 632—Norfolk & W. Ry. Co. v. Board of Public Works of West Virginia, D.C. W.Va., 3 F.Supp. 791—Republic Acceptance Corporation v. De Land, D.C.Mich., 275 F. 632—Hebe Co. v. Calvert, D.C.Ohio, 246 F. 711—Crescent Mfg. Co. v. Wilson, 242 F. 462, 155 C.C.A. 238, dismissing appeal, D.C., 233 F. 282.

32 C.J. p 290 note 31.

Purpose of statute

(1) "The legislation was enacted for the manifest purpose of taking away the power of a single United States judge, whether District Judge, Circuit Judge, or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the state pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. . . . The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated."—Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission, La., 43 S.Ct. 75, 76, 260 U.S. 212, 67 L.Ed. 217.

(2) Other statements.—Phillips v. U. S., Okl., 61 S.Ct. 480, 482, 483, 312 U.S. 246, 85 L.Ed. 809, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S.Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D. C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44—American Ins. Co. v. Lucas, D.C.Mo., 38 F. Supp. 926, denying new trial 38 F. Supp. 896.

Elements

(1) Four things are necessary to bring a case within the statute, namely: First, that an interlocutory injunction is sought; second, that such injunction will result in suspending or restraining the enforcement, operation, or execution of a statute of a state, or the order of an administrative board or commission acting under or pursuant to statute; third, that the ground on which the interlocutory injunction is asked is the unconstitutionality of the statute or order; and fourth, that it is sought to restrain by the interlocutory injunction the action of an officer of the state.—Cannonball Transp. Co. v. American Stages, D.C.Ohio, 53 F.2d 1050, 1051—In re Henrietta Mills Co. v. Rutherford County, D.C. N.C., 26 F.2d 799—Norfolk & W. Ry. Co. v. Board of Public Works of West Virginia, D.C.W.Va., 3 F.Supp. 791.

(2) "Each of [the] . . . conditions must exist before the single District Judge is shorn of his jurisdiction to hear and determine the cause without calling to his assistance two other federal judges as specified."—Cannonball Transp. Co. v. American Stages, supra.

Form of decree

Where decree dismissing bill, signed by one judge, was sanctioned by opinion signed by two judges and concurring opinion of third, it was equivalent to announcement in open court, three judges sitting.—Dohany v. Rogers, Mich., 50 S.Ct. 299, 281 U.S. 362, 74 L.Ed. 904, 68 A.L.R. 434, affirming, D.C., 33 F.2d 918.

Jurisdictional requirement

Requirement of a three-judge court is not a mere privilege or right which the parties may waive but is a jurisdictional requirement.—Riss & Co. v. Hoch, C.C.A.Kan., 99 F.2d 553.

Power of single judge

(1) A single judge on application for interlocutory injunction to restrain enforcement of a state law had no jurisdiction to dismiss the bill.—Riss & Co. v. Hoch, supra.

(2) However, a district court composed of three judges granting a temporary injunction against the enforcement of a state statute, after a hearing, may authorize the district judge to issue a similar injunction to any other intervener or plaintiff whose case is not essentially distinguishable from that of plaintiff

convened, and may take jurisdiction, where a temporary or permanent injunction is sought to restrain enforcement of a federal statute on the ground of its unconstitutionality.[85]

It is only in cases coming strictly within the provisions of the particular statute that a three-judge court must be convened,[86] it being necessary that the judge to whom the application for an injunc-

in the suit in which the injunction was granted without a further hearing before the three judges.—J. & A. Freiberg Co. v. Dawson, D.C.Ky., 274 F. 420, affirmed Dawson v. Kentucky Distilleries & Warehouse Co., 41 S.Ct. 272, 255 U.S. 288, 65 L.Ed. 638.

Restraining suspension of license

Where bankrupt sought to enjoin his judgment creditor and the commissioner of motor vehicles of New York from suspending his license to drive and his certificate of registration for failure to satisfy judgment in automobile accident case on ground of unconstitutionality of statute authorizing them to do so, a statutory three-judge court was required to be convened to hear the case against the commissioner.—Reitz v. Mealey, D.C.N.Y., 34 F.Supp. 532—Healey v. Murnaghan, D.C.N.Y., 34 F.Supp. 203.

Injunction by statutory court against proceedings in state court to enforce local statutes or regulations repugnant to the federal Constitution see Courts § 543 b.

85. U.S.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771.

Purpose of statute

The purpose of the statute was to require three judges to determine the issuance of injunctions suspending the enforcement of an act of congress on the ground that such act is unconstitutional.—Washington Water Power Co. v. City of Coeur D'Alene, D.C.Idaho, 24 F.Supp. 790.

Statute not retroactive

The statute relates to the issuance or granting of such injunctions in the first instance, and not to a permanent injunction already issued by a final decree.—Washington Water Power Co. v. City of Coeur D'Alene, supra.

Distinguished from cases under 28 U.S.C.A. § 380

Apart from the fact that one deals with an attack on a state statute and the other with an attack on a federal statute, § 380a is distinguishable from § 380 in that it is inapplicable to attacks on administrative regulations and orders.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771.

86. U.S.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 80 F.2d 322, which reversed, D.C., 27 F.2d 1005—Ex parte Collins, Ariz., 48 S.Ct. 585, 277 U.S. 565, 72 L.Ed. 990—Cannonball Transp. Co. v. American Stages, D.C.Ohio, 53 F.2d 1050—Green v. Hart, D.C.Conn., 41 F.2d 854—United Drug Co. v. Graves, D.C.Ala., 34 F.2d 808—Rorick v. Board of Com'rs of Everglades Drainage Dist., D.C.Fla., 27 F.2d 377—Connecting Gas Co. v. Imes, D.C.Ohio, 11 F.2d 191—Hume v. Mahan, D.C.Ky., 1 F.Supp. 142, reversed on other grounds Mahan v. Hume, 53 S.Ct. 223, 287 U.S. 575, 77 L.Ed. 505.

As extraordinary procedure

(1) The three-judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended.—International Ladies' Garment Workers Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, mandate conformed to 23 F.Supp. 998, reversed 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—California Water Service Co. v. City of Redding, Cal., 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F. Supp. 641—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 734, 292 U.S. 386, 78 L. Ed. 1318—Ex parte Collins, Ariz., 48 S.Ct. 585, 277 U.S. 565, 72 L.Ed. 990.

(2) "The extraordinary procedure before a court of three judges required by statute in suit to restrain enforcement of state statute by state officers cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action by state officers in enforcement or carrying into effect a challenged state statute of general application."—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 714, 306 U.S. 573, 83 L. Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23.

Strict application of statute

The statute is not a measure of broad social policy to be construed with great liberality, but is an enactment technical in the strict sense of the term and to be applied as such.—Phillips v. U. S., Okl., 61 S. Ct. 480, 312 U.S. 246, 85 L.Ed. 809, vacating, D.C., U. S. v. Phillips, 38 F.Supp. 261.

Assessment of damages

Where three-judge federal district court issued temporary injunction restraining state officials from enforcing state law but dissolved injunction on final hearing, motion of state officials for assessment of damages and costs against the plaintiffs and their injunction bond sureties presented questions for consideration of district court in the exercise of its ordinary jurisdiction and the two judges called in to assist district judge in passing on the application for injunction should not have participated in consideration of the motion to assess damages since the three-judge statutory requirement was inapplicable.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

Special court dissolved

U.S.—Henrietta Mills Co. v. Rutherford County, D.C.N.C., 26 F.2d 799.

Injunction unnecessary

Where bankrupt sought to enjoin judgment creditor and commissioner of motor vehicles of New York from suspending his license to drive and his certificate of registration for failure to satisfy judgment in automobile accident case on ground of unconstitutionality of statute authorizing them to do so, but the commissioner could not act to suspend the license unless creditor requested clerk of court where judgment was rendered to forward a copy of judgment to commissioner, three-judge court, convened because a state official was involved, would not pass on motion against commissioner, but it was for the judge of the bankruptcy court first to dispose of motion against creditor.—Healey v. Murnaghan, D.C.N.Y., 34 F.Supp. 203.

Puerto Rico

(1) Puerto Rico district court is not "a district court of the United States" within the statute requiring convening of three-judge court where constitutionality of federal statute is attacked in any "district court of the United States."—Porto Rico Ry., Light & Power Co. v. Colom, C.C.A. Puerto Rico, 106 F.2d 345, certiorari denied 60 S.Ct. 263, 308 U.S. 617, 84 L.Ed. 516.

tion is presented determine from the bill whether there are present the elements which call for the convening of a three-judge court.[87] A three-judge court need not be convened to hear and determine the application, if the judge to whom it is made determines that the basic elements of a federal court's jurisdiction are absent,[88] or that there is no basis for granting the injunction.[89] If such judge finds that the elements essential to the jurisdiction of a federal district court are absent, he may dismiss the complaint,[90] although on determining that the requisite jurisdiction is present in a case calling for a three-judge court, he may not dismiss the complaint on the merits.[91]

Request for injunction. An application to restrain enforcement of the allegedly unconstitutional statute is an essential factor and must be present to call for convening of a three-judge court.[92] That the constitutionality of a statute is in issue does not of itself bring the case within the requirement.[93]

(2) Puerto Rico is not a state, within a statute inhibiting the granting, until hearing by three judges, of interlocutory injunction restraining action of officers under statute of states, on ground of unconstitutionality of statute.—Benedicto v. West India & Panama Telegraph Co., Puerto Rico, 256 F. 417, 167 C.C.A. 545. Mandamus by supreme court to compel assembly of court see Federal Courts § 199.

87. U.S.—California Water Service Co. v. City of Redding, Cal., 68 S. Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F.Supp. 641—J. B. Schermerhorn, Inc., v. Holloman, C.C.A.Okl., 74 F.2d 265, certiorari denied 55 S.Ct. 548, 294 U. S. 721, 79 L.Ed. 1253—U. S. Building & Loan Ass'n v. McClelland, D. C.Colo., 6 F.Supp. 299.

"District judge is authorized to determine, before going to the expense and trouble of assembling such court, whether the relief sought could be granted."—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340, 342.

Determination of jurisdiction

Presence of three judges to pass on initial question of jurisdiction in the district court is unnecessary where such court is asked to grant interlocutory injunction suspending or restraining enforcement of state statute on ground of its unconstitutionality.—Ex parte Poresky, 54 S. Ct. 3, 290 U.S. 30, 78 L.Ed. 152.

88. U.S.—Poresky v. Ryan, C.C.A. Mass., 82 F.2d 311, certiorari denied 56 S.Ct. 678, 298 U.S. 654, 80 L.Ed. 1380, rehearing denied 56 S. Ct. 936, 298 U.S. 692, 80 L.Ed. 1409—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—U. S. Building & Loan Ass'n v. McClelland, D.C. Colo., 6 F.Supp. 299.

Substantial claim

Where petition to convene three-judge court does not present sufficient facts showing that there is real substance to the claim, district judge may dismiss for want of jurisdiction.—Farr v. O'Keefe, D.C.Miss., 27 F.Supp. 216.

89. U.S.—Independent Gin & Warehouse Co. v. Dunwoody, D.C.Ala., 30 F.2d 306, affirmed, C.C.A., 40 F. 2d 1—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340.

Basis for injunctive relief must be found to exist before judge to whom application for three-judge court is made may convene such court.—Independent Gin & Warehouse Co. v. Dunwoody, D.C.Ala., 30 F.2d 306, affirmed, C.C.A., 40 F.2d 1—Farr v. O'Keefe, D.C.Miss., 27 F.Supp. 216.

90. U.S.—Poresky v. Ryan, C.C.A. Mass., 82 F.2d 311, certiorari denied 56 S.Ct. 678, 298 U.S. 654, 80 L.Ed. 1380, rehearing denied 56 S.Ct. 936, 298 U.S. 692, 80 L.Ed. 1409—Republic Acceptance Corporation v. De Land, D.C.Mich., 275 F. 632—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—U. S. Building & Loan Ass'n v. McClelland, D.C. Colo., 6 F.Supp. 299.

Exercise of caution

Single district judge should not deny complainant opportunity to be heard by three judges on the question that is fairly open to debate, but may dismiss for want of jurisdiction where question of unconstitutionality of state statute presented as ground for interlocutory injunction lacks necessary substance and no other ground of jurisdiction appears.—Ex parte Porasky, Mass., 54 S.Ct. 3, 290 U.S. 30, 78 L.Ed. 152—Pullen v. Patton, D.C.Tex., 19 F. Supp. 340.

Indispensable party missing

Although single judge should not dismiss complaint on merits where interlocutory injunction is sought on constitutional grounds, he should scrutinize the complaint carefully to ascertain whether a substantial claim of unconstitutionality has been presented, and hence should have granted motion by secretary of interior to dismiss injunction action by Indian tribe on ground that United States was an indispensable party.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 178.

91. U.S.—Ex parte Poresky, 54 S.Ct. 3, 290 U.S. 30, 78 L.Ed. 152—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005—Ex parte Northern Pac. Ry. Co., 50 S. Ct. 70, 280 U.S. 142, 74 L.Ed. 233, mandamus granted 50 S.Ct. 187, 280 U.S. 530, 74 L.Ed. 596—McCormick & Co. v. Brown, C.C.A.W.Va., 52 F.2d 934—Brucker v. Fisher, C. C.A.Mich., 49 F.2d 759, dismissing appeal, D.C., Fisher v. Brucker, 41 F.2d 774.

Extent of power

"If an application for an interlocutory judgment is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. . . . His authority is strictly limited to granting . . . a temporary restraining order . . . pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty . . . to call two other judges, as the statute directs, to assist him in hearing and determining that application."—Stratton v. St. Louis Southwestern R. Co., Ill., 51 S.Ct. 8, 10, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005.

92. "The entire procedure prescribed . . . turns on the presentation of an application for an injunction to restrain the enforcement of a federal statute. It is when such application is presented to a judge that the participation by two other judges is required."—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 879, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, mandate conformed to 23 F.Supp. 998, reversed 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

93. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra.

In the case of an act of congress the application must under 28 U.S.C.A. § 380 a be for either a temporary or permanent injunction. In the case of an attack on a state statute or administrative order, the three-judge court must be convened only where an application for a preliminary or interlocutory injunction is made and pressed to a hearing,[94] an application for a permanent injunction being insufficient to bring the case within the requirements of the statute.[95]

The court cannot be convened to hear incidental motions in the course of an action,[96] nor can it be convened in a habeas corpus proceeding.[97]

Claim of unconstitutionality. The procedure which calls for the intervention of a three-judge court where the constitutionality of a federal or state statute, or state administrative order, is involved being extraordinary,[98] a substantial claim or question of unconstitutionality must be present to justify convening such a court to consider the application for an injunction against enforcement of such a statute or administrative order.[99] Con-

94. U.S.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249—Public Service Commission of Wisconsin v. Wisconsin Telephone Co., Wis., 53 S.Ct. 514, 289 U.S. 67, 77 L.Ed. 1036—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005—Smith v. Wilson, Tex., 47 S.Ct. 385, 273 U.S. 388, 71 L.Ed. 699, dismissing appeal, D.C., 13 F.2d 1007—New York State Electric & Gas Corporation v. Public Service Commission of New York, C.C.A.N.Y., 102 F.2d 453—Ross v. Goodwin, D.C.N.H., 40 F.2d 532—Bartlett Trust Co. v. Elliott, D.C.Mo., 30 F.2d 700, affirmed, C.C.A., 40 F.2d 351—Mills v. Board of Education of Anne Arundel County, 30 F.Supp. 245—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N.Y., 29 F. Supp. 486—Mills v. Lowndes, D.C. Md., 26 F.Supp. 792—Film Transport Co. v. Michigan Public Utilities Commission, D.C.Mich., 17 F. Supp. 857—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D. C.S.C., 280 F. 901.

Decision unnecessary

U.S.—Brucker v. Fisher, C.C.A.Mich., 49 F.2d 759, dismissing appeal, D. C., Fisher v. Brucker, 41 F.2d 774.

After denial of application

Where three-judge district court denied interlocutory injunction sought by utility to enjoin enforcement of order of public service commission of Indiana fixing temporary schedule of water rates, and utility, after commission's adoption of permanent schedule, filed amended bill assailing permanent rates as confiscatory under Fourteenth Amendment, but not seeking an interlocutory injunction, case was properly heard in district court by a single judge.—McCart v. Indianapolis Water Co., 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336, modifying, C.C.A., Indianapolis Water Co. v. McCart, 89 F.2d 522, reversing, D.C., 13 F.Supp. 110, certiorari granted McCart v. Indianapolis Water Co., 58 S.Ct. 14, 302 U.S. 665, 82 L.Ed. 513.

Constitutionality as sole question

Where sole question for determination in a criminal case is the constitutionality of a state statute, a single district court judge has jurisdiction of case.—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N. Y., 29 F.Supp. 486.

95. U.S.—Film Transport Co. v. Michigan Public Utilities Commission, D.C.Mich., 17 F.2d 857—Mills v. Board of Education of Anne Arundel Co., D.C.Md., 30 F.Supp. 245—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D.C.S.C., 280 F. 901.

After denial of preliminary injunction

Where, after denial of petition for interlocutory injunction, plaintiff filed in same suit amended and supplemental bill seeking permanent injunction, continuance of three-judge court, which heard application for interlocutory injunction, was not required.—Indianapolis Water Co. v. McCart, D.C.Ind., 13 F.Supp. 107.

96. "This cumbersome method is not in terms nor in reason extended to include . . . pleas to jurisdiction, motions to dismiss for insufficiency of the complaint, or other motions incidental to progress of the suit."—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of Montana, D.C.Mont., 34 F.2d 295, 297.

Motion to dismiss

The requirement of the three judges is inapplicable on motion to dismiss the complaint, which is equivalent to a demurrer to the whole bill, since, if the motion be refused, and no answer be interposed, the decree would be final, and a final injunction would issue.—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D.C. S.C., 280 F. 901.

Motion to vacate dismissal

District judge was held without authority to call three-judge court to vacate his dismissal of suit to enjoin state commission from enforcing order.—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of Montana, D.C.Mont., 34 F.2d 295.

97. U.S.—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N. Y., 29 F.Supp. 486.

98. U.S.—Acret v. Harwood, D.C. Cal., 41 F.Supp. 492.

99. U.S.—California Water Service Co. v. City of Redding, Cal., 58 S. Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F.Supp. 641—Ex parte Poresky, 54 S.Ct. 3, 290 U. S. 30, 78 L.Ed. 152—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L. Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005—City of Springfield v. U. S., C.C.A.Mass., 99 F.2d 860, affirming U. S. v. City of Springfield, D.C., 22 F.Supp. 672, certiorari denied City of Springfield v. U. S., 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—Poresky v. Ryan, C.C.A.Mass., 82 F.2d 311, certiorari denied 56 S.Ct. 678, 298 U.S. 654, 80 L.Ed. 1380, rehearing denied 56 S.Ct. 936, 298 U.S. 692, 80 L.Ed. 1409—United Drug Co. v. Graves, D.C.Ala., 34 F.2d 808—Columbia Terminals Co. v. Lambert, D.C.Mo., 30 F.Supp. 28, vacated on other grounds 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 983, and Public Service Commission of State of Missouri v. Columbia Terminal Co., 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 984—Acret v. Harwood, D.C.Cal., 41 F.Supp. 492—Rok v. Legg, D.C. Cal., 27 F.Supp. 243—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—U. S. Building & Loan Ass'n v. McClelland, D.C.Colo., 6 F.Supp. 299—Chapman v. Boynton, D.C.Kan., 4 F.Supp. 43.

"The jurisdiction of the three-judge court rests on a substantial claim that the statute . . . is unconstitutional."—Modern Woodmen of America v. Casados, D.C.N.M., 15 F.Supp. 483, 487.

How determined

(1) Allegations of bill alone determine the existence of a substantial question as to the constitutionality of a state statute, which would

vening such a court is unnecessary when only the construction[1] or application[2] of a statute is involved.

State statute or administrative order. In the case of a statute or administrative order under Judicial Code § 266, 28 U.S.C.A. § 380, by the unconstitutionality of a statute is meant that the statute is in conflict with the federal Constitution[3] or federal statute,[4] but not that it is invalid under the state constitution.[5] In determining the application of the requirement for a three-judge court, regard must be had to the nature of the statute enforcement of which is to be restrained.[6] Under Judicial Code § 266, 28 U.S.C.A. § 380, the court must be convened, and can take jurisdiction, only when the constitutionality of a state statute[7] is involved, and the state

justify a three-judge federal court in taking jurisdiction.—Liberty Nat. Life Ins. Co. v. Read, D.C.Okl., 24 F.Supp. 103—Chapman v. Boynton, D.C.Kan., 4 F.Supp. 43.

(2) Lack of a substantial question of constitutional law may appear either because it is obvious from reading of the statute, or because it so clearly results from previous decisions of supreme court as to foreclose the subject.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F. Supp. 179.

Diversity of citizenship is insufficient to confer jurisdiction on three-judge court in the absence of a substantial claim of unconstitutionality. —Wylie v. State Board of Equalization of California, D.C.Cal., 21 F. Supp. 604.

Statutes formerly upheld

(1) A substantial claim of unconstitutionality is not presented with regard to a statute of a type which has uniformly been upheld by earlier decisions.—Rok v. Legg, D.C.Okl., 27 F.Supp. 243.

(2) Where statute is of long standing and has been often before courts, which have repeatedly rejected claims of its unconstitutionality, there is no occasion for invoking extraordinary remedy of three-judge court to determine constitutionality thereof.—Acret v. Harwood, D.C.Cal., 41 F.Supp. 492.

Abandonment of constitutional question

A suit to enjoin the enforcement of an order of the National Mediation Board is not one requiring a three-judge court as seeking to enjoin the enforcement of an act of Congress on constitutional grounds, where, although raised in the pleadings, the constitutional question has been abandoned and is not pressed. —Hudson & M. R. Co. v. Hardy, D. C.N.Y., 22 F.Supp. 105, reversed on other grounds, C.C.A., 103 F.2d 327, certiorari denied Hudson & M. R. Co. v. Cahill, 59 S.Ct. 1038, 307 U. S. 640, 83 L.Ed. 1521.

1. U.S.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L. Ed. 1249—Hobbs v. Pollock, Kan., 60 S.Ct. 83, 280 U.S. 168, 74 L.Ed. 353—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361.

Federal statute

Under Judicial Code § 266, 28 U.S. C.A. § 380, a three-judge court is not necessary for determination of question of construction of federal statute.—Query v. U. S., S.C., 62 S.Ct. 1122, 316 U.S. 486, 86 L.Ed. 1616, vacating, C.C.A., 121 F.2d 631, affirming, D.C., U. S. v. Query, 37 F. Supp. 972, certiorari denied 62 S. Ct. 295, 314 U.S. 685, 86 L.Ed. 548, vacated on other grounds 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733, certiorari granted 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733.

2. U.S.—D. A. Beard Truck Line Co. v. Smith, D.C.Tex., 12 F.Supp. 964.

3. U.S.—Joyner v. Browning, D.C. Tenn., 30 F.Supp. 512—Cook v. Burnquist, D.C.Minn., 242 F. 321.

4. "It is prescribed by the federal Constitution that it and the laws and the treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional."—Michigan Cent. R. Co. v. Michigan Public Utilities Commission, D.C.Mich., 271 F. 319, 321.

5. U.S.—Cook v. Burnquist, D.C. Minn., 242 F. 321.

6. U.S.—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361.

7. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249—Gully v. Interstate Natural Gas Co., Miss., 54 S.Ct. 565, 292 U.S. 19, 78 L. Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F. Supp. 697—Ex parte Williams, Neb., 48 S.Ct. 523, 277 U.S. 267, 72 L.Ed. 877—Martin v. Producers Pipe Line Co., C.C.A.Ky., 113 F.2d 817—City of Springfield v. U. S., C.C.A.Mass., 99 F.2d 860, affirming, D.C., U. S. v. City of Springfield, 22 F.Supp. 672, certiorari denied City of Springfield v. U. S., 59 S. Ct. 592, 306 U.S. 650, 83 L.Ed. 1049 —Douglass v. Pan-American Bus Lines, C.C.A.Fla., 81 F.2d 222— Green v. Hart, D.C.Conn., 41 F.2d 854—Ross v. Goodwin, D.C.N.H., 40 F.2d 532—Grigsby v. Harris, D.C.Tex., 27 F.2d 945—U. S. ex rel. Murphy v. Warden of Clinton Prison, D.C.N.Y., 29 F.Supp. 486— Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F. Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361—D. A. Beard Truck Line Co. v. Smith, D.C.Tex., 12 F.Supp. 964—In re Manbeach Realty Corporation, D.C.N.Y., 10 F.Supp. 523—Quaker Baking Co. v. Herring, D.C.Iowa, 3 F.Supp. 118—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D.C. S.C., 280 F. 901—Lykins v. Chesapeake & O. Ry. Co., Ky., 209 F. 573, 126 C.C.A. 395.

Applicability of statute immaterial

Where action for injunction was brought on the theory that statute was constitutional, but consent decree settled all issues except one as to whether the act was applicable, the statute requiring three-judge federal district court was no longer applicable.—Green v. Phillips Petroleum Co., C.C.A.Iowa, 119 F.2d 466 reversing, D.C., Standard Oil Co. v. Green, 34 F.Supp. 30.

State statute conflicting with federal statute

A suit by manufacturer of processed or renovated butter, to restrain officers of Alabama department of agriculture from seizing country or packing stock butter moving in interstate commerce into manufacturer's Alabama plant for renovating and processing, was for district judge as a single judge and was not for a three-judge court, where manufacturer did not attack constitutionality of Alabama statutes relating to renovated butter, but merely asserted that Congress had preempted field of manufacture of processed or renovated butter in interstate commerce to exclusion of Ala-

statute in question must be of general application[8] or in the case of an attack on an order of an administrative board or commission acting under such a statute.[9] It is unnecessary in the case of a statute affecting only a particular municipality or district;[10] nor is it necessary in the case of a munici-

bama.—Cloverleaf Butter Co. v. Patterson, C.C.A.Ala., 116 F.2d 227, certiorari granted 61 S.Ct. 834, 313 U.S. 551, 85 L.Ed. 1515, reversed on other grounds 62 S.Ct. 491, 315 U.S. 148, 86 L.Ed. 754.

Direct relationship to statute

Even where a state statute is attacked as unconstitutional, the federal statute, requiring a three-judge court in an action to enjoin a state officer from enforcing a state statute on ground of its unconstitutionality is inapplicable unless the action complained of is directly attributable to the state statute.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249.

Order for martial law

(1) If the action of state officials in declaring martial law and using the state militia is challenged and involves the constitutionality of a state statute or constitution deemed to authorize such action, a three-judge court should take jurisdiction.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375.

(2) If, however, the acts of declaring martial law and calling out the militia are attacked as unlawful without attacking the statute under whose authority the state officials acted, the case is not one calling for a three-judge court.—Phillips v. U.S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U.S. v. Phillips, 33 F.Supp. 261.

Tax assessment

A tax assessment is not an "order" or "statute" within the requirement.—Gully v. Interstate Natural Gas Co., Miss., 54 S.Ct. 565, 292 U.S. 19, 78 L.Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F.Supp. 697—Ex parte Williams, Neb., 48 S.Ct. 523, 277 U.S. 267, 72 L.Ed. 877—Martin v. Producers Pipe Line Co., C.C.A.Ky., 113 F.2d 817—City of Springfield v. U.S., C.C.A.Mass., 99 F.2d 860, affirming, D.C., U.S. v. City of Springfield, 22 F.Supp. 672, certiorari denied City of Springfield v. U.S., 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—J. B. Schermerhorn, Inc., v. Holloman, C.C.A.Okl., 74 F.2d 265, certiorari denied 55 S.Ct. 548, 294 U.S. 721, 79 L.Ed. 1253—St. Louis Southwestern Ry. Co. v. Board of Directors of Red River Levee Dist. No. 1, C.C.A.Ark., 32 F.2d 124—Connecting Gas Co. v. Imes, D.C.Ohio, 11 F.2d 191.

Tax under unconstitutional statute

Suit to restrain state tax commissioner from paying into state treasury taxes paid under protest under statute claimed to violate federal constitution was held properly brought before three-judge court.—Standard Oil Co. of New Jersey v. Fox, D.C.W.Va., 6 F.Supp. 494, reversed on other grounds Fox v. Standard Oil Co. of New Jersey, 55 S.Ct. 333, 294 U.S. 87, 79 L.Ed. 78, and rehearing denied 56 S.Ct. 511, 294 U.S. 732, 79 L.Ed. 1261.

8. U.S.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458.

9. U.S.—Gully v. Interstate Natural Gas Co., Miss., 54 S.Ct. 565, 292 U.S. 19, 78 L.Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F.Supp. 697—Ex parte Williams, Neb., 48 S.Ct. 523, 277 U.S. 267, 72 L.Ed. 877—Green v. Hart, D.C.Conn., 41 F.2d 854—Ross v. Goodwin, D.C.N.H., 40 F.2d 532—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361—Eichholz v. Hargus, D.C.Mo., 23 F.Supp. 587, affirmed Eichholz v. Pacific Service Commission of State of Missouri, 59 S.Ct. 532, 306 U.S. 268, 83 L.Ed. 641—Henderson Co. v. Thompson, D.C.Tex., 12 F.Supp. 519.

Individual as "board" or "commission"

Individual, such as prohibition commissioner of West Virginia, may constitute "state administrative board or commission" within statute requiring three-judge court.—McCormick & Co. v. Brown, C.C.A.W.Va., 52 F.2d 934.

Consent of commission

Where New Jersey statute permitted a compromise of delinquent taxes by municipality and coterminous school district in which municipal finance commission composed of state officers was functioning but made commission's written consent a prerequisite to execution of the compromise which the commission could not command, commission's written consent was not an "order," within meaning of statute requiring suit for interlocutory injunction restraining enforcement of order of a state commission to be heard by court of three judges.—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23.

Notice to attend hearing

Issuance of notices by state industrial board sua sponte to attend hearing to determine board's jurisdiction under state compensation law was held "order" within the statute.—Albee Godfrey Whale Creek Co. v. Perkins, D.C.N.Y., 6 F.Supp. 409.

Tax assessment

Assessment by New Jersey state board of tax appeals was held not "order of administrative body" within statute requiring three-judge federal district court to enjoin enforcement of order of administrative body of state.—Lehigh Valley R. Co. of New Jersey v. Martin, D.C.N.J., 19 F.Supp. 63.

Order of railroad commission

The statute has been held to apply to a suit for a preliminary injunction against enforcement of an order of a state railroad commission on the ground that it violates the federal Constitution.—Ex parte Northern Pac. Ry. Co., Mont., 50 S.Ct. 70, 280 U.S. 142, 74 L.Ed. 233, mandamus granted 50 S.Ct. 157, 280 U.S. 530, 74 L.Ed. 596—Humble Oil & Refining Co. v. Railroad Commission of Texas, D.C.Tex., 35 F.Supp. 573, certiorari granted Railroad Commission of Texas v. Rowan & Nichols Oil Co., 61 S.Ct. 29, vacated on other grounds 61 S.Ct. 343, 311 U.S. 570, 85 L.Ed. 358, followed in Railroad Commission of Texas v. Humble Oil & Refining Co., 61 S.Ct. 347, 311 U.S. 578, 85 L.Ed. 363—Pullman Co. v. Railroad Commission of Texas, D.C.Tex., 33 F.Supp. 675—Henderson v. Terrell, D.C.Tex., 24 F.Supp. 147—Great Northern Ry. Co. v. Nagle, D.C.Mont. 16 F.Supp. 532—Amazon Petroleum Corporation v. Railroad Commission of Texas, D.C.Tex., 5 F.Supp. 633—New York Cent. R. Co. v. Public Service Commission of New York, Second Dist., D.C.N.Y., 268 F. 558.

Order of local officers

City police officers and prosecuting attorney for city court were held not to be administrative board or commission within statute.—Green v. Hart, D.C.Conn., 41 F.2d 854.

Under earlier statute

Before the amendment to the statute by act of March 4, 1913, c 160, 37 U.S.St. at L. p 1013, it was only in the case of a state statute that the three-judge court was required, the statute having no application to a mere order of a board or commission.—Michigan State Telephone Co. v. Odell, D.C.Mich., 288 F. 139.

10. U.S.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458.

pal ordinance,[11] or in the case of an order of a local board,[12] even though, in the case of an ordinance, it was enacted pursuant to a state plan applicable to many localities.[13]

A three-judge court is unnecessary where the attack for unconstitutionality is merely against acts based on a statute whose validity is not attacked.[14] Likewise, it has been held that the three-judge court need not be convened when the constitutionality of a mere department regulation is involved,[15] unless the invalidity of the regulation is based on the invalidity of the statute under which the regulation was promulgated.[16] However, in the case of an administrative order of a board or commission, it has been authoritatively settled by the supreme court that the need for, and jurisdiction of, a three-judge court exists, regardless of whether the case involved the constitutionality of the statute under which the board or commission acted.[17]

Under 28 U.S.C.A. § 380 a, calling for a three-

11. U.S.—Ex parte Collins, Ariz., 48 S.Ct. 585, 277 U.S. 565, 72 L.Ed. 990—Borges v. Loftus, C.C.A.Cal., 87 F.2d 734, certiorari denied 57 S.Ct. 789, 301 U.S. 687, 81 L.Ed. 1344, rehearing denied 57 S.Ct. 928, 301 U.S. 714, 81 L.Ed. 1366—City of Baton Rouge v. Baton Rouge Waterworks Co., C.C.A.La., 80 F.2d 895—Ward Baking Co. v. City of Fernandina, Fla., D.C.Fla., 29 F.2d 789—City of Dallas v. Dallas Telephone Co., C.C.A.Tex., 272 F. 410, certiorari denied 42 S.Ct. 50, 257 U.S. 638, 66 L.Ed. 410, appeal dismissed 42 S.Ct. 185, 257 U.S. 668, 66 L.Ed. 426—City of Des Moines, Iowa v. Des Moines Gas Co., C.C.A.Iowa, 264 F. 506—Birmingham Waterworks Co. v. City of Birmingham, D.C.Ala., 211 F. 497, affirmed 213 F. 450, 130 C.C.A. 96—Cumberland Tel. & Tel. Co. v. City of Memphis, D.C.Tenn., 198 F. 955—Sperry & Hutchinson Co. v. City of Tacoma, C.C.Wash., 190 F. 682.

Reason for rule

An ordinance cannot be considered as included within the word "statute."—Borges v. Loftis, C.C.A.Cal., 87 F.2d 734, certiorari denied 57 S.Ct. 789, 301 U.S. 687, 81 L.Ed. 1344, rehearing denied 57 S.Ct. 928, 301 U.S. 714, 81 L.Ed. 1366—City of Des Moines, Iowa, v. Des Moines Gas Co., C.C.A.Iowa, 264 F. 506—Calhoun v. City of Seattle, D.C.Wash., 215 F. 226.

City resolution

U.S.—Ex parte Collins, Ariz., 48 S.Ct. 585, 277 U.S. 565, 72 L.Ed. 990.

12. U.S.—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437—Ex parte Collins, Ariz., 48 S.Ct. 585, 277 U.S. 565, 72 L.Ed. 990.

Rates fixed by board

An application for a preliminary injunction in a suit to enjoin a municipal board, authorized by the city charter and a city ordinance to regulate telephone rates, from maintaining or prescribing rates so low as to be confiscatory is not within the statute, no attack being made on the constitutionality of any statute. —City of Dallas v. Dallas Telephone Co., C.C.A.Tex., 272 F. 410, certiorari denied 42 S.Ct. 50, 257 U.S. 638, 66 L.Ed. 410, and appeal dismissed 42 S.Ct. 185, 257 U.S. 668, 66 L.Ed. 426.

13. U.S.—Borges v. Loftis, C.C.A.Cal., 87 F.2d 734, certiorari denied 57 S.Ct. 789, 301 U.S. 687, 81 L.Ed. 1344, rehearing denied 57 S.Ct. 928, 301 U.S. 714, 81 L.Ed. 1366.

14. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249—Columbia Terminals Co. v. Lambert, D.C.Mo., 30 F.Supp. 28, vacated on other grounds 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 983, and Public Service Commission of State of Missouri v. Columbia Terminal Co., 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 984—Council of Defense of State of New Mexico v. International Magazine Co., C.C.A.N.M., 267 F. 390.

"An attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority, even though a misreading of the statute is invoked as justification."—Phillips v. U. S., Okl., 61 S.Ct. 480, 484, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261.

Reason for rule

(1) The enforcement of a statute, within the meaning of the statute, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness.—Phillips v. U. S., supra.

(2) On its face, the statute precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever some enactment may be said to authorize the questioned conduct.—Phillips v. U. S., supra.

Acts claimed to be required or authorized

Suits to enjoin state officers from doing acts which are claimed to be authorized and required by the state statutes and constitution have been held properly determinable by the statutory court.—Cox v. McNutt, D. C.Ind., 12 F.Supp. 355—Powers Mercantile Co. v. Olson, D.C.Minn., 7 F. Supp. 865.

Unauthorized acts

U.S.—Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, D.C.S.C., 280 F. 901.

Unconstitutional result

Petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of the state statute which is not attacked as unconstitutional does not require a three-judge court, since in such a case the attack is aimed at allegedly erroneous administrative action.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249.

Motion to dismiss complaint

It is not necessary to convene three judges to hear motion to dismiss on merits bill to enjoin insurance commissioner from revoking foreign company's license, where preliminary injunction sought is not to restrain enforcement of unconstitutional statute.—Firemen's Ins. Co. of Newark, N. J., v. King, D.C.S.C., 54 F.2d 941.

15. U.S.—Sweeney v. State Board of Public Assistance, D.C.Pa., 36 F. Supp. 171, appeal denied 36 F.Supp. 973, affirmed, C.C.A., 119 F.2d 1023.

Reason for rule

The attack on a regulation is aimed only at administrative action, not an invalid statute.—Sweeney v. State Board of Public Assistance, supra.

16. U.S.—Sweeney v. State Board of Public Assistance, supra—Ryan v. Pennsylvania Public Utility Commission, D.C.Pa., 44 F.Supp. 912.

17. U.S.—Prendergast v. New York Telephone Co., N.Y., 43 S.Ct. 466, 262 U.S. 43, 67 L.Ed. 853—Oklahoma Natural Gas Co. v. Russell, Okl., 43 S.Ct. 353, 261 U.S. 290, 67 L.Ed. 659—Louisville & N. R. Co. v. Railroad Commission of Alabama, D.C.Ala., 208 F. 35.

Reason for rule

"The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pur-

judge court where it is sought to enjoin enforcement of a federal statute on the ground of unconstitutionality, it is unnecessary to convene such a court in the case of an attack on a federal administrative regulation or order.[18]

Acts of state officers. In the case of a state statute, the three-judge court is necessary, and can take jurisdiction, only if a preliminary injunction is sought against enforcement of the statute by state officers.[19] There is no need for such a court in the case of local officers,[20] unless the local officers

suant to the statutes of such State' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. . . . The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. . . . But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."—Oklahoma Natural Gas Co. v. Russell, Okl., 43 S.Ct. 353, 354, 261 U. S. 290, 67 L.Ed. 659.

Contra Michigan State Telephone Co. v. Odell, D.C.Mich., 283 F. 139. 32 C.J. p 290 note 38-39.

18. U.S.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 81 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771.

19. U.S.—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23—Blease v. Safety Transit Co., C.C.A.S.C., 50 F.2d 852—Norfolk & W. Ry. Co. v. Board of Public Works of West Virginia, D.C.W. Va., 3 F.Supp. 791.

Requirement as of substance

The rule that statute providing for hearing before three-judge court in suit to restrain enforcement of state statute may be invoked only when the suit is one against state officers is one of substance not of form, and is not satisfied by joining as nominal parties defendant state officers whose action is not the effective means of the enforcement of the challenged statute.—Wilentz v. Sovereign Camp, W. O. W., 59 S. Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F. Supp. 23.

Function as test

(1) The sphere of functions of state officials sued regarding the matter in issue rather than the formal status of the officials sued is decisive of question whether district court of three judges is to be convened to hear application for injunction restraining enforcement of state statute by restraining action of officers of state.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F. Supp. 458.

(2) Thus, a state official, although localized by his geographic activities and the mode of his selection, may, when he enforces a statute which embodies a policy of statewide concern, be performing a "state function" within the statute.—Rorick v. Board of Com'rs of Everglades Drainage Dist., supra.

(3) On the other hand, a state official who is charged with duties under a state statute which is not of statewide concern is not a "state officer" within the statute.—Rorick v. Board of Com'rs of Everglades Drainage Dist., supra.

Inclusion of additional parties does not deprive three-judge court of jurisdiction, if state officers are the parties whose acts are sought to be enjoined.—Reppel v. Board of Liquidation, D.C.La., 11 F.Supp. 799.

Acts of private persons

Statute was held inapplicable to suit to enjoin acts of private persons.—Blease v. Safety Transit Co., C.C.A.S.C., 50 F.2d 852.

District attorney

In automobile dealer's suit to enjoin district attorney of New York County, N. Y., from instituting criminal prosecution under allegedly unconstitutional state statute declaring violations of codes approved under National Industrial Recovery Act to be misdemeanors, district attorney, although classified by another state statute as local officer, and chosen only by electors of county, was held "officer of state" within federal statute requiring three-judge court.—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437.

Federal agents

(1) Suit against agents of federal government to restrain enforcement of regulations applicable to oil industry, promulgated under National Industrial Recovery Act, and to restrain exaction of penalties for violation of regulations, was held not within jurisdiction of statutory three-judge federal district court, under Jud.Code § 266, 28 U.S.C.A. § 380.—Amazon Petroleum Corporation v. Railroad Commission of Texas, D.C.Tex., 5 F.Supp. 633.

(2) Note, however, that under 28 U.S.C.A. § 380 a, a three-judge court is now called for in the case of an injunction against enforcement of a federal statute on the ground of constitutionality.

Other officials held state officers

(1) Governor of state.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227.

(2) State superintendent of insurance.—O'Malley v. U. S., C.C.A.Mo., 128 F.2d 676, affirming, D.C., U. S. v. Pendergast, 39 F.Supp. 189, appeal dismissed Pendergast v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465 and O'Malley v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465, and certiorari granted Pendergast v. U. S., 63 S.Ct. 41, 317 U.S. 608, 87 L. Ed. 494, reversed on other grounds 63 S.Ct. 268, three cases, 317 U.S. 412, 87 L.Ed. 368.

(3) Members of board of commissioners of Port of New Orleans and of board of commissioners of Orleans levee district.—Reppel v. Board of Liquidation, D.C.La., 11 F.Supp. 799.

(4) Commissioner of insurance.—Liberty Nat. Life Ins. Co. v. Read, D.C.Okl., 24 F.Supp. 103.

(5) Railroad commissioners.—Great Northern Ry. Co. v. Nagle, D. C.Mont., 16 F.Supp. 532—Henderson Co. v. Thompson, D.C.Tex., 12 F. Supp. 519.

20. U.S.—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437—Petition of Public Nat. Bank of New York, 49 S.Ct. 43, 278 U.S. 101, 73 L.Ed. 202, discharging rule to show cause In re Public Nat. Bank of New York, 49 S.Ct. 7, 278 U.S. 555, 73 L.Ed. 503, and followed in Ex parte Tomson, 49 S.Ct. 249, 278 U.S. 584, 73 L.Ed. 520—City of Springfield v. U. S., C.C.A.Mass., 99 F.2d 860, affirming, D.C., U. S. v. City of Springfield, 22 F.Supp. 672, certiorari denied City of Springfield v. U. S., 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—J. B. Schermerhorn, Inc., v. Holloman, C.C.A.Okl., 74 F.

are performing a state function in the act sought to be enjoined.[21]

Presence at final hearing. Under Judicial Code § 266, 28 U.S.C.A. § 380, as amended, if the case is one in which a three-judge court must be convened to consider an application for a preliminary injunction, the presence of three judges at the final hearing in the action is also required.[22]

(3) Nature; Extent of Power

The special three-judge court is an enlarged district court, and broadly speaking is subject to the limitations on, and has the powers of, a regular district court.

The three-judge court is nothing more than a district court with the personnel enlarged in the particular kinds of litigation defined by the statute,[23] possessing the same powers as a regular district court.[24] It follows that, in order that a three-judge court may have jurisdiction, there must be

2d 265, certiorari denied 55 S.Ct. 548, 294 U.S. 721, 79 L.Ed. 1253—Pender County v. Garysburg Mfg. Co., C.C.A.N.C., 50 F.2d 732—Green v. Hart, D.C.Conn., 41 F.2d 854—Public Nat. Bank of New York v. Keating, D.C.N.Y., 29 F.2d 621—Henrietta Mills Co. v. Rutherford County, D.C.N.C., 26 F.2d 799—Connor v. Board of Com'rs of Logan County, D.C.Ohio, 12 F.2d 789—Rorick v. Board of Com'rs of Everglades Drainage Dist., D.C. Fla., 27 F.2d 377.

State officers nominal parties

Railroad's suit to enjoin collection of state taxes, in which temporary injunction was sought, was held within jurisdiction of single judge, not three-judge court, where the substantial relief sought was only against county officers, not state officers.—Pleasant v. Missouri-Kansas-Texas R. Co., C.C.A.Kan., 66 F.2d 842, certiorari denied Missouri-Kansas-Texas Ry. Co. v. Pleasant, 54 S.Ct. 376, 291 U.S. 659, 78 L.Ed. 1051.

21. U.S.—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C. Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361.

22. U.S.—Ex parte Northern Pac. Ry. Co., Mont., 50 S.Ct. 70, 280 U.S. 142, 74 L.Ed. 233, mandamus granted 50 S.Ct. 157, 280 U.S. 530, 74 L.Ed. 596.

23. U.S.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179—American Ins. Co. v. Lucas, D.C. Mo., 38 F.Supp. 926, denying new trial 38 F.Supp. 896—Sunshine Anthracite Coal Co. v. Adkins, D.C. Ark., 31 F.Supp. 125—Ziffrin Inc. v. Martin, D.C.Ky., 24 F.Supp. 924.

24. U.S.—Ziffrin Inc. v. Martin, supra.

Duty of judges

A three-judge court hearing application for injunction restraining enforcement of program prescribed under authority of state statute has a duty to declare the law as the judges see the law.—Brown v. Parker, D. C.Cal., 39 F.Supp. 895, reversed on other grounds 63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315.

Equity powers

The statute providing for a federal three-judge court to hear applications for injunction against enforcement of a state statute would not be construed as denying to such court the ordinary powers possessed by and fundamental in every court of equity to protect itself and litigants before it from fraud and imposition respecting such litigation, unless clear expression of such purpose appeared in the language of the statute.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, denying new trial 38 F.Supp. 896.

Power essential to performance of duties

U.S.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, denying new trial 38 F.Supp. 896.

Protection of constitutional rights

(1) A statutory three-judge court has jurisdiction of action to enjoin arrests and prosecutions of members of Jehovah's Witnesses under state statute.—Bevins v. Prindable, D.C. Ill., 39 F.Supp. 708.

(2) A three-judge district court was held to have jurisdiction to restrain future arrests, imprisonment, or prosecution of plaintiffs or other members of Jehovah's Witnesses under color of Kentucky statutes relating to the crime of sedition on account of distributing printed matter, but not to have jurisdiction to restrain or otherwise interfere with prosecutions or other criminal proceedings pending in Kentucky state courts under indictments set out in complaint or otherwise instituted before institution of action.—Beeler v. Smith, D.C.Ky., 40 F.Supp. 139.

(3) The statutory three-judge court had jurisdiction of suit by naturalized citizen and alien to enjoin enforcement of Pennsylvania statute requiring registration of aliens on ground of its unconstitutionality.—Davidowitz v. Hines, D.C.Pa., 30 F. Supp. 470.

Constitutionality of federal statute

A three-judge federal court had jurisdiction of action by a state to enjoin construction of dam pursuant to act of congress, where it is necessary for the court to determine constitutionality of the act.—State of Oklahoma ex rel. Philips v. Guy F. Atkinson Co., D.C.Okl., 37 F.Supp. 93, affirmed 61 S.Ct. 1050, 31 U.S. 508, 85 L.Ed. 1487.

Presumption as to powers

The statutory three-judge court is a "district court," presumably vested with all necessary and proper powers of such a court.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F. Supp. 179.

Limited jurisdiction

The jurisdiction of three-judge court to issue interlocutory injunction restraining enforcement of a state statute, or action of state officer in the enforcement of such statute or in the enforcement of an order of an administrative board acting pursuant to such statute, is limited by statute.—Latta Truck Lines v. Hargus, D.C.Mo., 29 F.Supp. 53.

Court as rate-making body

A statutory three-judge court convened to hear suit to enjoin enforcement of temporary rate order of state public utility commission was not a rate-making body.—Edison Light & Power Co. v. Driscoll, D.C. Pa., 25 F.Supp. 192, reversed on other grounds Driscoll v. Edison Light & Power Co., 59 S.Ct. 715, 307 U.S. 104, 83 L.Ed. 1134, rehearing denied 59 S.Ct. 831, 307 U.S. 650, 83 L.Ed. 1529.

One judge acting for all

It should be noted, under Act April 6, 1943, c 210 § 3, 28 U.S.C.A. § 792, that, in an action calling for a hearing and determination by a three-judge court in the situations specified, any one of the three judges may "perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted," with certain exceptions, subject to review by the full court.

Right of single district judge to issue preliminary injunction after three-judge court determines that such injunction should issue see infra § 205.

Propriety of local district judge approving bond on determination of three-judge court that preliminary injunction be issued see supra § 166 e (5).

Injunction by statutory court as to proceedings in state court see Courts § 543 b.

present such elements as would give a regular district court jurisdiction and power to issue an injunction, in addition to the circumstances which call for the convening of three judges.[25]

25. U.S.—Driscoll v. Edison Light & Power Co., Pa., 59 S.Ct. 715, 307 U.S. 104, 83 L.Ed. 1134, reversing, D.C., Edison Light & Power Co. v. Driscoll, 25 F.Supp. 192, rehearing denied Driscoll v. Edison Light & Power Co., 59 S.Ct. 831, 307 U.S. 650, 83 L.Ed. 1529—Ex parte Joseph Poresky, Mass., 54 S.Ct. 3, 290 U.S. 30, 78 L.Ed. 152—Marsh v. Earle, D.C.Pa., 24 F.Supp. 385—U. S. Building & Loan Ass'n v. McClelland, D.C.Colo., 6 F.Supp. 299—J. & A. Freiberg Co. v. Dawson, D.C.Ky., 274 F. 420, affirmed Dawson v. Kentucky Distilleries & Warehouse Co., 41 S.Ct. 272, 255 U.S. 288, 65 L.Ed. 638.

Diversity of citizenship

Diversity of citizenship is not a requisite of jurisdiction by a three-judge court of an action to enjoin enforcement of a state criminal statute on the ground that the statute deprives plaintiff of rights under the federal Constitution.—Trent v. Hunt, D.C.Ind., 39 F.Supp. 373.

Jurisdictional amount

(1) Three-judge court has jurisdiction of action to enjoin enforcement of state criminal statute on constitutional grounds, regardless of amount in controversy.—Trent v. Hunt, supra.

(2) Statutory three-judge court was held to have jurisdiction of elevator company's suit to enjoin enforcement of state statute and governor's proclamation thereunder imposing embargo on shipment of grain out of state, with respect to amount in controversy, insufficiency of amount not being clearly shown.—Grandin Farmers' Co-op. Elevator Co. of Grandin, N. D. v. Langer, D.C.N.D., 5 F.Supp. 425, affirmed Langer v. Grandin Farmers' Co-op. Elevator Co. of Grandin, N.D., 54 S.Ct. 772, 292 U.S. 605, 78 L.Ed. 1467.

Irreparable injury

(1) Question before court on motion for temporary injunction against enforcement of state statute is whether enforcement of statute pending final hearing would inflict irreparable injury.—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S. Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D.C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44.

(2) A suit brought before statutory three-judge court to restrain enforcement as to plaintiff of raisin marketing program adopted under California Agricultural Prorate Act was within the equity jurisdiction of the court, where complaint alleged and evidence showed threatened irreparable injury to plaintiff's business and threatened prosecutions.—Parker v. Brown, Cal., 63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315, reversing, D.C., Brown v. Parker, 39 F.Supp. 895.

Need for relief

(1) Jurisdiction properly assumed may be lost by a three-judge court where it appears that a prerequisite such as need for relief against state officers is lacking.—Ex parte Bransford, Ariz., 60 S.Ct. 947, 310 U.S. 354, 84 L.Ed. 1249.

(2) A statutory three-judge court would not restrain city officials from enforcing Connecticut statute prohibiting breaches of the peace on ground that city officials misapplied statute, or that statute was in conflict with federal Constitution, since such questions could be raised in criminal prosecution trial where there would be an ample opportunity for a review of the federal questions presented.—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F. Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361.

(3) Where, at time of motion for temporary injunction to restrain state industrial board from proceeding under state Workmen's Compensation Law, board had only issued appearance notices to plaintiff employer and to workmen injured, or representatives of workmen killed, in steamer explosion, it was held that there was no such present and pressing danger to plaintiff as to warrant granting of temporary injunction.—Albee Godfrey Whale Creek Co. v. Perkins, D.C.N.Y., 6 F. Supp. 409.

Speedy remedy in state court

(1) Under the judicial code, the three-judge court would have no jurisdiction to issue a temporary injunction against the enforcement of an order of a state board or commission if a plain, speedy, and efficient remedy in the state courts should be available.—Driscoll v. Edison Light & Power Co., Pa., 59 S. Ct. 715, 307 U.S. 104, 83 L.Ed. 1134, reversing, D.C., Edison Light & Power Co. v. Driscoll, 25 F.Supp. 192, rehearing denied Driscoll v. Edison Light & Power Co., 59 S.Ct. 831, 307 U.S. 650, 83 L.Ed. 1529.

(2) With respect to jurisdiction of statutory three-judge district court of suit to enjoin temporary rate order of Pennsylvania public utility commission, utility's remedy at law by appeal would be ineffective to protect utility's position pendente lite, since supersedeas would not postpone application of temporary rate.—Driscoll v. Edison Light & Power Co., supra.

(3) Under provision of the judicial code prohibiting injunction to stay proceedings in state court, and injunction against collection of a state tax where state courts provide plain, speedy, and efficient remedy, persons in possession of whisky by virtue of chattel mortgage could not maintain suit in three-judge federal court to restrain attachment proceedings in Kentucky circuit court to collect alcohol beverage tax, and to prevent disposing of the whisky attached, although court's equity powers to aid in foreclosure of mortgage were incidentally invoked.—Kohn v. Central Distributing Co., Ky., 59 S.Ct. 689, 306 U.S. 531, 83 L.Ed. 965.

(4) Since the Pennsylvania state courts afford plain, speedy, and efficient remedy by suit for injunction to restrain the collection of an unconstitutional or illegal tax, the federal three-judge court has no jurisdiction of such suit.—Guerra v. City of Philadelphia, D.C.Pa., 30 F.Supp. 791.

Substantial federal question

(1) In a case seeking to restrain enforcement of a state statute or order, or a federal statute, a three-judge court must be convened, and such a court may take jurisdiction, only if a substantial federal question is presented.—California Water Service Co. v. City of Redding, Cal., 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F.Supp. 641.

(2) The question before three-judge court on motion for temporary injunction against enforcement of state statute, where no answer or motion to dismiss had been filed, was not whether the statute was constitutional, or whether enforcement agency had complied with the statute, but whether the showing made raised serious questions under federal Constitution and state law.—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S.Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D.C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44.

Restrictions on district court generally

The restrictions against the issuance of an injunction by a district court contained in the judicial code apply also to the three-judge court.—Driscoll v. Edison Light & Power Co., 59 S.Ct. 715, 307 U.S. 104, 83 L. Ed. 1134, reversing, D.C., Edison Light & Power Co. v. Driscoll, 25 F. Supp. 192, rehearing denied Driscoll v. Edison Light & Power Co., 59 S.Ct. 831, 307 U.S. 650, 83 L.Ed. 1529.

Restrictions in Price Control Act

(1) By express provision of the Emergency Price Control Act of 1942,

When the three-judge court has been convened, it has the power and duty to determine its jurisdiction as such court,[26] and may dismiss the complaint if it should find the elements of jurisdiction lacking.[27]

Once a statutory court is properly convened, it is not restricted to the question of constitutionality, but may consider the cause in all its aspects,[28] it being necessary, in the case of a state statute or administrative order in which the application for a preliminary injunction is properly pressed to a hearing, that the final hearing in the action be held before the three-judge court.[29] Stated otherwise, once the three-judge court is properly convened, its jurisdiction continues until the end, or at least as long as the application has not been withdrawn.[30]

50 U.S.C.A. Appendix, the federal district court, among others, was deprived of jurisdiction to restrain enforcement of such statute, such restriction being applicable to the three-judge district court.—Lockerty v. Phillips, D.C.N.J., 49 F.Supp. 513—Henderson v. Kimmel, D.C.Kan., 47 F.Supp. 635.

(2) Thereunder, only the emergency court of appeals and the supreme court might pass on validity of regulation promulgated under the act, and statutory three-judge court was limited in its consideration of the act, to question of constitutionality thereof.—Henderson v. Kimmel, supra.

Res judicata

(1) A decision by the circuit court of appeals, affirming order of Bituminous Coal Commission denying producer's application for exemption on ground that his coal was not bituminous with respect to which supreme court denied certiorari, was "res judicata" in suit by producer against collector of internal revenue to enjoin collection of tax under the Bituminous Coal Act, and hence three-judge court had no jurisdiction to determine whether producer's coal was "bituminous."—Sunshine Anthracite Coal Co. v. Adkins, Ark., 60 S.Ct. 907, 310 U.S. 381, 84 L.Ed. 1263.

(2) Where state supreme court had upheld constitutionality of particular statute, its judgment was res judicata, and a subsequent action in three-judge court to enjoin enforcement of such statute was equivalent to an appeal from the state court, and hence was improper, since plaintiff's remedy was appeal to the United States supreme court.—Baker Driveaway Co. v. Hamilton, D.C.Pa., 29 F.Supp. 693.

Elements of jurisdiction held present

U.S.—Pavel v. Pattison, D.C.La., 24 F.Supp. 915—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.

Amount in controversy as affecting jurisdiction of district court see Federal Courts § 310 c (4) (a).

26. U.S.—Joyner v. Browning, D.C. Tenn., 30 F.Supp. 512.

Averments of bill control

In determining question of jurisdiction as a court of three judges, court was limited to the averments of unconstitutionality contained in bill, and affidavits filed in support of, and against, the bill could not be considered.—Joyner v. Browning, D. C.Tenn., 30 F.Supp. 512.

Determining limits of jurisdiction

A three-judge court should avoid determining or declaring limits of its power, if not necessary for its decision, and leave performance of that duty to supreme court.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179.

27. U.S.—Osage Tribe of Indians v. Ickes, supra.

As affected by power of single judge

Power of single trial judge to dismiss injunction suit on ground of absence of indispensable party is not necessarily inconsistent with similar power in three-judge court after it has convened, and unnecessary participation of two additional judges would not invalidate the court's action in any event.—Osage Tribe of Indians v. Ickes, supra.

Absence of federal question

(1) In the absence of such a question the special court should dismiss the complaint.—California Water Service Co. v. City of Redding, Cal., 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F.Supp. 641.

(2) The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of the supreme court as to foreclose the subject, with respect to applicability of statutes providing for three-judge courts in suits for injunctions restraining enforcement of state statutes or orders or federal statutes on ground of unconstitutionality.—California Water Service Co. v. City of Redding, supra.

Under earlier statute

(1) Prior to the amendment of the Judicial Code § 266, of Febr. 13, 1925, there were cases holding that the special court was convened only for the sole purpose of determining the application for the preliminary injunction.—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481—J. & A. Freiberg Co. v. Dawson, D.C.Ky., 274 F. 420, affirmed Dawson v. Kentucky Distilleries & Warehouse Co., 41 S. Ct. 272, 255 U.S. 288, 65 L.Ed. 638.

(2) Such court had no power either to sustain or deny a motion to dismiss the suit.—J. & A. Freiberg Co. v. Dawson, supra.

(3) Thus, it was held that, it being doubtful whether officers were state officials, in such a sense as to justify a hearing on an application for temporary injunction three-judge court would merely deny the application for temporary injunction, and, although complainant appeared entitled to no relief, would leave the question of the denial of the bill for determination of the judge of the district.—Silvey v. Commissioners of Montgomery County, D.C.Ohio, 273 F. 202.

28. U.S.—Healey v. Murnaghan, D. C.N.Y., 34 F.Supp. 203.

"Nor do the existence of other grounds of federal jurisdiction and the fact that the court placed the final decision on nonconstitutional grounds affect the jurisdiction of the statutory three-judge court."—Brucker v. Fisher, C.C.A.Mich., 49 F.2d 759, 761, dismissing appeal, D. C., Fisher v. Brucker, 41 F.2d 774.

29. U.S.—Smith v. Wilson, Tex., 47 S.Ct. 385, 386, 273 U.S. 388, 71 L. Ed. 699.

Reason for rule

"The specific purpose of the amendment to section 266 [28 U.S.C. A. § 380] . . . was to end the anomalous situation in which a single District Judge, on the final hearing might reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction."—Smith v. Wilson, supra.

30. U.S.—Brucker v. Fisher, C.C.A. Mich., 49 F.2d 759, dismissing appeal, D.C., Fisher v. Brucker, 41 F.2d 774.

Defendant's voluntary consent to inaction by state officers in lieu of preliminary restraining order, or interlocutory injunction, should not divest three-judge court of jurisdiction.—Brucker v. Fisher, supra.

Restraint in exercise of power

That three-judge court has power

Once convened, the court has power to determine every question involved in the litigation,[31] pertaining to the prayer for an injunction,[32] local as well as federal,[33] and including preliminary matters inextricably tangled with others which the court is required to decide.[34] It has jurisdiction and power to determine the issues raised by the pleadings as well as the application for a temporary injunction,[35] even though the court should first determine that the statute whose constitutionality is chal-

to act does not necessarily mean that it should act, and judicial restraint may be commendable where assertion of power might be destructive of a well-defined purpose of law or declared public policy.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179.

31. U.S.—Railroad Commission of California v. Pacific Gas & Electric Co., Cal., 58 S.Ct. 334, 302 U.S. 388, 82 L.Ed. 319—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227.

On refusal of injunction

Statutory three-judge federal court had jurisdiction to entertain proceeding to restrain Agricultural Prorate Commission and its zone agent from putting into effect California State Prorate Act on the ground that such act violated the federal Constitution, and to receive full recital of facts in trial of the issues, although it refused to issue an interlocutory injunction.—Mutual Orange Distributors v. Agricultural Prorate Commission of California, D.C.Cal., 30 F. Supp. 937.

32. U.S.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179.

Reason for rule

A three-judge federal district court has jurisdiction to determine every question involved in the litigation pertaining to prayer for injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

Questions of law

Whether the industrial commission of Minnesota applied standards set up in Minnesota Minimum Wage Law, whether it acted within or beyond authority conferred on it by the legislature, and whether its proceedings satisfied constitutional demands of due process, were appropriate questions for judicial decision, and constituted questions of law which three-judge federal court was required to decide.—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.

33. U.S.—Railroad Commission of California v. Pacific Gas & Electric Co., Cal., 58 S.Ct. 334, 302 U.S. 388, 82 L.Ed. 319—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227—Louisville & N. R. Co. v. Garrett, Ky., 34 S. Ct. 48, 231 U.S. 298, 58 L.Ed. 229—Firemen's Ins. Co. of Newark, N. J. v. Beha, D.C.N.Y., 30 F.2d 539, affirmed Firemen's Ins. Co. of Newark, N. J. v. Conway, 49 S. Ct. 184, 278 U.S. 580, 73 L.Ed. 517—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.

Question of state court's jurisdiction

Whether Kentucky circuit court had jurisdiction of attachment suit to recover Kentucky alcohol beverage tax by levy on whisky which was in possession of holder of chattel mortgage thereon was question for that court, to be determined in the attachment suit, rather than for three-judge federal district court in suit to restrain the proceedings.—Kohn v. Central Distributing Co., Ky., 59 S.Ct. 689, 306 U.S. 531, 83 L.Ed. 965.

Construction of state statute

In suit for injunction on ground, among others, of unconstitutionality of state law, three-judge court may determine case as one of statutory construction without deciding constitutional question.—Fisher v. Brucker, D.C.Mich., 41 F.2d 774, appeal dismissed, C.C.A., Brucker v. Fisher, 49 F.2d 759.

Substantial federal question involved

(1) If the three-judge court has jurisdiction because a substantial federal question is presented, the court may consider and determine purely local questions.—California Water Service Co. v. City of Redding, Cal., 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 1323, affirming, D.C., 22 F. Supp. 641—Firemen's Ins. Co. of Newark, N. J. v. Beha, D.C.N.Y., 30 F.2d 539, affirmed Firemen's Ins. Co. of Newark, N. J. v. Conway, 49 S. Ct. 184, 278 U.S. 580, 73 L.Ed. 517.

(2) It has been said, however, that the court is not required to decide such questions.—Firemen's Ins. Co. of Newark, N. J. v. Beha, supra.

34. U.S.—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179.

Preliminary motions

When a three-judge court is properly convened in an injunction case, it has inherent jurisdiction to deal with preliminary motions filed before or after the order convening the court. Under such power it may grant a motion to dismiss the complaint because of a defect in venue.—Hudson & M. R. Co. v. U. S., D.C. N.Y., 28 F.Supp. 137.

35. U.S.—Louisville & N. R. Co. v. Garrett, Ky., 34 S.Ct. 48, 231 U. S. 298, 58 L.Ed. 229—Sovereign Camp, W. O. W. v. Wilentz, D.C. N.J., 23 F.Supp. 23, appeal dismissed Wilentz v. Sovereign Camp, W. O. W., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994—Sovereign Camp, W. O. W. v. Murphy, D.C.Iowa, 17 F.Supp. 650.

On application for preliminary injunction

(1) On an application for an interlocutory injunction, the court is not required to determine finally the issues of law tendered by the pleadings.—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370—Seaboard Air Line R. Co. v. Railroad Commission of Georgia, D.C.Ga., 213 F. 27, 129 C.C.A. 613, affirmed 36 S. Ct. 260, 240 U.S. 324, 60 L.Ed. 669.

(2) Where complainant waives his prayer for an injunction pendente lite and goes to trial on the merits, one judge may try and decide the case.—Seaboard Air Line R. Co. v. Railroad Commission of Georgia, supra.

Dismissal of suit

The statutory three-judge district court had jurisdiction to entertain motion to dismiss suit to enjoin enforcement of Alcoholic Beverage Control Law of Kentucky, where it was necessary, in passing on sufficiency of pleading, to determine whether or not statute contravened federal constitutional provisions.—Ziffrin, Inc., v. Martin, D.C.Ky., 24 F. Supp. 924.

Stipulation for submission

Although three-judge federal district court had jurisdiction of suit attacking constitutionality of rules of Texas railroad commission relating to oil wells, any other questions between plaintiff and intervening oil companies presented by pleadings were to be decided by sitting judge of district in accord with agreement.—Whittington v. Smith, D.C.Tex., 16 F.Supp. 448.

Piecemeal decision unnecessary

U.S.—Modern Woodmen of America v. Casados, D.C.N.M., 15 F.Supp. 483.

lenged is not applicable.[36]

Improper convening of court. If the court has been convened in a case not coming within the terms of the statute, it nevertheless has power to dispose of the cause as a regular district court, within the limits of the jurisdiction of such a court,[37] although it is not required to do so,[38] and the better practice in such a case would seem to require the case to be remanded for disposition by a single judge of the district court.[39]

§ 169. —— Preliminary Injunction

a. In general
b. Judges absent or under disability

a. In General

Statutory authority must ordinarily exist for a court or judge to have power to issue a preliminary or temporary injunction.

The jurisdiction or power of a court or judge to issue a preliminary or temporary injunction is purely statutory, and a matter of legislative grant,[40] and without such a statute a court or judge ordinarily has no such power.[41] This power is not

36. U.S.—Modern Woodmen of America v. Casados, supra.

37. "No limitation appears in the statute upon the power of the special court to act with reference to such preliminary questions."—Osage Tribe of Indians v. Ickes, D.C.D.C., 45 F.Supp. 179, 184.

Jurisdiction in emergency court of appeals

A landlord, who sought relief from an order of the administrator of the Office of Price Administration fixing rentals in a defense area as authorized by Emergency Price Control Act of 1942, should have sought relief through a protest or petition for adjustment, and if aggrieved by the administrative decision, through a complaint filed with the emergency court of appeals, as provided by statute, and a statutory three-judge court was without power to award relief to the landlord, a regular district having no such power.—Henderson v. Kimmel, D.C.Kan., 47 F.Supp. 635.

Jurisdiction of court not affected

(1) The fact that three judges were present in a proceeding that did not require three judges would not affect the court's jurisdiction. —O'Malley v. U. S., C.C.A.Mo., 128 F.2d 676, affirming, D.C., U. S. v. Pendergast, 39 F.Supp. 189, appeal dismissed Pendergast v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465 and O'Malley v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465, and certiorari granted Pendergast v. U. S., 63 S.Ct. 41, 317 U.S. 608, 87 L.Ed. 494, reversed on other grounds 63 S.Ct. 268, three cases, 317 U.S. 412, 87 L.Ed. 368.

(2) Such fact does not invalidate the proceedings.—Cannonball Transp. Co. v. American Stages, D.C.Ohio, 53 F.2d 1050.

(3) Thus where three-judge federal district court issued temporary injunction restraining Missouri officials from enforcing Missouri Bus and Truck Law, but court dissolved injunction on final hearing, the fact that it was mistakenly assumed that defendants' motion for assessment of damages and costs against plaintiffs and their injunction bond sureties should be passed on by the district judge in association with the two judges previously called did not of itself invalidate the district court's judgment dismissing the motion.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L. Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

(4) However, it has also been held that the decision of the court must be that of the single district judge in whose court the action originated, not that of a majority of the three judges.—Cannonball Transp. Co. v. American Stages, supra.

38. U.S.—Smith v. Wilson, Tex., 47 S.Ct. 385, 273 U.S. 388, 71 L.Ed. 699 —Cannonball Transp. Co. v. American Stages, D.C.Ohio, 53 F.2d 1050 —Hi-Ball Transit Co. v. Railroad Commission of Texas, D.C.Tex., 27 F.2d 425.

39. U.S.—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 292 U.S. 386, 78 L. Ed. 1318.

Reason for rule

"The nature of the special tribunal of three judges justifies its questioning critically concerning character of any case of which it is called upon to take jurisdiction, and it should refuse to enter upon the trial of matters of which it is not required to take cognizance."—Public Service Commission of State of Missouri v. Brashear Freight Lines, C. C.A.Mo., 114 F.2d 1, 3, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, reversed on other grounds 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

Defect of parties

(1) Where United States, although an indispensable party, was not joined in action by Indian tribe to restrain secretary of interior from paying gas and oil royalties to county treasurer, three-judge court would not act on motion to dismiss the complaint, but remitted the case to single judge for appropriate action.—Osage Tribe of Indians, D.C. D.C., 45 F.Supp. 179, 185.

(2) "The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint, with no support therefor in fact or law . . . 'when it becomes apparent that the plaintiff has no case for three judges . . . their action is no longer prescribed' . . . and in such a case the statute contemplates that a court of three judges shall not continue to act."—Osage Tribe of Indians, supra.

40. Neb.—State v. Greene, 67 N.W. 162, 48 Neb. 327.
N.Y.—Bachman v. Harrington, 77 N. E. 657, 184 N.Y. 458—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355 —City of Buffalo v. Kissinger, 40 N.Y.S.2d 188.
Tex.—Ex parte Richards, 155 S.W.2d 597, 137 Tex. 520—Willacy County Water Control & Improvement Dist. No. One v. Nussbaum, Civ. App., 155 S.W.2d 1023.
32 C.J. p 287 note 89 [a].
"The power to issue temporary injunctions is granted by the Legislature."—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 14, 164 Misc. 355.

Affirmative showing of jurisdiction

It has been held that a temporary injunction or restraining order should not be granted until it affirmatively appears that the court has jurisdiction.—Ames v. Kruzner, 1 Alaska 596—32 C.J. p 289 note 18. Allowance at chambers or in vacation see supra § 168 e.

41. Tex.—Ex parte Richards, 155 S. W.2d 597, 137 Tex. 520—Willacy County Water Control & Improvement Dist. No. One v. Nussbaum, Civ.App., 155 S.W.2d 1023.

even, inherently, a part of the jurisdiction of a court of equity.[42] However, under the various statutes the power has been vested in courts of general chancery jurisdiction,[43] in which the action is pending,[44] or in judges thereof,[45] or in other designated judges,[46] or court commissioners,[47] or surrogates.[48]

Judges of courts of limited jurisdiction have been granted power to award injunctions with respect to actions in courts of more general jurisdiction.[49] It has been held, however, that a court having no jurisdiction to grant the final relief asked cannot issue an injunction pendente lite.[50]

Once the jurisdiction of a court is properly invoked, it cannot by arbitrary or erroneous order deprive itself of its jurisdiction to pass on an application for a temporary injunction.[51]

Being a matter of legislative grant, the legislature may impose conditions or restrictions on the exercise of the power,[52] the court having no power to issue the injunction unless the conditions on the exercise thereof are satisfied.[53]

Three-judge federal district court. The treatment of the three-judge district court in 32 Corpus Juris p 290 § 464 was based on the Judicial Code § 266, 28 U.S.C.A. § 380, which calls for the assembling of such a court only if an interlocutory injunction is sought in the cases specified. However, since the enactment of the act of August 24, 1937 c 754 § 3, 50 St. at L. p 752, 28 U.S.C.A. § 380 a, a three-judge court must be convened in the cases specified also where a permanent injunction is sought. Accordingly, such court and its jurisdiction and powers are considered supra § 168 g.

Appellate courts. While, as already shown supra § 168 f appellate courts or judges are ordinarily not vested with original jurisdiction in the matter of granting injunctions, express authority being necessary for the exercise of such jurisdiction, such a court may in the exercise of its appellate jurisdiction award an injunction for the purpose of protecting the subject matter of the appeal,[54] and preserving the status quo of the parties in their relation thereto,[55] so that the judgment rendered will not be ineffectual.[56] Nevertheless, the power to issue the injunction should not be exercised unless it is indispensable to the protection of the rights of the party asking it.[57]

42. N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.
32 C.J. p 287 note 89 [a].

43. N.Y.—Bodenstein v. Saul, 117 N.Y.S. 349, 132 App.Div. 628.
32 C.J. p 288 note 13.

Special term of supreme court of New York
N.Y.—Bodenstein v. Saul, 117 N.Y.S. 349, 132 App.Div. 628—Town of Mamaroneck v. New York Interurban Water Co., 205 N.Y.S. 580, 209 App.Div. 897.

44. N.Y.—City of Buffalo v. Kissinger, 40 N.Y.S.2d 188.

45. N.Y.—City of Buffalo v. Kissinger, supra.
32 C.J. p 288 note 14.

46. Tex.—Thorne v. Moore, 105 S.W. 985, 101 Tex. 205.
32 C.J. p 288 note 14.

Special county judge may grant temporary injunction under statute giving such power to any county judge.—City of Buffalo v. Kissinger, 40 N.Y.S.2d 188.

47. Wis.—Bay Land & Imp. Co. v. Washburn, 48 N.W. 492, 79 Wis. 423.
32 C.J. p 289 note 15.
In case of absence or disability of judge see infra subdivision c of this section.
Powers and functions of court commissioners see Court Commissioners §§ 4–8.

48. N.Y.—Aldinger v. Pugh, 80 N.E. 745, 182 N.Y. 402.

Statute construed
Statute empowering surrogate to enforce payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession belonging to the estate has been construed to empower the surrogate to enjoin, pending the final accounting, an executor from disposing of property claimed to be part of the estate.—In re Ashner's Estate, 246 N.Y.S. 129, 231 App.Div. 127.

49. Va.—Rosenberger v. Bowen, 5 S.E. 697, 84 Va. 660.
32 C.J. p 289 note 17.

50. U.S.—Davidson v. Calkins, C.C. Cal., 92 F. 230.

51. Cal.—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, 21 P.2d 643, 131 Cal.App. 365.

52. N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.
Conditions precedent in general see supra § 164.
Bond or other security as condition precedent see supra § 165.
Conditions on granting or refusing injunction see infra § 202.

53. Mo.—State ex rel. Association for Convalescent Crippled Children v. Cornell, 152 S.W.2d 83, 347 Mo. 1164.
N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

Jurisdictional elements lacking
U.S.—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 186, 308 U.S. 613, 84 L.Ed. 513, rehearing granted 60 S.Ct. 261, 308 U.S. 630, 84 L.Ed. 525, reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876—Purvis v. Bazemore, D.C.Fla., 5 F.Supp. 230.
Special prayer for temporary injunction as prerequisite to its issuance see infra § 182.

54. Neb.—State v. Marsh, 297 N.W. 551, 553, 139 Neb. 290, quoting **Corpus Juris.**
32 C.J. p 289 note 21.

55. Tex.—Gibbons v. Ross, Civ.App., 167 S.W. 17.
32 C.J. p 289 note 22.

However, it has been stated that the appellate court does not grant temporary injunctions, except where the original jurisdiction of the court is involved, in a case expressly refraining from deciding that such court has no jurisdiction to grant injunctions where the original jurisdiction of the court is not invoked.—State ex rel. Cowie v. La Crosse Theaters Co., Wis., 286 N.W. 707.

56. Neb.—State v. Marsh, 297 N.W. 551, 553, 139 Neb. 290, quoting **Corpus Juris.**
32 C.J. p 289 note 23.

57. Neb.—State v. Marsh, 297 N.W.

Questions as to the modification, suspension, granting, or continuance of injunctions by the court pending appeal are discussed in Appeal and Error § 632 f.

b. Judges Absent or under Disability

In case of the absence or disability of the judge to whom an application for a temporary injunction should be made, the power to issue it may, under statutory authority, be exercised by another judge, or a court clerk, or court commissioner.

Within constitutional limits,[58] statutes may provide, and frequently have provided, for the issuance of an injunction by another judge in the event of the absence or disability of the judge to whom an application for injunction should ordinarily be made.[59] Some of the statutes provide for the issuance of the injunction in such a case by a clerk of court,[60] or court commissioners.[61]

Unless the conditions prescribed by statute for the allowance of an injunction by a judge other than the one to whom the application should ordinarily be made exist, an injunction issued by any other judge is void;[62] and his authority to issue an injunction must be exercised in strict accordance with the terms of the statute.[63]

A statute providing that an injunction may be granted by "the District Court or any judge thereof" does not authorize a district judge to grant temporary injunctions throughout the state irrespective of whether the judge of the court in which the action is brought is absent or incapacitated.[64]

§ 170. Venue

a. In general
b. Injunctions to stay proceedings at law

a. In General

In the absence of a statute providing otherwise, the county in which defendant resides is ordinarily the county in which an action for injunction should be brought.

In the absence of statute or court rule providing otherwise, the county in which defendant resides is ordinarily the county in which an action for injunction should be brought.[65] However, where the

551, 553, 139 Neb. 290, quoting **Corpus Juris.**
32 C.J. p 289 note 24.

Matters for discretion of trial court
On affirmance of order overruling demurrer to complaint seeking abatement as nuisance of theater's practice of holding "bank nights," the supreme court would not issue injunctional order restraining defendant from continuing practice pending determination of case in circuit court, such matter being preferably for the trial court.—State ex rel. Cowie v. La Crosse Theaters Co., Wis., 286 N.W. 707.

58. **Master in chancery as ministerial officer**
Because the Constitution prohibits the exercise of judicial power by others than judicial officers, statutes conferring the power to issue injunctions on masters in chancery in case of the absence or disability of regular judges, were held invalid, a master in chancery being held to be a ministerial officer.—Bottom v. City of Edwardsville, 139 N.E. 5, 308 Ill. 68.

59. Ark.—Dobbins Bros. v. Anderson, 135 S.W.2d 325, 199 Ark. 635.
32 C.J. p 289 note 26.

Regular judge disqualified
Tex.—Love v. Worsham, Civ.App., 101 S.W.2d 598—Woodward v. Smith, Civ.App., 253 S.W. 847.

60. Ky.—Commonwealth v. Combs, 86 S.W. 697, 120 Ky. 368, 27 Ky.L. 751.
La.—Witkowski v. Selby, 15 La.Ann. 328.
32 C.J. p 289 note 27.

Disqualification as absence
A judge, disqualified to act in case was held "absent from the county," within statute authorizing clerk of court to grant injunction or temporary restraining order under such circumstances.—Dark Tobacco Growers' Co-op. Ass'n v. Wilson, 267 S.W. 1092, 206 Ky. 550.
Powers of clerks of court see Clerks of Courts §§ 33–47.
Power of deputy clerk see Clerks of Courts § 90.

61. Fla.—McMichael v. Grady, 15 So. 765, 34 Fla. 219.
32 C.J. p 289 note 28.

Absence of judge essential
Court commissioner's power to issue injunction writs exists only when circuit court is absent from county, which should be shown by record.—Walter C. Hardesty, Inc., v. Town of Holly Hill, 131 So. 134, 100 Fla. 1130.
Powers and functions of court commissioners generally see Court Commissioners § 4.

62. Ill.—Bottom v. City of Edwardsville, 139 N.E. 5, 308 Ill. 68.
Tex.—Love v. Worsham, Civ.App., 101 S.W.2d 598—Jones v. Moore, Civ.App., 63 S.W.2d 726—Box v. Oliver, Civ.App., 43 S.W.2d 979—Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 262 S.W. 736, affirming Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675, and reheard Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 267 S.W. 688.
32 C.J. p 290 note 29.

Rule inapplicable
Tex.—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.

63. Tex.—Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 262 S.W. 736, affirming Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675, and reheard Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com. App., 267 S.W. 688.
32 C.J. p 290 note 30.

64. Neb.—Ellis v. Karl, 7 Neb. 381.

65. Ga.—Huling v. Huling, 22 S.E. 2d 832, 194 Ga. 819—Goodman v. Mitcham, 128 S.E. 793, 160 Ga. 546—Morris v. Moseley, 128 S.E. 753, 160 Ga. 536—Dade Coal Co. v. Anderson, 30 S.E. 640, 103 Ga. 809.
Tex.—Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 262 S.W. 736, affirming Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675, and reheard Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com. App., 267 S.W. 688—Sheppard v. Zapp, Civ.App., 120 S.W.2d 898—Guillot v. Godchaux, Civ.App., 73 S.W.2d 924—Lindley v. Easley, Civ. App., 59 S.W.2d 927—Johnson v. State, Civ.App., 267 S.W. 1057—Fannin County Bank v. Lowenstein, Civ.App., 54 S.W. 316.
32 C.J. p 291 note 32.

Loss of right to be sued in county of residence
A mother attempting to violate law at children's domicile by kidnapping them from their father in the county of his residence loses right

county in which suit for injunction must be brought is designated by statute, the statutory requirement must be complied with and a suit for an injunction cannot be brought in any county other than the one so designated;[66] and this is so, although defendants, or part of them, reside in another county.[67] Such statutes are applicable only to cases brought clearly within their provisions;[68] and it has been held that these statutes apply only to a strict bill of injunction, and not to bills seeking other relief to which the injunction sought is merely ancillary.[69] An application for an injunction in aid of an equitable remedy should be made in the same court where the suit is pending.[70]

Venue in injunction actions as dependent on general principles or venue statutes generally is considered in the C.J.S. title Venue § 38, also 67 C.J. p 67 note 20-p 68 note 53.

Waiver. Where a case within the jurisdiction of the court is shown, a statutory privilege granted defendant to be sued in a particular county may be waived by him.[71]

b. Injunctions to Stay Proceedings at Law

Depending on the particular statute, suits for injunction to stay proceedings at law may or must be brought in the county where the proceedings are pending.

Under some statutes suits for injunction to stay proceedings at law may be brought in the county where the proceedings are pending,[72] although no defendant against whom substantial relief is prayed resides there,[73] provided no relief is prayed as to

to be sued for injunction in county claimed as residence; the district court of county, in which husband in lawful custody of children resided, having jurisdiction to restrain such kidnapping.—Wright v. Wright, Tex.Civ.App., 285 S.W. 909.

Resides or may be summoned

Kan.—State v. Miley, 243 P. 262, 120 Kan. 321.

Ky.—Black v. Elkhorn Coal Corporation, 26 S.W.2d 481, 233 Ky. 588.

"Domicile" as meaning "residence"

"Domicile," within the statute providing that certain writs of injunction shall be returned and tried in county of defendant's domicile, means "residence."—Johnson v. State, Tex.Civ.App., 267 S.W. 1057.

Under chancery rule, an application for an injunction should be made in the locality where the cause of action arose.—Scranton Button Co. v. Neonlite Corporation of America, 149 A. 369, 105 N.J.Eq. 708.

Injunction against receiver

(1) A suit for injunction against a receiver should be brought in the county of a receiver's residence, or in the county where the corporation, for which a receiver has been appointed, had its principal office.—Texas Gas Utilities Co. v. City of Uvalde, Tex.Civ.App., 77 S.W.2d 750.

(2) County court had jurisdiction to restrain defendants from interfering with plaintiff's possession of his automobile, if plaintiff's automobile was not same automobile for which receiver was appointed by county court of another county.—Alexander v. Morrison, Tex.Civ.App., 65 S.W.2d 393.

Several defendants

(1) Where an injunction is sought against several defendants, the action may be brought in the county of the residence of one of the defendants against whom substantial relief is prayed.—Hoch v. Candler, 9 S.E.2d 622, 190 Ga. 390—Kaiser v. Kaiser, 175 S.E. 647, 179 Ga. 305—South Georgia Trust Co. v. Barlow, 157 S.E. 326, 172 Ga. 166.

(2) A suit to enjoin execution sale and exercise of power in deed was not maintainable in county where only defendant residing there was the sheriff, who was merely a nominal party, and not a party against whom substantial relief was prayed.—Palmer v. Carson Naval Stores Co., 171 S.E. 262, 177 Ga. 734.

(3) A suit for injunction against joint defendants can be maintained in the county of the residence of one of such defendants.—Sun Cab Co. v. Cloud, 159 A. 922, 162 Md. 419.

66. Pa.—Shinehouse v. Brownmiller, 54 Montg.Co. 368, 52 York Leg. Rec. 124.

W.Va.—Downs v. Lazzelle, 136 S.E. 195, 102 W.Va. 663.

32 C.J. p 291 note 63.

Statute held directory

A statute, providing that where a duty is imposed by statute on a state officer or board, an injunction to restrain performance of duty shall not be granted except by the supreme court sitting at a term in department in which officer or board is located or duty required, has been held directory.—Reimer v. Fullen, 19 N.Y.S.2d 847, 174 Misc. 54—Dairy Sealed v. Ten Eyck, 288 N.Y.S. 641, 159 Misc. 716, reversed on other grounds 289 N.Y.S. 85, 248 App.Div. 352.

67. W.Va.—Wayland Oil & Gas Co. v. Rummel, 88 S.E. 741, 78 W.Va. 196.

68. U.S.—Abe Rafelson Co. v. Tugwell, C.C.A.Ill., 79 F.2d 653.

32 C.J. p 291 note 65.

69. Tex.—Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 267 S.W. 688, rehearing granted 262 S.W. 736, which affirmed Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675—Guillot v. Godchaux, Civ.App., 73 S.W.2d 924—Lindley v. Easley, Civ.App., 59 S.W.2d 927—Dickson v. McLaughlin, Civ.App., 51 S.W.2d 628, error refused—H. C. Burt & Co. v. City of Spearman, Civ.App., 19 S.W.2d 96.

W.Va.—Lewis, Hubbard & Co. v. Pugh, 174 S.E. 880, 115 W.Va. 232.

32 C.J. p 291 note 66.

70. Ky.—McCauley v. Givens, 1 Dana 261.

Tenn.—Deaderick v. Smith, 6 Humphr. 138.

71. **Failure to file plea in abatement**

Va.—Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corporation, 133 S.E. 812, 145 Va. 317.

State officer

Secretary of state, appearing generally and answering suit in court in Baltimore City for injunction against void referendum, waived objections to venue.—Sun Cab Co. v. Cloud, 159 A. 922, 162 Md. 419.

72. Ga.—Huling v. Huling, 22 S.E. 2d 832, 194 Ga. 819—Willie v. Willie, 115 S.E. 257, 154 Ga. 688—Bernstein v. Higginbotham, 96 S.E. 1, 148 Ga. 110—Stone v. King Hodgson Co., 79 S.E. 122, 140 Ga. 487—Beall v. Rust, 68 Ga. 774.

Tenn.—Gregory v. Merchants State Bank, 135 S.W.2d 465, 23 Tenn.App. 567.

32 C.J. p 292 note 72.

Proceedings held not "pending proceedings" within the statute.—Babson v. McEachin, 93 S.E. 292, 147 Ga. 143—Malsby & Co. v. Studstill, 56 S.E. 988, 127 Ga. 726—Meeks v. Roan, 45 S.E. 252, 117 Ga. 865—Townsend v. Brinson, 43 S.E. 748, 117 Ga. 375—Macon Navigation Co. v. Stallings, 35 S.E. 647, 110 Ga. 352—Dade Coal Co. v. Anderson, 30 S.E. 640, 103 Ga. 809—Rounsaville v. McGinnis, 21 S.E. 123, 93 Ga. 579.

73. Ga.—Crawley v. Barge, 63 S.E. 819, 132 Ga. 96.

matters not included in such proceedings.[74]

Under other statutes, suits for injunction to stay proceedings at law must be brought in the county where the proceedings are pending;[75] but this requirement does not apply when the application for the injunction is a mere incident to other relief, to which the injunction sought is merely ancillary.[76] The statutes under consideration apply only to suits in equity which have for their main purpose the enjoining of proceedings at law.[77]

§ 171. Time to Sue, Limitations, and Laches

a. In general
b. Limitations
c. Laches

a. In General

A bill for injunction may be brought before the commencement of a suit at law, pending suit, or after decision by the highest law tribunal. A suit for an injunction must not be brought prematurely.

A bill for injunction may be entertained in equity before the commencement of a suit at law,[78] pending such suit,[79] or after its decision by the highest law tribunal.[80] Where a statute so provides, the pendency of a petition before an administrative agency or officer would not preclude the officer from seeking an injunction to enforce its order.[81]

Prematurity. A suit for an injunction must not be brought prematurely.[82] Prematurity of an injunction suit to restrain state officers from tabulating returns and promulgating the result of an election has nothing to do with the jurisdiction of the court before which it is brought; these questions go to the merits and not to the jurisdiction.[83]

74. Ga.—Huling v. Huling, 22 S.E. 2d 832, 194 Ga. 819—Vining v. Bankers Commercial Security Co., 183 S.E. 494, 181 Ga. 556—Askew v. Bassett Furniture Co., 158 S.E. 577, 172 Ga. 700—Willie v. Willie, 115 S.E. 257, 154 Ga. 688—Amsler v. Lamar & Rankin Drug Co., 92 S. E. 55, 146 Ga. 635—Stone v. King-Hodgson Co., 79 S.E. 122, 140 Ga. 487—Crawley v. Barge, 63 S.E. 819, 132 Ga. 96.

75. Ill.—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
Iowa.—Phelan v. Johnson, 46 N.W. 68, 80 Iowa 727.
Mo.—State ex rel. Terry v. Allen, 271 S.W. 469, 308 Mo. 230, quashing certiorari Terry v. Hague, App., 251 S.W. 77.
N.Y.—Chubbuck v. Morrison, 6 How. Pr. 367.
Tex.—Duncan Coffee Co. v. Wilson, Civ.App., 139 S.W.2d 327, error dismissed—Murchison v. Kulawik, Civ.App., 149 S.W. 354.
32 C.J. p 292 note 76.

76. Ill.—Lester v. Stevens, 29 Ill. 155—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
Mo.—State ex rel. Terry v. Allen, 271 S.W. 469, 308 Mo. 230, quashing certiorari Terry v. Hague, App., 251 S.W. 77—State ex rel. Gabbert v. Lucas, 246 S.W. 208, 295 Mo. 538.
Tex.—Royal Amusement Co. v. Columbia Piano Co., Civ.App., 170 S. W. 278.
32 C.J. p 292 note 77.

77. Mo.—Davison v. Hough, 65 S.W. 731, 165 Mo. 561.

78. Ill.—Meyer v. Surkin, 262 Ill. App. 83.
32 C.J. p 292 note 80.

79. Ill.—Meyer v. Surkin, supra.
32 C.J. p 292 note 80.

80. Ill.—Meyer v. Surkin, supra.
32 C.J. p 292 note 80.

81. U.S.—U. S. v. Andrews, D.C. Mass., 26 F.Supp. 123.

82. U.S.—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666—Cole v. Atlanta Terminal Co., D.C.Ga., 15 F.Supp. 131.
Ind.—Greathouse v. Board of School Com'rs of City of Indianapolis, 151 N.E. 411, 198 Ind. 95.
La.—Durrett Hardware & Furniture Co. v. City of Monroe, 5 So.2d 911, 199 La. 329, 140 A.L.R. 433.
Md.—Hark v. Green, 178 A. 600, 168 Md. 690.
N.J.—Montclair Sav. Bank v. Sylvester, 194 A. 811, 112 N.J.Eq. 518—Grausman v. Porto Rican American Tobacco Co., 122 A. 815, 95 N. J.Eq. 223, affirming 121 A. 895, 95 N.J.Eq. 155.
N.Y.—The Nevins, Inc., v. Boland, 3 N.Y.S.2d 323, 167 Misc. 428.
Tex.—Bird v. Alexander, Civ.App., 294 S.W. 305.
Va.—Yoder v. Givens, 18 S.E.2d 380, 179 Va. 229.

Suits for injunction held not premature

(1) In general.
U.S.—Alton R. Co. v. U. S., Ill., 53 S.Ct. 124, 287 U.S. 229, 77 L.Ed. 275, reversing, D.C., 58 F.2d 399—Darger v. Hill, C.C.A.Cal., 76 F.2d 198, affirming, D.C., Hill v. Darger, 8 F.Supp. 189—Lion Laboratories v. Campbell, C.C.A.N.Y., 34 F.2d 642, followed in D. P. Paul & Co. v. Campbell, 34 F.2d 645, certiorari granted Campbell v. Galeno Chemical Co., 50 S.Ct. 85, 280 U.S. 548, 74 L.Ed. 607, affirmed 50 S. Ct. 412, 281 U.S. 599, 74 L.Ed. 1063. Followed in W. H. Long & Co. v. Campbell, C.C.A.N.Y., 34 F.2d 645, certiorari granted 50 S.Ct. 85, 280 U.S. 548, 74 L.Ed. 607, affirmed Campbell v. W. H. Long & Co., 50 S.Ct. 415, 281 U.S. 610, 74 L. Ed. 1070. Certiorari denied 50 S. Ct. 160, 280 U.S. 611, 74 L.Ed. 654—Paramount Publix Corporation v. Hill, D.C.Wis., 11 F.Supp. 478.
D.C.—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.
Ga.—Marbut v. Hollingshead, 158 S. E. 28, 172 Ga. 531.
Ill.—McAlpine v. Dimick, 157 N.E. 235, 326 Ill. 240.
Ky.—Graham v. Rice, 262 S.W. 968, 203 Ky. 614.
Mo.—Sheetz v. Price, 136 S.W. 733, 154 Mo.App. 574.
N.J.—Scott v. P. Lorillard Co., 154 A. 515, 108 N.J.Eq. 153, affirmed 157 A. 388, 109 N.J.Eq. 417.
N.C.—Patterson v. Durham Hosiery Mills, 200 S.E. 906, 214 N.C. 806.
Pa.—Jaski v. Leider, 34 Pa.Dist. & Co. 480.

(2) Suits to enjoin enforcement of statutes.—Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, Or., 45 S.Ct. 571, 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468, affirming, D.C., Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 F. 928—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U. S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U. S. 671, 68 L.Ed. 499, reheard 44 S. Ct. 123, 263 U.S. 350, 67 L.Ed. 1144—Schwartzman Service v. Stahl, D. C.Mo., 60 F.2d 1034—Southern Pac. Co. v. Peterson, D.C.Ariz., 43 F.2d 198—Gallardo v. Porto Rico Ry., Light & Power Co., C.C.A.Puerto Rico, 18 F.2d 918—Davidowitz v. Hines, D.C.Pa., 30 F.Supp. 470, affirmed Hines v. Davidowitz, 61 S.Ct. 399, 312 U.S. 52, 85 L.Ed. 581—Cleveland v. Davis, D.C.Ala., 9 F.Supp. 337.

83. La.—Gretna v. Bailey, 72 So. 996, 140 La. 363.

b. Limitations

A suit for an injunction must be brought within an applicable statute of limitations.

Where a statute of limitations is applicable, a suit for an injunction must be brought within the prescribed period.[84]

c. Laches

(1) In general
(2) Determination of laches
(3) Delay in conjunction with other circumstances
(4) Excuse for delay

(1) In General

Where a party is guilty of laches or unreasonable delay in applying for an injunction, he may thereby forfeit his claim to such remedy.

It is a well-established rule in equity[85] that, if a party is guilty of laches or unreasonable delay in applying for an injunction, he may thereby forfeit his claim to that special form of remedy.[86] The mere lapse of time, independent of the statute of limitations, may under some circumstances be a sufficient ground for denying an injunction unless a legal excuse for such delay is shown.[87] However, mere delay will not ordinarily defeat the remedy by injunction in support of a legal right, unless it has been continued so long, and under such circumstances, as to defeat the right itself,[88] or where the right of complainant is clear and the injury is of a character which would entitle him to call on a court of equity to interfere without first resorting to law;[89] and in general mere delay short of the period of the statute of limitations will not suffice to constitute laches if the parties have not changed their relative positions.[90]

84. La.—Collins v. McLemore, App., 177 So. 502, followed in McLemore v. Collins, 177 So. 506.
Wash.—Gibson v. Campbell, 241 P. 21, 136 Wash. 467.

85. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652—Fisk v. City of Hartford, 40 A. 906, 70 Conn. 720.
Del.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

86. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331.
Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652—Fisk v. City of Hartford, 40 A. 906, 70 Conn. 720.
Del.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.
Pa.—Soifer v. Stein, 101 Pa.Super. 135.
Tenn.—Saylor v. Trotter, 255 S.W. 590, 148 Tenn. 359, rehearing overruled 257 S.W. 93, 148 Tenn. 375.
Laches as affecting right:
To enjoin breach of contract in general see supra § 80.
To enjoin breach of contract in restraint of trade see supra § 84.
To relief against breach of restrictive covenants relating to use of land see supra § 87.
Laches as an equitable defense see supra § 40.

Injunction against referendum
Neb.—Barkley v. Pool, 169 N.W. 730, 102 Neb. 799.

A mandatory injunction should not be granted where there has been unreasonable delay.—Mercer County Court v. Princeton Power Co., 169 S.E. 450, 113 W.Va. 617—32 C.J. p 72 note 59 [b].

87. Cal.—Rankin v. De Bare, 271 P. 1050, 205 Cal. 639.
32 C.J. p 69 note 32.

"A comparatively short delay might be frought with such dire consequences to a defendant that a court of equity would deny injunctive relief."—Los Angeles Heights Independent School Dist. v. Chestnut, Tex.Civ.App., 287 S.W. 693, 694.

Injunction not barred by lapse of time
A railroad engineer's suit to restrain interference with his seniority rights was not barred by lapse of time, where violation of his rights occurred less than two years prior to filing of suit, and, although ten years had elapsed since agreement fixing seniority rights on merger of railroads had been entered into, engineer was not a party to agreement or entitled to the benefits thereof. —Fine v. Pratt, Tex.Civ.App., 150 S.W.2d 308.

88. U.S.—Menendez v. Holt, N.Y., 9 S.Ct. 143, 128 U.S. 514, 32 L.Ed. 526—J. A. Dougherty's Sons, Distillers v. Kosko Distillers Products Corporation, D.C.Pa., 35 F. Supp. 561.
Hawaii.—Magoon v. Lord-Young Engineering Co., 22 Hawaii 327.
Ind.—Minas Furniture Co. v. Edward C. Minas Co., 165 N.E. 84, 96 Ind.App. 520.
Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.
Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.
32 C.J. p 70 note 33.

89. Ala.—Cobia v. Ellis, 42 So. 751, 149 Ala. 108.
32 C.J. p 70 note 34.

90. U.S.—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188.
Ala.—Cobia v. Ellis, 42 So. 751, 149 Ala. 108.
Hawaii.—Lucas v. American-Hawaii Engineering & Construction Co., 16 Hawaii 80.
Idaho.—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.
Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.
"Injunction should not be denied simply because complainant might have begun his action sooner."—Seaboard All Florida Ry. Co. v. Underhill, 141 So. 306, 307, 105 Fla. 409.

Period of limitations
Under ordinary circumstances, a suit for an injunction will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; however, if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of such suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, equity will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. —Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

Inexcusable delay
In suit for a mandatory injunction to require the removal of structures that encroached on adjoining land, defendant could not complain of delay of adjoining landowner in seeking injunctive relief, where such delay did not extend beyond the time limited by statute for bringing suit, even if delay was inexcusable, if it did not work to his disadvantage.—

Laches cannot be urged as a defense to a suit to enjoin a wrong which is continuing in its nature,[91] or where the laches was not in any way prejudicial to the party setting it up,[92] or where reasonable efforts have been made to obtain settlement;[93] nor is laches necessarily a bar to the right to an injunction where the facts of the case were such as to appeal to the conscience of a court of equity,[94] or where a matter of public interest is involved.[95]

There is authority that delay will not constitute a bar, although complainant has suffered a considerable time to elapse where he has frequently protested to defendant against the doing of the act sought to be enjoined.[96] However, there is also authority that it is immaterial that complainant made assertions of right if no legal steps were taken to establish them,[97] and that a mere threat to take legal proceedings is insufficient to exclude the consequences of laches or acquiescence.[98]

There may be laches in the failure to prosecute with diligence an injunction suit actually commenced as well as by delay in commencing such suit.[99]

In accordance with rules discussed in Equity § 114, the principle of laches may[1] or may not[2] be applicable to the government and its higher officials.

(2) Determination of Laches

Whether injunction is barred by laches or unreasonable delay must be determined from all the facts and circumstances of the particular case.

There is no hard and fast rule as to what constitutes laches barring injunction.[3] As a general rule, whether the remedy is barred must be determined from all the facts and circumstances of the particular case.[4] In any event, complainant cannot

Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.

91. Okl.—Howard v. Mahoney, 106 P.2d 267, 188 Okl. 89.
Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of The Mystic Shrine v. Micheaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.
32 C.J. p 70 note 37.

92. Ind.—Engel v. Mathley, 48 N.E. 2d 468, 113 Ind.App. 458—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.
Ky.—Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 284 Ky. 258—Pilcher v. Stadler, 124 S.W.2d 475, 276 Ky. 450.
Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.
Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418.
N.J.—Henwood v. Jarvis, 27 N.J.Eq. 247.
N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325, reversing 16 N.Y.S.2d 626, 258 App. Div. 328.

93. La.—Anding v. Smith, App., 189 So. 362.

94. Okl.—Muskogee v. Nicholson, 171 P. 1102, 69 Okl. 273.

95. Mont.—Sawyer Stores v. Mitchell, 62 P.2d 342, 103 Mont. 148.

96. Ill.—Rippinger v. Niederst, 148 N.E. 7, 317 Ill. 264.
32 C.J. p 70 note 41.

97. Pa.—Harris v. Susquehanna Collieries Co., 156 A. 159, 304 Pa. 550.

98. Ill.—Hoskins v. Chicago Park Dist., 43 N.E.2d 546, 380 Ill. 78, reversing 35 N.E.2d 525, 311 Ill. App. 98—Cartsens v. City of Wood River, 176 N.E. 266, 344 Ill. 319.
32 C.J. p 70 note 42.

99. Ariz.—McRae v. Lois Grunow Memorial Clinic, 14 P.2d 478, 40 Ariz. 496.
Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.
32 C.J. p 73 note 62.

1. N.J.—Attorney General v. Delaware & B. B. R. Co., 27 N.J.Eq. 1, affirmed 27 N.J.Eq. 631.
32 C.J. p 70 note 44.

2. R.I.—Kane v. Lapre, 33 A.2d 218.
Tenn.—State Board of Examiners for Architects and Engineers v. Rodgers, 69 S.W.2d 1093, 167 Tenn. 374.
32 C.J. p 70 note 45.

3. Del.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

4. Fla.—Seaboard All Florida Ry. Co. v. Underhill, 141 So. 306, 105 Fla. 409.
Pa.—Soifer v. Stein, 101 Pa.Super. 135.
Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, affirming, Civ.App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Micheaux, 47 S.Ct. 472, 273 U. S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931—Los Angeles Heights Independent School Dist. v. Chestnut, Civ.App., 287 S.W. 693.
32 C.J. p 70 note 47.

Computation of time

(1) In determining whether owner of stock was guilty of laches in asking for injunction to prevent transfer by one wrongfully in possession, time would be computed from holder's demand for transfer.—Oden v. King, 113 So. 609, 216 Ala. 504, 54 A. L.R. 1416.

(2) Laches, barring suit to enjoin individuals from committing trespasses by and with void judgment, would date only from trespass. —North Pacific S. S. Co. v. Industrial Accident Commission, D.C.Cal., 23 F. 2d 109.

Injunction held barred by laches

U.S.—Gold Seal Electrical Co. v. Radio Corporation of America, C.C. A.Del., 52 F.2d 849.
Ga.—Wright v. City of Metter, 14 S. E.2d 443, 192 Ga. 75.
Pa.—Herriman v. Wilson, 18 A.2d 670, 341 Pa. 126—Lehman v. Pennsylvania Game Commission, 34 Pa. Dist. & Co. 662, 52 York Leg.Rec. 141—Clark v. City of New Castle, 32 Pa.Dist. & Co. 371, 30 Mun.L.R. 65—Foley v. School Dist. of City of Connellsville, 2 Fay.L.J. 205—Wieczko v. Majszak, 89 Pittsb.Leg. J. 114.
32 C.J. p 70 note 47 [a].

Laches held not shown

U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F. 2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685—Tennessee Min. & Mfg. Co. v. New River Lumber Co., C.C.A. Tenn., 5 F.2d 559—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188—Berger v. McHugh, D.C.Pa., 26 F.Supp. 107.
Ark.—Walton v. McDonald, 97 S.W. 2d 81, 192 Ark. 1155.
Conn.—Fitzgerald v. Merard Holding Co., 147 A. 513, 110 Conn. 130, certiorari denied Merard Holding Co. v. Fitzgerald, 50 S.Ct. 247, 281 U. S. 732, 74 L.Ed. 1148.
Del.—Holland v. National Automotive Fibres, 194 A. 124, 22 Del.Ch. 99.

be held guilty of laches where he acted with such promptness as the circumstances permitted.[5]

(3) Delay in Conjunction with Other Circumstances

Delay in conjunction with other circumstances will frequently operate as a bar to the right to an injunction.

Delay in conjunction with other circumstances will frequently operate as a bar to the right to an injunction.[6]

Assent or acquiescence. When, in addition to the lapse of time, complainant assents by word or conduct to the adverse claim or injurious conduct of defendant, he will as a general rule be deprived of his right to the interference of a court of equity by injunction,[7] at least until after he has established his right at law.[8] However, the remedy by injunction should not be withheld if it appears that complainant's delay in bringing suit has not been such as to show assent to the acts complained of and to their consequences.[9] The acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent not only to the acts of defendant, but also to the injuries to himself which have flowed or can reasonably be anticipated to flow from those acts.[10] Acquiescence in past continuing injuries does not estop one suffering therefrom from enjoining their future continuance.[11]

Whether the right to injunctive relief is affected by acquiescence depends on the circumstances of each case.[12]

Prejudice to defendant. A suitor who by laches has made it impossible[13] or very difficult[14] for a court to enjoin his adversary without inflicting great

Ga.—Redwine v. H. J. Carr & Co., 139 S.E. 1, 164 Ga. 592.
Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108, affirming 262 Ill.App. 189—Rippinger v. Niederst, 148 N.E. 7, 317 Ill. 264—Antillia Protective Ass'n of Chicago v. Wolfsohn, 244 Ill.App. 71.
Ind.—Engel v. Mathley, 48 N.E.2d 463, 113 Ind.App. 458.
Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.
Mass.—Pease v. Parsons, 156 N.E. 4, 259 Mass. 86.
Mich.—City of Lansing v. Dawley, 225 N.W. 500, 247 Mich. 394.
N.J.—Cintas v. American Car & Foundry Co., 25 A.2d 418, 131 N.J.Eq. 419, affirmed 28 A.2d 531, 132 N.J.Eq. 460—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J.Eq. 33.
N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325, reversing 16 N.Y.S.2d 626, 258 App. Div. 328.
Ohio.—Portmann v. Board of Elections of Stark County, 19 N.E.2d 531, 60 Ohio App. 54.
Pa.—Dietz v. Commonwealth, 31 Pa. Dist. & Co. 437, 45 Dauph.Co. 30.
Tenn.—Sawtelle v. Astor, 126 S.W. 2d 367, 23 Tenn.App. 33.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.
32 C.J. p 70 note 47 [b].

Delay held unreasonable

W.Va.—Mercer County Court v. Princeton Power Co., 169 S.E. 450, 113 W.Va. 617.

Delay held not unreasonable

Mass.—Crosby v. Blomerth, 154 N.E. 763, 258 Mass. 221—A. W. Dodd & Co. v. Tarr, 146 N.E. 256, 251 Mass. 189.

5. Minn.—Kanevsky v. National Council K. & L. S., 157 N.W. 646, 132 Minn. 422.
N.J.—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J Eq. 33—Teas v. Third Nat. Bank & Trust Co., 4 A.2d 64, 125 N.J.Eq. 224.
Pa.—Dietz v. Commonwealth, 31 Pa. Dist. & Co. 437, 45 Dauph.Co. 30.

6. U.S.—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188.
W.Va.—Litz v. First Huntington Nat. Bank, 197 S.E. 746, 120 W.Va. 281.
32 C.J. p 71 note 49.

7. U.S.—Adam Hat Stores v. Lefco, C.C.A.Pa., 134 F.2d 101, affirming, D.C., 44 F.Supp. 442.
Iowa.—Ground Lodge A. O. U. W. v. Graham, 65 N.W. 837, 96 Iowa 592, 31 L.R.A. 133.
Mich.—Stott v. Avery, 121 N.W. 825, 156 Mich. 674.
Pa.—Township of Haverford v. Bruno, 29 Del.Co. 307, 31 Mun.L.R. 152.
Tex.—Burrell v. Michaux, Com.App., 286 S.W. 176, 179, affirming, Civ. App., 273 S.W. 874, and certiorari granted Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Micheaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, reversed on other grounds 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.
32 C.J. p 71 note 51, p 72 note 59 [b].

Acquiescence in violation of:
Contract see supra § 80.
Restrictive covenants relating to use of land see supra § 87.

"Laches may be of such duration, and the circumstances may be of such character, as to evidence assent or acquiescence upon the part of the plaintiff in the things complained of, and for that reason preclude relief."—Burrell v. Michaux, supra.

"Acquiescence, although not in the sense of conferring a right on the opposite party, but merely in the sense of depriving the complainant of his right to the interference of a court of equity, will, of course, defeat the application."—Grey v. Ohio & P. R. Co., 1 Grant, Pa., 412, 413.

Actual or passive acquiescence

Del.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.

Assent or acquiescence not shown

Ky.—Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 284 Ky. 258.
Mass.—A. W. Dodd & Co. v. Tarr, 146 N.E. 256, 251 Mass. 189.
Mont.—Butte Miners Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418.
N.J.—Teas v. Third Nat. Bank & Trust Co., 4 A.2d 64, 125 N.J.Eq. 224.
32 C.J. p 71 note 51 [b].

8. N.J.—Higbee v. Camden & A. R. Co., 20 N.J.Eq. 435.
32 C.J. p 72 note 52.

9. Fla.—Seaboard All Florida Ry. Co. v. Underhill, 141 So. 306, 105 Fla. 409.

10. Cal.—Lux v. Haggin, 10 P. 674, 69 Cal. 255.

11. U.S.—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612.
32 C.J. p 72 note 55.

12. Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.

13. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Pa.—Harris v. Susquehanna Collieries Co., 156 A. 159, 304 Pa. 550—Stewart Wire Co. v. Lehigh Coal & Navigation Co., 53 A. 352, 203 Pa. 474.
32 C.J. p 72 note 58.

14. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.

injury on him will be left to pursue his ordinary legal remedy. A court of equity will not grant relief by injunction where the party seeking it, being cognizant of his rights, and the invasion thereof, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements which would render the granting of an injunction against the completion of his undertaking, or the use thereof when completed, a great injury to him.[15] This rule is especially applicable where the object of the injunction is to restrain the completion or use of public works, and where the granting of the injunction will operate injuriously to the public as well as to the party against whom the injunction is sought.[16] The government and quasi-public corporations may avail themselves of the rule as fully as an individual.[17] However, it is essential that complainant should have known of the acts complained of; otherwise the fact that large sums had been expended by defendant will not prevent the award of an injunction.[18]

Prejudice to third persons. When complainant has improperly delayed action until the rights of third persons have intervened and an injunction cannot be granted without substantial injury to such rights, an injunction will be denied[19] on grounds of public policy.[20]

(4) Excuse for Delay

Laches will not bar an injunction if a legal excuse for the delay is shown.

Laches will not bar complainant's right to an injunction if a legal excuse for the delay is shown.[21] For instance, where he has used due diligence and investigated every fact suggested by the surrounding circumstances, ignorance of an essential fact will excuse delay.[22]

Delay pending other proceedings may be excusable.[23]

§ 172. —— Preliminary Injunction

An application for a preliminary injunction must not be brought prematurely.

An application for a preliminary injunction must not be brought prematurely.[24]

In accordance with the rules stated supra § 171 c, the right to a preliminary injunction may be denied for laches.[25]

§ 173. Parties

All persons materially interested in the outcome or the subject matter of a suit for injunction shou.d be made parties.

All persons who are materially interested in the outcome of a suit for an injunction or in the subject matter thereof, or who will be affected by the decree, should be made parties, either as plaintiffs or defendants;[26] but persons not so situated are not

15. Del.—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.
Ill.—Hoskins v. Chicago Park Dist., 43 N.E.2d 546, 380 Ill. 78, reversing 35 N.E.2d 525, 311 Ill.App. 98—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319.
Ind.—Simmons v. Woodward, 26 N.E.2d 37, 217 Ind. 37.
Mich.—Thill v. Danna, 216 N.W. 406, 240 Mich. 595.
Pa.—Stewart Wire Co. v. Lehigh Coal & Navigation Co., 53 A. 352, 203 Pa. 474.
Tex.—Hall v. Stevens, Civ.App., 254 S.W. 610.
Wash.—Johnson v. Schultz, 243 P. 644, 615, 137 Wash. 584, quoting **Corpus Juris.**
32 C.J. p 72 note 59.

Other statements

(1) "Where the delay results in a situation inequitable to alter, equity won't enjoin its continuance if its origin was innocent."—J. A. Dougherty's Sons, Distillers, v. Kasko Distillers Products Corporation, D.C.Pa., 35 F.Supp. 561, 564.

(2) "Any delay that places the party sought to be restrained in a worse position than if there had been prompt action, and lulled him by inaction to expend money which might have been averted by prompt action, may defeat the remedial right."—Los Angeles Heights Independent School Dist. v. Chestnut, Tex.Civ.App., 287 S.W. 693, 694.

16. Pa.—Condron v. Pennsylvania R. Co., 82 A. 64, 233 Pa. 197—Stewart Wire Co. v. Lehigh Coal & Navigation Co., 53 A. 352, 203 Pa. 474.
32 C.J. p 73 note 60.

17. Ark.—Hall v. St. Louis, I. M. & S. R. Co., 194 S.W. 1031, 128 Ark. 437.
N.J.—Traphagen v. Jersey City, 29 N.J.Eq. 206, affirmed 29 N.J.Eq. 650.
32 C.J. p 73 note 61.

18. Pa.—Woelpper v. Pennsylvania Water & Power Co., 95 A. 717, 250 Pa. 559.

19. Ind.—Porter v. Midland R. Co., 25 N.E. 556, 135 Ind. 476.
32 C.J. p 73 note 64.

20. Ind.—Porter v. Midland R. Co., supra.

21. U.S.—Farmers' & Merchants' Bank of Catlettsburg, Ky., v. Federal Reserve Bank of Cleveland, Ohio, D.C.Ky., 286 F. 610.
N.J.—Prudential Ins. Co. of America v. Cafiero, 7 A.2d 882, 126 N.J.Eq. 33.
32 C.J. p 74 note 66.

22. Conn.—Harding v. Stamford Water Co., 41 Conn. 87.
D.C.—Brainard v. Buck, 16 App.D.C. 595.

23. U.S.—Port Richmond & Bergen Point Ferry Co. v. Hudson County, D.C.N.J., 264 F. 998.
32 C.J. p 74 note 68.

24. U.S.—U. S. Industrial Alcohol Co. v. Blair, D.C.Pa., 6 F.2d 658—Klein v. Herrick, D.C.N.Y., 41 F. Supp. 417.
N.Y.—O'Leary v. Rose, 19 N.Y.S.2d 704, 173 Misc. 1092.

25. Laches not shown
U.S.—Betmar Hats v. Young America Hats, C.C.A.N.Y., 116 F.2d 956.

26. U.S.—McCuler v. Super Maid Cook-Ware Corporation, C.C.A. Kan., 62 F.2d 426—Bookbinders' Trade Ass'n v. Book Mfrs.' Institute, D.C.N.Y., 7 F.Supp. 847.
Ill.—Texas Co. v. Hollingsworth, 31 N.E.2d 944, 375 Ill. 536, reversing 27 N.E.2d 67, 304 Ill.App. 607.
Ky.—Summers v. Besterman, 71 S.W. 2d 450, 254 Ky. 231.
Mass.—Bauer v. Mitchell, 142 N.E. 815, 247 Mass. 522.

necessary parties.[27]

Jurisdiction to make particular persons parties is to be determined by the allegations of the pleadings.[28] A plea that a third person is an indispensable party should be overruled where the answer contains evidence refuting the claim on which the contention is based.[29]

All the parties to a contract ordinarily are indispensable parties to a suit to enjoin its performance or enforcement[30] or its breach.[31]

The owners of a judgment or decree are necessary parties to an action to enjoin its enforcement.[32]

Beneficial interests in land. If the injunction is sought to protect an interest in lands, all persons who have a beneficial interest in the land which is the subject matter of the suit should be made parties.[33]

Where an injunction is sought relating to rights in a private or municipal corporation, all persons should be made parties whose legal or equitable interests will be affected by the decree prayed for.[34]

Purchasers, mortgagees, creditors, and others having an interest in the subject matter, which interest was acquired before the institution of the suit for injunction, are necessary parties.[35]

Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.
Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.
Tex.—Estes v. Commissioners Court of Hood County, Civ.App., 116 S.W.2d 826—Taxpayers' Ass'n of Harris County v. Houston Independent School Dist., Civ.App., 81 S.W.2d 815—Glenn v. Connell, Civ. App., 74 S.W.2d 451.
Vt.—American Surety Co. v. Creamery Com'rs, 127 A. 289, 98 Vt. 313.
W.Va.—Moore v. Jennings, 34 S.E. 793, 47 W.Va. 181.
Wis.—Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.
32 C.J. p 293 note 87—21 C.J. p 281 notes 81–83.

"In regard to the nature of the interest, it is wholly unimportant whether it be a legal or an equitable interest of the absent parties in the subject matter of the suit. Story's Eq. Pleading 137. This constitutes one of the leading distinctions between proceedings at law and in equity."—Crawford v. McDaniel, 1 Rob. 473, 481, 40 Va. 473, 481.

All parties claiming interest in money collected by attorney are necessary parties to his suit to enjoin actions therefor.—McLendon v. Truckee Land Co., 114 So. 3, 216 Ala. 586.

In suit to compel issuance of county warrant
Tex.—Kaufman County v. Gaston, Civ.App., 273 S.W. 273.

Payee of note after negotiation
The payee is a necessary party to a bill by the maker of a note against the holder to enjoin a judgment on such note on the ground of fraud in the procurement of the note.—Elston v. Blanchard, 3 Ill. 420.

Bank necessary party
The bank is a necessary party to preserve the fruit of the litigation for its rightful owner in a suit by the holder of a certificate of deposit, to whom it had not been indorsed, to enjoin a suit in detinue for its possession.—Hicks v. Meadows, 69 So. 432, 193 Ala. 246.

27. Cal.—Dickey v. Raisin Proration Zone No. 1, App., 140 P.2d 53.
Ill.—Illinois Power & Light Corporation v. Consolidated Coal Co., of St. Louis, 251 Ill.App. 49.
Tex.—City of Dallas v. Brice, Com. App., 12 S.W.2d 541, affirming Brice v. City of Dallas, Civ.App., 300 S.W. 970.

Incidental aid to others
"The fact that a favorable decree may incidentally aid other persons who are not present, does not require a court of equity to refuse to lend its aid to protect . . . [a party's] interest against an alleged threatened irreparable injury."—Equitable Trust Co. of New York v. Denney, C.C.A.Ind., 24 F.2d 169, 170.

Enjoining action against court officer
In a proceeding to enjoin the prosecution of an action at law against an officer of a court of equity for carrying out his orders, it is immaterial that the persons by whom such actions were instituted are not parties to the suit in the court of equity.—Matter of Merritt, 5 Paige, N.Y., 125, affirming 16 Wend. 405.

28. Ark.—Fels v. Ezell, 35 S.W.2d 359, 183 Ark. 229.

29. Del.—Benjamin Foster Co. v. E. L. Bruce Co., 149 A. 303, 17 Del.Ch. 111.

30. Ala.—Poyner v. Whidden, 174 So. 507, 234 Ala. 168.
Mont.—Board of Railroad Com'rs v. Reed, 58 P.2d 271, 272, 102 Mont. 382, quoting **Corpus Juris.**
Tex.—Bays v. Wright, Civ.App., 132 S.W.2d 144—Christian v. Hood, Civ.App., 19 S.W.2d 621.
21 C.J. p 282 note 91.
Persons entitled to injunction with respect to contract see supra § 94.
Who may be restrained with respect to contract see supra § 95.

Ordinance confirming agreement
All parties to agreement restricting district to white people had litigable interest in suit to enjoin enforcement of ordinance confirming agreement, and were proper parties to suit; and "to the extent that cancellation of the agreement is sought, all persons signing it (at least all subject to the jurisdiction of the court) are necessary parties."—City of Dallas v. Brice, Tex.Com.App., 12 S.W.2d 541, 542, affirming Brice v. City of Dallas, Civ.App., 300 S.W. 970.

31. U.S.—Wall v. Thomas, C.C.N.Y., 41 F. 620.

32. N.Y.—Mumford v. Sprague, 11 Paige 438.
21 C.J. p 281 note 84.

Restraining supplementary proceedings
Judgment creditor was held indispensable party to suit by judgment debtor against judgment creditor's attorney to test constitutionality of a statute and restrain supplementary proceedings thereunder.—McDermott v. Bryer, C.C.A.Mass., 62 F.2d 297.

33. Fla.—McAdoo v. Moses, 132 So. 638, 101 Fla. 936.
W.Va.—Moore v. Jennings, 34 S.E. 793, 47 W.Va. 181.
32 C.J. p 293 note 90.

34. U.S.—Minnesota v. Northern Securities Co., Minn., 22 S.Ct. 308, 184 U.S. 199, 46 L.Ed. 499.
32 C.J. p 293 note 91.

35. N.J.—Schalk v. Schmidt, 14 N.J. Eq. 268.
32 C.J. p 293 note 92.

Trustee under deed of trust or mortgage was held not proper or necessary party to suit by guarantor of payment of bonds to enjoin certain defendants from interfering with plaintiff's possession, where trustee made no objection to such possession and did not assert any right or desire to have possession itself.—Fidelity Bond & Mortgage Co. v. Grand Lodge, I. O. O. F. of Tennessee, C.C.A.Tenn., 41 F.2d 326.

Exceptions to rule. As the object of the rule is to enable the court to administer justice, the court should not permit it to become an instrument for the denial of justice to parties before the court who are entitled to relief.[36] Where it is not practicable to join all the necessary parties, as by reason of their being beyond the process of the court, the court may make such a decree as it can without them.[37]

Purchasers pendente lite. Where title in the subject matter is acquired pendente lite, the party claiming such title need not be joined, but is bound by the decree.[38]

The joinder of unnecessary parties will not prevent the maintenance of the action,[39] as it is without material effect except as to the matter of costs.[40]

§ 174. —— Complainants

Generally all persons interested in the controversy which is the subject of an injunction suit are proper parties, but, where it is impractical to make all of a great many interested persons parties, the court will permit one or more, if their interest fairly represents those not in court, to institute the action on behalf of all concerned.

The general and fundamental rule as to parties in injunction suits is that all persons interested in the controversy which is the subject of the suit should be made parties and such persons are manifestly proper parties.[41] As appears supra § 22, in case the right whose violation is complained of is a public right, it is essential that complainant have some special interest different from that of the public in general, to authorize him to maintain the suit.

Government; public officer. If the government is obstructed in exercising its powers and discharging its duties, it has a right to apply to its courts for any proper assistance by way of injunction; it is the proper party complainant because of its interest in promoting the general welfare.[42] However, the attorney general is not the proper plaintiff to enforce private, as distinguished from public, rights.[43] The state, in the absence of a statute to the contrary, is not a necessary party to a suit to enjoin a corporation from making an improper use of a corporate name.[44]

Suits to enjoin breach of contract. Ordinarily one who is not a party to a contract is not a proper party plaintiff to maintain a suit to enjoin a breach of the contract;[45] but it has been held that a person for whose benefit a restrictive agreement was made is a proper party plaintiff to a suit to enjoin the breach thereof,[46] and that, where the seller of a business covenants not to engage in the same business in the same town for a designated period and the buyers are succeeded by a corporation which carries on the business, the corporation alone may sue to restrain the seller from violating the covenant, although the original buyers are the sole stockholders in the corporation.[47]

Suits by one or more in behalf of all. Where the suit is one in which a great many individuals are interested, and it is impractical to make them all parties, the court will permit one or more of the persons so interested to institute the action in be-

36. U.S.—Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., C.C.Nev., 6 F.Cas.No.2,990, 1 Sawy. 685.
32 C.J. p 294 note 95.

37. U.S.—U. S. v. Parrott, C.C.Cal., 27 F.Cas.No.15,998, McAll. 271.
Ala.—Parkman v. Aircidi, 34 Ala. 393, 73 Am.D. 457.

38. Mass.—Schwoerer v. Boylston Market Assoc., 99 Mass. 285.
32 C.J. p 294 note 98.

39. Mass.—Stodder v. Rosen Talking Mach. Co., 135 N.E. 251, 241 Mass. 245.
N.C.—North Carolina Bd. of Health v. Louisburg Comrs., 91 S.E. 1019, 173 N.C. 250.

40. N.C.—North Carolina Bd. of Health v. Louisburg Comrs., supra.

41. Iowa.—McMurray v. Van Gilder, 9 N.W. 908, 56 Iowa 605.
Pa.—De Blasiis v. Bartell, 18 A.2d 478, 143 Pa.Super. 485.
R.I.—Thresher v. Cuddy-Gardner Co., 165 A. 438, 53 R.I. 175.
Tex.—Moore v. Toyah Valley Irr. Co., Civ.App., 179 S.W. 550.
32 C.J. p 294 note 4.
Persons entitled to injunction:
In general see supra § 35.
Against:
Payment or other disposition of public funds see supra § 122.
Unauthorized contracts of public officers and boards and municipalities see supra § 120.

Lessee

Where complainant had leased the right to trap fur-bearing animals to another, his lessee was not an indispensable party to a bill to enjoin other trappers from trapping on the land.—Nelson v. Hebert, C.C.A. La., 296 F. 445.

Effect of coplaintiffs' transfer of interest

Plaintiff held entitled to continue action to final determination notwithstanding coplaintiffs transferred their interests in property involved, without reservation, to corporation formed by them.—Dunlop v. Sweet Bros. Paper Mfg. Co., 208 N.Y.S. 54, 211 App.Div. 363.

42. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.
32 C.J. p 48 note 54.

43. Mass.—Pease v. Parsons, 156 N. E. 4, 259 Mass. 86.

44. R.I.—Armington v. Palmer, 42 A. 308, 21 R.I. 109, 79 Am.S.R. 786, 43 L.R.A. 95.

45. Mass.—Pennell v. Lothrop, 77 N. E. 842, 191 Mass. 357.
N.D.—Grow v. Taylor, 137 N.W. 451, 23 N.D. 469.

46. U.S.—Bausch & Lomb Optical Co. v. Wahlgren, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., Wahlgren v. Bausch & Lomb Optical Co., 68 F.2d 660, certiorari denied 54 S. Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.

47. Ala.—Knowles v. Jones, 62 So. 514, 182 Ala. 187.
32 C.J. p 295 note 15.

half of all the persons concerned,[48] in order to prevent multiplied and useless litigation.[49] The interest of those who sue must be of such a character as fully and fairly to represent those not in court,[50] and the bill should expressly state that it is filed as well on behalf of such other persons as of those who are actually made plaintiffs.[51]

§ 175. —— Defendants

a. In general
b. United States; governmental subdivisions
c. Public officers
d. Private corporations or associations or officers thereof; stockholders
e. Persons to whom payment of money is sought to be enjoined
f. Persons to whom issuance of bonds is sought to be enjoined
g. Tort-feasors
h. Persons participating in fraud forming basis of suit
i. Persons in representative capacity or represented by others
j. Principal, agents, or employees

a. In General

Persons whose interests will be affected by the decree or without whom a complete settlement of the questions involved could not be attained are proper parties defendant. Persons without whose joinder no effectual decree could be rendered for the complainant are necessary or indispensable parties defendant, as are all persons not plaintiffs who have such an interest that any decree adjudicating the rights of those before the court must necessarily affect their rights; but persons wholly without interest in the suit are neither necessary nor proper parties defendant, and persons whose presence is not essential to a complete settlement of the questions involved, and whose rights will not be affected by the decree, need not be joined.

All persons whose interests will necessarily be affected by the decree,[52] or without whose presence a complete settlement of the questions involved in the action could not be attained,[53] are properly joined as defendants.

Persons without whose joinder no effectual decree could be rendered in complainant's favor are necessary or indispensable parties defendant,[54] since

48. N.D.—Kvello v. Lisbon, 164 N. W. 305, 38 N.D. 71.
32 C.J. p 295 note 26.

49. D.C.—Harkness v. District of Columbia, 8 D.C. 121.

50. Cal.—Gibbons v. Peralta, 21 Cal. 629.
32 C.J. p 296 note 28.

51. N.Y.—Wood v. Draper, 24 Barb. 187, 4 Abb.Pr. 322.
32 C.J. p 296 note 29.

52. U.S.—Detroit Tile & Mosaic Co. v. Mason Contractors' Ass'n, C.C.A. Mich., 48 F.2d 729, reversing, D.C., 38 F.2d 284.
Ala.—Harris v. Theus, 43 So. 131, 149 Ala. 133, 123 Am.S.R. 17, 10 L.R.A.,N.S. 204.
Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
La.—Porter v. Conway, 159 So. 725, 732, 181 La. 487, quoting **Corpus Juris.**
Mo.—School Dist. No. 24 of St. Louis County v. Neaf, 148 S.W.2d 554, 557, 347 Mo. 700, quoting **Corpus Juris.**
Okl.—State ex rel. Tharel v. Board of County Com'rs of Creek County, 107 P.2d 542, 552, 188 Okl. 184, citing **Corpus Juris.**
Tex.—Feldman v. Costa, Civ.App., 171 S.W.2d 200, error refused.
Persons who may be restrained in general see supra § 34.

Real party in interest
Creditors, being real parties in interest, were held properly joined as defendants in suit by surety to enjoin any proceeding against it on account of bond.—American Surety Co. v. Creamery Com'rs, 127 A. 289, 98 Vt. 313.

"Persons unknown"
"The plaintiff had the right to bring an action against 'persons unknown.' The term included Charles C. Brinkley and William Barber when they were shown to have, or claimed, any interest in the matters involved in the suit."—Bell v. Brinkley, 156 S.E. 348, 350, 159 S.C. 171.

Person enjoined as cross defendant
Plaintiff's failure to make party defendant person who was enjoined was held immaterial, where she was made cross defendant, and cross bill also asked for "receiver" and injunction in aid thereof, which were necessary to protection of rights of all concerned.—Zanes v. Mercantile Bank & Trust Co. of Texas, Tex.Civ.App., 49 S.W.2d 922, error refused.

Executor, also made trustee of an interest in testator's property for plaintiff's benefit, was held a proper party defendant in an action to enjoin the probate of a will on the ground that testator had no right to dispose of the property as therein provided.—Cobb v. Hanford, 34 N. Y.S. 511, 88 Hun 21.

53. Ark.—Fels v. Ezell, 35 S.W.2d 359, 183 Ark. 229.
Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
Ga.—Sexton v. MacDougald Const. Co., 168 S.E. 32, 176 Ga. 468—Chase v. Endsley, 140 S.E. 876, 165 Ga. 292.
La.—Porter v. Conway, 159 So. 725, 732, 181 La. 487, quoting **Corpus Juris.**
Mo.—School Dist. No. 24 of St. Louis County v. Neaf, 148 S.W.2d 554, 557, 347 Mo. 700, quoting **Corpus Juris**—Magee v. Pope, 112 S.W.2d 891, 234 Mo.App. 191.
Wis.—Phœnix Mfg. Co. v. White, 135 N.W. 891, 149 Wis. 287.

54. U.S.—California Water Service Co. v. City of Redding, D.C.Cal., 22 F.Supp. 910.
Del.—Peyton v. William C. Peyton Corporation, 187 A. 849, 21 Del.Ch. 299.
Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
La.—Porter v. Conway, 159 So. 725, 732, 181 La. 487, quoting **Corpus Juris.**
Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.
Minn.—Cheney v. Bengtson, 259 N.W. 59, 193 Minn. 586, quoting **Corpus Juris.**
Mo.—School Dist. No. 24 of St. Louis County v. Neaf, 148 S.W.2d 554, 557, 347 Mo. 700, quoting **Corpus Juris.**
Tenn.—Knoxville Milk Producer's Ass'n v. Blake, 102 S.W.2d 64, 171 Tenn. 283.
Tex.—Gordon v. Hawkins, Civ.App., 66 S.W.2d 432.
32 C.J. p 296 note 33.
Stockholder sought to be enjoined from voting stock see Corporations § 558 c.

A stockyards company was an indispensable party to suit for manda-

the court ought not to interfere at all except in a mode which would be effectual for the purpose of the decree.[55] All persons not joined as plaintiffs who have an interest in the controversy presented by the bill of such a nature that any decree completely adjudicating the rights of those before the court must necessarily affect their rights are necessary or indispensable parties defendant without whom the court cannot lawfully proceed.[56] Conversely, it is not necessary to join as defendants persons whose presence is not essential to a complete determination or settlement of the questions involved in the action and whose rights will not be affected by the decree;[57] and persons wholly without interest in the suit are neither necessary nor proper parties defendant,[58] as, for instance, one

tory injunction by packing company to compel railroads delivering livestock to packing company at station on premises of stockyards company to provide packing company with suitable ingress to yard of stockyards company without payment of any charge to that company, since the court, without jurisdiction of the stockyards company, could not enforce such an order against it.—Armour & Co. v. Alton R. Co., D.C. Ill., 27 F.Supp. 625, affirmed, C.C.A., 111 F.2d 913, certiorari granted 61 S.Ct. 40, 311 U.S. 627, 85 L.Ed. 398, affirmed 61 S.Ct. 498, 312 U.S. 195, 85 L.Ed. 771.

55. Del.—Davidson v. Wilson, 3 Del. Ch. 307.
Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
La.—Porter v. Conway, 159 So. 725, 732, 181 La. 487, quoting **Corpus Juris.**
Minn.—Cheney v. Bengtson, 259 N.W. 59, 193 Minn. 586, quoting **Corpus Juris.**
Mo.—School Dist. No. 24 of St. Louis County v. Neaf, 148 S.W.2d 554, 557, 347 Mo. 700, quoting **Corpus Juris.**

56. Ga.—Hermann v. Mobley, 158 S.E. 38, 172 Ga. 380—Gober v. Richards, 128 S.E. 668, 160 Ga. 565.
Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.
Mo.—School Dist. No. 24 of St. Louis County v. Neaf, 148 S.W.2d 554, 557, 347 Mo. 700, quoting **Corpus Juris.**
N.Y.—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413.
Tex.—Taxpayers' Ass'n of Harris County v. Houston Independent School Dist., Civ.App., 81 S.W.2d 815, 818, citing **Corpus Juris**—Glenn v. Connell, Civ.App., 74 S.W.2d 451, 453, citing **Corpus Juris**—City of Dallas v. Couchman, Civ.App., 249 S.W. 234.
Va.—Virginian Ry. Co. v. Echols, 83 S.E. 1082, 117 Va. 182.
W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 131 S.E. 713, 101 W.Va. 73.
Wis.—Manning v. Young, 247 N.W. 61, 210 Wis. 588.
32 C.J. p 296 note 36.

All parties to a contract which plaintiff seeks to have held invalid and performance of which he seeks to restrain are necessary parties defendant.
La.—State ex rel. James H. Aitken & Sons v. Orleans Parish School Board, 182 So. 324, 190 La. 193.
Tex.—Crystal Falls Common School Dist. No. 3 v. Sanders, Civ.App., 54 S.W.2d 834.

A mortgagee's interest cannot be impaired or jeopardized in injunction proceedings against the mortgagor, where the mortgagee is not made a party thereto.—Tobacco Growers' Co-op. Ass'n v. Patterson, 121 S.E. 631, 187 N.C. 252.

Holders of bonds or other evidences of debt

(1) In suit against city to enjoin issuance and sale of bonds as invalid, persons who had purchased bonds before bill was filed were necessary parties, especially where city had already spent part of proceeds of sale.—Alabama Power Co. v. City of Guntersville, 177 So. 332, 235 Ala. 136, 114 A.L.R. 181.

(2) In suits to restrain officials from levying and collecting a tax for the purpose of paying off bonds, warrants, or other evidences of debt, involving questions as to the validity of the obligations, the holders of the bonds, warrants, or other evidences of debt are necessary parties defendant.—Jones v. Clark, Tex.Civ.App., 250 S.W. 217.

(3) Where bonds issued for the creation of a levee district had been sold, in suit to enjoin a later issue for completion of the district the owners of the first bonds were necessary parties.—Dallas County Levee Improvement Dist. No. 3 v. Ayers, Tex.Civ.App., 246 S.W. 1112.

In suit by labor union to enjoin an employer of labor from retaining in its employ any members of the union in arrears in payment of union dues, any members of the union in arrears in payment of union dues were "indispensable parties" defendant since "a final decree cannot be entered without affecting their interests."—Local Union No. B843 of International Brotherhood of Electrical Workers v. Western Public Service Co., 299 N.W. 531, 532, 140 Neb. 186.

57. U.S.—Berger v. McHugh, D.C. Pa., 26 F.Supp. 107.
Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199—Rhynders v. Greene, 8 N.Y.S.2d 143, 255 App. Div. 401—Farulla v. Ralph A. Freundlich, Inc., 274 N.Y.S. 70, 152 Misc. 761—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 54.
Pa.—Farmers' Trust Co. of Lancaster v. Miller, 176 A. 815, 116 Pa. Super. 446.
Tex.—Coleman Gas & Oil Co. v. Santa Anna Gas Co., Civ.App., 58 S.W.2d 540—City of Dallas v. Liberty Annex Corporation, Civ.App., 19 S.W.2d 845, error dismissed.
Wash.—Northern Pac. Ry. Co. v. Richey & Gilbert Co., 232 P. 355, 132 Wash. 526.
32 C.J. p 297 note 37.

Persons contracting with public official

All persons with whom a public official might contract, "if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question;" thus, to a suit to restrain the leasing of Indian land by the secretary of the interior, on the ground of want of authority to make such leases, a person to whom the secretary proposes to make such a lease is not a necessary party defendant.—Cherokee Nation v. Hitchcock, App. D.C., 23 S.Ct. 115, 117, 187 U.S. 294, 47 L.Ed. 183.

Homestead entrymen

In suit to restrain secretary of the interior from putting into effect order requiring state to show nonmineral character of land or have its claim rejected, homestead entrymen who have settled on such lands are not indispensable parties.—Work v. State of Louisiana, 46 S.Ct. 92, 269 U.S. 250, 70 L.Ed. 259, modifying Fall v. State of Louisiana, 287 F. 999, 58 App.D.C. 22.

58. R.I.—Thresher v. Cuddy-Gardner Co., 165 A. 438, 53 R.I. 175.

against whom no relief is sought and whose rights will not be affected by the outcome of the suit.[59] Even persons who are interested in the controversy but whose rights are separable from those of the parties before the court, and who will not be directly and necessarily affected by the decree, are not indispensable parties, and the court may proceed to a decree without them,[60] but they are proper parties and may be joined so that a complete decree may be rendered.[61]

b. United States; Governmental Subdivisions

The United States may or may not be a proper or necessary party defendant in actions for injunctions. Where the interests or property rights of a governmental or civil subdivision, such as a municipal corporation, will be affected if an injunction is granted, generally it should or must be made a party defendant.

Where the interests or property rights of a governmental or civil subdivision, such as a municipality, county, or school district, will be affected in case the injunction asked for is granted, generally it is held that it should or must be made a party defendant.[62] However, such an entity is not an indispensable party where there is no attempt to divest it of a right or to impose an obligation on it,[63] or where it has no substantial interest in the subject matter of the litigation,[64] or a practical and effective decree may be rendered without making it a party.[65] A municipality is not a proper party to a suit to enjoin the enforcement of an ordinance passed by a board of health which under the state laws is a public agency holding entirely independent of municipal control; and this is so even though the two exercise authority over the same territory in their different spheres.[66]

As representative of all concerned. In a suit to enjoin enforcement of an ordinance fixing rates for public service commissions, the municipality prop-

Tex.—Broussard v. Wilson, Civ.App., 183 S.W. 814.
32 C.J. p 297 note 38.

One not party to lease and not succeeding to rights thereunder was held not proper defendant in suit to enjoin further arbitration proceeding.—Dana v. Dana, 157 N.E. 623, 260 Mass. 460.

Lowest bidder on contract

In suit by taxpayer to restrain action on bids for construction of building as a federal project under authority of Emergency Relief Appropriation Act, construction company which was lowest bidder on contract was neither necessary nor proper party defendant.—Carr v. Desjardines, D.C.Okl., 16 F.Supp. 346.

59. Mass.—Tompkins v. Sullivan, 34 N.E.2d 607, 309 Mass. 496.
Tex.—City of McAllen v. Exchange Nat. Bank of Tulsa, Okl., Civ.App., 154 S.W.2d 971, error refused—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.
32 C.J. p 297 note 39.

Suit between states

In a suit by a state to enjoin another state from enforcing a statute compelling companies handling natural gas to prefer local customers over interstate customers, pipe line companies, against whom complainant state makes no complaint and seeks no relief, and who will evidently continue to supply gas, if not restrained or prevented, are not necessary parties.—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 800, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and reheard 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144.

60. Or.—State v. Boyer, 271 P. 46, 127 Or. 91.
Tex.—Liberty Annex Corporation v. City of Dallas, Civ.App., 289 S.W. 1067, affirmed City of Dallas v. Liberty Annex Corporation, Com.App., 295 S.W. 591.
32 C.J. p 297 note 40.

61. Tex.—Liberty Annex Corporation v. City of Dallas, Civ.App., 289 S.W. 1067, affirmed City of Dallas v. Liberty Annex Corporation, Com.App., 295 S.W. 591.
32 C.J. p 298 note 41.

62. Colo.—Merrill v. Barr, 213 P. 576, 73 Colo. 87.
N.J.—Woulfe v. Atlantic City Steel Pier Co., 20 A.2d 45, 129 N.J.Eq. 510—Araneo-White Const. Co. v. Joint Municipal Sewer Commission, 154 A. 313, 9 N.J.Misc. 243.
Or.—Herald Pub. Co. v. Klamath News Pub. Co., 240 P. 244, 116 Or. 62.
32 C.J. p 299 note 51.

"A mandatory injunction should not be granted which would interfere with the rights of the City . . . without making it a party to the bill."—Green v. Messer, 10 So.2d 157, 159, 243 Ala. 405.

Incurring indebtedness

City must be made party to bill to enjoin city from incurring indebtedness and issuing its obligation therefor on ground it has exhausted or will exhaust its debt contracting powers.—Browder v. Board of Com'rs of City of Montgomery, 155 So. 366, 228 Ala. 687.

Abolition of county

In proceeding to enjoin putting in force statute abolishing existing county, new county sought to be created thereby may be made defendant.—State v. Graham, 270 P. 897, 33 N.M. 504.

63. Cal.—Hughson v. Crane, 47 P. 120, 115 Cal. 404.
32 C.J. p 299 note 52.

64. Miss.—Ham v. Kings Daughters Circle No. 4 of Greenville, Miss., 155 So. 164, 170 Miss. 490.
Tex.—School Trustees of Jackson County v. Edna Independent School Dist., Civ.App., 9 S.W.2d 506, affirmed, Com.App., 34 S.W.2d 860.

Payment of school district funds

In action by trustees of two school districts against county superintendent, petition alleging that the two districts contracted for the transfer of pupils and of transferor's funds, and praying for injunction against payment to a third district of funds accruing to transferor, indicated that third district had no interest in the suit, as respects necessity of making third district a party.—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Tex.Civ.App., 121 S.W.2d 1048.

65. Miss.—Ham v. Kings Daughters Circle No. 4 of Greenville, Miss., 155 So. 164, 170 Miss. 490.

Restraining enforcement of invalid statute

School district was held not necessary defendant in suit to restrain members of board of directors thereof, as individuals, from carrying out provisions of statute creating district on ground that it is unconstitutional.—Harris v. Rush, 8 S.W.2d 366, 157 Tenn. 295.

66. U.S.—Borden's Condensed Milk Co. v. Baker, C.C.N.J., 168 F. 111, reversed on other grounds 177 F. 906, 101 C.C.A. 186.

erly may be made defendant as representative of all persons interested;[67] but a city has been held not a necessary party in a suit by a gas company to restrain a competing company from violating an ordinance fixing rates.[68]

United States. In the notes will be found adjudications as to the propriety or necessity of making the United States a party defendant in an action for an injunction.[69]

c. Public Officers

(1) In general

(2) Officers executing process of court

(1) In General

Where a superior official's legal power to issue a particular order or regulation is involved, or his subordinate exceeds the bounds of such order or regulation, the latter may be enjoined without joining the superior. The judge or judges of the court in which an action at law is pending ordinarily should not be made a party or parties to a suit to stay the proceedings.

Where a statute or regulation is challenged as being unlawful or unconstitutional, an injunction will lie only against the person or agency charged with the enforcement thereof.[70] It has been said that the law on the question whether a subordinate official may be enjoined from transgressing his authority without joining his superior is not clear, nor is it clear how far the decisions on the subject may be generalized;[71] likewise it has been said that there is considerable discord in the decisions as to whether a court may enjoin a subordinate official of an administrative officer without joining the latter as a party, where the subordinate's offending acts result from carrying out a mandate of his superior.[72] However, the rule has been laid down that where the legal power of the superior to issue the particular order or regulation is involved,[73] or where the subordinate exceeds the bounds of the order or regulation under which he is acting,[74] the subordinate may be enjoined without joining his

67. U.S.—In re Engelhard & Sons Co., Ky., 34 S.Ct. 258, 231 U.S. 646, 58 L.Ed. 416.

68. Tex.—Coleman Gas & Oil Co. v. Santa Anna Gas Co., Civ.App., 58 S.W.2d 540.

69. **Held not proper party** in suit to enjoin construction of diversion channel without condemnation, in alleged violation of statute.—Kincaid v. U. S., D.C.La., 35 F.2d 235.

Held necessary or indispensable party

(1) In suit to enjoin the maintenance of a naval mine depot.—Ferris v. Wilbur, C.C.A.Va., 27 F.2d 262.

(2) In action to restrain employees of the United States from using an article made by the United States in infringement of a patent and owned by, and in the possession of the government.—Belknap v. Schild, Cal., 16 S.Ct. 443, 161 U.S. 10, 40 L.Ed. 599.

(3) In action by a patentee for improvements in stamp-canceling and post-marking machines to enjoin the use by a postmaster in a United States post office of infringing machines of which the United States is a lessee in possession, for a term which has not expired.—International Postal Supply Co. v. Bruce, 24 S.Ct. 820, 194 U.S. 601, 48 L.Ed. 1134.

(4) In suit seeking interference with government's management and disposition of lands ceded to it by Indians for sale and deposit of proceeds to Indians' credit.—Morrison v. Work, 45 S.Ct. 149, 266 U.S. 481, 69 L.Ed. 394, affirming Morrison v. Fall, 53 App.D.C. 331, 290 F. 306.

(5) In suit by a state to enjoin secretary of the interior from issuing oil-prospecting permits on lands included within school land grants, but included before survey in a petroleum reserve.—State of Utah v. Work, 55 App.D.C. 372, 6 F.2d 675, affirmed 47 S.Ct. 246, 273 U.S. 649, 71 L.Ed. 822.

Held not necessary or indispensable party

(1) Suit by state to restrain secretary of the interior from putting into effect order requiring state to show nonmineral character of land or have claim rejected is not one against United States, even though it still retains title to lands, and it is not an indispensable party.—Work v. State of Louisiana, 46 S.Ct. 92, 269 U.S. 250, 70 L.Ed. 259, modifying Fall v. State of Louisiana, 287 F. 999, 53 App.D.C. 22.

(2) In action to enjoin alleged tortious misconduct of officials of government railroad in interfering with plaintiff's business of lightering ships by preventing plaintiff from using a dock necessary to that business, the government was not an indispensable party, even though action involved question as to whether the United States or city owned dock, since the action could conclude nothing against the United States.—Berger v. Ohlson, C.C.A.Alaska, 120 F.2d 56.

(3) A suit to enjoin district engineer and contracting officer of United States from doing a thing which was unlawful and unauthorized would not be a "suit against the United States" but a suit against the defendant engineer and contracting officer as an individual in which it would be unnecessary to join the United States.—Noce v. Edward E. Morgan Co., C.C.A.Ark., 106 F.2d 746.

(4) Other actions see 65 C.J. p 1420 note 10 [a] (3), (5), (6).

70. U.S.—Massachusetts Farmers Defense Committee v. U. S., D.C. Mass., 26 F.Supp. 941.

Action by state court

The superior court of California is without jurisdiction to declare invalid an order of an executive officer of the United States, such as the secretary of agriculture, in a proceeding to which officer is not a party, especially when enforcement of a statute is exclusively in officer's hands, and an order of the officer cannot be declared invalid by the court indirectly by interdicts directed against subalterns who may have some duty to perform in conjunction with orders issued by officer.—U. S. v. Western Fruit Growers, D.C.Cal., 34 F.Supp. 794, modified on other grounds, C.C.A., Western Fruit Growers v. U. S., 124 F.2d 381.

71. U.S.—National Conference on Legalizing Lotteries v. Goldman, C.C.A.N.Y., 85 F.2d 66, followed in Golden Stakes Advertising Co. v. Goldman, 85 F.2d 68.

72. U.S.—Gargilis v. Gleavy, D.C. Mass., 45 F.Supp. 721.

"The discord results from some apparently inconsistent decisions of the Supreme Court."—Gargilis v. Gleavy, supra.

73. U.S.—Gargilis v. Gleavy, supra —Acret v. Harwood, D.C.Cal., 41 F.Supp. 492—Eastman v. U. S., D. C.Wash., 28 F.Supp. 807.

National park superintendent

U.S.—State of Colorado v. Toll, Colo., 45 S.Ct. 505, 268 U.S. 228, 69 L. Ed. 927.

74. U.S.—Gargilis v. Gleavy, D.C Mass., 45 F.Supp. 721.

superior in the action; on the other hand, where the superior's legal authority to issue the particular order or regulation is not challenged, but only the manner in which he exercises it, the superior is a necessary party to an action to restrain the subordinate,[75] as he is where the subordinate is merely carrying out an order of his superior, without exercising any independent discretion.[76]

Where a suit is brought to restrain action in behalf of a municipality, the officers whose duty it is to perform the acts sought to be enjoined are proper,[77] and usually necessary,[78] parties.

Judges. Since an injunction to stay proceedings at law acts on the parties to the cause and not on the court or tribunal in which the action is pending,[79] the judge or judges thereof ordinarily should not be made a party or parties to the injunction suit.[80] It is improper to make a probate judge a party to a suit in chancery to enjoin the settlement of an estate pending in his court.[81]

Other officers. In the notes will be found adjudications as to the propriety or necessity of making the following public officers parties defendant: Attorney general,[82] commissioner of internal revenue,[83] district attorney,[84] postmaster general,[85] sec-

75. U.S.—Gargilis v. Gleavy, supra.

76. U.S.—Gargilis v. Gleavy, supra.

A regulation of country-wide application should not be attacked by injunction proceedings against subordinate officials.—Janes v. Lake Wales Citrus Growers Ass'n, C.C.A. Fla., 110 F.2d 653.

77. U.S.—Reppel v. Board of Liquidation, D.C.La., 11 F.Supp. 799.

N.Y.—Town of Harrison v. Sunny Ridge Builders, 8 N.Y.S.2d 632, 170 Misc. 161—Stein v. Brown, 211 N.Y.S. 822, 824, 125 Misc. 692, citing **Corpus Juris.**

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 907, 190 S.C. 22, quoting **Corpus Juris.**

32 C.J. p 298 note 42.

78. U.S.—Williams v. Rickard, C.C.A.Ill., 26 F.2d 244.

N.Y.—Stein v. Brown, 211 N.Y.S. 822, 824, 125 Misc. 692, citing **Corpus Juris.**

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 907, 190 S.C. 22, quoting **Corpus Juris.**

32 C.J. p 298 note 43.

Commissioners of quasi-municipal corporation

In an equitable proceeding, where an attack is made on the legality of certain taxes which it is alleged the commissioners of a quasi-municipal corporation are attempting to levy upon the property of complainants through the county clerk, the commissioners are necessary parties, essential to the rendition of a final decree.

Ill.—Knopf v. Chicago Real Estate Bd., 50 N.E. 658, 173 Ill. 196.

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 907, 190 S.C. 22, quoting **Corpus Juris.**

County board of education

A colored teacher seeking to enjoin enforcement of allegedly discriminatory state statutes providing a minimum scale of salaries for white teachers and a lower minimum for teachers in colored schools could not maintain suit against general state officials, but county board of education was a "necessary and indispensable party" where real objective of suit was to tie up equalization fund and prevent its distribution to counties as beneficiaries.—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792, 803.

79. Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W.2d 639, 141 Neb. 270.

80. Neb.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, supra.

81. Ala.—McNeill v. McNeill, 36 Ala. 109, 76 Am.D. 320.

82. **Held not necessary party**

(1) To suit to restrain treasurer of Puerto Rico from instituting criminal prosecution against complainants for failure to comply with joint resolution.—Gallardo v. Questell, C.C.A.Puerto Rico, 29 F.2d 897.

(2) To suits to enjoin United States marshal from enforcing public utility holding company act, rendering letters of unregistered holding companies nonmailable, on ground that act was unconstitutional.—Consolidated Gas Co. of New York v. Hardy, D.C.N.Y., 14 F.Supp. 223.

83. **Held necessary party** in action by licensed pharmacists to restrain enforcement of restriction embodied in permit to sell liquor issued under National Prohibition Act.—Gnerich v. Rutter, Cal., 44 S.Ct. 532, 265 U.S. 388, 68 L.Ed. 1068, reversing, C.C.A., Gnerich v. Yellowley, 277 F. 632.

Held not necessary party to suit to enjoin collector of internal revenue from refusing to honor application for withdrawals of specially denatured alcohol.—Wilson v. Bowers, D.C.N.Y., 14 F.2d 976.

84. **Held not necessary party** in action to restrain a city police department from interfering with plaintiff's manufacture and sale of malt extract for medicinal purposes.—Penn Beverage Co. v. Mackey, 12 Pa. Dist. & Co. 280.

85. **Held necessary or indispensable party**

(1) To action to enjoin enforcement by local postmaster of a postal fraud order of the postmaster general.—National Conference on Legalizing Lotteries v. Goldman, 85 F.2d 66, followed in Golden Stakes Advertising Co. v. Goldman, C.C.A.N.Y., 85 F.2d 68—Gargilis v. Gleavy, D.C.Mass., 45 F.Supp. 721—Acret v. Harwood, D.C.Cal., 41 F.Supp. 492—Smith v. Farley, D.C.N.Y., 38 F.Supp. 1012—Wheeler v. Farley, D.C.Cal., 7 F.Supp. 433, appeal dismissed 55 S.Ct. 144, 293 U.S. 526, 79 L.Ed. 637.

(2) To suit to enjoin action of local postmaster with regard to classification of publications mailable at book rate pursuant to presidential proclamation, which was taken by the postmaster under prescribed procedure and the instructions of the postmaster general and the third assistant postmaster general.—Viking Press v. Goldman, D.C.N.Y., 38 F.Supp. 1014.

(3) An action for injunctive relief with respect to a decision excluding certain matter from the mails could not be maintained against a local postmaster, but the postmaster general with whom the ultimate decision concerning mailability rests was a necessary party defendant.—Hardy v. Goldman, D.C.N.Y., 38 F.Supp. 1011.

Held not necessary or indispensable party

(1) To suit to enjoin local postmaster from preventing delivery of astrologer's mail under postal fraud order.—Rood v. Goodman, C.C.A.Tex., 83 F.2d 28, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 405.

(2) Jurisdiction of suit to restrain local postmaster from executing fraud order issued by postmaster general was held to exist, notwithstanding absence of postmaster general as party defendant.—Bailey Gaunce Oil & Refining Co. v. Duncan, D.C.La., 10 F.Supp. 280.

retary of agriculture,[86] secretary of the interior,[87] secretary of the treasury,[88] secretary of war,[89] and other officers.[90]

(3) In suits to restrain postmasters from enforcing public utility holding company act, rendering letters of unregistered holding companies nonmailable, postmaster general was held not necessary party where regulation requiring postmasters to exclude from mails all unmailable matter was concededly valid and suits were based on theory that portion of utility act declaring utility companies' letters to be unmailable matter was void.—Consolidated Gas Co. of New York v. Hardy, D.C.N.Y., 14 F.Supp. 223.

86. Held proper party in suit to enjoin examination of dairy company's books by committee appointed by secretary under agricultural adjustment act.—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.

Held indispensable party

(1) In an action to enjoin members of county agricultural conservation association from exercising authority under provisions of the agricultural adjustment act of 1938 relating to the production of cotton. —Hawthorne v. Fisher, D.C.Tex., 33 F.Supp. 891.

(2) The action of acting and alternate members of growers' advisory committee and distribution committee in carrying out an order issued by secretary of agriculture and provisions of agricultural adjustment act did not constitute "trespassing" upon property of others to extent of subjecting such members to injunctive process in a state court without presence of the secretary of agriculture before the court.—U. S. v. Western Fruit Growers, D.C.Cal., 34 F.Supp. 794, 796, modified on other grounds, C.C.A., Western Fruit Growers v. U. S., 124 F.2d 381.

Held not necessary or indispensable party

(1) To suit by intrastate milk dealers to restrain enforcement by subordinates of departmental regulations not authorized by congress.— Berdie v. Kurtz, C.C.A.Cal., 75 F.2d 898.

(2) To proceeding to enjoin officers appointed by secretary from proceeding against milk dealers for violation of license issued by secretary under agricultural adjustment act.—Darger v. Hill, C.C.A.Cal., 76 F.2d 198, affirming, D.C., Hill v. Darger, 8 F. Supp. 189.

(3) To proceedings by handlers of citrus fruit to enjoin enforcement of order issued by secretary regulating handling of citrus fruit.—Chester C. Fosgate Co. v. Kirkland, D.C. Fla., 19 F.Supp. 152.

(4) To proceeding to enjoin control committee, selected in manner provided in marketing agreement and license issued by secretary under agricultural adjustment act, from enforcing committee regulations governing citrus industry.— Yarnell v. Hillsborough Packing Co., C.C.A.Fla., 70 F.2d 435, 92 A.L.R. 1475.

(5) In suit to enjoin examination of dairy company's books by committee appointed by secretary under agricultural adjustment act.—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.

(6) To a suit by judgment creditor to restrain county administrative assistant from delivering to judgment debtor a rental check drawn by secretary of agriculture in favor of debtor in payment of amount due debtor for complying with federal government's conservation program, where secretary of agriculture did not claim any interest, did not ask to be made party, and it was conceded that neither United States nor any of its agencies claimed to have any interest.—Tilmon v. Adkisson, 162 S.W.2d 903, 204 Ark. 436.

87. Held necessary or indispensable party

(1) To a suit for injunction to compel the secretary and an Indian agency superintendent acting under his direction to disburse funds under Act March 3, 1921, § 4, payment of which to complainant had been refused under Rev.Stats. § 2087.—Webster v. Fall, Okl., 45 S. Ct. 148, 266 U.S. 507, 69 L.Ed. 411.

(2) To a taxpayer's suit to restrain action on bids for construction of building under authority of emergency relief appropriation act.— Carr v. Desjardines, D.C.Okl., 16 F. Supp. 346.

(3) In suit to enjoin agents or subordinates from refusing to deliver quantity of water to which plaintiffs claimed they were entitled by virtue of contracts with United States.—Moore v. Anderson, C.C.A. Wash., 68 F.2d 191, certiorari denied Anderson v. Moore, 55 S.Ct. 78, 293 U.S. 567, 79 L.Ed. 666, and Graham v. Moore, 55 S.Ct. 78, 293 U.S. 567, 79 L.Ed. 666.

Held not necessary or indispensable party

(1) To suit by Indian allottees to enjoin enforcement of regulations by secretary as in excess of his power. —Eastman v. U. S., D.C.Wash., 28 F.Supp. 807.

(2) To suit to enjoin federal officers from trespassing on petroleum producers' properties and enforcing petroleum code and secretary's regulations requiring production reports.—Ryan v. Amazon Petroleum Corporation, C.C.A.Tex., 71 F.2d 1, reversing, D.C., Amazon Petroleum Corporation v. Railroad Commission of Texas, 5 F.Supp. 639, and certiorari granted Amazon Petroleum Corporation v. Ryan, 55 S.Ct. 102, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 241, 293 U.S. 388, 79 L.Ed. 446. Followed in, C. C.A., Ryan v. Panama Refining Co., 71 F.2d 8, certiorari granted Panama Refining Co. v. Ryan, 55 S.Ct. 83, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 241, 293 U.S. 388, 79 L.Ed. 446.

88. Held indispensable party

U.S.—Jewel Productions v. Morgenthau, C.C.A.N.Y., 100 F.2d 390.

89. Held not necessary or indispensable party

(1) A bidder for levee work could maintain suit against district engineer and contracting officer of United States to prevent him from making charge against bidder on theory that bidder had defaulted on bid for doing levee work where engineer had attempted to accept conditional bid as though it were unconditional, as against contention that secretary of war was indispensable party.—Noce v. Edward E. Morgan Co., C.C.A.Ark., 106 F.2d 746.

(2) In action in three-judge federal court to enjoin construction of dam pursuant to contract with war department authorized by act of congress, secretary of war is not a necessary party if the act is unconstitutional.—State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., D.C.Okl., 37 F.Supp. 93, affirmed 61 S Ct. 1050, 313 U.S. 508, 85 L.Ed. 1487.

90. Administrator of N. I. R. A.

In suit to enjoin United States attorney from enforcing penalties under national industrial recovery act for violating administrator's orders attacked as being arbitrary and capricious, court was held without jurisdiction to consider such ground of attack in absence of administrator.—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.

Collector of customs; members of department of agriculture

In suit to enjoin detention of food shipment, collector of customs holding shipment and members of department of agriculture who instigated exclusion were properly made defendants.—Knapp v. Hyde, D.C.N. Y., 50 F.2d 272.

Prohibition commissioner was not necessary party to suit to enjoin collector of internal revenue from refusing to honor application for

withdrawals of specially denatured alcohol.—Wilson v. Bowers, D.C.N.Y., 14 F.2d 976.

Mayor; governor; adjutant general

(1) Governor is indispensable party as respects application for interlocutory injunction against enforcement of state laws.—Arneson v. Denny, D.C.Wash., 25 F.2d 993.

(2) Where, at request of mayor of city, governor of state sent state National Guard to take charge of district wherein plaintiff's plant was located and the troops took possession of plaintiff's property, the mayor, governor, and an adjutant general of state in charge of National Guard were necessary and proper parties to suit to enjoin interference with plaintiff's use of property.—Strutwear Knitting Co. v. Olson, D.C.Minn., 13 F.Supp. 384.

Municipal finance commission

In suit attacking constitutionality of state statute in so far as it affected enforceability of complainant's school bonds issued by board of education of borough and seeking to restrain the state municipal finance commission from functioning in the school district, so as to prevent levy or execution against the school district, members of the municipal finance commission were "proper, necessary, and indispensable parties" because of the supervisory control over the municipality.—Sovereign Camp, W. O. W., v. Wilentz, D.C.N.J., 23 F.Supp. 23, 28, appeal dismissed Wilentz v. Sovereign Camp, W. O. W., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994.

Peace officer; picketing

In suit to enjoin picketing, where there was no charge of the commission of any acts of violence or trespass, labor anti-injunction statute did not require that peace officer be made a party, since there was no necessity for inquiry as to whether such officer was willing or able to protect plaintiff's property.—Wiest v. Dirks, 20 N.E.2d 969, 215 Ind. 568.

School officials

(1) In suit to enjoin county school trustees from changing school district boundaries, county superintendent was not necessary or proper party.—School Trustees of Jackson County v. Edna Independent School Dist., Tex.Civ.App., 9 S.W.2d 506, affirmed, Com.App., 34 S.W.2d 860.

(2) Members of board of directors of school district were properly made defendants as individuals in suit to restrain them from carrying out provisions of invalid statute creating school district.—Harris v. Rush, 8 S.W.2d 366, 157 Tenn. 295.

(3) In suit by ousted superintendent of independent school district to prevent interference with his position and to restrain making of any payments to superintendent's successor out of school funds, successor was held "interested party" and required to be made party to hearing on the merits; but failure to make successor a party did not render temporary injunction void as to those against whom it was issued, where temporary injunction maintained status quo, notwithstanding some of its provisions may have been too indefinite to be enforceable. —Temple Independent School Dist. v. Proctor, Tex.Civ.App., 97 S.W.2d 1047, error refused.

State attorney general; secretary of state; election commissioners

(1) State attorney general held an indispensable party as respects application for interlocutory judgment against enforcement of state laws.—Arneson v. Denny, D.C.Wash., 25 F. 2d 993.

(2) An action to restrain secretary of state from taking any action in the filing of referendum petition, in which attorney general was joined as a defendant, is premature as to the latter, as he could not act until after the petition had been filed.—State v. Sullivan, 224 S.W. 327, 283 Mo. 546.

(3) Secretary of state held necessary party to suit to prevent her from counting alleged illegal election returns and to compel county canvassing board to perform ministerial duties.—Leslie v. Griffin, Tex.Civ. App., 23 S.W.2d 534.

(4) Suit could not be maintained against secretary of state, attorney general, and election commissioners to restrain them from permitting election of general assembly under invalid redistricting act, where they had no duty to perform respecting enforcement and practical operation of act.—Stiglitz v. Schardien, 40 S. W.2d 315, 239 Ky. 799, followed in Myre v. Lewis, 40 S.W.2d 322, 239 Ky. 788.

State labor relations board is not a proper party in employer's action to restrain trade union from carrying out threat to submit testimony before board regarding charges of unfair labor practices which allegedly occurred prior to an adjustment of controversy between the union and the employer.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, 9 N.Y.S.2d 964, 170 Misc. 199, affirmed 14 N.Y.S. 2d 74, 257 App.Div. 501.

Subordinate disbursing officer

Philippine scout's suit to compel payment of retirement pay was held properly brought against army's chief of finance, subordinate disbursing officer, from whom payment was first sought, not being indispensable, even though he might have been proper party.—Miguel v. McCarl, 54 S.Ct. 465, 291 U.S. 442, 78 L.Ed. 901, modifying McCarl v. Miguel, 66 F.2d 564, 62 App.D.C. 259, certiorari granted Miquel v. McCarl, 54 S.Ct. 102, 290 U.S. 618, 78 L.Ed. 540.

Treasurer of Puerto Rico held proper party to suit to restrain criminal proceedings under joint resolution, it being unnecessary to join attorney general or people of Puerto Rico.—Gallardo v. Questell, C.C.A. Puerto Rico, 29 F.2d 897.

When trustees of an agricultural college are charged with the enforcement of a law relative to fertilizer, they are properly named as defendants in suit to enjoin the enforcement of the law.—National Fertilizer Ass'n v. Bradley, D.C.S.C., 18 F.Supp. 263, affirmed 57 S.Ct. 748, 301 U.S. 178, 81 L.Ed. 990.

Where superintendent of public service signed county's name to contracts for employment of attorneys by commissioners to collect delinquent taxes, but superintendent neither authorized contracts nor participated in payment of funds, and no relief could be prayed against him, superintendent was not necessary party defendant to informations filed by state's attorney to enjoin payment of county funds to attorneys so employed.—People ex rel. Courtney v. Ashton, 192 N.E. 820, 358 Ill. 146.

(2) Officers Executing Process of Court

Authorities differ as to whether officers, such as sheriffs, enforcing the process of the court are proper or necessary parties to a suit to enjoin such enforcement.

According to a number of authorities, sheriffs,[91] clerks of court,[92] or notaries public[93] are neither necessary nor proper parties defendant to a suit to enjoin the enforcement of orders, judgments, or processes in their hands; but a contrary view is taken in other decisions which hold that a sheriff is

91. Tex.—Texas Co. v. Honaker, Civ. App., 282 S.W. 879, error refused 283 S.W. 1071, 115 Tex. 509.
32 C.J. p 298 note 45.

92. Conn.—Tyler v. Hamersley, 44 Conn. 419, 26 Am.R. 479.
32 C.J. p 298 note 46.

93. Tex.—Texas Co. v. Honaker, Civ. App., 282 S.W. 879, error refused 283 S.W. 1071, 115 Tex. 509.

a proper,[94] and, according to others, a necessary,[95] party defendant to a suit to enjoin such proceedings, in order that he may be bound by the judgment and be protected by it;[96] and it has also been held that a court commissioner who is directed to execute the court's decree of sale is a necessary party to a suit to enjoin the sale.[97] Under a statute providing that in certain actions all citations and other legal process shall be made on the sheriff, the sheriff is a necessary party defendant in such an action.[98]

d. Private Corporations or Associations or Officers Thereof; Stockholders

The general principles determining who are proper or necessary parties defendant in actions for injunction apply to private corporations or associations and their officers, and to stockholders.

An injunction will not be allowed against a corporation or its officers who are strangers to the suit.[99]

Corporation as party defendant. Where it is obvious that a corporation will not join in a stockholder's suit to enjoin a transfer of stock, it is properly made a party defendant.[1] Where several defendants who have incorporated are sued as individuals, and the acts complained of are threatened by the corporation, the corporation is a necessary party defendant.[2] Where a corporation has a de facto, but not a de jure, existence, suit may be brought against it in its corporate name.[3] A religious corporation should be made a party to a bill to restrain unauthorized acts of its trustees; but, where an injunction has issued, the failure to make it a party is not necessarily a fatal defect.[4]

Officers as defendants. Officers of a corporation are not necessary parties defendant when it is not shown that they, independent of the corporation, are doing or threatening to do the injury complained of,[5] or where no relief is prayed for as to any of the officers that is not prayed for with respect to the corporation;[6] nor is a former officer of a corporation a necessary party where no relief is sought against him, and neither his rights nor his liabilities will be affected if defendant prevails, while if plaintiff prevails the damages for which he may be liable for false representation will be diminished.[7] An officer against whom mandamus is the proper remedy, to obtain the performance of his duty, is not properly joined in a suit to enjoin the corporation.[8]

On the other hand, officers of a corporation are proper parties to an action to enjoin violation by a corporation of its contract,[9] or to enjoin the use by the corporation of plaintiff's trade-name,[10] and an officer who is interested, and actively engaged, in the business of a corporation is properly named as a defendant in a bill to enjoin it after expiration of a contract permitting it to use complainant's name in advertising.[11] Where a corporation is made a party defendant, the officers or members thereof may be made defendants for the purpose of compelling discovery by them.[12]

An action by policyholders against a mutual insurance company to enjoin it from buying land, when such purchase is a violation of its charter, should be brought against the officers and trustees of the company and not against the company itself.[13]

Stockholders as defendants. When some of the

94. U.S.—North v. Peters, Dak., 11 S.Ct. 346, 138 U.S. 271, 34 L.Ed. 936.
32 C.J. p 298 note 47.

A sheriff's successor is properly a party where a portion of the relief sought is to have declared void a subsequent execution sale of the same property under another judgment against the same judgment debtor, and to restrain the sheriff from executing any certificate of sale or deed based on such sale.—Butler v. Clark, 21 N.Y.S. 415, 66 Hun 444, 29 Abb.N.Cas. 413, 50 N.Y.St. 133.

95. N.Y.—National Park Bank v. Goddard, 30 N.E. 566, 131 N.Y. 494.

96. N.Y.—National Park Bank v. Goddard, supra.

97. Va.—Robertson v. Tabscott, 81 Va. 533.
32 C.J. p 298 note 50.

98. La.—Ott v. Grace, App., 13 So. 2d 138.

99. N.Y.—White v. Wood, 29 N.E. 835, 129 N.Y. 527.
32 C.J. p 299 note 57.

Enforcement of corporation's contract with state text-book commission cannot be enjoined without making corporation party.—Trimble v. John C. Winston Co., C.C.A.Miss., 56 F.2d 150, certiorari denied John C. Winston Co. v. Trimble, 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1289.

1. Wis.—Burke v. Universal Granite Quarries Co., 193 N.W. 517, 180 Wis. 520.

2. Ga.—Dieter v. Estill, 22 S.E. 622, 95 Ga. 370.

3. Ind.—Newton County Draining Co. v. Nofsinger, 43 Ind. 566.

4. N.J.—Morgan v. Rose, 22 N.J.Eq. 583.
N.Y.—Lawyer v. Cipperly, 7 Paige 281.

5. Tex.—Reitzer v. Medina Valley Irr. Co., Civ.App., 153 S.W. 380.

6. U.S.—Hatch v. Chicago, R. I. & P. R. Co., C.C.N.Y., 11 F.Cas.No. 6,204, 6 Blatchf. 105.

7. Me.—Clarke v. Marks, 88 A. 718, 111 Me. 218.

8. Pa.—Hanna v. Chester Times, 166 A. 243, 310 Pa. 583.

9. Ind.—Janalene, Inc., v. Burnett, 41 N.E.2d 942, 220 Ind. 253.

10. Cal.—Lutz v. Western Iron & Metal Co., 213 P. 962, 190 Cal. 554.

11. Ill.—C. P. Goerz American Optical Co. v. Jackson, 175 Ill.App. 482.

12. Va.—Baltimore & O. R. Co. v. Wheeling, 13 Gratt. 40, 54 Va. 40.

13. N.Y.—Levy v. Mutual L. Ins. Co., 7 N.Y.S. 562, 54 Hun 315.

stockholders seek to enjoin a corporation from paying an extra dividend, the other stockholders are necessary parties.[14]

The acts of an unincorporated association cannot be enjoined in a suit against the officers alone, in the absence of a statutory provision authorizing such procedure.[15]

e. Persons to Whom Payment of Money Is Sought to Be Enjoined

The person to whom money would be paid is a proper and, under most authorities, an indispensable party defendant to a suit to enjoin the payment of money.

Where the object of a suit is to enjoin the payment of money, the person to whom the money would be paid is a proper,[16] and, according to the weight of authority, an indispensable,[17] party defendant; but there are decisions in which it is either said[18] or held,[19] without discussion or statement of reasons, that the payee is not a necessary party. In a suit to enjoin payment of warrants for construction work delivered by a city to a bank pursuant to assignment of the contractor, where the bank had sold and transferred the warrants before suit, it was not a proper party defendant, no personal judgment being sought against it.[20]

f. Persons to Whom Issuance of Bonds Is Sought to Be Enjoined

According to most authorities, in suits to enjoin the issuance of municipal bonds the persons to whom they are to be issued, or enough of them to represent the interests of all, should or must be made parties.

In suits brought to enjoin the issuance of municipal bonds, the weight of authority is that the persons to whom the bonds are to be issued,[21] or a sufficient number of them fully to represent and protect the interests of all,[22] should or must be made parties defendant; but there are decisions to the effect that they need not be joined.[23]

g. Tort-Feasors

In a suit to enjoin tortious acts, it is proper, but not necessary, to join all the tort-feasors as defendants.

Where the acts sought to be enjoined are tortious, it is proper to join as defendants all the tort-feasors,[24] even though there was no concert or unity of design among them.[25] However, in a suit to enjoin tortious acts, it is not necessary to join all the tort-feasors as defendants,[26] since a person receiving injury from the tortious acts of others has a remedy against one or all of the tort-feasors and may enforce that remedy against one or all at his election,[27] either at law or in equity.[28]

h. Persons Participating in Fraud Forming Basis of Suit

Where the right to relief is based on fraud, all persons charged with participating in the fraud, and those who will benefit by it, are properly joined as defendants.

Where fraud is the gravamen of complainant's right to relief, all persons who are charged with having participated in the alleged fraud are properly joined as defendants;[29] and those who will be the beneficiaries of the fraud are also proper parties.[30]

i. Persons in Representative Capacity or Represented by Others

Persons fully, legally, and properly represented by

14. Md.—Gregg v. Baltimore, 14 Md. 479.

15. Mont.—Board of Railroad Com'rs v. Reed, 58 P.2d 271, 272, 102 Mont. 382, quoting **Corpus Juris.**
32 C.J. p 299 note 69.

16. Colo.—Merrill v. Barr, 213 P. 576, 73 Colo. 87.
31 C.J. p 299 note 70.

17. Ala.—Poyner v. Whiddon, 174 So. 507, 234 Ala. 168.
N.C.—Nash v. City of Monroe, 151 S.E. 634, 198 N.C. 306.
Tex.—Crystal Falls Common School Dist. No. 3 v. Sanders, Civ.App., 54 S.W.2d 834.
32 C.J. p 299 note 71.

18. Cal.—Modoc County v. Spencer, 37 P. 488, 103 Cal. 498.
32 C.J. p 300 note 72.

19. Or.—Carruthers v. Astoria, 143 P. 899, 1106, 72 Or. 505.

20. Wash.—Maryland Casualty Co. v. Hill, 170 P. 594, 100 Wash. 289.

21. Iowa.—Gunnar v. Town of Montezuma, 293 N.W. 1, 228 Iowa 581.
32 C.J. p 300 note 76—21 C.J. p 282 note 86.

22. Cal.—Hutchinson v. Burr, 12 Cal. 103.

23. Mont.—Hoffman v. Gallatin County, 44 P. 973, 18 Mont. 224.
32 C.J. p 300 note 78.

24. N.M.—Carlsbad Irr. Dist. v. Ford, 128 P.2d 1047, 1051, 46 N.M. 335, citing **Corpus Juris.**
32 C.J. p 300 note 79.

25. N.M.—Carlsbad Irr. Dist. v. Ford, supra, citing **Corpus Juris.**
Tex.—Sun Oil Co. v. Robicheaux, Com.App., 23 S.W.2d 713, reversing Robicheaux v. Sun Oil Co., Civ. App., 10 S.W.2d 250.
Wis.—Draper v. Brown, 91 N.W. 1001, 115 Wis. 361.
32 C.J. p 300 note 80.

26. Fla.—Dade Enterprises v. Wometco Theatres, 160 So. 209, 119 Fla. 70.
32 C.J. p 300 note 81.
Tortious interference with performance of contract
Fla.—Dade Enterprises v. Wometco Theatres, 160 So. 209, 119 Fla. 70.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.

27. Fla.—Dade Enterprises v. Wometco Theatres, 160 So. 209, 119 Fla. 70.
32 C.J. p 300 note 82.

28. U.S.—Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, C.C.Mont., 156 F. 809.
Fla.—Dade Enterprises v. Wometco Theatres, 160 So. 209, 119 Fla. 70.

29. Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
32 C.J. p 300 note 84.

30. Fla.—Pepple v. Rogers, 140 So. 205, 211, 104 Fla. 462, citing **Corpus Juris.**
32 C.J. p 301 note 85.

another need not be joined when the act to be enjoined affects the representative as such.

It is unnecessary to join as defendants persons who are fully and legally represented by another when the act to be enjoined affects the representative in his capacity as such,[31] provided the representative has duly qualified[32] and there is no conflict of interest between the representative and the person he represents.[33] Where such a conflict exists, the representative may be a necessary defendant in a suit for injunction brought by the person represented.[34]

Where the act to be enjoined does not affect the representative in his capacity as such, he need not be joined as a party.[35]

j. Principal, Agents, or Employees

An agent, servant, or employee of a person doing or causing a wrong ordinarily is not a necessary party, but should be made such where permitted to exercise independent discretion; and an injunction may be sought against him where the principal cannot be reached with process.

The action for injunction should be brought against the person doing or causing the wrong to be done and not against his agents, servants, or employees, the latter persons not being necessary parties,[36] although it has been said that the court may in its discretion permit them to be joined.[37] Where, however, the agent or servant is permitted to exercise an independent judgment or discretion, he should be made a party;[38] and where the principal is out of the jurisdiction, or cannot be reached with process, an injunction may be sought against the agent.[39]

§ 176. —— Joinder of Parties

a. Complainants
b. Defendants

a. Complainants

(1) In general
(2) Wrongful act doing common injury to many

(1) In General

As a general rule, persons having distinct and separate claims or rights cannot join as complainants in a suit for injunction; but all persons among whom there is a unity of interest in the subject matter of the suit and who are entitled to, and seek, the same character of relief may so join.

As a general rule, persons having distinct and separate claims or rights cannot join as complain-

31. U.S.—Carpenter v. Knollwood Cemetery, D.C.Mass., 198 F. 297.
32 C.J. p 301 note 86.

Remaindermen

In suit against surviving executor to enjoin ejectment action brought by him, it is unnecessary to join remaindermen whose rights must be worked out through executor.—Oil City Nat. Bank v. McCalmont, 154 A. 497, 303 Pa. 306.

Representation by state

In suit to enjoin a state from enforcing a statute requiring companies handling natural gas to prefer local consumers over interstate consumers, such local consumers are represented by the state, and need not be brought in or specially represented.—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and reheard 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144.

Local labor unions are in effect parties by representation to action against officers and business agents of unions to enjoin unlawful acts.—Willson & Adams Co. v. Pearce, 237 N.Y.S. 601, 135 Misc. 426, reversed on other grounds 265 N.Y.S. 624, 240 App.Div. 718, affirmed 191 N.E. 545, 264 N.Y. 521.

Association represented by promoters

In proceeding against an association and promoters thereof for violations of securities act, association was before the court for jurisdictional purposes where all of promoters thereof were before court, notwithstanding failure to join so-called "members" who had made contributions to enterprise allegedly carried on by association.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519.

32. Pa.—Nolde v. Madlem, 4 Lanc.L. Rev. 347.

33. Pa.—Nolde v. Madlem, supra.
32 C.J. p 301 note 87.

34. La.—Martel v. Block, 98 So. 398, 154 La. 863.

Issuance of stock

Where an owner of stock held by a trustee sought to restrain a domestic corporation from issuing new shares to the trustee directly, the trustee, although a nonresident, was a necessary party.—Martel v. Block, supra.

35. Miss.—Everett v. Winn, Sm. & M.Ch. 67.
Ohio.—Dayton & Union R. Co. v. Shoemaker's Ex'rs, 3 Ohio Cir.Ct. 473, 2 Ohio Cir.Dec. 270.

36. Ga.—Elliott v. Cline, 191 S.E. 372, 375, 184 Ga. 373, citing **Corpus Juris.**
32 C.J. p 301 note 90.

Attorney

A workmen's compensation claimant's attorney was improperly made party defendant in employer's suit to enjoin proceedings in such court on rehearing of dismissed compensation case and in claimant's second compensation proceeding.—Massman Const. Co. v. Nebraska Workmen's Compensation Court, 3 N.W. 2d 639, 141 Neb. 270.

37. N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1.

38. R.I.—Goddard v. Providence, 28 A. 765, 18 R.I. 536.
32 C.J. p 301 note 92.

39. U.S.—Osborn v. Bank of United States, Ohio, 9 Wheat 738, 6 L.Ed. 204—Beckman v. Mall, D.C.Kan., 48 F.Supp. 853.

Attorney

Where a resident having an equitable defense to a law action instituted by a nonresident sues to enjoin the prosecution of the law action, the nonresident's attorney may be joined as a party defendant to meet the necessities of justice.—Mattingly's Bakery v. Sparks Milling Co., 179 So. 271, 181 Miss. 198.

ants in a suit for injunction.[40] However, there is no inflexible rule as to the joinder of parties complainant, and the rule, as far as any rule can be said to exist, is one of convenience only and must depend on its application to the circumstances of each particular case.[41] It has been held that all persons among whom there is a unity of interest in the subject matter of the suit and who are entitled to, and seek, the same character of relief may join as complainants.[42]

(2) Wrongful Act Doing Common Injury to Many

A number of persons who would be injured in their similar but separate interests or rights by a wrongful act, and who seek the same relief, may unite in a bill to restrain the commission of the act.

It is very generally held that, where a wrongful act would injure many persons in the same way, interfering with similar but separate interests or rights of each, and the same relief is sought by all of them, they may unite in a bill to restrain the commission of the act, on the ground of avoidance of a multiplicity of suits,[43] or the bill may be brought by one or more on behalf of themselves and all others similarly situated,[44] or by the state on the relation of the proper officer.[45] This rule has been applied in cases of common injury to several persons resulting from the maintenance of a nuisance which is injurious to the property of all the plaintiffs;[46] from the diversion or obstruction of a stream[47] or an excessive use of its waters;[48] from the discontinuance of water service;[49] from the letting off of water from a reservoir jointly erected by plaintiff mill owners for the purpose of supplying their mills in the dry season;[50] from the enforcement of an ordinance requiring property owners to construct sidewalks, curbing, and guttering, and, on their failure to do so, authorizing the city to construct them at the expense of the property owner and making the expense a lien on the property;[51] from the enforcement of an invalid ordinance licensing plumbers and fixing a penalty for working at that trade without such license;[52] from the erection of a building in a city in violation of an ordinance to secure protection against fire which will result in a common danger to plaintiff's properties;[53] from the obstruction of a common drainage ditch[54] or of a street;[55] from the opening of a road under a void order of the county supervisors;[56] from the operation of a railroad in a street on which several properties abut;[57] from trespassing on mining property, the lessor and lessee of the property being permitted to join as plaintiffs;[58] from the turning off of gas by a gas company from the houses of plaintiffs living in the same municipality;[59] and from other wrongful acts.[60]

40. U.S.—Jones v. Oklahoma City, C.C.A.Okl., 78 F.2d 860—State of Ohio ex rel. Erkenbrecher v. Cox, D.C.Ohio, 257 F. 334.
32 C.J. p 301 note 93.

41. Mich.—Schofield v. Lansing, 17 Mich. 437.
N.Y.—Kennedy v. Troy, 14 Hun 368, reversed on other grounds 77 N.Y. 493.

Treating one of plaintiffs as sole plaintiff

Where a landowner and his tenant sued for damages for flooding land and crops and to enjoin the maintenance of the nuisance causing it, but before trial the tenant assigned his claim to the landowner, and this fact was pleaded by an amendment and proved on the trial, the trial court might well treat the landowner as the sole plaintiff, although allowing the action to proceed under the original title, and a judgment for plaintiff under such conditions will not be reversed for misjoinder of parties plaintiff.—Steber v. Chicago & G. W. Ry. Co., 117 N.W. 304, 139 Iowa 153.

42. Ala.—City of Roanoke v. Johnson, 158 So. 182, 184, 229 Ala. 496, citing **Corpus Juris.**
Colo.—Speyer v. School Dist. No. 1, City and County Denver, 261 P. 859, 82 Colo. 534, 57 A.L.R. 203.
Ind.—American Plate Glass Co. v. Nicoson, 73 N.E. 625, 34 Ind.App. 643.
32 C.J. p 301 note 95.

Several holders of policies of mutual life insurance may join as complainants to enjoin the company from making an assessment and paying certain claims.—Carmien v. Cornell, 47 N.E. 216, 148 Ind. 83.

43. Ala.—City of Roanoke v. Johnson, 158 So. 182, 185, 229 Ala. 496, citing **Corpus Juris.**
Colo.—Speyer v. School Dist. No. 1, City and County of Denver, 261 P. 859, 82 Colo. 534, 57 A.L.R. 203.
32 C.J. p 302 note 96.

44. Ark.—Brizzolara v. Ft. Smith, 112 S.W. 181, 87 Ark. 85.
Ga.—Noble v. State, 43 Ga. 466.

45. Mo.—State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co., 92 S.W. 153, 116 Mo.App. 175.

46. Ind.—Mt. Vernon First Nat. Bank v. Sarlls, 28 N.E. 434, 129 Ind. 201, 28 Am.S.R. 185, 13 L.R.A. 481.
Minn.—Grant v. Schmidt, 22 Minn. 1.

47. Mich.—Cornwell Mfg. Co. v. Swift, 50 N.W. 1001, 89 Mich. 503.
32 C.J. p 302 note 1.

48. N.Y.—Emery v. Erskine, 66 Barb. 9.

49. Ala.—City of Roanoke v. Johnson, 158 So. 182, 229 Ala. 496.

50. Mass.—Ballou v. Hopkinton, 4 Gray 324.

51. Ark.—Brizzolara v. Ft. Smith, 111 S.W. 181, 87 Ark. 85.

52. Ill.—Wilkie v. Chicago, 58 N. E. 1004, 188 Ill. 444, 80 Am.S.R. 182.
32 C.J. p 303 note 4.

53. Ind.—Mt. Vernon First Nat. Bank v. Sarlls, 28 N.E. 434, 129 Ind. 201, 28 Am.S.R. 185, 13 L.R.A. 481.

54. N.J.—Springer v. Lawrence, 21 A. 41, 47 N.J.Eq. 461, reversed on other grounds 24 A. 933, 49 N.J. Eq. 289, 31 Am.S.R. 702.

55. Pa.—Rafferty v. Central Tract. Co., 23 A. 884, 147 Pa. 579, 30 Am. S.R. 763—Riley v. Pennsylvania R. Co., 32 Pa.Super. 579.

56. Ind.—Heagy v. Black, 90 Ind. 534.

57. Pa.—Rafferty v. Central Tract. Co., 23 A. 884, 147 Pa. 579, 30 Am. S.R. 763.
32 C.J. p 303 note 11.

58. Colo.—United Coal Co. v. Canon City Coal Co., 48 P. 1045, 24 Colo. 116.

59. Pa.—Sewickley Borough v. Ohio Valley Gas Co., 6 Pa.Co. 99.

60. Ill.—Ashley v. Board of Education, 114 N.E. 20, 275 Ill. 274.
32 C.J. p 302 note 99.

b. Defendants

All persons threatening or performing the act sought to be enjoined may be joined as defendants; but persons having no community of interest in the subject matter of the controversy cannot be so joined.

Defendants who have a common interest and a common defense are properly joined in one suit for injunction.[61] Where the act sought to be enjoined is threatened or being performed by more than one person, all may be joined as defendants,[62] but not otherwise;[63] and persons among whom there is no community of interest with respect to the subject matter of the controversy cannot be joined as defendants.[64]

§ 177. —— New Parties

General equity rules governing the bringing in of new parties, amendment as to parties, and the substitution or intervention of parties have been applied in actions for injunctions.

It has been said that courts have inherent power to add such parties as may be affected by the result of a judgment of injunction,[65] and that whether complainants shall be permitted to remain such after transferring their interest in the property involved in the suit, and whether their grantees shall be brought in as complainants, are questions within the discretion of the court.[66]

Bringing in pending trial. If, in the course of a trial in an injunction suit, it appears that additional persons must be brought in as parties to accomplish the ends of justice, they must be brought in before the trial proceeds.[67]

Substitution. Where, after a bill is filed, some of the parties dispose of their interest in the subject matter of the suit, the court will permit the bill to be dismissed as to them and the new owners substituted in their place.[68]

When plaintiff dies, his heirs or personal representatives must be substituted as parties.[69]

Enjoining collection of tax see the C.J.S. title Taxation § 728, also 32 C.J. p 303 notes 14-16, 61 C.J. p 1093 note 16-p 1094 note 19.

61. Conn.—Town of Fairfield v. Southport Nat. Bank, 59 A. 513, 77 Conn. 423.
Miss.—State ex rel. Rice v. Hasson Grocery Co., 170 So. 234, 177 Miss. 204, 107 A.L.R. 663.
Va.—Coleman v. Claytor, 24 S.E. 463, 93 Va. 20.

Original landlord and purchaser to whom tenant attorned held properly joined as parties defendant in petition by tenant to enjoin distraint proceedings.—South Georgia Trust Co. v. Barlow, 157 S.E. 326, 172 Ga. 166.

62. Ind.—West Muncie Strawboard Co. v. Slack, 72 N.E. 879, 164 Ind. 21.
Mich.—Otto v. Highland Park, 169 N. W. 904, 204 Mich. 74.
Neb.—Sickler v. City of Broken Bow, 10 N.W.2d 462, 465, citing **Corpus Juris.**
Tex.—Leslie v. Griffin, Civ.App., 23 S.W.2d 534.
Wash.—Seattle Taxicab Co. v. De Jarlais, 236 P. 785, 135 Wash. 60.
Wis.—Draper v. Brown, 91 N.W. 1001, 115 Wis. 361.
32 C.J. p 303 note 18.

Diversion of water from a stream by several defendants.—Montecito Valley Water Co. v. Santa Barbara, 77 P. 1113, 144 Cal. 578.

Deposit of refuse in a stream by several upper riparian owners.—Warren v. Parkhurst, 92 N.Y.S. 1009, 105 App.Div. 239, affirming 92 N.Y. S. 723, 45 Misc. 466, and affirmed 78 N.E. 579, 186 N.Y. 45, 6 L.R.A.,N.S., 1149, 9 Ann.Cas. 513.

Federal Equity Rules, rule 26, held not to forbid joinder.—City of Jamestown v. Pennsylvania Gas Co., D.C.N.Y., 263 F. 437, modified on other grounds, C.C.A., 1 F.2d 871.

Class or representative suit

(1) Bill for injunction against picketing naming as defendants certain officers and members of labor union was not defective as to parties, where pleadings showed intent to join all individual members as defendants and contained sufficient allegations to indicate to defendants that it was brought on theory of a class bill.—Quinton's Market v. Patterson, 21 N.E.2d 546, 303 Mass. 315.

(2) Injunction by district court restraining sheriff of another county, who alone was named as defendant, and all other peace officers from arresting plaintiff, cannot be sustained as representative suit, "because only the persons named in the record in a class suit are parties thereto."—Box v. Oliver, Tex.Civ.App., 43 S. W.2d 979, 980.

63. Neb.—Sickler v. City of Broken Bow, 10 N.W.2d 462.

64. U.S.—Essman v. Hood, D.C.Tex., 45 F.2d 881.
Tex.—Broussard v. Wilson, Civ.App., 183 S.W. 814.
32 C.J. p 304 note 19.

Enjoining execution sale under separate judgments

An action cannot be maintained to enjoin a sale of realty under two executions each of which was issued under a judgment in favor of a different person, since the two judgment creditors "were not jointly affected by the two judgments."—Miller v. Curry, 53 Cal. 665.

65. N.Y.—People ex rel. Public Service Commission of New York (State Division, Department of Public Service) v. New York Telephone Co., 21 N.Y.S.2d 405, 174 Misc. 517.

Compliance with public service commission's order

In public service commission's proceeding to restrain telephone company from furnishing service to hotels which refused to comply with tariff rates fixed by company pursuant to commission's order fixing rates which hotels might charge their guests for telephone service, company was entitled to have noncomplying hotels brought into the proceeding as parties.—People ex rel. Public Service Commission of New York (State Division Department of Public Service) v. New York Telephone Co., supra.

66. N.Y.—Dunlop v. Sweet Bros. Paper Mfg. Co., 208 N.Y.S. 54, 211 App.Div. 363.

67. W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 131 S.E. 713, 101 W.Va. 73.
32 C.J. p 304 note 21.

Complainant's vendee added with respondent's consent

Suit instituted by purchaser of theater at mortgage foreclosure sale to restrain removal of theater equipment could be maintained after purchaser conveyed theater to corporation where corporation was added as party complainant with respondent's consent before case was heard on its merits.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

68. Ill.—Woodburn v. Russell, 213 Ill.App. 553.

69. Ga.—Miller v. McDonald, 72 Ga. 20.
N.Y.—Bergmann v. Salmon, 23 N.Y.S. 482, 69 Hun 295.

Where a public officer is a party, and during the pendency of the litigation his term of office expires or he is otherwise replaced, his successor may be substituted.[70] In particular circumstances, the attorney general of the United States has been held properly substituted for the rent commission of the District of Columbia as a party defendant in a suit to enjoin the enforcement of the latter's orders.[71]

Intervention. If the decree sought will materially affect the rights or interest of a person not a party, he has a right to intervene,[72] although it has been held that within the reasonable discretion of the court conditions or requirements may be imposed on intervention.[73] In the intervening pleading the intervener may refer to the pleadings of the original parties and adopt them and join in their prayer for relief.[74]

On the other hand, where one is neither a necessary nor a proper party and a complete determination of the controversy can be had without his being joined as such, or where he has no interest in the subject matter or outcome of the suit, he will not be permitted to intervene.[75]

Where it would oust the jurisdiction of the court

70. U.S.—Atchison, T. & S. F. Ry. Co. v. La Prade, D.C.Ariz., 2 F. Supp. 855.
Tex.—Kaufman County v. Gaston, Civ.App., 273 S.W. 273.

71. D.C.—Gilbert v. Sargent, 19 F. 2d 681, 57 App.D.C. 207, followed in Linkins v. Sargent, 19 F.2d 683, 57 App.D.C. 209.

72. U.S.—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.
Ga.—Anderson v. Black, 13 S.E.2d 650, 191 Ga. 627—Scott v. Flint River Pecan Co., 126 S.E. 769, 159 Ga. 668.
N.M.—Stovall v. Vesely, 34 P.2d 862, 38 N.M. 415.
Tex.—San Antonio, U. & G. R. Co. v. Nueces Valley Townsite Co., Civ.App., 34 S.W.2d 391, reversed on other grounds Nueces Valley Townsite Co. v. San Antonio, U. & G. R. Co., 67 S.W.2d 215, 123 Tex. 167—Moore v. Toyah Valley Irr. Co., Civ.App., 179 S.W. 550.
32 C.J. p 304 note 27.

Taxpayers

In suit to enjoin defendants from qualifying or acting as city commissioners, or carrying out act establishing commission form of government, where defendants averred that they were citizens and taxpayers and set up cross action praying affirmative relief against plaintiffs, other citizens and taxpayers might intervene.—Davis v. Warde, 118 S.E. 378, 155 Ga. 748, error dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 527.

Lessor; lessee

(1) In lessee's suit to enjoin enforcement of ordinance restricting parking in streets adjoining lessee's lot, allowing intervention making lessor party plaintiff was held proper.—Borough of Atlanta v. Kirk, 165 S.E. 69, 175 Ga. 395.

(2) Tenant of property to which there was attingent a perpetual easement entitling property to use of public sewerage system, could intervene in proceeding to enjoin disconnection of property owner's sewerage system from public sewerage system, and protect his property as lessee and the property of those similarly situated.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

Intervention in corporate name

School district trustees intervening in injunction suit brought by teacher against county superintendent should intervene in their corporate name.—Isbill v. Stovall, Tex.Civ. App., 92 S.W.2d 1067.

Opposition to intervener's claim

In state's action to enjoin fraudulent practices by a corporation, wherein a party was permitted to intervene for purpose of establishing claim as a defrauded purchaser of stock, a stockholder who might be entitled to share in any surplus remaining after payment of claims of defrauded purchasers had an ostensible interest in determination on the merits of the claim of the intervener, and was entitled to an opportunity to oppose the allowance of intervener's claim.—People v. Monthly Income Shares, 31 N.Y.S.2d 527, 263 App.Div. 832.

Action reduced to one for damages

Where an injunction action has been reduced to one for damages, all parties injured by the wrongs complained of should be permitted to come into the action and set up their damages.—Utah Oil Refining Co. v. District Court of Salt Lake County, 209 P. 624, 60 Utah 428—Kinsman v. Utah Gas & Coke Co., 177 P. 418, 53 Utah 10.

73. N.Y.—People v. Royal Development Co., 268 N.Y.S. 98, 239 App. Div. 518.

Requirements as to content of pleading

N.Y.—People v. Royal Development Co., supra.

74. Ala.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.
Ga.—Davis v. Warde, 118 S.E. 378, 155 Ga. 748, error dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 527.
Ky.—Horning v. Caldwell County Fiscal Ct., 218 S.W. 989, 187 Ky. 87.

75. Cal.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 599, 13 Cal.2d 661.
Fla.—Daugherty v. Latham, 190 So. 742, 139 Fla. 477.
Mo.—McNellis v. Kansas City, App., 143 S.W.2d 477.
Utah.—Price v. Hanson, 206 P. 272, 60 Utah 29.
32 C.J. p 304 note 26.

City; state

(1) "In an action in equity to restrain a contractor of a city from prosecuting a public improvement in a negligent manner . . . the city will not be allowed to intervene, where intervention is not necessary to determine the rights between the parties, where no injury to or title in real property in which the city has an interest is involved, where there can be no recovery against the city on the cause of action set forth in the complaint, or a recovery over against the city by the contractor, or by the contractor against the city."—Touhey Co. v. Shongo Const. Co., 165 N.Y.S. 420, 100 Misc. 181.

(2) In action to restrain railroad from constructing extension tracks without first obtaining a certificate of convenience and necessity from interstate commerce commission, city held not entitled to intervene.—L. Singer & Sons v. Union Pac. R. Co., D.C.Mo., 26 F.Supp. 721, affirmed, C. C.A., 109 F.2d 493, certiorari granted 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, and Kansas City, Mo. v. Singer & Sons, 60 S.Ct. 891, 309 U.S. 653, 84 L.Ed. 1002, affirmed L. Singer & Sons v. Union Pac. R. Co., 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198.

(3) City and state held not entitled to intervene in suit by subscribers to enjoin telephone company from discontinuing telephone service in violation of contract.—People v. Brophy, 120 P.2d 946, 49 Cal.App. 2d 15.

State labor relations board

In employer's action to restrain trade union from carrying out threat to submit testimony before state labor relations board regarding charges of unfair labor practices which

to make a party plaintiff a person applying to be made such, he will be made a party defendant, where, by that being done, he can equally have the benefit of the suit.[76] A stranger to a suit whose rights have been affected unfavorably by an injunction may appear by petition and request a construction or modification of the injunction so as to preclude all risk of violation in the pursuit of rights acquired previous to its issuance,[77] or, if the court is satisfied that he has a right to be made a party, it may order that the injunction shall stand dissolved, unless plaintiff shall amend his bill by making such person a party.[78]

A petition for leave to intervene must be timely filed.[79]

Amendments. The courts have been said to be very liberal in permitting amendments as to parties in injunction suits.[80] Where a misjoinder occurs, the court may allow an amendment by striking out the parties improperly joined.[81] In case of the nonjoinder of necessary parties the court will not dismiss the bill but will permit[82] or require[83] the addition of the necessary parties, the usual order being for the case to stand over with liberty to amend by adding the necessary parties.[84] Such an amendment, when necessary to accomplish the ends of justice and secure the interests of all, may, it has been held, be made at any time,[85] and, according to some decisions, even after an injunction has been granted;[86] but there is authority which apparently limits this latter proposition,[87] and, where an injunction has been refused, the trial court has no jurisdiction to reopen the case by permitting the filing of an amended petition adding a party defendant.[88]

On the other hand, entirely new parties cannot be substituted for improper parties by amendment;[89] and an amendment of the bill will not be allowed which will in effect, by the introduction of new parties, change the aspect of the bill and amount to the institution of a new suit.[90] Where, on the

allegedly occurred prior to an adjustment of controversy between the union and employer, wherein the state labor relations board asked permission to intervene, the board was not a "real party in interest."—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 81, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199.

Lis pendens purchaser held not entitled to intervene.—White v. Pond Creek Coal Co., 256 S.W. 30, 201 Ky. 212.

Sublessee

In suit against lessee under timber and turpentine lease to enjoin acts of trespass not authorized by the lease, intervening petition of sublessee setting up cross demands and contesting plaintiff's right to dismiss the action was held subject to demurrer.—Tyson v. Odom, 116 S.E. 316, 155 Ga. 320.

76. U.S.—Brown v. Pacific Mail SS. Co., C.C.N.Y., 4 F.Cas.No.2,025, 5 Blatchf. 525.

77. Tenn.—Speak v. Ransom, 2 Tenn.Ch. 210.

78. Va.—Harrison v. Morton, 4 Hen. & M. 483, 14 Va. 483.

79. **Petition denied as not timely**

Where check received by telephone subscriber for refund, pursuant to decree enjoining enforcement of order reducing rates, recited that particular amount was deducted as contribution to payment of attorneys, pursuant to court order, subscriber had actual notice of deduction for attorney's fees, and hence his petition to intervene and attack allowance of fees, filed nearly three years later and after entry of final decree, must be denied as not timely.—Lackner v. Illinois Bell Telephone Co., C.C.A.Ill., 111 F.2d 136, certiorari denied 61 S.Ct. 27, 311 U.S. 652, 85 L.Ed. 417.

80. N.J.—Buckery v. Corse, 1 N.J. Eq. 504.
N.Y.—Clark v. Judson, 2 Barb. 90.

Petition by attorney general held amendable so as to make the action one in the name of the state by and through the attorney general.—Hart v. Atlanta Terminal Co., 58 S.E. 452, 128 Ga. 754.

Effect of amendment dropping party

In suit by optometrist and his employer, a corporation, to enjoin state board from interfering with business in which by amendment the corporation was dropped as a party, plaintiff's contention that the corporation is no longer before this court and, therefore, all averments pertaining to it are irrelevant, merits scant attention because the corporation is but the alter ego of plaintiff; although plaintiff, by his amended bill of complaint, sought to drop the corporation as a party plaintiff, yet the activities of the corporation form the gravamen of the amended bill, and are necessarily before the court.—Wagner v. Brown, 47 Dauph.Co., Pa., 33.

81. Mass.—Dana v. Valentine, 5 Metc. 8.
32 C.J. p 304 note 33.

82. Miss.—T. L. Murphy & Co. v. American Soda Fountain Co., 39 So. 100, 86 Miss. 791.
N.Y.—Johnson v. Bee Line, 28 N.Y.S.2d 18.
32 C.J. p 304 note 34.
"An amendment to a petition for injunction may introduce new parties plaintiff or defendant."—Cozart v. Crenshaw, Tex.Civ.App., 299 S.W. 499, 502.

Making city nominal complainant

In suit by citizen against water company to enjoin violation of its duty to lay six-inch mains in extending its water system, where complainant was not party or privy to contract between city and water company, there was no impropriety in amendment, making city nominal party complainant.—Alabama Water Co. v. City of Jasper, 100 So. 486, 211 Ala. 280.

83. Mass.—Schwoerer v. Boylston Market Assoc., 99 Mass. 285.
32 C.J. p 304 note 35.

84. Mass.—Case v. Minot, 33 N.E. 700, 158 Mass. 577, 22 L.R.A. 536.
32 C.J. p 305 note 36.

85. Idaho.—Oro Fino & Morning Star Min. Co. v. Cullen, 1 Idaho 113.

86. Ga.—Mayer v. Coley, 7 S.E. 164, 80 Ga. 207.
32 C.J. p 305 note 38.

87. Mass.—Ingraham v. Dunnell, 5 Metc. 118.
32 C.J. p 305 note 39.

88. Mo.—Mitchell v. Dabney, App., 71 S.W.2d 165, transferred, see 58 S.W.2d 731, 332 Mo. 410.

89. Md.—Anderson v. Truitt, 148 A. 223, 158 Md. 193.

90. Mo.—Meyer v. Oregon Interurban Ry. Co., 271 S.W. 865, 219 Mo. App. 360.

allegations in the bill, plaintiff must necessarily fail even if an omitted party be brought in, an amendment will not be allowed.[91]

§ 178. —— Defects and Objections

Under a number of authorities, although not under others, a defect of parties in an injunction suit is ground for demurrer. An objection based on a defect or misjoinder of parties must be timely made, and may be waived by answer.

A defect of parties in a suit for injunction has been held not a ground for demurrer;[92] but other authority is to the contrary,[93] or holds that, where the facts showing plaintiff's lack of authority to sue appear on the face of the bill, the action may be abated by demurrer,[94] and that where a misjoinder of parties plaintiff does not appear on the face of the petition the question cannot be raised by general demurrer.[95] If the proper and necessary parties to an action for an injunction are not before the court, a decree may for this defect be reversed on rehearing[96] or on appeal;[97] but the presence of too many parties plaintiff, or a misjoinder, is not a defect of parties where some of the plaintiffs have full capacity to bring the suit.[98]

It has been said that a defect of parties in an injunction suit is waived by answer;[99] and an objection based on a defect of parties is cured or waived by their appearance and answering to the bill.[1] Such objection cannot be raised after the case has been reversed on the facts found by the court,[2] or, as appears in Appeal and Error § 265, for the first time on appeal. An objection for misjoinder of parties comes too late when made for the first time at the hearing.[3] However, an injunction suit against a defendant which is not a suable entity has been held void ab initio,[4] and its invalidity may be called to the attention of the court at any stage of the proceeding.[5]

The defect of want of parties does not go to the jurisdiction of the court to entertain the suit, but goes to its discretion, as a court of equity, to entertain it.[6]

Cure of defect of parties by amendment is considered supra § 177.

§ 179. Process and Appearance

Unless defendant voluntarily appears or waives process, a final injunction can be granted only if process issues and service is made on him.

Unless defendant voluntarily appears and submits himself to the jurisdiction, it is necessary that process issue and service be made on him before

N.Y.—Rhynders v. Greene, 8 N.Y.S.2d 143, 255 App.Div. 401—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 54.

32 C.J. p 305 note 40.

Claim held not changed by allowance of amendment striking out name of plaintiff and substituting that of his wife.—Rader v. Gvozdanovic, 130 P. 159, 35 Okl. 421.

Person allegedly continuing defendant's trespass

In suit to enjoin trespass, wherein it appeared that defendant had desisted from further trespass before hearing on petition, refusal to make third person a defendant, under allegation that such person took up and continued trespass committed by original defendant, was not error, in absence of allegation that third person committed trespass before suit was filed, or was acting in concert or collusion with original defendant in carrying out the latter's purpose and intent to commit trespass, or was in privity with him.—Hargroves v. Edwards, 192 S.E. 18, 184 Ga. 515.

91. N.Y.—Mickles v. Rochester City Bank, 11 Paige 118, 42 Am.D. 103.

92. Kan.—Andrews v. Richards, 226 P. 793, 116 Kan. 344.

Joint relief

"If the complaint states any ground for any kind of joint relief, the demurrer cannot be sustained for misjoinder of plaintiffs."—Speyer v. School Dist. No. 1, City and County of Denver, 261 P. 859, 860, 82 Colo. 534, 57 A.L.R. 203.

"Real party in interest;" capacity to sue

In action to restrain the defendant from further doing business as a death benefit association, demurrer for want of "legal capacity to sue" would not raise a question whether the attorney general of the state was the "real party in interest;" complaint was not subject to special demurrer on ground that plaintiff did not have legal capacity to sue, where it did not disclose that there was a legal disability of plaintiff to prosecute an action.—American Home Benefit Ass'n v. United American Benefit Ass'n, 125 P.2d 1010, 1016, 63 Idaho 754.

93. Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.
Mass.—Bauer v. Mitchell, 142 N.E. 815, 247 Mass. 522.
N.Y.—Shepard v. Manhattan Ry. Co., 23 N.E. 30, 117 N.Y. 442.
W.Va.—United Fuel Gas Co. v. Morley Oil, etc., Co., 131 S.E. 713, 101 W.Va. 73.

94. Miss.—Capitol Stages v. State, 128 So. 759, 157 Miss. 576.

95. Tex.—Porter v. Johnson, Civ. App., 140 S.W. 469.

96. Me.—Morse v. Machias Water Power & Mill Co., 42 Me. 119.

97. Me.—Morse v. Machias Water Power & Mill Co., supra.
Mich.—Cities Service Oil Co. v. Waldron, 238 N.W. 249, 255 Mich. 530, citing **Corpus Juris.**
W.Va.—Moore v. Jennings, 84 S.E. 793, 47 W.Va. 181.

98. Mich.—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692.
S.C.—Ezell v. Ritholz, 198 S.E. 419, 188 S.C. 39.

99. Colo.—Terrace Irr. Dist. v. Overflow Ditch No. 1, 195 P. 325, 69 Colo. 362.

1. Ga.—Brunswick v. Finney, 54 Ga. 317.
32 C.J. p 305 note 44.

2. Conn.—Chambers v. Robbins, 28 Conn. 552.

3. N.Y.—Watertown v. Cowen, 4 Paige 510, 27 Am.D. 80.

4. Mo.—Aalco Laundry & Cleaning Co. v. Laundry, Linen and Towel Chauffeurs and Helpers Union Local No. 366, App., 113 S.W.2d 1081.

5. Mo.—Aalco Laundry & Cleaning Co. v. Laundry, Linen and Towel Chauffeurs and Helpers Union Local No. 366, supra.

6. U.S.—Rood v. Goodman, C.C.A. Tex., 88 F.2d 28, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 405.

the court can grant a final injunction against him.[7] The procedure may be to serve on defendant the writ of injunction and a subpœna to appear and answer,[8] and the subpœna should be returned within the time prescribed for return of service for an injunction.[9] Process may be waived;[10] thus, want or insufficiency of service of process is waived or cured where defendant voluntarily appears and answers to the bill.[11] Some authorities permit service of process, by leave of court, on an attorney, to restrain proceedings at law, when the client is out of the jurisdiction,[12] and permit the service of a cross bill on the attorney of a nonresident plaintiff.[13] Under a statute providing for service on a nonresident by publication, service on his attorney gives the court no jurisdiction.[14] An injunction against the enforcement of a judgment obtained within the state by a nonresident may be sustained by constructive service on the nonresident as a remedy in personam ancillary to the action by the nonresident.[15] Where it is sought to restrain the fraudulent sale of securities within the state by a nonresident, it has been held that under statutory provisions service of process by registered mail directed to defendant's address outside the state may be sufficient.[16]

§ 180. —— Preliminary Injunction or Restraining Order

a. Necessity of notice in general
b. Dispensing with notice
c. Requisites and sufficiency of notice
d. Waiver of notice

a. Necessity of Notice in General

The general rule is that a preliminary injunction or restraining order will not be granted until after notice of the application therefor, or an order to show cause, has been given to defendant, so that he may oppose the application.

Under the general principles of equity, as well as under some statutes and rules of court, a preliminary injunction or restraining order will generally not be granted until after notice of the application therefor, or an order to show cause, has been given to defendant so that he may oppose the

7. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.
32 C.J. p 309 note 92.

Indorsement of summons, "Equity, temporary injunction issued," is not misleading.—Skinner v. Ashford, 268 N.W. 81, 131 Neb. 338.

No appearance day is fixed in the absence of issuance or service of summons.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.

Notice of intention to ask for injunction is not sufficient to authorize dispensing with issuance and service of process.
Fla.—Smith v. Housing Authority of City of Daytona Beach, supra.
W.Va.—Cooper v. Bennett, 73 S.E. 260, 70 W.Va. 110, Ann.Cas.1913D 851.

Service of summons and complaint may be obviated by statute authorizing issuance of injunction on five days' notice.—Julius Restaurant v. Lombardi, 25 N.E.2d 874, 282 N.Y. 126, reversing Julius Restaurant v. Lombardi, 13 N.Y.S.2d 490, 257 App.Div. 870.

Where complaint and final order are filed on the same day, there can be no proper mesne process where statute prohibits issuance of summons in equity until after filing of bill.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.

On whom service necessary

(1) National board of trade unions or its president, where injunction sought against them.—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.

(2) Pickets of trade union, where union has no officer or person within the state other than the pickets.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 7 A.2d 170, 125 N.J.Eq. 575.

(3) Members of National Labor Relations Board, where injunction sought against enforcement of National Labor Relations Act because of multiplicity of proceedings in various jurisdictions.—Associated Press v. Herrick, D.C.N.Y., 13 F.Supp. 897.

8. N.J.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116, 79 N.J.Eq. 150, affirmed 83 A. 1118, 79 N.J.Eq. 641.
32 C.J. p 309 note 93.

9. N.J.—Allman v. United Brotherhood of Carpenters and Joiners of America, supra.

10. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.

11. D.C.—Hutchins v. Munn, 28 App. D.C. 271, affirmed 28 S.Ct. 504, 209 U.S. 246, 52 L.Ed. 776.
Pa.—Mintzer v. Turnbach, 172 A. 162, 113 Pa.Super. 113.
Tex.—National Bank of Hopewell, Va. v. Marshall, Civ.App., 2 S.W. 2d 471, error dismissed.
32 C.J. p 309 note 95.

Appearance by attorney may be ratified by a subsequent answer and ratification may relate back.—Hutchins v. Munn, 28 App.D.C. 271, affirmed 28 S.Ct. 504, 209 U.S. 246, 52 L.Ed. 776.

Motion to dissolve restraining order obtained before commencement of action is not appearance in action.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293—Donlan v. Thompson Falls Copper & Milling Co., 112 P. 445, 42 Mont. 257.

Special appearance to dismiss complaint is not changed into general appearance by allegations of motion.—Eisner v. Williams, 298 N.W. 507, 298 Mich. 215.

12. U.S.—Crellin v. Ely, C.C.Cal., 13 F. 420, 7 Sawy. 532.
32 C.J. p 309 notes 96, 97.

Quasi party defendant
Miss.—Mattingly's Bakery v. Sparks Milling Co., 179 So. 271, 181 Miss. 198.

13. U.S.—Lowenstein v. Glidewell, C.C.Ark., 15 F.Cas.No.8,575, 5 Dill. 325.
32 C.J. p 310 note 98.

14. Iowa.—Death v. Pittsburg Bank, 1 Iowa 382.
Mich.—Union Assur. Soc., Limited, of London, England, v. Buono, 193 N.W. 827, 22 Mich. 336.

15. N.J.—Englander v. Jacoby, 28 A.2d 292, 132 N.J.Eq. 336.

16. N.J.—Wilentz v. Edwards, 33 A. 2d 297, 133 N.J.Eq. 488, affirmed 36 A.2d 423, 134 N.J.Eq. 522—Stevens v. Television, Inc., 162 A. 248, 111 N.J.Eq. 306.

application by answer or by affidavits or otherwise.[17] The rule is especially applicable after a

17. U.S.—Franz v. Franz, C.C.A.Mo., 15 F.2d 797—U. S. v. Wood, D.C. Mass., 27 F.Supp. 375.
Ala.—Rochell v. City of Florence, 182 So. 50, 53, 236 Ala. 313, quoting **Corpus Juris.**
Colo.—Fort v. Co-Operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-Operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.
Fla.—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254—Willis v. Hathaway, 117 So. 89, 95 Fla. 608.
Idaho.—Mountain States Power Co. v. City of Sandpoint, 290 P. 400, 49 Idaho 569.
Ill.—Balaban & Katz Corporation v. Rose, 283 Ill.App. 615.
Md.—Zimmerman v. Garfinkel, 124 A. 919, 144 Md. 394.
Mich.—Chamberlain v. Durfee, 249 N.W. 486, 264 Mich. 194.
Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.
Pa.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314—Commonwealth v. Kohut, 7 Pa.Dist. & Co. 648, 20 North Co. 180—Barbano v. Barbano, Com.Pl., 32 Del.Co. 24—Hance v. Easton Hospital, Com.Pl., 29 North.Co. 46.
Tex.—Plocek v. Welhausen, Civ.App., 144 S.W.2d 631—Texas Centennial Central Exposition v. Greenwood, Civ.App., 94 S.W.2d 813, error dismissed—Lokey v. Elliott, Civ.App., 88 S.W.2d 126—Railroad Commission of Texas v. Burkett, Civ.App., 66 S.W.2d 448—Nelson v. Thompson, Civ.App., 64 S.W.2d 373, error dismissed.
32 C.J. p 305 note 50.
Hearing see infra §§ 199, 200.

Purpose of statute requiring notice of application for injunction is to give defendant opportunity to show that injunction should not issue.—Schmidt v. Modern Woodmen of America, 261 Ill.App. 276.

Injunction without notice held void
Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.
N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

A mandatory injunction or order will generally not be issued except on proper notice.
Ky.—Roediger v. Caldwell, 246 S. W. 451, 197 Ky. 164.
Miss.—Mississippi Power & Light Co. v. Ross, 150 So. 830, 168 Miss. 400.
Tex.—Lower Colorado River Authority v. Gulf Coast Water Co., Civ. App., 107 S.W.2d 1101.
32 C.J. p 305 note 50 [b].

Disputed ownership of property
Court had jurisdiction to grant restraining order to preserve conditions in statu quo for reasonable time until hearing could be had on notice for injunction pendente lite, but had no jurisdiction without notice to make order pendente lite where rights of parties depended on disputed title and ownership of property.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

Enforcement of ordinance
A statute prohibiting issuance of a temporary injunction to restrain enforcement of an ordinance except on a hearing and after notice does not require notice where it is sought to enjoin an alleged improper manner of enforcing ordinance.—Ex parte Connor, 198 So. 850, 240 Ala. 327.

Nonresident defendant
The fact that the nonresidence of a defendant appeared on the face of the bill was not ground for vacation of order to show cause why a preliminary injunction should not issue, where the order had been served on defendant within the jurisdiction. —Elgart v. Mintz, 200 A. 488, 124 N.J.Eq. 136.

Prior service of subpœna
"Issuance and service of subpœna to answer are not prerequisites to the issuance and service of an order to show cause why a preliminary injunction should not issue."—Elgart v. Mintz, supra.

In Georgia
On application for injunction, the judge on a proper showing may grant without notice to defendant a temporary restraining order; where such order has been granted, it is the duty of the judge to cause sufficient notice to be given to defendant as to the time and place for an interlocutory hearing to be had thereon, and it is only on such hearing and after notice thereof that a temporary or interlocutory injunction may be granted.—Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418.

Reasonable time for restraint
An injunction order, treated as a temporary restraining order, was effective to preserve status quo for a reasonable time necessary to enable notice to be given for hearing as to whether it should be effective pendente lite, but could not be effective pendente lite without notice or hearing, and order spent its force after lapse of reasonable time, so that, in so far as order attempted to restrain beyond reasonable time, which was long before five years after issuance of order, order was void for want of jurisdiction.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

Service on one defendant
"Where the record fails to show that certain of the defendants were never served with process and never appeared therein, but the record does show that one defendant accepted service and does not show that service was not accepted by or made upon other defendants and that one of the defendants was before the chancellor, the chancellor acquired jurisdiction to deny a temporary restraining order."—Ames v. Baker, 130 So. 11, 100 Fla. 585.

In Indiana
"A temporary restraining order is usually issued without notice . . . while a temporary injunction is usually issued upon notice."—Swaim v. City of Indianapolis, 171 N.E. 871, 873, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

In Louisiana
(1) "A judge shall not grant a preliminary injunction—although he may grant a temporary restraining order—without first issuing a rule on the defendant to show cause why a preliminary injunction should not be granted."—Brock v. Stassi, 179 So. 44, 45, 189 La. 88.

(2) Act 1924 No. 29, § 1, providing that no writ of injunction shall be issued without notice, or without opportunity for hearing governs all injunctions issuing under prior special or general acts.—Rapides Dairy Dealers' Co-op. Ass'n v. Mathews, App., 158 So. 247.

(3) Injunction issued without notice required by the statute was void and incurable.—Fussell v. Burris Bros., 126 So. 537, 12 La.App. 516—State ex rel. Baptist Hospital v. Williams, 1 La.App. 341.

(4) "The statute regulating the procedure . . . Act No. 29 of 1924, does not require the district judge to issue a rule on the defendant to show cause why an injunction should not issue, in a case where the record itself, before the district judge, shows that an injunction should not issue."—Weber v. Dawson, 133 So. 751, 753, 172 La. 213.

In Washington
"Courts issue temporary restraining orders without notice only in cases in which a satisfactory showing is made which convinces the court that the signing of such an order is required in the interests of justice and equity . . . Instances in which a restraining order would be issued without notice, the effect of which will be other than to preserve the status quo, are rare." —State ex rel. Pay Less Drug Stores

defendant has answered or is otherwise before the court,[18] or where the granting of the injunction or order would result in a decision of the main questions involved,[19] or would have the effect of giving full relief on the application for interlocutory injunction,[20] or where for all practical purposes a temporary injunction could be tantamount to a permanent one.[21] Such notice is always required where there is no showing of injury likely to occur before a hearing can be had.[22]

Court rules providing as to the conditions under which a temporary restraining order may be granted without notice, and the requisites of such an order, must be substantially complied with.[23]

In at least one jurisdiction, where a temporary restraining order will afford adequate protection until notice can be given and a hearing had, it should be issued, rather than a temporary injunction without notice.[24]

Special statutory provisions. The statutes of some jurisdictions by implication permit the granting of a preliminary injunction without notice.[25] Under statute in some jurisdictions the general and ordinary business of a corporation,[26] or the operation of a railway or of a municipal corporation,[27] may not be suspended until after due notice and a hearing, and an ex parte injunction granted in such cases contrary to the statute is void.[28] Likewise, a restraining order is void if issued without the notice required by statute in a case between employer and employee growing out of a dispute concerning terms or conditions of employment.[29] It has been held, however, that, notwithstanding the statute, notice need not be given where an injunction is sought to restrain a corporation from committing unlawful acts injurious to plaintiff,[30] or acts that are not within the ordinary business of the corporation or municipality,[31] or within the meaning of the words "operation of a railway."[32] A statute providing that, before the issuance of an injunction to stay any proceeding, reasonable notice in writing shall be given to the adverse party or his agent is applicable only to injunctions sued out to stay a suit, judgment, or judicial proceeding, and it is not a condition precedent to the jurisdiction of the court to issue an injunction in other cases that any previous notice shall have been given to the adverse party.[33]

b. Dispensing with Notice

(1) In general

(2) Requisites and sufficiency of showing to justify writ or order without notice

(1) In General

A preliminary injunction or restraining order may be granted without notice in cases of great urgency or where irreparable injury or undue prejudice would ensue from the giving of notice. In the absence of mandatory legislation or court rule, such grant without notice rests in the court's discretion.

It has been said that only in the rarest cases is it proper to grant a temporary injunction without notice.[34] Under the general rule, as well as under some statutes, it is only in cases of great urgency or pressing necessity, or where irreparable injury or undue prejudice would ensue from the giving of notice,[35] or where the giving of notice is imprac-

v. Sutton, 98 P.2d 680, 684, 2 Wash. 2d 523.

18. S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
32 C.J. p 306 note 51.

19. Ky.—Roediger v. Caldwell, 246 S.W. 451, 197 Ky. 164.
Miss.—Martin v. Broadus, Freem. 35.

20. Tex.—Cartwright v. Warren, Civ.App., 177 S.W. 197.

21. Tex.—Plocek v. Welhausen, Civ. App., 144 S.W.2d 631.

22. Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.
32 C.J. p 306 note 55.

23. Tex.—Crouch v. Crouch, Civ. App., 164 S.W.2d 35.

24. Tex.—Plocek v. Welhausen, Civ. App., 144 S.W.2d 631—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690—Smith v. State, Civ.App., 103 S.W.2d 805—Texas Centennial Central Exposition v. Greenwood, Civ.App., 94 S.W.2d 813, error dismissed—Soto v. State, Civ.App., 171 S.W. 279—Holman v. Cowden & Sutherland, Civ.App., 158 S.W. 571.

25. Wyo.—Anderson v. Englehart, 108 P. 977, 18 Wyo. 409.

26. Idaho.—Mountain States Power Co. v. City of Sandpoint, 290 P. 400, 49 Idaho 569.
32 C.J. p 306 note 57.

27. Iowa.—Lodomillo Dist. Tp. v. Cass Dist. Tp., 6 N.W. 163, 54 Iowa 115.

28. N.Y.—Wilkie v. Rochester & S. L. R. Co., 12 Hun 242.

29. Kan.—Giltner v. Becker, 298 P. 780, 133 Kan. 170.

30. Cal.—Hobbs v. Amador & Sacramento Canal Co., 4 P. 1147, 66 Cal. 161.

31. Wis.—Bay Land & Imp. Co. v. Town of Washburn, 48 N.W. 492, 79 Wis. 423.
32 C.J. p 306 note 61.

32. Iowa.—Johnston v. Chicago, M. & St. P. R. Co., 12 N.W. 576, 53 Iowa 537.
32 C.J. p 306 note 62.

33. Mo.—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428—State v. Woodside, 163 S.W. 845, 254 Mo. 580.

34. Tex.—Lower Colorado River Authority v. Gulf Coast Water Co., Civ.App., 107 S.W.2d 1101—Smith v. State, Civ.App., 103 S.W.2d 805—Soto v. State, Civ.App., 171 S.W. 279—Holman v. Cowden & Sutherland, Civ.App., 158 S.W. 571.
Va.—Cohen v. Rosen, 160 S.E. 36, 157 Va. 71.

35. Colo.—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.
Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Thursby v. Stewart, 138 So. 742, 103 Fla. 990—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

ticable,[36] that a preliminary injunction or restraining order will be granted without notice; and in the case of a mandatory injunction it has been required that there be no reasonable doubt of its propriety.[37] Thus, if it is made to appear to the satisfaction of the court that an emergency or case of pressing necessity for the issuance of a temporary injunction or restraining order exists, and that irreparable and substantial injury or mischief will probably result if such issuance is delayed until after notice and hearing, an order for such injunction, or such restraining order, will usually be issued without notice,[38] as where it is made to appear that the giving of notice may induce the acceleration of the act sought to be enjoined.[39] Nevertheless, this power should be exercised with caution.[40] In the absence of mandatory provisions of statutes or court rules,[41] such grant without notice rests in

Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Balaban & Katz Corporation v. Rose, 283 Ill. App. 615.

Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

Or.—Forte v. Page, 143 P.2d 669, 672, citing **Corpus Juris.**

Pa.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314—Commonwealth v. Kohut, 7 Pa.Dist. & Co. 648, 20 North.Co. 180.

Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Plocek v. Welhausen, Civ.App., 144 S.W.2d 631—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 329—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Texas Centennial Central Exposition v. Greenwood, Civ.App., 94 S.W.2d 813, error dismissed—Andrews v. Archer County, Civ.App., 45 S.W.2d 227—Lark v. Coyle, Civ. App., 260 S.W. 1107—Thurman v. Kirkland, Civ.App., 260 S.W. 677—Farb v. Theis, Civ.App., 250 S.W. 290—Chas F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451—International & G. N. R. Co. v. Anderson County, Civ. App., 150 S.W. 239, affirmed 156 S. W. 499, 106 Tex. 60.

Va.—Cohen v. Rosen, 160 S.E. 36, 157 Va. 71.

32 C.J. p 306 note 54.

A mandatory injunction will be granted without notice only in cases of the greatest emergency or where the delay would work irreparable injury.

Miss.—Mississippi Power & Light Co. v. Ross, 150 So. 830, 168 Miss. 400.

Tex.—McMurrey Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Johnson v. Williams, Civ.App., 109 S.W.2d 213.

32 C.J. p 307 note 71 [a].

In a matter of great public importance, a temporary injunction or restraining order should not be granted without notice except in case of extreme emergency.—Mountain States Power Co. v. City of Sandpoint, 290 P. 400, 49 Idaho 569—Roberts v. Kartzke, 111 P. 1, 18 Idaho 552—32 C.J. p 305 note 50 [d].

Injunction unlawful but not void

Original fiat granting mandatory injunction without notice, although unlawful in view of lack of showing of extreme urgency excusing notice, was not void.—Pitts v. Carothers, 120 So. 830, 152 Miss. 694.

"When a temporary restraining order is issued there can be no possibility of injury during the time required to give notice for an injunction pendente lite."—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 748, 105 Mont. 72.

38. Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.

Inability to serve notice

(1) Granting order for temporary injunction without notice was held proper where defendant's place of business was closed and no one was in charge, and his attorneys stated that he was out of the jurisdiction and that they had no interest in the litigation.—McDougall v. Woods, 247 Ill.App. 170.

(2) Inability to serve notice of an application for a preliminary injunction does not appear where it is not shown that one or more of the defendants could not have been served at their known business address or that plaintiff could not have left or mailed a notice as rule of court provides.—A. Daigger & Co. v. Kraft, 281 Ill.App. 548.

Alabama statute construed

Provision of statute authorizing judge, in his discretion, to hear application for injunction pendente lite without notice, where respondents cannot with due diligence be served with timely notice means that hearing may be abandoned and application heard under alternate practice authorizing grant of injunction without hearing and subjecting injunction, if granted, to motion to dissolve.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.

37. Miss.—Mississippi Power & Light Co. v. Ross, 150 So. 830, 168 Miss. 400.

38. Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879—Thursby v. Stewart, 138 So. 742, 103 Fla. 990—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

Ga.—Edwards v. United Food Brokers, 22 S.E.2d 812, 195 Ga. 1.

Ill.—Hookanson v. Chicago City Bank & Trust Co., 5 N.E.2d 585, 287 Ill.App. 630—A. Daigger & Co. v. Kraft, 281 Ill.App. 548—Skelers v. Meyer, 246 Ill.App. 18—Loftis v. Loftis, 225 Ill.App. 478.

Ky.—Roediger v. Caldwell, 246 S. W. 451, 197 Ky. 164.

Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

Tex.—City of Jacksonville v. Devereux, Civ.App., 286 S.W. 572—Thurman v. Kirkland, Civ.App., 260 S.W. 677—Woodward v. Smith, Civ. App., 253 S.W. 847.

32 C.J. p 307 note 71, p 308 note 75.

39. Ill.—A. Daigger & Co. v. Kraft, 281 Ill.App. 548—Skelers v. Meyer, 246 Ill.App. 18.

40. Or.—Forte v. Page, 143 P.2d 669, 672, citing **Corpus Juris.**

Tex.—Farb v. Theis, Civ.App., 250 S.W. 290.

32 C.J. p 307 note 73.

"Of all the powers of the Court of Chancery, there is none which requires in its exercise greater caution than the power to issue a preliminary injunction ex parte, without notice to the defendants."—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

41. U.S.—Franz v. Franz, C.C.A.Mo.,

the sound discretion of the court,[42] and this may be done in vacation as well as in term time;[43] and the action of the court will not be reversed in the absence of an abuse of discretion.[44] Whether a temporary injunction should be granted in a particular case without notice depends on the special facts of that case.[45]

Even where an injunction is granted without notice, defendant is not bound by the injunction until properly served with notice of its issuance.[46]

(2) Requisites and Sufficiency of Showing to Justify Writ or Order without Notice

One seeking a preliminary injunction or restraining order without notice must make out a very clear case for dispensing with notice; thus, he must allege facts showing that irreparable damage would result from notice, and not merely state conclusions.

A complainant seeking the issuance of a preliminary injunction or restraining order without notice must make out a very clear case for dispensing with notice;[47] the supporting allegations have been required to be made unequivocally as existing facts, and not merely on information and belief.[48] The allegations of the bill or petition should be even more carefully considered than when defendant has been served with notice,[49] and it has been said that

15 F.2d 797, 799, citing **Corpus Juris.**

S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

Staying judicial proceedings

Equity court or judge thereof has no power to grant injunction to restrain prosecution of or stay judicial proceedings without written notice, required by statute, to adverse parties; such statute "cuts out the jurisdiction of the court to issue such a restraining order without the notice required by its terms first having been given relators; and there is no place left for the exercise of discretion in the matter by the judge."—State ex rel. Kansas City Exchange Co. v. Harris, 81 S. W.2d 632, 645, 229 Mo.App. 721.

In suit for foreclosure of mortgage on land, where deficiency judgment was anticipated, order enjoining defendants from collecting dividends on certain corporate stock, and directing that such dividends be paid into court pendente lite, was held erroneously entered without notice to defendants, under statutory provisions and rule of court.—Palmetto Guano Corporation v. Green, 136 S. E. 132, 138 S.C. 106.

42. Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879.

S.C.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

Va.—Cohen v. Rosen, 160 S.E. 86, 157 Va. 71.

32 C.J. p 307 notes 66, 74.

Discretion held not abused

Ill.—Bahr Cheese Co. v. Renter, 5 N.E.2d 109, 287 Ill.App. 635.

Tex.—Flocek v. Welhausen, Civ.App., 144 S.W.2d 631.

Violation of production proration order

In railroad commission's suit to enjoin violation of oil production proration order, court may, where circumstances require it, and in exercise of judicial discretion, issue restraining order against defendant without notice; and a temporary injunction so issued should be sustained in the absence of a showing of abuse of discretion.—Alpha Petroleum Co. v. Railroad Commission, Tex.Civ.App., 59 S.W.2d 374, error dismissed.

43. W.Va.—Powhatan Coal & Coke Co. v. Ritz, 56 S.E. 257, 60 W.Va. 395, 9 L.R.A.,N.S., 1225.

44. Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879.

32 C.J. p 307 note 69.

45. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.

Ill.—Skelers v. Meyer, 246 Ill.App. 18.

N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

32 C.J. p 307 note 68.

46. Tex.—McDade v. Vogel, Civ. App., 173 S.W. 506.

47. Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Thursby v. Stewart, 138 So. 742, 103 Fla. 990—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Balaban & Katz Corporation v. Rose, 283 Ill. App. 615.

N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Flocek v. Welhausen, Civ.App., 144 S.W.2d 631—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690—Shell Petroleum Corporation v. State, Civ.App., 86 S.W.2d 245—Ricketts v. Ferguson, Civ.App., 64 S.W.2d 416, error refused—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.

Wash.—Larsen v. Winder, 44 P. 123, 14 Wash. 109, 53 Am.S.R. 864.

32 C.J. p 308 note 76.

No presumptions may be indulged in favor of injunction without notice; a party seeking such injunction must bring himself within the statutory provision stating the circumstances under which it will be permitted.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill. App. 272.

Clear case for injunction

"The court should be satisfied that a clear case for injunction is made by a bill of complaint, before granting a temporary injunction or restraining order without notice."—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 48, 101 Fla. 254.

48. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.

Ill.—Johnson v. Crouch, 224 Ill.App. 105.

Tex.—Guthrie v. Speck, Civ.App., 53 S.W.2d 318.

32 C.J. p 305 note 50 [c], p 308 note 81 [b].

49. Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.

N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

32 C.J. p 308 note 77.

Prayer for relief for temporary restraining order restraining police officers from unlawfully interfering with restaurant business was too vague to support injunction without notice, where it did not plainly spec-

they will be subjected to strict construction,[50] and construed most strongly against the pleader[51] and against their sufficiency for the purpose.[52] The showing should be made by sworn statements, either in the bill or petition or in an affidavit accompanying it, of such facts as will lead the court to the conclusion that complainant will suffer irreparable and substantial injury if notice is given before the writ is issued.[53] The court should disregard words expressing a mere conclusion and rely on detailed facts;[54] thus, general allegations that complainant will be irreparably damaged unless an injunction is issued without notice,[55] or that the giving of notice will accelerate or precipitate the injury complained of[56] or will defeat the objects

ify whether immediate relief sought was temporary restraining order or temporary injunction.—Hopkins v. Frenchy, Tex.Civ.App., 75 S.W.2d 184.

50. Tex.—Plocek v. Welhausen, Civ. App., 144 S.W.2d 631—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Hopkins v. Frenchy, Civ.App., 75 S.W.2d 184.

51. Tex.—Plocek v. Welhausen, Civ. App., 144 S.W.2d 631—Hopkins v. Frenchy, Civ.App., 121 S.W.2d 1048—Eclipse Oil Co. v. McAlister, Civ. App., 103 S.W.2d 420, error dismissed—Barkley v. Conklin, Civ. App., 101 S.W.2d 405—Plough, Inc., v. Moore, Civ.App., 56 S.W.2d 681—Hood v. Scott, Civ.App., 67 S.W.2d 909.

52. Tex.—Steele v. Winningham, Civ.App., 128 S.W.2d 454—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048.

53. Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.
Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill.App. 307.
La.—Roux v. Teche Transfer Co., 103 So. 180, 157 La. 828.
N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.
Pa.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314.
Tex.—McMurry Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Refrigeration Discount Corporation v. Meador, Civ. App., 134 S.W.2d 329—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S. W.2d 1048—Hopkins v. Frenchy, Civ.App., 75 S.W.2d 184.
Va.—Cohen v. Rosen, 160 S.E. 36, 157 Va. 71.
32 C.J. p 308 note 78.

Form of allegation

(1) "If all of the allegations relating to the necessity of proceeding without notice, when taken together, manifestly make it appear to the judge that the apprehended act will be committed, precipitating the injury sought to be avoided, the form of the allegation will not be fatal to the cause, since this is a proceeding in equity, where substantive rights can be dealt with more readily than at law."—Dixie Music Co. v. Pike, 185 So. 441, 447, 135 Fla. 671.

(2) Allegation not following exact language of statute, may be sufficient where complaint alleged facts showing plaintiff's rights would be unduly prejudiced by giving notice.—Hookanson v. Chicago City Bank & Trust Co., 5 N.E.2d 585, 287 Ill.App. 630.

"The merits of the case, as alleged in the complaint or affidavit must be considered to enable the court to pass intelligently on the question whether notice should have been given."—Wagner v. Okner, 29 N.E.2d 385, 387, 306 Ill.App. 601.

Sufficient cause held shown

Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.
Idaho.—Mason v. Pelkes, 59 P.2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453.
Ill.—Hookanson v. Chicago City Bank & Trust Co., 5 N.E.2d 585, 287 Ill.App. 630—A. Daigger & Co. v. Kraft, 281 Ill.App. 548—Skelers v. Meyer, 246 Ill.App. 18—Loftis v. Loftis, 225 Ill.App. 478.
Tex.—Franks v. Brown, Civ.App., 43 S.W.2d 613—Thurman v. Kirkland, Civ.App., 260 S.W. 677—Woodward v. Smith, Civ.App., 253 S.W. 847.
32 C.J. p 308 note 78 [a], [b].

Sufficient cause held not shown for issuance of preliminary injunction without notice.
Ill.—Rossman v. Chapman, 37 N.E. 2d 911, 312 Ill.App. 185—Wagner v. Okner, 29 N.E.2d 385, 306 Ill. App. 601—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill.App. 272—Kessie v. Talcott, 27 N.E.2d 857, 305 Ill.App. 627—Balaban & Katz Corporation v. Rose, 283 Ill.App. 615—Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill.App. 356.
La.—Roux v. Teche Transfer Co., 103 So. 180, 157 La. 828.
Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.
Tex.—McMurry Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Refrigeration Discount Corporation v. Meador, Civ. App., 134 S.W.2d 329—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S. W.2d 1048—Johnson v. Williams, Civ.App., 109 S.W.2d 213—Lower Colorado River Authority v. Gulf Coast Water Co., Civ.App., 107 S. W.2d 1101—Hopkins v. Frenchy, Civ.App., 75 S.W.2d 184—Hood v. Scott, Civ.App., 67 S.W.2d 909—Andrews v. Archer County, Civ. App., 45 S.W.2d 227—Farb v. Theis, Civ.App., 250 S.W. 290—Chas F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.

54. Ill.—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill.App. 307—Thulin v. National Ice & Fuel Corporation, 11 N.E 2d 986, 293 Ill.App. 155—Balaban & Katz Corporation v. Rose, 283 Ill. App. 615—Brough v. Schanzenbach, 59 Ill.App. 407.
N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.
Tex.—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S. W.2d 331—Texas Centennial Central Exposition v. Greenwood, Civ. App., 94 S.W.2d 813, error dismissed—Franks v. Brown, Civ.App., 43 S.W.2d 613—Lark v. Coyle, Civ. App., 260 S.W. 1107.

55. Ill.—Grabarski v. Stankowicz, 179 Ill.App. 45.
32 C.J. p 308 note 79.

56. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671—Thursby v. Stewart, 138

of the application,[57] without a specific statement of fact to sustain such conclusion, are insufficient, and the facts showing irreparable injury should be stated directly.[58]

c. Requisites and Sufficiency of Notice

Statutory provisions as to the time or contents of a notice of application for a preliminary injunction or restraining order must be obeyed; in the absence of such provision, the sufficiency of the notice is for the court to determine.

Notice of application or motion for a preliminary injunction or restraining order must be served within the time provided by rule of court or statute,[59] and, if no time is provided, then within a reasonable time.[60] In the absence of controlling statutory provisions, the sufficiency of the notice, in respect of both time and contents, must be determined by the court in the exercise of its discretion in view of the particular circumstances.[61]

d. Waiver of Notice

Want of proper notice of an application for a preliminary injunction, or want of an order to show cause, may be waived by appropriate action on defendant's part, as where he appears and resists the application.

The want of proper notice of an application for a preliminary injunction or want of an order to show cause may be waived[62] as an irregularity,[63] or as being for the benefit of defendant,[64] and is waived by defendant if he appears and resists the application by answer, motion, or affidavit,[65] or fails to object for want of notice until the case is heard on appeal;[66] whether want of notice is waived by motion to dissolve the preliminary injunction after it has been granted is considered infra § 247. No objection for want of proper notice can be raised after hearing on the merits in which an injunction has been made permanent.[67]

An injunction granted on waiver of notice is the same as one granted with notice duly served.[68]

No waiver occurs in the case of persons who appear solely for the purpose of objecting to the jurisdiction over them;[69] and a party's right to notice is not waived by his counsel's participation in the hearing after specific objection to proceeding without notice.[70]

So. 742, 103 Fla. 990—Savage v. Parker, 43 So. 507, 53 Fla. 1002—Godwin v. Phifer, 41 So. 597, 51 Fla. 441.

57. Fla.—Savage v. Parker, 43 So. 507, 53 Fla. 1002.

58. Ill.—Brin v. Craig, 135 Ill.App. 301.
Tex.—Gill v. McFaddin, Civ.App., 210 S.W. 722.
32 C.J. p 308 note 81.

59. N.Y.—Hovey v. McCrea, 4 How. Pr. 31.

60. U.S.—New York v. Connecticut, 4 Dall. 1, 1 L.Ed. 715—32 C.J. p 309 note 83.

61. U.S.—Franz v. Franz, C.C.A.Mo., 15 F.2d 797, 799, citing **Corpus Juris.**
32 C.J. p 309 note 84.

Notice held sufficient
Ga.—Beavers v. Mabry, 23 S.E.2d 672, 195 Ga. 169.

Restraining enforcement of state statute
(1) Under Judicial Code § 266, as amended, 28 U.S.C.A. § 380, requiring the giving of notice to the governor and attorney general of a state of an application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of a statute of such state, "no particular form of notice is required."—Consolidated Freight Lines v. Pfost, D.C.Idaho, 7 F.Supp. 629, 630, 631.

(2) Notice specifically stating "that the application of the plaintiffs for the issuance of an interlocutory injunction had been presented to the judge and a time and place for the hearing was set, and that the defendants should show cause why an interlocutory injunction should not issue enjoining them from acting under or enforcing the act involved and from collecting the licenses or registration fees thereunder" was held sufficient.—Consolidated Freight Lines v. Pfost, supra.

(3) Notice failing to inform governor "of the particular law of the state of Washington, enforcement of which was sought to be enjoined, nor of the particular official acts sought to be enjoined, nor on what ground such law was claimed to be unconstitutional, nor the time when the defendants would be served with copies of the court's order, complaint, and motion," was held insufficient.—Arneson v. Denny, D.C. Wash., 25 F.2d 993, 995.

In New York
"The notice contemplated by section 882 of the Civil Practice Act, as amended by Laws of 1930, chapter 378, in effect September 1st [amended by Laws 1931, c. 387, effective April 13, 1931] is a formal notice of the application in the action pending, or if the action be not pending, bearing the title of the action to be brought, either with or without the papers upon which the application is based, returnable forthwith or at such other time as the judge or court may direct, in the discretion of the court or judge, the exercise of such discretion and the service of the notice to be incorporated in an order by the court or judge, a copy of which order is to be served with the notice."—George F. Stuhmer & Co. v. Korman, 257 N.Y.S. 140, 235 App.Div. 856, reversing 256 N.Y.S. 253, 143 Misc. 246.

62. Cal.—Remillard Brick Co. v. Dandini, 117 P.2d 432, 47 Cal.App. 2d 63—Walberg v. Underwood, 180 P. 55, 39 Cal.App. 748.
Iowa.—Bowman v. Waverly, 128 N.W. 950, 155 Iowa 745.

63. Ind.—Bowman v. Waverly, supra.

64. Cal.—Remillard Brick Co. v. Dandini, 117 P.2d 432, 47 Cal.App. 2d 63.

65. Iowa.—Bowman v. Waverly, 128 N.W. 950, 155 Iowa 745.
Contra Hughes v. Eckerson, 8 N.W. 484, 55 Iowa 641.
32 C.J. p 309 note 86.

Informality in the service of the notice is waived by filing an answer.—Brammer v. Jones, C.C.Ohio, 4 F.Cas.No.1,806, 2 Bond 100—32 C.J. p 401 note 93 [a].

66. Okl.—Couch v. Orne, 41 P. 368, 3 Okl. 508.

67. Ill.—Brown v. Luehrs, 79 Ill. 575.
32 C.J. p 309 note 89.

68. Cal.—Walberg v. Underwood, 180 P. 55, 39 Cal.App. 748.

69. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C 497, Ann.Cas.1918B 461.

70. Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 393.

§ 181. Pleading

The specific applications of rules of pleading to the bill or complaint, the answer, and subsequent pleadings are considered infra §§ 182–188.

Examine Pocket Parts for later cases.

§ 182. —— Bill, Complaint, or Application

a. In general
b. Substance of bill
c. Prayer
d. Construction of bill or complaint
e. Filing exhibits

a. In General

For relief by injunction the applicant's case must be presented by a bill or complaint or cross bill filed in the proper court. Leave to file the bill usually is not necessary unless it is required by statute or rule of court.

A sworn bill asking specifically for an injunction in the prayer for relief, and complying with all the other formalities requisite to obtain one, is properly denominated an injunction bill.[71] For relief by injunction the applicant's case must be presented by a bill or complaint[72] or by a cross bill,[73] but it has been held that an affidavit on which the motion for injunction is based will be sufficient if it contains all the ingredients of a bill or complaint.[74] The complaint speaks as of the date of filing and continues to speak until the date of the decree.[75] The pleadings must be filed in the court specified by statute.[76] A custom of presenting a petition for an injunction to the judge prior to filing it cannot prevail over a statute requiring such petition to be filed before being acted on by the court.[77] Under a statute permitting plaintiff in an action at law to include a claim for an injunction, the claim, if not included in the declaration in the action, must be affixed to the declaration or connected with it by proper reference.[78]

Leave to file bill. Except under the early equity practice,[79] or where required by statute or rule of court,[80] leave of court to file a bill for injunction ordinarily is not necessary;[81] but even where such leave may be necessary an order to show cause[82] or the granting of a temporary injunction[83] is tantamount to sanction, or at least cures the failure to obtain sanction, before filing the bill.

b. Substance of Bill

(1) In general
(2) Certainty of averment
(3) Plaintiff's status, title, or interest
(4) Wrongfulness of defendant's acts
(5) Injury to plaintiff
(6) Inadequacy of remedy at law
(7) Defendant's inability to respond in damages
(8) Multiplicity of suits
(9) Fraud
(10) Doing or offering to do equity

(1) In General

The bill or complaint must set forth all the material facts, and it must present a statement of facts which, if true, will entitle plaintiff to the relief sought.

All the facts necessary to entitle complainant to an injunction must be set forth in the bill or complaint,[84] and matters omitted therefrom cannot be

71. N.Y.—Clark v. Judson, 3 Barb. 90.

72. N.J.—Craft v. City of Trenton, 146 A. 366, 104 N.J.Eq. 375.
N.Y.—Julius Restaurant v. Lombardi, 13 N.Y.S.2d 490, 257 App.Div. 370, reversed on other grounds 25 N.E.2d 874, 282 N.Y. 126.
32 C.J. p 319 note 28.

73. Ill.—Bryant v. People, 71 Ill. 32.

74. N.Y.—Morgan v. Quackenbush, 22 Barb. 72.
32 C.J. p 319 note 30.

75. Iowa.—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.

76. In Missouri
(1) Under express statutory provisions, an injunction should not be granted by either county court or circuit court until petition has been filed in circuit court.—State ex rel. Association for Convalescent Crippled Children v. Corneli, 152 S.W.2d 83, 347 Mo. 1164.
(2) Where petition for permanent injunction in circuit court alleges facts showing jurisdiction to issue such injunction, county court has jurisdiction to grant temporary writ until petition may be heard in circuit court.—Gibson v. Judges of Christian County Court, 268 S.W. 700, 217 Mo.App. 460.

77. La.—Cristina v. O'Dwyer, 13 So. 2d 481, 203 La. 103.

78. Md.—Zimmerman v. Garfinkel, 124 A. 919, 144 Md. 394.

79. U.S.—U. S. v. American Lumber Co., Cal., 85 F. 827, 29 C.C.A. 431.

80. Ga.—Wynne v. Fisher, 119 S.E. 605, 156 Ga. 656.
32 C.J. p 338 notes 48, 49.

81. Ga.—Wynne v. Fisher, supra.
32 C.J. p 338 note 50.

82. Ga.—Alspaugh v. Adams, 5 S.E. 496, 80 Ga. 345.

83. Ky.—Talbott v. Todd, 5 Dana 190.

84. U.S.—Dayton-Goose Creek Ry. Co. v. U. S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.
Ark.—Micklish v. Grand Lodge of Loyal Star, 257 S.W. 353, 162 Ark. 71.
Cal.—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105.
Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.
Ga.—Banner v. Cohen, 185 S.E. 333, 182 Ga. 271.
Ill.—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill. App. 307—Felt v. U. S. Mortgage & Trust Co., 231 Ill.App. 110.
Ind.—Costigan v. Schalk, 145 N.E. 510, 82 Ind.App. 180.
Md.—American-Stewart Distillery v. Stewart Distilling Co., 177 A. 473, 168 Md. 212.
N.H.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N.H. 426.
N.Y.—Ten Eyck v. Hegeman Farms

supplied or shown by affidavit.[85] The bill or complaint must present a statement of facts which, if true, will entitle plaintiff to the relief sought,[86] and to be sufficient for this purpose it must allege facts

Corporation, 290 N.Y.S. 769, 160 Misc. 460.
N.C.—Plott v. Board of Com'rs of Haywood County, 121 S.E. 190, 187 N.C. 125.
N.D.—King v. Stark County, 266 N. W. 654, 66 N.D. 467.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.
Tex.—Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964, reversing W. L. Pearson & Co. v. Harding, Civ.App., 30 S.W.2d 403—Town of Refugio v. Strauch, Com.App., 29 S.W.2d 1041, reversing, Civ.App., 20 S.W.2d 326—Coleman v. Wright, Civ.App., 136 S.W. 2d 270—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Steele v. Winningham, Civ.App., 128 S.W.2d 454—Donic Independent School Dist. v. Freestone Consol. Common School Dist. No. 13, Civ.App., 127 S.W.2d 205—Barkley v. Conklin, Civ.App., 101 S.W.2d 405—Shell Petroleum Corporation v. Burnett, Civ.App., 91 S.W.2d 1091—Thompson v. Harrison, Civ.App., 86 S.W.2d 1093—Wood v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 86 S.W.2d 871—Smith v. Texas Farm Products, Civ.App., 86 S.W. 2d 52, affirmed Texas Farm Products Co. v. Smith, 96 S.W.2d 290, 128 Tex. 171—Jackson v. Reagan, Civ.App., 70 S.W.2d 446—Hood v. Scott, Civ.App., 67 S.W.2d 909—Mann v. Pace, Civ.App., 58 S.W.2d 1070, error refused—Plough, Inc., v. Moore, Civ.App., 56 S.W.2d 681—Maxey v. Noland, Civ.App., 31 S.W.2d 468, error denied Noland v. Maxey, 32 S.W.2d 822, 119 Tex. 462—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.
32 C.J. p 319 note 32.

85. U.S.—Missouri Pac. R. Co. v. Norwood, Ark., 51 S.Ct. 458, 283 U.S. 249, 75 L.Ed. 1010, affirming, D.C., 42 F.2d 765, and modified on other grounds 51 S.Ct. 652, 283 U. S. 809, 75 L.Ed. 1428.
N.Y.—Julius Restaurant v. Lombardi, 13 N.Y.S.2d 490, 257 App.Div. 370, reversed on other grounds 25 N.E.2d 874, 282 N.Y. 126.
N.D.—King v. Stark County, 266 N. W. 654, 66 N.D. 467.
32 C.J. p 320 note 33.

86. U.S.—Alabama Independent Service Station Ass'n v. Shell Petroleum Corporation, D.C.Ala., 28 F.Supp. 386.
Ala.—Dean v. Coosa County Lumber Co., 167 So. 566, 232 Ala. 177.
Cal.—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105—Grettenberg v. Goggin, 298 P. 56, 113 Cal.App. 252.
Fla.—Stanton v. Harris, 13 So.2d 17.
La.—Salter v. Walsworth, App., 167 So. 494.
N.Y.—Childs v. Moses, 38 N.Y.S.2d 704, 265 App.Div. 353, affirming 36 N.Y.S.2d 574, 178 Misc. 828—Nelson v. Nahtel Corporation, 289 N. Y.S. 201, 248 App.Div. 221—Hart v. A. L. Clarke & Co., 111 N.Y.S. 886, 127 App.Div. 679, affirmed 87 N.E. 808, 194 N.Y. 403—Eastern Farms Products v. Wampsville Dairymen's Corporation, 17 N.Y.S.2d 954, 173 Misc. 413.
Okl.—Weathers v. Layton & Forsyth, 230 P. 750, 104 Okl. 14.
Tex.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605—Ollison v. Norman, Civ.App., 31 S. W.2d 364—Elder v. Highsmith, Civ. App., 10 S.W.2d 736.
32 C.J. p 320 note 35.

Complaint showing laches

Petition for injunction states no cause of action, where petition shows complainant guilty of laches.—City of Corpus Christi ex rel. Harris v. Flato, Tex.Civ.App., 83 S.W.2d 433, error dismissed.

Suits against officers of corporation

(1) Complaints held sufficient.

Cal.—Remillard Brick Co. v. Dandini, 117 P.2d 432, 47 Cal.App.2d 63.
Ga.—Kaiser v. Kaiser, 175 S.E. 647, 179 Ga. 305.
Ill.—Hess v. Aquitania Apartments Co., 39 N.E.2d 724, 313 Ill.App. 267.
Ky.—Schumann v. Crook, 168 S.W.2d 1002, 293 Ky. 331.

(2) Complaints held insufficient.

Colo.—Wolford v. Bankers' Sec. Life Co., 17 P.2d 298, 91 Colo. 532.
Ill.—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill. App. 307.

Proper case for injunctive relief not stated

U.S.—Milliken v. Stone, D.C.N.Y., 7 F.2d 397, affirmed, C.C.A., 16 F.2d 981.
Ark.—City of El Dorado v. Citizens' Light & Power Co., 250 S.W. 882, 158 Ark. 550.
Ga.—Marshall v. Marthin, 22 S.E.2d 70, 194 Ga. 496—Warlick v. Rome Loan & Finance Co., 22 S.E.2d 61, 194 Ga. 419—Vining v. Bankers Commercial Security Co., 183 S.E. 494, 181 Ga. 556—Loftis v. Security Mortg. Co., 179 S.E. 108, 180 Ga. 480—Southland Loan & Investment Co. v. Anderson, 173 S.E. 688, 178 Ga. 587—Caswell v. Caswell, 169 S.E. 748, 177 Ga. 152—Darien Bank v. Varner, 165 S.E. 82, 175 Ga. 198.
Ill.—Malnick v. Rosenthal, 39 N.E.2d 767, 313 Ill.App. 249—Voliva v. WC BD, Inc., 39 N.E.2d 685, 313 Ill. App. 177—Felt v. U. S. Mortgage & Trust Co., 231 Ill.App. 110.
Kan.—Rittenoure Inv. Co. v. Birney, 95 P.2d 299, 150 Kan. 684.
Mass.—O'Neill v. Sullivan, 152 N.E. 341, 256 Mass. 76.
N.J.—Central Bus Operators v. Central Avenue Bus Owners Ass'n, 15 A.2d 608, 128 N.J.Eq. 177, affirming 11 A.2d 732, 127 N.J.Eq. 144.
Okl.—Thomas v. Dawson, 115 P.2d 136, 189 Okl. 193.
S.C.—National Loan & Exchange Bank of Columbia v. Hiers, 117 S. E. 809, 125 S.C. 57.
Tenn.—Knoxville Milk Producer's Ass'n v. Blake, 102 S.W.2d 64, 171 Tenn. 283—Howard v. Anderson, 76 S.W.2d 645, 168 Tenn. 207.
Tex.—McCollum v. McCollum, Civ. App., 67 S.W.2d 1055—Rio Grande Products Corporation v. Yarbrough, Civ.App., 3 S.W.2d 145.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Wis.—Milwaukee Electric Ry. & Light Co. v. Pallange, 236 N.W. 549, 205 Wis. 126—Burke v. Universal Granite Quarries Co., 193 N. W. 517, 180 Wis. 520.

Proper case for injunctive relief stated

U.S.—Berger v. McHugh, D.C.Pa., 26 F.Supp. 107.
Ala.—Dean v. Coosa County Lumber Co., 167 So. 566, 232 Ala. 177.
Ark.—Kansas City Southern Ry. Co. v. Ft. Smith Suburban Ry. Co., 22 S.W.2d 21, 180 Ark. 492.
Colo.—McCreery v. Miller's Grocerteria Co., 64 P.2d 803, 99 Colo. 499.
D.C.—Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App.D.C. 257.
Fla.—McCreary v. Lake Boulevard Sponge Exchange Co., 183 So. 7, 133 Fla. 740—Platt v. Ross, 150 So. 716, 112 Fla. 596—Pepple v. Rogers, 140 So. 205, 104 Fla. 462—Prest v. Hammock, 111 So. 112, 92 Fla. 941.
Ga.—Fulton Land Co. v. Armor Insulating Co., 15 S.E.2d 848, 192 Ga. 526—Kimsey v. Mickel, 12 S.E. 2d 567, 191 Ga. 158—Young v. Hirsch, 199 S.E. 179, 187 Ga. 1—Bentley v. Barlow, 173 S.E. 707, 178 Ga. 618—A. J. Evans Marketing Agency v. Federated Growers' Credit Corporation, 165 S.E. 114, 175 Ga. 294—Lee v. Reeves, 144 S. E. 241, 166 Ga. 757—Brown v. Kendrick, 132 S.E. 386, 161 Ga. 734—Summerour v. Summerour, 97 S. E. 71, 148 Ga. 498.

which present a case falling within some well defined or acknowledged head of equity jurisprudence and constitute a ground for equitable interposition,[87] except where jurisdiction is conferred by statute, in which case the bill need not state a case within the general equity powers of a court of chancery;[88] but complainant must bring his case within some one of the specifications in the statute authorizing the courts to take cognizance of such matters.[89] It is unnecessary to allege matters which are not essential to injunctive relief.[90] Candor and frankness are essential[91] and material facts should neither be concealed[92] nor misrepresented.[93] It is not necessary in any case that plaintiff should in his bill anticipate that which is properly a matter of defense.[94] In the determination of the sufficiency of the bill or complaint, the material allegations of the bill or complaint must be taken as true.[95]

To authorize the issuance of a temporary injunction the bill must make a prima facie case for final relief by alleging facts which, if proved and not controverted, will entitle complainant to the relief prayed for,[96] but this rule will not be vigorously applied

Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.

Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40—Edelman Bros., Inc. v. Balkoff, 277 Ill.App. 432—Illinois Power & Light Corporation v. Consolidated Coal Co., of St. Louis, 251 Ill.App. 49.

Kan.—Wyatt v. Mickey, 271 P. 304, 126 Kan. 690.

La.—Parker v. Harvey, App., 164 So. 507.

Mo.—Magee v. Pope, 112 S.W.2d 891, 234 Mo.App. 191.

N.J.—Bladis v. Ullrick, 179 A. 630, 118 N.J.Eq. 445.

N.Y.—Bell v. City of New York, 294 N.Y.S. 852, 250 App.Div. 564—Gertenbach v. Rodnon, 12 N.Y.S.2d 518, 171 Misc. 302—Gold v. Gold, 287 N.Y.S. 217, 158 Misc. 570—Hearn v. Leary, 211 N.Y.S. 668, 125 Misc. 446, affirmed 212 N.Y.S. 828, 215 App.Div. 735.

Okl.—Schlingman v. Wells, 254 P. 716, 122 Okl. 275.

Pa.—Commonwealth ex rel. Reno v. Dial Rock Coal Co., Com.Pl., 53 Dauph.Co. 342—Steinhauer v. School Dist. of Borough of Luzerne, Com.Pl., 35 Luz.Leg.Reg. 145.

Tenn.—Oliphant v. Moore, 293 S.W. 541, 155 Tenn. 359—Greene County Union Bank v. Miller, 75 S.W.2d 49, 18 Tenn.App. 239.

Tex.—Roberson v. Red Bluff Water Power Control Dist., Civ.App., 142 S.W.2d 248—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605—Bellows-MacLay Const. Co. v. MacLay, Civ.App., 98 S.W.2d 212—Amarillo Mut. Benev. Ass'n v. Sims, Civ.App., 52 S.W.2d 329—Fry v. Jackson, Civ.App., 264 S.W. 612—Longnecker v. Ward County Water Improvement Dist. No. 3, Civ.App., 258 S.W. 312.

32 C.J. p 319 note 81 [a].

Cross complaint held sufficient

Ala.—Webster v. De Bardeleben, 41 So. 831, 147 Ala. 280.

87. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512—Coley v. English, 87 So. 81, 204 Ala. 691—Pearson v. Duncan & Son, 73 So. 406, 198 Ala. 25, 3 A.L.R. 242—Hamilton v. Alabama Power Co., 70 So. 737, 195 Ala. 438—McHan v. Murray, 55 So. 793, 173 Ala. 182.

Mo.—State ex rel. Supreme Temple of Pythian Sisters v. Cook, 136 S.W.2d 142, 234 Mo.App. 898.

Tex.—Andrews v. Smith, Civ.App., 93 S.W.2d 493, error refused.

32 C.J. p 320 note 87.

Complaint held to be without equity

Ga.—Chambers v. Williams, 123 S.E. 865, 158 Ga. 543.

Ill.—Public Service Co. of Northern Illinois v. McCloskey, 235 Ill.App. 387.

Ky.—McCord v. Ball, 295 S.W. 903, 220 Ky. 610.

Mass.—Labagnara v. Kane Furniture Co., 193 N.E. 578, 289 Mass. 52.

88. Me.—Russ v. Wilson, 22 Me. 207.

N.Y.—Ayers v. Lawrence, 59 N.Y. 192.

89. Tex.—Shaw v. Hinton, Civ.App., 31 S.W.2d 478.

32 C.J. p 320 note 89.

90. **Suit to enjoin enforcement of void resolution**

In an action by a high school and its officers and principal and pupils and others to enjoin enforcement of resolution made by district executive committee of interscholastic league, respecting selection of team to represent district in inter-district football game, it was not necessary to allege fraud, oppression, and bad faith of committee where the resolution was absolutely void.—Sims v. University Interscholastic League, Civ.App., 111 S.W.2d 814, vacated on other grounds University Interscholastic League v. Sims, 131 S.W.2d 94, 133 Tex. 605.

Allegations held immaterial

In a suit to restrain a village from discontinuing its water supply to the premises of complainant outside the village limits, allegations that defendant unfairly discriminated against complainant in that it was furnishing water to others outside the village were immaterial.—Gage v. Village of Wilmette, 233 Ill.App. 30.

91. Md.—American-Stewart Distillery v. Stewart Distilling Co., 177 A. 473, 168 Md. 212—Maas v. Maas, 168 A. 607, 165 Md. 342—Surratt v. Chesapeake & Potomac Telephone Co., 144 A. 495, 156 Md. 510.

Mo.—State ex rel. Igoe v. Joynt, 110 S.W.2d 737, 739, 341 Mo. 788, citing **Corpus Juris.**

Neb.—Northport Irr. Dist. v. Farmers' Irr. Dist., 251 N.W. 174, 176, 125 Neb. 607, citing **Corpus Juris.**

N.J.—Cascade Laundry v. Volk, 20 A.2d 505, 129 N.J.Eq. 603.

Or.—Stangier v. Goad, 97 P.2d 191, 192, 163 Or. 314, citing **Corpus Juris.**

32 C.J. p 325 note 96.

92. Md.—Braiterman-Fedder Co. v. Cardilli, 145 A. 338, 156 Md. 699.

Neb.—Northport Irr. Dist. v. Farmers' Irr. Dist., 251 N.W. 174, 176, 125 Neb. 607, citing **Corpus Juris.**

32 C.J. p 325 note 97.

Presumption arising from concealment

It will be presumed that all facts not fully and candidly disclosed by person praying for injunction will make against him.—State ex rel. Igoe v. Joynt, 110 S.W.2d 737, 341 Mo. 788.

93. Md.—Braiterman-Fedder Co. v. Cardilli, 145 A. 338, 156 Md. 699.

94. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 95 Cal.App. 277.

Ky.—Bell County Board of Education v. Taylor, 71 S.W.2d 1005, 254 Ky. 447.

Tex.—Hubbard v. Ehman, Civ.App. 28 S.W.2d 270.

32 C.J. p 321 note 48.

95. Mich.—Wiley v. Murray, 196 N.W. 446, 225 Mich. 170.

Tex.—Tod v. Massey, Civ.App., 30 S.W.2d 532.

96. Fla.—Mutual Bankers Co. v. Terrell, 178 So. 399, 130 Fla. 583.

Ill.—Schuler v. Wolf, 24 N.E.2d 162,

when the questions of law or fact to be ultimately determined in the cause are grave and difficult, the injury to the moving party would be immediate, certain, and great, and the loss or inconvenience to the opposing party would be comparatively small or insignificant, if the writ should be granted.[97] Complainant must claim and satisfactorily show that the matter out of which his asserted rights arise should be preserved and held in statu quo until the cause can be disposed of on its merits.[98] A petition which does not seek a preservation of the status quo but seeks a change of the status cannot form the basis for a temporary injunction.[99]

Jurisdiction. The allegations of the bill must show that the case presented is within the jurisdiction of the court,[1] and so, where the petitioner seeks in a federal court to enjoin the enforcement of a state statute on the ground that it contravenes the federal Constitution, the bill must allege affirmatively and distinctly whatever is essential to the three-judge federal court's jurisdiction.[2]

Where the allegations of the bill clearly present a case within the court's jurisdiction mere technical defects in the bill do not deprive the court of jurisdiction.[3]

Where injunction is ancillary to other relief. Where plaintiff is not entitled to an injunction except as ancillary to other relief, the bill must present a case showing that plaintiff is entitled to the main relief sought and must show that an injunction is essential to the principal inquiry and to the relief sought in the bill.[4] The petition for the injunction need only disclose facts showing that an injunction may be properly granted as incidental relief.[5]

Injunction against breach of contract or covenant. In accordance with the general rule, the bill or complaint must allege facts clearly entitling plaintiff as a matter of equity to injunctive relief where he seeks to enjoin the breach of an agreement or covenant,[6] such as an agreement not to engage in a competing business,[7] a sales agency con-

372 Ill. 386—Baird v. Community High School Dist. No. 168, 136 N. E. 671, 304 Ill. 526—Malnick v. Rosenthal, 39 N.E.2d 767, 313 Ill. App. 249—Tidd v. General Printing Co., 257 Ill.App. 596.

Wash.—Hansen v. Runkel, 32 P.2d 103, 177 Wash. 384.

97. Wash.—Pacific Telephone & Telegraph Co. v. Tax Commission, 42 P.2d 420, 180 Wash. 673, followed in Home Telephone & Telegraph Co. v. Tax Commission, 42 P.2d 423, 180 Wash. 698.

98. Ill.—Schuler v. Wolf, 24 N.E. 2d 162, 372 Ill. 386.

Tex.—McCollum v. McCollum, Civ. App., 67 S.W.2d 1055.

Petition to hold stock in statu quo

A corporation's petition for temporary injunction holding stock in statu quo pending suits between divorced husband and wife to determine ownership of majority of stock of corporation stated a cause of action.—George M. Cox, Inc., v. Eddy, 189 So. 283, 192 La. 802.

99. Tex.—Morgan v. Smart, Civ. App., 88 S.W.2d 769—Barton v. Tharp, Civ.App., 27 S.W.2d 885.

1. U.S.—Magnolian Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 180, 308 U.S. 613, 84 L.Ed. 513, rehearing granted 60 S.Ct. 261, 308 U.S. 630, 84 L.Ed. 525, and reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876—Purvis v. Bazemore, D.C.Fla., 5 F.Supp. 230.

Ill.—Litzelman v. Town of Fox, 1 N. E.2d 915, 285 Ill.App. 7.

2. U.S.—Buck v. Case, D.C.Wash., 24 F.Supp. 541, appeal dismissed in part Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358, reversed on other grounds 59 S. Ct. 740, 307 U.S. 95, 83 L.Ed. 1128.

Jurisdiction of three-judge federal district court see supra § 168.

Failure to allege unconstitutionality of the statute renders the bill insufficient to support jurisdiction of the three-judge federal court.—Joyner v. Browning, D.C.Tenn., 30 F. Supp. 512.

3. Neb.—State v. Dungan, 132 N.W. 305, 89 Neb. 738.

4. Md.—Gelston v. Sigmund, 27 Md. 334.

32 C.J. p 334 note 78.

5. Tex.—Davenport v. Railroad Commission, Civ.App., 89 S.W.2d 1006, error dism.

6. U.S.—Everglades Drainage & Development Corporation v. Fairbanks, Morse & Co., C.C.A.Fla., 75 F.2d 794—Luette v. Bank of Italy Nat. Trust & Savings Ass'n, C.C.A. Cal., 42 F.2d 9, certiorari denied 51 S.Ct. 87, 282 U.S. 884, 75 L.Ed. 779.

Cal.—Sunset Scavenger Corporation v. Oddou, 53 P.2d 188, 11 Cal.App. 2d 92.

Ga.—Smith v. Wood, 197 S.E. 246, 186 Ga. 214.

Tex.—City of Fort Worth v. First Baptist Church of Fort Worth, Civ. App., 268 S.W. 1016.

Complaint held sufficient

U.S.—Petroleum Co. v. Suits, D.C. Okl., 31 F.2d 205.

Del.—Jackson v. Richards, Ch., 27 A.2d 857.

Fla.—Warrington v. Williams, 111 So. 250, 92 Fla. 1021.

Idaho.—Goble v. New World Life Ins. Co., 67 P.2d 280, 57 Idaho 516.

Ill.—George v. International Printing Ink Corporation, 24 N.E.2d 889, 303 Ill.App. 234.

Mo.—Summit City Creamery Co. v. Leach, App., 41 S.W.2d 191.

N.Y.—Kelley v. Levitt & Sons, 28 N.Y.S.2d 175, 262 App.Div. 92, reargument denied 29 N.Y.S.2d 726, 262 App.Div. 891.

Or.—Heitkemper v. Schmeer, 281 P. 169, 130 Or. 644, reversing 275 P. 55, 130 Or. 644—Guild v. Wallis, 279 P. 546, 130 Or. 148.

Tex.—McAnally v. Person, Civ.App., 57 S.W.2d 945, error refused—Fort v. Moore, Civ.App., 33 S.W.2d 807, error dismissed—Kibbin v. McFaddin, Civ.App., 259 S.W. 232.

7. Cal.—California Lineoleum & Shades Supplies v. Schultz, 287 P. 980, 105 Cal.App. 471.

Ga.—Strauss v. Phillips, 180 S.E. 123, 180 Ga. 641.

Ill.—Pelc v. Kulentis, 257 Ill.App. 213.

Wis.—My Laundry Co. v. Schmeling, 109 N.W. 540, 129 Wis. 597.

Necessity to explain delay in suing

Where bill to enjoin seller's entering competing business, in violation of agreement, showed twelve-year statutory period had not run, pleader need not explain delay.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.

Petition to enjoin party from inducing breach

Complaint, alleging that ice manufacturers had induced one who, on sale of ice business, had agreed not to sell ice in certain territory, to

tract,[8] an agreement between an employer and a labor union,[9] or a restrictive covenant relating to the use of real property.[10] The petition must show a valid contract[11] which has not been breached by plaintiff,[12] but an allegation of plaintiff's readiness to perform is not necessary.[13] The terms and conditions of the contract should be set out,[14] but it has been held sufficient to state merely the tenor or legal effect of the contract,[15] or to set out merely the part of the contract which forms the basis of plaintiff's right.[16] Where plaintiff seeks to enjoin defendant from violating a contract not to engage in a competing business in a certain territory, the bill must describe or otherwise sufficiently show to what territory the contract relates.[17] In a suit to enjoin the violation of a restrictive covenant relating to the use of real property it is not necessary to allege nuisance[18] or to negative possible defenses.[19]

Injunction against civil action. Where the prosecution of an action by defendant is sought to be enjoined, complainant must allege circumstances clearly entitling him as a matter of equity to the injunctive relief.[20] The complaint, in addition to al-

violate his contract in order that ice manufacturers might sell such person ice, stated a cause of action as against ice manufacturer for an injunction on ground of inadequacy of damages.—Imperial Ice Co. v. Rossier, 112 P.2d 631, 18 Cal.2d 33.

Complaint held sufficient

U.S.—Ireland v. Craggs, C.C.A.Fla., 56 F.2d 785.

Ark.—Hultsman v. Carroll, 6 S.W.2d 551, 177 Ark. 432.

Colo.—Electrical Products Consol. v. Howell, 117 P.2d 1010, 108 Colo. 370—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.

Del.—Capital Bakers v. Leahy, 178 A. 648, 20 Del.Ch. 407.

Ga.—National Linen Service Corporation v. Clower, 175 S.E. 460, 179 Ga. 136.

Ill.—A. J. Canfield Co. v. Gleasnor, 15 N.E.2d 918, 296 Ill.App. 637.

Iowa.—Sioux City Night Patrol v. Mathwig, 277 N.W. 457, 224 Iowa 748.

Kan.—Kent Oil Co. v. Waddill, 274 P. 1113, 127 Kan. 704.

Ky.—Thomas W. Briggs Co. v. Mason, 289 S.W. 295, 217 Ky. 269, 52 A.L.R. 1344.

N.Y.—Foster v. White, 7 N.E.2d 710, 273 N.Y. 596, affirming 290 N.Y.S. 394, 248 App.Div. 451.

Or.—Thompson Optical Institute v. Thompson, 237 P. 965, 119 Or. 252.

Tex.—Duggan Abstract Co. v. Moore, Civ.App., 139 S.W.2d 193, error dismissed, judgment correct—Bettinger v. North Fort Worth Ice Co., Civ.App., 278 S.W. 466—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454.

8. Ga.—Bishop v. McGuire, 150 S.E. 92, 169 Ga. 349.
N.Y.—Butterick Pub. Co. v. Frederick Loeser & Co., 133 N.E. 361, 232 N.Y. 86.
Ohio.—Fuchs v. United Motor Stage Co., 21 N.E.2d 669, 135 Ohio St. 509, affirming 22 N.E.2d 1011, 62 Ohio App. 20.
R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 176.

9. Cal.—Bentley v. Mountain, 124 P.2d 91, 51 Cal.App.2d 95.

Complaint held sufficient in suit

(1) By labor union or members thereof against employer.

Ga.—O'Jay Spread Co. v. Hicks, 195 S.E. 564, 185 Ga. 507.
Ind.—Janalene, Inc., v. Burnett, 41 N.E.2d 942, 220 Ind. 253.
Miss.—Mississippi Theatres Corporation v. Hattiesburg Local Union No. 615, 164 So. 887, 174 Miss. 439.
N.Y.—Basson v. Edjomac Amusement Corporation, 20 N.Y.S.2d 924, 259 App.Div. 1005.

(2) By employer against labor union or members of union.—Nevins, Inc. v. Kasmach, 18 N.E.2d 294, 279 N.Y. 323, reversing 300 N.Y.S. 64, 252 App.Div. 890, motion denied 16 N.E.2d 852, 278 N.Y. 705.

10. Cal.—California-Michigan Land & Water Co. v. Fletcher, 274 P. 527, 206 Cal. 392.
Minn.—Velie v. Richardson, 148 N.W. 286, 126 Minn. 334.
N.J.—Ritter v. Jersey City Dist. Missionary Soc. of M. E. Church, 147 A. 195, 105 N.J.Eq. 122.

Complaint held sufficient

Ala.—Moseby v. Roche, 171 So. 351, 233 Ala. 280.
Ga.—Shirley v. Standard Oil Co. of Kentucky, 157 S.E. 267, 172 Ga. 191—Sapp v. Ritch, 149 S.E. 636, 169 Ga. 33.
Ky.—Ulmer v. Ulrey, 122 S.W.2d 1018, 276 Ky. 90.
N.Y.—Sweet v. Hollearn, 252 N.Y.S. 202, 141 Misc. 135.
Pa.—Adams v. Field, 146 A. 889, 297 Pa. 247.
Tex.—Hubbard v. Ehman, Civ.App., 28 S.W.2d 270—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178—Woods v. Zimmerman, Civ.App., 8 S.W.2d 352.

11. Ga.—Brown v. Williams, 144 S.E. 256, 166 Ga. 804.

Allegation of consideration held sufficient

Ga.—Strachan v. Burford, 162 S.E. 120, 173 Ga. 321.

Required number of signers of restrictive covenant held shown

Ill.—Lee v. Hansberry, 10 N.E.2d 406, 291 Ill.App. 517.

12. Ga.—Bainbridge Farm Co. v. Ball & Reynolds, 141 S.E. 647, 165 Ga. 582.

13. **Readiness to buy stock**

In suit to enjoin violation of agreement giving stockholders option before sale of stock to others, allegation of stockholders' readiness to buy was unnecessary.—Doss v. Yingling, 172 N.E. 801, 95 Ind.App. 494.

14. R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.
Tex.—Pearson v. Black, Civ.App., 106 S.W.2d 787—Eastland County v. Davisson, Civ.App., 277 S.W. 779, reversed on other grounds Davisson v. Eastland County, Com.App., 287 S.W. 901—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.

15. Ala.—Casey v. Holmes, 10 Ala. 776.
Ind.—Laughlin v. Lamasco City, 6 Ind. 223.

16. Wis.—Pedelty v. Wisconsin Zinc Co., 134 N.W. 356, 148 Wis. 245.

17. Ala.—J. L. Davis, Inc., v. Christopher, 122 So. 406, 219 Ala. 346.

18. Fla.—Stephl v. Moore, 114 So. 455, 94 Fla. 313.

Necessity of observing statutory procedure to abate nuisance

Bill to enjoin breach of covenant of negro not to use own water front for bathing or picnicking of negroes generally, reserving use by himself, his family, and guests, was based on right to enjoin breach of covenant as such, and was not demurrable for failure to observe statutory procedure to abate nuisance.—Moseby v. Roche, 171 So. 351, 233 Ala. 280.

19. Tex.—Hubbard v. Ehman, Civ. App., 28 S.W.2d 270.

20. Cal.—Hilton v. Reed, 116 P.2d 98, 46 Cal.App.2d 449.
32 C.J. p 321 note 40.

Petition held insufficient to restrain action in state of forum

Ga.—Branan v. Holding Commission, 189 S.E. 593, 183 Ga. 736—Botatoles v. Hill, 180 S.E. 491, 180 Ga. 739—Brinson v. Franklin, 171 S.E. 287, 177 Ga. 727—Jennings v. Longino, 170 S.E. 806, 177 Ga. 591—

leging facts showing that the remedy at law is inadequate, must show the state of the pleadings and the court in which it is pending,[21] the grounds on which the action at law may be sustained,[22] and a good and meritorious defense to the action,[23] and that the failure to defend was not due to plaintiff's fault but was attributable to some act of his adversary.[24] Allegations sufficient to restrain the prosecution of an action in a court of the forum have been held sufficient to support a judgment restraining the prosecution of an action in a sister state.[25]

Injunction against enforcement of judgment or order. A petition to restrain the enforcement of a judgment or judicial order must present facts which affirmatively show plaintiff to be entitled to equitable relief.[26] Where no appeal from the judgment has been taken, plaintiff must allege facts which excuse the failure to appeal.[27]

Injunction against libel or slander. An application for an injunction against the uttering of slander or the writing of libel must contain strong allegations of continued and flagrant slander or libel for the sole purpose of injuring business.[28]

Injunction against interference with trade, busi-

Reed v. V. H. Kriegshaber & Son, 155 S.E. 469, 171 Ga. 352—Burkhalter v. Minter-Smith Hardware Co., 127 S.E. 852, 160 Ga. 307.
Ky.—Howard v. Howard, 33 S.W.2d 635, 236 Ky. 557.
Mo.—Wagoner v. Wagoner, 267 S.W. 654, 306 Mo. 241.
N.J.—Reeves v. Cordes, 155 A. 547, 108 N.J.Eq. 469.
Okl.—Davis v. District Court of Tulsa County, 264 P. 176, 129 Okl. 236, 57 A.L.R. 72.
W.Va.—Bungalow Gas Co. v. Swanson, 188 S.E. 235, 117 W.Va. 763—Rummel v. Young, 149 S.E. 166, 107 W.Va. 512.

Petition held sufficient to restrain action in state of forum
U.S.—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544.
Ala.—McLendon v. Truckee Land Co., 114 So. 3, 216 Ala. 586.
Ga.—Pullen v. General American Credits, 198 S.E. 747, 186 Ga. 642—Hollingsworth v. People's Bank of Carrollton, 177 S.E. 743, 179 Ga. 704—Hanson v. Williams, 154 S.E. 240, 170 Ga. 779—Redwine v. H. J. Carr & Co., 139 S.E. 1, 164 Ga. 592—Drane v. Miller, 125 S.E. 836, 159 Ga. 400—Vickers v. Robinson, 122 S.E. 405, 157 Ga. 731.
Md.—Hall v. Trustees of Sharp St. Station of Methodist Episcopal Church of Baltimore City, 142 A. 508, 155 Md. 654.
Tex.—Commonwealth Casualty & Insurance Co. v. Morris, Civ.App., 155 S.W.2d 394—Ebner v. Nall, Civ. App., 95 S.W.2d 1004, error dismissed—San Antonio Water Supply Co. v. Green, Civ.App., 198 S. W. 631.

21. Tex.—Pena v. Baker, Civ.App., 207 S.W. 426.
32 C.J. p 321 note 41.

Necessity for attaching copy of petition
In suit to enjoin prosecution of another suit, petition alleging merely that other suit involved same subject matter as a former one, not having attached thereto copy of petition in former suit, was held to state mere legal conclusion, and was insufficient to support injunction.—Mann v. Pace, Tex.Civ.App., 58 S.W.2d 1070, error refused.

22. Tex.—St. Louis Southwestern R. Co. v. Woldert Grocery Co., Civ. App., 162 S.W. 1174.
32 C.J. p 321 note 42.

23. Ala.—Weems v. Weems, 73 Ala. 462.
Ark.—Jones v. Harris, 117 S.W. 1077, 90 Ark. 51.
Miss.—Masonite Corporation v. Stockman, 132 So. 555, 159 Miss. 716, citing **Corpus Juris.**
Tex.—Shaw v. Hinton, Civ.App., 31 S.W.2d 478.

Failure to deny contractual liability
Petition to enjoin suits, without expressly denying liability under contract, presented no ground for equitable relief.—Malone v. U. S. Fidelity & Guaranty Co., Tex.Civ.App., 9 S.W.2d 461.

Allegation of rightful possession
A bill to enjoin action at law for money had and received, alleging rightful possession in complainant, stated defense to action at law.—Hamilton v. Watson, 112 So. 115, 215 Ala. 550.

24. Ala.—Weems v. Weems, 73 Ala. 462.

25. Tex.—Brand v. Eubank, Civ. App., 81 S.W.2d 1023, error dismissed.

Petition held sufficient to restrain action in sister state
Ala.—Jenkins v. Jenkins, 194 So. 493, 239 Ala. 141.
La.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.
Miss.—Davis v. Natchez Hotel Co., 128 So. 871, 158 Miss. 43.

Petition held insufficient to restrain action in sister state
Ill.—Wabash Ry. Co. v. Lindsey, 269 Ill.App. 152.
Miss.—Sharp v. Learned, 181 So. 142, 182 Miss. 333, suggestions of error overruled 182 So. 122, 182 Miss. 333.
Va.—U. S. Fire Ins. Co. v. Fleenor, 18 S.E.2d 901, 179 Va. 268.

26. Ill.—Guarantee Trust & Savings Bank of Chicago v. Carlson, 240 Ill. App. 36.
Tex.—Beck v. Priddy, Com.App., 252 S.W. 476, reversing, Civ.App., 249 S.W. 1105.
Pleadings in suits to restrain execution levy or sale see Executions § 158.

Invalidity of judgment
In a collateral attack on highway construction proceeding by suit for injunction, complaint must not only show that the proceeding was irregular and the judgment unwarranted, but it must show that the judgment attacked is absolutely void.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467.

Satisfaction of judgment
Petition to restrain execution of writ of possession, although alleging that judgment when order of sale was issued was dormant but not specifically alleging that dormant judgment was satisfied, was held insufficient.—Darlington v. Allison, Tex.Civ.App., 12 S.W.2d 839, error dismissed.

Complaints held sufficient
Ga.—Gaylor v. Citizens' Automobile Co., 158 S.E. 1, 172 Ga. 476—Selders v. Brown, 154 S.E. 877, 171 Ga. 214—Sims v. Etheridge, 150 S. E. 647, 169 Ga. 400—Four Wheel Drive Auto Co. v. Ballard, 149 S. E. 905, 169 Ga. 166—Pope v. Thompson, 122 S.E. 604, 157 Ga. 891.
Mo.—State ex rel. Howard v. Martin, 141 S.W.2d 186, 235 Mo.App. 406.

27. Tex.—Street v. Cumby, Civ.App., 285 S.W. 691.

28. U.S.—Starns v. Success Portrait Co., D.C.Tenn., 28 F.Supp. 711.

Complaint held insufficient
U.S.—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963.
Ill.—Lietzman v. Radio Broadcasting Station W.C.F.L., 282 Ill.App. 203.

ness, or occupation. The bill or complaint in a suit to restrain interference with plaintiff's trade, business, or occupation must allege facts showing that equitable relief is essential to protect plaintiff from illegal or wrongful acts of defendant.[29] A complaint to protect a business or occupation must allege an established business, not merely a contemplated business.[30]

Injunction against trespass or other injury to real property. In accordance with the general rule, a bill or complaint seeking an injunction against trespass or other injury to real property must present a statement of facts which, if true, will entitle plaintiff to the relief sought.[31] If the legal title is disputed it has been held that the petition must aver that an action at law is pending or is about to be brought to determine the title,[32] but, if plaintiff merely asserts an equitable title which is disputed, no allegation of that nature is necessary.[33] The petition must identify or describe the property concerned.[34]

Injunction by public official to restrain violation of law. The essential facts for injunctive relief must be stated in a bill or complaint by a public official to restrain the violation of a statute.[35] It is, of course, unnecessary to allege matters which

29. Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

Particular allegation as charging illegal practice of law

Allegation that title and mortgage corporation acted through lawyers hired by them "under subterfuge" added nothing to complaint to restrain allegedly illegal practice of law, since lawyers could be hired to do law work necessary or incidental to carrying on of such business.—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 148 Misc. 529, affirmed Wollitzer v. Title Guaranty & Trust Co., 270 N.Y.S. 968, 241 App. Div. 757.

Complaints held sufficient

Fla.—Port Everglades Terminal Co. v. Williams, 4 So.2d 522, 148 Fla. 439.

Ga.—Noland v. Biggers, 156 S.E. 266, 171 Ga. 627.

Ill.—Kenderdine v. Rouland, 260 Ill. App. 194.

Mass.—Lawrence Trust Co. v. Sun-American Pub. Co., 139 N.E. 655, 245 Mass. 262.

Mich.—Seifert v. Buhl Optical Co., 268 N.W. 784, 276 Mich. 692.

N.Y.—Allbrite Laundry Corporation v. Pretty Family Laundry, 287 N.Y.S. 102, 247 App.Div. 873.

Complaints held insufficient

Ark.—Esskay Art Galleries v. Gibbs, 172 S.W.2d 924, 205 Ark. 1157.

Conn.—Mechanicsville Supply Co. v. Langevin, 18 A.2d 703, 127 Conn. 627.

La.—H. C. Jones & Sons v. Wascom, 132 So. 803, 15 La.App. 661.

Mass.—Thompson v. Spagnuolo, 42 N.E.2d 498, 311 Mass. 597—Neustadt v. Employers Liability Assur. Corporation, 21 N.E.2d 538, 303 Mass. 321, 123 A.L.R. 134—Club Aluminum Co. v. Young, 160 N.E. 804, 263 Mass. 223.

Tenn.—Nashville Union Stockyards v. Grissim, 280 S.W. 1015, 153 Tenn. 225.

30. Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

31. Ga.—Brown v. Smith, 165 S.E. 243, 175 Ga. 470.

Ill.—Gage v. Village of Wilmette, 233 Ill.App. 30.

Trespass by airplanes

Bill alleging that defendants' airplanes in landing glided within one hundred feet of surface of plaintiffs' property, or possibly within five feet at one end of tract, was held not to state case of trespass in absence of allegation of damage, since use of airspace is lawful unless it causes injury to landowner's possession.—Hinman v. Pacific Air Transport, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 865—Hinman v. United Air Lines Transport Corporation, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865.

Allegations held to negative right

In suit to enjoin defendants from using automobile driveway over plaintiff's property on ground that defendants had abandoned the right of way, or, if not, had committed a trespass in obstructing the right of way on the driveway where it crossed defendants' property, plaintiff's allegation that plaintiff acquiesced in defendants' action in obstructing and destroying the easement negatived a claim of trespass, and plaintiff's allegations that defendants had relocated driveway expressly negatived an intention on defendant's part to abandon the right of way.—Dean v. Colt, 84 P.2d 481, 160 Or. 342.

Complaint held sufficient

Ark.—Brown v. Myers, 139 S.W.2d 398, 200 Ark. 511—Alger v. Beasley, 20 S.W.2d 317, 180 Ark. 46.

Cal.—Eames v. Philpot, 236 P. 373, 72 Cal.App. 151.

Ga.—Latham v. Fowler, 16 S.E.2d 591, 192 Ga. 686—Duggar v. Quarterman, 12 S.E.2d 302, 191 Ga. 314—City of Blue Ridge v. Kiker, 9 S.E.2d 253, 190 Ga. 206—Smith v. Wood, 197 S.E. 246, 186 Ga. 214—West v. Field, 181 S.E. 661, 181 Ga. 152, 101 A.L.R. 465—Russell v. King, 178 S.E. 706, 180 Ga. 271—Neal Lumber & Mfg. Co. v. O'Neal, 166 S.E. 647, 175 Ga. 883—Crockett v. Wofford, 144 S.E. 27, 166 Ga. 630—Sanders v. Jones, 142 S.E. 680, 166 Ga. 186—Hillandale Nursery Co. v. Forman, 142 S.E. 537, 166 Ga. 57—Sapp v. Odom, 141 S.E. 201, 165 Ga. 437—Kirkland v. Odum, 118 S.E. 706, 156 Ga. 131.

Ill.—Illinois Cent. R. Co. v. Queen City Building Corporation, 237 Ill. App. 129.

La.—Churchill Farms v. Gaudet, 168 So. 123, 184 La. 984.

Mass.—Pease v. Parsons, 156 N.E. 4, 259 Mass. 86.

Neb.—Standard Oil Co. v. O'Hare, 239 N.W. 467, 122 Neb. 89.

Or.—Sandy Holding Co. v. Ferro, 25 P.2d 561, 144 Or. 466.

Pa.—Central R. Co. of New Jersey v. Hoover, 34 Luz.Leg.Reg. 1.

Tex.—Galley v. Hedrick, Civ.App., 127 S.W.2d 978—Jackson v. Daltex Cattle Co., Civ.App., 294 S.W. 264—Davis v. Baker, Civ.App., 268 S.W. 766.

32 C.J. p 319 note 31 [a] (11).

32. W.Va.—Stickler v. Bays, 181 S.E. 717, 116 W.Va. 463—McDonald v. Boggs, 124 S.E. 680, 97 W.Va. 201—Galford v. Henry, 116 S.E. 683, 93 W.Va. 404.

33. W.Va.—Grove v. Long, 109 S.E. 817, 89 W.Va. 652.

34. Ky.—Ward v. Rice, 292 S.W. 508, 218 Ky. 805.

Description held sufficient

Ark.—Reed v. Ziff Lodge, No. 119, Order of Masons, 1 S.W.2d 1000, 175 Ark. 979.

Cal.—Tristram v. Marques, 3 P.2d 947, 117 Cal.App. 393.

Ga.—Lenoir v. Hamlin, 164 S.E. 201, 174 Ga. 793.

35. **Complaint against milk dealer failing to file bond**

N.Y.—Baldwin v. Hegeman Farms Corporation, 277 N.Y.S. 705, 154 Misc. 285.

Complaint held sufficient

U.S.—Snyder v. John J. Casale, Inc., D.C.N.Y., 49 F.Supp. 926—Snyder v. Gurnsey, D.C.N.H., 43 F.Supp.

are not pertinent to the violation of the particular statute or which are not essential to injunctive relief,[36] nor is it necessary to allege matters of defense.[37] Allegations in a suit to enjoin the violation of the Federal Securities Act of 1933, 15 U.S. C.A. § 77 a et seq, should be as simple as those of an indictment under the provisions of the federal mail fraud statute, 18 U.S.C.A. § 338.[38]

Injunctions involving labor or trade union disputes. As a general rule, where an injunction is sought in a labor or trade union dispute, the bill or complaint as a whole must present a case which clearly entitles plaintiff under equitable principles to injunctive relief.[39] Where labor disputes are governed by express statutory provisions, plaintiff must disclose a case calling for injunctive relief under the limitations and restrictions of the statute,[40] and must allege all the facts required to be shown by the statute.[41] So, in accordance with statutory requirements, plaintiff must allege that every reasonable effort to settle the dispute has been made,[42] and that local authorities would not or could not furnish adequate protection to plaintiff.[43] Such a statute is not applicable where no labor dis-

204—Fleming v. Whittemore, D.C. Ky.,, 41 F.Supp. 767—Fleming v. Smoot Sand & Gravel Corporation, D.C.D.C., 41 F.Supp. 330—Securities and Exchange Commission v. Timetrust, Inc., D.C.Cal., 28 F. Supp. 34.

Ariz.—State ex rel. La Prade v. Smith, 29 P.2d 718, 43 Ariz. 131, 92 A.L.R. 168, modified on other grounds 31 P.2d 102, 43 Ariz. 343, 92 A.L.R. 168.

Kan.—State v. McMahon, 280 P. 906, 128 Kan. 772, 66 A.L.R. 1072.

N.Y.—People ex rel. Bennett v. Laman, 14 N.E.2d 439, 277 N.Y. 368, reversing 295 N.Y.S. 728, 250 App. Div. 660, affirming 286 N.Y.S. 467, 158 Misc. 909, motion denied 298 N.Y.S. 995, 252 App.Div. 704—People v. Federated Radio Corporation, 154 N.E. 655, 244 N.Y. 33, affirming 214 N.Y.S. 670, 216 App. Div. 250.

Tex.—Garrett v. State, Civ.App., 51 S.W.2d 822, error dismissed.

36. U.S.—U.S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987.

Actual or threatened violation of statute

N.Y.—People v. Ackerman, 164 N.E. 571, 249 N.Y. 530, affirming 228 N. Y.S. 865, 223 App.Div. 847.

Guilty knowledge

La.—State by Grosjean v. Standard Petroleum Products Co., 146 So. 321, 176 La. 647.

37. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 95 Cal.App. 277.

38. U.S.—Securities and Exchange Commission v. Timetrust, Inc., D. C.Cal., 28 F.Supp. 34.

39. U.S.—Progressive Miners of America Local Union No. 109 v. Peabody Coal Co., D.C.Ill., 7 F. Supp. 340, affirmed, C.C.A., 75 F.2d 460.

Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

Ill.—Hoffman v. Chicago Laundry Owners' Ass'n, 17 N.E.2d 994, 297 Ill.App. 441—Booth v. Baker, 268 Ill.App. 474.

N.Y.—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.

Wash.—Zaat v. Building Trades Council, 20 P.2d 589, 172 Wash. 445.

Complaints held sufficient

(1) Complaint by employer against labor union.

Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

N.J.—Wucker Furniture Co. v. Furniture Salesmen's Union, C. I. O. Local 853, 8 A.2d 275, 126 N.J.Eq. 145.

N.Y.—Canepa v. Doe, 12 N.E.2d 790, 277 N.Y. 52, affirming Canepa v. "John Doe," 297 N.Y.S. 147, 251 App.Div. 802.

W.Va.—National Woolen Mills v. Local No. 350 of Journeymen Tailors' Union of America, 131 S.E. 357, 100 W.Va. 627.

Wis.—Trade Press Pub. Co. v. Moore, 193 N.W. 507, 180 Wis. 449.

(2) Complaint by labor union against employer.

Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418.

Wis.—Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.

(3) Complaint by employee against labor union.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill.App. 298.

(4) Complaint by labor union to restrain defendants from conducting strike in name of labor union.—Thomas v. International Seamen's Union of America, Tex.Civ.App., 101 S.W.2d 328.

(5) Complaint by employers' association and employers individually against defendants, attempting to break agreement between employers' association and union, and threatening employees of individual plaintiffs.—Pleaters' & Stitchers' Ass'n v. Taft, 227 N.Y.S. 185, 131 Misc. 506.

40. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F.2d 309, C.C.A. Mo., reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Oregon Shipbuilding Corporation v. National Labor Relations Board, D.C.Or., 49 F.Supp. 386.

Tex.—Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees of America, Division 1142, v. McDowell, Civ.App., 150 S. W.2d 866.

Service of complaint and bill of particulars

N.Y.—Catalpa Realty Corporation v. Foley, 23 N.Y.S.2d 727, 175 Misc. 392.

41. U.S.—Terrio v. S. N. Nielsen Const. Co., D.C.La., 30 F.Supp. 77.

N.Y.—Stalban v. Friedman, 19 N.Y. S.2d 978, 259 App.Div. 520, reversing 11 N.Y.S.2d 343, 171 Misc. 106—Brayer v. Charton, 37 N.Y.S.2d 326—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.

Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

Complaint held sufficient under statute

N.Y.—F. Everett, Inc., v. Penna, 6 N. Y.S.2d 630, 168 Misc. 589.

42. U.S.—Terrio v. S. N. Nielsen Const. Co., D.C.La., 30 F.Supp. 77—Dean v. Mayo, D.C.La., 8 F.Supp. 73—Scafidi v. Debnar, 22 N.Y.S.2d 390.

Pa.—Hulsizer v. Kline, 18 Lehigh Co. L.J. 119.

43. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557.

Pa.—Hulsizer v. Kline, 18 Lehigh Co. L.J. 119.

pute within the contemplation of the statute is presented by the complaint.[44]

Injunction to restrain public official. In accordance with the rule applicable to petitions for injunctions generally, the bill or complaint in a suit to restrain a public officer from performing an official act must establish affirmatively a cause of action for equitable relief,[45] or, where a statute confers the

44. U.S.—Lauf v. E. G. Shinner & Co., C.C.A.Wis., 82 F.2d 68.
N.Y.—American Guild of Musical Artists v. Petrillo, 36 N.E.2d 123, 286 N.Y. 226, reversing 24 N.Y.S.2d 854, 261 App.Div. 272.

Effect of violation of agreement by union
Where a union violates agreement prohibiting strikes, court can give employer injunctive relief, on general equitable principles, notwithstanding employer's failure to comply with statute providing that injunctive relief shall not be granted to plaintiff failing to allege that he has made every reasonable effort to settle labor dispute by negotiation or by the aid of machinery of mediation or arbitration provided by law or contract between the parties.—Diamond Candle Co. v. Fratello, 16 N.Y.S.2d 346.

Suit to enjoin operation of "courtesy cars" by union members
Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.

45. U.S.—Hegeman Farms Corporation v. Baldwin, N.Y., 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259, affirming, D.C., 6 F.Supp. 297—Local Draft Board No. 1 of Silver Bow County, Mont., v. Connors, C.C.A. Mont., 124 F.2d 388—Board of Trade of Kansas City of Milligan, C.C.A.Mo., 90 F.2d 855, affirming, D.C., 16 F.Supp. 859, and certiorari denied 58 S.Ct. 40, 302 U.S. 710, 82 L.Ed. 549—Jones v. Oklahoma City, C.C.A.Okl., 78 F.2d 860—Appalachian Electric Power Co. v. Smith, C.C.A.Va., 67 F.2d 451, reversing, D.C., 4 F.Supp. 6, and certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063—Boynton v. Mills Novelty Co., C.C.A.Kan., 60 F.2d 125—Jamestown Veneer & Plywood Corporation v. Boland, D.C.N.Y., 15 F.Supp. 28—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201.
Ala.—Eastburn v. Holcombe, 10 So.2d 457, 243 Ala. 433—Higdon v. McDuff, 172 So. 636, 233 Ala. 497.
Cal.—City of Oakland v. Brock, 67 P.2d 344, 8 Cal.2d 639—Holabird v. Richardson, 44 P.2d 530, 3 Cal.2d 299—Feraut v. City of Sacramento, 269 P. 537, 204 Cal. 687.
Fla.—Nelms v. City of St. Petersburg, 5 So.2d 408, 149 Fla. 197—Eccles v. Stone, 183 So. 628, 134 Fla. 113—Harper v. Saxon, 171 So. 807, 126 Fla. 815—State ex rel. Knott v. Willmer, 135 So. 859, 102 Fla. 64—Moore v. Board of Com'rs of Leon County, 118 So. 476, 96 Fla. 549.
Ga.—Cox v. Linder, 14 S.E.2d 93, 191 Ga. 790—Barber v. Housing Authority of City of Rome, 5 S.E.2d 425, 189 Ga. 155—Pitner v. Federal Land Bank of Columbia, 158 S.E. 331, 172 Ga. 610.
Ill.—Chicago Park Dist. v. Lattipee, 4 N.E.2d 86, 364 Ill. 182—Wilson v. Marshall County, 257 Ill.App. 220—Gage v. Village of Wilmette, 233 Ill.App. 30.
Ind.—Vonnegut v. Baun, 188 N.E. 677, 206 Ind. 172.
Kan.—Smith v. Board of Com'rs of Reno County, 247 P. 1046, 121 Kan. 444.
Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 191 Miss. 192.
Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.
Neb.—Griffin v. Gass, 274 N.W. 193, 133 Neb. 56.
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
N.Y.—O'Rourke v. Hutton, 291 N.Y.S. 89, 249 App.Div. 697, affirmed 11 N.E.2d 310, 275 N.Y. 488.
Or.—Hauke v. Ten Brook, 259 P. 908, 122 Or. 485—Herald Pub. Co. v. Klamath News Pub. Co., 240 P. 244, 116 Or. 62.
Pa.—Crane v. Pennsylvania Liquor Control Board, 50 Dauph.Co. 401.
R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.
Tex.—Ex parte Sterling, 53 S.W.2d 294, 122 Tex. 108—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Levy v. Rivaux, Civ.App., 84 S.W.2d 847—Sterling v. Williford, Civ.App., 54 S.W.2d 259—Nacogdoches Independent School Dist. v. Adams, Civ.App., 36 S.W.2d 567.
Wyo.—Kenosha Auto Transport Corporation v. City of Cheyenne, 100 P.2d 109, 55 Wyo. 298.

Allegation of unconstitutionality
Mere allegation that law is unconstitutional does not give courts jurisdiction to interfere with acts of executive officers.—Ferk v. Hall, 249 P. 1106, 119 Okl. 251.

Description of vending machines
A complaint for injunction restraining seizure and destruction of vending machines and games of skill used solely for stimulation of sale of merchandise, and not constituting games of chance or gambling devices, and from use of which plaintiff derived profit, was insufficient for failure to describe machines and games and their method of operation.—Stangier v. Goad, 97 P.2d 191, 163 Or. 314.

Petition presenting question of guilt
A petition to enjoin prosecution for a crime which presents a question of guilt of the petitioner cannot be considered.—Callison v. Kirkpatrick, 292 P. 54, 145 Okl. 132.

Suit to enjoin National Labor Relations Board
U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515.

Bill to restrain interference with interstate commerce
U.S.—Southern Express Co. v. Mayor, etc., of Ensley, C.C.Ala., 116 F. 756.

Complaint held sufficient
U.S.—Columbia Broadcasting System v. U. S., 62 S.Ct. 1194, 316 U.S. 407, 86 L.Ed. 1563, reversing, D.C., National Broadcasting Co. v. U. S., 44 F.Supp. 688—Wilcox v. City of Pittsburgh, C.C.A.Pa., 121 F.2d 835—Oney v. Oklahoma City, C.C.A.Okl., 120 F.2d 861—City of Reno v. Sierra Pac. Power Co., C.C.A.Nev., 44 F.2d 281—Gerber v. Schofield, C.C.A.Pa., 43 F.2d 225, reversing, D.C., 43 F.2d 222—Southern Pac. Co. v. Peterson, D.C.Ariz., 43 F.2d 198—White v. Federal Radio Commission, D.C.Ill., 29 F.2d 113—Ashcraft v. Healey, C.C.A.La., 23 F.2d 189—Pacific Telephone & Telegraph Co. v. City of Seattle, D.C.Wash., 14 F.2d 877—Lynch v. City of Muskogee, D.C.Okl., 47 F.Supp. 589—Favors v. Randall, D.C.Pa., 40 F.Supp. 743—Hawthorne v. Fisher, D.C.Tex., 33 F.Supp. 891—Dugan v. Bridges, D.C.N.H., 16 F.Supp. 694, appeal dismissed 57 S.Ct. 668, 300 U.S. 684, 81 L.Ed. 887—Henderson Co. v. Thompson, D.C.Tex., 12 F.Supp. 519—Acme Inc. v. Besson, D.C.N.J., 10 F.Supp. 1—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.
Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
Ark.—Connelly v. Earl Frazier Special School Dist., 266 S.W. 929, 167 Ark. 49.
Cal.—Standard Elementary School Dist. of Kern County v. Healy, 79 P.2d 123, 26 Cal.App.2d 172—Laton

right to apply for an injunction under certain circumstances, it must allege the facts essential for statutory relief.[46] It must show fully that the act sought to be restrained is irregular, wrongful, or invalid, or that the act constitutes an abuse of defendant's discretionary powers, as discussed infra subdivision b (4) of this section, but it need not anticipate matters of defense.[47] A bill or complaint to enjoin a prosecution under a municipal ordinance must set forth the ordinance in full,[48] or at least it must set forth the substance of the parts of the ordinance objected to.[49]

(2) Certainty of Averment

(a) In general

(b) Negativing reasonable inferences

(c) Pleading conclusions or opinions generally

(d) Pleading evidence

(e) Pleading on information and belief

(a) In General

The allegations of the complaint must be clear, definite, and certain and the facts on which the plaintiff rests his claim for relief must be set forth with particularity and in detail.

The allegations of the complaint must be clear, definite, and certain,[50] and not inconsistent or contradictory,[51] in the alternative,[52] or argumentative.[53] The facts on which plaintiff rests his claim for relief must be set forth with particularity and

Joint Union High School Dist. v. Armstead, 20 P.2d 757, 130 Cal. App. 628.

Colo.—Speyer v. School Dist. No. 1, City and County of Denver, 261 P. 859, 82 Colo. 534—Jones v. Newlon, 253 P. 386, 81 Colo. 25, 50 A.L.R. 1263.

D.C.—Lukens Steel Co. v. Perkins, 107 F.2d 627, 70 App.D.C. 354, certiorari granted Perkins v. Lukens Steel Co., 60 S.Ct. 513, 309 U.S. 643, 84 L.Ed. 997, reversed on other grounds 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108—Bugher v. Gottwals, 54 F.2d 451, 60 App.D.C. 340.

Fla.—Knight v. City of Miami, 173 So. 801, 127 Fla. 585.

Ga.—City of Albany v. Lippitt, 13 S.E.2d 807, 191 Ga. 756—Talmadge v. Sutton, 166 S.E. 240, 175 Ga. 811—Moore v. Brinson, 154 S.E. 141, 170 Ga. 680—Brinson v. Jackson, 148 S.E. 96, 168 Ga. 353.

Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.

La.—State ex rel. Sansone v. City of New Orleans, 113 So. 126, 163 La. 860.

N.Y.—Rhynders v. Greene, 8 N.Y.S.2d 143, 255 App.Div. 401—Weiner v. Valentine, 17 N.Y.S.2d 355, affirmed 23 N.Y.S.2d 866, 260 App.Div. 999, appeal denied 25 N.Y.S.2d 780, 261 App.Div. 818.

S.C.—Arnold v. City of Spartanburg, 23 S.E.2d 735, 201 S.C. 523, followed in Davis v. Smith, 23 S.E.2d 741, 201 S.C. 539—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205—Kirk v. Watson, 4 S.E.2d 16, 191 S.C. 162.

Tex.—Nacogdoches Independent School Dist. v. Adams, Civ.App., 36 S.W.2d 567—Farrall v. Hood, Civ.App., 32 S.W.2d 480—Marshall v. City of Dallas, Civ.App., 253 S.W. 857.

32 C.J. p 319 note 31 [a] (6, 8).

46. Tex.—Shaw v. Hinton, Civ.App., 31 S.W.2d 478.

Cause for injunctive relief under statute shown

La.—Bonnabel v. Police Jury for Parish of Jefferson, App., 3 So.2d 183.

Me.—Kelley v. Brunswick School Dist., 187 A. 703, 134 Me. 414.

47. Ky.—Bell County Board of Education v. Taylor, 71 S.W.2d 1005, 254 Ky. 447.

48. Ky.—City of Louisa v. Fyfee, 118 S.W.2d 726, 274 Ky. 458—Hamlin v. Durham, 32 S.W.2d 413, 235 Ky. 842.

49. Ill.—Cook County v. City of Chicago, 142 N.E. 512, 311 Ill. 234, reversing 228 Ill.App. 498.

50. Cal.—Phipps v. Western Pacific Development Co., 212 P. 407, 60 Cal.App. 171.

Fla.—Stanton v. Harris, 13 So.2d 17, 152 Fla. 736—Joughin v. Parks, 147 So. 273, 107 Fla. 833—Garriga v. Reid Lumber Co., 120 So. 849, 97 Fla. 321.

Ill.—Felt v. U. S. Mortgage & Trust Co., 231 Ill.App. 110.

Ky.—Murray v. Gill, 106 S.W.2d 634, 269 Ky. 207.

Md.—State Founders v. Oliver, 169 A. 59, 165 Md. 360—Braiterman-Fedder Co. v. Cardilli, 145 A. 338, 156 Md. 699—Surratt v. Chesapeake & Potomac Telephone Co., 144 A. 495, 156 Md. 510.

Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.

Or.—Blaser v. Dalles City, 137 P.2d 991.

R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.

Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Pearson v. Black, Civ.App., 106 S.W.2d 787—Thompson v. Harrison, Civ.App., 86 S.W.2d 1093—Wood v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 86 S.W.2d 871—Jackson v. Reagan, Civ.App., 70 S.W.2d 446—Mann v. Pace, Civ.App., 58 S.W.2d 1070, error refused—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454.

32 C.J. p 321 note 54, p 322 note 55.

Services for which attorney claims lien

Bill by attorney to enjoin actions for money collected by him should aver with certainty services for which he claimed attorney's lien.—McLendon v. Truckee Land Co., 114 So. 3, 216 Ala. 586.

Assertion of invalidity of statute or ordinance

Where statute or ordinance is assailed as invalid because discriminatory, ground of contention must be stated clearly and specifically in the bill for injunction.—Rutherford v. City of Nashville, 79 S.W.2d 581, 168 Tenn. 499.

Suit to enjoin criminal prosecution

Allegations of the petition in a suit to enjoin criminal prosecutions on the ground of unconstitutionality of the act alleged to have been violated, pointing out the exact constitutional provisions claimed to have been violated, stating the facts on which plaintiffs relied, and the reasons why the act violated such provisions, were held sufficient to entitle plaintiffs to a consideration of such questions.—State ex rel. Chase v. Hall, 250 S.W. 64, 297 Mo. 594.

51. Tex.—McCollum v. McCollum, Civ.App., 67 S.W.2d 1055.

32 C.J. p 322 note 56.

Allegations held not inconsistent

Del.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.

52. Or.—Ladd v. Ramsby, 10 Or. 207.

53. Ind.—Risley v. Rumble, 144 N.E. 568, 81 Ind.App. 573.

32 C.J. p 322 note 58.

in detail,[54] and in an orderly manner,[55] and should not be left to inference,[56] as bills should be sustained on facts alleged and not on those inferred.[57] It has been said that the general rule that a bill in equity must contain a clear statement of the facts on which plaintiff relies for relief is applied rigorously to a bill for an injunction.[58] However, the plaintiff need do no more than state the facts on which he relies with reasonable certainty,[59] and general allegations may be held sufficient where, because of the nature of the case, it is difficult to plead the facts in detail.[60]

(b) Negativing Reasonable Inferences

The essential facts relied on for relief by injunction must be stated with sufficient certainty to negative every reasonable inference that the applicant is not entitled to the relief sought.

The material and essential facts relied on for relief by injunction must be stated with sufficient certainty to negative every reasonable inference arising on the facts stated, from which it might be deduced that the applicant might not, under other supposable facts connected with the subject matter, be entitled to the relief sought.[61] This rule applies

54. U.S.—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963—Knights of the Ku Klux Klan v. International Magazine Co., C.C.A. N.Y., 294 F. 661, certiorari denied 44 S.Ct. 181, 263 U.S. 719, 68 L.Ed. 523.
Ala.—Browder v. Board of Com'rs of City of Montgomery, 155 So. 366, 228 Ala. 687.
Cal.—Holabird v. Richardson, 44 P. 2d 530, 3 Cal.2d 299—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105.
Del.—Donoho v. Carvell, 138 A. 630, 15 Del.Ch. 379.
Ga.—Lawrence v. Patterson, 153 S.E. 29, 170 Ga. 419—Ferrell v. E. W. Greenway, 122 S.E. 198, 157 Ga. 535.
Ill.—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill.App. 357—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
Md.—Surratt v. Chesapeake & Potomac Telephone Co., 144 A. 495, 156 Md. 510.
N.Y.—Cooke v. Dodge, 299 N.Y.S. 257, 164 Misc. 78, modified on other grounds 4 N.Y.S.2d 768, 254 App. Div. 808.
Tex.—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America, v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ. App., 137 S.W.2d 802—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218—Pearson v. Black, Civ.App., 106 S.W.2d 787.
32 C.J. p 321 note 52.

Labor or trade union disputes
Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.
Mass.—Walter v. McCarvel, 34 N.E. 2d 677, 309 Mass. 260.
N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 8 A. 2d 767, 126 N.J.Eq. 318, reversing 9 A.2d 295, 126 N.J.Eq. 374.
N.Y.—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.
Tex.—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America, v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ.App., 137 S.W.2d 802.

Rule applied in suits to restrain public official
(1) Suit to enjoin disbursement of state funds.—Nance v. Daniel, 189 S. E. 21, 183 Ga. 538.

(2) Suit to enjoin interference with pin game machines.
R.I.—Conte v. Roberts, 192 A. 814, 58 R.I. 353.
Tex.—Sweeten v. Titsworth, Civ. App., 107 S.W.2d 901—Barkley v. Conklin, Civ.App., 101 S.W.2d 405.

(3) Suit to restrain a municipality from interfering with the connections by which it had been supplying water to premises of complainant outside the village.—Gage v. Village of Wilmette, 233 Ill.App. 30.

55. Ala.—Cullman Property Co. v. H. H. Hitt Lumber Co., 77 So. 574, 201 Ala. 150.

56. Cal.—Provident Land Corporation v. Provident Irr. Dist., 79 P. 2d 392, 22 Cal.App.2d 105.
Fla.—Stanton v. Harris, 13 So.2d 17, 152 Fla. 736.
32 C.J. p 322 note 59.

57. Ala.—Cullman Property Co. v. H. H. Hitt Lumber Co., 77 So. 574, 201 Ala. 150.

58. Md.—Stinson v. Ellicott City, etc., Co., 71 A. 527, 109 Md. 111.

59. Ala.—Hooper v. Dora Coal Min. Co., 10 So. 652, 95 Ala. 235.
32 C.J. p 322 note 63.

60. N.Y.—Weiner v. Valentine, 23 N.Y.S.2d 866, 260 App.Div. 999, affirming 17 N.Y.S.2d 355, and appeal denied 25 N.Y.S.2d 780, 261 App. Div. 818.

61. Ill.—Gates v. Sweitzer, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill. App. 357—Wilson-Broadway Building Corporation v. Northwestern Elevated R. Co., 225 Ill.App. 306.
Or.—Weighers, Warehousemen & Cereal Workers' Union, Local 38—123 of International Longshoremen's Ass'n v. Green, 72 P.2d 55, 59, 157 Or. 394, citing **Corpus Juris.**

Tex.—Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964, reversing, Civ.App., W. L. Pearson & Co. v. Harding, 30 S.W.2d 403—Sartin v. Hudson, Civ.App., 143 S. W.2d 817—Coleman v. Wright, Civ. App., 136 S.W.2d 270—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331—Powell v. City of Baird, Civ.App., 132 S.W.2d 464—Magnolia Petroleum Co. v. de Garcia, Civ.App., 126 S.W.2d 1006—Sneed v. Ellison, Civ.App., 116 S.W.2d 864, error dismissed—Lower Colorado River Authority v. Gulf Coast Water Co., Civ.App., 107 S.W.2d 1101—Smith v. State, Civ.App., 103 S.W.2d 805—Barkley v. Conklin, Civ.App., 101 S.W.2d 405—Shell Petroleum Corporation v. Burnett, Civ.App., 91 S.W.2d 1091—Morgan v. Smart, Civ.App., 88 S.W.2d 769—Thompson v. Harrison, Civ.App., 86 S.W. 2d 1093—Wood v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 86 S.W.2d 871—Smith v. Texas Farm Products, Civ.App., 86 S.W.2d 52, affirmed Texas Farm Products Co. v. Smith, 96 S.W.2d 290, 128 Tex. 171—Jackson v. Reagan, Civ.App., 70 S.W.2d 446—Hood v. Scott, Civ.App., 67 S.W.2d 909—Mann v. Pace, Civ.App., 58 S. W.2d 1070, error refused—Plough, Inc. v. Moore, Civ.App., 56 S.W.2d 681—Johnson v. Ferguson, Civ. App., 55 S.W.2d 153, error dismissed—Magnolia Pipeline Co. v. McCarter, Civ.App., 52 S.W.2d 663, 666, citing **Corpus Juris**—Baer, Sternberg & Cohen v. Snodgrass, Civ.App., 42 S.W.2d 292—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused—Jeffers v. Rondeau, Civ.

particularly where public officers in discharge of official duties are sought to be restrained.[62]

(c) Pleading Conclusions or Opinions Generally

Facts, and not the mere conclusions or opinions of the pleader, must be stated in a bill or complaint for an injunction.

In accordance with the general rules of pleading, facts and not the mere conclusions or opinions of the pleader must be stated in a bill or complaint for an injunction,[63] and a statement of conclusions by

App., 1 S.W.2d 380—R. A. Toombs Sash & Door Co. v. Jamison, Civ. App., 271 S.W. 253—Holden v. Ryan, Civ.App., 268 S.W. 1022—City of Fort Worth v. First Baptist Church of Fort Worth, Civ.App., 268 S.W. 1016—Graham v. Omar Gasoline Co., Civ.App., 253 S.W. 896—O'Neil v. Duffey, Civ.App., 250 S.W. 772—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451—San Antonio Fire Fighters' Local Union No. 84 v. Bell, Civ.App., 223 S.W. 506, error refused.

32 C.J. p 322 note 64.

Petitions held insufficient within rule

Ga.—Ragan v. Smith, 174 S.E. 622, 178 Ga. 774.

Ill.—Schmidt v. Modern Woodmen of America, 261 Ill.App. 276—Wilson-Broadway Building Corporation v. Northwestern Elevated R. Co., 225 Ill.App. 306.

Tex.—Sartin v. Hudson, Civ.App., 143 S.W.2d 817.

32 C.J. p 322 note 64 [b].

62. Tex.—Wertheimer v. Walker, Civ.App., 96 S.W.2d 831—Houghton v. Brungardt, Civ.App., 89 S.W.2d 440.

Action to enjoin city

Ill.—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443.

Ind.—Michigan Cent. R. Co. v. Michigan City, 169 N.E. 873, 94 Ind. App. 481.

Action to enjoin township trustee

Ind.—Stutesman v. Sigerfoos, 145 N. E. 507, 82 Ind.App. 600.

63. U.S.—Isbrandtsen-Moller Co. v. U. S., N.Y., 57 S.Ct. 407, 300 U.S. 139, 81 L.Ed. 562, affirming, D.C., 14 F.Supp. 407—Guaranty Trust Co. of New York v. Henwood, C.C. A.Mo., 86 F.2d 347, 108 A.L.R. 1020, certiorari denied Henwood v. Guaranty Trust Co. of New York, 57 S. Ct. 492, two cases, 300 U.S. 661, 81 L.Ed. 870—Perry v. U. S. Employees' Compensation Commission, D.C.Cal., 27 F.2d 144—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S. Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Starns v. Success Portrait Co., D.C.Tenn., 28 F.Supp. 711—National Exhibition Co. v. Teleflash, D.C. N.Y., 24 F.Supp. 488.

Ala.—American Bakeries Co. v. City of Huntsville, 168 So. 880, 232 Ala. 612, appeal dismissed American Bakeries Co. v. City of Huntsville, Alabama, 57 S.Ct. 122, 299 U.S. 514, 81 L.Ed. 380—Browder v. Board of Com'rs of City of Montgomery, 155 So. 366, 228 Ala. 687—McLendon v. Truckee Land Co., 114 So. 3, 216 Ala. 586.

Cal.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44, 106 P. 2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105—Genazzi v. Marin County, 263 P. 825, 88 Cal.App. 545.

D.C.—Gilbert v. Ballinger, 36 App.D. C. 203.

Fla.—Stanton v. Harris, 13 So.2d 17, 152 Fla. 736.

Ga.—Hoch v. Candler, 9 S.E.2d 622, 190 Ga. 390—Green v. Spears, 182 S.E. 913, 181 Ga. 486—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 857—Ferrell v. E. W. Greenway & Co., 122 S.E. 198, 157 Ga. 535.

Ill.—Cook County v. City of Chicago, 142 N.E. 512, 311 Ill. 234, reversing 228 Ill.App. 498—Drewrys, Ltd., U. S. A. v. Drewrys Beers, 44 N.E.2d 454, 316 Ill.App. 307—Loomis v. McCahey, 17 N.E.2d 1015, 297 Ill.App. 479—Lietzman v. Radio Broadcasting Station W.C.F.L., 282 Ill.App. 203—People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill.App. 357.

Ind.—Chadwick v. City of Crawfordsville, 24 N.E.2d 937, 216 Ind. 399, 129 A.L.R. 469—Costigan v. Schalk, 145 N.E. 510, 82 Ind.App. 180—Risley v. Rumble, 144 N.E. 568, 81 Ind.App. 573.

Ky.—City of Ashland v. Beckham, 111 S.W.2d 575, 271 Ky. 96.

La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.

Miss.—Masonite Corporation v. Stockman, 132 So. 555, 159 Miss. 716.

Mo.—Hughes v. State Board of Health, 137 S.W.2d 523, 345 Mo. 995.

N.Y.—Shay v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 347, 172 Misc. 202, affirmed 24 N.Y.S.2d 870, 260 App. Div. 958—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.

Tex.—Sign Hangers, Erectors and Builders Local No. 1060, Brotherhood of Painters, Decorators and Paperhangers of America, v. Local Union No. 716, International Brotherhood of Electrical Workers, Civ.App., 137 S.W.2d 802—Smith v. State, Civ.App., 103 S.W. 2d 805—Thompson v. Harrison, Civ.App., 86 S.W.2d 1093—Wood v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 86 S. W.2d 871—San Angelo Nat. Bank v. Wright, Civ.App., 66 S.W.2d 804, error refused—Franks v. Brown, Civ.App., 43 S.W.2d 613—Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675, affirmed Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 262 S.W. 736, and reheard 267 S. W. 688.

Wyo.—Board of Com'rs of Natrona County v. Casper Nat. Bank, 105 P.2d 578, 56 Wyo. 132, 130 A.L.R. 727.

32 C.J. p 323 note 67.

Statements held conclusions of pleader

U.S.—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 92 F.2d 845—Stanley v. Peabody Coal Co., D.C. Ill., 5 F.Supp. 612.

Ark.—McCord v. Welch, 227 S.W. 765, 147 Ark. 362.

Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426 and 90 P.2d 113, certiorari denied 61 S. Ct. 939, 313 U.S. 566, 85 L.Ed. 1525—Bentley v. Mountain, 124 P.2d 91, 51 Cal.App.2d 95—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105—Lloyd v. City of Redondo Beach, 12 P.2d 1087, 124 Cal.App. 541—Ellis Landing & Dock Co. v. City of Richmond, 234 P. 336, 70 Cal. App. 720.

Fla.—Eccles v. Stone, 183 So. 628, 134 Fla. 113.

Ga.—City of LaGrange v. Whitley, 180 S.E. 823, 180 Ga. 805—Sherman v. Board of Education of Bartow County, 142 S.E. 152, 165 Ga. 889—Whiteside v. Croker, 142 S.E. 139, 165 Ga. 765.

Ill.—Southern Illinois Gas Co. v. Parsons, 139 N.E. 21, 308 Ill. 139—Felt v. U. S. Mortgage & Trust Co., 231 Ill.App. 110.

Ind.—Chadwick v. City of Crawfordsville, 24 N.E.2d 937, 216 Ind. 399, 129 A.L.R. 469—Risley v. Rumble, 144 N.E. 568, 81 Ind.App. 573.

Ky.—City of Louisville v. Martin, 144 S.W.2d 1034, 284 Ky. 490—Hamlin v. Durham, 32 S.W.2d 413, 235 Ky. 842—Mitchell Mill Remnant Corporation v. Long, 3 S.W 2d 639, 223 Ky. 242.

the pleader is insufficient to correct a complaint which is defective for failure to allege the facts with certainty and particularity.[64] Nevertheless it has been held that, where plaintiff alleges conclusions of law merely without setting forth facts in support of them, it is competent for defendant to consent to such method of pleading, and the objection is waived by failure to demur[65] or to move to dismiss or dissolve.[66]

(d) Pleading Evidence

It is unnecessary for the bill or complaint to recite the evidence or proof.

It is sufficient that the bill apprises defendant of the precise case which he is required to meet, and it is not necessary to recite the evidence or to aver all the minute circumstances which may be proved in support of the general statement or charge in the bill.[67]

(e) Pleading on Information and Belief

As a general rule an injunction will not be granted where the material allegations are made on information and belief, but there are exceptions to the rule.

Under the general rules of equity pleading, considered in Equity § 223, an injunction usually will not be granted where the material allegations are made on information and belief,[68] unless there is annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given.[69] Nevertheless, an injunction may be granted, where the information is alleged to have been obtained from defendant;[70] where the facts alleged on information are charged to rest within defendant's knowledge and not within the knowledge of plaintiff;[71] where the facts are shown by documents or records which are referred to in the bill;[72] where the bill charges fraud and prays a discovery,[73] or where the allegations on information and belief are accompanied by a sworn statement of plaintiff's informants;[74] and even this statement may be dispensed with where it is shown that it would be impossible to obtain it.[75] It has been held that an affidavit made on information and belief may be sufficient as against a defendant who has had an opportunity to deny the allegations if they are unfounded.[76] According to some decisions the fact

La.—Wrenn v. Miller, App., 161 So. 882.

Mass.—Walter v. McCarvel, 34 N.E. 2d 677, 309 Mass. 260—Universal Mach. Co. v. Alcoholic Beverages Control Commission, 16 N.E.2d 53, 301 Mass. 40.

Miss.—Brumfield v. Brock, 142 So. 745, 169 Miss. 784.

Mo.—Juengel v. City of Glendale, 161 S.W.2d 408, transferred, see, App., 164 S.W.2d 610—State ex rel. Reed v. Harris, 153 S.W.2d 834, 348 Mo. 426—State ex rel. Igoe v. Joynt, 110 S.W.2d 737, 341 Mo. 788—State ex rel. City of Clarence v. Drain, 73 S.W.2d 804, 335 Mo. 741—State ex rel. and to Use of Bader v. Flynn, 159 S.W.2d 379, 236 Mo.App. 577—Marbury v. City of Farmington, App., 5 S.W.2d 677.

Or.—Blaser v. Dalles City, 137 P.2d 991.

S.C.—Woodworth v. Gallman, 10 S.E. 2d 316, 195 S.C. 157.

Tex.—Steele v. Winningham, Civ. App., 128 S.W.2d 454—Jackson v. Reagan, Civ.App., 70 S.W.2d 446—Mills v. Disney, Civ.App., 54 S.W.2d 596—City of San Antonio v. South Trunk Co., Civ.App., 13 S.W.2d 401—Los Angeles Heights Independent School Dist. v. Chestnut, Civ.App., 287 S.W. 693.

Wyo.—Bourne v. Cole, 77 P.2d 617, 53 Wyo. 31.

32 C.J. p 323 note 70–p 324 note 80.

Statements held not conclusions of pleader

Ala.—Jenkins v. Jenkins, 194 So. 493, 239 Ala. 141.

Fla.—Couture v. Dade County, 112 So. 75, 93 Fla. 342.

Ga.—Shirley v. Standard Oil Co. of Kentucky, 157 S.E. 267, 172 Ga. 191—Vickers v. Robinson, 122 S.E. 405, 157 Ga. 731.

Mo.—National Pigments & Chemical Co. v. Wright, App., 118 S.W.2d 20.

Or.—Heitkemper v. Schmeer, 281 P. 169, 130 Or. 644, reversing 275 P. 55, 130 Or. 644.

64. Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218—Pearson v. Black, Civ.App., 106 S.W.2d 787.

65. Ala.—Louisville & N. R. Co. v. Bessemer, 18 So. 880, 108 Ala. 238—Headley v. Bell, 4 So. 391, 84 Ala. 346.

66. Ala.—Headley v. Bell, supra.

67. U.S.—City of St. Louis v. Knapp, Stout & Co., Mo., 104 U.S. 658, 26 L.Ed. 883.

Ga.—Gray v. Bradford, 22 S.E.2d 43, 194 Ga. 492.

Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97—Commonwealth ex rel. Reno v. Dial Rock Coal Co., Com.Pl., 53 Dauph.Co. 342.

Tex.—Wells Fargo & Co. v. Guilheim, Civ.App., 169 S.W. 1053, error refused.

68. U.S.—Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 207, v. Spreckels, C.C.A.Cal., 119 F.2d 64—Moore v. New York Cotton Exchange, C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.

Cal.—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105.

Ga.—Nance v. Daniel, 189 S.E. 21, 183 Ga. 538.

S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.

32 C.J. p 324 note 83, p 354 note 26.

69. U.S.—Moore v. New York Cotton Exchange, C.C.A.N.Y., 296 F. 61, affirming, D.C., 291 F. 681, affirmed 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370.

Fla.—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593.

32 C.J. p 324 note 84.

70. N.Y.—Cole v. Savage, Clarke p 361.

71. Cal.—Kelsey v. Miller, 226 P. 630, 66 Cal.App. 386.

32 C.J. p 324 note 86.

72. N.Y.—Hamersley v. Wyckoff, 8 Paige 72.

73. N.J.—Youngblood v. Schamp, 15 N.J.Eq. 42.

74. Mich.—Hartingh v. Bay Cir. Judge, 142 N.W. 585, 176 Mich. 289, Ann.Cas.1915B 520.

32 C.J. p 325 note 89.

75. N.Y.—French v. Maguire, 55 How.Pr. 471—Campbell v. Morrison, 7 Paige 157.

76. N.Y.—Walker v. Devereaux, 4 Paige 229.

that many or all of the material averments of the bill are stated on information and belief will not prevent the granting of an injunction after notice to defendant when defendant in no manner denies such averment,[77] especially after a demurrer to the bill had been opposed,[78] as it must be taken to admit the facts alleged on information and belief.[79]

(3) Plaintiff's Status, Title, or Interest

Plaintiff must allege clearly his status and his right, title, or interest in the subject matter of the suit.

One who asks for injunctive relief must allege his status clearly so that his right to sue can be determined,[80] and it is not sufficient that it may be inferred from an exhibit attached to the bill.[81] Likewise he must show clearly in his bill or complaint a right, title, or interest in the subject matter of the suit which warrants his seeking relief against defendant's acts.[82] Where the injury complained of is one which is suffered by the general public, the

77. Ind.—Spurgeon v. Rhodes, 78 N. E. 228, 167 Ind. 1.
Wis.—Gibson v. Gibson, 1 N.W. 154, 46 Wis. 462.

78. D.C.—Niles v. U. S. Trust Co., 32 App.D.C. 225, 238.
Ga.—Lee v. Clark, 49 Ga. 81.

79. Ga.—Lee v. Clark, supra.

80. U.S.—Sanger v. Lukens, C.C.A. Idaho, 26 F.2d 855, reversing, D. C., 24 F.2d 226.
Ind.—Indianapolis Market Ass'n v. City of Indianapolis, 192 N.E. 754, 207 Ind. 356.
N.J.—Knee v. Suitcase, Bag and Portfolio Makers' Union, Ch., 142 A. 184.
R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.
Tex.—San Jacinto Life Ins. Co. v. Brooks, Civ.App., 274 S.W. 648.
32 C.J. p 325 note 98.

Citizen or taxpayer
Ky.—Vermillion v. Davis, 266 S.W. 374, 205 Ky. 727.

Right of petitioner to elective office
Tex.—Jones v. City of Uvalde, Civ. App., 57 S.W.2d 1129, error dismissed.

Independent labor union
Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426 and 90 P.2d 113, certiorari denied 61 S. Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

81. Pa.—Seitz v. Lafayette Tract. Co., 5 Pa.Co. 469.

82. U.S.—Commonwealth of Massachusetts v. Mellon, 43 S.Ct. 597, 262 U.S. 447, 67 L.Ed. 1078, affirming Frothingham v. Mellon, 288 F. 252, 53 App.D.C. 47—Patten v. Dennis, C.C.A.Wash., 134 F.2d 137—Berger v. McHugh, D.C.Pa., 26 F.Supp. 107—Meyers v. Bennett, D. C.N.Y., 22 F.Supp. 357.
Conn.—McNamara v. Town of Watertown, 124 A. 244, 100 Conn. 575.
Fla.—House v. Nash, 105 So. 266, 90 Fla. 123.
Ga.—Gray v. Bradford, 22 S.E.2d 43, 194 Ga. 492—Domin v. Brush, 161 S.E. 809, 174 Ga. 32, citing Corpus Juris—Jones v. Newsome, 142 S. E. 142, 165 Ga. 812—Allmond v. Jenkins, 140 S.E. 879, 165 Ga. 334.
Ill.—People ex rel. Terp v. Washingtonian Home of Chicago, 198 N.E. 721, 361 Ill. 522—Moy v. City of Chicago, 140 N.E. 845, 309 Ill. 242.
Ky.—Blackburn v. Bevins, 3 S.W.2d 762, 223 Ky. 389.
Or.—Weighers' Warehousemen and Cereal Workers' Union, Local 38—123 of International Longshoremen's Ass'n v. Green, 72 P.2d 55, 157 Or. 394—Grussi v. Eighth Church of Christ, Scientist, of Portland, 241 P. 66, 116 Or. 336—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310.
R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.
Tex.—Ferguson v. Ferguson, Civ. App., 69 S.W.2d 592—San Jacinto Life Ins. Co. v. Brooks, Civ.App., 274 S.W. 648—City of Fort Worth v. First Baptist Church of Fort Worth, Civ.App., 268 S.W. 1016.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
W.Va.—Tompkins v. Kanawha County Court, 138 S.E. 120, 103 W.Va. 481.
32 C.J. p 325 note 2, p 326 note 3.

Contract or covenant for benefit of plaintiff
Cal.—McBride v. Freeman, 215 P. 678, 191 Cal. 152—Bresee v. Dunn, 172 P. 387, 178 Cal. 96—Grant Memorial Park v. Robla School Dist., 92 P.2d 499, 33 Cal.App.2d 528.
Mo.—Cejka v. Korn, App., 127 S.W. 2d 786.

Seniority status
Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.
Tex.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 173 S.W.2d 357.

Union's right to dues deducted from wages
N.J.—Local 60 of Industrial Union of Marine and Shipbuilding Workers of America v. Welin Davit & Boat Corporation, 33 A.2d 708, 133 N.J.Eq. 551.

Compliance with lease by lessee
Wis.—Hotel Wisconsin Realty Co. v. Phillip Gross Realty Co., 198 N.W. 761, 184 Wis. 388, rehearing denied 200 N.W. 304, 184 Wis. 388.

Nonperformance of contract by plaintiff
Petition by purchaser showing nonperformance of contract to purchase did not authorize injunction against vendor.—Warren v. Harrison, 139 S.E. 549, 164 Ga. 777.

Establishment of property as "community property"
In suit by divorced wife to enjoin divorced husband from attempting to deprive her of her share of the community property, by a fictitious proceeding to secure the dissolution of a business operated by husband under the assumed name of a corporation, allegation that all the property used in the operation of the business was acquired during the marriage and subsequent to the expiration of the corporation's charter established that the property was "community property" and disclosed a cause of action.—In re F. H. Koretke Brass & Mfg. Co., 196 So. 917, 195 La. 415.

Plaintiff unlawfully using city streets for business
A petition to enjoin city from enforcing ordinance prohibiting operation of sound trucks was demurrable even if ordinance were inapplicable or invalid where plaintiff's private business conducted exclusively upon streets and public ways of city without its consent and in defiance of prior ordinance, constituted an unlawful appropriation of city's streets.—Maupin v. City of Louisville, 144 S.W.2d 237, 284 Ky. 195.

Allegations held not made in good faith
Where husband filed bill in New Jersey to restrain wife from prosecuting divorce action in Arkansas and from dealing with certain lands, allegations concerning husband's rights in lands were held, under circumstances, not made in good faith but introduced solely to induce New Jersey court to assume jurisdiction respecting Arkansas divorce proceedings.—Greensaft v. Greensaft, 184 A. 529, 120 N.J.Eq. 208.

Title or interest held sufficiently alleged
(1) Petition to enjoin continuing trespass.—Chase v. Endsley, 140 S.E. 876, 165 Ga. 292.

bill must show a special interest in complainant distinct from the public.[83] Plaintiff will not be assumed to have any other or better title than that which is asserted in the bill.[84]

Sufficiency of pleadings setting up title. According to some decisions it will be sufficient to allege generally title in plaintiff without setting out the several steps by which the title was perfected,[85] and without attaching title papers to the petition,[86] at least when the general allegations of title are not qualified or otherwise rendered insufficient by other averments in the pleading.[87] Other decisions have reached the opposite conclusion and hold that plaintiff must set forth his title with particularity,[88] and where he claims under paper title he should exhibit his title papers or copies thereof.[89] A rule requiring complainant to deraign his title has been held to be one of practice and of convenience and not a matter of jurisdiction, and after answer, may be dealt with by the court in its sound discretion.[90]

Possession. If possession is essential to the cause of action for injunction, possession must be alleged,[91] but title or ownership need not be alleged.[92] The character of the possession, whether as owner, tenant, etc. should be made to appear from the facts stated in the bill.[93]

(4) Wrongfulness of Defendant's Acts

The bill or complaint must unequivocally disclose facts and circumstances showing that the defendant has no right to perform the act or pursue the course of action of which the plaintiff complains.

The bill or complaint should unequivocally disclose facts and circumstances showing that defendant has no right to perform the act or pursue the course of action of which plaintiff complains.[94] Ac-

(2) Bill by restaurant buyers to restrain seller from entering into competing business, in violation of agreement.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.

(3) Petition by employer's assignee to enjoin breach of employee's covenant in employment contract not to compete with employer.—National Linen Service Corporation v. Clower, 175 S.E. 460, 179 Ga. 136.

(4) In suit to enjoin members of a typographical union from interfering with plaintiff's several employers as to their use of the union label.—Knuth v. Lepp, 193 N.W. 519, 180 Wis. 529.

83. Ga.—Bennett v. Kimmel, 137 S.E. 60, 163 Ga. 725.
Ind.—Indianapolis Market Ass'n v. City of Indianapolis, 192 N.E. 754, 207 Ind. 356.
W.Va.—County Court of Mingo County v. Bailey, 125 S.E. 253, 97 W.Va. 351.
32 C.J. p 326 note 5.

Allegations held sufficient
U.S.—Land Development Co. of Louisiana v. City of New Orleans, C.C.A.La., 17 F.2d 1016, reversing, D.C., 13 F.2d 898.

84. U.S.—Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., C.C.Pa., 60 F. 622.

85. Ga.—Gray v. Bradford, 22 S.E. 2d 43, 194 Ga. 492—Mitchell v. Bale, 165 S.E. 5, 175 Ga. 52—Domin v. Brush, 161 S.E. 809, 810, 174 Ga. 32, citing **Corpus Juris.**
Tex.—Collins v. Powell, Civ.App., 268 S.W. 1031—Miller-Link Lumber Co. v. Stephenson, Civ.App., 265 S.W. 215, affirmed Stephenson v. Miller-Link Lumber Co., Com.App., 277 S.W. 1039.
32 C.J. p 326 note 6.

Title held sufficiently pleaded
Ga.—Flowers, Inc., v. Chamblee, 141 S.E. 907, 165 Ga. 703.
La.—Weaver Bros. Realty Corporation v. Voight, App., 191 So. 580.

86. Ga.—Gray v. Bradford, 22 S.E. 2d 43, 194 Ga. 492.

Purpose and effect of attaching abstract of title
An abstract of title is attached to petition to enjoin trespasses upon land to give notice of what will be relied on at the trial, and not to show title in plaintiff on the face of the pleadings, and defects in the abstract will not render the petition demurrable.—Gray v. Bradford, supra.

Bill setting forth copies of deeds held sufficient
Ga.—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108.

87. Fla.—Sinclair v. Hornsby, 55 So. 404, 61 Fla. 742.

Bill showing title in another as manager
Where a bill or complaint showed title to be in another person as manager and there was no allegation that complainant furnished the purchase money, or of any other fact showing the right or interest of complainant in the land, a general allegation of ownership was held insufficient.—Baker v. McKinney, 44 So. 944, 54 Fla. 495.

88. Va.—Bledsoe v. Robinett, 54 S.E. 861, 105 Va. 723.
32 C.J. p 327 note 7.

89. Va.—Bledsoe v. Robinett, supra.

90. U.S.—Thomas v. Nantahala Marble & Talc Co., N.C., 58 F. 485, 7 C.C.A. 330.

91. Ala.—Ashcraft v. Chamblee, 105 So. 694, 213 Ala. 601.
Ga.—Byrd v. Goodman, 25 S.E.2d 34, 195 Ga. 621—Gray v. Bradford, 22 S.E.2d 43, 194 Ga. 492.
32 C.J. p 327 note 11.

Possession held sufficiently alleged
Ill.—Jobst v. Mayer, 158 N.E. 745, 327 Ill. 423.

92. Miss.—Cooper v. Newell, 36 Miss. 316.

Possession of lands in homestead entry
Complaint alleging plaintiff's lawful possession of lands included in homestead entry was held to state cause of action for injunction to restrain trespasses.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.

93. Md.—Lamm v. Burrell, 14 A. 682, 69 Md. 272.

94. La.—Minden Syrup Co. v. Applegate, App., 150 So. 421.
Mass.—Labagnara v. Kane Furniture Co., 193 N.E. 578, 289 Mass. 52.
Or.—Weighers, Warehousemen and Cereal Workers' Union, Local 38—123 of International Longshoremen's Ass'n v. Green, 72 P.2d 55, 157 Or. 394.
Tex.—Texas Centennial Central Exposition v. Ahlfinger, Civ.App., 95 S.W.2d 1344.

Bill or complaint held sufficient
U.S.—Snyder v. John J. Casale, Inc., D.C.N.Y., 49 F.Supp. 926.
Ill.—Strey v. Buehl, 265 Ill.App. 554.
Pa.—Commonwealth ex rel. Reno v. Dial Rock Coal Co., Com.Pl., 53 Dauph.Co. 342.

Bill or complaint held insufficient
U.S.—Galveston Wharf Co. v. City of Galveston, Tex., 43 S.Ct. 168, 260 U.S. 473, 67 L.Ed. 355.
Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196—Gore v. National Associa-

cordingly, where defendant's right to act is dependent on his lack of knowledge or notice of certain facts, defendant's knowledge or notice of such facts must be alleged.[95] In a suit to restrain the performance of an official act by a public officer, the bill or complaint must show fully that the act sought to be restrained is irregular, wrongful, or invalid[96] or that the act constitutes an abuse of defendant's discretionary powers.[97]

(5) Injury to Plaintiff

(a) In general

(b) Irreparable injury

(a) In General

Generally the bill or complaint must allege facts which show that the acts sought to be enjoined will in all probability be committed by the defendant unless restrained, and that the acts will result in substantial injury to plaintiff.

Generally the bill or complaint must allege facts from which the court can see that the acts sought to be enjoined will in all probability be committed by defendant, unless restrained by injunction,[98] and that the acts will result in substantial injury to plaintiff.[99] A statement of a mere conclusion of the pleader that the injurious acts will be commit-

tion of Certified Public Accountants, 231 Ill.App. 38.
N.Y.—H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 266 N.Y.S. 762, 149 Misc. 210.
Or.—Weighers, Warehousemen & Cereal Workers' Union, Local 38—123 of the International Longshoremen's Ass'n v. Green, 72 P.2d 55, 157 Or. 394.
Tex.—City of Fort Worth v. First Baptist Church of Fort Worth, Civ. App., 268 S.W. 1016.

95. N.Y.—Senn v. Ladd, 38 N.Y.S. 2d 820, 179 Misc. 306.
Tex.—San Jacinto Life Ins. Co. v. Brooks, Civ.App., 274 S.W. 648.

Bill to enjoin negotiation of warehouse receipts was held subject to demurrer, where it did not appear how defendants came into possession or when and how receipts were purchased.—Bowen v. Bearden, 117 So. 622, 218 Ala. 67.

96. U.S.—Rash v. Zurbrick, C.C.A., 75 F.2d 934, affirming, D.C., 6 F. Supp. 390—Kreutz v. Elting, D.C. N.Y., 3 F.Supp. 364, affirmed, C.C. A., Kreutz v. Durning, 69 F.2d 802.
Idaho.—Fritchman v. Athey, 211 P. 1080, 36 Idaho 560.
Ill.—School Directors of Dist. No. 3, Clay County, v. Babcock, 249 Ill. App. 305.
R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.
Tex.—Bobbitt v. Gordon, Civ.App., 108 S.W.2d 234.

Petition to restrain election officials
Colo.—People ex rel. Sauter v. Monson, 62 P.2d 467, 99 Colo. 289.
Complaint held to show invalidity of act
Ga.—Rollins v. Legg, 175 S.E. 382, 179 Ga. 85.
Ill.—Audia v. City of Chicago, 236 Ill.App. 613.
Ind.—Coleman v. City of Gary, 44 N.E.2d 101, 220 Ind. 446.
Or.—Lessard v. Snell, 63 P.2d 893, 155 Or. 293.
Wis.—Horlick v. Swoboda, 267 N.W. 38, 221 Wis. 373.

97. Ga.—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551.
Idaho.—Fritchman v. Athey, 211 P. 1080, 36 Idaho 560.
Iowa.—Van Es v. New Independent Consol. School Dist. of Newkirk, 197 N.W. 55, 197 Iowa 348.
N.Y.—Brockway Motor Truck Corporation v. City of New York, 254 N.Y.S. 262, 142 Misc. 523.
Okl.—Boyle v. Rock Island Coal Mining Co., 256 P. 883, 125 Okl. 137—Moore v. Porterfield, 241 P. 346, 113 Okl. 234.
Tenn.—Parks v. Margraves, 7 S.W.2d 990, 157 Tenn. 316.

Refusal of superintendent to approve teacher's contract
Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.

Closing of home for delinquent children by judge
Ga.—Stevenson v. Weekes, 171 S.E. 710, 177 Ga. 867.

Abuse of discretion shown
Okl.—Hayes v. Hoffsommer, 250 P. 1009, 120 Okl. 157—Moore v. Porterfield, 241 P. 346, 113 Okl. 234.
Tenn.—Cheatham County v. Baker, 30 S.W.2d 234, 161 Tenn. 222.

98. Tex.—Spears v. City of South Houston, 150 S.W.2d 74, 136 Tex. 218, affirming, Civ.App., 137 S.W. 2d 197—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—State v. San Antonio Public Service Co., Com.App., 69 S.W.2d 38, affirming San Antonio Public Service Co. v. State, Civ.App., 62 S.W.2d 585—Beall v. Barsch, Civ.App., 37 S.W.2d 761, 762, citing **Corpus Juris**—Wright v. Wright, Civ.App., 278 S.W. 925, 926, citing **Corpus Juris**—Chas F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.
32 C.J. p 327 note 14, p 328 note 15.

Inference
A bill will not be sufficient where it appears therefrom only by inference and not by averment that the acts complained of are being committed or threatened.—Daniel v. Owens, 70 Ala. 297.

Prosecution of action
A bill to enjoin defendant from instituting or maintaining an action must allege that the action is threatened or pending.
Del.—Gray Co. v. Alemite Corporation, 174 A. 136, 20 Del.Ch. 244.
N.Y.—De Raay v. De Raay, 8 N.Y.S. 2d 361, 255 App.Div. 544, affirmed 21 N.E.2d 879, 280 N.Y. 822.
Tex.—Becknal v. Becknal, Civ.App., 296 S.W. 917.

Enforcement of statute or order
A bill or complaint seeking to enjoin a public official from enforcing a statute or an order which does not show that proceedings for enforcement have been instituted against plaintiff or are imminent is not sufficient.
U.S.—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—S. Buchsbaum & Co. v. Beman, D.C. Ill., 14 F.Supp. 444.
Ga.—Cox v. Linder, 14 S.E.2d 93, 191 Ga. 790—City of Albany v. National Linen Service Corporation, 174 S.E. 621, 178 Ga. 771—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 851.
Miss.—Baldwyn v. Board of Barber Examiners, 145 So. 240, 164 Miss. 744.

Trespass
The petition in a suit to enjoin a trespass must show an actual or threatened trespass.
Ga.—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491.
Tex.—Wright v. Wright, Civ.App., 278 S.W. 925.

Allegations held sufficient
Ga.—Durrence v. Groover, 129 S.E. 29, 160 Ga. 680—Burell v. Pirkle, 119 S.E. 529, 156 Ga. 398.
Ind.—Beard v. Link, 141 N.E. 792, 81 Ind.App. 293.
Kan.—State v. Cruzan, 243 P. 329, 120 Kan. 316.
Tex.—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471.
Vt.—Town of West Rutland v. Rutland Ry. Light & Power Co., 127 A. 883, 98 Vt. 379.

99. U.S.—Patten v. Dennis, C.C.A.

ted without further stating the facts on which to base the conclusion is insufficient.[1] In like manner it is not sufficient merely to allege injury or to state a mere apprehension or fear of injury without stating the facts, showing how injury will result,[2] but exceptions have been held to exist where at the time of filing the bill complainant would be unable to show any damages, or at least any material damages,[3] or where the situation is such that injury or damage will inevitably accrue to plaintiff if defendant is permitted to do the threatened acts.[4]

Where the injury is of a public nature, a bill by a private person must allege some special injury different in kind and not merely in degree from that of the public generally,[5] or that the injury consti-

Wash., 134 F.2d 137—Hinman v. Pacific Air Transport, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 865—Hinman v. United Air Lines Transport Corporation, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865—Milliken v. Stone, C.C.A.N.Y., 16 F.2d 981, affirming, D.C., 7 F.2d 397, and certiorari denied 47 S.Ct. 764, 274 U.S. 748, 71 L.Ed. 1331—Connecticut Telephone & Electric Co. v. Automotive Equipment Co., D.C.N.J., 14 F.2d 957, affirmed, C.C.A., Automotive Equipment Co. v. Connecticut Telephone & Electric Co., 19 F.2d 990, certiorari denied 48 S.Ct. 121, 275 U.S. 564, 72 L.Ed. 428—Columbia Terminals Co. v. Lambert, D.C.Mo., 30 F.Supp. 28, vacated on other grounds 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 983, and Public Service Commission of State of Missouri v. Columbia Terminals Co., 60 S.Ct. 471, 309 U.S. 620, 84 L.Ed. 984—Acme Inc. v. Besson, D.C.N.J., 10 F.Supp. 1.

Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, prior opinions, App., 89 P.2d 426, and 90 P.2d 113, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435.

Ga.—Smith v. Bukofzer, 178 S.E. 640, 180 Ga. 213.

Ill.—People ex rel. Terp v. Washingtonian Home of Chicago, 198 N.E. 721, 361 Ill. 522—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill. App. 179.

Ky.—Vermillion v. Davis, 266 S.W. 374, 205 Ky. 727.

La.—Minden Syrup Co. v. Applegate, App., 150 So. 421.

Mo.—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 229 Mo.App. 622.

Tex.—Shelton v. City of Abilene, Civ.App., 80 S.W.2d 351.

32 C.J. p 328 note 19.

Injury to third persons

Allegations that injuries will happen to others if code adopted by industry under National Industrial Recovery Act is enforced have been held immaterial as respects plaintiff's right to restrain enforcement of code.—Starring v. Frazier, D.C. Tenn., 4 F.Supp. 818.

Prosecution for violation of statute or ordinance

A bill to enjoin prosecution of plaintiff for violation of a statute or ordinance which does not allege illegal interference with plaintiff or special injury to him is insufficient.

U.S.—Bookbinders' Trade Ass'n v. Book Mfrs.' Institute, D.C.N.Y., 7 F.Supp. 847.

Ga.—Stephens v. City Council of Augusta, 20 S.E.2d 80, 193 Ga. 815—Winchester v. City of Gainesville, 17 S.E.2d 66, 189 Ga. 33—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551—Bunn v. City of Atlanta, 11 S.E.2d 194, 191 Ga. 48—Ray v. City of Dalton, 11 S.E. 2d 193, 191 Ga. 46—Loftis Plumbing & Heating Co. v. Quarles, 3 S.E.2d 725, 188 Ga. 404.

Ill.—Eichelberger v. Robinson, 233 Ill.App. 579.

Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

Minn.—Schwartz v. Rice County Co-op. Egg & Poultry Ass'n, 204 N.W. 316, 163 Minn. 515.

Miss.—Baldwyn v. Board of Barber Examiners, 145 So. 240, 164 Miss. 744.

Mo.—Wellston Kennel Club v. Castlen, 55 S.W.2d 288, 331 Mo. 798.

Violation of contract

A bill to enjoin a seller of a business from violating a contract not to engage in a similar business in a certain territory must show how complainant is injured by the breach.—J. L. Davis, Inc., v. Christopher, 122 So. 406, 219 Ala. 346.

Suit on invalid claim

Allegation that suit is to be or has been brought on invalid claim does not state case for injunction.—Allen v. American Fidelity & Casualty Co., C.C.A.Tex., 80 F.2d 458.

1. U.S.—Precision Castings Co. v. Boland, D.C.N.Y., 13 F.Supp. 877, affirmed, C.C.A., 85 F.2d 15.

Ariz.—Clark v. Holcomb, 253 P. 897, 31 Ariz. 378.

Ill.—City of Chicago v. People's Gas Light & Coke Co., 170 Ill.App. 98.

N.Y.—In re Chisholm's Will, 264 N.Y.S. 352, 248 Misc. 158.

N.D.—Federal Land Bank of St. Paul v. Koslofsky, 271 N.W. 907, 67 N.D. 322.

Tex.—City of Dallas v. Cain, Civ. App., 52 S.W.2d 269.

2. U.S.—E. I. Dupont De Nemours & Co. v. Boland, C.C.A.N.Y., 85 F.2d 12—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

Ga.—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.

Ill.—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179.

N.Y.—Reidy v. City of Syracuse, 300 N.Y.S. 440, 164 Misc. 656, affirmed 299 N.Y.S. 122, 252 App.Div. 838, appeal dismissed 11 N.E.2d 765, 275 N.Y. 582.

Tex.—Yates v. Blythe, Civ.App., 79 S.W.2d 913, error dismissed Blythe v. Yates, 86 S.W.2d 219, 126 Tex. 85.

32 C.J. p 324 note 73, p 328 note 20.

Damage from use of land for garages

Bill to enjoin construction of eight garages on one lot, as violative of restriction against buildings in which shall be carried on business, offensive, noxious, or detrimental to use of any of the land for residences, was held insufficient, it being impossible to say, in advance, that the running of automobiles in and out of eight privately rented garages must render them offensive, noxious, or detrimental.—Roop v. Michener, 124 A. 581, 14 Del.Ch. 205.

3. Colo.—Colorado Nat. Co. v. Colorado Nat. Bank, 36 P.2d 454, 455, 95 Colo. 386, quoting **Corpus Juris.**

Ky.—Dix River Barytes Co. v. Pence, 123 S.W. 263.

4. Cal.—Lutz v. Western Iron & Metal Co., 213 P. 962, 190 Cal. 554.

5. N.Y.—Atkins v. West, 226 N.Y.S. 335, 222 App.Div. 308—Wollitzer v. National Title Guaranty Co., 266 N.Y.S. 184, 148 Misc. 529, affirmed Wollitzer v. Title Guaranty & Trust Co., 270 N.Y.S. 968, 241 App.Div. 757.

32 C.J. p 328 note 22.

Petition by adjoining owner to enjoin construction of garage at point other than rear of defendant's lot, in violation of ordinance was held sufficient to show peculiar damage to plaintiff.—Woods v. Kiersky, Tex. Com.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518.

tutes a public nuisance.[6] In an action by a city to restrain the violation of a zoning ordinance, no special damage or injury to the city need be alleged.[7] To authorize an injunction in a suit by the attorney general, acting for the state, to restrain a public service corporation from charging rates in excess of those fixed by statute, it is not necessary to aver a specific injury to the public, it being sufficient if the facts alleged are such as to show a public injury or mischief.[8]

In a suit for injunction, allegations of damage are not necessary in the sense that the amount which plaintiff should recover enters into the determination of the right to equitable relief; they are essential only in order that the court may determine that plaintiff's injuries are of such substance as to warrant the equitable intervention of the court.[9]

(b) Irreparable Injury

Generally the complaint must show that a refusal to grant the writ will result in irreparable injury to the plaintiff, but specific allegations of irreparable injury are not necessary if the averments as a whole show that this would be the result of the acts complained of.

Generally, unless the rule is changed by statute,[10] an injunction will not be granted unless the complaint shows that a refusal to grant the writ will work irreparable injury.[11] It is not sufficient simply to allege that the injury will be irreparable, but the facts must be stated so that the court may see that the apprehension of irreparable injury is well founded.[12] In view of the severity or harshness of the remedy by injunction, a strict adherence to this rule of pleading is required.[13] Nevertheless, it need not be alleged in terms that the damages would be irreparable if the averments of the complaint as a whole show that this would be the result of the acts complained of.[14] Where the facts alleged in the bill show that the acts complained of are of such a character that if persisted in irreparable injury will be done, the fact that the word "almost" is used in connection with the charge of irreparable damage will not vitiate the pleading.[15]

Suit by merchants to enjoin street hawking

Ill.—Edelman Bros., Inc., v. Baikoff, 277 Ill.App. 432.

6. N.Y.—Atkins v. West, 226 N.Y.S. 335, 222 App.Div. 308.

7. N.Y.—City of Utica v. Ortner, 10 N.Y.S.2d 729, 256 App.Div. 1039.

8. Wis.—Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425.

9. N.Y.—O'Reilly v. New York El. R. Co., 42 N.E. 1063, 148 N.Y. 347, 31 L.R.A. 407.

10. Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.

Great injury

Averment or proof that plaintiff will suffer irreparable injury if injunction is denied is unnecessary under the Indiana Code of Practice. An allegation that plaintiff will suffer great injury is sufficient.—Biggs v. Bank of Marshfield, 169 N.E. 71, 90 Ind.App. 467.

11. Ala.—Wood v. Curry, 8 So.2d 822, 243 Ala. 136.

Fla.—Garriga v. Reid Lumber Co., 120 So. 849, 97 Fla. 321.

Ga.—Gray v. Chason, 123 S.E. 290, 158 Ga. 313.

La.—State ex rel. Brock v. Clancy, 152 So. 331, 178 La. 687, certiorari denied Brock v. Wainer, 54 S.Ct. 773, 292 U.S. 640, 78 L.Ed. 1492—Adams v. Town of Ruston, 3 La.App. 188.

N.Y.—Levine v. Nolan Motors, 8 N.Y.S.2d 311, 169 Misc. 1025—Valenti v. Spiatto, 227 N.Y.S. 616, 223 App.Div. 198.

S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.

Tex.—Spears v. City of South Houston, 150 S.W.2d 74, 136 Tex. 218, affirming, Civ.App., 137 S.W.2d 197—Beck v. Priddy, Com.App., 252 S.W. 476, reversing, Civ.App., 249 S.W. 1105—Guadalupe-Blanco River Authority v. Tuttle, Civ.App., 171 S.W.2d 520, error refused—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562.

32 C.J. p 329 note 27, p 331 notes 35-39.

Irreparable injury held sufficiently pleaded

U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.

Cal.—People v. Stafford Packing Co., 227 P. 485, 193 Cal. 719.

N.Y.—Ryder v. Pyrke, 224 N.Y.S. 289, 130 Misc. 505.

N.C.—City of Goldsboro v. W. P. Rose Builders' Supply Co., 157 S.E. 58, 200 N.C. 405.

Vt.—Town of West Rutland v. Rutland Ry. Light & Power Co., 127 A. 883, 98 Vt. 379.

12. U.S.—Universal Rim Co. v. General Motors Corporation, C.C.A. Mich., 31 F.2d 969, setting aside, D.C., 20 F.2d 966—Electric Bond & Share Co. v. Securities and Exchange Commission, C.C.A.N.Y., 92 F.2d 580, affirming, D.C., Securities and Exchange Commission v. Electric Bond & Share Co., 18 F. Supp. 131, certiorari granted Electric Bond & Share Co. v. Securities and Exchange Commission, 58 S.Ct. 411, 302 U.S. 681, 82 L.Ed. 526, and affirmed 58 S.Ct. 678, 303 U.S. 419, 82 L.Ed. 936, 115 A.L.R. 105.

Cal.—E. H. Rensel Co. v. Warehousemen's Union I. L. A. 38-44, 106 P. 2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435.

Colo.—Hunt v. Brewer, 91 P.2d 485, 104 Colo. 375.

Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698—Williams v. Dormany, 126 So. 117, 99 Fla. 496.

Ga.—Walnut Transfer & Storage Co. v. Harrison, 196 S.E. 432, 185 Ga. 720.

Hawaii.—Brown v. Kaahanui, 29 Hawaii 804.

La.—Minden Syrup Co. v. Applegate, App., 150 So. 421.

Md.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412—American-Stewart Distillery v. Stewart Distilling Co., 177 A. 473, 168 Md. 212.

Neb.—Omaha Grain Exchange v. Spillman, 226 N.W. 452, 118 Neb. 729.

N.Y.—Levine v. Nolan Motors, 8 N.Y.S.2d 311, 169 Misc. 1025.

Ohio.—Offenbacher v. Columbus, 17 Ohio N.P.,N.S., 74.

Tex.—Coleman v. Wright, Civ.App., 136 S.W.2d 270—Elder v. Highsmith, Civ.App., 10 S.W.2d 736.

32 C.J. p 330 note 29, p 331 note 30.

13. Ind.—Wabash R. Co. v. Engleman, 66 N.E. 892, 160 Ind. 329.

14. U.S.—Nemser v. Aviation Corporation, D.C.Del., 47 F.Supp. 515, 516, citing **Corpus Juris.**

La.—O'Beirne v. Police Jury of Red River Parish, 95 So. 862, 153 La. 357.

W.Va.—Williams v. Victory Coal Co., 183 S.E. 520, 521, 117 W.Va. 9, citing **Corpus Juris.**

32 C.J. p 331 note 32.

15. Md.—Davis v. Reed, 14 Md. 152

Trespass or other injury to real property. Generally an injunction against trespass, waste, or other injury to real property must allege facts showing irreparable injury,[16] and a mere conclusion or opinion that the damages will be irreparable, not substantiated by the facts, is insufficient.[17] The fact that plaintiff's title is undisputed does not relieve him from the necessity of showing that irreparable injury will be done by the threatened or apprehended acts of defendant.[18] If the injunction is sought against a continuing trespass, a showing of irreparable injury has been held to be unnecessary,[19] at least where the injunction is sought as an auxiliary remedy in an action for damages.[20] In a suit primarily to reform a lease, but seeking an injunction against trespass as incidental to relief, irreparable injury need not be alleged.[21]

Petition to restrain acts by public official. In accordance with the general rule, a petition to enjoin performance of certain acts by a public official must show that plaintiff will suffer irreparable injury,[22] and a mere general allegation to this effect is not sufficient.[23]

Suit by public official to restrain violation of law. Irreparable injury need not be alleged by a public official seeking to restrain the violation of an administrative order where the statute authorizes an injunction on a showing of violation of the order.[24]

Breach of contract or covenant. Generally a petition to restrain the violation of a contract must allege facts showing irreparable injury,[25] but this allegation has been held not to be necessary in a suit to enjoin the violation of a restrictive covenant[26] or in a suit to enjoin the violation of a contract for exclusive sales territory where the statute permits an injunction whenever there is no adequate remedy by an action for damages.[27]

16. Ga.—Slaughter v. Land, 9 S.E. 2d 754, 190 Ga. 491—Lenoir v. Hamlin, 164 S.E. 201, 174 Ga. 793—Griner v. Culpepper, 139 S.E. 666, 164 Ga. 858.
32 C.J. p 331 notes 42, 43.

Irreparable damage held sufficiently alleged
Ala.—May v. Lowery, 107 So. 67, 214 Ala. 230.
Cal.—Tristram v. Marques, 3 P.2d 947, 117 Cal.App. 393.
Ga.—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108—Couey v. Talalah Estates Corporation, 188 S.E. 822, 183 Ga. 442.

17. Ga.—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108.

18. Nev.—Thorn v. Sweeney, 12 Nev. 251.

19. Ga.—Nash Loan Co. v. Dixon, 182 S.E. 23, 181 Ga. 297.

20. Iowa.—Pisny v. Chicago & N. W. Ry. Co., 221 N.W. 205, 207 Iowa 515, modified on other grounds 222 N.W. 609, 207 Iowa 515.

21. Ill.—Utterback v. Estill, 224 Ill. App. 151.

22. U.S.—Spielman Motor Sales Co. v. Dodge, N.Y., 55 S.Ct. 678, 295 U.S. 89, 79 L.Ed. 1322, modifying, D.C., 8 F.Supp. 437—New Orleans Private Patrol Service v. Fleming, D.C.La., 33 F.Supp. 856—Watch Tower Bible & Tract Soc. v. City of Bristol, D.C.Conn., 24 F.Supp. 57, affirmed 59 S.Ct. 246, 305 U.S. 572, 83 L.Ed. 361—McDermott v. Hamilton, D.C.Wash., 11 F.Supp. 235—McNally v. Reynolds, D.C. Wash., 7 F.Supp. 112.
Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.
Cal.—U. S. v. Superior Court, 120 P. 2d 26, 19 Cal.2d 189—Affonso Bros. v. Brock, 84 P.2d 515, 29 Cal.App. 2d 26.
Conn.—Lazarevich v. Stoeckel, 167 A. 823, 117 Conn. 260.
Ga.—Pitner v. Federal Land Bank of Columbia, 158 S.E. 331, 172 Ga. 610.
Ky.—City of Ashland v. Beckham, 111 S.W.2d 575, 271 Ky. 96.
N.Y.—Mills Novelty Co. v. Sunderman, 193 N.E. 541, 266 N.Y. 32, reversing 271 N.Y.S. 1077, 242 App. Div. 617.
Tex.—Atlas Metal Works v. City of Dallas, Civ.App., 30 S.W.2d 431.
32 C.J. p 331 notes 40, 41.

Irreparable injury held sufficiently pleaded
Ala.—Moore v. Howard, 149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.
Cal.—McKay Jewelers v. Bowron, 122 P.2d 543, 19 Cal.2d 595, 139 A. L.R. 1188.
Ill.—Linehan v. City of Chicago, 227 Ill.App. 255.
Mich.—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.
Mo.—State ex rel. Chase v. Hall, 250 S.W. 64, 297 Mo. 594.
N.Y.—Ryder v. Pyrke, 224 N.Y.S. 289, 130 Misc. 505.
Okl.—Choctaw Pressed Brick Co. v. Townsend, 236 P. 46, 108 Okl. 235.
Tex.—Neal v. Cain, Civ.App., 247 S. W. 694—Neal v. Boog-Scott, Civ. App., 247 S.W. 689.

23. U.S.—Milliken v. Stone, C.C.A. N.Y., 16 F.2d 981, affirming, D.C., 7 F.2d 397, and certiorari denied 47 S.Ct. 764, 274 U.S. 748, 71 L.Ed. 1331.
Cal.—Golden Gate Sightseeing Tours v. City and County of San Francisco, 69 P.2d 899, 21 Cal.App.2d 582.
Conn.—Lazarevich v. Stoeckel, 167 A. 823, 117 Conn. 260.
Fla.—Egan v. City of Miami, 178 So. 132, 130 Fla. 465.
Ga.—Stephens v. City Council of Augusta, 20 S.E.2d 80, 193 Ga. 815.
Ill.—Eichelberger v. Robinson, 233 Ill.App. 579.
Ky.—City of Ashland v. Beckham, 111 S.W.2d 575, 271 Ky. 96.

Allegation of "great expense"
An allegation in bill that compliance with regulations would subject complainant "to great expense" was not adequate basis for injunctive relief on ground of irreparable damages, in absence of supporting detail or specification.—State of California v. Latimer, Cal., 59 S.Ct. 166, 305 U.S. 255, 83 L.Ed. 159.

24. U.S.—American Fruit Growers v. U. S., C.C.A.Cal., 105 F.2d 722—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528, reversed on other grounds, 137 F.2d 689, 78 U.S.App. D.C. 98, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, and reversed on other grounds 64 S.Ct. 587.

25. Fla.—Garriga v. Reid Lumber Co., 120 So. 849, 97 Fla. 321.
Tex.—Harris v. Siegel, Civ.App., 68 S.W.2d 330—McAllen and Harlingen Local No. 688 of International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators of U. S. and Canada v. Publix Theatres Corporation, Civ. App., 51 S.W.2d 1090—Graham v. Omar Gasoline Co., Civ.App., 253 S.W. 896.

26. Fla.—Stephl v. Moore, 114 So. 455, 94 Fla. 313.

27. Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292.

(6) Inadequacy of Remedy at Law

Where the jurisdiction of equity depends on the lack of an adequate remedy at law the bill must state facts from which the court can determine that the remedy at law is inadequate.

Where the jurisdiction of equity depends on the lack of an adequate remedy at law, a bill for an injunction must state facts from which the court can determine that the remedy at law is inadequate.[28] The petition must show that no legal remedy exists or that all legal remedies have been exhausted,[29] unless the pursuit of the legal remedies would subject plaintiff to a multiplicity of suits and would therefore not constitute an adequate remedy at law.[30] A general allegation that plaintiff has no speedy or adequate remedy at law is a mere conclusion and of no effect.[31] However, where the facts

28. U.S.—Northport Power & Light Co. v. Hartley, D.C.Wash., 35 F.2d 199, affirmed 51 S.Ct. 581, 283 U.S. 568, 75 L.Ed. 1275—New Orleans Private Patrol Service v. Fleming, D.C.La., 33 F.Supp. 856—Spiegel v. Ford, D.C.Mass., 5 F.Supp. 456.
Ala.—Skates v. Hartsfield, 114 So. 10, 216 Ala. 618.
Ark.—Twin City Bank v. J. S. McWilliams Auto Co., 34 S.W.2d 229, 230, 182 Ark. 1086, citing **Corpus Juris.**
Colo.—People ex rel. Sauter v. Monson, 62 P.2d 467, 99 Colo. 289.
Ga.—Stephens v. City Council of Augusta, 20 S.E.2d 80, 193 Ga. 815—City of Atlanta v. Miller, 13 S.E. 2d 814, 191 Ga. 767—Lyles v. Watson, 7 S.E.2d 909, 189 Ga. 768—Hamilton v. First Nat. Bank, 180 S.E. 840, 180 Ga. 820—Lenoir v. Hamlin, 164 S.E. 201, 174 Ga. 793—Sherman v. Board of Education of Bartow County, 142 S.E. 152, 165 Ga. 889.
Miss.—Henry v. Donovan, 114 So. 482, 148 Miss. 278.
Neb.—Retail Section of Chamber of Commerce of Plattsmouth v. Kieck, 257 N.W. 493, 128 Neb. 13.
N.Y.—Mills Novelty Co. v. Sunderman, 193 N.E. 541, 266 N.Y. 32, reversing 271 N.Y.S. 1077, 242 App. Div. 617—Valenti v. Spiatto, 227 N.Y.S. 616, 223 App.Div. 198—Wick v. Crane Co., 251 N.Y.S. 741, 141 Misc. 31.
Tex.—Magnolia Petroleum Co. v. de Garcia, Civ.App., 126 S.W.2d 1006—Quinn v. Johnson, Civ.App., 91 S.W.2d 499, error dismissed—Harris v. Siegel, Civ.App., 68 S.W.2d 330—San Angelo Nat. Bank v. Wright, Civ.App., 66 S.W.2d 804, error refused—Hudgens v. Yancey, Civ.App., 284 S.W. 347—San Jacinto Life Ins. Co. v. Brooks, Civ.App., 274 S.W. 648.
32 C.J. p 328 note 24.

Liberal enforcement of rule
The rule which denies injunctive relief on failure to negative the existence of an adequate legal remedy is not rigidly enforced in Texas.—Magnolia Petroleum Co. v. de Garcia, Tex.Civ.App., 126 S.W.2d 1006.

Inadequate remedy at law held sufficiently pleaded
U.S.—American R. Co. of Porto Rico v. South Porto Rico Sugar Co., C.C.A.Puerto Rico, 293 F. 670—Bank of Palmetto v. Hyman, C.C.A. Ga., 290 F. 353—Winola Lake & Land Co. v. Gorham, D.C.Pa., 13 F. Supp. 721.
Ala.—State ex rel. Embry v. Bynum, 9 So.2d 134, 243 Ala. 138—Alexander v. Hill, 141 So. 638, 224 Ala. 671—Bowen v. Morris, 123 So. 222, 219 Ala. 689.
Cal.—People v. Stafford Packing Co., 227 P. 485, 193 Cal. 719.
Fla.—State ex rel. Meredith v. Board of Trustees of Salvation Army, 135 So. 781, 102 Fla. 219—Warrington v. Williams, 111 So. 250, 92 Fla. 1021.
Ga.—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860—City of Albany v. Lippitt, 13 S.E.2d 807, 191 Ga. 756—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551.
Ill.—Edelman Bros., Inc., v. Baikoff, 277 Ill.App. 432.
Mass.—Bancroft Trust Co. v. Canane, 171 N.E. 281, 271 Mass. 191.
Mo.—Nokol Co. of Missouri v. Becker, 300 S.W. 1108, 318 Mo. 292—Thompson v. City of Malden, App., 118 S.W.2d 1059.
Tex.—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178—Nagy v. Bennett, Civ.App., 24 S.W.2d 778, error refused.
Va.—Edwards v. W. M. Ritter Lumber Co., 177 S.E. 841, 163 Va. 851.

29. U.S.—Dickert v. Hickey, D.C.N.Y., 47 F.Supp. 577—McDermott v. Bradford, D.C.Wash., 10 F.Supp. 661—Thomas v. Dennis, D.C.Wash., 8 F.Supp. 501.
Ga.—City of Cedartown v. Pickett, 20 S.E.2d 263, 193 Ga. 840—Garrison v. Toccoa Electric Power Co., 171 S.E. 564, 177 Ga. 850, followed in Hayes v. Toccoa Electric Power Co., 171 S.E. 566, 177 Ga. 856.
Mass.—Neustadt v. Employers Liability Assur. Corporation, 21 N.E. 2d 538, 303 Mass. 321, 123 A.L.R. 134.
Miss.—Madison County v. Mississippi State Highway Commission, 198 So. 284, 191 Miss. 192.
Mo.—Sampson Distributing Co. v. Cherry, 156 S.W.2d 596—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W.2d 290, transferred, see, Sup., 152 S.W.2d 178.
N.Y.—Shay v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 347, 172 Misc. 202, affirmed 24 N.Y.S.2d 870, 260 App. Div. 958.
Okl.—Caldwell v. Traub, 43 P.2d 1047, 172 Okl. 12—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133—Hooven v. Oklahoma Cotton Growers' Ass'n, 247 P. 39, 118 Okl. 238—Carmichael v. Oklahoma Cotton Growers' Ass'n, 245 P. 598, 117 Okl. 24—Oklahoma Cotton Growers' Ass'n v. Salyer, 243 P. 232, 114 Okl. 77.
Tex.—Stafford v. Powell, Civ.App., 129 S.W.2d 1204—First Nat. Bank v. Coyle, Civ.App., 95 S.W.2d 1337—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067—Campbell v. Moore, Civ.App., 12 S.W.2d 806.

Negativing inferences
In accordance with the general rule, stated supra subdivision b (2) (b) of this section, to obtain relief through injunction, petition must negative facts from which it could reasonably be inferred that complainant had legal remedy.—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Tex.Civ.App., 53 S.W.2d 73.

30. Mo.—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W.2d 290, transferred, see, Sup., 152 S.W.2d 178.

31. U.S.—Dickert v. Hickey, D.C.N.Y., 47 F.Supp. 577.
Ill.—Kroschel v. Schwall, 139 N.E. 77, 307 Ill. 530.
Mo.—Thompson v. City of Malden, App., 118 S.W.2d 1059—National Pigments & Chemical Co. v. Wright, App., 118 S.W.2d 20.
Mont.—State v. Zuck, 215 P. 806, 67 Mont. 324.
Neb.—Retail Section of Chamber of Commerce of Plattsmouth v. Kieck, 257 N.W. 493, 128 Neb. 13.
N.Y.—Juran v. Title Guarantee & Trust Co., 273 N.Y.S. 493, 151 Misc. 631—Boro Wide Food Dealers Ass'n v. La Guardia, 44 N.Y.S.2d 160.
Tex.—Coleman v. Wright, Civ.App., 136 S.W.2d 270—Magnolia Petroleum Co. v. de Garcia, Civ.App., 126 S.W.2d 1006—Woodley v. Gulf, C. & S. F. Ry. Co., Civ.App., 20 S.W. 2d 842—Hudgens v. Yancey, Civ. App., 284 S.W. 347.
32 C.J. p 329 note 25.

stated in the bill show that the remedy at law is inadequate, it is not necessary to allege in terms that the remedy at law is inadequate.[32] Where the inadequacy of a remedy at law is not an essential factor to the granting of relief it need not be pleaded in the bill or complaint.[33]

(7) Defendant's Inability to Respond in Damages

If the fact that the injury inflicted will be irreparable or the fact that the remedy at law will be inadequate depends on whether the defendant is able to respond in damages, an allegation of his insolvency or inability to respond in damages is indispensable.

If the fact that the injury inflicted will be irreparable, or the fact that the remedy at law will be inadequate, depends on whether defendant is able to respond in damages, an allegation of his insolvency or inability to respond in damages is indispensable.[34] Unless dispensed with by statute, an allegation of insolvency is necessary if it appears that compensation in damages will afford an adequate remedy,[35] and it has been so held where the complaint shows that the damages are readily ascertainable,[36] or where it is alleged that the act complained of will result in damages in a designated sum.[37] In the absence of an averment of insolvency it generally will be assumed that defendant is solvent and able to respond in damages for any injuries inflicted.[38] Insolvency of defendant need not be alleged where it is not a material factor for equitable relief,[39] and it has been held that where the allegations are such as to show that the injury will be irreparable,[40] or that the damages will not be capable of estimation,[41] or that there is a determined purpose on the part of defendant to commit repeated injuries and thus render redress at law obtainable only by a multiplicity of suits[42] an averment that defendant is insolvent is unnecessary. So a complaint to restrain continuous trespasses need not allege defendant's insolvency,[43] at least where the title is undisputed.[44]

Sufficiency of pleading. Vague, conflicting, and uncertain averments of insolvency or financial irresponsibility are of no effect,[45] nor is it sufficient

32. Ark.—Rutherford v. Casey, 77 S.W.2d 58, 190 Ark. 79.
32 C.J. p 329 note 26.

33. Injunction as auxiliary remedy
Where a statute permits an injunction against a continuance of the injury as an auxiliary remedy in an action for damages for the injury, the absence of a legal remedy need not be alleged.—Pisny v. Chicago & N. W. Ry. Co., 221 N.W. 205, 207 Iowa 515, modified on other grounds 222 N.W. 609, 207 Iowa 515.

Suit to restrain violation of administrative order
In a suit by a public official to restrain the violation of an administrative order under a statute authorizing an injunction on a showing of violation of the order, it is not necessary for complainant to negative the existence of an adequate remedy at law.—American Fruit Growers v. U. S., C.C.A.Cal., 105 F.2d 722—Brown v. Hecht Co., D.C.D.C., 49 F.Supp. 528, reversed on other grounds 137 F.2d 689, certiorari granted Hecht Co. v. Brown, 64 S.Ct. 81, and reversed on other grounds 64 S.Ct. 587.

A certificate of no adequate remedy at law, as required by the Act of Oct. 13, 1840, P.L. 1, § 11, 17 P.S. § 284, is neither necessary nor proper to a bill in equity, praying for injunctive relief.—Chatfield v. Washeim, Pa.Com.Pl., 29 North.Co. 275.

34. U.S.—Martin v. James B. Berry Sons' Co., C.C.A.R.I., 88 F.2d 857.
Fla.—Garriga v. Reid Lumber Co., 120 So. 849, 97 Fla. 321.
Ga.—Slaughter v. Land, 9 S.E.2d 754, 190 Ga. 491—Darien Bank v. Varner, 165 S.E. 82, 175 Ga. 193—Lenoir v. Hamlin, 164 S.E. 201, 174 Ga. 793—Nalley Land & Investment Co. v. Shaddix, 157 S.E. 291, 172 Ga. 171—Owens v. Davidson, 144 S.E. 103, 166 Ga. 635—Gray v. Chason, 123 S.E. 290, 158 Ga. 813—Howser Bros. v. Tonson, 119 S. E. 313, 156 Ga. 447.
Mass.—Bancroft Trust Co. v. Canane, 171 N.E. 281, 271 Mass. 191.
Tex.—Crocker v. McGill, Civ.App., 24 S.W.2d 1112.
32 C.J. p 332 note 44.

As showing inadequacy of legal remedy
(1) A statement that defendant is insolvent or unable to respond in damages may show that the remedy at law is inadequate.—White Star Refining Co. v. Hansen, 231 N.W. 577, 251 Mich. 224.

(2) An allegation that judgment for damages against defendant would be uncollectable has been held to be a sufficient basis for averment of irreparable injury, as against general demurrer.—Fuller v. Wright, Tex.Civ.App., 82 S.W.2d 179.

35. Ga.—Dasher v. Schroer, 175 S. E. 382, 179 Ga. 88.
Tex.—Beck v. Priddy, Com.App., 252 S.W. 476, reversing, Civ.App., 249 S.W. 1105.
32 C.J. p 332 note 45.

36. Tex.—Hudgens v. Yancey, Civ. App., 284 S.W. 347.
32 C.J. p 332 note 46.

37. U.S.—Sewerage and Water Board of New Orleans v. Howard, La., 175 F. 555, 99 C.C.A. 177.

38. Ala.—Kellar v. Bullington, 14 So. 466, 101 Ala. 267—Chambers v. Alabama Iron Co., 67 Ala. 353.

39. U.S.—Speh v. Bullard, C.C.A. Fla., 83 F.2d 809.
Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Ill.—Sheehy v. Koerber, 282 Ill.App. 543—Utterback v. Estill, 224 Ill. App. 151.
Iowa.—Pisny v. Chicago & N. W. Ry. Co., 221 N.W. 205, 207 Iowa 515, modified on other grounds 222 N. W. 609, 207 Iowa 515.
Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.

40. Ga.—McConnell v. Jones Naval Stores Co., 54 S.E. 117, 125 Ga. 376.
32 C.J. p 332 note 49.

41. Nev.—Sierra Nevada Min. Co. v. Sears, 10 Nev. 346.
Tex.—Parisian Live Dyers & Cleaners v. Springfield, Civ.App., 275 S. W. 1098.

42. Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.
32 C.J. p 332 note 51.

43. Ga.—Nash Loan Co. v. Dixon, 182 S.E. 23, 181 Ga. 297.
Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.
N.C.—Kinsland v. Kinsland, 125 S.E. 625, 188 N.C. 810—Cobb v. Atlantic Coast Line R. Co., 89 S.E. 807, 172 N.C. 58.
32 C.J. p 332 note 49 [a, b].

44. W.Va.—Henline v. Miller, 185 S. E. 852, 117 W.Va. 439.

45. Hawaii.—Brown v. Kaahanui, 29 Hawaii 804.

to allege that plaintiff believes defendant to be insolvent.[46] For the purpose of showing insolvency it has been held sufficient to allege that defendant's property is "beyond the reach of legal process,"[47] or that he has very little property not exempt from execution and is not responsible for the damages,[48] or that he "is in very slender circumstances, and is unable to pay and satisfy the recovery were he [the plaintiff] compelled to resort to" covenants contained in a deed made by defendant,[49] or that an execution against defendant has been returned nulla bona.[50] It has been held that, in the absence of a motion for a more specific allegation, an averment that defendant will not be able to respond for the damages for which he will be liable is sufficient, and that it is not necessary to aver that he is proof against an execution;[51] but it is not sufficient to allege that defendant has parted with "most" of his property, subject to levy and sale, except his residence[52] or that he has no visible property exempt from execution.[53] Where defendant is an officer who has given a bond with sureties, it is not sufficient to allege that he is insolvent in a suit to enjoin him from performing his official duties, but it must be alleged that his sureties are insolvent.[54] An allegation that all the defendants are insolvent except one admits the solvency of the latter.[55]

(8) Multiplicity of Suits

Plaintiff should state the facts showing how a multiplicity of suits would be required if injunctive relief were not granted rather than merely stating that a multiplicity of suits would be required.

Mere averments that a multiplicity of suits will be required in the absence of relief by injunction are not sufficient; the facts showing how a multiplicity of suits would be required should be stated,[56] and it should be alleged that all plaintiffs will be affected alike by the act sought to be enjoined.[57]

(9) Fraud

Where fraud is relied on as a ground for injunctive relief, the facts constituting the fraud must be set forth clearly and specifically.

A mere general allegation or conclusion of fraud relied on as a ground for injunctive relief is insufficient; the facts constituting the fraud must be set forth clearly and specifically.[58]

(10) Doing or Offering to Do Equity

In some jurisdictions the plaintiff must allege that he has done or is willing to do everything which is necessary to entitle him to the relief sought.

In some jurisdictions plaintiff must allege that he has done or is willing to do everything which is necessary to entitle him to the relief sought.[59] Perhaps the most familiar application of this principle

Neb.—Tigard v. Moffitt, 14 N.W. 534, 13 Neb. 565.
32 C.J. p 332 note 52.

Averments held sufficient

U.S.—Mulford v. Smith, Ga., 59 S. Ct. 648, 307 U.S. 38, 83 L.Ed. 1092, affirming, D.C., 24 F.Supp. 919.
Ala.—Alexander v. Hill, 141 So. 638, 224 Ala. 671.

46. W.Va.—Farland v. Wood, 14 S.E. 140, 35 W.Va. 458.

47. Md.—Conolly v. Riley, 25 Md. 402.

48. Iowa.—Burroughs v. Saterlee, 25 N.W. 808, 67 Iowa 396, 56 Am.R. 350.

49. Ala.—Graham v. Tankersley, 15 Ala. 634.

50. W.Va.—Ward v. Ohio River R. Co., 14 S.E. 142, 35 W.Va. 481.

51. Iowa.—Burroughs v. Saterlee, 25 N.W. 808, 67 Iowa 396, 56 Am.R. 350.
Kan.—Long v. Kasebeer, 28 Kan. 226.

52. Ga.—Powell v. Parker, 38 Ga. 644.

53. Nev.—Connery v. Swift, 9 Nev. 39.

54. Nev.—Wells v. Dayton, 11 Nev. 161.

55. Or.—Miller v. Laneda, 146 P. 1090, 75 Or. 349.

56. Ala.—Cullman Property Co. v. H. H. Hitt Lumber Co., 77 So. 574, 201 Ala. 150.
32 C.J. p 333 note 63.

Allegations held sufficient

A bill by a trustee in bankruptcy to recover a fund belonging to the estate, which alleged that, unless enjoined, defendant would distribute the fund among a large number of bondholders, making necessary separate suits against each for its recovery, and praying for such injunction, was held to state a cause of action within the equity jurisdiction.—Mercantile Trust Co. v. Schlafly, C.C.A.Mo., 299 F. 202, certiorari denied 45 S.Ct. 96, 266 U.S. 614, 69 L.Ed. 468.

Probability of multiplicity of suits held not shown

R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.

57. Ill.—Kearney v. Canton, 113 N. E. 98, 273 Ill. 507.

58. Ala.—Waldrop v. Martin, 188 So. 59, 237 Ala. 556.
Ga.—Lathrop v. Miller, 138 S.E. 50, 164 Ga. 167.
Md.—Maas v. Maas, 168 A. 607, 165 Md. 342.—Braiterman-Fedder Co. v. Cardilli, 145 A. 338, 156 Md. 699.—Kinsey v. Drury, 119 A. 646, 141 Md. 684.
Mo.—State ex rel. Barnett School Dist. No. 66, Laclede County v. Barton, 104 S.W.2d 284, 287, citing **Corpus Juris.**
Tenn.—Reams v. Town of McMinnville, 284 S.W. 382, 153 Tenn. 408.
32 C.J. p 333 notes 66–69.

Allegations held sufficient to show fraud

Ga.—Young v. Hirsch, 199 S.E. 179, 187 Ga. 1.
N.Y.—People v. Federated Radio Corporation, 154 N.E. 655, 244 N.Y. 33, affirming 214 N.Y.S. 670, 216 App.Div. 250.—People v. Rice, 223 N.Y.S. 566, 221 App.Div. 443.

Allegations held insufficient to show fraud

U.S.—El Paso & Southwestern Co. v. Riddle, D.C.Tex., 287 F. 173, affirmed, C.C.A., 294 F. 892.
Ark.—City of El Dorado v. Citizens' Light & Power Co., 250 S.W. 882, 158 Ark. 550.
Ill.—Goss v. Board of Education of City of Chicago, 247 Ill.App. 58.

59. Ariz.—Clark v. Holcomb, 253 P. 897, 899, 31 Ariz. 378, citing **Corpus Juris.**
Tex.—Southwest Gas Co. v. Hoff, Civ. App., 50 S.W.2d 379, 380, quoting **Corpus Juris**—West Texas Loan Co. v. Beckham, Civ.App., 291 S.W. 582.
32 C.J. p 333 note 73.

occurs in cases of averment of tender, as where plaintiff admits a sum of money to be due or equitably due to defendant. In these circumstances the bill must show that plaintiff has paid or has offered to pay, or must contain an averment of plaintiff's willingness to pay, such sum of money to entitle him to relief by injunction;[60] but if the contract is void tender of money has been held not to be necessary.[61] An allegation that plaintiff "is still willing and now offers to pay whatever amount he may be justly chargeable with, if any, and in this respect submits himself to the order and decree of the court," is a sufficient offer to do equity, and plaintiff need not actually bring the money into court.[62] Where defendant refuses to receive what is justly due to him, on a tender being made of it, plaintiff need only repeat his offer in the bill and need not make a formal tender of the money.[63]

c. Prayer

Ordinarily an injunction will not be granted under a prayer for general relief; it must be expressly prayed, and the precise nature of the injunctive relief sought must be specified.

There is some authority that an injunction may be granted under a prayer for general equitable relief.[64] Ordinarily, however, an injunction will not be granted under a prayer for general relief; it must be expressly prayed.[65] This is true with respect to perpetual,[66] temporary,[67] and mandatory injunctions,[68] and to restraining orders.[69] The prayer must specify the precise nature of injunctive relief sought.[70] A prayer for permanent relief on a final hearing does not include relief by a temporary injunction,[71] but a prayer for either a

60. Ga.—Vining v. Bankers Commercial Security Co., 183 S.E. 494, 181 Ga. 556—Snell v. Spalding Foundry Co., 180 S.E. 218, 180 Ga. 582—Lawrence v. Patterson, 153 S.E. 29, 170 Ga. 419.
N.Y.—Lubetkin v. D. S. Stern & Co., 227 N.Y.S. 630, 223 App.Div. 770.
Tex.—Southwest Gas Co. v. Hoff, Civ.App., 50 S.W.2d 379, 380, quoting **Corpus Juris**—West Texas Loan Co. v. Beckham, Civ.App., 291 S.W. 582.
32 C.J. p 334 note 74.

Attorney claiming lien on money collected
Attorney, suing to enjoin actions against him for money collected, claiming lien thereon, should pay money into court.—McLendon v. Truckee Land Co., 114 So. 3, 216 Ala. 586.

61. Suit to enjoin dunning
Ga.—Nash Loan Co. v. Dixon, 182 S.E. 23, 181 Ga. 297.

62. Ala.—Security Loan Assoc. v. Lake, 69 Ala. 456.
32 C.J. p 334 note 75.

63. N.Y.—Morgan v. Schermerhorn, 1 Paige 544.
32 C.J. p 334 note 76.

64. Nev.—Sugarman Iron & Metal Co. v. Morse Bros. Machinery & Supply Co., 255 P. 1010, 50 Neb. 191.

65. Mass.—McLaughlin v. Levenbaum, 142 N.E. 906, 248 Mass. 170.
Tex.—Temple Independent School Dist. v. Proctor, Civ.App., 97 S.W. 2d 1047, error refused—Fletcher v. King, Civ.App., 75 S.W.2d 980, error refused.
32 C.J. p 334 note 81—21 C.J. p 679 note 67 [c].

Reason for rule
The reason assigned for requiring injunctive relief to be expressly asked is that defendant might by his answer make a different case under the general prayer from what he would if an injunction was specifically prayed.
Ark.—Gaines v. Hale, 26 Ark. 168, affirmed 93 U.S. 3, 23 L.Ed. 782.
Hawaii.—Montgomery v. Montgomery, 2 Hawaii 553.

66. Tex.—Fletcher v. King, Civ. App., 75 S.W.2d 980, error refused.
32 C.J. p 334 note 82.

Motion for permanent injunction during hearing on preliminary injunction
An objection that defendant had no notice that plaintiff would move for a permanent injunction on a hearing pertaining to the dissolution of a preliminary injunction is obviated by a subsequent rehearing at which all the parties are present.—Banke v. Novadel-Agene Corporation, C.C.A.Mich., 130 F.2d 99, certiorari denied 63 S.Ct. 324, 317 U.S. 692, 87 L.Ed. 554.

67. Tex.—Smith v. State, Civ.App., 140 S.W.2d 299—Sipe v. Sayer, Civ. App., 140 S.W.2d 297, 1112—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Temple Independent School Dist. v. Proctor, Civ.App., 97 S.W.2d 1047, error refused—Ely v. Elliott, Civ.App., 55 S.W.2d 1080—Miller v. Stafford, Civ.App., 46 S.W.2d 438—English v. Kermit Townsite Co., Civ.App., 38 S.W.2d 898—Yellow Cab & Baggage Co. v. City of Amarillo, Civ.App., 20 S.W. 2d 855—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused—Miller v. Miller, Civ. App., 294 S.W. 694—Jacksonville Independent School Dist. v. Devereux, Civ.App., 286 S.W. 573.
32 C.J. p 335 note 83.

Grant by judge in vacation
Judge in vacation has no authority to grant preliminary writ of injunction unless that kind of relief is specially prayed for in application.—Barton v. Tharp, Tex.Civ.App., 27 S.W.2d 885.

68. Ill.—Oakwood Tp. Highway Comrs. v. Union Drain. Dist. No. 1 Comrs., 162 Ill.App. 158.
32 C.J. p 335 note 84.

69. Fla.—Savage v. Parker, 43 So. 507, 53 Fla. 1002.
Tex.—Dickson v. Waples-Platter Co., Civ.App., 45 S.W.2d 428—Yellow Cab & Baggage Co. v. City of Amarillo, Civ.App., 20 S.W.2d 855—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.

70. Tex.—Temple Independent School Dist. v. Proctor, Civ.App., 97 S.W.2d 1047, error refused—Fletcher v. King, Civ.App., 75 S.W. 2d 980, error refused—English v. Kermit Townsite Co., Civ.App., 38 S.W.2d 898.

Prayer to restrain excavation
Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.

Prayer held sufficient for relief granted
Tex.—Temple Independent School Dist. v. Proctor, Civ.App., 97 S.W. 2d 1047, error refused.
32 C.J. p 335 note 99 [a].

71. Tex.—Temple Independent School Dist. v. Proctor, supra—City of Jacksonville v. Devereux, Civ.App., 286 S.W. 572—Fort Worth Acid Works v. City of Fort Worth, Civ.App., 248 S.W. 822, affirmed City of Fort Werth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919—Hoskins v. Cauble, Civ.App., 198 S.W. 629.

Prayer sufficient for temporary injunction
(1) A petition praying for the issuance of an injunction and in immediate connection praying that "upon final hearing hereof these

temporary restraining order or a temporary injunction is amply specific to support the jurisdiction of the court to grant relief by preliminary injunction.[72] Where the injunctive relief asked is broader than that to which plaintiff is entitled under the allegations of the bill it has been held proper in some jurisdictions to refuse all injunctive relief,[73] but it has also been held that a complaint is not so defective as to bar any relief because complainant asks for more relief than the court might deem proper under the facts proved,[74] or because he has asked the wrong relief.[75] A prayer may be so general and indefinite as not to warrant any relief,[76] but the fact that a prayer for a temporary injunction is verbose and illogical will not vitiate it if other substantial requirements of a prayer are complied with.[77] A prayer for relief in the alternative is not objectionable,[78] although inconsistent relief cannot be prayed for.[79] Failure of the petition to ask for the fixing of bond for the issuance of the injunction is not fatal to the petition as the court may order the giving of the bond under prayer for general relief.[80]

Additional relief. A prayer for general relief in addition to a specific injunctive relief may support the granting of any relief which the court deems justified under the circumstances.[81] Damages may be allowed under a prayer for general relief,[82] unless the complaint is not framed in such a manner as to make that legal remedy available.[83] It is proper to ask at the same time for both an injunction and for damages.[84]

As ancillary relief. Relief by injunction may be sought as ancillary relief, but in such case if the right to the main relief falls the right to injunctive relief also falls.[85] Where the ultimate purpose of the action is not an injunction, but an accounting, a prayer for an injunction is not necessary.[86]

Prayer for process. As a general rule in the absence of a statute otherwise providing, an injunction bill should contain a prayer for process against defendant.[87] While there is some authority to the contrary,[88] it has very generally been held that the bill or complaint should contain a prayer for injunction in the prayer for process as well as in the prayer for relief,[89] and that if it does not it is demurrable.[90]

d. Construction of Bill or Complaint

A bill or complaint for injunctive relief is construed strictly against the pleader. The court will give a reasonable construction to the bill and will consider it in accordance with its general scope and tenor regardless of isolated averments.

A bill or complaint for injunctive relief will be construed strictly against the pleader,[91] and no pre-

plaintiffs have judgment making said injunction perpetual" contained a sufficiently specific prayer for the issuance of a temporary injunction. —McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Tex.Civ. App., 121 S.W.2d 1048.

(2) Prayer that court immediately issue injunction against further proceedings in another suit, and that, after hearing, defendant be permanently enjoined, authorized temporary relief.—Hunt v. Hunt, Tex.Civ. App., 55 S.W.2d 911.

(3) Prayer that defendants be restrained from doing specified acts, that they be cited to answer, and that on final hearing injunction be made perpetual, was held to ask for both temporary and permanent relief.—Sinclair Refining Co. v. McElree, Tex.Civ.App., 52 S.W.2d 679.

72. Tex.—McAnally v. Person, Civ. App., 57 S.W.2d 945, error refused.

73. Fla.—McSween v. State Live Stock Sanitary Board, 125 So. 704, 97 Fla. 749.
Md.—Mayor and City Council of Baltimore v. Sackett, 107 A. 557, 135 Md. 56.

74. Ga.—Edwards Mfg. Co. v. Hood, 145 S.E. 87, 167 Ga. 144.
Tex.—Gurtov v. Williams, Civ.App., 105 S.W.2d 328, error dismissed.
32 C.J. p 335 note 95.

Prayer held too broad but relief given
U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.

75. N.Y.—Spielberg v. Canada SS. Lines, 162 N.Y.S. 610, 98 Misc. 304.

Application for writ of prohibition
On application to restrain parties from prosecuting suit in district court for interference with jurisdiction of court of civil appeals, although relator designated relief sought as writ of prohibition, if the right to relief by injunction were clearly manifest by the application, injunction would be granted.—Ferguson v. Ferguson, Tex.Civ.App., 98 S.W.2d 847.

76. U.S.—Wright v. Barnard, D.C. Del., 248 F. 756.
32 C.J. p 335 note 93.

77. Ill.—People v. Quigg, 151 Ill. App. 186.

78. Pa.—Sharon R. Co.'s App., 17 A. 234, 122 Pa. 533, 9 Am.S.R. 133.

79. Mich.—McKibbin v. Bristol, 15 N.W. 491, 50 Mich. 319.
32 C.J. p 335 note 98.

80. La.—Bogalusa Ice Co. v. Moffett, App., 179 So. 327.

81. Wash.—Merager v. Turnbull, 99 P.2d 434, 2 Wash.2d 711, 127 A. L.R. 1142.

82. U.S.—United Electric Coal Cos. v. Rice, D.C.Ill., 22 F.Supp. 221.

83. Cal.—Long Beach Drug Co. v. United Drug Co., 89 P.2d 386, 13 Cal.2d 158, denying rehearing 88 P.2d 698, 13 Cal.2d 158.

84. Iowa.—Berger v. Armstrong, 41 Iowa 447.
N.Y.—Gillilan v. Norton, 29 N.Y.Super. 546, 33 How.Pr. 373.

85. Mich.—Blackwood v. Van Vleet, 11 Mich. 252.

86. N.Y.—Safety Electric Construction Co. v. Cramer, 19 N.Y.S. 747.

87. U.S.—U. S. v. Agler, C.C.Ind., 62 F. 824.
32 C.J. p 334 note 80.

88. Md.—Webb v. Rigley, 38 Md. 364.

89. Me.—Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402.
32 C.J. p 335 note 88.

90. U.S.—U. S. v. Agler, C.C.Ind., 62 F. 824.

91. Ga.—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 551.
Neb.—Bishop v. Huff, 116 N.W. 665, 81 Neb. 729.

sumptions will be indulged to support the pleading.[92] The court will look at the substance of the bill, and will disregard the name by which the pleader calls it;[93] it will give a reasonable construction to the bill[94] and will consider it in accordance with its general scope and tenor, regardless of isolated averments[95] or general allegations unsupported by the facts stated.[96] The bill will be construed with the exhibits filed with it.[97] If the statements of fact in the bill are contradictory they nullify each other and pertinent matters of common knowledge or public record may be resorted to in construing them.[98] Where the statement of facts constituting a cause or causes of action will support either of two actions, and it is doubtful which the pleader intended, the prayer for relief may be consulted for the purpose of ascertaining the pleader's intendment.[99]

e. Filing Exhibits

As a general rule, where the right to an injunction is based on a written instrument in plaintiff's possession, the instrument or a copy thereof should be filed with the bill.

As a general rule, where the right to an injunction is based on a written instrument in the possession of plaintiff or to which he has ready access, or such instrument materially supports plaintiff's claim, the instrument itself or a copy thereof should be filed with the bill to enable the court to construe it and determine whether plaintiff is entitled to the relief prayed;[1] and if this is not done the bill may be subject to demurrer.[2] However, if what purports to be a full and exact copy of the document is filed with the bill, alleged omissions therein do not render the bill demurrable, the existence of such omissions being a question of fact which should be raised by answer and not by demurrer.[3] Where the right to an injunction is sufficiently supported by possession of the locus in quo, the bill need not attach documents evidencing complainant's right to

Tex.—Holcombe v. Lorino, 79 S.W. 2d 307, 124 Tex. 446, reversing Lorino v. Holcombe, Civ.App., 71 S.W.2d 402—Magnolia Petroleum Co. v. de Garcia, Civ.App., 126 S. W.2d 1006—Sneed v. Ellison, Civ. App., 116 S.W.2d 864, error dismissed—Svrcek v. Hahn, Civ.App., 103 S.W.2d 840, 843, error dismissed, citing **Corpus Juris**—Thomas v. Bunch, Civ.App., 41 S.W.2d 359, affirmed Bunch v. Thomas, 49 S. W.2d 421, 121 Tex. 225—R. A. Toombs Sash & Door Co. v. Jamison, Civ.App., 271 S.W. 253—City of Fort Worth v. First Baptist Church of Fort Worth, Civ.App., 268 S.W. 1016—San Antonio Fire Fighters' Local Union No. 84 v. Bell, Civ.App., 223 S.W. 506, error refused.

32 C.J. p 338 note 42.

Suits against public officials

The rule applies where public officers in discharge of official duties are sought to be restrained.—Wertheimer v. Walker, Tex.Civ.App., 96 S.W.2d 831—Marion County v. Perkins Bros. Co., Tex.Civ.App., 171 S. W. 789.

92. Ala.—McHan v. McMurry, 55 So. 793, 173 Ala. 182.

32 C.J. p 338 note 43.

Inferences or implications from pleadings

(1) Under rule that, when opposed by demurrer, complaint must be construed most strongly against pleader, it may be inferred from allegation in complaint to enjoin selling of remaining lots of addition free from restrictions that plaintiffs "or" their predecessors in title purchased from, etc., that none of plaintiffs were original vendees of any of defendants.—Phipps v. Western Pacific Development Co., 212 P. 407, 60 Cal. App. 171.

(2) Allegations in a bill of complaint that defendant instituted a certain suit against complainant, an interstate railway company, in a court in a named foreign state, and that the case has been set for trial, imply that personal service on complainant was obtained in the foreign state.—Wabash Ry. Co. v. Lindsey, 269 Ill.App. 152.

Inference favoring legality of act of public official

In a petition to restrain a public officer in the discharge of his duty, every reasonable inference will be indulged in favor of the legality of the act.—Marion County v. Perkins Bros. Co., Tex.Civ.App., 171 S.W. 789.

93. Ill.—McConnel v. Gibson, 12 Ill. 128.

94. **Allegation of compliance with law**

In suit for injunction, petition alleging compliance with the law in all respects in sale of wine would be construed as referring to domestic wines, the sale of which has been legalized, and as alleging the operation of the business in a lawful manner so far as that beverage was concerned.—McKown v. City of Atlanta, 190 S.E. 571, 184 Ga. 221.

Corporate existence of defendant held admitted by bill

Ill.—Baird v. Community High School Dist. No. 168, 136 N.E. 671, 304 Ill. 526.

95. Ind.—Miller v. Burket, 32 N.E. 309, 132 Ind. 472.

Tex.—Svrcek v. Hahn, Civ.App., 103 S.W.2d 840, 843, error dismissed, citing **Corpus Juris**.

96. Ala.—Eastburn v. Holcombe, 10 So.2d 457, 243 Ala. 433.

Tex.—Camp v. Thomas, Civ.App., 26 S.W.2d 470, error refused.

97. Ala.—Moore v. Howard, 149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.

Tex.—City of Beaumont v. Carroll, Civ.App., 136 S.W.2d 235, error refused.

Reference to another bill pending in court

Where a bill for an injunction refers to another bill pending in the same court and relating to closely connected matter, the allegations of the latter bill may be examined in passing on the sufficiency of the former to constitute a basis for injunctive relief.—Bolton v. Flournoy, Ga., R.M.Charlt. p 125.

98. Mich.—Wiley v. Murray, 196 N. W. 446, 225 Mich. 170.

99. N.Y.—Rodgers v. Rodgers, 11 Barb. 595.

1. U.S.—Perry v. U. S. Employees' Compensation Commission, D.C. Cal., 27 F.2d 144.

Md.—Maas v. Maas, 168 A. 607, 165 Md. 342—Wetherall v. Hoffman, 121 A. 847, 142 Md. 686.

32 C.J. p 339 note 55.

Papers held properly filed

Md.—Kaliopulus v. Lumm, 141 A. 440, 155 Md. 30.

2. Md.—Washington County Water Co. v. Hagerstown, 82 A. 826, 116 Md. 497, Ann.Cas.1913C 1022.

32 C.J. p 339 note 56.

3. Md.—Washington County Water Co. v. Hagerstown, 89 A. 500, 122 Md. 252.

occupy the premises as life tenant.[4] Failure to file exhibits is excusable where the writings are in the hands of plaintiff's adversary and cannot be produced.[5] Documents which are not the basis of plaintiff's claim, but are remote or collateral,[6] or which are merely evidence in support of allegations of ultimate facts,[7] need not be filed. Also a failure to file exhibits is not fatal where the bill incorporates or sets out all that the exhibits would show.[8]

The filing of title papers is considered supra subdivision b (3) of this section.

§ 183. —— Plea or Answer and Subsequent Pleadings

Defendant must set up in his answer every ground on which he intends to rely and he must meet fairly and fully all the properly pleaded allegations of the complaint.

Defendant must set up in his answer every ground on which he intends to rely,[9] and he must, by denial or avoidance or by showing a want of equity, meet fairly and fully the allegations of the bill or complaint,[10] other than those which are merely conjectural or argumentative.[11] Material allegations of a verified bill which are not denied are deemed to be true,[12] but this rule has no application to statements of the bill which are mere conclusions.[13] In accordance with the rules of practice in the particular jurisdiction a general denial may be sufficient to put in issue all the allegations of the complaint,[14] but, where a bill alleges on information and belief, a general denial of the allegations puts in issue only plaintiff's information and belief and not the truth or falsity of the facts alleged.[15]

Although the precision requisite in pleading in an action at law has been held to be unnecessary,[16] the averments of the answer should be positive, certain, unambiguous, and unequivocal,[17] and relevant

4. Md.—Didier v. Merryman, 79 A. 597, 114 Md. 434.

5. Md.—Hall v. Trustees of Sharp St. Station of Methodist Episcopal Church of Baltimore City, 142 A. 508, 155 Md. 654.
32 C.J. p 339 note 59.

6. Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845.
Md.—Hall v. Trustees of Sharp St. Station of Methodist Episcopal Church of Baltimore City, 142 A. 508, 155 Md. 654.
32 C.J. p 339 note 60.

7. U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519.

8. Ga.—Marion County v. McCorkle, 200 S.E. 285, 187 Ga. 312—Behn v. Young, 21 Ga. 207.

9. Conn.—Xanthakey v. Hayes, 140 A. 808, 107 Conn. 459.
N.Y.—Commissioners of Palisades Interstate Park v. Lent, 147 N.E. 228, 240 N.Y. 1, affirming 205 N.Y.S. 560, 209 App.Div. 883.
32 C.J. p 339 note 63.

Abandonment asserted in support of a title of property must be specially pleaded by defendant in injunction.—Goldsbury v. MacConnell, 215 P. 872, 73 Colo. 351.

Adequacy of remedy at law

(1) As a general rule defendant must plead the adequacy of plaintiff's remedy at law for this defense to be available.
U.S.—Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., C.C.A. Okl., 100 F.2d 770, certiorari granted 59 S.Ct. 789, 306 U.S. 629, 83 L.Ed. 1032, reversed on other grounds 60 S.Ct. 215, 308 U.S. 530, 309 U.S. 4, 84 L.Ed. 447, 537, rehearing denied 60 S.Ct. 465, 309 U.S. 693, 84 L.Ed. 1034.
Ga.—Haygood v. King, 132 S.E. 62, 161 Ga. 732.
Ohio.—Sedaris v. Riley, 27 Ohio N.P., N.S., 215.
Tex.—Rivers v. Campbell, 111 S.W. 190, 51 Tex.Civ.App. 103, error refused.
32 C.J. p 339 note 63 [b].

(2) Thus, where defendant is sought to be restrained from proceeding with action at law, he must plead defense that plaintiff can protect his rights in such action.—Cunningham v. Ganley, 166 N.E. 712, 267 Mass. 375.

10. U.S.—Olsness v. Home Ins. Co., C.C.A.N.D., 14 F.2d 907.
Fla.—Lee v. Beach Pub. Co., 173 So. 440, 127 Fla. 600.
32 C.J. p 339 note 64, p 340 note 71.

Pleading res judicata
Ill.—Schmidt v. Modern Woodmen of America, 261 Ill.App. 276.

Answers held sufficient
Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.
Fla.—Hagerty v. Southern Bell Telephone & Telegraph Co., 199 So. 570, 145 Fla. 51—Ryan v. State, by Knott, 174 So. 438, 128 Fla. 1.
Ga.—Couey v. Talalah Estates Corporation, 188 S.E. 822, 183 Ga. 442.
Ill.—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.
Ind.—Doss v. Yingling, 9 N.E.2d 139, 103 Ind.App. 555.
Ky.—Green v. Collett, 21 S.W.2d 252, 231 Ky. 215.
N.D.—Vinquist v. Siegert, 227 N.W. 556, 58 N.D. 820.
Wash.—Rial v. City of Yakima, 219 P. 1, 126 Wash. 694.
32 C.J. p 339 note 64 [b].

11. Pa.—Todd v. Sablosky, 15 A.2d 677, 339 Pa. 504, 132 A.L.R. 282.

12. U.S.—McNee v. Wall, D.C.Fla., 13 F.Supp. 326, affirmed, C.C.A., Wall v. McNee, 87 F.2d 768.
Mo.—P. M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co., 152 S.W. 601, 169 Mo.App. 295.
32 C.J. p 340 note 80, p 355 notes 44, 45.

13. N.C.—Mayo v. Washington, 29 S.E. 343, 122 N.C. 5, 40 L.R.A. 163.

14. Tex.—Trimble v. Hawkins, Civ. App., 197 S.W. 224.

15. U.S.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 848.

16. **Pleading affirmative matter**
Affirmative matter in the answer cannot be ignored, if it is sufficient in substance to warrant denial of relief to plaintiff or to require the imposition of conditions to granting of relief, although such matter is not pleaded with the precision required at law in pleading counterclaim.—Pittsmont Copper Co. v. O'Rourke, 141 P. 849, 49 Mont. 281.

17. Ill.—International Mutual Fire Ins. Co. v. Carrington, 241 Ill.App. 208.
Tenn.—Cockrill v. People's Sav. Bank, 293 S.W. 996, 155 Tenn. 342.
32 C.J. p 339 note 65, p 340 note 68.

Plea in abatement
Where a plea in abatement failed to set forth specifically the essential facts, it was held to be properly overruled.—Gulf Refining Co. v. City of Dallas, Tex.Civ.App., 10 S.W.2d 151, error dismissed.

and material to the subject matter of the controversy;[18] and they must not consist of mere conclusions.[19] Defendant may assert in the answer any rights arising out of the transaction which are necessarily involved in the complete determination of the controversy,[20] and, if he desires relief by injunction, he must ask for it in his pleadings.[21] The answer must be that of defendant and not his attorney,[22] and it must be based on defendant's knowledge and not merely on his belief.[23] The papers filed by defendant must be filed as an answer in order to be effective as such.[24]

A motion to dissolve, where it puts in issue the truth of the allegation of the complaint, may be ordered to stand as a part of the answer.[25] The court may in its discretion refuse to allow an injunction against any one of defendants on the answer of some of them, although others have failed to answer.[26]

Time for answer. Generally, the time to answer as of right is governed by the statutes or rules of practice prevailing in the forum where the action is brought,[27] but the court in its discretion may permit the answer to be filed after the expiration of the prescribed time if the circumstances warrant and plaintiff is not prejudiced thereby.[28]

Reply by plaintiff. Affirmative averments of a verified answer must be taken as true in the absence of a replication.[29] Where the answer raises the question as to whether the complaint is within the provisions of a particular statute and, therefore, must comply therewith, plaintiff may test the issue by pleading both as though it were within the statute and as though it were outside the statute.[30] A reply in which plaintiff seeks to deny averments in the answer and also to demur to the answer has been held to be defective.[31]

§ 184. —— Cross Bill

Defendant for the purpose of asserting equities which are connected with the subject matter of the original bill or complaint may file a cross bill or counterclaim against plaintiff or against codefendants, and, as a general rule, he must do so if he seeks affirmative relief.

Defendant, for the purpose of asserting equities which are connected with the subject matter of the original bill or complaint, may file a cross bill or, in some jurisdictions, a counterclaim in lieu of a cross bill, against plaintiff[32] or against codefendants,[33] even though plaintiff may be entitled to an injunction;[34] and, as a general rule, it is necessary for defendant to file a cross bill or counterclaim if he seeks affirmative relief.[35] To be maintainable the cross bill must be germane to the issues pre-

18. Cal.—Wheeler v. West, 20 P. 45, 78 Cal. 95.
N.Y.—International R. Co. v. Jaggard, 197 N.Y.S. 384, 204 App.Div. 67.
Immaterial matter may be stricken out.—Wheeler v. West, 20 P. 45, 78 Cal. 95.

19. Ill.—City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616, transferred, see 24 N.E.2d 344, 372 Ill. 455.
32 C.J. p 339 note 66.

20. Okl.—Banks v. City of Ardmore, 112 P.2d 372, 188 Okl. 611.

21. Wis.—Cobb v. Smith, 23 Wis. 261.

22. U.S.—Read v. Consequa, Pa., 20 F.Cas.No.11,606, 4 Wash.C.C. 174.

23. U.S.—U. S. v. Parrott, C.C.Cal., 27 F.Cas.No.15,998, 1 McAll. 271.
N.J.—Megis v. Lister, 23 N.J.Eq. 199; Society for Establishing Useful Manufactures v. Low, 17 N.J.Eq. 19.

24. Va.—Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corporation, 133 S.E. 812, 145 Va. 317.

25. La.—Denson v. Stewart, 14 La. Ann. 703.

26. Ga.—Cobb v. Hogue, 13 S.E. 633, 87 Ga. 459.

27. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.
N.Y.—Bond Stores v. Turner, 29 N.Y.S.2d 82, 262 App.Div. 417.
W.Va.—Smith v. City of Parkersburg, 24 S.E.2d 588.
32 C.J. p 340 notes 76, 77.
Answer in vacation
An answer to bill of complaint in injunction suit may be filed in vacation of court in aid of a motion to dissolve a temporary injunction.—Tennant v. Kilcoyne, 196 S.E. 559, 120 W.Va. 137.

28. N.Y.—Bond Stores v. Turner, 29 N.Y.S.2d 82, 262 App.Div. 417.

29. Ill.—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.

30. N.Y.—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.

31. Pa.—Steinhauer v. School Dist. of Borough of Luzerne, Com.Pl., 35 Luz.Leg.Reg. 145.

32. Cal.—Mixer v. Mixer, 83 P. 273, 2 Cal.App. 227.
Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394.
Ga.—Kidd v. Finch, 4 S.E.2d 187, 188 Ga. 492—May v. Sorrell, 111 S.E. 810, 153 Ga. 47.
Ind.—Livengood v. Munns, 27 N.E. 2d 92, 108 Ind.App. 27.
Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.
Pa.—Wagner v. Brown, Com.Pl., 47 Dauph.Co. 33.
Tenn.—Beaty v. Owens, 6 Tenn.App. 154.
Tex.—Spaulding Mfg. Co. v. Kuykendall, Civ.App., 151 S.W. 1122.
Tort claim
Defendant may file a cross action based on a tort claim germane to the controversy.—Verginadis v. Atlanta Milling Co., 160 S.E. 800, 173 Ga. 626.
Subjects permissible in suit to enjoin trespass
Defendant in an action to enjoin continuing trespasses may file a cross bill asking an injunction to stay actions brought by complainant at law for the trespasses and for mandatory injunction, directing complainant to remove from the land a retaining wall and certain filling placed thereon and for damages, defendant claiming title to the land in itself.—Averill v. Vermont Valley R. Co., 92 A. 220, 88 Vt. 293.

33. Ga.—Kidd v. Finch, 4 S.E.2d 187, 188 Ga. 492.
Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.

34. Tenn.—Holston River Electric Co. v. Hydro Electric Corporation, 12 Tenn.App. 556.

35. Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.

sented by the original bill or complaint,[36] and it must state facts which, if proved, will entitle defendant to the relief sought.[37] In some jurisdictions defendant may, by a cross action, set up a claim for damages against plaintiff for having sued out the injunction,[38] but in other jurisdictions he cannot do so.[39] The cross bill may be construed with the other pleadings in the case.[40] Defendant is not entitled to relief on a cross claim where his supplemental pleadings are inconsistent with a right thereto.[41]

A defense consisting of facts arising after issue joined must be alleged in a cross bill in the nature of a plea.[42]

§ 185. —— Demurrer and Motions

a. In general
b. Grounds
c. Requisites and sufficiency
d. Admissions
e. Hearing and determination

a. In General

As a general rule the sufficiency of a bill or complaint for an injunction may be tested by demurrer.

Generally, in the absence of a statute or rule of court to the contrary, the sufficiency of a bill or complaint for an injunction may be questioned or tested by demurrer.[43] The right to demur for want of jurisdiction of the subject matter is not waived by the submission of a party to the jurisdiction of the court over his person.[44] The court may properly allow a general demurrer to be presented at the hearing of an application for a temporary injunction.[45]

Motion to dissolve. Under some statutes it is permissible to attack the sufficiency of the bill by a motion to dissolve the temporary injunction in the same manner as by a general demurrer.[46]

Motion to make more definite and certain. While a bill or complaint containing a general allegation of injury to real estate by waste, without stating the particulars, is not demurrable for want of facts, a motion may be made to make the petition more definite and certain.[47]

b. Grounds

Generally, grounds for a demurrer exist where, through particular defects in pleading or omissions of essential allegations, the bill or complaint fails to set forth a good cause for equitable relief.

In accordance with the rule that the sufficiency of a bill or complaint for an injunction may be tested by demurrer, as stated supra subdivision a of this section, broadly stated a bill which on its face fails to set forth a good cause of action is demurrable,[48] and a bill which sets forth a good cause of action for the equitable relief prayed is not demurrable.[49] A complaint for an injunction is not

36. Ala.—City of Florala v. Louisville & N. R. Co., 104 So. 769, 213 Ala. 342.
Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394.
Utah.—Logan City School Dist. v. Kowallis, 77 P.2d 348, 94 Utah 342.

Suit to restrain action
In a suit to enjoin the prosecution of an action for damages in the courts of a sister state, the only question presented is defendant's right to sue in that forum, and defendant cannot by a cross bill litigate his right to recover damages.—Missouri-Kansas & T. R. Co. v. Wilkins, 256 P. 910, 125 Okl. 150.

Determination of boundary in trespass suit
In lessee's suit to enjoin trespass on leased glebe land, defendant's cross bill, alleging that lessee was acting for third person who had encroached on defendant's land and with whom defendant had had controversy concerning boundary line, and asking that boundary line be determined, was held proper, since issue raised by cross bill was germane to that presented by lessee's petition.—Brown v. Derway, 192 A. 16, 109 Vt. 37.

Cross bill by intervener
Ga.—Anderson v. Black, 13 S.E.2d 650, 191 Ga. 627.

37. Ill.—City of Edwardsville v. Illinois Bell Telephone Co., 142 N.E. 197, 310 Ill. 618.

Cross bill held sufficient
Ga.—Adcock v. Berry, 21 S.E.2d 605, 194 Ga. 243.

38. Tex.—Garrett v. Kelley, Civ. App., 6 S.W.2d 414, error refused.

39. Ga.—Werk v. Big Bunker Hill Mining Corporation, 17 S.E.2d 825, 193 Ga. 217.

40. Tex.—Garrett v. Kelley, Civ. App., 6 S.W.2d 414, error refused.

41. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446.

42. N.J.—McAlpin v. Universal Tobacco Co., Ch., 57 A. 418.

43. Fla.—State ex rel. Landis v. Tedder, 143 So. 148, 106 Fla. 140.
Tex.—Arcola Sugar Mills Co. v. Rodriquez, Civ.App., 18 S.W.2d 844.

44. Tenn.—Reynolds Corp. v. Knoxville Lithographing Co., 197 S.W. 897, 133 Tenn. 287.

45. Tex.—Booth v. Board of Education of Fort Worth Independent School Dist., Civ.App., 70 S.W.2d 350.

46. Mo.—Alberts Commission Co. v. Spencer, 150 S.W. 712, 245 Mo. 268.
32 C.J. p 341 note 97.

47. Ohio.—Piatt v. Piatt, 3 Ohio Dec., Reprint, 92, 3 Wkly.L.Gaz. 140.

48. Ga.—Warlick v. Rome Loan & Finance Co., 22 S.E.2d 61, 194 Ga. 419—Clower v. Bryan, 166 S.E. 194, 175 Ga. 790—Chambers v. Williams, 123 S.E. 865, 158 Ga. 543.
Md.—Maas v. Maas, 168 A. 607, 165 Md. 342.
Requisites and sufficiency of bill or complaint see supra § 182.

49. Ala.—Bankers' Fire & Marine Ins. Co. v. Sloss, 155 So. 371, 229 Ala. 26.
Ark.—Duck v. Arkansas Corporation Commission, 158 S.W.2d 24, 203 Ark. 488, appeal dismissed 62 S. Ct. 946, 316 U.S. 641, 86 L.Ed. 1727.
Ga.—Scales v. Bellamy, 26 S.E.2d 775—Elder v. Camp, 18 S.E.2d 622, 193 Ga. 320—Latham v. Fowler, 16 S.E.2d 591, 192 Ga. 686—Fulton Land Co. v. Armor Insulating Co., 15 S.E.2d 848, 192 Ga. 526—Smith v. McCranie, 186 S.E. 191, 182 Ga.

demurrable if, on any state of proof which its allegations justify, the court could grant an injunction.[50] A special demurrer is properly overruled when the grounds on which it is urged are not supported by the actual facts of the case,[51] but, when the grounds on which the demurrer is urged are valid and are supported by the facts, it is error for the court to overrule the demurrer.[52] The impropriety of the bill for injunction as a means of obtaining the relief sought,[53] or want of equity appearing on the face of the bill,[54] may be a ground for demurrer, and, where the prayer and scope of a bill show that its chief purpose is to obtain an injunction, it has been held that it will be held bad on demurrer if it is insufficient for that purpose, although it may be sufficient to warrant other relief,[55] but these rules do not prevail, of course, if they are superseded by statutory provisions.[56] Particular defects for which a demurrer will lie, in the absence of a statute or rule of court otherwise providing, include multifariousness,[57] failure to state facts instead of conclusions,[58] failure to show irreparable injury,[59] failure to allege facts showing the inadequacy of a remedy at law,[60] such as by allegations of defendant's insolvency,[61] failure to present a concrete issue for decision,[62] and misjoinder or nonjoinder of necessary parties.[63] Defective allegations as to the right by which plaintiff sues should be reached by a motion to make more specific and not by demurrer,[64] but failure to show that a contract or covenant sought to be enforced was for the benefit of plaintiff has been held ground for demurrer.[65] Failure to serve with process one of the parties named as defendant in the petition is not a ground for demurrer.[66] A bill which is improperly verified or entirely lacks verification is not demurrable, because the demurrer admits the truth of the allegations.[67]

Where the question of laches can better be determined at the hearing on the merits, the court will refuse to dispose of the question on demurrer.[68]

A cross bill which on its face fails to set forth a good cause of action,[69] or which is not germane to the original bill or complaint,[70] is subject to demurrer. On the other hand, a cross bill which contains equity and which is germane to the issues presented by the original bill or complaint has been held not to be demurrable.[71]

588—City of Atlanta v. Bowden, 153 S.E. 357, 170 Ga. 527—Ward v. Parks, 142 S.E. 690, 166 Ga. 149—Carolina Portland Cement Co. v. Charles N. Walker Roofing Co., 135 S.E. 503, 163 Ga. 33—Burell v. Pirkle, 119 S.E. 529, 156 Ga. 398.

50. Ga.—McKown v. City of Atlanta, 190 S.E. 571, 184 Ga. 221.
Ind.—Haas v. Holder, 32 N.E.2d 590, 218 Ind. 263.
N.Y.—Butterick Pub. Co. v. Frederick Loeser & Co., Inc., 133 N.E. 361, 232 N.Y. 86, reversing 187 N.Y.S. 500, 196 App.Div. 1, appeal granted and reargument denied 188 N.Y.S. 913, 196 App.Div. 967.
32 C.J. p 341 note 93.

51. Ga.—Elder v. Camp, 18 S.E.2d 622, 193 Ga. 320—Fulton Land Co. v. Armor Insulating Co., 15 S.E.2d 848, 192 Ga. 526—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860.

Adequacy of damages
Ga.—National Linen Service Corporation v. Clower, 175 S.E. 460, 179 Ga. 136.

52. Ga.—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860.

53. Ga.—Sweat v. Barnhill, 153 S.E. 364, 170 Ga. 545.
Okl.—Thomas v. Dawson, 115 P.2d 136, 189 Okl. 193.
Tex.—West v. Culpepper, Civ.App., 159 S.W.2d 961.

54. Ga.—Chambers v. Williams, 123 S.E. 865, 158 Ga. 543.
32 C.J. p 341 note 3.

55. Ind.—Carmel Natural Gas & Improvement Co. v. Small, 47 N.E. 11, 150 Ind. 427, rehearing overruled 50 N.E. 476, 150 Ind. 427—Logansport v. Uhl, 99 Ind. 531, 49 Am. R. 109.

56. **Statute abolishing demurrer for want of equity**
When so provided by statute, the fact that the complaint does not show plaintiff to be entitled to equitable relief is not a ground for demurrer if the facts stated entitled plaintiff to any measure of judicial redress.—Fisher v. Goodman, 237 N.W. 93, 205 Wis. 286.

57. N.J.—Rodman v. Manganese Steel Co., 72 A. 963, 75 N.J.Eq. 295.
N.Y.—New York Cent. & H. R. R. Co. v. Reeves, 85 N.Y.S. 28, 41 Misc. 490.

58. Tex.—Rio Grande Valley Gas Co. v. City of McAllen, Civ.App., 158 S.W.2d 122, error refused.

59. Ga.—Fleisher v. Duncan, 24 S.E. 2d 15, 195 Ga. 309.

60. Mo.—Missouri Power & Light Co. v. Lewis County Rural Electric Co-op. Ass'n, 149 S.W.2d 881, 235 Mo.App. 1056.
Ohio.—Sedaris v. Riley, 27 Ohio N.P.,N.S., 215.
Tex.—Rivers v. Campbell, 111 S.W. 190, 51 Tex.Civ.App. 103, error refused.
32 C.J. p 341 note 3 [b], [c].

Statute requiring defendant to prove financial responsibility
A demurrer on the ground that plaintiff has an adequate remedy in damages is not applicable where the statute requires defendant to prove that he is able to respond in damages if the defense of adequacy of damages is to be available.—Universal Realty Corporation v. Felser, 22 A.2d 448, 179 Md. 635.

61. Ga.—Burkhalter v. Minter-Smith Hardware Co., 127 S.E. 852, 160 Ga. 307.

62. Or.—Blaser v. Dallas City, 137 P.2d 991.

63. Ga.—McLamb v. Jackson, 128 S.E. 580, 160 Ga. 460.
Okl.—Thomas v. Dawson, 115 P.2d 136, 189 Okl. 193.
32 C.J. p 341 note 4.

64. Ark.—Reed v. Ziff Lodge No. 119, Order of Masons, 1 S.W.2d 1000, 175 Ark. 979.

65. Cal.—Bresee v. Dunn, 172 P. 387, 178 Cal. 96.

66. Iowa.—Forbes v. Delashmutt, 26 N.W. 56, 68 Iowa 164.

67. Ind.—Champ v. Kendrick, 30 N.E. 787, 130 Ind. 549.
32 C.J. p 341 note 7.

68. Pa.—Pennsylvania Schuylkill Valley R. Co. v. Reading Paper Mills, 24 A. 205, 149 Pa. 18.

69. Ga.—Kimsey v. Mickel, 12 S.E.2d 567, 191 Ga. 158.

70. Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394.

71. Fla.—Osius v. Barton, supra.

Answer. A demurrer to an answer which seeks to set up an unavailable defense should be sustained.[72] Where an answer in an injunction suit contains a general denial pursuant to a statute allowing a defendant in injunction proceedings to answer as in other civil actions, a demurrer to the answer will be overruled.[73]

Absence of, or defects in, exhibits. Failure of complainant to attach a necessary exhibit to his bill is not a ground for demurrer but should be reached by motion.[74] Defects in an abstract of title attached to a petition to enjoin trespass for the purpose of showing what will be relied on at the trial and not to show title in plaintiff are not ground for demurrer,[75] but, if the abstract is incorporated in the petition to show title, failure of the abstract to show a good chain of title will render the petition subject to demurrer.[76] Where no abstract of title is required to be attached to the petition, a mere allegation of ownership is sufficient to withstand a demurrer on the ground that plaintiff's title is not shown.[77]

c. Requisites and Sufficiency

As a general rule a demurrer should specify the reasons why the pleading demurred to is insufficient.

As a general rule a demurrer should specify the reasons why the pleading demurred to is insufficient,[78] or point out clearly its defective features.[79] Thus a specific objection that plaintiff has failed to allege facts in support of conclusions,[80] that plaintiff has misnamed repeated breaches of a contract by calling them trespasses,[81] that a contract, in a suit to restrain its breach, is unenforceable in equity,[82] or that a bill for mandatory injunction against the county judge should have joined the other members of the fiscal court as defendants,[83] should be reached by a special demurrer, but a general demurrer has been held to be sufficient to raise the question as to the adequacy of plaintiff's legal remedy apparent from the face of the petition.[84] Where a complaint states several grounds, a demurrer may be addressed to each of them.[85] A motion to dismiss a bill for want of equity operates as a demurrer ore tenus.[86]

d. Admissions

A demurrer to an injunction bill admits the truth of all such matters of fact as are well and sufficiently pleaded.

In accordance with rules of equity pleading, as stated in Equity § 283, a demurrer to an injunction bill admits the truth of all such matters of fact as are well and sufficiently pleaded.[87] On the other hand, matters which are not well pleaded are not admitted by demurrer,[88] such as allegations which are mere conclusions of law;[89] and matters of law or fact which are repugnant to each other are not admitted.[90]

e. Hearing and Determination

In determining the sufficiency of the bill as against a demurrer, the court is limited to an inquiry as to whether

72. Wis.—State ex rel. Attorney General v. Noyes, 269 N.W. 710, 223 Wis. 378.

73. Tex.—Manton v. San Antonio, Civ.App., 207 S.W. 951.

74. Tenn.—State Board of Medical Examiners v. Friedman, 263 S.W. 75, 150 Tenn. 152.

75. Ga.—Gray v. Bradford, 22 S.E. 2d 43, 194 Ga. 492.

76. Ga.—Gray v. Bradford, supra.

77. Ga.—Gray v. Bradford, supra.
Sufficiency of pleadings setting up title see supra § 182 b (3).

78. Ga.—English v. Little, 139 S.E. 678, 164 Ga. 805.
32 C.J. p 341 note 10.

79. U.S.—Atwill v. Ferrett, C.C.N.Y., 2 F.Cas.No.640, 2 Blatchf. 39.
32 C.J. p 342 note 11.

80. Ga.—Duggar v. Quarterman, 12 S.E.2d 302, 191 Ga. 314.
Tex.—Bell v. Smith, Civ.App., 6 S.W. 2d 778, error refused.

81. Ga.—English v. Little, 139 S.E. 678, 164 Ga. 805.

82. R.I.—Drew v. Socony-Vacuum Oil Co., 18 A.2d 340, 66 R.I. 170.

83. Ky.—Board of Education of Cumberland County v. Jones, 240 S.W. 65, 194 Ky. 603.

84. Mo.—Missouri Power & Light Co. v. Lewis County Rural Electric Co-op. Ass'n, 149 S.W.2d 881, 235 Mo.App. 1056.

85. Ind.—Hilton v. Mason, 92 Ind. 157.
32 C.J. p 342 note 12.

86. Ill.—Kenderdine v. Rouland, 260 Ill.App. 194.

87. Ala.—State ex rel. Embry v. Bynum, 9 So.2d 134, 243 Ala. 188—Poyner v. Whiddon, 174 So. 507, 234 Ala. 168—Bankers' Fire & Marine Ins. Co. v. Sloss, 155 So. 371, 229 Ala. 26.
Ark.—City of Morrilton v. Malco Theatres, 149 S.W.2d 55, 202 Ark. 100.
Colo.—Electrical Products Consol. v. Howell, 117 P.2d 1010, 108 Colo. 370.
Ill.—Audia v. City of Chicago, 236 Ill.App. 613.
Mich.—Wiley v. Murray, 196 N.W. 446, 225 Mich. 170.
Mo.—Missouri Power & Light Co. v. Lewis County Rural Electric Co-op. Ass'n, 149 S.W.2d 881, 235 Mo. App. 1056.
Tex.—Svrcek v. Hahn, Civ.App., 103 S.W.2d 840, error dismissed.
32 C.J. p 342 note 14.

Against exception of no cause of action, allegations of application for preliminary injunction must be taken as true.—Tennent v. Caffery, 113 So. 167, 163 La. 976.

88. La.—State ex rel. Hourguettes v. City of Gretna, 193 So. 706, 194 La. 460.
32 C.J. p 342 note 15.

89. La.—State ex rel. Hourguettes v. City of Gretna, 193 So. 706, 194 La. 460.
Mass.—Walter v. McCarvel, 34 N.E. 2d 677, 309 Mass. 260.
Mo.—Hughes v. State Board of Health, 137 S.W.2d 523, 345 Mo. 995.
Wash.—Roberts v. Millikin, 93 P.2d 393, 200 Wash. 60.
32 C.J. p 342 note 16.

Allegations of irreparable injury, constituting the mere conclusion of the pleader, are not admitted by demurrer.—Gibson v. Gibson, 1 N.W. 154, 46 Wis. 462—32 C.J. p 342 note 17.

90. Mont.—Boley v. Griswold, 2 Mont. 447.

the matters or facts disclosed by the bill present a case for relief and it cannot consider matters outside the bill. A demurrer is properly decided before a hearing on the merits, but the time for the decision has been held to rest within the discretion of the court.

In determining the sufficiency of a bill or complaint as against a demurrer, the court is limited to an inquiry as to whether the matters or facts disclosed by the bill present a case for relief,[91] and it cannot consider matters outside the bill,[92] such as the answer,[93] oral testimony,[94] or affidavits presented on a hearing for a preliminary injunction;[95] nor can it determine questions of relative convenience and injury.[96] The general rule that as against a general demurrer every reasonable intendment is indulged favorably to the petition is inapplicable to injunction applications.[97] The sustaining of a demurrer without a submission on the demurrer and without complainant's consent has been held to be error.[98]

Time for hearing. A demurrer to a bill is properly decided before a motion for an injunction is heard,[99] but whether or not a demurrer will be decided before a hearing on the merits has been held to rest within the discretion of the court.[1] When a demurrer to a bill for an injunction and a motion to dissolve a temporary injunction issued thereon are both pending, it is within the discretion of the trial court to determine which shall be heard first.[2] When authorized by statute the court may rule on a demurrer to a petition for an injunction at an interlocutory hearing,[3] but the mere statutory authorization does not require the court to do so;[4] the court may refuse to pass on a demurrer at an interlocutory hearing after the appearance term and it may consider the demurrer along with the pleadings and evidence.[5]

Under a constitutional provision permitting a judge at any time, in vacation, or at chambers, to hear and determine by interlocutory or final judgment any matter or issue where a jury verdict is not required, the judge, in vacation, may vacate prior orders overruling a demurrer.[6]

Rulings on demurrer. The sustaining of a demurrer to a complaint, is in effect a final decision that, as far as that pleading is concerned, plaintiff was not entitled to an injunction,[7] and, if no exception thereto is taken, the ruling becomes the law of the case,[8] but an order sustaining a general demurrer does not dispose of the rights of the petitioner on an amended petition.[9] Where a demurrer to a petition is sustained, the answer of defendant falls with the petition.[10] A demurrer to an amended bill may be sustained, although defendant had filed an answer to the original bill.[11] Where an amended bill is served after sustaining a demurrer to the original, the original being completely

91. Ala.—Alabama Great Southern R. Co. v. Denton, 195 So. 218, 239 Ala. 301.
Colo.—Electrical Products Consol. v. Howell, 117 P.2d 1010, 108 Colo. 370.
Md.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.
32 C.J. p 342 note 22.

92. Ala.—Alabama Great Southern R. Co. v. Denton, 195 So. 218, 239 Ala. 301.
Exception of no cause of action
A ground alleged, as an exception of no cause of action, why an injunction should not issue, which is triable on the face of the papers, does not call for introduction of evidence.—Derbes v. Rogers, 110 So. 84, 162 La. 49.

93. Ga.—Butler v. City of Dublin, 13 S.E.2d 362, 191 Ga. 551—Walters v. Walters, 137 S.E. 386, 163 Ga. 884.

94. Tex.—Sartin v. Hudson, Civ. App., 143 S.W.2d 817.

95. Cal.—Platt v. San Francisco, 110 P. 304, 158 Cal. 74.

96. Colo.—Electrical Products Consol. v. Howell, 117 P.2d 1010, 108 Colo. 370.
Del.—Haitsch v. Duffy, 93 A. 249, 10 Del.Ch. 280.

97. Tex.—Magnolia Petroleum Co. v. de Garcia, Civ.App., 126 S.W.2d 1006—Railroad Commission of Texas v. Inter-City Forwarding Co., Civ.App., 57 S.W.2d 290, followed in Railroad Commission of Texas v. Bradberry, 57 S.W.2d 294—Johnson v. Ferguson, Civ.App., 55 S.W.2d 153, error dismissed.

98. Ala.—Hughes v. Stephens, 121 So. 397, 219 Ala. 134.

99. U.S.—Ketchum v. Driggs, C.C. Mich., 13 F.Cas.No.7,735, 6 McLean 13.
32 C.J. p 342 note 20.

1. Mass.—Beauregard v. Dailey, 1 N.E.2d 481, 294 Mass. 315.
Postponement until disposition of action at law
Puerto Rico.—Esteves v. Sucrerie Central Coloso, 2 Puerto Rico Fed. 442.

2. Ind.—Clark v. Shaw, 101 Ind. 563.

3. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E. 2d 753, 192 Ga. 817—Americus Finance Co. v. Wilson, 7 S.E.2d 259, 189 Ga. 635—Justice v. Warner, 173 S.E. 703, 178 Ga. 579—Byrd v. Piha, 141 S.E. 48, 165 Ga. 397.
Under a former Georgia statute the court was without authority on interlocutory hearing before appearance term to pass judgment on demurrer to petition for injunction, and order formally sustaining or overruling it at such time would be erroneous.—Baldwin v. Hicks, 88 S.E. 923, 145 Ga. 199—Solomon v. Peters, 37 Ga. 251, 92 Am.D. 69—32 C.J. p 342 notes 20 [a], 23–25.

4. Ga.—Americus Finance Co. v. Wilson, 7 S.E.2d 259, 189 Ga. 635—Vance v. Vogel, 167 S.E. 112, 176 Ga. 132—Byrd v. Piha, 141 S.E. 48, 165 Ga. 397.

5. Ga.—South Georgia Funeral Homes v. Harrison, 184 S.E. 875, 182 Ga. 60.

6. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.

7. N.Y.—Williams v. Montgomery, 43 N.E. 57, 148 N.Y. 519—Blakeslee v. International Motor Co., 147 N.Y.S. 49, 161 App.Div. 624.

8. Ga.—McGinty v. Chambers, 185 S.E. 513, 182 Ga. 341.

9. Tex.—Johnson v. Sunset Stores, Civ.App., 27 S.W.2d 644.

10. Ga.—Walters v. Walters, 137 S.E. 386, 163 Ga. 884.

11. Ill.—Gage v. Village of Wilmette, 233 Ill.App. 123, affirmed 146 N.E. 325, 315 Ill. 328.

superseded, an injunction pendente lite cannot be granted on a motion made on the original bill.[12] In a proper case a demurrer to a complaint for a permanent injunction may be sustained without prejudice to the preliminary restraining order or temporary injunction already granted.[13] Unless the case has been submitted for final decree, the court in its order overruling the demurrer cannot grant a permanent injunction without giving defendant an opportunity to answer.[14] A ruling that the petition is not demurrable on any ground stated is not a ruling that plaintiff is entitled to the injunction.[15] Where the temporary restraining order has by its terms expired at the time of the hearing, an order in the ruling on the demurrer cannot have the effect of dissolving the restraining order.[16]

§ 186. —— Amended and Supplemental Pleadings

a. In general
b. Leave of court
c. Time to amend
d. Procedure
e. Operation and effect
f. Supplemental pleadings

a. In General

Unless otherwise provided by statute or rule of court, the pleadings in a suit for an injunction may be amended under the rules pertaining to the amendments of pleadings generally.

In the absence of a statute or rule of court to the contrary, the pleadings in a suit for an injunction may be amended under the rules pertaining to the amendments of pleadings generally.[17] The pleadings may be amended to correct a formal defect or mistake,[18] or to add necessary allegations,[19] or, as stated supra § 177, to cure a defect of parties. It is permissible to amend a bill or complaint defective by reason of stating conclusions of law,[20] or for a failure sufficiently to describe the locus in quo,[21] or for want of an averment of the amount in controversy if it does not affirmatively appear that the court is without jurisdiction,[22] or for want of an averment of insolvency;[23] and it may also be amended to change the statement of the capacity in which plaintiff brings the suit,[24] or to correct the statement of damages.[25] Acts done pendente lite,[26] or information received since the start of the suit,[27] may be brought into the suit by amendment. Where the bill is defective for want of a prayer for injunction,[28] or for defects in the prayer,[29] an amendment to cure the defect may be allowed, and an amendment asking additional relief which is germane to the cause of action may also be allowed.[30] The court may grant relief warranted by the state of facts existing at the time of the entry of the decree, including facts which did not exist at the time the bill was filed, without requiring an amendment if the prayers of the bill

12. N.Y.—Blakeslee v. International Motor Co., 147 N.Y.S. 49, 161 App. Div. 624.

13. Cal.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.

14. Md.—Wolf v. Oldenburg, 140 A. 494, 154 Md. 353.

15. Ga.—English v. Little, 139 S.E. 678, 164 Ga. 805.

16. Tex.—Johnson v. Sunset Stores, Civ.App., 27 S.W.2d 644.

17. Tex.—Cozart v. Crenshaw, Civ. App., 299 S.W. 499.

18. N.J.—Bristol-Myers Co. v. L. Bamberger & Co., 4 A.2d 685, 125 N.J.Eq. 306.
32 C.J. p 342 note 29.

19. U.S.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.
Cal.—Lloyd v. City of Redondo Beach, 12 P.2d 1087, 124 Cal.App. 541.
Tex.—Johnson v. Sunset Stores, Civ. App., 27 S.W.2d 644—Cozart v. Crenshaw, Civ.App., 299 S.W. 499.
32 C.J. p 342 notes 30, 31.

20. Cal.—Lloyd v. City of Redondo Beach, 12 P.2d 1087, 124 Cal.App. 541.
32 C.J. p 343 note 32.

21. Ga.—Faucett v. Rogers, 82 S.E. 563, 142 Ga. 145.

22. U.S.—Home Ins. Co. v. Nobles, C.C.Pa., 63 F. 641.

23. Wash.—State v. Smith, 208 P. 1, 120 Wash. 540.

24. Tex.—Cozart v. Crenshaw, Civ. App., 299 S.W. 499.

25. Tex.—Cozart v. Crenshaw, supra.

26. Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.
Tex.—Cozart v. Crenshaw, Civ.App., 299 S.W. 499.

Change in circumstances since application for injunction
Application for injunction against encroachment over boundary by construction of adjoining owner's improvements was held abandoned by amendment alleging that improvements were completed, thereby leaving action at law for value of land. —Grobli v. Foreman, 156 S.E. 622, 171 Ga. 712, transferred, see 161 S.E. 658, 44 Ga.App. 427.

27. U.S.—Tower Mfg. Co. v. Monsanto Chemical Works, D.C.N.Y., 20 F.2d 386.

Claims discovered since filing bill
Del.—Ætna Casualty & Surety Co. v. Mayor and Council of Wilmington, 160 A. 747, 17 Del.Ch. 280.

28. Me.—Hinckley v. Haines, 69 Me. 76.
32 C.J. p 343 note 36.

29. Mich.—Heliker v. Heliker, 151 N.W. 757, 184 Mich. 657.
32 C.J. p 343 note 37.

30. Ga.—Sanders v. Jones, 142 S.E. 680, 166 Ga. 186.

Adjudication of title in trespass suit
An amendment to a petition to restrain trespass has been held to be properly allowed to show an abstract of title and to ask adjudication of defendant's claim of prescriptive title.—Sapp v. Odom, 141 S.E. 201, 165 Ga. 437.

Amendment to prayer for general relief
An amendment to petition to enjoin trespass, seeking recovery of land included within boundary fence, was held not to add new cause of action where the original prayer asked for general relief.—Sanders v. Jones, 142 S.E. 680, 166 Ga. 186.

are broad enough to cover such relief.[31] An amendment to the answer may be allowed to conform to the proofs.[32]

No amendment should be allowed unless the interests of justice manifestly require it.[33] When permitted by statute the court may, before trial, allow an amendment which states a new cause of action if it is germane to the controversy before the court;[34] but, in the absence of statute, the court will not permit an amendment which changes the essential nature of the action,[35] although plaintiff has discovered from the evidence for the defense that such a new cause of action exists;[36] and, where there is no cause of action for injunctive relief at the commencement of the suit, an amendment to include a cause of action subsequently accruing is properly denied.[37] An amendment which is insufficient to cure defects or to warrant relief,[38] which merely amplifies the cause of action set out in the original petition without alleging any additional facts in addition to those already contained in the petition,[39] which is sought for the manifest purpose of delay,[40] which concerns a person not a party to the suit,[41] or which shows on its face that it was filed before the happening of the event therein alleged as a fact,[42] should be refused. Likewise, it is proper for the court to refuse to allow an amendment which contradicts facts which plaintiff has sworn to in the original bill to be positively true, unless he can clearly show that the statements in the original bill were made by mistake,[43] or an amendment, the effect of which will be to relieve plaintiff from the rules and practice of a court of equity, and to deprive defendants of the advantages of their proper position as respondents to a bill in equity before a decree.[44]

In the case of verified bills the right of amendment is granted with greater caution than in case of unverified bills.[45] A verified bill for an injunction cannot be amended by striking out any of its allegations.[46] It may, however, be corrected by the addition of explanatory or supplemental statements.[47]

Reamendment of bill. The court, on an application to allow a reamendment of a bill, will act with great circumspection.[48] It has been held that, where a second amendment is desired, plaintiff must accompany his application with an affidavit that he "had not a knowledge of the facts, so as to enable him to bring . . . [his] case upon the record sooner."[49]

Amendments of demurrers may be permitted in the discretion of the court.[50]

Additional answer by defendant. Where the bill is materially amended after defendant has put in his answer, he is entitled to put in a further answer.[51]

31. R.I.—Renzi v. Spirito, 147 A. 666, 50 R.I. 332.

32. Cal.—Farley v. Stirling, 233 P. 810, 70 Cal.App. 526.

33. Ind.—Watson v. Adams, 69 N. E. 696, 32 Ind.App. 281.
32 C.J. p 343 note 33.

34. Or.—Nelson v. Smith, 69 P.2d 1072, 157 Or. 292.

35. U.S.—America Land Co. v. City of Keene, C.C.A.N.H., 41 F.2d 484.
Ga.—Melnick v. City of Atlanta, 94 S.E. 1015, 147 Ga. 525.
Ill.—Hoerrmann v. Wabash Ry. Co., 141 N.E. 289, 309 Ill. 524.
Mo.—State ex rel. and to Use of Bader v. Flynn, 159 S.W.2d 379, 236 Mo.App. 577.
32 C.J. p 343 note 39.

Amendment held not to set forth new cause of action
U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519.
Fla.—Atlantic Coast Line R. Co. v. Feagin, 113 So. 89, 93 Fla. 1015.
Tex.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Civ.App., 263 S. W. 1103.

36. N.W.Terr.—Moran v. Graham, 2 Terr.L. 204.

37. Ga.—Cooley v. Enzor, 9 S.E.2d 277, 190 Ga. 290.

Subsequent efforts to settle labor dispute
Pa.—Bulkin v. Sacks, 31 Pa.Dist. & Co. 501.

38. Ga.—Darien Bank v. Varner, 165 S.E. 82, 175 Ga. 193.
Ill.—Village of Averyville v. City of Peoria, 166 N.E. 488, 335 Ill. 106.
32 C.J. p 343 note 44.

Petition and amendment held to show cause of action
Ga.—Sapp v. Odom, 141 S.E. 201, 165 Ga. 437.

39. Ky.—Horning v. Caldwell County Fiscal Ct., 218 S.W. 989, 187 Ky. 87.

40. La.—Calderwood v. Trent, 9 Rob. 227.

41. Ga.—Warren County Fertilizer Co. v. Reese, 120 S.E. 534, 156 Ga. 824.

42. Ill.—Winnebago County v. Cannell, 33 N.E.2d 478, 376 Ill. 277.

43. Ill.—Winnebago County v. Cannell, supra—Marble v. Bonhotel, 35 Ill. 240.

44. Pa.—Appeal of Forward School Dist., 56 Pa. 318.

45. N.Y.—Verplanck v. Mercantile Ins. Co., 1 Edw. 46.
32 C.J. p 343 note 46.

46. Ga.—Carey v. Smith, 11 Ga. 539.
N.Y.—Renwick v. Wilson, 6 Johns. Ch. 81.

47. Ga.—Carey v. Smith, 11 Ga. 539.

48. N.Y.—Renwick v. Wilson, 50 Johns.Ch. 81.

Reamendment held properly refused
U.S.—Hinman v. Pacific Air Transport, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 865—Hinman v. United Air Lines Transport Corporation, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865.

49. N.J.—Buckley v. Corse, 1 N.J. Eq. 504.

50. N.J.—Metler v. Metler, 18 N.J. Eq. 270.

51. Md.—Iglehart v. Lee, 4 Md.Ch. 514.
32 C.J. p 345 note 51.

Reply. Plaintiff may be permitted to amend his reply.[52]

b. Leave of Court

As a general rule leave of court is necessary for an amendment and the matter is within the discretion of the court.

As a general rule after the bill has been filed, it cannot be amended without leave of court,[53] and a motion for an injunction based on an amendment made without leave will ordinarily be dismissed,[54] although it has been held that, where an amended bill is filed without leave, the chancellor's refusal to strike it out is equivalent to leave to file it and cures the irregularity of filing it without leave.[55] The allowance or refusal of permission to amend is within the discretion of the court.[56]

c. Time to Amend

As a general rule an amendment may be made at any time within the discretion of the court subject to the limitation that the rights of the opposite party must not be prejudiced thereby.

An amendment may be made, in the absence of a rule of court to the contrary, at any time within the discretion of the court,[57] subject to the limitation that the rights of the opposite party must not be prejudiced thereby.[58] Amendments are usually allowed before an answer is filed;[59] but they may be allowed after the answer is filed and before the hearing,[60] after a temporary injunction has been granted and before the final trial or hearing,[61] or after the dissolution of a temporary injunction and before the final hearing,[62] at the close of the evidence,[63] or even after the final hearing and before the final decree.[64] The court, in its discretion, may refuse to allow an amendment at the time requested.[65] After the cause is at issue,[66] or after the injunction has been refused,[67] leave to file an amendment pertaining to matters known by applicant at an earlier stage of the proceedings is properly refused.

After death of plaintiff and revival. Even after the death of plaintiff and the revival of the suit in the names of his personal representatives, it is permissible to amend the bill by setting up matters which are not inconsistent with, but are merely an addition to, what is already set out in the bill.[68]

d. Procedure

To authorize the allowance of an amendment the causes necessitating the amendment should be stated and sworn to and at least the substance of the amendment should be set forth.

To authorize the allowance of an amendment, the causes necessitating the amendment should be stated and sworn to,[69] and at least the substance of the amendment should be set forth.[70] Where the evidence before the court is sufficient to support the amendment and no further relief is asked, it has been held to be unnecessary that the proposed amendment be first submitted to the court in writing verified by affidavit showing why it had not been filed sooner.[71] The amendment, when short,

52. Pa.—Steinhauer v. School Dist. of Borough of Luzerne, Com.Pl., 35 Luz.Leg.Reg. 145.

53. Miss.—Ward v. Whitfield, 2 So. 493, 64 Miss. 754.
32 C.J. p 343 note 53.

54. R.I.—Baker v. Baldwin, 1 R.I. 489.

55. Miss.—Ward v. Whitfield, 2 So. 493, 64 Miss. 754.

56. U.S.—Hinman v. Pacific Air Transport, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 865—Hinman v. United Air Lines Transport Corporation, C.C.A.Cal., 84 F.2d 755, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865.
Fla.—Atlantic Coast Line R. Co. v. Feagin, 113 So. 89, 93 Fla. 1015.
Md.—Richfield Oil Corporation of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 560.
N.J.—Bristol-Myers Co. v. L. Bamberger & Co., 4 A.2d 685, 125 N.J. Eq. 306.

57. Ala.—Fullington v. Kyle Lumber Co., 35 So. 852, 139 Ala. 242.
32 C.J. p 343 note 57.

58. Colo.—Axelson v. Columbine Co., 254 P. 990, 81 Colo. 254.
32 C.J. p 343 note 58.

59. U.S.—Insurance Co. of North America v. Svendsen, C.C.S.C., 74 F. 346.
32 C.J. p 343 note 59.

60. Ill.—Marble v. Bonhotel, 35 Ill. 240.
32 C.J. p 343 note 60.

61. Pa.—Haytock v. Nickel, 19 Pa. Dist. & Co. 671, 24 North. Co. 96.
Tex.—Clifton Mfg. Co. v. Crawford-Austin Mfg. Co., Civ.App., 12 S.W. 2d 1098.

62. Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.
32 C.J. p 344 note 61.

63. Colo.—Axelson v. Columbine Laundry Co., 254 P. 990, 81 Colo. 254.
Ill.—Law v. Neola Elevator Co., 117 N.E. 435, 281 Ill. 143.

64. R.I.—Renzi v. Spirito, 147 A. 666, 50 R.I. 332.
32 C.J. p 344 note 62.

65. Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.

Amendment after announcement of court's decision
The chancellor's refusal to allow amendment of bill for injunction on petition filed after he verbally announced his decision to dismiss bill, although before filing of written opinion and order, was not abuse of discretion.—Richfield Oil Corporation of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 560.

66. N.J.—Bristol-Myers Co. v. L. Bamberger & Co., 4 A.2d 685, 125 N.J.Eq. 306.

Amendment held not to include matters previously known
Ga.—Atlanta Steel Co. v. Mynahan, 75 S.E. 980, 138 Ga. 668.

67. Ga.—Price v. Brownlee, 88 S.E. 965, 145 Ga. 291.

68. N.Y.—Coster v. Griswold, 4 Edw. 364.

69. La.—Netherlin v. Big Pine Lumber Co., 60 So. 637, 131 La. 981.
32 C.J. p 344 note 64.

70. N.J.—Hornor v. Leeds, 10 N.J. Eq. 86.
32 C.J. p 344 note 66.

71. Ill.—Law v. Neola Elevator Co., 117 N.E. 435, 281 Ill. 143.

may be interlined; but if it is of considerable length, it should be on a separate sheet of paper and annexed to the bill.[72]

A stipulation of the parties and an order to amend the pleadings may be treated as an amendment to the pleadings as respects the court's jurisdiction.[73]

Notice to adversary. Notice to the opposite party has been held to be necessary.[74]

Opposing affidavit by defendant. An affidavit by defendant denying the truth of the matters contained in the proposed amendment will not avail him, and the amendment will be allowed notwithstanding such affidavit.[75]

e. Operation and Effect

As a general rule an amendment of a bill relates back to the time at which the bill was filed. Generally an amendment of a bill after a temporary injunction has been granted does not operate to dissolve or vacate the injunction as of course, but there is some authority that it does so unless the injunction is expressly saved in the order for amendment.

As a general rule, an amendment of a bill relates back to the time at which the bill was filed.[76] If the amendments do not change the aspect of the bill, a new motion for injunction will be denied.[77] If the court had no jurisdiction of the bill as filed, any amendment is a nullity.[78]

On injunction previously granted. Generally, the amendment of a bill after a temporary injunction has been granted does not operate to dissolve or vacate the injunction as of course,[79] although the order granting leave to amend is silent on the subject,[80] but there is some authority that the injunction is thereby dissolved unless an order is obtained that the amendment shall be without prejudice to the injunction.[81] An amendment which merely enlarges and strengthens the allegations of the bill without changing the character of the case does not affect the force of the injunction.[82]

It has been held that a preliminary injunction which is a nullity for having been issued under a petition so defective as not to state a cause of action cannot be made valid by the subsequent filing of an amendment,[83] but other decisions hold that the amended bill may be looked to, to support a preliminary injunction already issued, where the end sought to be attained by both bills is practically the same,[84] and, if the amended bill shows good ground for the injunction, it will not be dissolved on the sole ground that the original bill may have been defective.[85]

Amendment as furnishing grounds for dissolution is considered infra § 243.

f. Supplemental Pleadings

As a general rule a supplemental bill or a supplemental answer pertaining to matters germane to the original pleadings may be filed on leave of court.

As a general rule plaintiff may, on leave of court, file a supplemental bill, adding new charges based on facts which have occurred since the original bill was filed and on facts existing at that time which were then not known to him,[86] but in some jurisdictions a supplemental bill is not held to be necessary and an amendment may accomplish the object.[87] A supplemental bill should contain no matters which are not germane to the case made by the original bill,[88] and the new matter introduced thereby must not be such as to change the rights and interests of the parties before the court.[89] The court will not permit a supplemental bill to be filed when the bill shows that the act which the original bill

72. N.J.—Layton v. Ivans, 2 N.J.Eq. 387.

73. U.S.—Trickett v. Kaw Valley Drainage Dist. of Wyandotte County, C.C.A.Kan., 25 F.2d 851, certiorari denied Trickett v. Kaw Valley Drainage Dist., 49 S.Ct. 26, 278 U.S. 624, 73 L.Ed. 544.

74. N.Y.—Clark v. Judson, 2 Barb. 90.

75. N.Y.—Coster v. Griswold, 4 Edw. 364.

76. Cal.—Barber v. Reynolds, 33 Cal. 497.
Ill.—Miller v. Cook, 25 N.E. 756, 135 Ill. 190, 10 L.R.A. 292.

77. N.J.—Matthiessen & Wiechers' Sugar Refining Co. v. Jersey City, 26 N.J.Eq. 275.

78. Ill.—Kerfoot v. People, 51 Ill. App. 409.

79. Fla.—Pedrick v. Vidal, 116 So. 857, 858, 95 Fla. 952, citing **Corpus Juris.**
Ill.—Leonard v. Pearce, 271 Ill.App. 428, 440, citing **Corpus Juris.**
32 C.J. p 344 note 75, p 407 note 86.
Amendment as to parties
An amendment to the bill bringing in other parties will not operate as a dissolution of the injunction.—Covington County Bd. of Revenue v. Merrill, 68 So. 971, 193 Ala. 521—32 C.J. p 407 note 91.

80. Ill.—Leonard v. Pearce, 271 Ill. App. 428.
32 C.J. p 344 note 76; p 407 note 94.

81. Ga.—Semmes v. Columbus, 19 Ga. 471.
Md.—Binney's Case, 2 Bland 99.

82. Ill.—Court Rose No. 12 F. A. v. Corna, 117 N.E. 144, 279 Ill. 605.
32 C.J. p 407 note 90.

83. La.—Salter v. Walsworth, App., 167 So. 494.
32 C.J. p 344 note 78.

84. Miss.—Belzoni Oil Co. v. Yazoo & M. V. R. Co., 47 So. 468, 94 Miss. 58.
32 C.J. p 344 note 79.

85. Cal.—Tehama County v. Sisson, 92 P. 64, 152 Cal. 167.

86. Cal.—Union Oil Co. of California v. Reconstruction Oil Co., 66 P. 2d 1215, 20 Cal.App.2d 170.
32 C.J. p 345 note 83.

87. R.I.—Renzi v. Spirito, 147 A. 666, 50 R.I. 332.

88. U.S.—Selden Co. v. General Chemical Co., C.C.A.Pa., 73 F.2d 195.
Ill.—Fahs v. Roberts, 54 Ill. 192.

89. Fla.—Ledwith v. Jacksonville, 13 So. 454, 32 Fla. 1.

sought to prevent had been done.[90] Permission to file a supplemental bill will be refused where the original or amended bill is wholly without equity,[91] or is wholly defective,[92] although, if the original bill is sufficient for one kind of relief, and facts afterward occur which entitle complainant to other and more extensive relief, he may have such relief by setting out the new matter in a supplemental bill.[93] Matters previously within plaintiff's knowledge will not be allowed to be incorporated in a supplemental bill where there is no sufficient excuse given by plaintiff for his failure to bring forward such matters in his original bill.[94]

A new injunction may be awarded on new facts incorporated in a supplemental bill, even though an injunction previously issued has been dissolved.[95]

Where subsequent events affect the right of plaintiff to equitable relief, a supplemental answer should be allowed.[96] The court in its discretion may properly refuse to permit defendant to add a counterclaim to his answer after the filing by the court of its findings and rulings.[97]

Leave of court. When plaintiff desires to file a supplemental bill he must obtain leave of court,[98] and the application should advise the court of the ground on which the relief sought by the supplemental bill is applied for.[99]

Effect on injunction already granted. The filing of a supplemental bill does not put an end to an injunction which has been previously issued on the original bill.[1]

§ 187. —— Verification

a. In general
b. Who may verify
c. Requisites and sufficiency
d. Amendment and waiver of defects

a. In General

A verified bill is, as a rule, essential to the granting of a preliminary injunction or restraining order. An answer seeking to dissolve an injunction before final hearing ordinarily must be verified.

As a general rule, where a preliminary injunction or a restraining order is asked, the bill or complaint must be verified,[2] but, in the absence of a strict mandatory requirement by statute or rule of court, it has been held that failure to verify does not as a matter of law require dismissal of the bill if affidavits or other satisfactory proof showing the necessity for the injunction is submitted or produced.[3] A statutory requirement that an application for injunction shall be verified is not dispensed with by another statutory provision which authorizes such temporary orders in divorce proceedings as are deemed necessary and equitable.[4] No verification is necessary in suits instituted by public officials to abate a nuisance or to restrain a violation of law where the statute permits the suit to be instituted on information only,[5] or where the statute expressly dispenses with the necessity for verification.[6] A motion for a preliminary injunction, if separate from the bill or complaint, need not be verified.[7] The fact that the bill or complaint waives answer under oath does not deprive defendant of the right to answer under oath.[8]

A material amendment to the bill[9] or a reply al-

90. Fla.—Smith v. Scott, 22 Fla. 405.
91. Ala.—Tallassee Mfg. Co. v. Spigener, 49 Ala. 262.
32 C.J. p 345 note 87.
92. Ill.—Miller v. Cook, 25 N.E. 756, 135 Ill. 190, 10 L.R.A. 292.
93. Ill.—Miller v. Cook, supra.
94. Miss.—Walker v. Gilbert, 15 Miss. 456.
95. N.Y.—Fanning v. Dunham, 4 Johns.Ch. 35.
96. N.J.—General Leather Products Co. v. Luggage & Trunk Makers Union, Local No. 49, 183 A. 165, 119 N.J.Eq. 432, appeal dismissed 187 A. 582, 121 N.J.Eq. 101.
N.Y.—Runcie v. Bankers Trust Co., 17 N.Y.S.2d 197, granting application for leave to reopen 11 N.Y.S.2d 924.
97. Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.
98. N.Y.—Eager v. Price, 2 Paige 333.
32 C.J. p 345 note 92.
99. U.S.—Parkhurst v. Kinsman, C.C.N.Y., 18 F.Cas.No.10,758, 2 Blatchf. 72.
1. N.J.—Conover v. Ruckman, 34 N.J.Eq. 293.
2. Ill.—City of Springfield v. North Fork Outlet Drainage Dist., 249 Ill.App. 133.
N.J.—Giordano v. Asbury Park & Ocean Grove Bank, 139 A. 881, 102 N.J.Eq. 64.
S.C.—Pickman v. Georgetown County, 125 S.E. 191, 130 S.C. 18.
Tex.—Cole v. Varner, Civ.App., 246 S.W. 410.
32 C.J. p 336 note 4.
Waiver of discovery
The text rule is especially true when discovery is waived.—Mathews v. Cody, 60 Ga. 355.
3. Ga.—Bracewell v. Cook, 16 S.E.2d 432, 192 Ga. 678.
32 C.J. p 335 note 1 [a]-[c].
4. Tex.—Lingwiler v. Lingwiler, Civ.App., 204 S.W. 785.
5. Tex.—Thurman v. State, Civ.App., 67 S.W.2d 382.
6. Tex.—Alamo Club v. State, Civ.App., 147 S.W. 639.
7. U.S.—New York, N. H. & H. R. Co. v. Railway Employees' Department, American Federation of Labor, Federated Shop Crafts, System Federation No. 17, D.C.Conn., 288 F. 588.
8. Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 107 Fla. 304.
9. Ill.—Winnebago County v. Cannell, 33 N.E.2d 478, 376 Ill. 277—City of Springfield v. North Fork Outlet Drainage Dist., 249 Ill.App. 133.
Tex.—Wilmut v. Franklin, Civ.App., 268 S.W. 971, 972, citing **Corpus Juris.**
32 C.J. p 336 note 7.
A supplemental bill must be verified
La.—Maillot v. Martin, 15 La.Ann. 40.
Tex.—Ross v. Veltmann, Civ.App., 161 S.W. 1073.

leging new facts[10] should be verified in the same manner and to the same extent as the bill itself, although an amendment need not be sworn to where no relief by way of injunction is prayed in the amendment and the injunction does not require for its support the additional matter brought out by the amendment.[11]

Where only perpetual injunction asked. Verification is not necessary where only a perpetual injunction is demanded.[12]

Answer. Under statutes in some jurisdictions, an answer containing a general denial puts plaintiff on proof of his case in order to procure a perpetual injunction, although the answer is not verified,[13] but verification of the answer is necessary on motion to dissolve the injunction before final hearing if the petition is sufficient to state a cause for injunctive relief.[14] Where an unverified answer and motion to dissolve are combined in one proceeding, the pleading may be treated as a demurrer.[15] The answer of a corporation under its seal must be accompanied by affidavits.[16]

b. Who May Verify

As a general rule the affidavit verifying the complaint should be made by plaintiff, but it may be made by plaintiff's attorney or agent, or by any person having personal knowledge of the facts contained in the complaint.

As a general rule the affidavit verifying the complaint should be made by plaintiff,[17] but it may also be made by any person having personal knowledge of the facts contained in the complaint,[18] although it has been held that an affidavit made by a person not apparently connected with the suit is practically no affidavit.[19] It must appear from the verification that the person verifying the bill knows the contents thereof; otherwise the verification is fatally defective.[20] The affidavit may be made by plaintiff's attorney or agent,[21] but, if it is so made, the attorney or agent must be described as such therein, or the affidavit will be fatally defective.[22] An affidavit by an agent must give reasons why it was not made by plaintiff.[23] If there are several plaintiffs the affidavit may be made by any one of them who is cognizant of the facts,[24] particularly under statutes which expressly so provide,[25] but an affidavit by one has been held to be insufficient if each of the plaintiffs represents separate and distinct interests and there is no showing in the petition or affidavit that affiant is acting as the agent for the others.[26]

c. Requisites and Sufficiency

No particular form of verification is required unless so prescribed by statute, but the verification must be definite, direct, and positive and it must extend to all the material facts on which the right to an injunction rests.

No particular form of verification is required unless so prescribed by statute,[27] but the verification must extend to all the material facts on which the right to an injunction rests,[28] and should not leave

10. Tex.—Wilmut v. Franklin, Civ. App., 268 S.W. 971.

11. Ill.—Bauer Grocer Co. v. Zelle, 50 N.E. 238, 172 Ill. 407—Rickerman v. German Mut. Life Ins. Co., 172 Ill.App. 189.

12. N.J.—Metropolitan Lumber Co. v. Fordham Nat. Bank, 144 A. 879, 104 N.J.Eq. 248, affirming Metropolitan Lumber Co. v. Fordham Nat. Bank in New York, 141 A. 742, 102 N.J.Eq. 514.
Tex.—Brown v. Munger Farm Co., Civ.App., 87 S.W.2d 527.
32 C.J. p 336 note 9.

13. Tex.—Leach v. Thompson, Civ. App., 192 S.W. 602.
32 C.J. p 340 note 82 [a].

14. Tex.—Arcola Sugar Mills Co. v. Rodriquez, Civ.App., 18 S.W.2d 844.
32 C.J. p 340 note 82 [a].
Consideration of unverified answer
In suit for injunction, where answer and certain pleas in intervention contained general demurrer and special exceptions to sufficiency of petition, facts alleged in such pleadings could not be looked to in aid of general demurrer or in support of court's denial of relief, where such pleadings were not verified, while petition was duly verified.—Cannon v. McComb, Tex.Civ.App., 268 S.W. 999.

15. Tex.—Wood v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 86 S.W.2d 871.

16. N.J.—New Jersey Zinc Co. v. Franklin Iron Co., 29 N.J.Eq. 422—Citizens' Coach Co. v. Camden Horse R. Co., 29 N.J.Eq. 299.

17. S.C.—Pickman v. Georgetown County, 125 S.E. 191, 130 S.C. 18.
32 C.J. p 336 note 11.

18. Tex.—Hood v. State, Civ.App., 90 S.W.2d 1101, 1102, error dismissed, citing **Corpus Juris.**
32 C.J. p 336 notes 14, 16.
Necessity for knowledge of facts
Person verifying must be acquainted with the facts.—Fowble v. Kemp, 48 A. 379, 92 Md. 630—32 C.J. p 337 note 17.
Petition by public official
A petition in a suit instituted by a county attorney under a statute providing for injunctions to restrain maintenance of pool halls may be verified by a citizen with knowledge of facts and it is not required to be verified by county attorney.—Hood v. State, Tex.Civ.App., 90 S.W. 2d 1101, error dismissed.

19. La.—Smith v. Frohlich, 66 So. 163, 135 La. 733.

20. W.Va.—Baltimore Bargain House v. St. Clair, 52 S.E. 660, 58 W.Va. 565.

21. Ala.—Birmingham Belt R. Co. v. City of Birmingham, 101 So. 599, 211 Ala. 674.
32 C.J. p 336 note 16 [b].

22. Tex.—Hook v. Payne, Civ.App., 185 S.W. 1014.

23. S.C.—Pickman v. Georgetown County, 125 S.E. 191, 130 S.C. 18.

24. Tex.—Collin County School v. Still, Civ.App., 190 S.W. 216.
32 C.J. p 336 note 12.

25. Wis.—Trade Press Pub. Co. v. Moore, 193 N.W. 507, 180 Wis. 449.

26. La.—Robertson v. Travis, 4 La. Ann. 151.

27. Tex.—Chancey v. Allison, 107 S.W. 605, 48 Tex.Civ.App. 441.

28. Md.—Block v. City of Baltimore, 129 A. 887, 149 Md. 39.
N.J.—Youngblood v. Schamp, 15 N.J.Eq. 42.

in doubt what facts affiant swears to.[29] The verification must be definite, direct, and positive,[30] and as a general rule not merely on information and belief,[31] or from hearsay,[32] but it has been held to be sufficient when affiant avers that he has information as a basis for his belief.[33] The verification must be of such a character as to render affiant liable for perjury if the facts sworn to are untrue.[34] Where plaintiff does not personally know the facts constituting his right to equitable relief he should swear that the facts stated as within his knowledge are true, and that those which he alleges are not stated within his knowledge he believes to be true;[35] he should give the source of his information and the grounds of his belief,[36] and he should annex to the bill affidavits of those from whom his information is derived.[37] Also, if some of the facts are sworn to on personal knowledge and some on information and belief, it should clearly appear from the affidavit itself what allegations are sworn to on personal knowledge and what allegations are sworn to on information and belief.[38] If this requirement is satisfied and the facts stated on knowledge are sufficient to authorize the allowance of an injunction, it is not material that other facts are stated on information and belief.[39] The fact that some of the facts are sworn to on information and belief will not of itself vitiate the pleading if such facts are not material to the issuance of the injunction.[40] If the facts are alleged directly and positively, a further statement that affiant believes them to be true will be treated as surplusage and the bill sustained.[41]

The fact that the affidavit to the bill is not attached thereto but is filed separately has been held not to be a reason for dismissal under preliminary objections.[42]

An unverified petition may be verified on the day of the hearing.[43]

Before whom sworn. An affidavit which is intended to be made the basis of an application for injunction should not be sworn to before plaintiff's attorney.[44] If the officer before whom verification must be made is designated by statute, the verification before any other officer than the one so designated is insufficient.[45]

Signature and jurat. Verification is sufficient when the petition for injunction is signed by petitioner and the jurat of the officer shows that it was sworn to and subscribed before him.[46]

d. Amendment and Waiver of Defects

The verification may be amended to correct defects, and the amendment may be allowed at the hearing or at the time of allowance of the injunction. Defects in the verification are waived by the failure to make formal and timely objections.

When the verification is defective, it may be amended.[47] It has been held that the amendment may be allowed at the hearing,[48] or at the time of

29. La.—Lewis v. Winston, 26 La. Ann. 707.
32 C.J. p 337 note 22.

30. Fla.—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593.
Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 652, 188 Ga. 418, citing **Corpus Juris.**
Tex.—Robertson v. Economy Plumbing Co., Civ.App., 269 S.W. 481.
32 C.J. p 337 note 23.

31. Ill.—Wright v. Depositors' State Bank, 268 Ill.App. 478.
Tex.—Bledsoe v. Mack, Civ.App., 57 S.W.2d 869—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused—City of Arlington v. Dallas-Fort Worth Safety Coach Co., Civ.App., 270 S.W. 1094.
32 C.J. p 337 note 24.

32. N.J.—Madsen v. Burns Bros., 155 A. 28, 108 N.J.Eq. 275.
Tex.—Graves v. O'Neil, Civ.App., 189 S.W. 778.

33. Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.

34. Ill.—Wright v. Depositors' State Bank, 268 Ill.App. 478.
Tex.—Johnson v. Ferguson, Civ.App., 55 S.W.2d 153, error dismissed—City of Arlington v. Dallas-Fort Worth Safety Coach Co., Civ.App., 270 S.W. 1094—Robertson v. Economy Plumbing Co., Civ.App., 269 S.W. 481.
32 C.J. p 337 note 26.

35. La.—Catlett v. McDonald, 13 La. 44.
32 C.J. p 337 note 27.
Verification held to comply with rule
U.S.—United Air Cleaner Corporation v. Evans, C.C.A.Ill., 22 F.2d 975.

36. S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225—Pickman v. Georgetown County, 125 S.E. 191, 130 S.C. 18.

37. Fla.—Trust Co. of Florida v. Crider, 136 So. 434, 102 Fla. 593.
32 C.J. p 337 note 28.

38. Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 652, 188 Ga. 418, citing **Corpus Juris.**
Tex.—Smith v. Banks, Civ.App., 152 S.W. 449.
32 C.J. p 337 note 29.

39. Tenn.—Nashville R. & Light Co. v. Lawson, 229 S.W. 741, 144 Tenn. 78.

40. Tex.—Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co., Com.App., 267 S.W. 688, rehearing 262 S.W. 736, which affirmed Asphalt Belt Ry. Co. v. Uvalde Rock Asphalt Co., Civ.App., 256 S.W. 675—Paine v. Carpenter, 111 S.W. 430, 51 Tex. Civ.App. 191.

41. Tex.—Simpson v. McGuirk, Civ. App., 194 S.W. 979.

42. Pa.—McGuire v. Dexter, Com.Pl., 46 Dauph.Co. 226.

43. Ga.—Beall v. Francis, 137 S.E. 251, 163 Ga. 894.

44. N.Y.—Kuh v. Barnett, 6 N.Y.S. 881, 57 N.Y.Super. 234.

45. U.S.—Stationary Engineer Pub. Co. v. Comerford, C.C.N.Y., 155 F. 667.

46. Tex.—Kendrick v. Polk, Civ. App., 225 S.W. 826.
32 C.J. p 338 note 36.

47. Ga.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522.
Mont.—Claussen v. Chapin, 221 P. 1073, 69 Mont. 205.
32 C.J. p 338 note 37.

48. Ga.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522.
32 C.J. p 338 note 38.

allowance of the temporary injunction.[49] Defects in the verification are waived by the failure to make formal and timely objections.[50] Any deficiencies in the verification of a bill for injunction which might prevent the issuance of a temporary injunction are immaterial, where they are supplied by defendant in affidavits presented in opposition to the motion for temporary injunction.[51]

§ 188. —— Issues, Proof, and Variance

The issues properly determinable by the court are those presented by the pleadings, and the proof must correspond with the pleadings. Plaintiff must prove all the essential allegations of his bill which are not admitted and in like manner defendant must prove all the defenses on which he relies which are not admitted.

The issues properly determinable by the court are those presented by the pleadings,[52] and issues which are outside the scope of the case as presented by the pleadings are not before the court for determination.[53] In accordance with the general rules of equity pleading discussed in Equity §§ 444, 445, the proof must correspond with the pleadings,[54] and evidence not tending to support allegations in the pleadings should be rejected on the ground of variance,[55] but mere immaterial variances between pleading and proof are not fatal.[56] Plaintiff must

49. Tex.—Needham v. Arno Co-Op. Irr. Co., Civ.App., 196 S.W. 887.

50. Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418.
Tex.—Tips v. Railroad Commission of Texas, Civ.App., 110 S.W.2d 585, error dismissed.
32 C.J. p 338 note 40—p 340 notes 85, 86.

51. N.J.—Liedtke v. Lipman, Ch., 76 A. 463.

52. U.S.—Threedy v. Brennan, D.C. Wis., 40 F.Supp. 69—Montana Eastern Pipe Line Co. v. Montana Dakota Utilities Co., D.C.Mont., 26 F. Supp. 284, appeal denied, C.C.A., 104 F.2d 1016.
Ga.—Tarver v. Silver, 178 S.E. 377, 180 Ga. 124.
Md.—Gaither v. Cate, 144 A. 239, 156 Md. 254.
N.J.—Greene v. Security Trust Co., 143 A. 623, 103 N.J.Eq. 475.
N.Y.—Dickinson v. Springer, 158 N.E. 74, 246 N.Y. 203, reversing 219 N. Y.S. 799, 218 App.Div. 831, and motion denied 159 N.E. 642, 246 N.Y. 539—Innes v. Cosgrove, 30 N.Y.S.2d 951, 177 Misc. 464, affirmed 32 N. Y.S.2d 149, 263 App.Div. 880, appeal denied 33 N.Y.S.2d 385, 263 App.Div. 957, affirmed 43 N.E.2d 89, 288 N.Y. 700—Busch Jewelry Co. v. United Retail Employees' Union Local 830, 5 N.Y.S.2d 575, 168 Misc. 224, affirmed 8 N.Y.S.2d 819, 255 App.Div. 970, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706, affirmed Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E. 2d 320, 281 N.Y. 150, 124 A.L.R. 744.
Tex.—Guthrie v. Speck, Civ.App., 53 S.W.2d 318—Nacogdoches Independent School Dist. v. Adams, Civ.App., 36 S.W.2d 567—Bray v. Peters, Civ.App., 283 S.W. 591—Johnson v. Poteet, Civ.App., 279 S. W. 902.
Vt.—Raithel v. Hall, 130 A. 749, 99 Vt. 65.
Va.—State Highway Commission of Virginia v. Nock, 120 S.E. 869, 138 Va. 212.

53. U.S.—Johnson v. Fuller, C.C.A. Pa., 121 F.2d 618, affirming, D.C., 36 F.Supp. 744, certiorari denied 62 S.Ct. 184, 314 U.S. 681, 86 L.Ed. 545—Marrs v. City of Oxford, D.C. Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L. Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Charles Zimmerman Sons Co. v. Ferguson, D.C.Mich., 18 F.2d 125, denying rehearing 16 F. 2d 604—Keegan v. State of New Jersey, D.C.Mo., 42 F.Supp. 922—West Coast Macaroni Mfg. Co. v. Brock, D.C.Cal., 24 F.Supp. 442.
Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.
Cal.—Hague v. Cleary, 48 P.2d 5.
Iowa.—Brodkey v. Sioux City, 291 N.W. 171, 229 Iowa 1291, reheard 296 N.W. 352, 229 Iowa 1291—Ritchhart v. Barton, 186 N.W. 851, 193 Iowa 271.
Ky.—Citizens' Trust & Guaranty Co. v. Hays, 180 S.W. 811, 167 Ky. 560.
La.—Noe v. Maestri, App., 190 So. 590.
Md.—William Danzer & Co. v. Western Maryland Ry. Co., 165 A. 463, 164 Md. 448.
Mo.—Diekroeger v. Jones, 151 S.W. 2d 691, 235 Mo.App. 1117, transferred, see, Sup., 145 S.W.2d 435.
N.J.—Greensaft v. Greensaft, 184 A. 529, 120 N.J.Eq. 208.
N.Y.—Houghtaling v. Stoothoff, 19 N. Y.S.2d 510, 259 App.Div. 854, affirming 12 N.Y.S.2d 207, 170 Misc. 773—Bourianoff v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 50, affirmed 32 N.Y.S.2d 129, 263 App. Div. 802.
R.I.—Bressler v. Board of Trustees of State Colleges, 21 A.2d 559, 67 R.I. 269.
Tex.—Hunt v. Hudgins, Civ.App., 168 S.W.2d 703—Bray v. Peters, Civ. App., 283 S.W. 591—West v. City of Waco, Civ.App., 275 S.W. 282, affirmed 294 S.W. 832, 116 Tex. 472.
Va.—City of Norfolk v. Bell, 141 S.E. 844, 149 Va. 772.
Wis.—Toebe Academy of Beauty Culture v. Kelly, 300 N.W. 476, 239 Wis. 103.

54. Ky.—Fordson Coal Co. v. Marcum, 268 S.W. 289, 206 Ky. 624.
32 C.J. p 346 note 2.

55. U.S.—Grace Co. v. Williams, C. C.A.Mo., 96 F.2d 478, affirming, D. C., 20 F.Supp. 263—Securities and Exchange Commission v. Macon, D.C.Colo., 28 F.Supp. 127.
Cal.—McBride v. Freeman, 215 P. 678, 191 Cal. 152—London v. Robinson, 9 P.2d 880, 122 Cal.App. 232.
Colo.—Goldsbury v. MacConnell, 215 P. 872, 73 Colo. 351.
Fla.—Ryan v. State, by Knott, 180 So. 10, 131 Fla. 486.
Ga.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163.
Mass.—Donohue v. White, 142 N.E. 692, 247 Mass. 479.
N.Y.—Morrell v. Brooklyn Borough Gas Co., 184 N.Y.S. 651, 113 Misc. 65, affirmed 185 N.Y.S. 883, 195 App.Div. 1, reversed on other grounds 132 N.E. 129, 231 N.Y. 398.
Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.
32 C.J. p 346 note 3.

Affirmative defense, not disclosed by answer in injunction suit, was not admissible as matter of right.—Trafton v. Downey, 151 A. 4, 51 R.I. 87.

Reliance on ordinance in suit by private individual

A municipal ordinance requiring a permit for the erection of a filling station may be relied on as evidence material to the issues in a suit by a private individual to restrain the erection of a filling station as a private nuisance.—Wofford Oil Co. of Georgia v. David, 183 S.E. 808, 181 Ga. 639.

56. Ga.—Williams v. Hicks, 59 S.E. 897, 129 Ga. 785.
32 C.J. p 346 note 7.

prove all the essential allegations of his bill which are not admitted;[57] and it has been held that the operation of this rule is not affected by the court's intimation that a complete case has been made out, which intimation causes plaintiff to refrain from offering further evidence.[58] Similarly, defendant must prove all the defenses on which he relies which are not admitted.[59] Immaterial, surplus, or incidental allegations,[60] or allegations which are admitted by the opposing party,[61] need not be proved. In a suit by a public official to restrain a violation of law under a special statute granting that right, an equitable basis for the proceeding need not be proved, but the equitable remedy provided by the statute is to be exercised in accordance with established equitable procedure.[62]

§ 189. Evidence in General

Basing an injunction in part on proofs taken in open court may satisfy a statute prohibiting the issuance of an injunction except after hearing the testimony of witnesses in open court.

A statute prohibiting the issuance of an injunction in a case involving or growing out of a labor dispute except after hearing the testimony of witnesses in open court may be satisfied if the injunction is based in part on proofs taken in open court[63] or at least it may be so satisfied in a particular case where the oral proofs relate to disputed matters and affidavits are relied on only in respect of undisputed facts.[64] It is improper to issue a permanent injunction on defendant's default where there is no evidence in the record other than affidavits to support plaintiff's demand, a general statute requires proof of plaintiff's demand in all cases, and another statute authorizing proof by affidavit applies only

57. U.S.—Buck v. Case, D.C.Wash., 24 F.Supp. 541, appeal dismissed in part Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358, reversed on other grounds 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128.
Ala.—McRae v. McDonald, 57 Ala. 423.
Ark.—Micklish v. Grand Lodge of Loyal Star, 257 S.W. 353, 162 Ark. 71.
Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415.
Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.
Ga.—Nalley Land & Investment Co. v. Shaddix, 157 S.E. 291, 172 Ga. 171.
La.—State ex rel. Brock v. Clancy, 152 So. 331, 178 La. 687, certiorari denied Brock v. Walner, 54 S.Ct. 773, 292 U.S. 640, 78 L.Ed. 1492.
Mass.—Thompson v. Spagnuolo, 42 N.E.2d 498, 311 Mass. 597.
Mo.—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W. 2d 290, transferred, see, Sup., 152 S.W.2d 178—Union Electric Land & Development Co. v. De Graffenreid, 78 S.W.2d 571, 229 Mo.App. 622—F. C. Church Shoe Co. v. Turner, 279 S.W. 232, 218 Mo.App. 516.
Mont.—State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 132 P.2d 689, 114 Mont. 52.
N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 19 A.2d 786, 129 N.J.Eq. 424, reversing 15 A.2d 826, 128 N.J.Eq. 41.
N.Y.—Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 236 N.Y. 312, 29 A.L.R. 1325, reversing 184 N.Y.S. 914, 193 App.Div. 924, which affirmed 177 N.Y.S. 614, 108 Misc. 399, and reargument denied 142 N.E. 316, 236 N.Y. 638—Stalban v. Friedman, 19 N.Y.S.2d 978, 259 App.Div. 520, reversing 11 N.Y.S.2d 343, 171 Misc. 106—Voorhees & Hobart v. Hobart, 295 N.Y.S. 616, 251 App.Div. 111—Senn v. Ladd, 38 N.Y.S.2d 820, 179 Misc. 306—Boro Wide Food Dealers Ass'n v. La Guardia, 44 N.Y.S.2d 160.
Ohio.—Board of Education of Berea Rural School Dist. of Hamilton County v. Board of Education of Hamilton County, 31 N.E.2d 702, 66 Ohio App. 267.
Or.—Grussi v. Eighth Church of Christ, Scientist, of Portland, 241 P. 66, 116 Or. 336.
Tex.—Guadalupe-Blanco River Authority v. Tuttle, Civ.App., 171 S.W.2d 520, error refused—Bethea v. Lockhart, Civ.App., 127 S.W.2d 1029, error refused—Sneed v. Ellison, Civ.App., 116 S.W.2d 864, error dismissed—Texas Centennial Exposition v. Ahlfinger, Civ.App., 95 S.W.2d 1344—Andrews v. Smith, Civ.App., 93 S.W.2d 493, error refused—Shelton v. City of Abilene, Civ.App., 80 S.W.2d 351—Maxey v. Noland, Civ.App., 31 S.W.2d 468, error denied Noland v. Maxey, 32 S.W.2d 822, 119 Tex. 462.
W.Va.—Tompkins v. Kanawha County Court, 138 S.E. 120, 103 W.Va. 481.
32 C.J. p 346 note 4.
Necessity and sufficiency of allegations in bill or complaint see supra § 182.

58. Cal.—Crescent Feather Co. v. United Upholsterers' Union Local No. 28, 95 P. 871, 153 Cal. 433.

59. Tex.—Bethea v. Lockhart, Civ. App., 127 S.W.2d 1029, error refused—Guthrie v. Speck, Civ.App., 53 S.W.2d 318.
32 C.J. p 346 note 6.
Suit to enjoin violation of zoning ordinance
In a suit to enjoin defendants from violating a zoning ordinance, it is incumbent on defendant to prove the invalidity of the ordinance or that he is within an exception thereof if he bases his defense on those grounds.—City of Idaho Falls v. Grimmett, 117 P.2d 461, 63 Idaho 90.

60. N.M.—Wright v. Atkinson, 46 P. 2d 667, 39 N.M. 307.
Tex.—Fort Worth Stockyards Co. v. Brown, Civ.App., 161 S.W.2d 549.
32 C.J. p 346 note 8.

61. **Denial of title after admitting material facts**
If the material facts on which plaintiff's title is based are admitted, the mere denial of plaintiff's title in the answer is not sufficient to put the title in issue to the extent requiring its establishment at law.—National Refining Co. v. Cox, 57 S.W.2d 778, 227 Mo.App. 778.

62. U.S.—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987.

63. N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A. 2d 183, 132 N.J.Eq. 613.

64. N.J.—Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A. 2d 183, 132 N.J.Eq. 613, modifying Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506.

to the issuance of a preliminary injunction.[65] The use of affidavits as evidence is considered infra § 195.

§ 190. —— Presumptions and Burden of Proof

a. Presumptions
b. Burden of proof

a. Presumptions

Various presumptions may be indulged in a suit for an injunction; but a particular presumption will not be indulged where the proof, or lack of proof, renders it inapplicable or inappropriate.

General rules as to evidentiary presumptions in civil actions, as discussed in Evidence §§ 114–157, are applicable in proceedings for an injunction.[66] Thus it will be presumed that all facts which are not fully and candidly disclosed by the party seeking an injunction are detrimental to him,[67] or that defendant intends to continue to perform acts being done under permission,[68] or that he intends to perform acts commanded by his superiors.[69] Where complainant is not in actual possession he must show legal title to raise presumption of possession.[70] It has been held that a limitation on the use of property cannot be predicated on a mere inference.[71]

b. Burden of Proof

In a suit for injunctive relief, the plaintiff or complainant has the burden, in so far as the facts are controverted, of establishing his right to such relief, and the defendant has the burden of proving matters of defense.

In actions for injunctive relief the burden of proof is, as a rule, on complainant[72] to establish his right to injunctive relief[73] or where controvert-

65. La.—Meers v. Seymour, App., 175 So. 431.

66. **Presumptions held proper as to**
(1) Absence of instigation of sabotage.—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App.2d 642.
(2) Good faith of pipe line carrier's rates.—Montana Eastern Pipe Line Co. v. Montana Dakota Utilities Co., D.C.Mont., 26 F.Supp. 284, appeal dismissed, C.C.A., 104 F.2d 1016.
(3) Identical dates of execution of contracts of sale of business and contract not to compete.—Weiss v. Stein, 153 N.W. 810, 187 Mich. 369.
(4) Integrity and competency of arbitrators.—Dana v. Dana, 157 N. E. 628, 260 Mass. 460.
(5) Irreparable injury from breach of covenant not to compete.—Granger v. Craven, 199 N.W. 10, 159 Minn. 296, 52 A.L.R. 1356.
(6) Ownership of fee from possession under deed of fee.—Jobst v. Mayer, 158 N.E. 745, 327 Ill. 423.
(7) Regularity of legal proceedings.
U.S.—Branaman v. Harris, C.C.Mo., 189 F. 461.
Tenn.—Homer v. Warren, 10 Heisk. 471.
(8) Regularity of official action.—Phillips v. Ballinger, 37 App.D.C. 46 —32 C.J. p 347 note 16.
(9) Truth of allegations of indictment.—Keegan v. State of New Jersey, D.C.N.J., 42 F.Supp. 922.
(10) Truth of sheriff's return.—Quinn R. Barton, Inc., v. Johnson, 196 So. 489, 143 Fla. 245.
Presumptions held not proper as to
(1) Abandonment of restrictive agreement.—Burke v. Kleiman, 277 Ill.App. 519, transferred, see 189 N. E. 372, 355 Ill. 390.
(2) Absence of bidders at tax sale.—Albany County v. Featherstone, 174 P. 192, 26 Wyo. 1.
(3) Absence of injury from breach of restriction.—Durham Essex Corporation v. Schaffer, 133 A. 754, 99 N.J.Eq. 602.
(4) Actual harm from acts intended to harm.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38–44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435.
(5) Commission of acts unauthorized by by-laws of unincorporated association.—Papakostas v. Stephano, 56 Montg.Co., Pa., 353.
(6) Commission of criminal acts by corporation.—Railway Employees Co-op. Ass'n v. Atlanta, B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.
(7) Impossibility of execution of act of legislature.—State v. Eau Claire, 40 Wis. 533.
(8) Insufficiency and ineffectiveness of measures of mediation board. —Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., supra.
(9) Issuance of patent in absence of possession.—Richmond Cedar Works v. West, 147 S.E. 196, 152 Va. 533.
(10) Satisfaction of dormant judgment.—Darlington v. Allison, Tex. Civ.App., 12 S.W.2d 839, error dismissed.
(11) Violation of exemption period by creditors of decedent's estate.—Hudson v. Tate, 4 S.E.2d 577, 188 Ga. 707.

67. Ky.—Denton v. Cumberland Telephone & Telegraph Co., 96 S.W. 1112, 29 Ky.L. 1218.
32 C.J. p 346 note 11.
Failure to allege possession may raise presumption of absence of possession.—Gage v. Village of Wilmette, 146 N.E. 325, 315 Ill. 328.

Prior enactment of ordinance may be presumed where time of complainant's acts is not alleged.—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625.

68. N.Y.—Tiffany v. U. S. Illuminating Co., 51 N.Y.Super. 280.
32 C.J. p 346 note 14.

69. N.Y.—Williams v. Boynton, 42 N.E. 184, 147 N.Y. 426.
32 C.J. p 346 note 15.

70. Tenn.—Union Tanning Co. v. Lowe, 255 S.W. 712, 148 Tenn. 407.

71. Ohio.—Taylor v. Summit Post No. 19, American Legion, 20 N.E.2d 267, 60 Ohio App. 201.

72. U.S.—Britton Motor Service v. Dammann, D.C.Wis., 14 F.Supp. 634.
Ind.—Wabash Valley Coach Co. v. Turner, 46 N.E.2d 212, certiorari denied 63 S.Ct. 1167, 319 U.S. 754, 87 L.Ed. 1707.
N.J.—Stein v. Elizabeth Trust Co., 22 A.2d 872, 131 N.J.Eq. 35.
N.Y.—People v. Silinsky, 216 N.Y.S. 637, 217 App.Div. 247, motion granted 155 N.E. 882, 244 N.Y. 524.
N.C.—Comfort Spring Corporation v. Burroughs, 9 S.E.2d 473, 217 N.C. 658.
Ruling that burden of proof is on defendant is error.—Porter v. Guggenheim, Tex.Civ.App., 107 S.W.2d 891, error dismissed.
On motion in pending suit to enjoin the prosecution thereof, the burden of proof is on the party making the motion.—Cold Metal Process Co. v. E. W. Bliss Co., D.C.Del., 21 F. Supp. 509.

73. U.S.—Mantle Lamp Co. of Amer-

ed,[74] the facts essential to establish his case[75] although he does not have the burden of proving an admitted prima facie case[76] or facts unessential to his right to relief.[77] Thus complainant must show, among other things, that he has exhausted his remedies at law,[78] circumstances that render his legal remedy inadequate,[79] that he will suffer substantial injury[80] or be deprived of some lawful right,[81] unless an injunction is granted, and that the injury will be irreparable.[82] If it is essential to his right to relief he must show his title[83] unless defendant is estopped to deny it,[84] or right of possession,[85] easement,[86] or other right[87] or interest[88] in the property involved. On the other hand, the burden of proving all matters of defense rests on defendant.[89]

ica v. Knapp-Monarch Co., C.C.A. Ill., 81 F.2d 428—Æolian Co. v. Fischer, C.C.A.N.Y., 29 F.2d 679, affirming, D.C., 27 F.2d 560—California Packing Corporation v. Sun-Maid Raisin Growers of California, D.C.Cal., 7 F.Supp. 497, reversed on other grounds, C.C.A., 81 F.2d 674, certiorari denied Sun-Maid Raisin Growers of California v. California Packing Corporation, 56 S.Ct. 833, 298 U.S. 668, 80 L.Ed. 1391.

Ind.—Local No. 1460 of Retail Clerks Union v. Roth, 31 N.E.2d 986, 218 Ind. 275.

Ky.—Potter v. Tolliver, 293 S.W. 1074, 219 Ky. 522.

Md.—Stuart v. Johnson, 28 A.2d 837, 181 Md. 145.

Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

Mont.—Atkinson v. Roosevelt County, 214 P. 74, 66 Mont. 411.

N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.

N.Y.—Saito v. Waiters and Waitresses Union Local No. 2 of Brooklyn and Queens, 12 N.Y.S.2d 283.

N.C.—Plott v. Board of Com'rs of Haywood County, 121 S.E. 190, 187 N.C. 125.

Pa.—Hock v. Levan, 32 Berks Co. 209.

Tex.—Municipal Gas Co. v. City of Wichita Falls, Civ.App., 88 S.W.2d 608, error dismissed—Roberts v. Gossett, Civ.App., 88 S.W.2d 507—May v. Lee, Civ.App., 28 S.W.2d 202—Dennett v. Dancy, Civ.App., 10 S.W.2d 1057, error refused—Massa v. Guardian Trust Co., Civ. App., 258 S.W. 598.

Vt.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

32 C.J. p 347 note 20.

He who seeks harsh remedy of injunction must show himself entitled thereto.—Ray v. Belton, Tex.Civ. App., 162 S.W. 1015.

74. U.S.—General Talking Pictures Corporation v. Stanley Co. of America, D.C.Del., 42 F.2d 904.

Fla.—Ericson v. Jayette, 5 So.2d 453, 149 Fla. 82—Ryan v. State, by Knott, 174 So. 438, 128 Fla. 1.

Mass.—Selectmen of Sudbury v. Garden City Gravel Corporation, 14 N.E.2d 112, 300 Mass. 41.

Neb.—Gering Irr. Dist. v. Mitchell Irr. Dist., 3 N.W.2d 566, 141 Neb. 344—Chizek v. City of Omaha, 253 N.W. 441, 126 Neb. 333—World Realty Co. v. City of Omaha, 203 N.W. 574, 113 Neb. 396, 40 A.L.R. 1313.

Tex.—Harbert v. Owen, Civ.App., 26 S.W.2d 670.

Capacity to sue

In view of a general denial in the answer, the burden is on plaintiff, who has made averments in the petition respecting his capacity to sue, to prove such capacity.—Harnett v. Edmonston, 185 N.E. 426, 44 Ohio App. 304.

75. U.S.—U. S v. Weirton Steel Co., D.C.Del., 7 F.Supp. 255.

Mich.—Scott v. Plummer, 239 N.W. 893, 257 Mich. 31.

Miss.—Overby v. Burnham, 200 So. 591, 190 Miss. 435.

32 C.J. p 347 note 22.

76. Ga.—Baldwin v. McLendon, 131 S.E. 361, 161 Ga. 636.

77. D.C.—Meyer v. Washington Times Co., 76 F.2d 988, 64 App.D. C. 218, certiorari denied Washington Times Co. v. Meyer, 55 S.Ct. 646, 295 U.S. 734, 79 L.Ed. 1682.

78. N.Y.—Edwards v. New York Edison Co., 268 N.Y.S. 24, 149 Misc. 722.

79. U.S.—Kelliher v. Stone & Webster, C.C.A.Fla., 75 F.2d 331—Kingan & Co. v. Smith, D.C.Ind., 12 F. Supp. 329, appeal dismissed, C.C.A., Smith v. Kingan & Co., 80 F.2d 1020.

80. Cal.—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal.App. 383.

32 C.J. p 347 note 23.

Actual or threatened injury

Plaintiff has burden of proving actual or threatened injury to be entitled to injunctive relief.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435.

Injury to property

Landowner had burden of showing that restraining order sought was necessary to protect his property from injury by cropper until controversy over cropper's alleged breach of covenants could be heard.—Gibbons v. Huntsinger, 74 P.2d 443, 105 Mont. 562.

81. S.D.—State v. Olsen, 137 N.W. 561, 30 S.D. 57.

82. U.S.—Kingan & Co. v. Smith, D.C.Ind., 12 F.Supp. 329, appeal dismissed, C.C.A., Smith v. Kingan & Co., 80 F.2d 1020.

32 C.J. p 347 note 25.

83. Ga.—Sapp v. Odom, 141 S.E. 201, 165 Ga. 437

Ky.—Maggard v. Asher, 105 S.W.2d 184, 268 Ky. 416—Prewitt v. Bull, 27 S.W.2d 399, 234 Ky. 18.

Mass.—Howes v. Town of Barnstable, 189 N.E. 34, 285 Mass. 361.

32 C.J. p 347 note 26.

Title back of common source need not be proved where both parties claim from common source.—Petty v. Petty, 95 S.W.2d 1122, 265 Ky. 15.

84. Mo.—Parker v. Raymond, 14 Mo. 535.

85. Fla.—McGourin v. De Funiak Springs, 41 So. 541, 51 Fla. 502, motion denied 42 So. 187, 52 Fla. 556.

32 C.J. p 348 note 28.

86. Mass.—Raynes v. Stevens, 107 N.E. 398, 219 Mass. 556.

32 C.J. p 348 note 27.

87. Del.—Lewes Sand Co. v. Commissioners of Lewes, 191 A. 821, 22 Del.Ch. 21.

88. Iowa.—Harlow v. Gow, 44 Iowa 533.

32 C.J. p 348 note 29.

89. La.—Crichton v. Louisiana Highway Commission, 129 So. 373, 170 La. 863.

Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545, 328 Mo. 1.

32 C.J. p 348 note 30.

Ability to give bond or respond in damages

Md.—Universal Realty Corporation v. Felser, 22 A.2d 448, 179 Md. 635.

Attack on paper title

Ky.—French v. Elkhorn City Land Co., 168 S.W.2d 746, 293 Ky. 250.

Easement by prescription

Md.—Stuart v. Johnson, 28 A.2d 837, 181 Md. 145.

Laches of plaintiff

Mass.—Ferrone v. Rossi, 42 N.E.2d 564, 311 Mass. 591.

License or permission from plaintiff

Mass.—Smith v. Wells, 145 N.E. 50, 250 Mass. 151.

These rules have been applied in fixing the burden of proof, among other instances,[90] in actions for injunctions by public bodies or officials;[91] in actions against public bodies or officials;[92] in ac-

Va.—Johnson v. Burson, 129 S.E. 251, 143 Va. 57.

Waiver by plaintiff

Mass.—Berenson v. French, 159 N.E. 909, 262 Mass. 247.

90. Complainant must show

(1) Steps taken to protect secrecy of device.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

(2) That rates offered by a common carrier were unreasonable.—Montana Eastern Pipe Line Co. v. Montana Dakota Utilities Co., D.C. Mont., 26 F.Supp. 284, appeal dismissed, C.C.A., 104 F.2d 1016.

91. Burden on complainant

(1) Price administrator must show violation of Emergency Price Control Act.—Henderson v. J. B. Beaird Corporation, D.C.La., 48 F.Supp. 252.

(2) That purchase of securities would not have been made if undisclosed facts had been known need not be shown in suit to enjoin violation of Securities Act by dealer.—Otis & Co. v. Securities and Exchange Commission, C.C.A.Ohio, 106 F.2d 579, affirming, D.C., Securities and Exchange Commission v. Otis & Co., 18 F.Supp. 100.

(3) To show authority of secretary of agriculture to fix prices as condition of license under Agricultural Adjustment Act.—U. S. v. Seven Oaks Dairy Co., D.C.Mass., 10 F. Supp. 995.

(4) To show breach of contract by book company.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.

Burden on defendant

Defendant must bring case within exemption of Fair Labor Standards Act.—Walling v. Home Loose Leaf Tobacco Warehouse Co., D.C.Ky., 51 F.Supp. 914.

92. Burden on complainant to show

(1) Abuse of discretion.

U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107.

Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141, reversing, Civ.App., 70 S.W.2d 333.

(2) Arbitrary and unreasonable action.

Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.

Ill.—United Artists Corporation v. Thompson, 171 N.E. 742, 339 Ill. 595.

Pa.—Kates v. Com'rs of Lower Merion Tp., 54 Montg.Co. 350.

(3) Illegality of suspension as student.—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 41 Ohio App. 367.

(4) Lack of jurisdiction to compel removal of car tracks.—Hammond, W. & E. C. Ry. Co. v. Zeigler, 152 N.E. 806, 198 Ind. 456, rehearing denied 154 N.E. 20, 198 Ind. 456.

(5) Necessity of restraint for protection of property rights.—Champlin Refining Co. v. Corporation Commission of State of Oklahoma, Okl., 52 S.Ct. 559, 286 U.S. 210, 76 L.Ed. 1062, 86 A.L.R. 403, modifying, D.C., 51 F.2d 823.

(6) That conclusion of director of motion picture division of educational department could not have been arrived at by any reasonable person.—Jewel Productions v. Esmond, 6 N.Y.S.2d 711, 168 Misc. 838.

(7) That fraud order was improperly issued.—Hall v. Willcox, C.C.N.Y., 225 F. 333.

(8) That intra-state business is a mere incident of interstate business.—J. E. Raley & Bros. v. Richardson, Ga., 44 S.Ct. 256, 264 U.S. 157, 68 L.Ed. 615.

(9) That officials are acting under unconstitutional laws or contrary to powers conferred.—Newfield v. Ryan, C.C.A.Fla., 91 F.2d 700, certiorari denied Ryan v. Newfield, 58 S.Ct. 54, two cases, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, two cases, 302 U.S. 650, 82 L.Ed. 504—Ballentine v. Florida Tex Oil Co., C.C.A.Fla., 91 F.2d 700, certiorari denied Florida Tex Oil Co. v. Ballentine, 58 S.Ct. 54, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, 302 U.S. 650, 82 L.Ed. 504.

(10) That prior proceedings on which actions are based are invalid.

Fla.—Du Bose v. Kelly, 181 So. 11, 132 Fla. 548.

Mont.—Atkinson v. Roosevelt County, 227 P. 811, 71 Mont. 165.

Neb.—Monell v. Irey, 66 N.W. 289, 47 Neb. 213.

N.M.—Orchard v. Board of Com'rs of Sierra County, 76 P.2d 41, 42 N.M. 172.

(11) That refusal of building permit bore no relation to public health, safety, morals, or general welfare.—City of Dallas v. Meserole Bros., Tex. Civ.App., 164 S.W.2d 564, error refused.

(12) That statutes or ordinances are invalid or unconstitutional.

U.S.—Ingels v. Morf, Cal., 57 S.Ct. 439, 300 U.S. 290, 81 L.Ed. 653, affirming, D.C., Morf v. Ingels, 14 F.Supp. 922—Terrace v. Thompson, Wash., 44 S.Ct. 15, 263 U.S. 197, 68 L.Ed. 255—Newfield v. Ryan, C.C.A.Fla., 91 F.2d 700, certiorari denied Ryan v. Newfield, 58 S.Ct. 54, two cases, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, two cases, 302 U.S. 650, 82 L.Ed. 504—Ballentine v. Florida Tex Oil Co., C.C.A.Fla., 91 F.2d 700, certiorari denied Florida Tex Oil Co. v. Ballentine, 58 S.Ct. 54, 302 U.S. 729, 82 L.Ed. 563, rehearing denied 58 S.Ct. 138, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 262, 302 U.S. 650, 82 L.Ed. 504—Kingan & Co. v. Smith, D.C.Ind., 12 F.Supp. 329, appeal dismissed, C.C.A., Smith v. Kingan & Co., 80 F.2d 1020.

Or.—Daniels v. City of Portland, 265 P. 790, 124 Or. 677, 59 A.L.R. 512.

Tex.—Neiman-Marcus Co. v. City of Houston, Civ.App., 109 S.W.2d 543, error refused.

(13) That tracks of street railroad were not constructed in violation of law.—Spokane St. R. Co. v. City of Spokane Falls, C.C.Wash., 46 F. 322.

Burden on defendant to show

(1) Authority to confiscate vending machine.—Ross v. Goodwin, D.C.N.H., 40 F.2d 535.

(2) That building which it seeks to destroy is a nuisance.—Crossman v. City of Galveston, 247 S.W. 810, 112 Tex. 303, 26 A.L.R. 1210, reversing, Civ.App., 204 S.W. 128.

(3) That employer engaged in interstate commerce within jurisdiction of National Labor Relations Board.—Myers v. Bethlehem Shipbuilding Corporation, C.C.A.Mass., 89 F.2d 1000, denying rehearing 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F. Supp. 915, certiorari granted Myers v. Bethlehem Shipbuilding Corporation, 58 S.Ct. 26, 302 U.S. 667, 82 L. Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515, and reversed on other grounds Myers v. Bethlehem Shipbuilding Corporation, 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638.

(4) That fence is in highway.—McIntyre v. Storey, 80 Ill. 127.

(5) That its action as highway commission in changing route is justified.—Crichton v. Louisiana Highway Commission, 129 So. 373, 170 La. 863.

(6) That plaintiff is not a bona fide bondholder.—Board of Education of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91.

Burden rests on interveners to show that acts of complainant detracted from the value of their property.—City of Miami v. Lithgow, Fla., 12 So.2d 360.

tions for injunctions to enforce covenants against competition by the sellers of a business[93] or by employees after leaving employment;[94] in actions to restrain breach by employee of employment contract;[95] in actions growing out of labor disputes;[96] and in suits involving restrictions and covenants as to the use of real property.[97]

§ 191. —— Admissibility

The rules as to the admissibility of evidence in other equitable proceedings are applicable in actions for injunctions although it has been said that they are less strictly applied in an application for a preliminary injunction.

With regard to the admissibility of evidence, injunction proceedings are in general governed by the same rules that are applicable to other equitable proceedings.[98] Thus the rule that any otherwise competent evidence which is relevant and material is admissible and that evidence which is irrelevant, immaterial, or directed to collateral issues will be excluded has been applied in proceedings for injunctions as to actions and other legal proceedings;[99] injunctions with relation to property, conveyances, and encumbrances,[1] such, for example, as the pre-

93. Burden is on complainant to establish reasonableness and necessity of restriction.—Southern Properties v. Carpenter, Tex.Civ.App., 21 S.W. 2d 372, error dismissed—Byers v. Trans-Pecos Abstract Co., Tex.Civ. App., 18 S.W.2d 1096, error dismissed.

Burden is on defendant to show that his transactions are in good faith.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.

94. Burden is on complainant to show that restrictive covenants are reasonable and necessary.

U.S.—Super Maid Cook-Ware Corporation v. Hamil, C.C.A.Tex., 50 F. 2d 830, certiorari denied 52 S.Ct. 138, 284 U.S. 677, 76 L.Ed. 572.

Tex.—City Ice Delivery Co. v. Evans, Civ.App., 275 S.W. 87.

Burden is on defendant to show that contract is against public policy or unnecessarily restrictive.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.

95. Burden is on complainant to show that defendant's services cannot be replaced.—Merl, Inc., v. Richfield-Jenks, 209 N.Y.S. 530, 125 Misc. 318.

Burden is on employee to show that he left employment with complainant's consent.—Essex Specialty Co. v. Bueschel, 173 A. 595, 116 N.J. Eq. 337.

96. Burden on complainant to show

(1) Efforts to settle dispute by negotiation, mediation, or arbitration. —Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

(2) That picketing was accompanied by violence and intimidation.

Fla.—Weissman v. Jureit, 181 So. 898, 132 Fla. 661.

Ill.—Ritholz v. Andert, 24 N.E.2d 573, 303 Ill.App. 61.

Or.—Greenfield v. Central Labor Council, 192 P. 783, 104 Or. 236, reheard 207 P. 168, 104 Or. 236.

(3) That union rules are unlawful. —Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.Pa., 15 F.2d 16, certiorari denied 47 S. Ct. 449, 273 U.S. 748, 71 L.Ed. 871.

Burden on defendant to show

(1) That defendant is not connected with labor union.—Davis v. McGuigan, 36 Pa.Dist. & Co. 554.

(2) That employer breached agreement not to discriminate against members of union.—Sarros v. Nouris, 138 A. 607, 15 Del.Ch. 391.

(3) That order was not interference with right of employer to manage his own business.—Keegan v. O'Donnell, 37 N.E.2d 995, 310 Mass. 346.

(4) That strike was justified.— New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators and Paper Hangers of America, 122 A. 622, 95 N.J.Eq. 108, reversed on other grounds 126 A. 399, 96 N.J.Eq. 632, 47 A.L.R. 384.

97. Burden on complainant to show

(1) Existence of restrictions.

Mass.—Snow v. Van Dam, 197 N.E. 224, 291 Mass. 477.

Mich.—Denhardt v. De Roo, 294 N. W. 163, 295 Mich. 223—Grant v. Craigie, 291 N.W. 44, 292 Mich. 658.

N.J.—Bennett v. Haerlin, 164 A. 461, 112 N.J.Eq. 285, reversing 152 A. 164, 107 N.J.Eq. 224.

(2) Notice or knowledge on the part of defendant.—Reis v. Bixhorn, 271 Ill.App. 279.

(3) That he did not cause the situation complained of.—McRae v. Lois Grunow Memorial Clinic, 14 P. 2d 478, 40 Ariz. 496.

(4) That premises are subject to restriction.—Fenwick v. Leonard, 237 N.W. 381, 255 Mich. 85.

(5) That restriction is for his benefit.

N.J.—Kliem v. Sisters of Charity of St. Elizabeth, 139 A. 174, 101 N.J. Eq. 761.

Tex.—Davis v. Skipper, 83 S.W.2d 318, 125 Tex. 364, setting aside Skipper v. Davis, Civ.App., 59 S. W.2d 454—Monk v. Danna, Civ. App., 110 S.W.2d 84, error dismissed.

(6) Violation of covenant.

N.Y.—Purdy v. Mulroney, 31 N.Y.S. 2d 1006.

Vt.—Donahue v. Conant, 146 A. 417, 102 Vt. 108.

Burden on defendant to show

(1) Abandonment of agreement.— Porter v. Johnson, 115 S.W.2d 529, 232 Mo.App. 1150.

(2) Absence of damage from breach.—Armstrong v. Leverone, 136 A. 71, 105 Conn. 464.

(3) Estoppel to enforce covenant. —Neilson v. Hiral Realty Corporation, 16 N.Y.S.2d 462, 172 Misc. 408.

(4) Laches.—Thompson v. Diller, 146 N.Y.S. 438, 161 App.Div. 98.

(5) Modification of restrictions.— Menstell v. Johnson, 262 P. 853, 125 Or. 150, 57 A.L.R. 311, modified on other grounds and rehearing denied 266 P. 891, 125 Or. 150, 57 A.L.R. 311.

98. Ga.—Warren v. Monnish, 23 S.E. 823, 97 Ga. 399.

32 C.J. p 348 note 31–p 349 note 40.

Right and infringement

In suit for injunction, chancellor may admit relevant evidence on issues of whether right has been infringed and whether circumstances call for withholding injunction regardless of infringement.—Christenson v. Nielsen, 54 P.2d 430, 88 Utah 336.

99. Evidence held admissible

La.—Daspit v. Sinclair Refining Co., 3 So.2d 259, 198 La. 9.

Evidence held inadmissible

Mass.—Cunningham v. Ganley, 166 N.E. 712, 267 Mass. 375.

S.D.—Ewing v. Waddington, 252 N. W. 28, 62 S.D. 166.

Tenn.—Bilbrey v. Smith, 158 S.W.2d 735, 25 Tenn.App. 446.

1. Evidence held admissible

N.Y.—Barbara Hope Theatres v. S. Kaplan & Co., 227 N.Y.S. 22, 223 App.Div. 83.

vention of trespasses;[2] injunctions as to contracts,[3] as, for example, covenants and restrictions with reference to the use of real property,[4] or contracts as to the sale of good will or to refrain from engaging in a competing business;[5] injunctions as to corporate franchises, management, and dealings;[6] injunctions as to public officers, boards, and municipalities,[7] as, for example, to prevent the enforcement of statutes or ordinances;[8] injunctions as to matters affecting public welfare, property, and rights, as, for example, injunctions against the unlawful practice of law,[9] medicine,[10] or injunctions against the violation of the Fair Labor Standards Act;[11] injunctions against violation of zoning ordinances and building regulations;[12] injunctions to restrain enforcement of zoning ordinances and building regulations;[13] injunctions to restrain a change in zoning;[14] injunctions affecting personal rights and duties,[15] such as right of privacy;[16] injunctions against interference with trade, business,

Evidence held inadmissible
Mass.—Norris Drug Co. v. Gainsboro Bldg. Corporation, 156 N.E. 840, 260 Mass. 117.

2. Evidence held admissible
Conn.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386.
Ga.—Allen v. Smith, 150 S.E. 584, 169 Ga. 395.

Evidence held inadmissible
Ga.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163—Russell v. King, 178 S.E. 706, 180 Ga. 271—Jones v. Harris, 151 S.E. 848, 169 Ga. 665—Flowers, Inc., v. Chamblee, 141 S.E. 907, 165 Ga. 703.
N.H.—Perley v. Roberts, 18 A.2d 385, 91 N.H. 254.

3. Evidence held admissible
Del.—Sharpless-Hendler Ice Cream Co. v. Davis, 151 A. 261, 17 Del.Ch. 161.
Ga.—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338.
Vt.—Raithel v. Hall, 130 A. 749, 99 Vt. 65.

Complainant's breach of contract, subsequently renewed, was admissible.—Hill v. Haberkorn, 6 N.Y.S. 474, 3 Silv.Sup. 87—32 C.J. p 348 note 31 [a].

4. Evidence held admissible
Cal.—Hurd v. Albert, 3 P.2d 545, 214 Cal. 15, 76 A.L.R. 1348—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal.App.2d 646.
Ga.—Jones v. Lanier Development Co., 11 S.E.2d 11, 190 Ga. 887—Jones v. Lanier Development Co., 2 S.E.2d 923, 188 Ga. 141—Phillips v. Ingram, 136 S.E. 785, 163 Ga. 580.
La.—Edwards v. Wiseman, App., 3 So.2d 655, amended 3 So.2d 661, 198 La. 382.
Pa.—Asbury v. Carroll, 54 Pa.Super. 97.
Tex.—Monk v. Danna, Civ.App., 110 S.W.2d 84, error dismissed—Gillingham v. Timmins, Civ.App., 104 S.W.2d 115, error dismissed—Hubbard v. Ehman, Civ.App., 28 S.W.2d 270.

Evidence held inadmissible
D.C.—Avignone v. Roumel, 13 F.2d 292, 56 App.D.C. 320.
Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471.
La.—Edwards v. Wiseman, App., 3 So.2d 655, amended 3 So.2d 661, 198 La. 382.
Mo.—Pierce v. St. Louis Union Trust Co., 278 S.W. 398, 311 Mo. 262—Wuertenbaecher v. Feik, App., 43 S.W.2d 848, transferred, see, Sup., 36 S.W.2d 913.

5. Evidence held admissible
Minn.—Andrews v. Cosgriff, 221 N.W. 642, 175 Minn. 431.

Evidence held inadmissible
Mo.—Grossenbacher v. Daly, App., 287 S.W. 781.

6. Evidence held admissible
N.Y.—Wagstaff v. Holly Sugar Corporation, 3 N.Y.S.2d 552, 253 App.Div. 616, affirming 1 N.Y.S.2d 36, 165 Misc. 530, reargument denied 4 N.Y.S.2d 1000, 254 App.Div. 725, affirmed 17 N.E.2d 681, 279 N.Y. 625, reargument denied 18 N.E.2d 315, 279 N.Y. 686.

Evidence held inadmissible
Utah.—Fower v. Provo Bench Canal & Irrigation Co., 101 P.2d 375, 99 Utah 267, certiorari denied 61 S.Ct. 841, 313 U.S. 564, 85 L.Ed. 1523.

7. Evidence held admissible
U.S.—Farmers' & Merchants' Bank of Catlettsburg, Ky., v. Federal Reserve Bank of Cleveland, Ohio, D.C.Ky., 286 F. 610.
Mo.—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
Ohio.—Cahn v. Guion, 160 N.E. 868, 27 Ohio App. 141.
Tex.—City of Austin v. Nelson, Civ. App., 45 S.W.2d 692.

Evidence held inadmissible
Okl.—Consolidated School Dist. No. 41 v. Dacus, 117 P.2d 508, 189 Okl. 400.
Tex.—Twing v. Rhodes, Civ.App., 24 S.W.2d 728, certified questions answered 16 S.W.2d 258, 118 Tex. 410, and reversed on other grounds Rhodes v. Twing, 41 S.W.2d 13, appeal dismissed 53 S.Ct. 5, 287 U.S. 561, 77 L.Ed. 495.

8. Evidence held admissible
U.S.—Chalk v. U. S., C.C.A.N.C., 114 F.2d 207, certiorari denied 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.
Idaho.—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.
Md.—Gaither v. Cate, 144 A. 239, 156 Md. 254.

Evidence held inadmissible
U.S.—Borchert v. City of Ranger, Tex., D.C.Tex., 42 F.Supp. 577.

9. Evidence held inadmissible
Conn.—Grievance Committee of Bar of New Haven County v. Payne, 22 A.2d 623, 128 Conn. 325.

10. Evidence held admissible
Tex.—Johnson v. State, Civ.App., 267 S.W. 1057.

11. Evidence held admissible
U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

12. Evidence held admissible
Cal.—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180.

Evidence held inadmissible
Cal.—Diederichsen v. Sutch, 118 P.2d 863, 47 Cal.App.2d 646.
Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

13. Evidence held admissible
N.Y.—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936, second case, 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.
Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Evidence held inadmissible
Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 Cal.App.2d 804.

14. Evidence held admissible
D.C.—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

Evidence held inadmissible
D.C.—Garrity v. District of Columbia, supra.

15. Evidence held admissible
Ga.—Kniepkamp v. Richards, 16 S.E.2d 24, 192 Ga. 509.

Evidence held inadmissible
Ga.—Kniepkamp v. Richards, supra.

16. Evidence held inadmissible
N.Y.—Rhodes v. Sperry & Hutchinson Co., 100 N.Y.S. 1140, 114 App. Div. 920, affirmed 104 N.Y.S. 1102, 120 App.Div. 467—Wyatt v. Wanamaker, 110 N.Y.S. 900, 58 Misc. 429, affirmed 111 N.Y.S. 90, 126 App.Div. 656.

or occupation;[17] injunctions in labor disputes,[18] such as injunctions against strikes,[19] or boycotts,[20] or against the disclosure or use of trade secrets;[21] or injunctions against criminal acts and conspiracies.[22]

Evidence is admissible in plaintiff's behalf to show his title or right,[23] and the absence of right of defendant to do the acts complained of,[24] and defendant may introduce evidence to controvert plaintiff's title[25] or establish his own right or title.[26]

Complainant is entitled to show the nature and extent of the threatened injury,[27] and that the acts complained of will be continued;[28] and defendant may controvert such evidence.[29]

Plaintiff may show the manner in which the evil may be remedied,[30] but defendant is not entitled to show that by the taking of measures not required of plaintiff the damages may be prevented.[31]

Matters occurring after the filing of a petition for an injunction and before trial on the merits may be heard by the court in the exercise of its discretion.[32]

Secondary evidence is inadmissible where the best evidence may be procured,[33] although the sufficiency of the foundation for the admission of secondary evidence is largely discretionary with the trial judge.[34]

The record of a prior suit wherein, on the same facts, an injunction was denied is admissible to resist a second application.[35]

Evidence for preliminary, compared with that for final, injunction. On the hearing of a motion for a preliminary injunction the rules of evidence are less strictly applied than on a final hearing, and evidence may be admissible which would not be competent in support of an application for a permanent injunction,[36] the object of this rule being to enable the court to exercise a sound discretion in granting or refusing an injunction.[37]

On bill and cross bill for injunction, it is correct practice to consider on the cross bill the evidence taken on the bill.[38]

§ 192. —— Weight and Sufficiency

a. In general
b. Preliminary injunctions

a. In General

In order to authorize the issuance of an injunction, every essential material fact must be established to a reasonable certainty, or at least a reasonable probability, by clear, convincing, and satisfactory evidence.

While, as will be noted, there are various statements in the cases as to the proof requisite in injunction proceedings, summed up in substance they are that every material fact essential to authorize the issuance of an injunction must be established to a reasonable certainty, or at least a reasonable probability, by clear, convincing and satisfactory ev-

17. Evidence held inadmissible
Ga.—Taggart v. Savannah Gas Co., 175 S.E. 491, 179 Ga. 181.
Minn.—George T. Ross Lodge No. 831, Brotherhood of Railroad Trainmen, v. Brotherhood of Railroad Trainmen, 254 N.W. 590, 191 Minn. 373.

18. Evidence held inadmissible
U.S.—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.

19. Evidence held inadmissible
Mass.—Alden Bros. Co. v. Dunn, 162 N.E. 773, 264 Mass. 355.

20. Evidence held admissible
U.S.—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D.C.Mo., 29 F.Supp. 15.

21. Evidence held admissible
Vt.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

22. Evidence held admissible
Tex.—Texon Amusements v. State, Civ.App., 90 S.W.2d 871.

23. Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338—Allen v. Smith, 150 S.E. 584, 169 Ga. 395.
32 C.J. p 348 note 33, p 349 note 41.

Evidence held inadmissible
Ga.—Payne v. Nix, 17 S.E.2d 67, 193 Ga. 4—Corker v. Stafford, 54 S.E. 92, 125 Ga. 428.
32 C.J. p 348 note 31 [d].

24. Mo.—Houck v. Patty, 73 S.W. 389, 100 Mo.App. 302.
32 C.J. p 349 note 42.

25. Ga.—O'Neal v. Ward, 95 S.E. 709, 148 Ga. 62.
Pa.—Schumacker v. Ploplis, 87 Pa. Super. 265.
32 C.J. p 349 note 43.

26. Tenn.—Jones v. Czaza, 86 S.W. 2d 1096, 19 Tenn.App. 327.
32 C.J. p 348 notes 31 [b], 36.

27. Conn.—W. G. Maltby, Inc., v. Associated Realty Co., 158 A. 548, 114 Conn. 283.
Pa.—Holgate Bros. Co. v. Bashore, 45 Dauph.Co. 274.
32 C.J. p 349 note 44.

28. Ala.—Scofield v. Perry Creamery Co., 176 So. 195, 234 Ala. 560.
Cal.—Heilbron v. Last Chance W. D. Co., 9 P. 456, 2 Cal.Unrep.Cas. 633.
32 C.J. p 349 note 45.

29. Ill.—Cook v. Miller, 26 Ill.App. 421.
32 C.J. p 349 note 46.

30. Wis.—Winchell v. Waukesha, 85 N.W. 668, 110 Wis. 101, 84 Am.S. R. 902.
32 C.J. p 349 note 47.

31. Colo.—Sylvester v. Jerome, 34 P. 760, 19 Colo. 128.
32 C.J. p 349 note 48.

32. Mo.—Putnam v. Coates, 283 S. W. 717, 220 Mo.App. 218.

33. Mo.—Houck v. Patty, 73 S.W. 389, 100 Mo.App. 302.
32 C.J. p 349 note 49.

34. Ga.—Davis v. Covington & M. R. Co., 2 S.E. 555, 77 Ga. 322.
32 C.J. p 349 note 50.

35. Mont.—Wetzstein v. Boston & Montana Consol. Copper & Silver Mining Co., 66 P. 943, 26 Mont. 193.

36. Ga.—Kniepkamp v. Richards, 16 S.E.2d 24, 192 Ga. 509—Griffith v. City of Hapeville, 185 S.E. 522, 182 Ga. 333.
Kan.—Wyatt v. Mickey, 271 P. 304, 126 Kan. 690.
32 C.J. p 349 note 51.

37. U.S.—Buck v. Hermance, C.C.N. Y., 4 F.Cas.No.2,081, 1 Blatchf. 322.

38. Pa.—McCue v. Holleran, 7 Del. Co. 458, 9 Kulp 433, 13 York Leg. Rec. 106.

idence, and that an injunction should be denied where the evidence is such as to leave in doubt the existence of any fact necessary to authorize its issuance.[39] It has been variously stated in the decisions that, in order to authorize the issuance of an injunction, the right thereto must be established with certainty;[40] that the evidence must be clear,[41] clear and conclusive,[42] clear and convincing,[43] clear and satisfactory,[44] satisfactory,[45] or clear, satisfactory, and convincing;[46] that the right must be supported by the clearest proof;[47] that a clear and unexceptional right to an injunction must be shown;[48] that plaintiff will be held to strict proof;[49] that the evidence must convince the chancellor that an action for damages would be inadequate;[50] that an alleged mutual mistake must be proved by precise, clear, and indubitable evidence;[51] and that the proved facts must indisputably sustain the allegations.[52]

In any case, the facts necessary for granting relief by injunction must be established at least by a preponderance of the evidence,[53] which must be

39 Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 796, 188 Okl. 690, citing **Corpus Juris.**

Abundant evidence

To justify an injunction absolutely prohibiting certain acts, there should be abundant evidence that continuance of the acts will inevitably produce irreparable injury.—Thompson v. Kraft Cheese Co. of California, 291 P. 204, 210 Cal. 171.

Substantial evidence

(1) An injunction will be refused where there is no substantial evidence of a requisite fact.—Culinary Workers and Bartenders Local Union No. 631 A. F. of L. v. Busy Bee Cafe, 115 P.2d 246, 57 Ariz. 514.

(2) The remedy must be based on something more substantial than speculation.—Missouri Pac. Transp. Co. v. Priest, C.C.A.Ark., 117 F.2d 32.

Prima facie evidence of the facts on which complainant's right to relief rests must be presented to the court to warrant the issuance of an injunction.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.

Documentary evidence may constitute prima facie evidence.—Smith v. Shiebeck, supra.

40. Or.—Andrews v. Donnelly, 116 P. 569, 59 Or. 138.

41. U.S.—Cullen v. Esola, D.C.Cal., 21 F.2d 877—Cinderella Theater Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 164.
Del.—Warrick v. Missouri-Kansas Pipe Line Co., Ch., 15 A.2d 298, affirmed In re Missouri-Kansas Pipe Line Co., Sup., 22 A.2d 388, and decree sustained Missouri-Kansas Pipe Line Co. v. Warrick, 22 A.2d 871.
Ga.—Jones v. Lanier Development Co., 11 S.E.2d 11, 190 Ga. 887.
Iowa—Strasburger v. Witousek, 211 N.W. 713.
Me.—Brown v. Chadbourne, 122 A. 625, 123 Me. 214—Hall v. Hamilton, 121 A. 551, 123 Me. 80.
N.Y.—Ten Eyck v. Hegeman Farms Corporation, 290 N.Y.S. 769, 160 Misc. 460.
Ohio.—Briggs v. Butler, 47 N.E.2d 812, 71 Ohio App. 48, reversed on other grounds 45 N.E.2d 757, 140 Ohio St. 499—State ex rel. Shafer v. Merrell, 185 N.E. 815, 44 Ohio App. 347.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.
Tex.—Sneed v. Ellison, Civ.App., 116 S.W.2d 864, error dismissed—Cunningham v. Koons, Civ.App., 33 S.W.2d 761—Cain v. Trueheart, Civ.App., 12 S.W.2d 239, error dismissed.
Wis.—Janssen v. Foeller, 214 N.W. 338, 193 Wis. 334.
32 C.J. p 350 note 62.

To secure mandatory injunction, evidence must clearly warrant its issuance.—Kissinger v. Yellow Pine Bldg. Co., 152 N.E. 775, 21 Ohio App. 165.

42. La.—Capell v. Molony, 97 So. 595, 154 La. 420.

43. U.S.—Fleming v. National Bank of Commerce of Charleston, D.C.W.Va., 41 F.Supp. 833.
N.J.—Board of Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511, affirming 18 A.2d 62, 129 N.J.Eq. 51—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302.
Or.—Deadmond v. Moon, 260 P. 1100, 123 Or. 28.
Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467—Shryock v. Association of United Fraternal Buyers, 5 A.2d 581, 135 Pa.Super. 428.
32 C.J. p 350 note 63.

44. Md.—Mayor and City Council of Baltimore v. Brack, 3 A.2d 471, 175 Md. 615, 120 A.L.R. 543.
N.J.—Bright v. Forest Hill Park Development Co., 31 A.2d 190, 133 N.J.Eq. 170.
Tex.—Freis v. Consolidated Theatres, Civ.App., 134 S.W.2d 369, error dismissed, judgment correct—Vireca Corporation v. Cole, Civ.App., 93 S.W.2d 567.
Va.—Stoneman v. Wilson, 192 S.E. 816, 169 Va. 239.
32 C.J. p 347 note 22 [a], p 350 note 64.

45. N.Y.—Albee v. Godfrey Co. v. Arci, 201 N.Y.S. 172.
Ohio.—Miller v. Miller, 162 N.E. 459, 28 Ohio App. 203.

46. Wis.—George M. Danke Co. v. Marten, 255 N.W. 121, 215 Wis. 470.

47. Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 796, 188 Okl. 690, citing **Corpus Juris.**
32 C.J. p 350 note 65.

48. Ohio.—Spangler v. Cleveland, 3 N.E. 365, 43 Ohio St. 526.

49. N.Y.—Grimstone v. Carter, 3 Paige 421, 24 Am.D. 230.

50. Mo.—Hatton v. Kansas City, C. & S. R. Co., 162 S.W. 227, 253 Mo. 660.

51. Pa.—Luzerne Anthracite v. E. Boston Coal Co., Com.Pl., 36 Luz. Leg.Reg. 396.

52. U.S.—General Talking Pictures Corporation v. Stanley Co. of America, D.C.Del., 42 F.2d 904.

53. Ark.—Word v. Grigsby, 174 S.W. 2d 439.
Fla.—Ericson v. Jayette, 5 So.2d 453, 149 Fla. 82.
Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.
N.Y.—People v. Silinsky, 216 N.Y.S. 637, 217 App.Div. 247, motion granted 155 N.E. 882, 144 N.Y. 524—Sweet v. Hollearn, 254 N.Y.S. 625, 142 Misc. 408.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 188 Okl. 690.
Pa.—Hoch v. Levan, Com.Pl., 32 Berks Co. 209.
Tex.—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.
32 C.J. p 349 note 57, p 350 note 76—p 351 note 81.

Prima facie case held shown

U.S.—Getz v. City of Harvey, C.C.A. Ill., 118 F.2d 817, certiorari denied City of Harvey v. Getz, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L. Ed. 504.
Ga.—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37—Harrell v. Rose Bros. & Co., 122 S.E. 240, 157 Ga. 640.
Tex.—Stewart Abstract Co. v. Judicial Commission of Jefferson County, Civ.App., 131 S.W.2d 686.

competent and credible;[54] and what constitutes a preponderance of evidence is a question for the court trying the case, taking into consideration all the circumstances.[55] An injunction should be denied where the evidence is such as to leave it in doubt whether an injunction should be granted.[56] A jurisdictional fact necessary to the allowance of an injunction must be established prima facie before the court may proceed further.[57]

Direct or circumstantial evidence. While it has been said that, in order to justify the granting of an injunction, the evidence must be direct and positive, and not merely on information and belief,[58] either direct or circumstantial evidence may be sufficient to authorize the granting of an injunction.[59]

Hearsay evidence alone may be insufficient to establish a fact in an injunction suit,[60] but, when no objection is made thereto, it is, like any other evidence, to be considered and given the importance it deserves.[61]

Particular evidence held insufficient. Likewise, in accordance with the general principles stated at the opening of this section, the evidence in particular cases has been held to warrant the refusal of an injunction or insufficient to warrant the issuance of an injunction or to establish particular facts or support particular findings in actions for injunctions as to actions and other legal proceedings;[62] injunctions with relation to property, conveyances, and encumbrances,[63] such, for example, as the prevention of trespasses,[64] requiring the removal of encroachments,[65] or preventing the cutting of timber;[66] injunctions as to contracts,[67] as, for example, covenants and restrictions with reference to the use of real property,[68] contracts as to the sale

54. U.S.—Great Northern R. Co. v. Local Great Falls Lodge International Machinists' Ass'n No. 287, D.C.Mont., 283 F. 557.

55. U.S.—Walling v. Builders' Veneer & Woodwork Co., D.C.Wis., 45 F.Supp. 808.

32 C.J. p 350 note 59.

56. U.S.—Motor Parts Co. v. Bendix Home Appliances, D.C.Del., 36 F. Supp. 649.

Ga.—England v. Atkinson, 26 S.E.2d 431.

Mo.—Steele v. Allison, 73 S.W.2d 842, 228 Mo.App. 656.

N.J.—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A. 210, 132 N.J.Eq. 302—Central Bus Operators v. Central Ave. Bus Owners Ass'n, 11 A.2d 732, 127 N.J. Eq. 144, affirmed 15 A.2d 608, 128 N.J.Eq. 177.

Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 188 Okl. 690.

Pa.—Hoch v. Levan, Com.Pl., 32 Berks Co. 209.

32 C.J. p 350 note 69.

Proof beyond a reasonable doubt as the term is used in the criminal law is not required.—Fainblatt v. Leo Sportswear Co., 36 N.Y.S.2d 695, 178 Misc. 760.

57. W.Va.—Ward v. Ohio River R. Co., 14 S.E. 142, 35 W.Va. 481.

58. Fla.—Doke v. Peek, 34 So. 896, 45 Fla. 244.

59. Ill.—Spring Valley Coal Co. v. Framasetta, 182 Ill.App. 539.

60. Or.—Parker v. Furlong, 62 P. 490, 37 Or. 248.

32 C.J. p 350 note 74.

61. N.J.—Smith v. Delaware & Atlantic Telegraph & Telephone Co., 51 A. 464, 63 N.J.Eq. 93, affirmed 53 A. 818, 64 N.J.Eq. 770.

62. U.S.—Cohn v. Kramer, D.C. Mich., 41 F.Supp. 782, affirmed, C.C.A., 124 F.2d 791.

Fla.—Quinn R. Barton, Inc. v. Johnson, 196 So. 489, 143 Fla. 245.

Iowa.—Farber v. Ritchie, 238 N.W. 436, 212 Iowa 1396.

Kan.—Fox v. Hammers, 87 P.2d 512, 149 Kan. 497—Missouri-Kansas-Texas R. Co. v. Ball, 271 P. 313, 126 Kan. 745.

La.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.

N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N. J.Eq. 283—Bell v. Merchants Building & Loan Ass'n of West Hudson, 28 A.2d 295, 132 N.J.Eq. 356, affirmed 32 A.2d 364, 133 N.J.Eq. 345—Van Name v. Federal Deposit Ins. Corporation, 23 A.2d 261, 130 N.J.Eq. 433, affirmed 28 A.2d 210, 132 N.J.Eq. 302—Sholk v. Cayer, 166 A. 152, 113 N.J.Eq. 170.

Pa.—Baltimore & O. R. Co. v. Barry, Com.Pl., 87 Pittsb.Leg.J. 351.

R.I.—Bacon v. Ætna Loan & Finance Co., 13 A.2d 813, 65 R.I. 159.

Tenn.—Gregory v. Merchants State Bank, 135 S.W.2d 465, 23 Tenn.App. 567—McRae v. Knoxville Finance Co., 10 Tenn.App. 79.

63. U.S.—J. C. Penney Co. v. Arbetter, C.C.A.Tex., 24 F.2d 81.

Ariz.—Takiguchi v. State, 55 P.2d 802, 47 Ariz. 302.

N.J.—Tomburo v. Liberty Freehold Theatre Corporation, 25 A.2d 909, 131 N.J.Eq. 513.

Or.—Ross v. Collman, 3 P.2d 1112, 137 Or. 646.

64. Del.—Maisano v. Spain, 150 A. 20, 17 Del.Ch. 133.

65. Neb.—Resnick v. Kazakes, 243 N.W. 861, 123 Neb. 654, rehearing 240 N.W. 585, 122 Neb. 489.

66. Ark.—McGill v. Grigsby, 168 S. W.2d 809, 205 Ark. 349—Halbrook v. Lewis, 163 S.W.2d 171, 204 Ark. 579—Foster-Thompson Lumber Co. v. Brigham, 5 S.W.2d 914, 177 Ark. 27.

Ga.—Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 18 S.E.2d 774, 193 Ga. 404.

Ky.—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841.

La.—Bennett v. Bennett, App., 14 So. 2d 272.

Me.—Brown v. Chadbourne, 122 A. 625, 123 Me. 214.

Mich.—Wilcox v. Vinkemulder, 229 N.W. 599, 250 Mich. 182.

Or.—Sandy Holding Co. v. Ferro, 25 P.2d 561, 144 Or. 466.

67. Fla.—Florida Nat. Bldg. Corporation v. Miami Beach First Nat. Bank, 9 So.2d 563, 151 Fla. 276, amendment of judgment denied 10 So.2d 311, 151 Fla. 520.

Ill.—Ellis Electrical Laboratory Sales Corporation v. Ellis, 269 Ill. App. 417.

N.J.—Weissman v. Grunt, 151 A. 848, 107 N.J.Eq. 104—Morgan Realty Co. v. Pazen, 139 A. 712, 102 N.J. Eq. 33.

N.Y.—Affiliated Ladies' Apparel Carriers Ass'n v. National Dress Mfrs. Ass'n, 299 N.Y.S. 914, 164 Misc. 785.

N.C.—Carolina Power & Light Co. v. Johnston County Electric Membership Corporation, 192 S.E. 105, 211 N.C. 717.

Pa.—Flyte v. Bean, Com.Pl., 54 Montg.Co. 337.

Tex.—Aldridge Seed Farms v. Texas Centennial Central Exposition, Civ. App., 95 S.W.2d 1051.

68. Cal.—Du Ross v. Trainor, 10 P. 2d 763, 122 Cal.App. 732.

Ga.—England v. Atkinson, 26 S.E.2d 431—Jones v. Lanier Development Co., 11 S.E.2d 11, 190 Ga. 887—

of good will or to refrain from engaging in a competing business,[69] contracts by employees against competition or solicitation of customers,[70] or contracts for personal services;[71] injunctions as to corporate franchises, management, and dealings;[72] injunctions as to matters affecting public welfare, property, and rights,[73] as, for example, injunctions against the unlawful practice of law,[74] or other professions;[75] injunctions against the violation of the Federal Securities Act[76] or other federal regulations;[77] injunctions affecting personal rights and duties;[78] injunctions as to public officers, boards, and municipalities,[79] as, for example, to prevent the enforcement of statutes or ordinances;[80] injunctions

Randall v. Atlanta Advertising Service, 125 S.E. 462, 159 Ga. 217.
Ill.—Reis v. Bixhorn, 271 Ill.App. 279.
La.—Cambais v. Douglas, 120 So. 369, 167 La. 791.
Md.—Jones v. Northwest Real Estate Co., 131 A. 446, 149 Md. 271.
Mich.—Shedd v. Krushinski, 298 N. W. 490, 298 Mich. 160—White v. Evangelical Lutheran Salem Church, 214 N.W. 245, 239 Mich. 216—Zwickey v. Sullivan, 211 N. W. 746, 237 Mich. 333.
Mo.—Mathews Real Estate Co. v. National Printing & Engraving Co., 48 S.W.2d 911, 330 Mo. 190, 81 A. L.R. 1039—Britton v. School Dist. of University City, 44 S.W.2d 33, 328 Mo. 1185—Prendergast v. Blomberg, App., 141 S.W.2d 156.
N.J.—Bright v. Forest Hill Park Development Co., 31 A.2d 190, 133 N.J.Eq. 170—Bennett v. Haerlin, 164 A. 461, 112 N.J.Eq. 285, reversing 152 A. 164, 107 N.J.Eq. 224.
N.Y.—Smith v. Lazos, 11 N.Y.S.2d 712, 256 App.Div. 1099, reargument denied 13 N.Y.S.2d 288, 257 App. Div. 963.
Tex.—Baker v. Henderson, Civ.App., 125 S.W.2d 660, affirmed 153 S.W. 2d 465, 137 Tex. 266—Goodman v. Bingle, Civ.App., 48 S.W.2d 432—Johnson v. Poteet, Civ.App., 279 S.W. 902.
Wis.—Burden v. Doucette, 2 N.W.2d 204, 240 Wis. 230.
32 C.J. p 351 note 80 [b] (2).

69. U.S.—Goldberg v. Tri-States Theatre Corporation, C.C.A.Neb., 126 F.2d 26.
La.—Simmons v. Johnson, App., 11 So.2d 710.
Mich.—Stoia v. Miskinis, 298 N.W. 469, 298 Mich. 105.

70. U.S.—Briggs v. Boston, D.C. Iowa, 15 F.Supp. 763.
Cal.—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 218 Cal. 568.
Mo.—Athletic Tea Co. v. Cole, App., 16 S.W.2d 735.
R.I.—Horvitz v. Horvitz, 173 A. 318.
Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.

71. Iowa.—Dunkelbarger v. Ladd, 212 N.W. 726, 204 Iowa 1208.

72. U.S.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.
La.—Cogswell v. Texas & N. O. R. Co., 8 So.2d 645, 200 La. 696.
N.Y.—Epstein v. Schenck, 35 N.Y.S. 2d 969.
Tex.—State v. San Antonio Public Service Co., Com.App., 69 S.W.2d 38, affirming San Antonio Public Service Co. v. State, Civ.App., 62 S.W.2d 585.
Wash.—Depositors Bond Co. v. Christensen, 53 P.2d 312, 185 Wash. 161.

73. U.S.—Fogarty v. Southern Bell Telephone & Telegraph Co., D.C. La., 34 F.Supp. 251.
Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.
N.D.—McIntyre v. State Board of Higher Education, 3 N.W.2d 463, 71 N.D. 630.
Okl.—City of Enid v. Champlin Refining Co., 240 P. 604, 112 Okl. 168.
Tex.—Dickson v. Strickland, 265 S. W. 1012, 114 Tex. 176.
Wash.—Strickler v. Schaaf, 91 P.2d 1007, 199 Wash. 372, 123 A.L.R. 226.

74. Ga.—Sharp-Boylston Co. v. Haldane, 187 S.E. 68, 182 Ga. 833.
N.D.—Cain v. Merchants Nat. Bank & Trust Co. of Fargo, 268 N.W. 719, 66 N.D. 746.

75. Iowa.—State ex rel. Bierring v. Ritholz, 283 N.W. 268, 226 Iowa 70, 121 A.L.R. 1450.
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.

76. U.S.—Securities and Exchange Commission v. Macon, D.C.Colo., 28 F.Supp. 127—Securities and Exchange Commission v. Otis & Co., D.C.Ohio, 18 F.Supp. 100, affirmed, C.C.A., Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579.

77. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014—Brown v. Hannum, D.C.Tex., 50 F.Supp. 697—Henderson v. J. B. Beaird Corporation, D.C.La., 48 F. Supp. 252.

78. U.S.—Turner v. Keefe, D.C.Fla., 50 F.Supp. 647.

79. U.S.—Rood v. Goodman, C.C.A. Tex., 83 F.2d 28, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 405—Wallace v. Ford, D.C.Tex., 21 F.Supp. 624.
Ark.—Greer v. City of Texarkana, 147 S.W.2d 1094, 201 Ark. 1041.
Ga.—Crump v. State Highway Department, 12 S.E.2d 310, 191 Ga. 130.
Ill.—United Artists Corporation v. Thompson, 171 N.E. 742, 339 Ill. 595—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443—Benton v. Kaneville Community High School Dist. No. 147, 250 Ill. App. 6—Gage v. Village of Wilmette, 233 Ill.App. 30.
Kan.—State v. Hemphill, 237 P. 905, 119 Kan. 223.
Ky.—Meade County Board of Education v. Powell, 71 S.W.2d 638, 254 Ky. 352.
La.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491.
Minn.—Linster v. Luecke, 243 N.W. 395, 186 Minn. 386.
Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738—Drainage Dist. No. 28 of New Madrid County v. Drainage Dist. No. 23 of Stoddard County, App., 146 S.W.2d 858, transferred, see Sup., 144 S.W.2d 61.
N.Y.—International Mutoscope Reel Co. v. Valentine, 286 N.Y.S. 806, 247 App.Div. 130, affirmed 3 N.E.2d 453, 271 N.Y. 622, amendment of remittitur denied 3 N.E.2d 885, 272 N.Y. 494.
N.C.—Parker v. Debnam, 141 S.E. 535, 195 N.C. 56.
N.D.—Russell v. City of Fargo, 148 N.W. 610, 28 N.D. 300.
Okl.—Brooks v. Shannon, 86 P.2d 792, 184 Okl. 255—Hayes v. Dalke, 1 P.2d 642, 150 Okl. 251—Moore v. Porterfield, 257 P. 307, 125 Okl. 217—Boyle v. Rock Island Coal Mining Co., 256 P. 883, 125 Okl. 137.
Tex.—Shaw v. Hinton, Civ.App., 31 S.W.2d 478.

80. U.S.—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F.2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651—Faria v. Violette, D.C.Mass., 32 F.Supp. 239.
Kan.—Cole v. City of Topeka, 88 P. 2d 1044, 149 Kan. 705—Ramsey v. City of Oxford, 261 P. 572, 124 Kan. 713.
Mo.—Yowell v. Mace, 290 S.W. 96, 221 Mo.App. 85.
N.Y.—Yankee Doodle Boys v. McLaughlin, 215 N.Y.S. 257, 127 Misc. 84.
Tex.—De Shong Motor Freight Line v. Whisnand, Civ.App., 98 S.W.2d 839.

against the enforcement of zoning ordinances and building regulations;[81] injunctions against the violation of zoning ordinances and building regulations;[82] injunctions against interference with trade, business, or occupation;[83] injunctions in labor disputes,[84] such as injunctions against strikes,[85] boycotts,[86] or picketing,[87] or against the disclosure or use of trade secrets;[88] injunctions against criminal acts and conspiracies;[89] or injunctions against criminal prosecutions, arrests, and judgments.[90] Likewise the evidence has been held insufficient to show such particular facts as plaintiff's title,[91] waiver or modification of restrictive covenants,[92] change in character and environment of property,[93] or the

Va.—Stickley v. Givens, 11 S.E.2d 681, 176 Va. 548.

81. Ill.—Pollack v. DuPage County, 25 N.E.2d 895, 304 Ill.App. 250, transferred, see 20 N.E.2d 273, 371 Ill. 199.

La.—Charbonnet v. City of New Orleans, 147 So. 345, 176 La. 1050.

N.D.—Russell v. Fargo, 148 N.W. 610, 28 N.D. 300.

Tex.—City of Dallas v. Meserole Bros., Civ.App., 164 S.W.2d 564, error refused.

82. Ill.—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179.

83. U.S.—Gibson v. Smoot Engineering Corporation, D.C.Del., 50 F.2d 203—Cheney Co. v. Cunningham, D.C.Pa., 37 F.Supp. 224, affirmed, C.C.A., 127 F.2d 294.

Ala.—Ashcraft v. Chamblee, 105 So. 694, 213 Ala. 601.

84. U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557—Heintz Mfg. Co. v. Local No. 515 of United Automobile Workers, D.C.Pa., 20 F.Supp. 116—U. S. v. Weirton Steel Co., D.C.Del., 10 F.Supp. 55—Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union, D.C.N.J., 8 F.Supp. 209.

Ill.—Barnett v. Pitcairn, 32 N.E.2d 979, 309 Ill.App. 201.

Md.—Seymour Ruff & Sons v. Bricklayers', Masons' & Plasterers' International Union of America, 164 A. 752, 163 Md. 687.

Minn.—George T. Ross Lodge No. 831, Brotherhood of Railroad Trainmen, v. Brotherhood of Railroad Trainmen, 254 N.W. 590, 191 Minn. 373.

N.J.—Chew v. Manhattan Laundries, 32 A.2d 194, 133 N.J.Eq. 326, modified on other grounds 36 A.2d 205, 134 N.J.Eq. 566—Bayer v. Brotherhood of Painters, Decorators, and Paperhangers of America, Local 301, 154 A. 759, 108 N.J.Eq. 257.

N.Y.—Miller v. Fish Workers Union of Greater New York, Local 635, 11 N.Y.S.2d 278, 170 Misc. 713.

Wash.—Building Service Employees International Union, Lodge No. 6, v. Seattle Hospital Council, 138 P.2d 891—Seattle Street Railway & Municipal Employees Relief Ass'n v. Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, 101 P.2d 338, 3 Wash.2d 520.

Wis.—David Adler & Sons Co. v. Maglio, 228 N.W. 123, 200 Wis. 153, 66 A.L.R. 1085.

85. N.Y.—Paylay Hats v. Zaritsky, 271 N.Y.S. 786, 151 Misc. 569.

86. W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.

87. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120—Chrisman v. Culinary Workers' Local Union No. 62, 115 P.2d 553, 46 Cal.App.2d 129.

Fla.—Weissman v. Jureit, 181 So. 898, 132 Fla. 661.

Ga.—Mason and Dixon Lines v. Odom, 18 S.E.2d 841, 193 Ga. 471.

Ill.—2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 35 N.E.2d 373, 377 Ill. 37—Baker v. Retail Clerks' International Protective Ass'n, Local Union No. 1000, Eldorado, 40 N.E.2d 571, 313 Ill.App. 432—Rosen v. United Shoe and Leather Workers Union, Local 48, 4 N.E.2d 507, 287 Ill.App. 49.

Ind.—Local No. 1460 of Retail Clerks Union v. Roth, 39 N.E.2d 775, 219 Ind. 642, certiorari denied Roth v. Local No. 1460 of Retail Clerks Union, 63 S.Ct. 41, 317 U.S. 646, 87 L.Ed. 520—Local No. 1460 of Retail Clerks Union v. Roth, 31 N.E.2d 986, 218 Ind. 275—Scofes v. Helmar, 187 N.E. 662, 205 Ind. 596, vacating 153 N.E. 802.

Mo.—Purcell v. Journeymen Barbers and Beauticians International Union of America, Local 192-A, 133 S.W.2d 662, 234 Mo.App. 843.

N.J.—Vim Electric Co. v. Retail Employees Union Local 830, 16 A.2d 798, 128 N.J.Eq. 450—Rossi v. Waiters', Waitresses' and Cooks' Union Local No. 508, of Hotel and Restaurant Employees' International Alliance, 1 A.2d 421, 124 N.J.Eq. 264.

N.Y.—Miller v. Gallagher, 28 N.Y.S.2d 606, 176 Misc. 647.

Ohio.—Morris v. Retail Clerks' International Protective Ass'n, Local No. 450, 33 N.E.2d 851, 67 Ohio App. 472, appeal dismissed 30 N.E.2d 993, 137 Ohio St. 540.

Wash.—Edwards v. Teamsters Local Union No. 313, 113 P.2d 28, 8 Wash.2d 492.

88. U.S.—Detachable Bit Co. v. Timken Roller Bearing Co., C.C.A.Ohio, 133 F.2d 632, affirming, D.C., 41 F.Supp. 37.

Mass.—Commonwealth Laundry Co. v. Daggett, 186 N.E. 41, 283 Mass. 79.

Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.

Minn.—Radium Remedies Co. v. Weiss, 217 N.W. 339, 173 Minn. 342.

Mo.—Godefroy Mfg. Co. v. Lady Lennox Co., App., 134 S.W.2d 140—Kansas City Laundry Service Co. v. Jeserich, 247 S.W. 447, 213 Mo.App. 71.

N.Y.—Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 235 N.Y. 1, affirming 188 N.Y.S. 678, 197 App.Div. 66.

89. Ky.—McDaniel v. Sams, 82 S.W.2d 215, 259 Ky. 56.

90. U.S.—Fenner v. Boykin, D.C.Ga., 3 F.2d 674.

91. Ga.—Hutchinson v. Clark, 150 S.E. 905, 169 Ga. 511—Sheffield v. First Nat. Bank, 121 S.E. 809, 157 Ga. 422.

Ky.—Steele v. Ferrell, 156 S.W.2d 153, 288 Ky. 392.

Mass.—Howes v. Town of Barnstable, 189 N.E. 34, 285 Mass. 361.

Mich.—Pakulski v. Ludwiczewski, 289 N.W. 231, 291 Mich. 502.

N.Y.—Confer v. Pirman, 7 N.E.2d 706, 273 N.Y. 587, affirming 286 N.Y.S. 192, 247 App.Div. 825.

Pa.—Mecke v. Heist, Com.Pl., 54 Montg.Co. 275.

R.I.—Melidossian v. Stade, 152 A. 737.

S.C.—Battle v. DeVane, 138 S.E. 821, 140 S.C. 305.

Tex.—Schroeder v. Rosenbaum, Civ. App., 16 S.W.2d 328.

32 C.J. p 351 note 80 [a] (3), [c].

92. Mich.—Michiana Shores Estates v. Robbins, 287 N.W. 547, 290 Mich. 384.

N.J.—Dottsloff v. Hockstetter, 124 A. 770, 6 N.J.Eq. 391.

N.M.—Alamogordo Imp. Co. v. Prendergast, 109 P.2d 254, 45 N.M. 40.

Or.—Menstell v. Johnson, 262 P. 853, 125 Or. 150, 57 A.L.R. 311, modified on other grounds and rehearing denied 266 P. 891, 125 Or. 150, 57 A.L.R. 311.

Pa.—St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa.Super. 146.

Tex.—Sayles v. Owens, Civ.App., 161 S.W.2d 542, error refused.

93. Cal.—Du Ross v. Trainor, 10 P.2d 763, 122 Cal.App. 732.

likelihood of irreparable injury.[94]

Particular evidence held sufficient. In accordance with the general principles hereinbefore stated, the evidence in particular cases has been held sufficient to warrant the issuance of an injunction or to establish facts or to support particular findings in actions for injunctions as to actions and other legal proceedings;[95] injunctions with relation to property, conveyances, and encumbrances,[96] such, for example, as the prevention of trespasses,[97] interference with possession,[98] requiring the removal of encroachments,[99] preventing the destruction of shade trees,[1] the cutting of timber,[2] or interference with a right to cut timber;[3] injunctions as to contracts,[4] as, for example, covenants and restrictions with reference to the use of real property,[5] contracts as to the sale of good will or to re-

D.C.—Kenealy v. Chevy Chase Land Co. of Montgomery County, 72 F.2d 378, 63 App.D.C. 327.
Ill.—O'Neill v. Wolf, 170 N.E. 669, 338 Ill. 508.
Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.
Ky.—Mechling v. Dawson, 28 S.W.2d 18, 234 Ky. 318.
Mich.—Smith v. Lynch, 206 N.W. 362, 233 Mich. 6.
Mo.—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545—Pierce v. St. Louis Union Trust Co., 278 S.W. 398, 311 Mo. 262—Milligan v. Balson, 264 S.W. 73, 214 Mo.App. 627.
Okl.—Southwest Petroleum Co. v. Logan, 71 P.2d 759, 180 Okl. 477.
Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.
Pa.—Neff v. Gorman, 154 A. 293, 303 Pa. 186.
Tenn.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239.

94. U.S.—Massachusetts State Grange v. Benton, Mass., 47 S. Ct. 189, 272 U.S. 525, 71 L.Ed. 387, affirming, D.C., 10 F.2d 515.
Wyo.—Alaska Development Co. v. Brannan, 275 P. 115, 40 Wyo. 106.
32 C.J. p 351 note 80 [a] (2).

95. U.S.—American Optometric Ass'n v. Ritholz, C.C.A.Ill., 101 F. 2d 883, certiorari denied Ritholz v. American Optometric Ass'n, 59 S. Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527, rehearing denied 60 S.Ct. 70, 308 U.S. 634, 84 L.Ed. 527.
Ga.—Bowman v. Givens, 9 S.E.2d 833, 190 Ga. 522—Hollingsworth v. Peoples Bank of Carrollton, 183 S.E. 492, 181 Ga. 601.
Ill.—De Lia v. Toolen, 30 N.E.2d 763, 307 Ill.App. 491—Traders' Safety Building Corporation v. Shirk, 237 Ill.App. 1.
Mich.—Bennett v. Haines, 196 N.W. 206, 225 Mich. 185.
N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518—Sholk v. Cayer, 166 A. 152, 113 N.J.Eq. 170—New Jersey Zinc Co. v. Fancher, 128 A. 172, 97 N.J.Eq. 508, affirming 125 A. 9, 96 N.J.Eq. 65.
N.Y.—Ashkenas v. Ashkenas, 41 N. Y.S.2d 388, 180 Misc. 580.
Wash.—Burdick v. Burdick, 267 P. 767, 148 Wash. 15.

96. Ga.—West v. Haas, 13 S.E.2d 376, 191 Ga. 569.
Ind.—Beard v. Link, 141 N.E. 792, 81 Ind.App. 293.
Pa.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A. 2d 520, 133 Pa.Super. 18.

97. Ga.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163.
Ky.—Leach v. Taylor, 266 S.W. 894, 206 Ky. 28.
La.—Churchill Farms v. Gaudet, 168 So. 123, 184 La. 984.
Okl.—Sunderland v. Bishop, 227 P. 398, 100 Okl. 54.
Or.—Austin v. Bloch, 105 P.2d 868, 165 Or. 116—Big Butte Horse & Cattle Ass'n v. Anderson, 289 P. 503, 133 Or. 171, 70 A.L.R. 399.
Va.—Johnson v. Burson, 129 S.E. 251, 143 Va. 57.

98. Ark.—Reed v. Ziff Lodge, No. 119, Order of Masons, 1 S.W.2d 1000, 175 Ark. 979.
Colo.—Perry v. Bunten, 85 P.2d 731, 103 Colo. 279.
Ga.—Henderson v. James, 139 S.E. 34, 164 Ga. 575.
Pa.—Smith v. Stelma, Com.Pl., 36 Luz.Leg.Reg. 293.

99. Ala.—Dreyer v. Vaughn, 145 So. 446, 226 Ala. 38.

1. Neb.—Weisel v. Hobbs, 294 N.W. 448, 138 Neb. 656.

2. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581.
Ky.—U. S. Trust Co. v. Frakes, 139 S.W.2d 759, 282 Ky. 683.
Mass.—Smith v. Wells, 145 N.E. 50, 250 Mass. 151.
R.I.—Albro v. Matteson, 13 A.2d 391, 64 R.I. 494.

3. Tex.—Conn v. Southern Pine Lumber Co., Civ.App., 11 S.W.2d 199.

4. U.S.—Moore v. New York Cotton Exchange, N.Y., 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370, affirming, C.C.A., 296 F. 61, which affirmed, D.C., 291 F. 681—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.
Colo.—Western Seed Co. v. Co-Operative Farmers' Exchange, 256 P. 329, 81 Colo. 448—Fort v. Co-Operative Farmers' Exchange, 256 P. 319, 81 Colo. 431.
D.C.—Meyer v. Washington Times Co., 76 F.2d 988, 64 App.D.C. 218, certiorari denied Washington Times Co. v. Meyer, 55 S.Ct. 646, 295 U.S. 734, 79 L.Ed. 1682.
Fla.—Lincoln Tower Corporation v. Richter's Jewelry Co., 12 So.2d 452.
Ga.—Allison v. Cassels, 149 S.E. 557, 169 Ga. 6—Edwards Mfg. Co. v. Hood, 145 S.E. 87, 167 Ga. 144.
Kan.—Peoples Ice & Fuel Co. v. Dickey Oil Co., 65 P.2d 319, 145 Kan. 351—Continental & Commercial Trust & Savings Bank v. Garden City Co., 256 P. 983, 123 Kan. 659.
La.—Balser v. Shreveport Oil Co., 113 So. 356, 163 La. 1008.
Mich.—Morris v. Levin, 211 N.W. 107, 236 Mich. 490.
Miss.—Kendrick v. Robertson, 111 So. 99, 145 Miss. 585.
Mo.—McBride Realty Co. v. Grace, 15 S.W.2d 957, 223 Mo.App. 508.
S.D.—Ewing v. Waddington, 252 N. W. 28, 62 S.D. 166.
Tex.—Duggan v. Buckner, Civ.App., 155 S.W.2d 661, error refused.

5. Ark.—Moore v. Adams, 141 S.W. 2d 46, 200 Ark. 810.
Cal.—Martin v. Holm, 242 P. 718, 197 Cal. 733—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
Ill.—Lee v. Hansberry, 24 N.E.2d 37, 372 Ill. 369, certiorari granted Hansberry v. Lee, 60 S.Ct. 889, 309 U.S. 652, 84 L.Ed. 1002, reversed on other grounds 61 S.Ct. 115, 311 U.S. 32, 85 L.Ed. 22, 132 A.L.R. 741—Doran v. Graham, 195 Ill.App. 65.
Iowa.—Curtis v. Schmidt, 237 N.W. 463, 212 Iowa 1279.
Kan.—Clark v. Vaughan, 292 P. 783, 131 Kan. 438.
Mass.—Snow v. Van Dam, 197 N.E. 224, 291 Mass. 477.
Mich.—Fenwick v. Leonard, 237 N.W. 381, 255 Mich. 85—Bunce v. Jones, 213 N.W. 125, 238 Mich. 337—Schulte v. Starks, 213 N.W. 102, 238 Mich. 102—Signaigo v. Begun, 207 N.W. 799, 234 Mich. 246.
Mo.—Palfrey v. Killian, 27 S.W.2d 462, 224 Mo.App. 325.
N.J.—Durham Essex Corporation v. Schaffer, 133 A. 754, 99 N.J.Eq. 602.

frain from engaging in a competing business,[6] contracts by employees against competition or solicitation of customers,[7] or contracts for personal services;[8] injunctions as to corporate franchises, management, and dealings;[9] injunctions as to public officers, boards, and municipalities,[10] as, for example, to prevent the enforcement of statutes or ordinances;[11] injunctions as to matters affecting public welfare, property, and rights,[12] as, for example, injunctions against the unlawful practice of law,[13] medicine,[14] or other professions;[15] injunctions against the violation of the Fair Labor Standards Act;[16] injunctions against the violation of the

N.Y.—Neilson v. Hiral Realty Corporation, 16 N.Y.S.2d 462, 172 Misc 408—Hofmann v. Hofmann, 14 N.Y.S.2d 565, 172 Misc. 378, affirmed 19 N.Y.S.2d 130, 259 App.Div. 820, modified on other grounds 28 N.E 2d 964, 283 N.Y. 730, motion denied 29 N.E.2d 668, 284 N.Y. 593—Murphy v. Hitchcock, 268 N.Y.S. 385, 150 Misc. 36.

Okl.—Vaughn v. Lyon, 252 P. 1088, 122 Okl. 179.

Tenn.—Ridley v. Haiman, 47 S.W.2d 750, 164 Tenn. 239.

Tex.—Plaster v. Stutzman, Civ.App., 8 S.W.2d 750.

W.Va.—Wolfe v. Landers, 20 S.E.2d 124, 124 W.Va. 290.

Wis.—Mueller v. Schier, 205 N.W. 912, 189 Wis. 70.

32 C.J. p 350 note 77 [h].

6. Cal.—Stephens v. Bean, 224 P. 1022, 65 Cal.App. 779.

Iowa.—Haggin v. Derby, 229 N.W. 257, 209 Iowa 939.

Ky.—Proctor v. Allen, 289 S.W. 300, 217 Ky. 180.

La.—Hickman v. Branan, App., 151 So. 113.

Md.—Anderson v. Truitt, 148 A. 223, 158 Md. 193.

Mass.—Saltman v. Smith, 46 N.E.2d 550, 313 Mass. 135—New England Tree Expert Co. v. Russell, 28 N.E.2d 997, 306 Mass. 504.

Mich.—Sewall v. Feller, 284 N.W. 662, 288 Mich. 107.

Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178, 209 Minn. 470.

Mo.—Kreger Glass Co. v. Kreger, App., 49 S.W.2d 260.

Neb.—Gable v. Carpenter, 287 N.W. 70, 136 Neb. 669.

N.Y.—Topol v. Smoleroff Development Corporation, 34 N.Y.S.2d 653, 264 App.Div. 164—Manuszewski v. Keele, 13 N.Y.S.2d 852, 257 App. Div. 1036—Holland Furnace Co. v. Beers, 29 N.Y.S.2d 876, 177 Misc. 29.

N.C.—Sineath v. Katzis, 12 S.E.2d 671, 218 N.C. 740.

Or.—Columbia Tent & Awning Co. v. Thiele, 295 P. 501, 135 Or. 511.

Pa.—Nibauer v. Oster, 100 Pa.Super. 86.

R.I.—North Shore Dye House v. Rosenfield, 166 A. 346, 53 R.I. 279.

Tex.—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372, error dismissed—Clay v. Richardson, Civ.App., 290 S.W. 235—Texas Ice & Cold Storage Co. v. McGoldrick, Civ.App., 284 S.W. 615.

7. U.S.—Wahlgren v. Bausch & Lomb Optical Co., C.C.A.Ill., 68 F.2d 660, affirming, D.C., Bausch & Lomb Optical Co. v. Wahlgren, 1 F.Supp. 799, and certiorari denied Wahlgren v. Bausch & Lomb Optical Co., 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.

Cal.—Collester v. Oftedahl, 120 P.2d 710, 48 Cal.App.2d 756.

Ga.—Smithloff v. Weinman, 141 S.E. 205, 165 Ga. 449.

Md.—Tolman Laundry v. Walker, 187 A. 836, 171 Md. 7.

Mich.—Vogue Cleaners & Dyers v. Berkowitz, 291 N.W. 12, 292 Mich. 575.

Mo.—City Ice & Fuel Co. v. McKee, App., 57 S.W.2d 443—City Ice & Fuel Co. v. Snell, App., 57 S.W.2d 440.

N.J.—J. I. Kislak, Inc., v. Muller, 135 A. 673, 100 N.J.Eq. 110.

N.M.—Nichols v. Anderson, 92 P.2d 781, 43 N.M. 296.

N.Y.—Foster v. White, 17 N.E.2d 761, 279 N.Y. 38, reversing 3 N.Y.S.2d 456, 253 App.Div. 448, reargument denied 18 N.E.2d 868, 279 N.Y. 786—Wallace v. Kranz, 234 N.Y.S. 439, 226 App.Div. 125, affirming 233 N.Y.S. 30, 133 Misc. 591.

Tex.—McAnally v. Person, Civ.App., 57 S.W.2d 945, error refused—Carpenter v. Southern Properties, Civ. App., 299 S.W. 440.

Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.

Wash.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.

8. Mass.—Anderson v. Moskovitz, 157 N.E. 601, 260 Mass. 523.

N.Y.—Shubert Theatrical Co. v. Gallagher, 201 N.Y.S. 577, 206 App.Div. 514.

9. Cal.—Festa Do Divino Esperito Santo De Manteca, Manteca, Cal., v. Mendes, 26 P.2d 12, 219 Cal. 276.

Ga.—Free Gift Lodge, No. 25, Brothers and Sisters of Benevolence, v. Edwards, 132 S.E. 206, 161 Ga. 832.

Kan.—Longhofer v. Schick, 193 P. 371, 107 Kan. 601.

Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 20 N.E.2d 482, 303 Mass. 1.

Minn.—Tyler v. Bruce, 204 N.W. 644, 164 Minn. 167.

N.Y.—Brennan v. Barnes, 232 N.Y.S. 112, 133 Misc. 340.

10. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663—Farmers' Livestock Commission Co. v. U. S., D.C.Ill., 54 F.2d 375—Hill City Ry. Co. v. Youngquist, D.C.Minn., 32 F.2d 819.

Ark.—Wylie v. Rural Special School Dist. No. 9, 61 S.W.2d 69, 187 Ark. 445.

Minn.—Burns v. Essling, 194 N.W. 404, 156 Minn. 171.

Okl.—Oklahoma City v. Brown, 297 P. 809, 148 Okl. 148.

Tex.—State v. All the Oil and Products of Oil Situated in Certain Pits in Upshur County, Civ.App., 153 S.W.2d 191, error refused.

11. U.S.—Ingels v. Morf, Cal., 57 S.Ct. 439, 300 U.S. 290, 81 L.Ed. 653, affirming, D.C., Morf v. Ingels, 14 F.Supp. 922—New Hampshire Fire Ins. Co. v. Murray, C.C.A.Wis., 105 F.2d 212—Southern Pac. Co. v. Mashburn, D.C.Nev., 18 F.Supp. 393.

Cal.—Eaton v. Klimm, 18 P.2d 678, 217 Cal. 362.

Ill.—Public Service Co. of Northern Illinois v. Lynch, 242 Ill.App. 28.

Okl.—City of Tulsa v. Bishop's Restaurant No. 4, 65 P.2d 436, 179 Okl. 290—Cain's Coffee Co. v. City of Muskogee, 44 P.2d 50, 171 Okl. 635.

Pa.—Pennsylvania R. Co. v. Driscoll, 9 A.2d 621, 336 Pa. 310—Maurer v. Boardman, 7 A.2d 466, 336 Pa. 17, affirmed Maurer v. Hamilton, 60 S.Ct. 726, 309 U.S. 598, 84 L.Ed. 969, 135 A.L.R. 1347.

12. R.I.—Rhode Island Bar Ass'n v. Lesser, 26 A.2d 6.

13. Mo.—Liberty Mut. Ins. Co. v. Jones, 130 S.W.2d 945, 344 Mo. 932, 125 A.L.R. 1149.

14. Iowa.—State v. Baker, 235 N.W. 313, 212 Iowa 571.

15. Ariz.—Funk Jewelry Co. v. State ex rel. La Prade, 50 P.2d 945, 46 Ariz. 348.

16. U.S.—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404, affirming, D.C., 37 F.Supp. 628—

Federal Securities Act[17] or other federal regulations;[18] injunctions against the sale of securities;[19] injunctions against violation of zoning ordinances and building regulations;[20] injunctions affecting personal rights and duties;[21] injunctions against interference with trade, business, or occupation;[22] injunctions in labor disputes,[23] such as injunctions against strikes,[24] boycotts,[25] or picketing,[26] or

Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Walling v. Woodruff, D.C.Ga. 49 F.Supp. 52—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 609—Walling v. Higgins, D.C.Pa., 47 F.Supp. 856—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C. C.A., 141 F.2d 331—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654—Fleming v. Enterprise Box Co., D.C.Fla., 37 F.Supp. 331, affirmed, C.C.A., Enterprise Box Co. v. Fleming, 125 F.2d 897, certiorari denied Enterprise Box Co. v. Holland, 62 S.Ct. 1312, 316 U.S. 704, 86 L.Ed. 1772.

17. U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519—R. J. Koeppe & Co. v. Securities and Exchange Commission, C.C.A.Ill., 95 F.2d 550—Securities and Exchange Commission v. Pyne, D.C.Mass., 39 F. Supp. 434—Securities and Exchange Commission v. Foundation Plan, D.C.N.Y., 31 F.Supp. 331.

18. U.S.—U. S. v. Krechting, D.C. Ohio, 26 F.Supp. 266, appeal dismissed, C.C.A., J. H. Berling Dairy Products Co. v. U. S., 108 F.2d 1014, and Willer v. U. S., 108 F.2d 1023.

Ill.—Voliva v. WCBD, Inc., 39 N.E. 2d 685, 313 Ill.App. 177.

19. Kan.—Cities Service Co. v. Koeneke, 20 P.2d 460, 137 Kan. 7, 87 A.L.R. 16.

N.J.—Wilentz v. Fairland Management Corporation, 21 A.2d 733, 130 N.J.Eq. 212.

N.Y.—People v. F. H. Smith Co., 243 N.Y.S. 446, 230 App.Div. 268, modifying 240 N.Y.S. 807, 136 Misc. 449—People v. Photocolor Corporation, 281 N.Y.S. 130, 156 Misc. 47—People v. Latta, 244 N.Y.S. 487, 137 Misc. 208.

20. Cal.—Smith v. Collison, 6 P.2d 277, 119 Cal.App. 180.

Idaho.—City of Idaho Falls v. Grimmett, 117 P.2d 461, 62 Idaho 90.

Ill.—City of Highland Park v. Calder, 269 Ill.App. 255.

Va.—Cherrydale Cement Block Co. v. Arlington County Board, 23 S. E.2d 158, 180 Va. 443.

21. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S. Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, and modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Mills v. Board of Education of Anne Arundel County, D.C.Md., 30 F.Supp. 245.

N.Y.—Loftus v. Greenwich Lith. Co., 182 N.Y.S. 428, 192 App.Div. 251.

Ohio.—McGinnis v. Walker, App., 40 N.E.2d 488.

Tex.—Hunt v. Hudgins, Civ.App., 168 S.W.2d 703.

22. Iowa.—Burlington Instrument Corporation v. Debrey, 286 N.W. 473, 226 Iowa 1190.

23. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, 57 S. Ct. 857, 301 U.S. 468, 81 L.Ed. 1229, affirming 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C.A. Va., 125 F.2d 853—System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., D.C.Va., 11 F.Supp. 621, affirmed, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of America Federation of Labor, 84 F.2d 641, certiorari granted 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U. S. 515, 81 L.Ed. 789—Montgomery v. Pacific Electric Ry. Co., C.C.A. Cal., 293 F. 680, certiorari denied 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862.

Ind.—Janalene, Inc., v. Burnett, 41 N. E.2d 942, 220 Ind. 253—Glover v. Parson, 9 N.E.2d 109, 103 Ind.App. 561.

Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236.

N.J.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A. 2d 796, 130 N.J.Eq. 506.

N.Y.—Falciglia v. Gallagher, 299 N. Y.S. 890, 164 Misc. 838—Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 162 Misc. 177—Farulla v. Ralph A. Freundlich, Inc., 279 N. Y.S. 228, 155 Misc. 262—Vail-Ballou Press v. Casey, 212 N.Y.S. 113, 125 Misc. 689—Saito v. Waiters and Waitresses Union Local No. 2 of Brooklyn and Queens, 12 N.Y.S. 2d 283.

Wis.—Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.

24. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A.Ill., 182 F.2d 265, certiorari granted Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R., 63 S.Ct. 995, 318 U.S. 755, 87 L.Ed. 1129, reversed on other grounds 64 S. Ct. 413, 321 U.S. 50, 88 L.Ed. ——.

Del.—Sarros v. Nouris, 138 A. 607, 15 Del.Ch. 391.

25. Cal.—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal.App.2d 137.

26. U.S.—Knapp-Monarch Co. v. Anderson, D.C.Ill., 7 F.Supp. 332.

Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389, prior opinion, App., 89 P.2d 425.

Ill.—Ellingsen v. Milk Wagon Drivers' Union of Chicago, Local 753, 35 N.E.2d 349, 377 Ill. 76.

Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

Mo.—Joe Dan Market v. Wentz, 20 S.W.2d 567, 223 Mo.App. 772, transferred, see 13 S.W.2d 641, 321 Mo. 943.

N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J. Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

N.Y.—Wise Shoe Co. v. Lowenthal, 194 N.E. 749, 266 N.Y. 264, modifying 272 N.Y.S. 612, 242 App.Div. 660—Stalban v. Friedman, 11 N.Y. S.2d 343, 171 Misc. 106, reversed on other grounds 19 N.Y.S.2d 978, 259 App.Div. 520—Tree-Mark Shoe Co. v. Schwartz, 248 N.Y.S. 56, 139 Misc. 136—Bolivian Panama Hat Co. v. Finkelstein, 215 N.Y.S. 399, 127 Misc. 337—Silver Dollar Bake Shop v. Weissman, 27 N.Y.S.2d 744.

Tex.—International Ass'n of Machinists Union, Local No. 1488, v. Federated Ass'n of Accessory Workers, Civ.App., 109 S.W.2d 301, appeal dismissed International Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory

against the disclosure or use of trade secrets;[27] or injunctions against criminal acts and conspiracies.[28] Likewise the evidence has been held sufficient to show such particular facts as authority to sue,[29] plaintiff's title,[30] waiver of restrictive covenants,[31] change in character and environment of property,[32] special damage to plaintiff,[33] the likelihood of irreparable injury,[34] or the existence of a labor dispute.[35]

b. Preliminary Injunctions

To warrant issuance of a preliminary injunction, at least a prima facie case should be made out; but it is not necessary that a case be made out that would entitle complainant to relief at all events on the final hearing.

On an application for a preliminary injunction, it is not necessary that a case should be made out that would entitle complainant to relief at all events on the final hearing.[36] A preliminary injunction may issue to maintain the status quo where complainant has made out a prima facie case,[37] or where from the pleadings and the evidence it appears to the court that a case is presented proper for its investigation on a final hearing,[38] and there is no ap-

Workers, 130 S.W.2d 282, 133 Tex. 624.

27. U.S.—Mitchell Metal Products v. Berkeley Equipment Co., D.C.Pa., 36 F.Supp. 1010.
Cal.—Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 24 P.2d 489, 218 Cal. 568—Riess v. Sanford, 117 P.2d 694, 47 Cal.App.2d 244.
Ill.—Boylston Coal Co. v. Rautenbush, 237 Ill.App. 550.
Minn.—Radium Remedies Co. v. Weiss, 217 N.W. 339, 173 Minn. 342.
Mo.—Charles Reilly Optical Co. v. Burke, App., 41 S.W.2d 909.
N.J.—Club Razor & Blade Mfg. Corporation v. Bindzsus, 25 A.2d 31, 131 N.J.Eq. 283, affirmed 30 A.2d 31, 133 N.J.Eq. 38—Maas & Waldstein Co. v. Walker, 135 A. 275, 100 N.J.Eq. 224, affirmed 140 A. 921, 102 N.J.Eq. 328—Kellems Products v. Coley, 160 A. 639, 10 N.J.Misc. 695.
N.Y.—Conviser v. J. C. Brownstone & Co., 205 N.Y.S. 82, 209 App.Div. 584—Rubner v. Gursky, 21 N.Y.S.2d 558.
Pa.—Belmont Laboratories v. Heist, 151 A. 15, 300 Pa. 542, reheard 154 A. 19, 303 Pa. 7.
32 C.J. p 350 note 77 [1].

28. Neb.—Chicago, B. & Q. R. Co. v. Davis, 197 N.W. 599, 111 Neb. 737.
Or.—Phegley & Cavender v. Swender Blue Print Co., 289 P. 500, 133 Or. 146.
Tex.—McCloskey v. San Antonio Public Service Co., Civ.App., 51 S.W.2d 1088—Garrett v. State, Civ. App., 51 S.W.2d 822, error dismissed—McCombs v. State, Civ. App., 48 S.W.2d 665.

29. Fla.—Ryan v. State, by Knott, 180 So. 10, 131 Fla. 486.

30. U.S.—Pavell v. Berwick, D.C. La., 48 F.Supp. 246.
Ark.—Staples v. Freeman, 207 S.W. 433, 137 Ark. 18.
Conn.—Torrington Electric Light Co. v. Stedman, 123 A. 261, 100 Conn. 217.
Ky.—Chapman v. Hounshell, 79 S.W. 3d 685, 258 Ky. 214—Swift Coal & Timber Co. v. Cornett, 61 S.W. 2d 625, 249 Ky. 760—Prewitt v. Bull, 27 S.W.2d 399, 234 Ky. 18.
La.—Bond v. Texas & P. Ry. Co., 160 So. 406, 181 La. 763.
Tenn.—Scott v. Mangrum, 7 Tenn. App. 437.

31. Ky.—Ulmer v. Ulrey, 133 S.W. 2d 744, 280 Ky. 457.
Mich.—Nechman v. Supplee, 210 N. W. 323, 236 Mich. 116.

32. Cal.—Hurd v. Albert, 3 P.2d 545, 214 Cal. 15, 76 A.L.R. 1348—Downs v. Kroeger, 254 P. 1101, 200 Cal. 743—Du Ross v. Trainor, 10 P.2d 763, 122 Cal.App. 732.
Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.

33. Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108, affirming 262 Ill.App. 189.
N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325, reversing 16 N.Y.S.2d 626, 258 App.Div. 328.

34. Tex.—Nagy v. Bennett, Civ.App., 24 S.W.2d 778, error refused.
32 C.J. p 350 note 77 [e].

35. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. Buckingham Transp. Co. of Colorado, 118 P.2d 1088, 108 Colo. 419.

36. U.S.—U. S. v. Hughes, D.C. Wash., 28 F.Supp. 977, 978, quoting **Corpus Juris**—Kingan & Co. v. Smith, D.C.Ind., 12 F.Supp. 329, appeal dismissed, C.C.A., Smith v. Kingan & Co., 80 F.2d 1020.
Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 629, 52 Idaho 728, citing **Corpus Juris**—Rowland v. Kellogg Power & Water Co., 233 P. 869, 872, 40 Idaho 216, quoting **Corpus Juris.**
Ill.—Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190.
Kan.—Wyatt v. Mickey, 271 P. 304, 306, 126 Kan. 690, quoting **Corpus Juris.**
Wash.—Hansen v. Runkel, 32 P.2d 103, 177 Wash. 384.
32 C.J. p 351 note 82.

Absolute certainty not required

Right of plaintiff and threatened impairment or destruction of right need not be established with absolute certainty on application for temporary injunction.—City of Amarillo v. Garwood, Tex.Civ.App., 63 S.W.2d 888, error refused.

37. U.S.—U. S. v. Hughes, D.C. Wash., 28 F.Supp. 977, 978, quoting **Corpus Juris.**
Fla.—Merryman v. Southern Tours, 162 So. 897, 120 Fla. 440.
Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 872, 40 Idaho 216, quoting **Corpus Juris.**
Kan.—Wyatt v. Mickey, 271 P. 304, 306, 126 Kan. 690, quoting **Corpus Juris.**
Wash.—Hansen v. Runkel, 32 P.2d 103, 177 Wash. 384.
32 C.J. p 351 note 83.

Court should grant temporary injunctions on prima facie showing when essential to assertion and preservation of legal rights.—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

38. U.S.—U. S. v. Hughes, D.C. Wash., 28 F.Supp. 977, 978, quoting **Corpus Juris.**
Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 629, 52 Idaho 728, citing **Corpus Juris**—Rowland v. Kellogg Power & Water Co., 233 P. 869, 872, 40 Idaho 216, quoting **Corpus Juris.**
Ill.—Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190.
Ind.—Wise v. Curdes, 40 N.E.2d 122, 219 Ind. 606.
Kan.—Wyatt v. Mickey, 271 P. 304, 306, 126 Kan. 690, quoting **Corpus Juris.**
Wash.—Hansen v. Runkel, 32 P.2d 103, 177 Wash. 384.
32 C.J. p 351 note 83.

Evidence held sufficient

(1) To authorize or justify temporary injunction.
U.S.—Betmar Hats v. Young America Hats, C.C.A.N.Y., 116 F.2d 956—Henderson v. C. Thomas Stores, D.C.Minn., 48 F.Supp. 295—U. S. v. Wood, D.C.Mass., 27 F.Supp. 375.

parent reason why the status quo should not remain until actual trial of the issues.[39] Nevertheless a preliminary injunction should not issue unless at least a prima facie case is made out,[40] and, according to some authorities, a clear showing is necessary.[41] Where no evidence is offered and the allegations of the verified petition are insufficient without the aid of evidence, a temporary injunction is properly refused.[42] It will nearly always be refused where the preponderance of the evidence as to complainant's right or as to the existence of an impending irreparable injury is on the side of defendant.[43] Where the evidence is conflicting, it is not error to grant,[44] refuse,[45] or grant only in

Ga.—Atkinson v. England, 22 S.E.2d 798, 194 Ga. 854—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108—Newsome v. Moore, 143 S.E. 400, 166 Ga. 301—Hines v. Lavant, 123 S.E. 611, 158 Ga. 336—Columbia Drug Co. v. Reid, 123 S.E. 269, 158 Ga. 375.

La.—Williams v. Road Dist. No. 11 of Parish of Winn, 134 So. 94, 172 La. 287.

Mont.—Thrasher v. Hodge, 283 P. 219, 86 Mont. 218.

N.J.—National Sec. Bank v. Blumberg, 125 A. 330, 96 N.J.Eq. 270.

N.Y.—Bond Stores v. Turner, 14 N.Y.S.2d 705, 258 App.Div. 769—Remington Rand v. Crofoot, 289 N.Y.S. 1025, 248 App.Div. 356, affirmed 18 N.E.2d 37, 279 N.Y. 635, answering question certified, 292 N.Y.S. 701, 249 App.Div. 706—United Cloak & Suit Designers' Mut. Aid Ass'n of America v. Sigman, 218 N.Y.S. 483, 218 App.Div. 367—Bennett v. Goldsmith, 4 N.Y.S.2d 278, 168 Misc. 42—Murphy v. Ralph, 299 N.Y.S. 270, 165 Misc. 335—Stolper v. Straughn, 29 N.Y.S.2d 285—Long Island American Ass'n Football Club v. Manrodt, 23 N.Y.S.2d 858.

Pa.—Yale Knitting Mills v. Knitgoods Workers Union Local 190, 5 A.2d 323, 334 Pa. 23—Seidel v. Goldsmith, 97 Pa.Super. 164—Scowden v. Thomas, 94 Pa.Super. 35—McDevitt v. Phillips, 45 Dauph.Co. 394.

Tex.—Brotherhood of Railroad Trainmen v. Martin, Civ.App., 161 S.W. 2d 556, error refused—Long Island Machinery & Equipment Co. v. Baird, Civ.App., 117 S.W.2d 565, error dismissed—Ransberger v. Leach, Civ.App., 109 S.W.2d 331—Gibraltar Sav. & Bldg. Ass'n v. Isbell, Civ.App., 101 S.W.2d 1029—Kauffman v. Parker, Civ.App., 99 S.W.2d 1074—Burnett v. Surratt, Civ. App., 67 S.W.2d 1041, error refused.

Wash.—U. S. Fidelity & Guaranty Co. v. Barrow, 99 P.2d 949, 3 Wash. 2d 89.

32 C.J. p 351 note 83 [a].

(2) To establish prima facie case and show probability of success.—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680.

(3) To warrant, sustain, or require denial of temporary injunction.

Del.—Johns-Manville Corporation v. American Hair & Felt Co., 158 A. 141, 18 Del.Ch. 230.

Ga.—Ellis v. McAllister, 129 S.E. 138, 160 Ga. 786.

Tex.—Tipton v. Hotel and Restaurant Employees International Alliance, Local No. 808, Civ.App., 149 S.W.2d 1028—Hodge v. Hendrick, Civ.App., 97 S.W.2d 722—Turner v. Sims, Civ.App., 20 S.W. 2d 355, error dismissed.

39. N.Y.—Dusing v. Nuzzo, 26 N.Y.S.2d 345, motion denied 27 N.Y.S. 2d 382, 262 App.Div. 781.

40. U.S.—Northwestern Stevedoring Co. v. Marshall, C.C.A.Wash., 41 F. 2d 28—Henderson Co. v. Thompson, D.C.Tex., 12 F.Supp. 519.

Ind.—Public Service Commission of Indiana v. Baltimore & O. R. Co., 169 N.E. 530, 202 Ind. 449, rehearing denied 176 N.E. 551, 202 Ind. 449.

Kan.—Emporia Loan & Investment Co. v. Dailey, 44 P.2d 288, 141 Kan. 845.

La.—Acosta v. Nunez, 13 So.2d 860, 203 La. 275, affirming, App., 5 So. 2d 574.

Md.—Campeggi v. Wakefield, 145 A. 546, 157 Md. 229.

N.J.—Morrison v. Standard Oil Co. of New Jersey, 147 A. 161, 105 N. J.Eq. 104, affirmed 151 A. 906, 106 N.J.Eq. 281.

N.Y.—McGrath v. Dillon, 262 N.Y.S. 90, 145 Misc. 912.

Pa.—Lulejian v. Hagopian, 173 A. 105, 315 Pa. 417.

Tenn.—Nashville, C. & St. L. Ry. v. Railroad and Public Utilities Commission, 32 S.W.2d 1043, 161 Tenn. 592.

Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673—Shaw v. Hinton, Civ.App., 31 S.W. 2d 478—Turner v. Parker, Civ.App., 14 S.W.2d 931.

Wash.—Hansen v. Runkel, 32 P.2d 103, 177 Wash. 384.

32 C.J. p 351 note 84.

Evidence held insufficient

U.S.—Henderson Co. v. Thompson, D.C.Tex., 12 F.Supp. 519—Knapp-Monarch Co. v. Anderson, D.C.Ill., 7 F.Supp. 332—Richmire v. Legg, D.C.Ga., 3 F.Supp. 787.

Ga.—Bibb County v. Winslett, 14 S.E.2d 108, 191 Ga. 860—Mobley v. Askews, Inc., 159 S.E. 565, 173 Ga. 129—Saffold v. Hattaway, 147 S.E. 75, 168 Ga. 126.

N.J.—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108—Howard v. Jersey City, 140 A. 261, 102 N.J.Eq. 213—Pappas v. Meyer, 130 A. 834, 98 N.J.Eq. 18—Dellacorte v. Gentile, 129 A. 739, 98 N.J.Eq. 194.

N.Y.—Wick v. Crane Co., 251 N.Y.S. 741, 141 Misc. 31—Fox v. Bankers' Trust Co., 240 N.Y.S. 267, 136 Misc. 63—Best Service Wet Wash Laundry Co. v. Dickson, 201 N.Y.S. 173, 121 Misc. 416.

Tenn.—Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co., 5 Tenn.App. 619.

Tex.—Townsend v. McDonald, Civ. App., 149 S.W.2d 1038, error refused—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ. App., 95 S.W.2d 1346—Brooks v. Cherry, Civ.App., 298 S.W. 170—Massa v. Guardian Trust Co., Civ. App., 258 S.W. 598.

32 C.J. p 351 note 84 [b].

41. U.S.—Six Companies v. Stinson, D.C.Nev., 58 F.2d 649—Anheuser-Busch, Inc., v. Power City Brewery, D.C.N.Y., 28 F.Supp. 740—General Theatres v. Metro-Goldwyn-Mayer Distributing Corporation, D.C.Colo., 9 F.Supp. 546—National Commodities Co. v. Viret, C. C.A.N.Y., 296 F. 664.

N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 8 A. 2d 767, 126 N.J.Eq. 318, reversing 9 A.2d 295, 126 N.J.Eq. 374—Miller's Inc., v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, Ch., 15 A.2d 820.

N.Y.—Moran v. Lasette, 223 N.Y.S. 283, 221 App.Div. 118—Yankee Doodle Boys v. McLaughlin, 215 N. Y.S. 257, 127 Misc. 84—Werner v. Becker, 43 N.Y.S.2d 294.

Tex.—Renfro v. Sperry, Civ.App., 134 S.W.2d 438—Ferguson v. Ferguson, Civ.App., 69 S.W.2d 592.

42. Okl.—Woodward v. Panther Creek Oil Co., 150 P. 1065, 50 Okl. 318.

43. U.S.—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 563.

32 C.J. p 352 note 88.

44. Ga.—Pickron v. Phillips, 160 S.E. 615, 173 Ga. 407—Mobley v. Brundage, 154 S.E. 452, 170 Ga. 829—Broome v. Arlington Realty Co., 131 S.E. 896, 161 Ga. 823—Lanier v. Elder, 115 S.E. 81, 154 Ga. 707.

45. Ga.—Ingram & Le Grand Lumber Co. v. McAllister, 4 S.E.2d 558,

part[46] the preliminary injunctive relief sought; but this rule has reference only to a conflict in the evidence on the material issues in the case.[47] The discretion of the court where the evidence is conflicting is discussed supra § 14.

§ 193. Pleadings and Affidavits as Evidence

Verified pleadings may be regarded as evidence on an application for a preliminary injunction.

Where the pleadings are properly verified, they may serve the office both of pleadings and evidence on an application for a temporary injunction.[48]

§ 194. —— Bill or Complaint

In many, although not all, jurisdictions a verified bill or complaint may, if not denied, support the issuance of a temporary injunction without any further evidence.

Except on a final hearing for a perpetual injunction[49] the bill or complaint itself, when properly verified, may be used as an affidavit as to the facts properly stated therein,[50] and in many,[51] but not all,[52] jurisdictions the bill alone, when so verified, may be a sufficient basis for the issuance of a temporary injunction. Where the practice is followed of accepting a verified complaint as part of complainant's evidence, the pleading takes the place of an affidavit and should be treated as such,[53] and the well pleaded allegations of the bill, to the extent that they have not been denied, are accepted as true for the purpose of deciding the application for temporary injunction.[54] In such cases the grant or denial of injunctive relief will be predicated on the sufficiency of the bill to state adequate grounds therefor.[55] The facts stated

188 Ga. 626—Voyles v. Carr, 160 S.E. 801, 173 Ga. 627—Hendrix v Hunt, 146 S.E. 897, 168 Ga. 81—Burkhalter v. Wilson, 136 S.E. 409, 163 Ga. 467—Holloway v. Citizens' Bank of Metter, 129 S.E. 94, 160 Ga. 824—Harrell v. B. W. Williams & Sons, 125 S.E. 452, 159 Ga. 230—Shugart & Shugart v. Echota Cotton Mills, 115 S.E. 485, 154 Ga. 822.
N.Y.—Yonkers New System Laundry v. Simon, 18 N.Y.S.2d 73, modified on other grounds 20 N.Y.S.2d 74, 259 App.Div. 912.

46. Ga.—Associated Mutuals v. Coe, 26 S.E.2d 450.

47. Ga.—Jones v. Lanier Development Co., 2 S.E.2d 923, 188 Ga. 141.

48. Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418—Roberts v. Roberts, 180 S.E. 491, 180 Ga. 671.
Minn.—Behrens v. City of Minneapolis, 271 N.W. 814, 199 Minn. 363.
Application, bill, or complaint as evidence see infra § 194.
Answer as evidence see infra § 196.

Allegations are taken as true where no other evidence was introduced.—Iowa Southern Utilities Co. v. Town of Lamoni, D.C.Iowa, 11 F.Supp. 581, appeal dismissed, C.C.A., Iowa Southern Utilities Co. v. Town of Lamoni, Iowa, 79 F.2d 1000.

49. Tex.—McAmis v. Gulf, C. & S. F. Ry. Co., Civ.App., 184 S.W. 331. 32 C.J. p 352 note 90.

50. Ga.—Grizzel v. Grizzel, 3 S.E. 2d 649, 188 Ga. 418—Bowers v. Dean, 1 S.E.2d 655, 187 Ga. 700—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108—Roberts v. Roberts, 180 S.E. 491, 180 Ga. 671.
Ind.—Chicago, St. L. & P. R. Co. v. Eisert, 26 N.E. 759, 127 Ind. 156.
N.Y.—Abeles v. Friedman, 14 N.Y.S.2d 252, 171 Misc. 1042.
Tex.—McAmis v. Gulf, C. & S. F. Ry. Co., Civ.App., 184 S.W. 331. 32 C.J. p 352 note 91.

In New York
(1) Early decisions were to the effect that the practice was not to issue an injunction on a verified complaint alone, but to require supporting affidavits.—Chatterton v. Kreitler, 2 Abb.N.Cas. 453—32 C.J. p 352 note 93 [a] (1).

(2) It was also held that an ordinary affidavit of verification was not sufficient evidence to establish as a fact the positive allegations in the complaint.—Bostwick v. Elton, 25 How.Pr. 362.

(3) But independent affidavits were not necessary, it being sufficient to attach an affidavit to the bill or complaint, and thus make it answer a double purpose.—Fowler v. Burns, 20 N.Y.Super. 637—Roome v. Webb, 3 How.Pr. 327, 1 Code Rep. 114.

(4) Under later practice it was held that an "affidavit," as the word was used in code provisions relative to issuance of injunctions, included a verified complaint.—Clark v. Herbert Booth King & Bro. Pub. Co., 57 N.Y.S. 975, 40 App.Div. 405.

(5) In any event, where a complaint is thus used, its evidential force should be tested by the same rules as are applied to other affidavits, and only such allegations as are sworn to positively, or, if stated on information and belief, where the source of the information and the ground of the belief are given, may be accepted as true.—Clark v. Herbert Booth King & Bro. Pub. Co., supra—32 C.J. p 352 note 93 [a] (2).

Verified cross petition
Ga.—Kniepkamp v. Richards, 16 S.E. 2d 24, 192 Ga. 509.

51. La.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491.
Tex.—McAmis v. Gulf, C. & S. F. Ry. Co., Civ.App., 184 S.W. 331. 32 C.J. p 352 notes 92, 94.

52. Pa.—Baur v. Wilkes-Barre Light Co., 102 A. 430, 259 Pa. 117. 32 C.J. p 352 note 93 [b].

In Maryland the affidavit of complainant alone has been held to be sufficient to warrant an interlocutory injunction except as to facts of record or provable by documentary evidence.—Myers v. Amey, 21 Md. 302.

53. Cal.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.

54. U.S.—Cluett, Peabody & Co. v. Spetalnik, D.C.N.Y., 29 F.Supp. 173—Spang v. Roper, D.C.Pa., 13 F. Supp. 840, vacated on other grounds, C.C.A., Gossnell v. Spang, 84 F.2d 889, certiorari denied Spang v. Gossnell, 57 S.Ct. 233, 299 U.S. 605, 81 L.Ed. 446—Table Supply Stores v. Hawking, D.C.Fla., 9 F. Supp. 888—McNee v. Wall, D.C.Fla., 4 F.Supp. 496—Crummer v. City of Fort Pierce, D.C.Fla., 2 F.Supp. 737.
N.C.—Carolina Motor Service v. Atlantic Coast Line R. Co., 185 S.E. 479, 210 N.C. 36, 104 A.L.R. 1165.
Tex.—Welch v. Buffalo Engineering Co., Civ.App., 63 S.W.2d 393—W. L. Pearson & Co. v. Harding, Civ. App., 30 S.W.2d 403, reversed on other grounds Harding v. W. L. Pearson & Co., Com.App., 48 S.W. 2d 964—Richardson v. Kent, Civ. App., 21 S.W.2d 72, error refused. 32 C.J. p 352 note 94.

55. Cal.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.
Fla.—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.

in a bill or complaint treated as an affidavit must stand the test to which oral testimony would be subjected,[56] averments which are only conclusions of law are not competent testimony even though they might stand as pure matter of pleading,[57] and unless a statement in the nature of a conclusion is supported by the facts or circumstances on which it rests it is insufficient to sustain an application for injunction.[58] Defects in a bill which fails to state facts sufficient to authorize the issuance of an injunction cannot be supplied by affidavits, as discussed supra § 182.

An unverified or insufficiently verified bill or petition, standing alone, is not sufficient evidence to authorize an interlocutory or temporary injunction,[59] and the allegations and their verification must be direct and positive.[60]

§ 195. —— Affidavits

a. In general
b. Requisites and sufficiency
c. By whom affidavit made
d. Notice, and service of affidavits
e. Affidavits in rebuttal

a. In General

In the absence of a statute to the contrary, and except on the hearing for a permanent injunction, affidavits may be considered, and where they establish sufficient grounds for a temporary injunction may justify its issuance; the court, however, may require or consider other evidence.

Except on final hearing,[61] it generally is held proper for complainant to support his case by affidavits, either before or after the answer, and either in support of his bill or in contradiction of the answer,[62] it being proper for the court to consider affidavits on both sides.[63] In the absence of statute providing otherwise[64] complainant may introduce other proper evidence if he sees fit;[65] and the court in its discretion may require or accept proofs other than affidavits and issue an injunction on the basis of such other proofs.[66] If it appears that the facts are evidenced by documents, a mere affidavit of those facts is not sufficient without accounting for the absence of the better form of evidence.[67] Affidavits may be refused where no sufficient reason is shown for delay in presenting them.[68]

To justify the issuance of a preliminary injunction on the basis of affidavits it must appear therefrom that sufficient grounds exist for its issuance;[69]

Ga.—Lowry Co. v. Kilpatrick, 120 S.E. 772, 157 Ga. 91.
Kan.—Kansas Wheat Growers' Ass'n v. Schulte, 216 P. 311, 113 Kan. 672.
Tex.—Wilmans v. Great Southern Life Ins. Co., Civ.App., 141 S.W. 2d 407.

Defendant seeking injunction by cross action
Ga.—Lowry Co. v. Kilpatrick, 120 S. E. 772, 157 Ga. 91.

Where bill sets forth no ground for relief an injunction should be denied.—Blume v. Giles, 197 So. 344, 143 Fla. 615—City of Tarpon Springs v. Chrysostomides, 146 So. 845, 108 Fla. 500—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254—32 C.J. p 352 note 94 [c].

56. Cal.—E. H. Renzel Co. v. Warehousemen's Union I.L.A. 38–44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.

Complaint held sufficient
Cal.—Lutz v. Western Iron & Metal Co., 213 P. 962, 190 Cal. 554.

57. Cal.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38–44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435.
Kan.—State ex rel. Burton v. City of Parsons, 95 P. 391, 77 Kan. 774—Olmstead v. Koester, 14 Kan. 464.
32 C.J. p 352 note 95.

58. Cal.—E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38–44, 106 P.2d 1, 16 Cal.2d 369, prior opinion, App., 89 P.2d 435—Willis v. Lauridson, 118 P. 530, 161 Cal. 106.
Mo.—State ex rel. Barnett School Dist. No. 66, Laclede County v. Barton, App., 104 S.W.2d 284.

59. Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418.
Ill.—Will v. City of Zion, 225 Ill. App. 179.
Tex.—Magnolia Petroleum Co. v. McClendon, 65 S.W.2d 484, 123 Tex. 10—City of Groveton v. Josserand, Civ.App., 48 S.W.2d 382.

60. Fla.—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.
Mont.—Peterson v. Fugle, 31 P.2d 1030, 96 Mont. 537.

61. U.S.—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111.
Ky.—Markendorf v. Friedman, 133 S. W.2d 516, 280 Ky. 484, 127 A.L.R. 416, appeal dismissed Friedman v. Markendorf, 60 S.Ct. 610, 309 U. S. 627, 84 L.Ed. 987.
Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509.
32 C.J. p 353 note 97.

62. U.S.—Utah Power & Light Co. v. Pfost, D.C.Idaho, 52 F.2d 226.
Ky.—Markendorf v. Friedman, 133 S.W.2d 516, 280 Ky. 484, 127 A.L. R. 416, appeal dismissed Friedman v. Markendorf, 60 S.Ct. 610, 309 U. S. 627, 84 L.Ed. 987.
32 C.J. p 353 note 98.

63. N.Y.—Abeles v. Friedman, 14 N. Y.S.2d 252, 171 Misc. 1042.
Counteraffidavits see infra § 197.

64. N.Y.—Abeles v. Friedman, supra.
32 C.J. p 353 note 1.

65. Ga.—Carter v. Johnson, 119 S.E. 22, 156 Ga. 207.
32 C.J. p 353 note 2.
Hearing generally see infra §§ 199, 200.

66. U.S.—Flintkote Co. v. Philip Carey Co., C.C.A.Ill., 13 F.2d 850—Schermerhorn v. L'Espenasse, C.C. Pa., 21 F.Cas.No.12,454, 2 Dall. 360, 1 L.Ed. 415.
Ala.—City of Birmingham v. Leo A. Seltzer, Inc., 159 So. 203, 229 Ala. 675.

Affidavit is not required where the facts relied on to warrant injunctive relief are admitted in the pleadings. —Murphy v. Swanson, 198 N.W. 116, 50 N.D. 788, 32 A.L.R. 82.

67. Ga.—Davis v. Covington & M. R. Co., 2 S.E. 555, 77 Ga. 322.
32 C.J. p 353 note 3.

68. Ga.—Green v. Freeman, 55 S.E. 45, 126 Ga. 274, 7 Ann.Cas. 1069.

69. Cal.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.
N.J.—Board of Health of Medford Tp. v. Jennings, 18 A.2d 62, 129 N.J.Eq. 51, affirmed Board of

and, where sufficient grounds are shown, the bill and affidavits alone may support issuance of a temporary or preliminary injunction.[70] There is, however, authority condemning affidavits as an untrustworthy source of evidence in injunction cases, and stating that the practice of granting injunctions on the basis of affidavits should be discouraged,[71] and that in all important matters the presence of the chief witnesses should be required at the hearing for the purpose of oral questioning.[72] The court will not, however, issue even a preliminary injunction on the basis of ex parte affidavits unless the right thereto clearly appears,[73] or unless necessary to prevent threatened irreparable damage,[74] and where the bill and answer present debatable questions the court in its discretion may refuse to grant a preliminary injunction on affidavits.[75]

b. Requisites and Sufficiency

(1) In general
(2) Verification; information and belief
(3) Entitling affidavits

(1) In General

Affidavits supporting an application for injunction should be based on the bill, disclose all known and material facts, and avoid allegations of mere conclusions.

The subject matter of an affidavit should be such as is admissible under general principles governing the admissibility of evidence.[76] An affidavit should be founded solely on the allegations of the bill,[77] and cannot, as shown supra § 182, enlarge or sup-

Health of Medford Tp. in Burlington County v. Jennings, 25 A.2d 861, 131 N.J.Eq. 511.

Controverted affidavits

Where charges in affidavit in support of motion to enjoin defendants from doing acts claimed to be injurious to plaintiff's business were denied, such charges could not form basis for a temporary injunction.—General Bottle Co. v. Oneto, 12 N.Y.S.2d 348.

70. Mich.—Saginaw Lumber & Salt Co. v. Griffore, 108 N.W. 681, 145 Mich. 287, 116 Am.S.R. 297.
Minn.—Mathwig v. Olson, 251 N.W. 518, 190 Minn. 262.
N.J.—Ruty v. Huelsenbeck, 156 A. 922, 109 N.J.Eq. 273.
32 C.J. p 353 note 99.

"Prima facie evidence," warranting the issuance of an injunction, may consist of the affidavit of a complainant or of a third person who knows the facts, the purpose being to verify the averments and induce the court to credit the bill for the truth of its statements.—Smith v. Shiebeck, 24 A.2d 795, 180 Md. 412.

71. U.S.—Great Northern Ry. Co. v. Brosseau, D.C.N.D., 286 F. 414.

In New Jersey recent statutory provisions prohibiting the issuance of a temporary or permanent injunction in any case involving or growing out of a labor dispute except after hearing the testimony of witnesses in open court do not ban the use of affidavits, and are satisfied if the injunction is based in part on proofs taken in open court.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

In New York

(1) Under statutory provisions to the effect that hearings as to injunctions concerning labor disputes shall consist of the taking of testimony in open court with opportunity for cross-examination and testimony in opposition thereto, if offered, and that no affidavits shall be received in support of any of the allegations of the complaint, the temporary right to enjoin peaceful picketing by a labor union may not be established by affidavit.—Strauss v. Steiner, 18 N.Y.S.2d 395, 173 Misc. 521, affirmed 18 N.Y.S.2d 75, 259 App.Div. 725, appeal denied 19 N.Y.S.2d 771, 259 App. Div. 818—Abeles v. Friedman, 14 N.Y.S.2d 252, 171 Misc. 1042—Krip Holding Corporation v. Canavan, 288 N.Y.S. 468, 159 Misc. 3.

(2) Where no labor dispute is involved within the meaning of such statutory provisions they are inapplicable, but an injunction against picketing may be refused where the affidavits submitted fail to show the illegality of the act.—Anora Amusement Corporation v. Doe, 12 N.Y.S.2d 400, 171 Misc. 279.

(3) Earlier cases.—Altman v. Schlesinger, 198 N.Y.S. 128, 204 App. Div. 513—N. & R. Theaters v. Basson, 215 N.Y.S. 157, 127 Misc. 271.

72. U.S.—Great Northern Ry. Co. v. Brosseau, D.C.N.D., 286 F. 414.

73. U.S.—Murray Hill Restaurant v. Thirteen Twenty One Locust, C.C.A. Pa., 98 F.2d 578—Set-O-Type Co. v. American Multigraph Co., C.C.A. Ohio., 55 F.2d 800—Decorative Stone Co. v. Building Trades Council of Westchester County, C.C.A. N.Y., 13 F.2d 123—Blackman v. Mellon, D.C.N.Y., 5 F.2d 987—Kelley v. Kavanaugh, D.C.N.Y., 3 F. Supp. 666—Popular Mechanics Co. v. Fawcett Publications, D.C.Del., 1 F.Supp. 292.
Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
N.J.—Heyl v. Culinary Alliance, Local 611, 8 A.2d 809, 126 N.J.Eq. 320, reversing 9 A.2d 331, 126 N.J.Eq. 384—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 8 A. 2d 767, 126 N.J.Eq. 318, reversing 9 A.2d 295, 126 N.J.Eq. 374.

Conflict in complainant's affidavits

U.S.—Oneida Community v. Fouke Fur Co., D.C.Del., 286 F. 757.

Substantial doubt

Preliminary injunction should not be awarded on ex parte affidavits, unless in clear case, and should be refused if there is any substantial doubt as to right thereto.—U. S. v. Weirton Steel Co., D.C.Del., 7 F. Supp. 255.

Stereotyped form

Where affidavits annexed to a bill of complaint praying for an injunction were in stereotyped form, the affidavits lacked that probative force which, in a suit for injunction, is of first importance, and injunction would be denied.—Majestic Laundry Co. v. Laundry Workers International Local No. 284, A. F. of L., 15 A.2d 101, 128 N.J.Eq. 40.

74. U.S.—Murray Hill Restaurant v. Thirteen Twenty One Locust, C.C. A.Pa., 98 F.2d 578.
Va.—Cohen v. Rosen, 160 S.E. 36, 157 Va. 71.

75. U.S.—Decorative Stone Co. v. Building Trades Council of Westchester County, C.C.A.N.Y., 13 F. 2d 123.
N.Y.—Rueffer v. Department of Agriculture and Markets, 299 N.Y.S. 606, 164 Misc. 803.
Discretion of court as to grant or refusal of injunction where answer controverts allegations of bill generally see infra § 196.

76. N.J.—Webb v. Township Committee of Hanover Tp., 142 A. 244, 105 N.J.Eq. 733.

77. N.Y.—Stull v. Westfall, 25 Hun 1.

plement plaintiff's claims or supply defects in the bill. All facts within the knowledge of the applicant and material to the application should be disclosed,[78] although it is not essential that the affidavits should of themselves make out a sufficient case for injunction; they may be supplemented by documentary and record evidence.[79] Mere statements of conclusions are not sufficient,[80] but it is necessary that the facts relied on as showing grounds for injunction should be stated,[81] although the fact that some affidavits fail to satisfy this requirement will not render erroneous the granting of an injunction if there is ample other evidence on which to base the order.[82]

An affidavit of a third person that what he has stated in the complaint is true, when no complaint has been filed by him, is not sufficient.[83]

(2) Verification; Information and Belief

The verification of an affidavit, whether incorporated in the plaintiff's initial pleading or a distinct instrument, should be positive and direct; verification on information and belief ordinarily is insufficient, except under exceptional circumstances, as where positive knowledge is unattainable.

The verification of an affidavit in support of an application for injunctive relief must be direct[84] and positive.[85] The general rule is that affidavits, whether incorporated in plaintiff's initial pleading or employed as distinct and supporting papers, are insufficient to sustain issuance of an injunction if the averments are verified merely on the information and belief of affiant,[86] and that if any material averment is stated on information and belief there must also be attached the affidavit of the person from whom such information was obtained;[87] but statements on information and belief may be sufficient in exceptional cases, as where positive knowledge is not attainable and the danger of injury is immediate,[88] and it has been held that after a rule to show cause has been issued and no return has been made thereto, and especially if a demurrer has been interposed, allegations on information and belief may be sufficient to authorize an injunction.[89]

Verification positive in part. If the affidavit is positive in part and in part on information and belief, it is insufficient if the affidavit and bill leave it indefinite and uncertain as to which allegations are positively verified and which are stated on information and belief; but if the bill and affidavit permit the positive allegations to be distinguished from those which are stated to be on information and belief, and if there are enough material allegations positively sworn to, a bill thus verified will support issuance of a temporary injunction.[90]

Verification of an amended petition repeating the material allegations of the original and unverified petition, and the further fact that affidavits of petitioners were submitted at the hearing, has been held sufficient basis for issuance of an injunction.[91]

Amendment of verification. Where injunctive relief has been granted on the basis of a petition and verification defective in that it was merely on belief, and immediately on the manner of verification being called to the attention of the court plaintiff pursuant to leave so amended the verification as to make it positive in character, the court may

78. Md.—Sprigg v. Western Tel. Co., 46 Md. 67.

79. W.Va.—Oil Run Petroleum Co. v. Gale, 6 W.Va. 525.

80. Ill.—Thulin v. National Ice & Fuel Corporation, 11 N.E.2d 986, 293 Ill.App. 155.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N.Y.S. 825, 220 App.Div. 830.
32 C.J. p 353 note 13.

81. Cal.—Waldron v. Marsh, 5 Cal. 119.
32 C.J. p 353 note 14.

Affidavit held admissible

Ga.—Griffith v. City of Hapeville, 185 S.E. 522, 182 Ga. 333.

82. Ga.—Logan v. Campbell, 69 S.E. 548, 135 Ga. 366.

83. N.C.—Martin v. Sloan, 69 N.C. 128.

84. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615.

85. Fla.—Kilgore Groves v. Mayo, supra.
Tex.—West Texas Abstract & Guaranty Co. v. Stolte, Civ.App., 256 S.W. 632.

Affidavit held sufficiently positive

An affidavit by an attorney in support of an application for an injunction was sufficient, where it stated unequivocally that "all" the allegations "are true."—McCarty v. McCarty, Tex.Civ.App., 40 S.W.2d 165, error dismissed, Com.App., 61 S.W.2d 1115.

86. U.S.—Behre v. Anchor Ins. Co. of New York, C.C.A.N.Y., 297 F. 986.
Cal.—Provident Land Corporation v. Provident Irr. Dist., 79 P.2d 392, 22 Cal.App.2d 105—Kelsey v. Miller, 226 P. 630, 66 Cal.App. 386.
Ga.—Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418.
Ill.—Adelman v. Carson, Pirie, Scott & Co., 247 Ill.App. 574—Will v. City of Zion, 225 Ill.App. 179.
Mo.—State ex rel. Barnett School Dist. No. 66, Laclede County v. Barton, App., 104 S.W.2d 284.
Tex.—Tindall v. Tindall, Civ.App., 129 S.W.2d 1209—Wilson v. State, Civ.App., 59 S.W.2d 303—Zanes v. Mercantile Bank & Trust Co. of Texas, Civ.App., 49 S.W.2d 922, error refused—City of Groveton v. Pruitt, Civ.App., 48 S.W.2d 385—State Banking Board v. Smyth, Civ.App., 2 S.W.2d 536—West Texas Abstract & Guaranty Co. v. Stolte, Civ.App., 256 S.W. 632.
32 C.J. p 354 note 26.

87. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.

88. Cal.—Kelsey v. Miller, 226 P. 630, 66 Cal.App. 386.
32 C.J. p 354 note 27.

89. D.C.—Niles v. U. S. Trust Co., 22 App.D.C. 225.

90. Ill.—Will v. City of Zion, 225 Ill.App. 179.

91. Ga.—Lanier v. Elder, 115 S.E. 81, 154 Ga. 707.

permit the injunction to stand on the basis of the amended verification.[92]

(3) Entitling Affidavits

Affidavits submitted in support of an application for an injunction should be entitled in the cause and show that they were made for the particular case.

It has been held that affidavits should be entitled in the cause and show that they were made for use in the particular case;[93] otherwise they will not be admitted.[94] However, under the practice of the federal courts, it is not an objection to affidavits filed with a bill and motion for a preliminary injunction in support of such motion that they were previously made and signed and are not entitled in the cause, where it reasonably appears that they were made for the purpose of being used in a suit between the parties.[95]

c. By Whom Affidavit Made

Affidavits in support of an application for injunction should be made by persons knowing the facts, who may be agents, and by persons falling within the contemplation of any statutory provisions governing the matter.

Affidavits submitted in support of an application for an injunction should be made by persons knowing the facts.[96] Agents are competent to make the necessary affidavits in the absence of their principals, if they know the facts.[97]

Under statutes providing that no injunction shall be granted unless the applicant shall present his petition therefor verified by his affidavit, as construed in connection with other statutory provisions authorizing affidavits in civil suits generally by either a party or his agent or attorney, an affidavit supporting a bill for injunction may be verified by the principal, his agent or attorney,[98] but the affidavit of one not shown to be any of the three is insufficient.[99]

d. Notice, and Service of Affidavits

Complainant seeking an injunction should give due and timely notice, as by service of copies of his pleading and supporting affidavits in compliance with rule or statute.

Copies of the complaint and affidavits in support of an application for injunctive relief should be served on the opposite party within the time limited by applicable statute or rule,[1] and failure to comply with such requirements has been held to constitute a jurisdictional defect.[2]

After reservation of case for decision. Where, on the hearing of a rule on a petition for injunction, the judge reserves his decision, it is error for him, pending the consideration of the case and before his decision is made, to permit plaintiff to amend the petition in a material particular and submit affidavits in support of the petition as thus amended, without giving notice to the opposite party of such amendment and affidavits, in order that such party may meet them if he should so desire.[3]

e. Affidavits in Rebuttal

Ordinarily the plaintiff may not file affidavits in rebuttal of the defendant's counter-affidavits; but under special circumstances such rebuttal affidavits may be filed and considered. New matter set up in defense is open to attack by the plaintiff's supplemental affidavits.

While special circumstances and leave of court may warrant the consideration and filing of affidavits in rebuttal,[4] in the absence of such excep-

92. Kan.—Kent Oil Co. v. Waddill, 274 P. 1113, 127 Kan. 704.

93. Ga.—Warren v. Monnish, 23 S. E. 823, 97 Ga. 399.
32 C.J. p 354 note 18, p 348 note 32.

94. Ga.—Horton v. Fulton, 60 S.E. 1059, 130 Ga. 466.
32 C.J. p 354 note 19.

95. U.S.—Moxie Nerve Food Co. v. Modox Co., C.C.R.I., 153 F. 487, affirmed 162 F. 649, 89 C.C.A. 441.
32 C.J. p 354 note 20.

96. N.J.—Perth Amboy Gaslight Co. v. Kilek, 138 A. 886, 101 N.J.Eq. 805.

In Pennsylvania

The affidavits must be made by different persons, neither of whom is a party to the proceedings.—Thompson v. South Union Tp. School Directors, 17 Pa.Dist. 816, 35 Pa.Co. 353.

97. Kan.—Long v. Kasebeer, 28 Kan. 226.
La.—Wilson v. Curtis, 13 La.Ann. 601.

98. Tex.—Turman v. State, Civ.App., 26 S.W.2d 661.

99. Tex.—City of Groveton v. Josserand, Civ.App., 48 S.W.2d 382—Turman v. State, Civ.App., 26 S.W.2d 661.

"Credible person"

Verification of a petition by a so-called "credible person" was insufficient where such person was not shown to be the applicant for injunctive relief or his agent or attorney.—Turman v. State, supra.

1. Cal.—Green v. Superior Court of Los Angeles County, 223 P. 582, 65 Cal.App. 237.
Ga.—Hester v. Exley, 60 S.E. 1053, 130 Ga. 460.

Twenty-four hours before hearing

Where on continuance of a hearing of an interlocutory injunction, the parties are notified that the court will strictly enforce a rule requiring all affidavits to be used as evidence to be served on the opposite party twenty-four hours before the hearing, it is proper to reject at the hearing affidavits offered in evidence which were not so served.—Hester v. Exley, supra.

After continuance

Provision of Code Civ.Proc. § 527, requiring plaintiff receiving a temporary ex parte restraining order, and applying for a preliminary injunction on notice, to serve his affidavits two days prior to the date first set for hearing, was held not to apply to an affidavit filed at date of continuance of hearing.—City of Los Angeles v. Superior Court of Los Angeles County, 238 P. 670, 196 Cal. 445.

2. **Service with restraining order**
Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.

3. Ga.—Sylvania Water Supply Co. v. Overstreet, 52 S.E. 164, 124 Ga. 235.

4. U.S.—Benbow-Brammer Mfg. Co.

tional conditions complainant's motion for a preliminary injunction should be determined on the basis of the bill and the accompanying affidavits originally filed without resort to any supplemental affidavits offered in rebuttal of defendant's counter-affidavits,[5] and the court may refuse to allow the filing of affidavits in rebuttal of defendant's affidavits.[6]

New matter set up in defense may be contradicted or explained by affidavits.[7]

§ 196. —— Answer

a. In general
b. Answer denying equities of bill
c. Character of verification and denials

a. In General

A duly verified answer may serve the double function of pleading and proof, sometimes being regarded as evidentially equivalent to an affidavit. The defendant's sworn answer may become conclusive in his favor if not overcome by satisfactory testimony in opposition, as by two witnesses or one witness and corroborating circumstances evidentially equivalent to a second witness.

A duly verified answer may serve the office of both pleading and evidence on application for an injunction,[8] and may be given the evidential effect of an affidavit of defendant.[9] Even though averments in an answer have been stricken on demurrer and were not formally introduced into evidence, the court on the hearing may nevertheless consider such averments as evidence against defendant.[10]

Weight of answer as evidence. On an application for an injunction the court will apply the familiar rule, discussed in Equity § 473, that, where a sworn answer is responsive to the bill and clearly and positively denies its allegations, it is not only evidence for defendant, but is conclusive in his favor unless overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances equivalent in weight to a second witness;[11] but the rule is inapplicable where the answer is on information and belief,[12] or where the answer fails to deny important allegations.[13] It has further been held that the foregoing rule does not apply where the injunction bill is verified, as the oath to the bill stands against the oath to the answer;[14] but in such a case it is necessary to have at least one witness in support of the bill in order to decide the issue in complainant's favor.[15] Where the oath to the answer has been waived, it has been held that the answer, although sworn to, is entitled only to the evidential weight of an ex parte affidavit.[16]

b. Answer Denying Equities of Bill

(1) In general
(2) Discretion of court
(3) Denial of intent to continue acts

(1) In General

The general rule is that a temporary injunction may not be granted on a hearing in limine on bill and answer where the defendant duly denies the allegations on which the complainant claims the right to injunctive relief; but where the denial is not explicit and circumstantial it will not preclude the granting of an injunction in an otherwise proper case.

Generally speaking, where the facts constituting complainant's claim for injunctive relief are controverted on oath by defendant, the court will not interfere at the initial stage of proceedings seeking an injunction but will refuse to grant an injunction before hearing on the merits.[17] On motions for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true,[18] and if in such answer under oath or accompanying affidavits the facts constituting the claim of complainant for the interposition of the court are controverted by defendant the court generally will not interfere but will deny the injunction.[19] The reason is that such

v. Simpson Mfg. Co., C.C.Wis., 132 F. 614.
32 C.J. p 354 note 24.

5. U.S.—Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., supra.
Counter-affidavits see infra § 197.

6. U.S.—Day v. Boston Belting Co., C.C.Mass., 7 F.Cas.No.3,674, Brunn. Coll.Cas. 585.
32 C.J. p 354 note 23.

7. N.Y.—Davis v. Hackley, 14 Abb. Pr. 64—Powell v. Clark, 5 Abb.Pr. 70.

8. Ga.—Roberts v. Roberts, 180 S. E. 491, 180 Ga. 671.

9. Tex.—McAmis v. Gulf, C. & S. F. R. Co., Civ.App., 184 S.W. 331.
32 C.J. p 355 note 37.

10. Ga.—Kimsey v. Mickel, 12 S.E. 2d 567, 191 Ga. 158.

11. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374, 376, quoting **Corpus Juris.**
Va.—Wise v. Lamb, 9 Gratt. 294, 50 Va. 294.
32 C.J. p 355 note 39.

12. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374, 376, quoting **Corpus Juris.**
32 C.J. p 355 note 41.

13. U.S.—Trautwein v. Moreno Mut. Irr. Co., supra, quoting **Corpus Juris.**
32 C.J. p 355 note 42.

14. Tenn.—Brown v. Daniels, Ch. App., 51 S.W. 991.
32 C.J. p 355 note 40.

15. Tenn.—Brown v. Daniels, supra.

16. U.S.—U. S. v. Railway Employés' Department, American Federation of Labor, D.C.Ill., 286 F. 228—Pere Marquette R. Co. v. Bradford, C.C.Mich., 149 F. 492.

17. U.S.—Behre v. Anchor Ins. Co. of New York, C.C.A.N.Y., 297 F. 986.
N.J.—Snider v. Freehold Theatre Co., 150 A. 415, 9 N.J.Misc. 85.

18. Tex.—McAmis v. Gulf, C. & S. F. R. Co., Civ.App., 184 S.W. 331.
32 C.J. p 355 note 46.

19. U.S.—John T. Stanley Co. v. Lagomarsino, C.C.A.N.Y., 49 F.2d 702—Firemen's Ins. Co. of Newark, N. J., v. Beha, D.C.N.Y., 30 F.2d 539, affirmed Firemen's Ins. Co. of

an answer is deemed to overcome the equities of the bill[20] or to render the truth of its allegations at least doubtful.[21] It has been held that it is within the discretion of the court to refuse an injunction as to all the defendants, even though some of them failed to answer.[22]

Where the answer contains nothing construable as a substantial denial of the equities of the bill, award of an injunction may be proper,[23] as where the answer is not a full, explicit, and circumstantial denial, and on the entire showing of both sides it appears reasonably probable that complainant has the right which he claims.[24]

Where, on a hearing on bill and answer, there are no admissions in the answer aiding plaintiff on the merits, plaintiff can prevail only on the strength of averments in his bill for injunction which are not denied in the answer.[25]

Later stages of proceedings. The rule that the court will refuse to grant an injunction where

Newark, N. J. v. Conway, 49 S.Ct. 184, 278 U.S. 580, 73 L.Ed. 517—Lisichin v. Andrews, D.C.N.Y., 23 F.Supp. 657—U. S. v. Weirton Steel Co., D.C.Del., 7 F.Supp. 255—Gray v. Yellowley, D.C.N.Y., 290 F. 400.

Cal.—Monterey Club v. Superior Court of Los Angeles, 119 P.2d 349, 48 Cal.App.2d 131.

Del.—Capital Bakers v. Leahy, 178 A. 648, 20 Del.Ch. 407.

Ga.—Blanton v. Crosby, 5 S.E.2d 780, 189 Ga. 297.

N.J.—Heine's Inc., v. Truck Drivers' and Helpers' Union, Local No. 676, 19 A.2d 204, 129 N.J.Eq. 308, reversing 14 A.2d 262, 127 N.J.Eq. 514—Pazen v. Silver Rod Stores, 18 A.2d 576, 129 N.J.Eq. 128, reversed on other grounds 22 A.2d 237, 130 N.J.Eq. 407—Benton v. Kernan, 8 A.2d 719, 126 N.J.Eq. 343, modifying 6 A.2d 195, 125 N. J.Eq. 412—Davey Tree Expert Co. v. Ahlers, 200 A. 1012, 124 N.J.Eq. 175—Sneath v. Lehsten, 185 A. 55, 120 N.J.Eq. 327—Bladis v. Ullrick, 179 A. 630, 118 N.J.Eq. 445—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307—Kellett v. Local No. 274, United Ass'n of Journeymen Plumbers and Steamfitters of U. S. and Canada, 168 A. 265, 114 N.J.Eq. 107—Rissler v. Plumbers' Local No. 326 of United Ass'n of Journeymen Plumbers & Steamfitters of U. S. and Canada, 156 A. 498, 109 N.J.Eq. 91—Ideal Laundry Co. v. Gugliemone, 151 A. 617, 107 N.J.Eq. 108—Metropolitan Lumber Co. v. Fordham Nat. Bank, 144 A. 879, 104 N.J.Eq. 248, affirming Metropolitan Lumber Co. v. Fordham Nat. Bank in New York, 141 A. 742, 102 N.J.Eq. 514—D'Elia v. Warren, 142 A. 553, 103 N.J.Eq. 190—Maplewood Tp. v. Margolis, 141 A. 564, 102 N.J.Eq. 467, affirmed 144 A. 715, 104 N.J.Eq. 207—Loomis v. Public Service Transp. Co., 140 A. 398, 102 N.J.Eq. 259—Harld Holding Co. v. Laird, 136 A. 731, 101 N.J.Eq. 94, affirmed 141 A. 920, 103 N.J.Eq. 17—Feld v. Kantrowitz, 132 A. 657, 99 N.J.Eq. 847, affirming 130 A. 6, 98 N.J.Eq. 167—Pappas v. Meyer, 130 A. 834, 98 N.J.Eq. 18—Ye Olde Staten Island Dyers & Cleaners v. Barrett Nephews & Co. Old Staten Island Dyeing Establishment, 130 A. 528, 98 N.J.Eq. 702—Schindler Advertising Co. v. Public Service Transp. Co., 127 A. 786, 97 N.J.Eq. 542—Guangione v. Guangione, 127 A. 262, 97 N.J.Eq. 803—J. I. Kislak, Inc. v. Artof, 176 A. 899, 13 N.J.Misc. 129—Snider v. Freehold Theatre Co., 150 A. 415, 9 N.J.Misc. 85.

N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188, reversing 222 N. Y.S. 825, 220 App.Div. 830—Giordano v. Dellwood Dairy Co., 275 N. Y.S. 193, 153 Misc. 54.

Tex.—City of Jasper v. Brown, Civ. App., 39 S.W.2d 112.

W.Va.—McGhee v. Stevens, 3 S.E. 2d 615, 121 W.Va. 430.

32 C.J. p 355 note 47.

Labor disputes

(1) The statute prohibiting the issuance of a temporary or permanent injunction in any case involving or growing out of a labor dispute except after hearing the testimony of witnesses in open court changes the general rule that, when material allegations of a bill are met by full, explicit, and circumstantial denial under oath, a preliminary injunction will not issue, and an injunction cannot be refused as formerly merely because of a denial on oath.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 163.

(2) On the other hand, it has also been held that, in suit for injunction restraining members of union and others from picketing complainant's place of business, interference with business, violence, etc., where complainant's affidavits in support of bill were met by a full, explicit and circumstantial denial under oath in defendant's counteraffidavits, granting of preliminary injunction was error.—Heine's, Inc., v. Truck Drivers' and Helpers' Union, Local No. 676, 19 A.2d 204, 129 N.J.Eq. 308, reversing 14 A.2d 262, 127 N.J.Eq. 514.

20. U.S.—Woodside v. Tonopah & G. R. Co., C.C.Nev., 184 F. 358.

21. U.S.—Demarest v. Winchester Repeating Arms Co., D.C.Conn., 257 F. 162—Water Co. of Tonopah v. Public Service Commission of Nevada, D.C.Nev., 250 F. 304.

22. Ga.—Cobb v. Hogue, 13 S.E. 633, 87 Ga. 450.

23. U.S.—Paramount Publix Corporation v. Hill, D.C.Wis., 11 F.Supp. 478.

N.J.—Gevas v. Greek Restaurant Workers' Club, 134 A. 309, 99 N. J.Eq. 770—Forstmann & Huffman Co. v. United Front Committee of Textile Workers, Ch., 133 A. 202.

Right to do acts not in issue

The intimidation of employees by strikers may be enjoined pendente lite, notwithstanding denials of the acts charged, for such denials do not put in issue the right to do the acts, and it is only in such case that the general rule applies.—Herzog v. Fitzgerald, 77 N.Y.S. 366, 74 App.Div. 110, 11 N.Y.Ann.Cas. 208.

24. N.J.—Pazen v. Silver Rod Stores, 18 A.2d 576, 129 N.J.Eq. 128, reversed on other grounds 22 A.2d 237, 130 N.J.Eq. 407—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 8 A.2d 767, 126 N.J.Eq. 318, reversing 9 A.2d 295, 126 N.J.Eq. 374—Davey Tree Expert Co. v. Ahlers, 200 A. 1012, 124 N.J.Eq. 175—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J.Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450, modifying 168 A. 799, 114 N.J.Eq. 307—Ideal Laundry Co. v. Gugliemone, 151 A. 617, 107 N.J.Eq. 108—J. I. Kislak, Inc., v. Artof, 176 A. 899, 13 N.J.Misc. 129.

General denial insufficient

Tex.—Rosenfield v. Seifert, Civ.App., 270 S.W. 220, motion to correct judgment denied 274 S.W. 642.

25. U.S.—Lisichin v. Andrews, D.C. N.Y., 23 F.Supp. 657.

plaintiff's alleged equities are met by denial in a verified answer is applicable only where the application for injunctive relief is heard on bill and answer,[26] and where the case comes up on a hearing on bill and answer, and denial of the immediate application for injunction would be proper because of defendant's sworn denial of complainant's equities, either party then has the right to introduce evidence, after which the court in granting or denying injunctive relief will be governed by the weight and legal effect of the evidence introduced.[27] It is the duty of the court in such cases to exercise its discretion on a consideration of all testimony offered and to determine the application in accordance with the rights of the parties irrespective of denials in the answer or conflicts in the affidavits filed,[28] and injunction may be granted where the evidence of disinterested witnesses supports complainant or the court is otherwise satisfied that his allegations are true.[29]

(2) Discretion of Court

Despite denial by the defendant of the equities of the complainant's bill for injunction, the court may in its discretion award injunctive relief on a hearing on the bill and answer where exceptional circumstances so warrant, as where a denial of injunction would in effect amount to a decision on the merits defeating entirely the object of the bill.

The general rule against granting injunctive relief in the face of defendant's denial of plaintiff's equities, as discussed supra subdivision b (1) of this section, is subject to exceptions,[30] and, notwithstanding positive denials under oath in the answer, the court has discretion to grant a preliminary injunction, and it will not be denied as of course.[31] In such a case the court may grant an injunction where a denial of an injunction would be in effect a decision on the merits and would defeat entirely the objects of the bill;[32] where irreparable injury might result from a denial of the injunction;[33] where the bill contains charges of fraud;[34] where it appears probable that the complaint will on final hearing be found to be true;[35] or where the right to an injunction depends on the interpretation to be placed by the court on a written instrument.[36] Where the cause was submitted on the pleadings and there was enough of the bill undenied to warrant temporary injunction, it may be granted, notwithstanding the rule that the court shall not grant an injunction on a sworn bill and answer without hearing evidence supporting the allegations of the bill.[37]

(3) Denial of Intent to Continue Acts

As a general rule an injunction will be denied where the defendant denies intent to continue the acts sought to be enjoined and there is nothing to show the falsity of his denial.

An injunction will usually,[38] but not always,[39] be refused when defendant denies having any intention to do the acts in question, and there is no evidence that his denial is untrue; but in these circumstances leave to renew the application at any time will be given.[40]

c. Character of Verification and Denials

To be entitled to such weight as to preclude issuance of an injunction the defendant's answer should be positive in character and verification and not be made merely on information and belief, or consist merely of new matter in avoidance.

For the answer to be given such weight as to

26. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.

27. Fla.—Dade Enterprises v. Wometco Theaters, 160 So. 209, 119 Fla. 70.

28. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.
Ill.—Moss v. Balch, 49 N.E.2d 801, 320 Ill.App. 135.

29. N.J.—Thielens v. Dialogue, Ch., 19 A. 970.
32 C.J. p 356 note 52.

30. Cal.—Lutz v. Western Iron & Metal Co., 213 P. 962, 190 Cal. 554.

31. Ala.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.
Cal.—Monterey Club v. Superior Court of Los Angeles, 119 P.2d 349, 48 Cal.App.2d 131—Metropolitan Laundry Co. v. Greenfield, 66 P.2d 722, 20 Cal.App.2d 246.
Minn.—Neill v. City of Red Wing, 195 N.W. 145, 156 Minn. 467.
Tex.—Fort v. Moore, Civ.App., 33 S.W.2d 807, error dismissed—San Jacinto Const. Co. v. Scanlan, Civ. App., 300 S.W. 220.
Wis.—Fassbender v. Peters, 191 N.W. 973, 179 Wis. 587.
32 C.J. p 356 note 51.

Granting of temporary injunction held proper
Trial court did not abuse discretion in granting temporary injunction restraining defendant from engaging in laundry business, although plaintiff's motion was based only on complaint, to which was attached defendant's contract not to engage in such business, and on defendant's answer denying facts pleaded in the complaint, where plaintiff's rights were in danger of being infringed on, and injunction merely prohibited defendant from doing those things he contracted not to do.—Metropolitan Laundry Co. v. Greenfield, 66 P.2d 722, 20 Cal.App.2d 246.

32. N.J.—Caplan v. Palace Realty Co., Ch., 110 A. 584.
32 C.J. p 356 note 53.

33. Wis.—Fassbender v. Peters, 191 N.W. 973, 179 Wis. 587.
32 C.J. p 356 note 54.

34. Ga.—Bigham v. Gorham, 52 Ga. 329.

35. Minn.—Cornell v. Upper Michigan Land Co., 155 N.W. 99, 131 Minn. 337.

36. U.S.—Clum v. Brewer, C.C. Mass., 5 F.Cas.No.2,909, 2 Curt. 506.
32 C.J. p 357 note 57.

37. Tex.—San Antonio & A. P. R. Co. v. Mosel, Civ.App., 180 S.W. 1138.

38. Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.
32 C.J. p 357 note 61.

39. N.Y.—Lewis v. Wilson, 17 N.Y.S. 128.
32 C.J. p 357 note 62.

40. U.S.—E. I. Du Pont de Nemours Powder Co. v. Masland, D.C.Pa., 216 F. 271.

cause the denial of the motion for an injunction, it must be sworn to positively and not on information and belief,[41] and it must be responsive to the bill and contain a denial of the facts there, and not a mere denial of conclusions or mere allegations of new matter in avoidance which can be established only by evidence.[42]

Answer of corporation. In some jurisdictions,[43] but not in others,[44] the answer of a corporation under seal, without oath, has been held sufficient to prevent the issuance or procure the dissolution of an injunction.

§ 197. —— Counter-Affidavits

Defendant may support his opposition to an application for temporary injunction by counter-affidavits and the court may grant or deny injunctive relief on the basis of the affidavits submitted. In such cases the court ordinarily will deny an injunction where the affidavits are in conflict and evenly balanced, unless special circumstances warrant issuance of an injunction to preclude irreparable injury to the plaintiff and without substantial damage to the defendant pending a final decision on the merits on a full hearing.

Affidavits may be used in opposition to the motion for an injunction,[45] whether made by defendant or others,[46] and although no plea or answer has been interposed;[47] but affidavits in opposition to a motion for temporary injunction constitute part of the record only for the purpose of determining the propriety of the temporary injunction.[48] Such affidavits should contradict the material allegations of the complaint, and where they fail to do so or are otherwise insufficient they will not preclude issuance of an injunction.[49] They should state appropriate facts and not legal conclusions, and the latter, if contained therein, must be disregarded.[50]

The court cannot determine the credibility of witnesses testifying only by affidavit,[51] determination of the final merits of the case ordinarily will not be made on conflicting affidavits,[52] and in the absence of the witnesses the affidavits on each side are entitled to equal weight.[53] This does not mean, however, that the court is precluded by the number of affidavits in event of a conflict between them; it is, on the contrary, required to examine all proofs in the light of reasonable probability as gauged by the ordinary experiences and contacts of the court;[54] and, where a consideration of the affidavits filed on each side convinces the court of the equity of plaintiff's case, it may issue a temporary injunction.[55] Where the evidence is equally balanced on affidavits, the court will not issue a preliminary injunction unless it is shown that irreparable injury will result to plaintiff, should he finally prevail, through denial of the preliminary injunction, without material injury to defendant if the latter should prevail.[56]

Entitling affidavits. Counter-affidavits should be entitled in the cause.[57]

41. U.S.—Lake Shore & M. S. R. Co. v. Felton, Ohio, 103 F. 227, 43 C.C.A. 189.
32 C.J. p 357 note 66.

42. U.S.—U. S. v. Carlisle, C.C.Mich., 25 F.Cas.No.14,724.
Md.—Riggs v. Winterode, 59 A. 762, 100 Md. 439.
32 C.J. p 357 note 67.

43. U.S.—Haight v. Morris Aqueduct, C.C.N.J., 11 F.Cas.No.5,902, 4 Wash.C.C. 601.

44. Ga.—Hemphill v. Ruckersville Bank, 3 Ga. 435.
N.Y.—Fulton Bank v. New York & Sharon Canal Co., 1 Paige 311.
32 C.J. p 357 note 69 [a].

45. Mont.—Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co., 66 P. 943, 26 Mont. 193.
N.Y.—Abeles v. Friedman, 14 N.Y.S.2d 252, 171 Misc. 1042.
32 C.J. p 354 note 29.
Affidavits in rebuttal see supra § 195.
In the absence of answering affidavits, the allegations in the affidavits in support of a motion for a temporary injunction must be taken as true.—Beach v. Queens County Jockey Club, 298 N.Y.S. 777, 164 Misc. 363.

46. Ill.—Fox Film Corporation v. Collins, 236 Ill.App. 281.
Mont.—Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co., 66 P. 943, 26 Mont. 193.
32 C.J. p 355 note 30 [a].

47. Ill.—Collins v. Weigsebaum, 126 Ill.App. 158.

48. U.S.—Gibbs v. Buck, Fla., 59 S. Ct. 725, 307 U.S. 66, 83 L.Ed. 1111.

49. Alaska.—Alaskan Airways v. Wien, 8 Alaska 179.
Ind.—Watson v. Burnett, 23 N.E.2d 420, 216 Ind. 216.
N.Y.—Alley v. Positype Corporation of America, 231 N.Y.S. 461, 224 App.Div. 603, affirmed 168 N.E. 433, 251 N.Y. 577.
32 C.J. p 355 note 32.
"Machine-made" affidavits generally are not convincing.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 485, 120 N.J.Eq. 376.
Affidavits are properly stricken where containing irrelevant argument and denunciations and odious characterizations of opponents.—Knee v. Suitcase, Bag and Portfolio Makers' Union, N.J.Ch., 142 A. 184.
Where answer and counter-affidavits duly deny equities of plaintiff's bill see supra § 196 b.

50. Cal.—Fresno Canal & Irrigation Co. v. People's Ditch Co., 163 P. 497, 174 Cal. 441.

51. U.S.—U. S. v. Zukauckas, D.C.Pa., 293 F. 756.

52. N.Y.—Farulla v. Ralph A. Freundlich, Inc., 274 N.Y.S. 70, 152 Misc. 761—Bohl v. City of Schenectady, 220 N.Y.S. 349, 128 Misc. 863.

53. U.S.—Warner Bros. Pictures v. Gittone, C.C.A.Pa., 110 F.2d 292, reversing, D.C., Gittone v. Warner Bros. Pictures, 30 F.Supp. 823—U. S. v. Weirton Steel Co., D.C.Del., 7 F.Supp. 255.

54. U.S.—Anheuser-Busch, Inc., v. Power City Brewery, D.C.N.Y., 28 F.Supp. 740.

55. N.Y.—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243.

56. U.S.—U. S. v. Zukauckas, D.C.Pa., 293 F. 756.

57. U.S.—Goldstein v. Whelan, C.C.N.Y., 62 F. 124.

§ 198. Dismissal before Hearing

a. Voluntary dismissal
b. Involuntary dismissal
c. Procedure
d. Operation and effect

a. Voluntary Dismissal

Complainant in an injunction suit may discontinue on payment of costs if defendant is not prejudiced thereby.

It has been stated, as a general rule, that the right of complainant in an injunction suit to discontinue the action or suffer a nonsuit is not absolute, but rests in the sound discretion of the court.[58] However, in accordance with the general rules discussed in Dismissal and Nonsuit § 7, and in Equity § 563, ordinarily, on payment of costs,[59] plaintiff in a suit for an injunction may discontinue his suit as a matter of right where no rights of defendant as against plaintiff have accrued,[60] or where he will not be deprived of some affirmative advantage to which he is properly entitled.[61]

Where suit is brought by plaintiffs in behalf of themselves and of all others similarly situated, they cannot dismiss the suit, against the objection of the others.[62]

Time of dismissal. It has been held that complainant may voluntarily discontinue or dismiss his suit at any time before interlocutory or final decree;[63] or after a cross bill has been filed, where the cross bill is for a cause of action for which cross complainant would not be entitled to file an original bill;[64] or even after a full hearing on an application for temporary injunction and after the judge has announced his purpose to deny the injunction;[65] but that it is discretionary with the court whether it will reduce the judgment to writing and make it a part of the case or not.[66] Similarly complainant may dismiss his petition for an injunction where there are other persons who might intervene, if the dismissal is effected before such intervention.[67] On the other hand, after a decree, whether final or interlocutory, has been made, by which defendant,[68] or intervening parties,[69] have acquired rights, plaintiff will not be permitted to dismiss the bill without their consent. However, the denial of a motion for a preliminary injunction after a hearing fixes no such right in defendant as to prevent complainant from taking a voluntary nonsuit on the bill,[70] the same having also been held to be true where a preliminary injunction issued in the case has been dissolved.[71]

Effect of dismissal. A voluntary dismissal without prejudice of a bill for an injunction does not adjudicate the rights of defendant with respect to the subject matter of the action, although it may constitute an admission that a preliminary injunction issued in the case was wrongfully issued.[72] Hence if plaintiff withdraws his suit before a final determination of the issues, he is not concluded from pursuing another remedy,[73] from bringing a new suit for injunction for the same cause,[74] or from making an application for reinstatement.[75]

Under some statutes, however, if the answer of defendant is purely defensive, the voluntary discontinuance does preclude defendant from thereafter amending his pleadings, and the court from continuing with the trial. It prevents defendant or the court from bringing in new parties by way of intervention, and rendering or entering judgment in

58. Discretion not abused
Pa.—Adam Hat Stores v. Lefco, 176 A. 734, 317 Pa. 442.

59. U.S.—Chicago & A. R. Co. v. Union Rolling Mill Co., Ill., 3 S.Ct. 594, 109 U.S. 172, 24 L.Ed. 1081.
32 C.J. p 357 note 71.

Right to damages
Voluntary nonsuit of main action by plaintiff in injunction suit was held not an admission of wrongful issuance of temporary restraining order, which expired before taking nonsuit, so as to entitle defendant to damages on dismissal of the bill under the nonsuit.—Richards v. Roudilion, 140 So. 274, 19 La.App. 535.

60. U.S.—Ætna Life Ins. Co. of Hartford, Conn. v. Wilson, C.C.A. S.C., 84 F.2d 330.
32 C.J. p 357 note 72.

61. U.S.—Orr v. Coca-Cola Co., Cal., 247 F. 452, 159 C.C.A. 506.
32 C.J. p 357 note 73.

62. N.J.—McAlpin v. Universal Tobacco Co., Ch., 57 A. 418.
32 C.J. p 357 note 74.

63. U.S.—Orr v. Coca-Cola Co., Cal., 247 F. 452, 159 C.C.A. 506.
Dismissal of bill at final hearing see infra § 199.

64. N.J.—New York & N. J. Water Co. v. North Arlington, Ch., 75 A. 177.

65. Ga.—Bryant v. Jones, 13 S.E. 636, 87 Ga. 451.
N.C.—Bynum v. Powe, 2 S.E. 170, 97 N.C. 374.

66. Ga.—Bryant v. Jones, 13 S.E. 636, 87 Ga. 451.

67. Ga.—Davenport v. Hardman, 192 S.E. 11, 184 Ga. 518.

68. Miss.—Canadian & American Mortg. & Trust Co. v. Fitzpatrick, 14 So. 270, 71 Miss. 347, 350.
32 C.J. p 358 note 80.

69. La.—Whittemore v. Watts, 7 Rob. 10.
32 C.J. p 358 note 81.

70. U.S.—Orr v. Coca-Cola Co., Cal., 247 F. 452, 159 C.C.A. 506.
Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 127 A. 414, 14 Del.Ch. 368.

71. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, supra.

72. Neb.—Beatty v. Casselman, 211 N.W. 617, 115 Neb. 104.

73. Ky.—Cavenaugh v. Davis, 7 J. J.Marsh. 371.

Action at law
Ky.—Cavenaugh v. Davis, supra.

74. Ga.—Parker v. Weaver, 107 S. E. 484, 151 Ga. 547.
32 C.J. p 358 note 83.

75. Ill.—Shannahan v. Stevens, 28 N.E. 804, 139 Ill. 428, reversing 38 Ill.App. 571.

favor of such parties.[76]

b. Involuntary Dismissal

(1) In general
(2) Grounds

(1) In General

It has been held that a motion to dismiss a bill for an injunction before trial or answer is addressed to the sound discretion of the court. However, as a general rule, the court should not dismiss before trial if it can reasonably be conceived from the allegations that complainant could establish his right at the trial. If issues of fact appear, they cannot be adjudicated on the motion to dismiss.

Whether a motion to dismiss a bill for an injunction before answer or trial should be granted or refused is largely a matter for the discretion of the court.[77] If it appears to the court to be more convenient and just, the questions raised by the motion will be reserved for trial.[78]

It has been stated as the best judicial policy for a court not to pass on a motion to dismiss a bill for an injunction until the parties have brought in all the facts on final hearing and all the proofs are before the court.[79] So if under the allegations of the bill it can reasonably be conceived that the complainant at the trial could establish a case entitling him to the injunction, a motion to dismiss should not be granted.[80]

An issue of fact cannot be adjudicated on a motion to dismiss the bill before a trial.[81]

One not a party to the suit has no standing to move for the dismissal of the bill.[82]

76. Ga.—Davenport v. Hardman, 192 S.E. 11, 184 Ga. 518.

77. U.S.—Gibbs v. Buck, Fla., 59 S. Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Albee Godfrey Whale Creek Co. v. Perkins, D.C.N.Y., 6 F.Supp. 409.
N.J.—National House & Farms Ass'n v. New York Sash & Door Co., 34 A.2d 10, 134 N.J.Eq. 6, affirmed 36 A.2d 894.

78. U.S.—Albee Godfrey Whale Creek Co. v. Perkins, D.C.N.Y., 6 F.Supp. 409.

Reasonableness of traffic regulation
N.Y.—Weiner v. Valentine, 17 N.Y.S. 2d 355, affirmed 23 N.Y.S.2d 866, 260 App.Div. 999, appeal denied 25 N.Y.S.2d 780, 261 App.Div. 818.

Issues of grave consequences
U.S.—Albee Godfrey Whale Creek Co. v. Perkins, D.C.N.Y., 6 F.Supp. 409, 410.

Pending appeal
Where stockbroker was threatened with more than one hundred suits based on claim that contracts whereby stock was sold on installment plan were void because not approved by public utilities commission, bill to prevent multiplicity of suits would not be dismissed, pending appeal from decree and finding that defendants had a right to rescind.—Doherty v. McAuliffe, D.C.Mass., 7 F.Supp. 49, vacated on other grounds, C.C.A., 74 F.2d 800, certiorari denied McAuliffe v. Doherty, 55 S.Ct. 639, 294 U.S. 730, 79 L.Ed. 1260.

Dismissal of bill for injunction against execution see Executions § 160.

79. N.J.—Alliance Mills Co. v. Society for Establishing Useful Manufacturers, 142 A. 49, 103 N.J.Eq. 3.

80. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, and certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

81. U.S.—Knapp v. Hyde, D.C.N.Y., 50 F.2d 272—Dartmouth Woolen Mills v. Myers, D.C.N.H., 15 F. Supp. 751.

Issues in doubt
Where, in suit by foreign corporation to restrain prosecution of action at law of domestic corporation based on contract, and to reform contract, domestic corporation pleaded judgment dismissing action at law and counterclaim filed by foreign corporation as res judicata, and moved for dismissal of suit, and where replication by foreign corporation raised issue which might be different than that passed on by judgment, motion was denied and issues held over until final hearing.—National House & Farms Ass'n v. New York Sash & Door Co., 34 A.2d 10, 134 N.J.Eq. 6, affirmed 36 A.2d 894.

Issues raised by pleadings
N.Y.—Sweet v. Campbell, 25 N.E.2d 963, 282 N.Y. 146, reversing 12 N. Y.S.2d 359, 256 App.Div. 1069, affirming 9 N.Y.S.2d 281.

Evidence essential
Pa.—Commonwealth ex rel. Reno v. Dial Rock Coal Co., Com.Pl., 53 Dauph.Co. 342.

Effort to settle labor dispute
U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, C.C.A.Mo., 99 F.2d 309, reversing, D.C., 23 F.Supp. 998, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, and certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

Exact nature of interest justifying injunctive relief need not be determined on motion to dismiss.—Gamage v. Masonic Cemetery Ass'n, D.C. Cal., 31 F.2d 308, reversed on other grounds, C.C.A., Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 1027, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

On denial of preliminary injunction
(1) That the evidence does not justify a preliminary injunction does not of itself warrant dismissal of the bill.—Municipal Gas Co. v. City of Wichita Falls, Tex.Civ.App., 88 S.W.2d 608, error dismissed.

(2) Where the bill for an injunction raises intricate, novel, and important legal questions, and the affidavits in favor of, and opposed to, a motion for preliminary injunction indicate that on final hearing many facts alleged in the bill will be seriously challenged, defendant's motion to dismiss the bill will be denied, without prejudice to its right to take by answer whatever advantage it might have by the motion.—Oneida Community v. Fouke Fur Co., D. C.Del., 286 F. 757.

82. Person seeking to intervene
In employer's action to restrain trade union from carrying out threat to submit testimony before State Labor Relations Board regarding charges of unfair labor practices which allegedly occurred prior to an adjustment of controversy between the union and employer, wherein the

(2) Grounds
- (a) Want of jurisdiction
- (b) Want of equity on face of bill
- (c) Defect of parties
- (d) Failure to prosecute
- (e) Change of circumstances
- (f) Dissolution of preliminary injunction
- (g) Miscellaneous grounds

(a) Want of Jurisdiction

Want of jurisdiction in the court is a ground for the dismissal of a bill for an injunction.

Where the court is without jurisdiction in a suit for an injunction,[83] as where the amount involved is not within the court's jurisdiction,[84] the suit will be dismissed. So a dismissal is proper where the action is brought in the wrong county or district,[85] or where a court of concurrent jurisdiction has secured prior jurisdiction of the cause of action.[86]

That an injunction should not issue in a particular case is not a basis for dismissal of the bill for want of jurisdiction, if the court has the power to issue an injunction in a proper case.[87] So the insufficiency of affidavits to warrant the issuance of a temporary injunction does not warrant the dismissal of the bill, if its allegations are sufficient to warrant the issuance of an injunction after a final hearing.[88]

(b) Want of Equity on Face of Bill

Want of equity on the face of a bill for an injunction is ordinarily ground for dismissal thereof before trial.

If a bill in equity states a good cause of action for an injunction and no other dismissible defect appears, the bill should not be dismissed before trial.[89] On the other hand, a bill for an injunction which does not present a case of equitable cognizance or does not show complainants' right to an injunction may be dismissed.[90] Thus, where it is apparent

State Labor Relations Board asked permission to intervene, the board could not make a motion to dismiss the complaint until it had been permitted to intervene.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199.

83. U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. MacKenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515—Marsh v. Earle, D.C.Pa., 24 F.Supp. 385.

Del.—Flaherty v. Industrial Trust Co., 178 A. 586, 20 Del.Ch. 403.

Tex.—White v. Maverick County Water Control & Improvement Dist. No. 1, Civ.App., 26 S.W.2d 659, reversed on other grounds, Com.App., 35 S.W.2d 107.

32 C.J. p 358 note 86.

Reason for rule

Such defect cannot be remedied by amendment.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing, C.C.A., 88 F.2d 154, affirming, D.C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari granted 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. MacKenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515.

Cross bill

Where bill seeking to enjoin prosecution of action at law on note was required to be dismissed because equity was without jurisdiction, cross bill was also required to be dismissed, since, if complainant had no right to draw controversy out of law court into chancery court, defendant had no right through cross bill to keep it there.—Flaherty v. Industrial Trust Co., 178 A. 586, 20 Del. Ch. 403.

Jurisdiction of party

(1) Since an injunction can only operate in personam, unless jurisdiction of the party can be acquired, the proceedings should be dismissed on appropriate motion.—Southern Mills, Inc. v. Armstrong, 27 S.E.2d 281, 223 N.C. 495.

(2) Suit to enjoin storage of explosives was held properly dismissed as to secretary of the navy, who was not served, nor a resident of district, nor voluntarily appearing.—Ferris v. Wilbur, C.C.A.Va., 27 F.2d 262.

Jurisdiction not lacking

Pa.—Clark v. Beamish, 169 A. 130, 313 Pa. 56.

84. Ill.—York v. Kile, 67 Ill. 233.

85. U.S.—Ferris v. Wilbur, C.C.A. Va., 27 F.2d 262.

32 C.J. p 358 note 88.

86. Md.—Withers v. Denmead, 22 Md. 135.

87. U.S.—White v. Federal Radio Commission, D.C.Ill., 29 F.2d 113.

88. U.S.—U. S. v. Cohen, D.C.Mo., 268 F. 420.

89. Fla.—Hord v. City of Fort Myers, 13 So.2d 809.

Bill not without equity should not be dismissed.—City of Miami Beach v. Ocean & Inland Co., 200 So. 402, 146 Fla. 145.

Bill held sufficient

Fla.—Blitch v. City of Ocala, 195 So. 406, 142 Fla. 612.

Demurrer in suit for injunction see supra § 185.

90. U.S.—Bradford v. Hurt, C.C.A. Tex., 84 F.2d 722, affirming, D.C., 15 F.Supp. 426—C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, D.C.Cal., 33 F.Supp. 539—Manhattan Transit Co. v. U. S., D.C. Mass., 24 F.Supp. 174—Indianapolis Brewing Co. v. Liquor Control Commission of Michigan, D.C. Mich., 21 F.Supp. 969, affirmed Indianapolis Brewing Co. v. Liquor Control Commission of State of Michigan, 59 S.Ct. 254, 305 U.S. 391, 83 L.Ed. 243—Grace Co. v. Williams, D.C.Mo., 20 F.Supp. 263, affirmed, C.C.A., 96 F.2d 478.

Ala.—Dailey v. Koepple, 51 So. 349, 164 Ala. 317.

Del.—Flaherty v. Industrial Trust Co., 178 A. 586, 20 Del.Ch. 403.

Fla.—Givens v. Tampa Bar Ass'n, 169 So. 744, 125 Fla. 294—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

N.Y.—Valentine v. Valentine, 43 N.Y.S.2d 824.

32 C.J. p 358 note 92.

Bill prematurely filed

Pa.—Klahr v. Baldwin, Com.Pl., 23 Erie Co. 345.

Defective "bill of peace"

Bill styled "bill of peace," alleging defendants had filed suits against plaintiff to vex and harass plaintiff, was held properly dismissed, where the nature of the suits was not indicated and the bill showed that motions to dismiss such suits had not been heard and that declarations had not been filed therein.—State Mut. Rodded Fire Ins. Co. of Mich-

that complainant has an adequate remedy at law, the bill will be dismissed,[91] except where by statute a resort to the wrong remedy or procedure is not a ground for dismissal.[92] However, it has been held that a bill should not be dismissed on the ground of want of equity on its face, unless it is manifest that no amendment can help it,[93] although failure or refusal of complaint to amend after opportunity so to do is afforded will justify its dismissal.[94]

If the allegations of the bill are sufficient to set out a cause of action for any of the relief sought, it will not be dismissed.[95]

That complainant seeks more relief than he is entitled to under the allegations of his bill for an injunction does not justify dismissal of the bill.[96]

igan v. Engel, 257 N.W. 839, 269 Mich. 348.

Effect of abstract attached to bill

Where plaintiffs' petition to enjoin trespasses on land contained an unqualified averment that plaintiffs owned the land and there was nothing in an amendment to show that the averment was limited to title as shown by an attached abstract, trial court properly overruled defendant's motion to strike the petition on the ground that the abstract was defective.—Gray v. Bradford, 22 S.E.2d 43, 194 Ga. 492.

Joinder of causes

State officers were held not entitled to dismissal of suit by liquor wholesaler purchasing beer from nonresident corporation to enjoin such officials from enforcing provisions of Washington liquor statute under which such nonresident corporation was required to obtain license, on ground of improper joinder of two or more causes of action.—Pacific Fruit & Produce Co. v. Martin, D.C.Wash., 16 F.Supp. 34.

Inferences from allegations

A bill for an injunction will not be dismissed for failure to allege an essential fact, if such fact can be inferred from other allegations.—Fenstemacher v. Pennsylvania R. Co., D.C.Pa., 296 F. 210.

Statutory prerequisites

(1) Complaint not containing allegations showing compliance with the statute in a labor dispute case is properly dismissed.

U.S.—Grace Co. v. Williams, C.C.A. Mo., 96 F.2d 478, affirming, D.C., 20 F.Supp. 263.

N.Y.—Reiner v. Sullivan, 33 N.Y.S. 2d 77—Wishnetzky Food Products v. Osman, 27 N.Y.S.2d 750.

(2) Complaint may be amended to show compliance.—Wishnetzky Food Products v. Osman, supra.

Substantial right not prejudiced

N.Y.—Modern Engineering Corporation v. Saratoga Springs Authority, 278 N.Y.S. 4, 243 App.Div. 830.

Retention to assess damages unnecessary

U.S.—Beals v. City of Atlanta, C.C.A.Ga., 61 F.2d 439.

On demurrer

Ala.—Caudle v. Cotton, 173 So. 847, 234 Ala. 126.

Ga.—Flint v. City Council of Augusta, 14 S.E.2d 859, 192 Ga. 318—Lathrop v. Miller, 138 S.E. 50, 164 Ga. 167.

Bills held sufficient

U.S.—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.

Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615—City of Miami Beach v. Sun Oil Co., 178 So. 109, 130 Fla. 582—City of Miami Beach v. Texas Co., 178 So. 109, 130 Fla. 580—City of Miami Beach v. Gulf Oil Corporation, 178 So. 110, 130 Fla. 581—Pohl Beauty School v. City of Miami, 159 So. 789, 118 Fla. 664—McIlwain v. Mortgage & Investing Corporation, 155 So. 641, 115 Fla. 230.

Ill.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill. App. 298.

N.Y.—Boro Wide Food Dealers Ass'n v. La Guardia, 44 N.Y.S.2d 160—Rueffer v. Department of Agriculture and Markets, 299 N.Y.S. 606, 164 Misc. 803—Village of Great Neck Estates v. Bemak & Lehman, 218 N.Y.S. 359, 128 Misc. 441.

91. U.S.—Marsh v. Earle, D.C.Pa., 24 F.Supp. 385.

Ala.—Fischer v. McDuff, 172 So. 637, 233 Ala. 499—Higdon v. McDuff, 172 So. 636, 233 Ala. 497.

Ark.—Special School Dist. No. 50 v. Deason, 34 S.W.2d 1084, 183 Ark. 102.

N.J.—Ollendorf v. Hirsch, 181 A. 879, 119 N.J.Eq. 225.

N.Y.—Carlisle v. Bennett, 197 N.E. 220, 268 N.Y. 212, reversing 277 N.Y.S. 197, 243 App.Div. 655, affirming 275 N.Y.S. 152, 153 Misc. 151, affirmed 277 N.Y.S. 187, 243 App.Div. 186—Valentine v. Valentine, 43 N.Y.S.2d 824—Wishnetzky Food Products Co. v. Osman, 27 N.Y.S.2d 750.

32 C.J. p 358 note 93.

Adequacy of legal remedy uncertain

Dismissal before trial is not warranted.—Commonwealth ex rel. Reno v. Dial Rock Coal Co., Pa.Com.Pl., 53 Dauph.Co. 342.

Partial remedy insufficient to justify dismissal.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill.App. 298.

Remedies inadequate

In suit to enjoin defendant from further prosecuting action at law on claim allegedly released, defendant's motion to dismiss bill on ground that remedy at law was adequate would be denied, since adequacy of remedy was dependent on defendant's prosecuting action to judgment.—King Mfg. Co. v. Fabian, 195 A. 623, 122 N.J.Eq. 554.

Remedy of minority stockholder

Where minority stockholder could have resisted dissolution of corporation and appointment of receiver in proceedings for dissolution, by joining in cross bill of other minority stockholders or by filing one of his own, his bill to enjoin prosecution of dissolution suit was properly dismissed.—Dorris Motor Car Co. v. Colburn, 270 S.W. 339, 307 Mo. 137.

92. Ark.—Sledge-Norfleet Co. v. Matkins, 243 S.W. 289, 154 Ark. 509.

93. Ala.—Dailey v. Koepple, 51 So. 348, 164 Ala. 317.

32 C.J. p 358 note 94.

Nonamendable defects

U.S.—C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, D.C.Cal., 33 F.Supp. 539.

Want of equity raised only incidentally

Where no demurrer to a bill for injunction or motion to dismiss it for want of equity has been heard and the equity of the bill is drawn in question only incidentally and the decree is rendered in vacation, absolute dismissal of the bill without affording complainant an opportunity to amend is erroneous.—Bishop v. Wood, 59 Ala. 253.

94. Neb.—Northport Irr. Dist. v. Farmers' Irr. Dist., 251 N.W. 174, 125 Neb. 607.

Tex.—Fawver v. First Texas Joint Stock Land Bank of Houston, Civ. App., 115 S.W.2d 1217—Booth v. Board of Education of Fort Worth Independent School Dist., Civ.App., 70 S.W.2d 350.

95. Ga.—Mitchell v. Bale, 165 S.E. 5, 175 Ga. 52.

96. U.S.—Sidney Morris & Co. v. National Ass'n of Stationers, Office Outfitters & Manufacturers, C.C.A. Ill., 40 F.2d 620.

If from the face of the petition it appears that there are persons with interests in the subject matter of the litigation who are not before the court, the bill should not be dismissed for want of equity until such interested parties are before the court.[97]

(c) Defect of Parties

Nonjoinder of a necessary party is ground for dismissal of a bill for an injunction; mere misjoinder is not, under some statutes, although the bill will be dismissed as to parties improperly joined.

Under the rules or practice of some jurisdictions, the failure to join necessary parties is ground for dismissal of a bill for an injunction.[98] Under some statutes, however, a mere misjoinder is not ground for dismissal of the bill,[99] although the bill may be dismissed as to parties improperly joined in the action.[1]

Where only part of defendants have been served with process, the bill should not be dismissed on motion of those who have appeared.[2]

Reinstatement. A necessary party who has not been joined has the right to have the dismissal set aside and the suit reinstated.[3]

(d) Failure to Prosecute

The bill in an injunction suit may be dismissed for lack of diligence in its prosecution.

In accordance with general rules discussed in Dismissal and Nonsuit § 65, and Equity § 569 a, the bill in an injunction suit may be dismissed for failure of complainant to use due diligence in its prosecution.[4] The failure of complainant's counsel to appear on the date set for argument of defendant's motion to dissolve a preliminary injunction issued in the case, does not constitute such a want of prosecution as would justify a dismissal of the bill.[5]

(e) Change of Circumstances

The bill in an injunction suit may be dismissed by a change in circumstances subsequent to its filing.

If plaintiff had a right of action at the time of filing the bill but has lost it by a subsequent change of circumstances, the bill may be dismissed.[6] On the other hand a bill for a permanent injunction will not be dismissed merely because defendant desists from doing acts which he was enjoined from doing by a preliminary injunction.[7] Where the change in circumstances renders the issuance of an injunction unnecessary, the bill should be dismissed as moot rather than on the merits.[8]

Inequitable conduct on the part of complainant after filing of the bill is a ground for its dismissal.[9]

(f) Dissolution of Preliminary Injunction

As a general rule on a mere motion to dissolve an injunction the bill may not be dismissed.

The general rule is that, on a mere motion to dis-

97. Ill.—Texas Co. v. Hollingsworth, 31 N.E.2d 944, 375 Ill. 536, reversing 27 N.E.2d 67, 304 Ill.App. 607.

98. U.S.—Ferris v. Wilbur, C.C.A.Va., 27 F.2d 262.
Pa.—Hanna v. Chester Times, 154 A. 591, 303 Pa. 252—Bardine v. Samuels, 13 Pa.Dist. & Co. 497, 44 York Leg.Rec. 29.
Tenn.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn.App. 369.
32 C.J. p 358 note 97.

Absence of parties held not ground for dismissal
U.S.—Mississippi Power Co. v. City of Aberdeen, C.C.A.Miss., 95 F.2d 990—Pacific Fruit & Produce Co. v. Martin, D.C.Wash., 16 F.Supp. 34.
Nonjoinder as ground for dismissal of bill in equity see Equity § 155 d.

99. Md.—Jones v. Gordy, 180 A. 272, 169 Md. 173.
Misjoinder as ground for dismissal of bill in equity see Equity § 156 c.

1. U.S.—D. S. Kresge Co. v. Ottinger, D.C.N.Y., 29 F.2d 762, affirmed Roschen v. Ward, 49 S.Ct. 336, 279 U.S. 337, 73 L.Ed. 722—Ferris v. Wilbur, C.C.A.Va., 27 F.2d 262.

2. Ill.—Duncan v. State Bank, 2 Ill. 262.

3. Ill.—Shannahan v. Stevens, 28 N. E. 804, 139 Ill. 428, reversing 38 Ill.App. 571.

4. Ill.—Duncan v. Finch, 10 Ill. 296.
32 C.J. p 359 note 1.

5. U.S.—Staudte & Rueckoldt Mfg. Co. v. Carpenters' District Council of United Brotherhood of Carpenters and Joiners of America, C.C.A.Mo., 12 F.2d 867, 868.
"The case was not set for trial on the merits. . . . The matter before the court was the motion of defendants to dissolve the temporary injunction."—Staudte & Rueckoldt Mfg. Co. v. Carpenters' District Council of United Brotherhood of Carpenters and Joiners of America, supra.

6. Iowa.—People's Sav. Bank of Avoca v. McCarthy, 231 N.W. 487, 210 Iowa 952.
Mich.—Golden v. Davis, 253 N.W. 195, 266 Mich. 7.
32 C.J. p 359 note 2.

Reason for injunction having ceased
Tex.—Polk v. Holland Texas Hypotheek Bank, Civ.App., 66 S.W.2d 1112.

Cause becoming moot
N.J.—Dolan Dining Co. v. Cooks' and Assistants' Union Local No. 399, A. F. of L., 9 A.2d 303, 126 N.J. Eq. 445, reversed on other grounds 15 A.2d 453, 128 N.J.Eq. 210.

Sale of business by complainant
Va.—Burchell v. Capitol City Dairy, 163 S.E. 81, 158 Va. 6.

7. **Injunction against order**
Where suit to enjoin enforcement of an order of a state commission has been brought, bond given, injunction issued, liability for costs incurred, and the taking of testimony largely completed, defendants cannot obtain dismissal of the bill merely by revoking the order complained of, while retaining the power to reinstate it, and especially where, in case of such dismissal, complainant would be liable to third parties on its bond.—Mobile Gas Co. v. Patterson, D.C.Ala., 288 F. 890.

8. Ky.—Stacy v. Caudill, 115 S.W. 2d 316, 272 Ky. 841.

Dismissal without prejudice
Pa.—Universal Carloading & Distributing Co. v. Universal Ind. Union, Com.Pl., 90 Pittsb.Leg.J. 326.

9. **Abuse of court process or order**
N.J.—Kem Products Co. v. Levin, 177 A. 77, 117 N.J.Eq. 560.

solve an injunction, the court is without authority on granting the motion to dismiss the bill,[10] except where by agreement the whole case is considered on the motion to dissolve.[11] Plaintiff still has the right to a trial of the case on the merits and to such relief as the case may then warrant,[12] and to amend the bill, if so advised,[13] unless the right to such trial is expressly waived;[14] and it is error to dismiss, although plaintiff made no request for a trial on the merits,[15] no motion to retain the bill being necessary;[16] and especially is this so where the merits turn on grave questions of law or conceded facts;[17] and the rule applies with full force in case of the dissolution of an injunction at chambers or in vacation,[18] and this is true in such a case, even though the temporary injunction is dissolved on the filing of an answer swearing away the equities of the bill.[19]

Exceptions or limitations to the general rule are recognized in some decisions.[20] Thus, it has been held that, where the injunction asked for is not ancillary, but the primary and principal relief prayed for, there is no reason for retaining the bill, if, on hearing, on bill and answer, or bill, answer, and depositions, it appears to the court that there is no ground for issuing or granting the injunction on the merits;[21] that, where a bill to restrain a suit at law is in effect a bill for discovery merely and the answer denies the equity of the bill, it may be dismissed on dissolution of the injunction;[22] and that, where an injunction is the only relief sought and the bill on its face shows want of equity, the court on sustaining a motion to dissolve the injunction may dismiss the bill,[23] the view being taken that the motion is equivalent to a demurrer,[24] although no such limitation is recognized by other decisions which hold that the bill should stand, even though the injunction be dissolved for want of equity,[25] or that the bill will not be dismissed without first giving plaintiff an opportunity to amend.[26] A further exception which has been recognized is objections to the jurisdiction which, being established, at once terminate the proceedings in which they are relied on whether taken by plea or answer.[27]

10. Ala.—Ex parte Baptist Tabernacle of Anniston, 8 So.2d 170, 242 Ala. 670.
Miss.—Galbreath v. Thayer, 113 So. 180, 147 Miss. 556, 53 A.L.R. 288.
N.C.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275—Cox v. City of Kinston, 8 S.E.2d 252, 217 N.C. 391—Lawhon v. McArthur, 195 S.E. 786, 213 N.C. 260—Grantham v. Nunn, 124 S.E. 309, 188 N. C. 239.
Pa.—Maroni v. West Penn. Power Co., 91 Pa.Super. 259.
32 C.J. p 359 note 3.

11. N.C.—Owen v. Cumberland County Bd. of Education, 114 S.E. 390, 184 N.C. 267.
32 C.J. p 359 note 4.

12. Colo.—Vallero v. Camilla, 125 P. 497, 53 Colo. 312.
32 C.J. p 359 note 5.

Restoration to calendar

Where action for injunction was submitted on motion to dissolve temporary injunction, and not on merits for final decree on pleadings and proof, and court improperly dismissed bill, the court in restoring the case to trial docket within thirty days was acting within its plenary power and did not abuse its discretion in restoring the parties to their status quo.—Ex parte Baptist Tabernacle of Anniston, 8 So.2d 170, 242 Ala. 670.

13. Colo.—Vallero v. Camilla, 125 P. 497, 53 Colo. 312.

14. Tex.—Love v. Powell, 2 S.W. 456, 67 Tex. 15, overruling Clegg v. Darragh, 63 Tex. 357—Gaskins v. Peebles, 44 Tex. 390.
32 C.J. p 359 note 7.

15. Tex.—Meyers v. Walker, Civ. App., 264 S.W. 314, affirmed Walker v. Meyers, 266 S.W. 499, 114 Tex. 225.
32 C.J. p 359 note 8.

16. Tenn.—Cole v. Sands, 1 Overt. 183.
Tex.—McKenzie v. Withers, Civ.App., 153 S.W. 413.
32 C.J. p 360 note 9.

17. Tenn.—Owen v. Brien, 2 Tenn. Ch. 295.

18. Tex.—Meyers v. Walker, Civ. App., 264 S.W. 314, affirmed Walker v. Meyers, 266 S.W. 499, 114 Tex. 225.
32 C.J. p 360 note 11.

On argument of order to show cause

Where sole object of litigation was permanent injunction, dismissal of the bill on the hearing of the order to show cause why the temporary injunction should not be dissolved was improper.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275.

19. Tex.—Meyers v. Walker, Civ. App., 264 S.W. 314, affirmed Walker v. Meyers, 266 S.W. 499, 114 Tex. 225.

20. **Rule recognized**
Fla.—Sauls v. Freeman, 4 So. 525, 24 Fla. 209, 12 Am.S.R. 190.
Ill.—Field v. Western Springs, 54 N.E. 929, 181 Ill. 186.

21. Md.—Easter v. Overlea Land Co., 99 A. 893, 129 Md. 627.
32 C.J. p 360 note 14.

22. Ala.—Steele v. Lowry, 6 Ala. 124.

23. Ala.—Higdon v. McDuff, 172 So. 636, 233 Ala. 497, followed in Fisher v. McDuff, 172 So. 637, 233 Ala. 499.
Fla.—Blume v. Giles, 197 So. 344, 143 Fla. 615—B. L. E. Realty Corp. v. Mary Williams Co., 134 So. 47, 101 Fla. 254.
Tenn.—Barthell v. Zachman, 36 S.W. 2d 886, 162 Tenn. 336.
32 C.J. p 360 note 16.

On court's own motion

Only question involved being validity of statute, it was proper for chancellor to dismiss bill of own motion after dissolving temporary injunction, so as to afford opportunity for early appeal.—Frazier v. Lindsey, 36 S.W.2d 436. 162 Tenn. 228.

Amendable defects treated as amended

Ala.—Birmingham Interurban Taxicab Service Corporation v. McLendon, 98 So. 578, 210 Ala. 525.

24. Mo.—C. H. Albers Commission Co. v. Spencer, 150 S.W. 712, 245 Mo. 368.
32 C.J. p 360 note 17.

25. Ga.—Gullatt v. Thrasher, 42 Ga. 429.

26. Ky.—Beard v. Geran, Hard. 12.
Tex.—Washington County v. Schulz, 63 Tex. 32.
32 C.J. p 360 note 19 [a].

27. Md.—Withers v. Denmead, 22 Md. 135.

Dismissal at next term after dissolution. In some jurisdictions statutes require that the bill shall be dismissed of course at the next term after the dissolution of the injunction, unless cause is shown why the case should be retained.[28] However, the statutes do not apply where other relief is demanded,[29] or in case of a dissolution in vacation or at chambers.[30]

Where a bill asks other relief than an injunction, the bill should not be dismissed on dissolution of the injunction, but should be continued for a hearing on the right to the other relief demanded.[31]

Dissolution as to some of the parties. On the dissolution of the injunction, the bill may be dismissed as to a part of the parties and retained as to the remainder.[32]

(g) Miscellaneous Grounds

Various other grounds have been considered by the courts on applications for dismissal of the bill in an injunction suit.

That the case as presented does not call for the issuance of a preliminary injunction, does not of itself call for the dismissal of the complaint sufficient in itself.[33] So it has been held that grounds for dissolving a temporary injunction, discussed infra §§ 241–246, such as the failure to file an injunction bond,[34] defects in the bond,[35] or want of an affidavit or a defective affidavit,[36] do not warrant a dismissal of the suit. However, under the practice of some jurisdictions a bill may be dismissed without regard to the merits if it be found by the court that a temporary injunction was improperly issued in the case.[37] It has also been held that where a restraining order is granted on condition that a proper indemnity bond be posted, failure to comply with such condition justifies dismissal of the complaint.[38]

If defendant in his answer concedes plaintiff's claims and disavows any purpose or intention to commit the acts which plaintiff seeks to restrain, the suit may be dismissed at the discretion of the court or retained with leave to plaintiff to move for an injunction on defendant's disregarding his avowed intentions.[39]

c. Procedure

The dismissal of a bill in an injunction suit may be sought by demurrer or motion, the question presented being generally whether the bill states facts sufficient to constitute a cause of action.

The bill in an injunction suit may be dismissed for want of equity on demurrer[40] or on motion to dismiss,[41] provided an amendment could not help the bill,[42] the bill on such a motion being taken by the court as amended with respect to amendable defects.[43]

There is no objection to combining an application for dissolution of a preliminary injunction with a motion to dismiss the bill as insufficient on questions theretofore raised by demurrer.[44]

On court's own motion. In some jurisdictions the bill cannot be dismissed by the court on its own motion before answer.[45]

At what stage of proceeding. In general a bill demanding injunctive relief may be dismissed at any stage of the proceedings before the final decree.[46]

28. Miss.—Evans v. Money, 61 So. 309, 104 Miss. 264.
32 C.J. p 360 note 22.

29. Va.—Adkins v. Edwards, 2 S.E. 435, 83 Va. 300.
32 C.J. p 361 note 23.

30. Tex.—Price v. Bland, 44 Tex. 145.
32 C.J. p 361 note 24.

31. U.S.—Morton v. Commissioner of Internal Revenue, C.C.A., 104 F.2d 534.
32 C.J. p 361 note 25.

32. Va.—Pettit v. Jennings, 2 Rob. 676, 41 Va. 676.

33. **Irreparable injury not shown**
U.S.—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.

34. Ga.—Guerry v. Dunham, 11 Ga. 9.
Ohio.—Gallagher v. Johnson, 31 Cinc. L.Bul. 24.
Bond as prerequisite to injunction see supra §§ 165, 166.

35. Iowa.—Massie v. Mann, 17 Iowa 131.
32 C.J. p 361 note 28.

36. N.J.—Corey v. Voorhies, 2 N.J. Eq. 5.
Tex.—Pullen v. Baker, 41 Tex. 419.
Under Pennsylvania practice
(1) A mere general affidavit by complainant to the truth of the facts set forth in the bill is not sufficient to support a preliminary injunction, but injunction affidavits must be filed at the time the writ is awarded and, if this is not done, the injunction must be dissolved.—Hicks v. Derrick, 17 Pa.Co. 605.
(2) It has been held, however, that, where continued injunctions have been filed, the court will not dissolve an injunction already granted on account of the alleged insufficiency of such facts.—Hicks v. Derrick, supra.

37. Colo.—Axelson v. Columbine Laundry Co., 254 P. 990, 81 Colo. 254.

38. Fla.—Ginsberg v. City of Daytona Beach, 137 So. 253, 103 Fla. 168.

39. Ill.—Warrick v. Hull, 102 Ill. 280.
32 C.J. p 361 note 30.

40. Ga.—Justice v. Warner, 173 S.E. 703, 178 Ga. 579.
32 C.J. p 361 note 31.

41. N.J.—Philadelphia Trust, Safe Deposit & Ins. Co. v. Merchantville, 69 A. 729, 74 N.J.Eq. 330.
32 C.J. p 361 note 32.

42. Ill.—Sargent Co. v. Baublis, 127 Ill.App. 631.
32 C.J. p 361 note 33.

43. Ala.—Cahalan v. Monroe, 56 Ala. 303.

44. Mich.—Freeman v. Mitchell, 164 N.W. 445, 198 Mich. 207.

45. Pa.—Maroni v. West Penn Power Co., 91 Pa.Super. 259—Swainbank v. Yoder, 79 Pa.Super. 132.

46. Tex.—Merifee v. Myers, 33 Tex. 690.

While, as considered supra subdivision b (2) (f) of this section, under some circumstances, the bill may be dismissed at the time of the dissolution of a temporary injunction, it has been held improper for a court before answer or demurrer to dismiss a bill on a hearing, on the bill and affidavits, of a motion to continue the preliminary injunction.[47]

The bill may be dismissed on a proper showing after a hearing on the application for a preliminary injunction;[48] but not at an interlocutory hearing in a case which seeks additional relief.[49] Where the answer has been filed and the case called for trial on its merits, it is too late for defendant to move to dismiss a bill on the ground that complainant has an adequate remedy at law.[50]

At term, chambers, or in vacation. Under the practice of some jurisdictions a motion to dismiss an action for an injunction should be heard at term,[51] and it is generally held that a judge, at chambers or in vacation, has no authority to dismiss the bill,[52] but on motion being made to dismiss the bill should leave further action in the case to be taken at a regular term of court.[53] It has been held, however, that the bill may be dismissed in vacation as well as in term if the court is without jurisdiction.[54]

On the death of a party a reasonable time for the appointment of his personal representative and making him a party in the case by amended bill and bringing him into court by proper process will be allowed, and the bill will not be dismissed until such reasonable time shall have passed unheeded.[55]

Renewal of motion. After denial of a motion to dismiss, the court still has jurisdiction to reconsider its action and make final disposition of the motion.[56]

Matters considered. In accordance with general rules considered in Dismissal and Nonsuit § 71 c, a motion to dismiss a bill for an injunction presents generally the issue whether the bill states facts sufficient to constitute a cause of action,[57] which issue must be determined from the bill itself;[58] the court may not consider the affidavits or other evidence submitted on the application for the injunction.[59]

For the purpose of the motion, the facts properly set forth in the bill stand admitted and are to be taken as true.[60] This is not so as to conclusions

47. Ala.—Conner v. Smith, 74 Ala. 115.
32 C.J. p 361 note 37.

48. Fla.—Sauls v. Freeman, 4 So. 525, 24 Fla. 209, 12 Am.S.R. 190.
Ill.—Field v. Western Springs, 54 N. E. 929, 181 Ill. 186.

49. **Effect of statute**
Statute, permitting the court to pass on a demurrer to a bill in equity seeking extraordinary relief at an interlocutory hearing, was held not to authorize the judge at interlocutory hearing, after introduction of evidence on petition seeking both injunction and cancellation of deed, to render judgment dismissing entire case.—Justice v. Warner, 173 S.E. 703, 178 Ga. 579.

50. Ga.—Hargraves v. Jones, 27 Ga. 233.

51. N.C.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275.

52. Neb.—Browne v. Edwards & McCulloch Lumber Co., 62 N.W. 1070, 44 Neb. 361.
Tenn.—Mitchell v. Williams, Ch.A., 46 S.W. 325.
32 C.J. p 362 note 42.

Absent consent of parties
Tex.—Walker v. Meyers, 266 S.W. 499, 114 Tex. 225, affirming Meyers v. Walker, Civ.App., 264 S.W. 314.

53. Tenn.—Mitchell v. Williams, Ch. A., 46 S.W. 325.

54. Tex.—White v. Maverick County Water Control and Improvement Dist. No. 1, Civ.App., 26 S.W. 2d 659, reversed on other grounds, Com.App., 35 S.W.2d 107.

55. W.Va.—Frank v. Brunnemann, 8 W.Va. 462.

56. Mich.—Eisner v. Williams, 298 N.W. 507, 298 Mich. 215.

57. U.S.—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Polk Co. v. Glover, Fla., 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Ghadiali v. Delaware State Medical Soc., D.C.Del., 28 F.Supp. 841.
Ill.—Texas Co. v. Hollingsworth, 27 N.E.2d 67, 304 Ill.App. 607, reversed on other grounds 31 N.E.2d 944, 375 Ill. 536.
Mich.—Red Star Motor Drivers' Ass'n v. City of Detroit, 221 N.W. 622, 244 Mich. 480, followed in City of Detroit v. Webster, 221 N. W. 629, 244 Mich. 503.

Allegations of ultimate fact
N.Y.—Weiner v. Valentine, 17 N.Y.S. 2d 355, affirmed 23 N.Y.S.2d 866, 260 App.Div. 999, appeal denied 25 N.Y.S.2d 780, 261 App.Div. 818.

Prima facie showing of right
U.S.—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.

Matters not determined
N.Y.—Abeles v. Friedman, 14 N.Y.S. 2d 252, 171 Misc. 1042.

Restraining enforcement of statute
U.S.—Premier-Pabst Sales Co. v. McNutt, D.C.Ind., 17 F.Supp. 708.

58. U.S.—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Polk Co. v. Glover, Fla., 59 S. Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995.
N.Y.—Abeles v. Friedman, 14 N.Y.S. 2d 252, 171 Misc. 1042.

59. U.S.—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Polk Co. v. Glover, Fla., 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Redlands Foothill Groves v. Jacobs, D. C.Cal., 30 F.Supp. 995.
N.Y.—Abeles v. Friedman, 14 N.Y.S. 2d 252, 171 Misc. 1042.

On application for temporary injunction
U.S.—Paramount Motors Corporation of the Pacific v. Title Guarantee & Trust Co., C.C.A.Cal., 15 F.2d 298.
N.Y.—Lella v. Rubel Corporation, 25 N.Y.S.2d 548.

Matters of defense
U.S.—Gobitis v. Minersville School Dist., D.C.Pa., 21 F.Supp. 581.

60. U.S.—Polk Co. v. Glover, Fla., 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6—Marrs v. City of Oxford, D.C. Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Higgins Mfg. Co. v. Page, D.C.R.I., 20 F.2d 948—Snyder v. Gurnsey, D.C.N.H., 43 F.Supp.

of fact.[61]

On a motion to dismiss before an answer on the merits, only procedural points are considered, not the merits.[62]

On a motion to dismiss a bill seeking an injunction to restrain enforcement of an ordinance, the court may inquire into the reasons for the enactment of the ordinance.[63]

Failure to mention a point in the briefs submitted on a motion to dismiss has been considered an abandonment of such point.[64]

d. Operation and Effect

The dismissal of the bill constitutes a dissolution of a preliminary injunction issued in the case. If dismissed without prejudice the rights of the parties are left unaffected.

The dismissal of a bill ipso facto dissolves a temporary injunction already allowed in the action,[65] and is conclusive evidence that the injunction was wrongfully sued out,[66] although made "without prejudice,"[67] or that it was improvidently granted;[68] and even though the dismissal is erroneous, an action at law against the prosecution of which a temporary injunction is thereby dissolved is reinstated and may be prosecuted to judgment.[69] So the dismissal from a bill of all charges on which the injunction was issued dissolves the injunction.[70] Where an injunction is granted restraining defendant until further order of the court, a failure to procure an order making it perpetual does not ipso facto dissolve the injunction; it continues in force until dissolved or modified.[71]

A dismissal not on the merits,[72] such as a dismissal for want of prosecution,[73] or for want of jurisdiction,[74] is not res judicata. The dismissal of a bill for an injunction without prejudice leaves the rights and claims of complainant unaffected.[75]

A dismissal by stipulation or consent is not conclusive on defendant who was not brought in and was not a party to the stipulation.[76]

§ 199. Trial or Hearing

a. In general
b. Necessity
c. Time for hearing
d. Papers and evidence on hearing
e. Inspection of subject matter
f. Submission of issue to jury
g. Verdict and findings
h. Rehearing or second application
i. Dismissal

a. In General

The trial or hearing in an injunction suit must be

204—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995—Ghadiali v. Delaware State Medical Society, D.C.Del., 28 F.Supp. 841—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20—U. S. v. Goldsmith Fruit Co., D.C.Fla., 19 F.Supp. 147—U. S. v. M. K. Goetz Brewing Co., D.C.Mo., 10 F.Supp. 334.

Fla.—Mayo v. Bossenbury, 10 So.2d 725—Clark v. Kreidt, 199 So. 333, 145 Fla. 1.

Iowa.—Farmers Co-op. Ass'n v. Quaker Oats Co., 7 N.W.2d 906.

Mich.—Red Star Motor Drivers' Ass'n v. City of Detroit, 221 N.W. 622, 244 Mich. 480, followed in City of Detroit v. Webster, 221 N.W. 629, 244 Mich. 503.

N.Y.—Beach v. Queens County Jockey Club, 298 N.Y.S. 777, 164 Misc. 363—Lella v. Rubel Corporation, 25 N.Y.S.2d 548.

61. U.S.—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625.

Questions of law

In suit to enjoin violation of restrictive covenants, whether restrictions were intended for benefit of purchaser and of subsequent purchasers of other lots in the tract was a "question of law" for court.—Jackson v. Richards, Del.Ch., 27 A.2d 857.

62. Constitutional questions raised by bill need not be considered.—Royal Farms Dairy v. Wallace, D.C.Md., 7 F.Supp. 560.

63. U.S.—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625.

64. Three-judge district court

In suit against state governor, state tax commissioner, and attorney general to enjoin defendants from assessing and collecting tax against foreign corporation, contention that suit was in reality against state, and therefore not within jurisdiction of three-judge federal court, was treated as abandoned where not mentioned in brief.—Rainier Nat. Park Co. v. Martin, D.C.Wash., 18 F.Supp. 481, affirmed 58 S.Ct. 478, 302 U.S. 661, 82 L.Ed. 511, and rehearing denied, D.C., 23 F.Supp. 60.

65. Okl.—Mid-Continent Petroleum Corporation v. Skeen, 45 P.2d 724, 172 Okl. 428, citing **Corpus Juris.** 32 C.J. p 362 note 44.

66. Miss.—Alexander v. Wood, 75 So. 772, 115 Miss. 164.

67. Miss.—Yale v. Baum, 11 So. 879, 70 Miss. 225.

68. Ala.—National Surety Co. v. O'Connell, 81 So. 146, 16 Ala.App. 654, certiorari denied 81 So. 660, 202 Ala. 684.

69. Ill.—Billboard Pub. Co. v. McCarahan, 192 Ill.App. 384.

70. Ill.—Thomsen v. McCormick, 26 N.E. 373, 136 Ill. 135.

71. Iowa.—Curtis v. Crane, 38 Iowa 459.

72. U.S.—Smith v. McNeal, Tenn., 3 S.Ct. 319, 109 U.S. 426, 27 L.Ed. 986.
32 C.J. p 362 note 52.

73. Ill.—Chamberlain v. Sutherland, 4 Ill.App. 494.

74. U.S.—Smith v. McNeal, Tenn., 3 S.Ct. 319, 109 U.S. 426, 27 L.Ed. 986—Walden v. Bodley, Ky., 14 Pet. 156, 10 L.Ed. 398.

75. Md.—Rosenberg v. State, 165 A. 306, 164 Md. 473.

76. Ill.—Shannahan v. Stevens, 28 N.E. 804, 139 Ill. 428, reversing 38 Ill.App. 571.

held before a tribunal having jurisdiction. Statutes regulating the trial or hearing must be complied with.

Plaintiff in an injunction suit has the right to have his case tried and decided on the merits by a proper tribunal having jurisdiction to do so.[77]

Questions of law or fact. The question of whether the circumstances are such as to justify the issuance of an injunction presents a question of fact for determination[78] by the trier of the facts.[79] In the absence of a disputed question of fact, whether legal wrong exists or is threatened which requires injunctive relief is a question of law.[80]

Statutory provisions generally. The trial or hearing of a suit or application for an injunction is frequently the subject of statutory provision.[81] Statutes regulating the trial or hearing of an injunction suit must be complied with.[82]

b. Necessity

(1) Preliminary injunction
(2) Permanent injunction

(1) Preliminary Injunction

Except as statutes otherwise provide, the court may under certain circumstances issue a preliminary injunction without a trial or hearing at which the parties have had an opportunity to be heard. Ordinarily, however, such an injunction should not be granted without such a hearing.

As a general rule, under the practice or statutes of the various jurisdictions, a temporary injunction should not be issued without a hearing at which the interested parties have been given an opportunity to be heard,[83] if practicable.[84] However, where the need for the preliminary injunction is pressing and the threatened injury or loss is imminent and irreparable, the court is usually held to have power to issue the same without a hearing,[85] in the ex-

77. S.C.—Kinder v. Atlantic Coast Lumber Corp., 93 S.E. 7, 107 S.C. 404.
Jurisdiction see supra §§ 168, 169.
Venue see supra § 170.

78. Cal.—Simpson v. New York Hardware Trading Co., 266 P. 956, 91 Cal.App. 213.
Mass.—Anderson v. Moskovitz, 157 N.E. 601, 260 Mass. 523.
Va.—Eastern Finance Co. v. Gordon, 20 S.E.2d 522, 179 Va. 674—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.

79. Cal.—People v. Stafford Packing Co., 227 P. 485, 193 Cal. 719.
Ga.—Chapple v. Hight, 131 S.E. 505, 161 Ga. 629.
Ind.—Greathouse v. Board of School Com'rs of City of Indianapolis, 151 N.E. 411, 198 Ind. 95.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.

80. N.Y.—Baumann v. Baumann, 165 N.E. 819, 250 N.Y. 382, modifying 229 N.Y.S. 833, 224 App.Div. 719, affirming 228 N.Y.S. 539, 132 Misc. 217, and reargument denied 166 N.E. 344, 250 N.Y. 612—De Raay v. De Raay, 8 N.Y.S.2d 361, 255 App. Div. 544, affirmed 21 N.E.2d 879, 280 N.Y. 822.
Tex.—Woods v. Kiersky, Civ.App., 14 S.W.2d 825, reversing, Civ.App., 297 S.W. 518.

81. Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.

Service of points and authorities
Cal.—Remillard Brick Co. v. Dandini, 117 P.2d 432, 47 Cal.App.2d 63—McDonald v. Superior Court in and for Sierra County, 64 P.2d 738, 18 Cal.App.2d 652.

82. Or.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

83. Tex.—Lower Colorado River Authority v. Gulf Coast Water Co., Civ.App., 107 S.W.2d 1101—Anthony v. North American Building & Loan Ass'n, Civ.App., 68 S.W.2d 581—Panhandle Const. Co. v. Plain, Civ.App., 52 S.W.2d 504—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.
Wis.—Ritholz v. Ammon, 4 N.W.2d 173, 240 Wis. 578—Milwaukee Horse & Cow Commission Co. v. Hill, 241 N.W. 364, 207 Wis. 420.

Prayer for injunction
Where petition contained no prayer for temporary injunction, court is not authorized in granting temporary injunction without a hearing.—Lokey v. Elliott, Tex.Civ.App., 88 S.W.2d 126.

Ex parte hearing insufficient
Ill.—Brandt v. Milk Wagon Drivers Union of Chicago, Local 753, 26 N.E.2d 643, 304 Ill.App. 578.
Tex.—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331.

Hearing on order to show cause
Right to temporary injunction, heard on order to show cause, is adjudicated by decision after hearing.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.

Presentation of evidence
(1) Defendant should be permitted to present evidence at the hearing.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314.

(2) Trial court did not err in granting temporary injunction on duly verified application, sufficient on its face to state a cause of action for injunctive relief, without hearing evidence in support thereof, where due and proper notice was given and parties were present before court, but where defendants made no request for leave to present evidence, offered no evidence, and did not deny allegations contained in application.—Jennings v. Elliott, 97 P.2d 67, 186 Okl. 285.

84. Tex.—Refrigeration Discount Corporation v. Meador, Civ.App., 134 S.W.2d 331.

85. Tex.—Alpha Petroleum Co. v. Railroad Commission, Civ.App., 59 S.W.2d 374, error dismissed—Woodward v. Smith, Civ.App., 253 S.W. 847.

As exercise of judicial function
N.Y.—People v. George Henriques & Co., 196 N.E. 304, 267 N.Y. 398, reversing 271 N.Y.S. 1068, 242 App. Div. 618—Jewish Hospital of Brooklyn v. Doe, 300 N.Y.S. 1111, 252 App.Div. 581.

Unusual haste necessary
Pa.—Varzaly v. Yuhasz, 193 A. 63, 128 Pa.Super. 314.

Mandatory injunction
Tex.—Woodward v. Smith, Civ.App., 253 S.W. 847.

Sufficiency of petition or affidavits
Ill.—Wright v. Depositors' State Bank, 268 Ill.App. 478.
Pa.—Stim v. Bezinec, 190 A. 894, 325 Pa. 492.
Tex.—McMurrey Refining Co. v. State, Civ.App., 149 S.W.2d 276, error refused—Refrigeration Discount Corporation v. Meador, Civ. App., 134 S.W.2d 331—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ. App., 126 S.W.2d 690—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ.App., 121 S.W.2d 1048—Lower Colorado River Authority v. Gulf Coast Water Co., Civ.App., 107 S.W.2d 1101—Hopkins v. Frenchy, Civ.App., 75 S.W. 2d 184—San Angelo Nat. Bank v.

ercise of its judicial discretion.[86] The court should be reluctant to grant a temporary injunction without a hearing[87] and should not issue the same on an ex parte hearing unless the right thereto is clearly established.[88]

Under the statutes of some jurisdictions, no injunction may be issued in the type of case specified except after a hearing of the evidence of the witnesses, in open court, with an opportunity for cross-examination.[89] Thereunder no injunction can be issued, in a case covered thereby, on affidavits alone.[90]

(2) Permanent Injunction

A trial or hearing at which the interested parties have an opportunity to be heard is ordinarily essential to the issuance of a permanent injunction.

A court of equity will not make a decree for a perpetual injunction, which is to operate directly on the parties in interest, without giving them an opportunity to be heard.[91] Unless the right is waived,[92] the parties are entitled to a trial in open court, with the right to have the evidence heard, either by deposition or orally,[93] and the opportunity to examine and cross-examine witnesses.[94] As considered infra § 200 b, it is not proper to issue a permanent injunction on the hearing of an application for a preliminary injunction or on motion to dissolve heard before answer. A permanent injunction should issue, or a temporary injunction should be made permanent, only on final hearing after the cause is at issue,[95] and after notice to defendant.[96]

c. Time for Hearing

(1) In general

(2) Continuances

(1) In General

Statutes or rules of court ordinarily determine the time for the trial or hearing in an injunction suit.

Wright, Civ.App., 66 S.W.2d 804, error refused—Andrews v. Archer County, Civ.App., 45 S.W.2d 227—Woodward v. Smith, Civ.App., 253 S.W. 847—Farb v. Theis, Civ.App., 250 S.W. 290—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ.App., 248 S.W. 451.

86. Tex.—Alpha Petroleum Co. v. Railroad Commission, Civ.App., 59 S.W.2d 374, error dismissed.

Statutory provisions

Ala.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.

Discretion not abused

Tex.—Alpha Petroleum Co. v. Railroad Commission, Civ.App., 59 S.W. 2d 374, error dismissed.

87. Tex.—John Hancock Mut. Life Ins. Co. v. Baldwin, Civ.App., 107 S.W.2d 1035, 1037.

Disapproval of practice

Tex.—International Harvester Co. v. Farmers & Merchants Nat. Bank of De Leon, Civ.App., 126 S.W.2d 690.

88. Tex.—Chas. F. Noble Oil & Gas Co. v. American Refining Co., Civ. App., 248 S.W. 451.

89. N.J.—Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, C. I. O., 29 A. 2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

Statute inapplicable

N.J.—Kohn v. Local No. 195, Amalgamated Clothing Workers of America, 29 A.2d 141, 132 N.J.Eq. 512.

Enjoining enforcement of ordinance

(1) Under some statutes, a preliminary injunction may not issue against a municipal corporation restraining enforcement of a municipal ordinance except after a hearing on specified notice.—Ex parte Connor, 198 So. 850, 240 Ala. 327.

(2) Such a statute has been held not to contemplate an illegal activity or attempt to authorize a municipality to engage in an unauthorized act, and, when enjoined therefor, municipality cannot challenge jurisdiction of issuing court or judge on ground that the activities in question were but rational attempts to enforce an ordinance.—Ex parte Connor, supra.

Injunctions in labor dispute cases see supra § 138.

90. N.Y.—Aberdeen Restaurant Corporation v. Gottfried, 285 N.Y.S. 832, 158 Misc. 785.

Use of affidavits not banned

N.J.—Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

91. N.Y.—People v. Henriques & Co., 196 N.E. 304, 267 N.Y. 398, reversing 271 N.Y.S. 1068, 242 App.Div. 618.

32 C.J. p 362 note 58.

"A permanent injunction could not be properly granted without the formality of . . . the presentation of proof, in the absence of any waiver."—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 881, 148 Fla. 195.

92. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.

Ill.—Chicago, P. & St. L. R. R. Co. v. St. Louis, P. & N. Ry. Co., 79 Ill.App. 384.

Pa.—Green v. Milk Control Commission of Pennsylvania, Com.Pl., 48 Dauph.Co. 416.

93. Ill.—Chicago, P. & St. L. R. R. Co. v. St. Louis, P. & N. Ry. Co., 79 Ill.App. 384.

Hearing on bill and answer

Where temporary injunction is dissolved on bill and answer, hearing cause finally on bill and answer and unqualifiedly dismissing bill without opportunity to take proof was held error, in absence of default of plaintiff or notice to plaintiff of defendant's motion to submit on bill and answer, where it would result in barring plaintiff from recovery on demand alleged in bill.—Shrewsbery v. Meadows, 174 S.E. 688, 115 W.Va. 98.

94. Colo.—Boyd v. Brown, 267 P. 200, 202, 83 Colo. 547, citing **Corpus Juris.**

Ill.—Chicago, P. & St. L. R. R. Co. v. St. Louis, P. & N. Ry. Co., 79 Ill App. 384.

Rule of court

Under Chancery Court Rules, rule 215, where complainant in injunction suit, after demand by solicitor for defendants for cross-examination of complainant's affiants neglects or refuses to submit its affiants, chancery court may decline to consider the affidavits.—Majestic Laundry Co. v. Laundry Workers International Local No. 284, A. F. of L., 15 A.2d 101, 128 N.J.Eq. 40.

95. Ga.—Peebles v. Perkins, 140 S. E. 360, 165 Ga. 159.

Ill.—Levy v. Rosen, 258 Ill.App. 262.

32 C.J. p 362 note 64.

96. Fla.—State v. Jacksonville, Pensacola & Mobile R. Co., 15 Fla. 201.

Ga.—Purcell v. Pilgrim, 108 S.E. 515, 152 Ga. 61.

Notice of application for injunction see supra §§ 179, 180.

In general, the parties to an injunction suit have a right to insist on a prompt trial of the issues raised.[97] Ordinarily, however, the time when a suit for injunction may be brought on for hearing is dependent on statutes and rules of court,[98] which must be complied with if the court is to have jurisdiction to hear and determine the cause.[99]

As considered supra § 198 b (2) (b), the court may proceed to hear the cause on its merits before it is formally set for hearing, on a motion to dissolve a temporary injunction, if defendant is present in court and offers no objections.

Before appearance or answer. In the absence of a waiver by defendant,[1] a suit for an injunction cannot be set down for a hearing before expiration of defendant's time to appear or answer.[2]

In vacation. It has been held that a suit for a mandatory injunction can be heard and determined in vacation only in the manner prescribed by the statutes, or by the consent of the parties. The fact that defendant appears and contests the issuance of the injunction sought is not equivalent to consent that the cause be heard finally in vacation.[3]

Notice of hearing. Notice of the time for the hearing must be given in compliance with the governing statute or rule.[4]

(2) Continuances

Within the limits of governing statutes or rules of court, an application for a continuance of the hearing in an injunction case is addressed to the sound discretion of the court.

Except as a special statute or rule of court may vary the same,[5] the rules relating to continuances in general, considered in Continuances, particularly those applicable to suits in equity, considered in Equity § 484, apply to continuances in injunction suits.[6] While sufficient ground for a continuance must be present,[7] within the limits of governing statutes,[8] whether or not a postponement or con-

97. After restraining order without notice

Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

As respects propriety of temporary injunction

Tex.—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused.

Time and notice of hearing in equity generally see Equity § 483.

98. Ark.—Phillips v. Baker, 295 S. W. 384, 174 Ark. 403.

Ga.—Kniepkamp v. Richards, 16 S. E.2d 24, 192 Ga. 509—Johnson v. Holt, 3 Ga. 117.

32 C.J. p 363 note 67.

99. Cal.—Agricultural Prorate Commission v. Superior Court in and for Riverside County, 85 P.2d 898, 30 Cal.App.2d 154—Agricultural Prorate Commission v. Superior Court in and for Riverside County, 85 P.2d 899, 30 Cal.App.2d 156—McDonald v. Superior Court in and for Sierra County, 64 P.2d 738, 18 Cal.App.2d 652.

1. What constitutes waiver

Tex.—Fort Worth Acid Works v. City of Fort Worth, Civ.App., 248 S.W. 822, affirmed City of Fort Worth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919.

2. Tex.—City Council of City of Fort Worth v. Fort Worth Associated Master Plumbers & Heating Contractors, Civ.App., 8 S.W.2d 730, error refused.

Temporary injunction pending delay

Tex.—Fort Worth Acid Works v. City of Fort Worth, Civ.App., 248 S.W. 822, affirmed City of Fort Worth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919.

3. Miss.—Morris v. Trussell, 109 So. 854, 144 Miss. 343.

4. Order to show cause

That order to show cause why temporary injunction in a divorce action should not issue was made and set for hearing on same day it was granted was held not to render order invalid as conflicting with statute, where order was forthwith served on defendant and on his motion hearing of order was set for the seventh day after issuance thereof, since procedure conformed to statute.—McDonald v. Superior Court in and for Sierra County, 64 P.2d 738, 18 Cal. App.2d 652.

Labor dispute case

(1) Under some statutes, due and personal notice of the trial or hearing must be given in a labor dispute case, in such manner as the court may direct, to all known persons against whom relief is sought, and also to the public officials of the county or city in which the wrongful acts have been threatened or committed, and who are charged with the duty of protecting complainant's property. The requirements as to notice under such statutes must be complied with before an injunction may issue in a case coming within its terms.—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, 63 P.2d 1104, 155 Or. 634.

(2) "The purpose of such notice is obvious. The officers may, upon receiving it, give such attention to the controversy that the objectionable conduct may be terminated before the time fixed for the hearing shall have arrived. It is a salutary provision and one that commends itself as a step toward rendering government by injunction unnecessary."—Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101, supra.

Notice of application for an injunction see supra §§ 179, 180.

5. Statute inapplicable

Mo.—Soderberg v. Pierce, 33 Mo.App. 60.

6. U.S.—Folding Furniture Works v. Industrial Commission of Wisconsin, D.C.Wis., 300 F. 991.

Mo.—Soderberg v. Pierce, 33 Mo.App. 60.

32 C.J. p 363 note 70.

7. U.S.—Folding Furniture Works v. Industrial Commission of Wisconsin, D.C.Wis., 300 F. 991.

32 C.J. p 363 note 70.

8. In California

(1) Under Code Civ.Proc. § 527, requiring an order to show cause containing a temporary restraining order to set the return date at not more than ten days from the date of the order, the court may not postpone the hearing against wishes of defendant to a date beyond such ten-day period, while also continuing the restraining order.—Agricultural Prorate Commission v. Superior Court in and for Riverside County, 85 P.2d 898, 30 Cal.App.2d 154—Agricultural Prorate Commission v. Superior Court in and for Riverside County, 85 P.2d 899, 30 Cal.App.2d 156.

(2) Under this statute defendant has an absolute right to one continuance for a reasonable period, to prepare to meet the application for the preliminary injunction.—Mc-

tinuance should be ordered rests in the sound discretion of the court.[9]

d. Papers and Evidence on Hearing

(1) In general
(2) Preliminary injunction
(3) Permanent injunction

(1) In General

The court is confined to the pleadings and supporting proof in determining the issues raised in an injunction case.

In determining the issues presented in a suit for an injunction the court is confined to the pleadings and the supporting evidence.[10]

Offer of proof. In accordance with general rules, a proper offer of proof may be essential to require the reception of evidence in an injunction suit.[11]

Reopening case to receive further evidence. The matter of the reopening of a case to permit additional evidence to be introduced rests in the sound discretion of the court.[12] It is discretionary with the judge sitting at chambers, on an application for injunction, to reopen the case for more testimony, on discovery of additional witnesses by one of the parties after argument, and while holding the matter for decision.[13]

(2) Preliminary Injunction

An application for a preliminary injunction may be heard on affidavits only; the court may in its discretion permit the introduction of oral evidence.

An application for a temporary or preliminary injunction may be heard and determined on affidavits only,[14] and in the absence of statute or court rule to the contrary, on the hearing of such an application the court is not required to permit the introduction of evidence other than the affidavits which are made part of, or are presented with, the pleadings.[15] However, the trial court may in its discretion hear oral testimony,[16] and determine the application on the pleading and proof submitted.[17]

An affidavit tendered and received in evidence on the hearing of an application for an injunction, where no objection is made on the ground of incompetency of the witness, and no motion made to withdraw or rule out the affidavit, may be considered whether or not the witness was competent.[18]

Use of answer. On an application for a preliminary injunction, defendant may at once file his answer, which must be considered and given its proper effect in deciding as to the propriety of issuing a temporary injunction.[19] However, an application for an injunction may be heard without answers be-

Donald v. Superior Court in and for Sierra County, 64 P.2d 738, 18 Cal. App.2d 652.

(3) However, the court may not arbitrarily divest itself of jurisdiction to hear an application for an injunction by continuing hearing of order to show cause to time more than ten days from date thereof.—McDonald v. Superior Court in and for Sierra County, supra—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, 21 P.2d 643, 131 Cal. App. 365.

9. Or.—State v. Beaver Portland Cement Co., 124 P.2d 524, 169 Or. 1, rehearing denied State by Wilson v. Beaver Portland Cement Co., 126 P.2d 1094, 169 Or. 1.

10. Del.—Matthews v. Tubbs, 141 A. 619, 16 Del.Ch. 124.
Evidence in injunction proceedings see supra §§ 189–192.
Pleadings and affidavits as evidence see supra §§ 193–197.

Absence of evidence
On failure of complainant to submit evidence in support of his allegations of fact, the court properly denies the injunction.—Gray v. City of Atlanta, 189 S.E. 591, 183 Ga. 730—Frederick v. McCleskey, 185 S.E. 722, 182 Ga. 468—Haden v. City of Atlanta, 171 S.E. 703, 177 Ga. 869.

Injunction properly denied
Ga.—National Linen Service Corporation v. City of Albany, 169 S.E. 894, 177 Ga. 81.

Special injunction
A cause before the court for final decree, although seeking a special injunction, should be heard on bill, answer, replication, and proofs, and the bill should not be treated as an affidavit in plaintiff's behalf.—Airs v. Billops, 57 N.C. 17.

11. Mass.—Martin v. Francke, 116 N.E. 404, 227 Mass. 272.

12. **Refusal not abuse of discretion**
Ill.—Rosehill Cemetery Co. v. City of Chicago, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.

Effect of new presidential order
U.S.—Nemser v. Aviation Corporation, D.C.Del., 47 F.Supp. 515.

13. Ga.—Electric R. Co. v. Savannah, F. & W. R. Co., 13 S.E. 512, 87 Ga. 261.

14. Va.—Virginia R. Co. v. Echols, 83 S.E. 1082, 117 Va. 182.

Absence of answer
Ill.—Moss v. Balch, 49 N.E.2d 801, 320 Ill.App. 135—McNevin v. Stoolman, 235 Ill.App. 449.

Sorting of affidavits on order to show cause
N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 487, 116 N.J.Eq. 502.

15. Tex.—Gordon v. Hoencke, Civ. App., 253 S.W. 629.

Evidence of persons knowing facts
N.J.—Perth Amboy Gaslight Co. v. Kilek, 138 A. 886, 101 N.J.Eq. 805.

16. Tex.—Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964, reversing W. L. Pearson & Co. v. Harding, Civ.App., 30 S.W.2d 403—Hutchison v. Ross, Civ.App., 89 S.W.2d 495.

17. Tex.—Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964, reversing W. L. Pearson & Co. v. Harding, Civ.App., 30 S.W.2d 403.

18. Ga.—Putney v. Kohler, 11 S.E. 127, 84 Ga. 528.

19. U.S.—Community Natural Gas Co. v. City of Cisco, C.C.A.Tex., 65 F.2d 320.
Fla.—Seaboard Oil Co. v. Donovan, 128 So. 821, 99 Fla. 1296.
Ill.—Moss v. Balch, 49 N.E.2d 801, 320 Ill.App. 135—Schmidt v. Modern Woodmen of America, 261 Ill. App. 276.
32 C.J. p 355 note 36.
Answer as evidence see supra § 196.

Unverified answer not considered
Tex.—W. L. Pearson & Co. v. Harding, Civ.App., 30 S.W.2d 403, reversed on other grounds Harding v. W. L. Pearson & Co., Com.App., 48 S.W.2d 964.

ing filed by those persons who are merely formal parties.[20]

Objections to affidavits. General objections to the introduction of affidavits on the ground that the facts set out are irrelevant will be overruled if any of the facts are relevant.[21] Supplemental affidavits filed without permission on a motion for a temporary injunction will be disregarded by the court on objection by defendant.[22]

(3) Permanent Injunction

The issues in an injunction suit ordinarily may not be finally determined on affidavits alone or on evidence submitted at a hearing on an application for a preliminary injunction.

Ordinarily it is improper for the issues in an injunction suit to be heard on affidavits only and a perpetual injunction granted thereon.[23]

Unless the parties otherwise agree,[24] the cause may not be finally determined on the evidence submitted at the hearing on the application for the preliminary injunction.[25] However, if no additional testimony is adduced by the parties on the final hearing, the court will look to the bill and testimony given at the preliminary hearing to determine whether the temporary injunction was properly issued in the first instance.[26]

e. Inspection of Subject Matter

An inspection may be ordered in an injunction case after issue has been joined.

In a proper case in an injunction suit an order for an inspection of the subject matter of the suit may be granted on motion after issue has been joined,[27] but not before.[28]

f. Submission of Issue to Jury

To justify submission of an issue in an injunction case to a jury there must be sufficient evidence in support thereof. Appropriate instructions should be given on submitting the case to the jury.

On an application for a preliminary injunction no right of trial by jury exists.[29]

Where a jury trial may be had in an injunction case, as discussed in the C.J.S. title Juries § 35, also 35 C.J. p 170 note 60–p 173 note 81, to justify or require submitting an issue to the jury there must be sufficient evidence in support thereof.[30]

Instructions. In a suit for an injunction tried before a jury, the court by appropriate instructions may, and should, submit the issues in the case as raised by the pleadings and evidence,[31] and properly charge on the law applicable to the case under the evidence.[32]

20. Md.—Patriotic Order of Sons of America Camp No. 6 v. Arrington, 68 A. 548, 107 Md. 319.

21. Ga.—Davis v. Covington & M. R. Co., 2 S.E. 555, 77 Ga. 322.

Affidavit relating to answer

Tenn.—Higgins v. Lewis, 137 S.W.2d 308, 23 Tenn.App. 648.

22. N.Y.—Spivak v. Wankofsky, 278 N.Y.S. 562, 155 Misc. 530.

23. Va.—Virginia R. Co. v. Echols, 83 S.E. 1082, 117 Va. 182.

24. Colo.—Boyd v. Brown, 267 P. 200, 83 Colo. 547.

25. Colo.—Boyd v. Brown, supra.

Right to support claim

N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N. J.Eq. 283.

Exhibits

U.S.—Kohler Mfg. Co. v. Beeshore, Pa., 59 F. 572, 8 C.C.A. 215.

63 C.J. p 551 note 92 [a].

26. Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.

27. Pa.—Wilson v. Keely, Com.Pl., 19 Phila. 396.

32 C.J. p 363 note 78.

28. Pa.—Commonwealth v. Perkins, 46 Leg.Int. 67.

29. Ind.—Hopkins v. Greensburg, K. & C. Turnp. Co., 46 Ind. 187.

32 C.J. p 365 note 95.

30. Evidence held sufficient

Ga.—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338.

N.C.—Alley v. McPherson, 4 S.E.2d 512, 216 N.C. 794.

Tex.—Barrington v. City of Sherman, Civ.App., 155 S.W.2d 1008, error refused—Gillingham v. Timmins, Civ.App., 104 S.W.2d 115, error dismissed—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372, error dismissed.

Evidence held insufficient

S.C.—Savannah River Lumber Corporation v. Bray, 200 S.E. 760, 189 S.C. 237.

Tex.—City of San Antonio v. Zogheib, 101 S.W.2d 539, 129 Tex. 141, reversing, Civ.App., 70 S.W.2d 333.

31. Ga.—Kinsey v. Avans, 26 S.E. 2d 787—Horton v. Johnson, 15 S. E.2d 605, 192 Ga. 338—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37.

Instructions justified by evidence

Ky.—Howard v. Risnor, 174 S.W.2d 404, 295 Ky. 320.

Issues properly submitted

Ga.—Pickron v. Phillips, 160 S.E. 615, 173 Ga. 407—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37.

Withdrawal of issue improper

Ga.—Sapp v. Odom, 141 S.E. 201, 165 Ga. 437.

32. Ga.—Scales v. Bellamy, 26 S.E. 2d 775—Horton v. Johnson, 15 S.E. 2d 605, 192 Ga. 338.

S.C.—Battle v. De Vane, 138 S.E. 821, 140 S.C. 305.

Instructions justified by evidence

Ga.—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338—Phillips v. Ingram, 136 S.E. 785, 163 Ga. 580.

Ky.—Howard v. Risnor, 174 S.W.2d 404, 295 Ky. 320.

Instructions proper or erroneously refused

Ga.—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338—Sawyer v. Foremost Dairy Products, 177 S.E. 584, 179 Ga. 809—Gragg v. Hall, 139 S. E. 339, 164 Ga. 628—Baldwin v. McLendon, 138 S.E. 775, 164 Ga. 387.

Instructions erroneous or properly refused

Ga.—Farrar Lumber Co. v. Brindle, 151 S.E. 923, 170 Ga. 37—Henderson v. James, 139 S.E. 34, 164 Ga. 575—Baldwin v. McLendon, 138 S.E. 775, 164 Ga. 387—Phillips v. Ingram, 136 S.E. 785, 163 Ga. 580.

S.C.—Battle v. DeVane, 138 S.E. 821, 140 S.C. 305.

Misleading instructions

Ga.—Durrence v. Groover, 129 S.E. 29, 160 Ga. 680.

"Practice of dentistry"

Ga.—Rivers v. Atlanta Southern Den-

Direction of verdict. A verdict should not be directed in a suit for an injunction tried before a jury unless the evidence warrants.[33]

g. Verdict and Findings

Findings of fact, where required, must be within the pleadings and evidence, and be otherwise sufficient to justify injunctive relief.

Where findings of fact are unnecessary in cases of equitable cognizance, as discussed in Equity § 493 b, no such findings need be made in support of the decree in a suit for an injunction.[34] However, findings by the court sufficient to sustain its judgment are sometimes required,[35] and statutes prohibiting the issuance of an injunction in cases coming within its terms except after the finding of specified facts must be strictly complied with.[36]

Sufficiency of findings. Where the court purports to base its decree on the facts reported, the findings of fact must include all the facts essential to the issuance of the injunction sought.[37] In such case a general finding for complainant does not carry with it by implication a finding as to a fact essential to the issuance of the injunction.[38]

The findings must be within the issues made by the pleadings,[39] be supported by the evidence,[40] and be sufficient to justify injunctive relief if an injunction is to issue.[41] No finding need be made with respect to an allegation constituting a conclusion of law, not a statement of fact.[42] If the findings are sufficient to entitle plaintiff to the relief sought, he cannot complain of failure to make more extended findings.[43]

Where findings are required by statute, to justify the issuance of an injunction thereunder the findings must be sufficient to satisfy the requirements of the statute,[44] and the record must support the

tal College, 1 S.E.2d 750, 187 Ga. 720.

33. Ga.—Albany Theatre v. Short, 159 S.E. 688, 173 Ga. 121.
Tex.—Barrington v. City of Sherman, Civ.App., 155 S.W.2d 1008, error refused—Gillingham v. Timmins, Civ.App., 104 S.W.2d 115.
Dismissal:
Before hearing see supra § 198.
At trial see infra subdivision i of this section.
Evidence improperly admitted
Ga.—Gray v. Bradford, 22 S.E.2d 43, 194 Ga. 492.
Conceded issue
In suit to enjoin the erection of theater in a subdivision on ground that proposed building would violate general building scheme with building line restrictions, trial court erred in directing verdict in favor of defendants on issue whether there was a violation of the express building line restrictions contained in defendants' deeds, where defendants conceded that there was at least a slight violation of such express line as to some of the lots on which building was being erected.—Jones v. Lanier Development Co., 11 S.E.2d 11, 190 Ga. 887.
Directed verdict justified by evidence.
S.C.—Savannah River Lumber Corporation v. Bray, 200 S.E. 760, 189 S.C. 237.
Tex.—Nieman-Marcus Co. v. City of Houston, Civ.App., 109 S.W.2d 543, error refused—Johnson v. State, Civ.App., 267 S.W. 1057.

34. Wash.—Moses Lake State Bank v. Bell, 223 P. 587, 128 Wash. 523.

35. U.S.—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695.
N.C.—McCormick v. Proctor, 6 S.E.2d 870, 217 N.C. 23.
Three-judge district court
U.S.—Public Service Commission of Wisconsin v. Wisconsin Telephone Co., Wis., 53 S.Ct. 514, 289 U.S. 67, 77 L.Ed. 1036.

36. D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 298, 138 A.L.R. 258, reversing, D.C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.
N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.
Wis.—Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.
Purpose of statute
N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 290 N.Y. 101, reversing Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115 F. R.C.I.P.A., 35 N.Y.S.2d 598, 264 App.Div. 375.
Case not covered by statute
U.S.—Lauf v. E. G. Shinner & Co., C.C.A.Wis., 82 F.2d 68.

37. N.H.—Hatch v. Hillsgrove, 139 A. 366, 83 N.H. 91, rehearing 138 A. 428, 83 N.H. 91.

38. N.H.—Hatch v. Hillsgrove, supra.

39. Cal.—Van Horn v. Decrow, 68 P. 473, 136 Cal. 117.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425.
Va.—Ransone v. Craft, 170 S.E. 610, 161 Va. 332.
32 C.J. p 366 note 6.
Findings held certain
Ga.—Kinsey v. Avans, 26 S.E.2d 787.

40. **Evidence sufficient to sustain findings**
Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Tex.—Beall v. Barsch, Civ.App., 37 S.W.2d 761—Southern Properties, Inc. v. Carpenter, Civ.App., 21 S.W.2d 372, error dismissed—Huggins v. Johnston, Civ.App., 3 S.W.2d 937, affirmed 35 S.W.2d 688, 120 Tex. 21.
Wis.—Janssen v. Foeller, 214 N.W. 338, 193 Wis. 334.
Improper or unnecessary findings
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.
Va.—Ransone v. Craft, 170 S.E. 610, 161 Va. 332.
Basis for findings
Tex.—Beall v. Barsch, Civ.App., 37 S.W.2d 761.

41. Pa.—Trimmer v. Brown-Miller, 47 Dauph.Co. 89.
Findings held sufficient
Tex.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 173 S.W.2d 357.
Findings held insufficient
Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 6 A.2d 321, 125 Conn. 391, 122 A.L.R. 1287—Truesdale v. Town of Greenwich, 165 A. 201, 116 Conn. 426.
Tex.—City of Graham v. Wheeless, Civ.App., 89 S.W.2d 792.

42. U.S.—Securities and Exchange Commission v. Macon, D.C.Colo., 28 F.Supp. 127.
Question of fact
Vt.—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

43. Tex.—Fleming v. Rohleder, Civ. App., 135 S.W. 735.

44. Idaho.—Boise Street Car Co. v.

findings.[45]

Conclusions of law should follow or have support in the findings of fact.[46]

Verdict of jury. The verdict of a jury in an injunction case must be supported by, and be in accord with, the evidence.[47] A special verdict will authorize the chancellor to decree a perpetual injunction without the finding by the jury in express words that the perpetual injunction be granted;[48] but such a verdict must contain a finding on all the issues submitted.[49]

Construction. In accordance with the rule applicable in equity generally, as discussed in Equity § 493 g, findings of the court, master, or jury will be construed, if possible, to sustain the judgment or decree granted.[50]

Conclusiveness of jury verdict or finding. In accordance with general equity rules discussed in Equity § 510, where the trial of an injunction suit before a jury is not a matter of right the verdict or findings of a jury are advisory only, and not conclusive on the court.[51]

h. Rehearing or Second Application

The refusal of an application for a preliminary injunction does not bar a subsequent application therefor.

The refusal of an application for a preliminary injunction does not bar complainant from making a second application,[52] and, like the decision on the first application,[53] the second application is addressed to the discretion of the judge,[54] and the court may, on a subsequent application, reach a different conclusion on the same or more convincing evidence.[55] The court is not bound to adhere to its former ruling,[56] nor is it bound, in case the former application was in another court, to follow the ruling of that court,[57] although it will generally do so by way of comity.[58]

The renewal of a motion for an interlocutory injunction on grounds or on evidence which should have been presented on the first application will be

Van Avery, 103 P.2d 1107, 61 Idaho 502.
N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J. Eq. 506, modified on other grounds Isolantite Inc. v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613.
Pa.—De Wilde v. Scranton Bldg. Trades and Construction Council, 22 A.2d 897, 343 Pa. 224.

Findings held sufficient
Wis.—Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 215 Wis. 623.

Findings held insufficient
D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 298, 138 A.L.R. 258, reversing, D.C., Obergfell v. Green, 29 F.Supp. 589, and certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

45. Green v. Obergfell, supra.

Balance of convenience
N.J.—Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613.

46. **Conclusions held proper**
Ind.—Michigan Cent. R. Co. v. Michigan City, 169 N.E. 873, 94 Ind. App. 481.
Mass.—New England Wood Heel Co. v. Nolan, 167 N.E. 328, 268 Mass. 191, 66 A.L.R. 1079.

47. **Evidence held sufficient** to sustain verdict.—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338.

48. Ga.—McManus v. Cook, 59 Ga. 485.

49. N.Y.—Parker v. Laney, 58 N.Y. 469.

50. Ga.—Kinsey v. Avans, 26 S.E.2d 787.
Mass.—Melville Shoe Corporation v. Kozminsky, 167 N.E. 305, 268 Mass. 172—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319—Crosby v. Blomerth, 154 N.E. 763, 258 Mass. 221—Moore Drop Forging Co. v. McCarthy, 137 N.E. 919, 243 Mass. 554.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.

Construction of findings
Cal.—Eaton v. Klimm, 18 P.2d 678, 217 Cal. 362.
Minn.—Linster v. Luecke, 243 N.W. 395, 186 Minn. 386.
Vt.—Dyar Sales & Machinery Co. v. Bleiler, 175 A. 27, 106 Vt. 425—McClary v. Hubbard, 122 A. 469, 97 Vt. 222.
32 C.J. p 366 note 7 [a].

Findings of board
U.S.—Hudson & Manhattan R. Co. v. Hardy, D.C.N.Y., 22 F.Supp. 105, reversed on other grounds 103 F. 2d 327, certiorari denied Hudson & M. R. Co. v. Cahill, 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1521.

Findings held sufficient
Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 Cal.App.2d 804.

Findings held insufficient
Tex.—Bethea v. Lockhart, Civ.App., 127 S.W.2d 1029, error refused.

51. Neb.—Robinson v. Dawson County Irr. Co., 8 N.W.2d 179, 142 Neb. 811.
N.Y.—Comesky v. Postal Tel. Cable Co., 58 N.Y.S. 467, 41 App.Div. 245.

52. U.S.—Red Star Yeast Products Co. v. La Budde, C.C.A.Wis., 83 F. 2d 394.
Fla.—Thursby v. Stewart, 138 So. 742, 748, 103 Fla. 990, quoting **Corpus Juris.**
Ga.—Moody v. Williams, 122 S.E. 56, 157 Ga. 576.
32 C.J. p 366 note 12.

Denial on conflicting affidavits
N.Y.—J. S. Krum, Inc. v. Bauerman, 16 N.Y.S.2d 615.

53. U.S.—Louisville & N. R. Co. v. Kentucky R. Commn., D.C.Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U. S. 601, 59 L.Ed. 379.

54. Ga.—Moody v. Williams, 122 S. E. 56, 157 Ga. 576.

55. U.S.—Louisville & N. R. Co. v. Kentucky R. Commn., D.C.Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379.
Fla.—Thursby v. Stewart, 138 So. 742, 748, 103 Fla. 990, quoting **Corpus Juris.**

56. Fla.—Thursby v. Stewart, supra, quoting **Corpus Juris.**
32 C.J. p 366 note 15.

57. Fla.—Thursby v. Stewart, supra, quoting **Corpus Juris.**
32 C.J. p 366 note 15.

58. Fla.—Thursby v. Stewart, supra, quoting **Corpus Juris.**
32 C.J. p 366 note 17.

discouraged,[59] and an application once refused will not be granted at a later stage except in a clear case.[60] As a general rule the second application will be denied merely on a showing that the first one was denied, unless complainant presents new and additional matter discovered since the former hearing,[61] and shows that such new grounds or matter was not reasonably discoverable at the time of the first application.[62]

i. Dismissal

A bill for an injunction may be dismissed at the final trial or hearing for any reason on which complainant may be defeated.

As stated in Equity § 579, the grounds for dismissing a bill in equity at the hearing are as broad as those on which plaintiff may be in any way defeated. Thus in a suit for an injunction, the bill will be dismissed if it appears to be without equity,[63] or if complainant fails to make out his case.[64] Noncompliance by complainant with conditions imposed by the court as a preliminary to the issuance of the injunction may constitute a ground for dismissal.[65]

In an appropriate case the bill may be dismissed as to some parties although an injunction is issued as against others.[66]

Preliminary hearing. As a general rule, in the absence of a waiver the bill may not be dismissed on the denial of an application for a temporary injunction in a case in which the injunctive relief sought is ancillary to the principal cause of action.[67] The bill may not be dismissed at such a hearing if it appears that complainant is entitled to partial relief,[68] but the court may dismiss the suit if it appears from the evidence and admissions that there is no cause of action.[69] Dismissal of bill prior to hearing is considered supra § 198.

On the merits. If the bill is dismissed after a hearing on the pleadings and proofs taken in open court, the dismissal generally is considered on the merits.[70] However, it has been held that if it appears that complainant is entitled to damages at law the dismissal should be without prejudice to such right of recovery at law.[71]

§ 200. —— Scope of Inquiry

a. In general
b. Preliminary injunction
c. Permanent injunction

a. In General

Where injunction is sought to restrain public officers in the exercise of their discretion, the court is limited to the determination of whether this discretion was abused.

As discussed supra § 108, where public officials are intrusted with discretionary power in certain matters, their exercise of such discretion will not be controlled by injunction in the absence of fraud or bad faith. Where an injunction is sought in such a case, the court is limited to a determination of whether the officials clearly abused their discretion by acting arbitrarily, corruptly, capriciously, or without credible, competent, and relevant evidence.[72]

b. Preliminary Injunction

As a general rule on an application for a preliminary injunction the only concern of the court is whether the

59. U.S.—Louisville, etc., R. Co. v. Kentucky R. Commn., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 798, 146 S.C. 225, quoting **Corpus Juris.**

60. U.S.—Louisville & N. R. Co. v. Kentucky R. Commn., D.C.Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379.

61. U.S.—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F.2d 394.
Fla.—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.
Ga.—Moody v. Williams, 122 S.E. 56, 157 Ga. 576.
S.C.—Tallevast v. Kaminski, 143 S. E. 796, 798, 146 S.C. 225, quoting **Corpus Juris.**
32 C.J. p 366 note 18.

62. Ga.—Moody v. Williams, 122 S. E. 56, 157 Ga. 576.
S.C.—Tallevast v. Kaminski, 143 S. E. 796, 146 S.C. 225.

63. Md.—Campeggi v. Wakefield, 145 A. 546, 157 Md. 229.

64. La.—Bonnabel v. Police Jury for Parish of Jefferson, App., 3 So. 2d 183.
Mich.—Denhardt v. De Roo, 294 N. W. 163, 295 Mich. 223.
N.Y.—Justin Seubert, Inc. v. Reiff, 164 N.Y.S. 522, 98 Misc. 402—Parkview Towers v. Nordheim, 27 N.Y. S.2d 268.
Nonsuit properly granted
Ga.—James v. James, 144 S.E. 284, 166 Ga. 786.
S.C.—Intendant and Wardens of Town of Port Royal v. Charleston & W. C. Ry. Co., 134 S.E. 497, 136 S.C. 525.

65. Mass.—Tramonte v. Colarusso, 152 N.E. 90, 256 Mass. 299.
Conciliation effort in labor dispute
U.S.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262.

66. U.S.—Beeler v. Smith, D.C.Ky., 40 F.Supp. 139.

67. Okl.—Head v. Carlton, 229 P. 178, 100 Okl. 292.

68. Fla.—L. Maxcy, Inc., v. Mayo, 139 So. 121, 103 Fla. 552.

69. N.C.—Lassiter v. Board of Com'rs of Wake County, 124 S.E. 738, 188 N.C. 379.

70. Mich.—Palmer v. Kleiner, 210 N.W. 332, 236 Mich. 480.

71. Mass.—Tramonte v. Colarusso, 152 N.E. 90, 256 Mass. 299.

72. Ky.—Meade County Board of Education v. Powell, 71 S.W.2d 638, 254 Ky. 352—Howard v. Bell County Board of Education, 57 S. W.2d 466, 247 Ky. 586.
Reasonable basis for action
N.Y.—People ex rel. Public Service Commission of New York (State Division, Department of Public Service) v. New York Telephone Co., 21 N.Y.S.2d 405, 174 Misc. 517—Jewel Productions v. Esmond, 6 N.Y.S.2d 711, 168 Misc. 838.

complainant has made out a prima facie case for the issuance of such an injunction. The merits cannot be finally determined at this hearing, and no permanent injunction may issue thereat.

On a motion or application for a preliminary injunction, the court will consider the nature and object of the bill, the property or rights requiring protection, and the interests of the parties in the subject matter.[73] On the hearing of an application for a preliminary injunction, the chancellor is entitled to possess himself of the whole case from both parties, and may require defendant to submit all of his defenses together,[74] and he may go into the merits of the case as disclosed by the moving papers and the answer or affidavits in opposition thereto,[75] whether presenting issues of law or of fact,[76] for the purpose of enabling him to exercise his discretion wisely in determining whether a temporary injunction shall be granted or refused.[77] The court may pass on the sufficiency of the complaint,[78] and if the bill possesses equity, the issue to be determined on the preliminary hearing is mainly one of fact.[79] However, the judge or court is limited to the issues so raised and cannot go into outside or collateral matters.[80]

The court is not required to determine finally either the issues of law or fact involved in the action.[81] Its primary concern is whether the complainant has made out a prima facie case,[82] and the action of the trial judge or court is not predicated on an anticipated determination of issues of fact or questions of law which may be involved in the case.[83] If the essential facts are in dispute the court need not examine the merits.[84] However, while it is proper to consider the merits of the case in determining whether a preliminary injunction should issue, this is the only purpose for which the merits of the case can be considered;[85] and hence it is not proper on an application of this character to make a final determination or finding of facts,[86]

73. U.S.—Gasaway v. Borderland Coal Corp., C.C.A.Ind., 278 F. 56.
N.Y.—Graff v. Bernwitt Corporation, 255 N.Y.S. 55, 142 Misc. 865, affirmed 243 N.Y.S. 886, 230 App.Div. 762—Mutual Biscuit Co. v. Kudisch, 34 N.Y.S.2d 949.
Character and extent of injunctive relief see infra § 206.
Rights of members of union
U.S.—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 92.
Injunctions in labor dispute cases see supra § 138.
Injury to public as consideration see supra § 31.

74. Ga.—Hambrick v. Crawford, 55 Ga. 335.

75. Fla.—McMullen v. Pinellas County, 106 So. 73, 90 Fla. 398.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
32 C.J. p 363 note 82.

76. S.C.—Alston v. Charleston Bd. of Health, 77 S.E. 727, 93 S.C. 553.

77. Fla.—McMullen v. Pinellas County, 106 So. 73, 90 Fla. 398.
La.—Agricultural Supply Co. v. Livigne, 147 So. 365, 177 La. 15—Rhymes v. Abell, 3 La.App. 389.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.
32 C.J. p 364 note 84.
Future complications
U.S.—Guaranty Trust Co. of New York v. Broadway & S. A. R. Co., D.C.N.Y., 43 F.2d 130.

78. U.S.—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42—Menominee & Marinette Light & Traction Co. v. City of Menominee, Mich., D.C.Mich., 11 F.Supp. 989.
Fla.—McMullen v. Pinellas County, 106 So. 73, 90 Fla. 398.
Ill.—Friedman v. Peckler, 255 Ill. App. 199.
N.Y.—Challenger v. Household Finance Corporation, 40 N.Y.S.2d 465, 179 Misc. 966.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.
Allegations not considered
Allegations based on an unwarranted construction of an ordinance will be disregarded.—Minneapolis St. R. Co. v. Minneapolis, C.C.Minn., 189 F. 445.
Nature of action as basis of right
N.Y.—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243—Barnard Bakeshops v. Dirig, 19 N.Y.S.2d 224, 173 Misc. 862.

79. Ala.—Kirk v. McTyeire, 95 So. 361, 209 Ala. 125.

80. U.S.—Securities and Exchange Commission v. Associated Gas & Electric Co., D.C.N.Y., 24 F.Supp. 899, affirmed, C.C.A., 99 F.2d 795.
Alaska.—Alaskan Airways v. Wien, 8 Alaska 179.
32 C.J. p 364 note 85.
Matter in record
U.S.—Cœur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.

81. U.S.—Doyne v. Saettele, C.C.A. Mo., 112 F.2d 155.
Tex.—City of Wichita Falls v. Whitney, Civ.App., 11 S.W.2d 404, error dismissed.

82. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.
Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386.
N.Y.—Suma v. Landriscina, 36 N.Y.S.2d 279.

83. U.S.—Selchow & Righter Co. v. Western Printing & Lithographing Co., C.C.A.Wis., 112 F.2d 430, affirming, D.C., 29 F.Supp. 569.
Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386.

84. Ga.—Fuller v. Goldberg, 156 S.E. 582, 171 Ga. 696.
Minn.—Lende v. Canby Hereford Farms Co., 225 N.W. 150, 177 Minn. 318.
N.Y.—Lyttle v. Valentine, 290 N.Y.S. 11, 160 Misc. 355—Town of Huntington v. Welfare Honor Relief Fund of Department of Sanitation of City of New York, 14 N.Y.S.2d 272.
Pa.—Pennsylvania Coal Co. v. Kelley, 2 Kulp 41.
Tex.—Long Island Machinery & Equipment Co. v. Baird, Civ.App., 117 S.W.2d 565, error dismissed—State v. Guardian Foundation of Texas, Civ.App., 112 S.W.2d 806.
32 C.J. p 364 note 86.

85. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
32 C.J. p 364 note 89.

86. N.Y.—Trustees of Saints Peter and Paul's Church v. Elliott, 220 N.Y.S. 308, 219 App.Div. 219—Sperry & Hutchinson Co. v. Adam, Meldrum & Anderson, 259 N.Y.S. 941, 145 Misc. 307—Yankee Doodle Boys v. McLaughlin, 215 N.Y.S. 257, 127 Misc. 84.
32 C.J. p 364 note 90.
Opinion evidence
N.Y.—William L. Blumberg Co. v. Farber, 11 N.Y.S.2d 427, 170 Misc. 930.

to decide the case on the merits,[87] or to determine issues more properly determinable at the final hearing or trial,[88] or grant relief which is only proper as a part of the final judgment after a trial on the merits,[89] especially where such merits depend on grave questions of law,[90] or where the hearing is had before a judge at chambers.[91]

It may be stated generally that no permanent injunction should be issued on a hearing of an application for a preliminary injunction,[92] and as a general rule no mandatory injunction will be granted thereon,[93] unless a mandatory provision is necessary to restore the status quo and prevent irreparable injury.[94] However, where there are no controverted questions of fact and the right to an injunction depends solely on the law applicable, the issue may be determined finally on the motion for a preliminary injunction.[95] So it has been said

87. U.S.—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42—Menominee & Marinette Light & Traction Co. v. City of Menominee, Mich., D.C.Mich., 11 F. Supp. 989—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.
Alaska.—Alaskan Airways v. Wien, 8 Alaska 179.
Mont.—Williams v. Neal, 271 P. 455, 83 Mont. 244.
N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J. Eq. 283—Glacken v. Glacken, 28 A. 2d 213, 132 N.J.Eq. 304.
N.Y.—Elk St. Market Corporation v. Rothenberg, 251 N.Y.S. 259, 233 App.Div. 243—Suma v. Landriscina, 36 N.Y.S.2d 279.
N.C.—Grantham v. Nunn, 124 S.E. 309, 188 N.C. 239.
Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Tex.—James v. E. Weinstein & Sons, Com.App., 12 S.W.2d 959, reversing, Civ.App., 1 S.W.2d 421—Pena v. Le Comte, Civ.App., 35 S.W.2d 252—Gordon v. Hoencke, Civ.App., 253 S.W. 629.
Wis.—Wisconsin Co-operative Milk Pool v. Saylesville Cheese Mfg. Co., 263 N.W. 197, 219 Wis. 350—Fassbender v. Peters, 191 N.W. 973, 179 Wis. 587.
32 C.J. p 364 note 91.

Appearance of defendant immaterial
Tex.—James v. E. Weinstein & Sons, Com.App., 12 S.W.2d 959, reversing, Civ.App., 1 S.W.2d 421.

Merits determined by preliminary injunction
Ill.—Klein's Restaurant Corporation v. McLain, 11 N.E.2d 644, 293 Ill. App. 54.
N.Y.—Manhattan Refrigerating Co. v. Fassler, 300 N.Y.S. 571, 165 Misc. 29.
Jurisdiction and power of three-judge district court see supra § 168.

88. Tex.—James v. E. Weinstein & Sons, Com.App., 12 S.W.2d 959, reversing, Civ.App., 1 S.W.2d 421—State v. Guardian Foundation of Texas, Civ.App., 112 S.W.2d 806.

Ultimate rights
U.S.—Williams v. Southern Cotton Oil Co., C.C.A.Ga., 45 F.2d 387.
N.J.—Earrusso v. Town of Montclair, 168 A. 398, 114 N.J.Eq. 12, modifying 164 A. 899, 112 N.J.Eq. 520.
N.Y.—Casarona v. Pace, 22 N.Y.S. 2d 726, 175 Misc. 269.
Tex.—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused.

Substantive rights
Tex.—City of Amarillo v. Garwood, Civ.App., 63 S.W.2d 888, error refused.

Matters for court of law
U.S.—Cullen v. Esola, D.C.Cal., 21 F. 2d 877.

89. U.S.—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 92.
Ga.—Leary v. First Nat. Bank, 170 S.E. 84, 177 Ga. 179—Turner v. City of Atlanta, 127 S.E. 652, 160 Ga. 216.
La.—Succession of Levins, 167 So. 454, 184 La. 825.
N.J.—Hamilton v. United Laundries Corporation, 161 A. 347, 111 N.J. Eq. 78—Dvorin v. Greenberg, 151 A. 95, 106 N.J.Eq. 495—Elevator Supplies Co. v. Wylde, 150 A. 347, 106 N.J.Eq. 163.
Pa.—Anderson v. Council of Associated Building Trades, 99 Pa.Super. 100.
S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
Tex.—Haden Employee's Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused—Hunt v. Hunt, Civ. App., 55 S.W.2d 911.
32 C.J. p 365 note 92.

Abatement of nuisance
Tex.—Murphy v. Wright, Civ.App., 115 S.W.2d 448.

Damages
Ala.—Mobile County v. Barnes-Creary Supply Co., 139 So. 270, 224 Ala. 168.
Ga.—Massell Realty Improvement Co. v. MacMillan Co., 147 S.E. 38, 168 Ga. 164.

Property rights
Ga.—Nelson v. Billingslea, 1 S.E.2d 659, 187 Ga. 492.
N.J.—Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 147 A. 202, 105 N.J.Eq. 108—Howard v. Jersey City, 140 A. 261, 102 N.J. Eq. 213.
Tex.—James v. E. Weinstein & Sons, Com.App., 12 S.W.2d 959, reversing, Civ.App., 1 S.W.2d 421.

Rule not violated
Wash.—U. S. Fidelity & Guaranty Co. v. Barrow, 99 P.2d 949, 3 Wash. 2d 89.

90. U.S.—New Memphis Gas & Light Co. v. Memphis, C.C.Tenn., 72 F. 952.
32 C.J. p 365 note 93.

91. S.C.—Ætna Casualty & Surety Co. v. Yonce, 187 S.E. 536, 181 S.C. 369.
32 C.J. p 365 note 94.

In vacation
Ga.—Moon v. First Nat. Bank, 136 S.E. 433, 163 Ga. 489—Chason v. O'Neal, 124 S.E. 519, 158 Ga. 725.

92. U.S.—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42—Menominee & Marinette Light & Traction Co. v. City of Menominee, Mich., D.C.Mich., 11 F.Supp. 989.
Ga.—Knickpkamp v. Richards, 16 S.E. 2d 24, 192 Ga. 509—Pig'n Whistle Sandwich Shops v. Keith, 146 S.E. 455, 167 Ga. 735—Smithloff v. Weinman, 141 S.E. 205, 165 Ga. 449—Peebles v. Perkins, 140 S.E. 360, 165 Ga. 159—Burns v. Hale, 133 S.E. 857, 162 Ga. 336—Turner v. City of Atlanta, 127 S.E. 652, 160 Ga. 216.
Ill.—Levy v. Rosen, 258 Ill.App. 262.
N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.
Pa.—Anderson v. Council of Associated Building Trades, 99 Pa.Super. 100.
32 C.J. p 362 note 64.

Status quo destroyed rather than preserved.—Perry v. Stringfellow, 134 S.W.2d 1031, 134 Tex. 328, reversing, Civ.App., 113 S.W.2d 1012.

93. Ga.—Scott v. Flint River Pecan Co., 126 S.E. 769, 159 Ga. 668.
R.I.—Miller v. Tanenbaum, 200 A. 449, 61 R.I. 92.
Tex.—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ. App., 121 S.W.2d 1048.

94. Pa.—Leisenring v. Pennsylvania Lighting Co., 59 Pa.Super. 202—Taylor v. Sauer, 40 Pa.Super. 229—Richman v. Shprintz, 27 Pa.Dist. & Co. 135.

95. U.S.—Coty v. Prestonettes, Inc., C.C.A.N.Y., 285 F. 501, certiorari granted Prestonettes, Inc., v Coty.

that, where the facts are undisputed and a final hearing would be but a repetition of the preliminary hearing, injunctive relief may be granted even in cases requiring a mandatory injunction.[96]

Defense of res judicata. A plea or defense of res judicata may be considered on an application for a preliminary injunction for the purpose of denying such an injunction,[97] it being proper, the circumstances or evidence warranting, for a preliminary injunction to issue in the face of such a defense.[98] However, no order may be made finally disposing of such a plea.[99]

Matters determined by interim restraint. On the return of an order to show cause why an injunction pendente lite should not issue containing an interim restraint granted after a hearing on answering affidavits and argument on notice under court rule, the entire question of the preliminary injunction may be gone into unprejudiced by the interim restraint contained in the order to show cause.[1]

Difficult questions of law and fact. Novel, difficult, or doubtful questions of law or fact will generally not be determined on preliminary hearing,[2] as, for example, the constitutionality of a statute.[3]

Questions of title. Questions of title to real estate will not be passed upon, although rights will be protected pendente lite, even though the title is doubtful.[4]

Waiver of preliminary injunction. By going to trial on the merits pursuant to agreement with defendant, plaintiff waives his right to a hearing on his application for a preliminary injunction as well as his right, if any, to the issuance of such injunction.[5]

c. Permanent Injunction

Only such questions as are necessarily involved and raised by the pleadings may be considered on the hearing for a permanent injunction.

On the hearing as to a permanent injunction, only questions necessarily involved in a determination of the right thereto can be considered,[6] and only such questions as are raised by the pleadings;[7] but all incidental questions necessarily involved must be determined.[8]

The question of title, being one of law, ordinarily will not be determined.[9]

The question of adequacy of remedy at law must be raised by demurrer, or at least be specially relied on in the answer, and cannot be raised for the first time at the hearing.[10]

Court without power to issue injunction. If the facts developed at the trial show the court to be without power to grant an injunction, it is equally without power to pass on matters otherwise for the consideration of a court of law.[11]

43 S.Ct. 250, 260 U.S. 720, 67 L.Ed. 480, and reversed on other grounds 44 S.Ct. 350, 264 U.S. 359, 68 L.Ed. 731.
32 C.J. p 364 note 91 [g] (2), (3).

96. N.J.—Benton v. Kernan, 6 A.2d 195, 125 N.J.Eq. 412, modified on other grounds 8 A.2d 719, 126 N.J.Eq. 343.

97. U.S.—Consolidated Freightways v. Railroad Commission of California, D.C.Cal., 36 F.Supp. 269—Baker Driveaway Co., Inc. v. Hamilton, D.C.La., 29 F.Supp. 693—Betts v. Railroad Commission of State of California, D.C.Cal., 6 F.Supp. 591, affirmed 54 S.Ct. 563, 291 U.S. 652, 79 L.Ed. 1046, and rehearing denied 54 S.Ct. 713, 292 U.S. 604, 78 L.Ed. 1466.
32 C.J. p 364 note 91 [e].

98. Ga.—Perry v. Gormley, 189 S.E. 850, 183 Ga. 757.

99. Ga.—Perry v. Gormley, supra.
32 C.J. p 364 note 91 [e].

1. N.J.—Newark Ladder & Bracket Sales Co. v. Furniture Workers Union Local 66, 4 A.2d 49, 125 N.J.Eq. 99—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 374.

2. U.S.—Oneida Community v. Fouke Fur Co., D.C.Del., 286 F. 757.
N.Y.—A. S. Beck Shoe Corporation v. Johnson, 274 N.Y.S. 946, 153 Misc. 363.
32 C.J. p 365 note 97.
Doubtful issues of law
U.S.—Doyne v. Saettele, C.C.A.Mo., 112 F.2d 155.
Temporary injunction denied on conflicting affidavits
N.Y.—Lyttle v. Valentine, 290 N.Y.S. 11, 160 Misc. 355.
Denial of motion without prejudice
N.Y.—J. S. Krum, Inc., v. Bauerman, 16 N.Y.S.2d 615.

3. Me.—Deering v. York & C. R. Co., 31 Me. 172.
N.Y.—Municipal Tel. Co. v. McCreary, 77 N.Y.S. 409.
Answer by defendant essential
Pa.—Miller v. Bashore, 45 Dauph.Co. 67, affirmed Holgate Bros. Co. v. Bashore, 200 A. 672, 331 Pa. 255, 117 A.L.R. 639.

4. Idaho.—Washington Water Power Co. v. Crane, 233 P. 878, 881, 40 Idaho 310, citing **Corpus Juris.**
Tex.—Florence v. Fikes, Civ.App., 48 S.W.2d 1047.
32 C.J. p. 365 note 96.

5. La.—W. & W. Oil Co. v. American Supply Co., App., 8 So.2d 384.

6. U.S.—Utility Investing Corporation v. Stuart, D.C.Pa., 11 F.Supp. 391, affirmed, C.C.A., Stuart v. Utility Investment Corporation, 78 F.2d 279.
Ind.—Costigan v. Schalk, 145 N.E. 510, 82 Ind.App. 180
32 C.J. p 365 note 99.

7. U.S.—Union Sulphur Co. v. Reed, D.C.La., 249 F. 172.

8. Mo.—State v. Burns, 172 S.W.2d 259.
Wis.—Pride v. Weyenberg, 53 N.W. 29, 83 Wis. 59.
32 C.J. p 365 note 2.
Disqualification of judge
Ky.—Wagers v. Sizemore, 300 S.W. 918, 222 Ky. 306.
Related issues
La.—Toms v. Nugent, App., 12 So.2d 713.

9. N.J.—Morris & E. R. Co. v. Blair, 9 N.J.Eq. 635.
Findings of subordinate facts
Vt.—Turner v. Bragg, 35 A.2d 356, 113 Vt. 393.

10. Mass.—Creely v. Bay State Brick Co., 103 Mass. 514.
N.Y.—Jennings v. Whittemore, 2 Thomps. & C. 377.
Demurrers in injunction cases see supra § 185.

11. Miss.—Mississippi Power &

§ 201. Reference

In injunction cases a reference may be ordered as in equity cases generally.

In injunction cases proof may be taken before any one agreed on, to be used at the hearing.[12] In accordance with general rules of equity discussed in Equity §§ 513–562, the court may in a proper case order a reference to take testimony[13] and make findings thereon.[14] The court may also, subject to statutory provisions, order a reference in a proper case to take an account, assess damages, determine title, etc.,[15] or to determine other questions and report on the form of decree.[16] A reference, however, should not be ordered to determine an account before evidence has been adduced tending to prove the material allegations of the bill;[17] and in actions involving the title to land the legal issues should be tried before a reference of equitable issues.[18]

A master has no authority to make recommendations for a temporary injunction unless the case has been referred to him for that purpose.[19]

The master should report the form of decree, and, when specifically directed, any means or schemes by which the injury might be remedied.[20] If the report is not sufficiently specific, it will be referred back to the master for further action.[21]

It has been said that the trial court may refuse to adopt the report of the referee,[22] and found its judgment on the facts as it sees them.[23]

Objections to report. Exceptions resulting from objections duly brought in and appended to the report of the master may be considered by the court.[24] However, the exceptions do not reach error not manifest on the face of the report.[25] Where no objections to the master's report are filed or presented to the court, the court may not, in the decree approving the report and granting the injunction sought, grant leave to defendants to file objections nunc pro tunc as of the date of the decree, and provide that, having been advised of the nature and contents of the objections, they be overruled.[26]

§ 202. Conditions on Granting or Refusing Injunction

a. Preliminary injunction
b. Permanent injunction

a. Preliminary Injunction

(1) In general
(2) Giving of bond as condition of refusal

(1) In General

The court may impose such reasonable terms and conditions as it deems proper in granting or refusing a preliminary injunction.

Founded on, and arising from, the discretionary power of the court to issue or refuse to issue a preliminary injunction,[27] it is within the power of the court to impose such reasonable terms as seem proper as a condition to the granting of such an injunction[28] or as a condition to the granting of such

Light Co. v. Ross, 150 So. 830, 168 Miss. 400.

12. Md.—Steigerwald v. Winans, 17 Md. 62.

13. Ala.—Martin Bldg. Co. v. Imperial Laundry Co., 124 So. 82, 220 Ala. 90.
Ill.—Wagner v. Milk Wagon Drivers' Union, Local 753, 50 N.E.2d 865, 320 Ill.App. 341.
Fees of referee
Ill.—Wagner v. Milk Wagon Drivers' Union, Local 753, supra.

14. **Sufficiency of findings**
Mass.—Moore Drop Forging Co. v. McCarthy, 137 N.E. 919, 243 Mass. 554.

15. Ala.—Bailey v. Jordan, 32 Ala. 50.
W.Va.—Arbuckle v. McClanahan, 6 W.Va. 101.
32 C.J. p 367 note 25.

16. Mass.—La Chance v. Rubashe, 17 N.E.2d 685, 301 Mass. 488.
32 C.J. p 367 note 26.

17. W.Va.—Arbuckle v. McClanahan, 6 W.Va. 101.

18. S.C.—Alston v. Limehouse, 39 S.E. 188, 60 S.C. 559.

19. Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 23 N.E.2d 229, 301 Ill.App. 591.
Ex parte hearing insufficient
Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., supra.

20. Mass.—Breed v. Lynn, 126 Mass. 367.

21. Pa.—Reid v. Anderson, 6 Lanc. L.Rev. 26.

22. Mo.—Sayman v. Becker, 269 S.W. 973, 976.

23. Mo.—Sayman v. Becker, supra. "The finding of the trial court itself is the only judicial finding in the case."—Sayman v. Becker, supra.

24. Mass.—Respro, Inc., v. Worcester Backing Co., 197 N.E. 198, 291 Mass. 467.

25. Mass.—Respro, Inc. v. Worcester Backing Co., supra.

26. Ill.—Klein's Restaurant Corporation v. McLain, 11 N.E.2d 644, 293 Ill.App. 54.

27. U.S.—Inland Steel Co. v. U. S., Ill., 59 S.Ct. 415, 306 U.S. 153, 83 L.Ed. 557, affirming, D.C., 23 F. Supp. 291.
N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
32 C.J. p 371 note 91.

28. U.S.—Inland Steel Co. v. U. S., Ill., 59 S.Ct. 415, 306 U.S. 153, 83 L.Ed. 557, affirming, D.C., 23 F. Supp. 291—Central Kentucky Natural Gas Co. v. Railroad Commission, Ky., 54 S.Ct. 154, 290 U.S. 264, 78 L.Ed. 307—O'Malley v. U. S., C.C.A.Mo., 128 F.2d 676, affirming, D.C., U. S. v. Pendergast, 39 F. Supp. 189, appeal dismissed Pendergast v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465, and O'Malley v. U. S., 62 S.Ct. 116, 314 U.S. 574, 86 L.Ed. 465—United Motors Service v. Tropic-Aire, C.C.A.Minn., 57 F.2d 479—Becker v. Stander, D.C.La., 17 F.2d 772.
Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406.
N.J.—Miller v. Bond & Mortgage Guaranty Co., 188 A. 678, 121 N.J. Eq. 197—Poole v. Supreme Circle, Brotherhood of America, Ch., 85 A.

a restraining order,[29] provided the terms imposed are not for any reason illegal.[30] It has even been said to be the duty of the court in granting injunctive relief to do so on conditions that will protect all, including the public, whose interests the injunction may affect.[31] An order for injunction is not effectual until the terms imposed thereby have been complied with.[32]

The court also has power to impose terms as a condition to the refusal of such an injunction.[33]

In granting the injunction the court may limit the time for complainant or defendant to prosecute the pending suit to a speedy determination.[34] So also, as a condition of refusing an injunction pendente lite, the court may require defendant to file his answer by a specified date[35] and consent to an early trial as specified by the order.[36]

Modification or mitigation of terms. Since terms are imposed for the sole purpose of effecting justice between the parties,[37] in the absence of any imperative statute to the contrary, the court has, it would seem, power to mitigate the terms which it has imposed or to relieve therefrom altogether whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them.[38]

(2) Giving of Bond as Condition of Refusal

Refusal of a preliminary injunction may be conditioned on the giving of a bond by the defendant securing the complainant against loss.

Under certain circumstances a preliminary injunction will be denied on condition of defendant filing a bond to secure complainant against loss.[39] The injunction may be denied, particularly where defendant will be caused greater inconvenience by the injunction than complainant by its refusal, on condition that defendant give bond to secure complainant against loss.[40] In some cases an indemnity bond has been substituted for an injunction where the public interest demanded it and justice would be thereby subserved,[41] as where injunction is sought against taking land by a railroad company without compensating the owners,[42] but it has been held that a bond conditioned to pay damages for property taken for public use without compensation should not be substituted for an injunction.[43] However, if complainant has a clear right to the injunction itself, and a bond would not provide an adequate reparation, it is error to withhold it on the giving of a bond by defendant, or to provide for its dissolution on the giving of such bond.[44]

b. Permanent Injunction

The grant of a permanent injunction by final decree

453, affirmed 87 A. 1118, 80 N.J.Eq. 259.
N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371—Long Island American Ass'n Football Club v. Manrodt, 23 N.Y.S.2d 858.
32 C.J. p 370 note 86.
Bond as condition for issuance of preliminary injunction see supra § 166.
Confession of judgment at law as condition to granting injunction against prosecution of action at law see supra § 41.
As affected by pleadings
Mo.—Adair County Coal Co. v. Chicago, B. & Q. R. Co., 260 S.W. 538, 216 Mo.App. 614.

29. U.S.—San Francisco Gas & Electric Co. v. City and County of San Francisco, C.C.Cal., 164 F. 884.
32 C.J. p 371 note 87.

30. Fla.—Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438.
Ky.—U. S. Fidelity & Guaranty Co. v. Travelers' Ins. Mach. Co., 224 S. W. 496, 188 Ky. 841.
Tex.—Parker v. Trueheart, Civ.App., 246 S.W. 428.
Surrender of substantial rights
Minn.—Lende v. Canby Hereford Farms Co., 225 N.W. 150, 177 Minn. 318.

31. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L. Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Inland Steel Co. v. U. S., Ill., 59 S.Ct. 415, 306 U.S. 153, 83 L.Ed. 557, affirming, D.C., 23 F.Supp. 291.

32. Mass.—Tramonte v. Colarusso, 152 N.E. 90, 256 Mass. 299.
32 C.J. p 371 note 89.

33. Ga.—Hagan v. Hagan, 141 S.E. 54, 165 Ga. 364.
N.Y.—Diamond Candle Co. v. Fratello, 16 N.Y.S.2d 346.
32 C.J. p 371 note 90.
Bond as condition of refusal see infra subdivision a (2) of this section.

34. Minn.—Cary & Co. v. F. E. Satterlee & Co., 208 N.W. 408, 166 Minn. 507.
N.Y.—New York State Electric & Gas Corporation v. City of Plattsburgh, 3 N.Y.S.2d 122, 254 App.Div. 628—Reinlib v. Lubliner, 12 N.Y.S.2d 24.
32 C.J. p 126 note 4.
Noticing case for trial and payment of issue fee
N.Y.—Stolper v. Straughn, 29 N.Y.S. 2d 285.

35. N.Y.—Diamond Candle Co. v. Fratello, 16 N.Y.S.2d 346.

36. N.Y.—Tucker v. Gillmore, 14 N. Y.S.2d 221, 172 Misc. 132—Diamond Candle Co. v. Fratello, 16 N.Y.S.2d 346—Botnick v. Winokur, 7 N.Y. S.2d 6.

37. U.S.—Great Falls Mfg. Co. v. Henry, 25 Gratt. 575, 578, 66 Va. 575, 578.
32 C.J. p 371 note 92.

38. U.S.—Russell v. Farley, Minn., 105 U.S. 433, 26 L.Ed. 1060.

39. N.Y.—Horn & Hardart Co. v. 455 Seventh Ave., 242 N.Y.S. 509, 137 Misc. 305.
32 C.J. p 371 note 95.
Bond on condition of granting see supra § 166.

40. Ga.—Baker v. Mills, 9 S.E. 1100, 81 Ga. 342.
32 C.J. p 371 note 96.

41. W.Va.—Campbell v. Point Pleasant & O. R. R. Co., 23 W.Va. 448.
32 C.J. p 372 note 97.

42. W.Va.—Spencer v. Point Pleasant & O. R. R. Co., 23 W.Va. 406.
32 C.J. p 372 note 97.

43. Iowa.—Horton v. Hoyt, 11 Iowa 496.

44. Ga.—Stewart v. Davis-Sears Lumber Co., 63 S.E. 817, 132 Ga. 205.
32 C.J. p 372 note 1.

may be conditioned on the performance of certain acts by the plaintiff, as may the refusal of such an injunction on the performance of certain acts by the defendant.

While it may be improper to impose conditions on complainant where the right to an injunction is absolute,[45] or other persons are interested in performance of the covenant involved and the object of the condition can be accomplished easily by other means,[46] the court may, except as the matter may be controlled by statute,[47] as a condition of granting the injunction, impose terms and conditions looking to the protection of all parties connected with the litigation.[48] As a condition to entering the decree, the court usually may require complainant to do what is equitable,[49] as, for example, to pay money that may be due.[50] In granting a mandatory injunction the court may order the writ to issue on such reasonable terms and conditions as will afford defendant an opportunity to comply with the decree,[51] without undue hardship, inconvenience, or expense.[52]

Alternative relief is discussed infra § 217.

Compliance with statutory requirements. A condition may be that complainant shall give notice by publication to a nonresident defendant in accordance with a statutory requirement to that effect;[53] but on final decree it is not necessary or proper to require complainant to file a bond as in the case of temporary injunctions.[54]

An injunction may be refused on condition that defendant shall do certain acts.[55] In an injunction suit by a railroad against another which had entered upon the first company's land without paying or offering to pay for or condemning the land, where defendant was operating a railroad on the land, an unconditional injunction should not be granted, as it would be injurious to the public interest, but time should be given defendant to agree with plaintiff as to compensation or to condemn the land.[56]

The payment of damages by defendant as condition is discussed infra § 217.

B. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT

§ 203. Nature of Mandate in General

The definition and nature of an injunction, temporary or permanent, prohibitory or mandatory, are discussed supra §§ 1–11.

Examine Pocket Parts for later cases.

§ 204. Writ or Order

An injunction may reside in a writ or an order.

An injunction may reside in a writ or an order.[57]

§ 205. —— Issuance

A preliminary injunction ordinarily should not be granted before the filing of the bill or complaint or before the issuance of a subpoena or summons.

Under some statutes it is error to order an injunction to issue prior to the filing of the bill or

45. N.Y.—Crocker v. Manhattan Life Ins. Co., 70 N.Y.S. 492, 61 App. Div. 226, modifying 66 N.Y.S. 84, 31 Misc. 687.

46. Fla.—Lincoln Tower Corporation v. Richter's Jewelry Co., 12 So.2d 452.

47. Idaho.—Porter v. Speno, 92 P. 367, 13 Idaho 600.
32 C.J. p 380 note 11 [a].

48. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291 Ky. 194.

49. U.S.—Central Kentucky Natural Gas Co. v. Railroad Commission, Ky., 54 S.Ct. 154, 290 U.S. 264, 78 L.Ed. 307—Seybold v. Lainson, C.C.A.Iowa, 7 F.2d 362—Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., D.C.R.I., 295 F. 895.
Cal.—Collester v. Oftedahl, 120 P. 2d 710, 48 Cal.App.2d 756.
Colo.—Brennan v. Monson, 50 P.2d 534, 97 Colo. 448.
Fla.—Schultz v. Freeland, 145 So. 257, 107 Fla. 286.
Iowa.—White v. Massee, 211 N.W. 839, 202 Iowa 1304, 66 A.L.R. 1434.
N.Y.—Friendship and Truth Sick and Brotherly Ass'n, Kastoryalis of New York v. Rothman, 3 N.Y.S.2d 651, 167 Misc. 560.
Tex.—American Nat. Ins. Co. v. Smith, Civ.App., 1 S.W.2d 515.
32 C.J. p 380 note 12.

50. U.S.—Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., D.C.R.I., 295 F. 895.
32 C.J. p 380 note 13.

51. Iowa.—Carpenter v. Kruidenier, 187 N.W. 1, 193 Iowa 390.

52. Pa.—McNanamy v. Firestone Tire & Rubber Co., 173 A. 491, 114 Pa.Super. 282.

53. Ala.—Montgomery Enterprises v. Empire Theater Co., 86 So. 880, 204 Ala. 566.
32 C.J. p 380 note 16.

54. Ill.—Chicago Title & Trust Co. v. De Lasaux, 168 N.E. 640, 336 Ill. 522.
Ky.—Lancaster v. Pope, 160 S.W. 509, 156 Ky. 1, Ann.Cas.1915C 752.
32 C.J. p 380 note 17.

55. N.J.—Lurie v. J. J. Hockenjos Co., 167 A. 766, 113 N.J.Eq. 504, affirmed 170 A. 593, 115 N.J.Eq. 304.
32 C.J. p 380 note 18.

56. Ill.—Gulf Lines Connecting R. Co. v. Golconda Northern R. Co., 125 N.E. 357, 290 Ill. 384.

57. N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

Order directing receiver to hold securities until final determination of case and further order is "injunctive order."—Dorrian v. Davis, supra.

Order operating to prevent holder of warehouseman's certificates from disposing of them, except under order of court, constituted an "injunction."—Standard Bonded Warehouse Co. v. Cooper & Griffin, D.C.N.C., 30 F.2d 842.

It is duty of court either to grant or refuse interlocutory injunction at the hearing set for that purpose. —Grizzel v. Grizzel, 3 S.E.2d 649, 188 Ga. 418.

What should be part of judgment may not be inferred to make foundation for decree ordering temporary injunction.—Wall v. City of Muncie, 166 N.E. 659, 201 Ind. 170.

complaint;[58] and it has been so held in the absence of any statutory regulation of the matter.[59] However, in most jurisdictions where the court has jurisdiction over the subject matter and the parties in a proceeding, the fact that a preliminary injunction is ordered before the filing of the bill or complaint will not render the order void and, if objectionable at all, is at most an irregularity,[60] but, when this is done, the injunction does not take effect until the filing of the bill and the required undertaking.[61] In some jurisdictions a preliminary injunction cannot issue before answer,[62] and pursuant to statute an injunction may not be allowed after defendant has answered except on notice or on an order to show cause.[63] A temporary injunction may be granted before hearing and passing on a plea of privilege seeking to have the venue changed to another county,[64] but a temporary injunction cannot be granted after final judgment.[65]

By whom issued. Where a three judge court determines that a preliminary injunction should issue, as considered supra § 168, it is proper for the local district judge, acting alone, to issue the preliminary injunction prayed for.[66]

Issuance and service of summons or subpœna. While it has been held that the issuance of a temporary injunction without issuance of a summons is a mere irregularity, the writ becoming operative when the summons is issued,[67] ordinarily a temporary injunction cannot be granted before issuance of the summons or subpœna;[68] but the writ may be issued or the order signed prior to the service of the summons or subpœna,[69] in which case the injunction and process may be served together;[70] and although service of the writ or order before or without the service of the summons is irregular, the injunction is not rendered void but is binding until dissolved.[71]

A common injunction issued as of course on the showing made in the bill and default in answer.[72]

§ 206. —— Form, Requisites, and Sufficiency

a. In general
b. Definiteness and certainty
c. Reference to bill, writ, or bond to ascertain meaning
d. Character and extent of restraint granted
e. Mandatory injunction

58. Ind.—Dixon v. Dixon, 86 A. 1042, 119 Ind. 413.
32 C.J. p 367 note 32.

59. U.S.—Wilson v. Childs, D.C.Pa., 30 F.Cas.No.17,796.
32 C.J. p 367 note 33.

60. Idaho.—Reinertsen v. Idaho Power & Concentrating Co., 182 P. 851, 32 Idaho 353.
32 C.J. p 367 note 34.

61. Idaho.—Elmore County Irrigated Farms Ass'n v. Stockslager, 126 P. 616, 22 Idaho 420.
32 C.J. p 367 note 35.

62. Tex.—Panhandle Const. Co. v. Plain, Civ.App., 52 S.W.2d 504.

63. N.D.—Murphy v. Swanson, 198 N.W. 116, 50 N.D. 788, 32 A.L.R. 82.

64. Tex.—Story v. Story, Civ.App., 172 S.W.2d 753, reversed on other grounds, Sup., 176 S.W.2d 925.

65. N.Y.—Bell v. Rochester, 30 N.Y.S. 365.
32 C.J. p 367 note 39.

66. U.S.—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805—Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission, D.C.Mich., 292 F. 139.

67. Okl.—Wilder v. State, 225 P. 557, 27 Okl.Cr. 53.

Violations subsequent to summons
A temporary writ of injunction issued and served prior to the issuance of summons became obligatory on the person against whom it is directed from the time of the issuance of the summons, as to all violations occurring subsequent to issuance of summons.—Wilder v. State, supra.

Where no summons was ever issued or served on defendant, the temporary injunction is void.—Superior Oil Corporation v. International Ass'n of Oil Field, Gas Well and Refinery Workers of America, Local No. 209, 56 P.2d 122, 176 Okl. 444.

68. Kan.—In re Sharp, 124 P. 532, 87 Kan. 504, Ann.Cas.1913E 460.
32 C.J. p 367 note 36.
Issuance of subpoena as prerequisite to issuance of restraining order see infra § 210.
Notice of application for preliminary injunction see supra § 180.
Issuance and service of process as prerequisite to final injunction see supra § 179.

Extraterritorial service held not authorized
Pa.—Brown v. Swartz, Com.Pl., 54 Dauph.Co. 80.

In New Jersey
(1) A subpoena must be issued with the preliminary injunction and returned served within the time prescribed by rule of court for the return of the injunction.—Packard-Bamberger & Co. v. Guarantee Fruit Market, 182 A. 267, 119 N.J.Eq. 300—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 133 A. 774, 99 N.J.Eq. 696—Reliable Cloak Co. v. Sarbella, 129 A. 137, 98 N.J.Eq. 354—Allman v. United Brotherhood of Carpenters & Joiners of America, 81 A. 116, 79 N.J.Eq. 150—Lee v. Cargill, 10 N.J.Eq. 331.

(2) The subpoena must be served in suits to enjoin strikes, although such suits rarely go to final hearing. —Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, supra.

69. S.C.—Jordan v. Wilson, 48 S.E. 224, 69 S.C. 256.
32 C.J. p 367 note 37.

Failure to make additional service outside jurisdiction is not fatal.—Meng v. Meng, 47 Pa.Dist. & Co. 429, 44 Lack.Jur. 193.

70. Fla.—Thebaut v. Canova, 11 Fla. 143.
S.C.—Jordan v. Wilson, 48 S.E. 224, 69 S.C. 256.
32 C.J. p 367 note 38, p 372 notes 9, 10.

71. Minn.—Lash v. McCormick, 14 Minn. 482.
Failure to serve process as ground for dissolution of injunction see infra § 241.

72. Tenn.—Chadwell v. Jordan, 2 Tenn.Ch. 635.
32 C.J. p 367 note 41.
"Common injunction" defined see supra § 6.

a. In General

The order for an injunction need not be in any particular form, unless the form is prescribed by statute or rule of court.

In the absence of statutory directions no particular form is necessary,[73] and mere irregularities in the form of the order do not vitiate it.[74] The writ or order should show on its face that it was issued by proper authority.[75] In the absence of statute or rule of court it has been held that an order for the issuance of a preliminary injunction need not be signed by the judge, but the entry of the order, announced orally in open court, in the clerk's minute book makes the decision a matter of record.[76] Where an application for injunctive relief is heard by a three-judge court, as considered supra § 168, and it is determined by them that it is not a case calling for a three-judge court, the three judges, being in accord as to the findings and decree to be entered, may sign such findings and decree so that, in the event that it should thereafter be determined that the case was one for three judges, an appropriate decree will have been entered.[77]

Statutory provisions and rules of court. In form and content the writ or order should comply with statutory regulations[78] and rules of court.[79] Thus, when required by statute or rules of court, the order should recite the grounds or reasons for its issuance,[80] and the court must set forth the findings of fact and conclusions of law which constitute the grounds of its action,[81] although it has been held that a disregard of a statute requiring that the order shall set forth the reasons for its issuance does not render the order void.[82] When required by statute the order must be entered of record.[83]

b. Definiteness and Certainty

An injunction should be so clear and certain in its terms that defendant may readily know what he is restrained from doing.

It is impossible to lay down any precise rule of universal application as to the degree of certainty required,[84] further than the rule that an injunc-

73. N.C.—Davis v. Champion Fiber Co., 63 S.E. 178, 150 N.C. 84.
32 C.J. p 367 note 43.

"Judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties."—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 556, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145, and affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated on other grounds Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419.

Form of order

(1) The section of the Fair Labor Standards Act of 1938, providing that every employer shall pay specified minimum wages, can be violated only by failure to discharge the affirmative duty created by the act, and violations can be enjoined only by ordering payment, and whether the injunction is couched as a double negative ("You are enjoined from failing to pay") or in affirmative mandatory language ("You are ordered to pay") is immaterial.—Fleming v. Alderman, D.C.Conn., 51 F.Supp. 800.

(2) Other cases.—Great Northern Ry. Co. v. Brosseau, D.C.N.D., 286 F. 414—Southern R. Co. v. Machinists' Local Union No. 14, C.C.Tenn., 111 F. 49.

74. Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.
32 C.J. p 367 note 44.

75. Ala.—Governor v. Wiley, 14 Ala. 172.

76. Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1038, 215 Cal. 734.

Injunction based on written order or clerk's minute entry

Written order, granting temporary injunction without prejudice to right to move to vacate injunction rather than clerk's minute entry of court's oral announcement that it would grant the injunction, constituted the order on which injunction was based. —Wheeler v. Superior Court in and for City and County of San Francisco, 255 P. 275, 82 Cal.App. 202.

77. U.S.—U. S. v. Query, D.C.S.C., 37 F.Supp. 972, affirmed, C.C.A., Query v. U. S., 121 F.2d 631, vacated on other grounds 62 S.Ct. 1122, 316 U.S. 486, 86 L.Ed. 1616, certiorari denied 62 S.Ct. 295, 314 U.S. 685, 86 L.Ed. 548, vacated on other grounds 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733, certiorari granted 62 S.Ct. 1036, 316 U.S. 653, 86 L.Ed. 1733.

78. Kan.—State v. Cruzan, 243 P. 329, 120 Kan. 316.

Order overruling motion for temporary injunction need not, under Civ.Code § 296, declare it effective not over twenty days after its entry to authorize consideration of like motion by judge of court of appeals.—Kentucky Utilities Co. v. Ginsberg, 72 S.W.2d 738, 255 Ky. 148.

79. U.S.—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680.

80. U.S.—Shannon v. Retail Clerks, International Protective Ass'n, C.C.A.Ill., 128 F.2d 553—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680.
32 C.J. p 368 note 48.

Order held to comply with statute

Temporary injunction order in suit to restrain purchase of busses with funds of community high school complied with statute by reciting reasons for its issuance.—State v. Cruzan, 243 P. 329, 120 Kan. 316.

81. U.S.—Shannon v. Retail Clerks, International Protective Ass'n, C.C.A.Ill., 128 F.2d 553.

82. U.S.—Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co., Ark., 47 S.Ct. 724, 274 U.S. 597, 71 L.Ed. 1224—Lawrence v. St. Louis-San Francisco Ry. Co., Okl., 47 S.Ct. 720, 274 U.S. 588, 71 L.Ed. 1219.

83. Ill.—Smith v. Nelson, 131 Ill. App. 145.

What constitutes entry of record

Tex.—Ex parte Rains, 257 S.W. 217, 113 Tex. 428.

84. Conn.—Robinson v. Clapp, 32 A. 939, 65 Conn. 365, 29 L.R.A. 582.
Utah.—Thompson v. Liquor Control Commission of Utah, 52 P.2d 463, 464, 87 Utah 578, quoting **Corpus Juris.**

tion should be so clear and certain in its terms that defendant may readily know what he is restrained from doing, and that he must obey it at his peril.[85] An injunction restraining the threatening or doing of things unlawful, which does not specify what specific acts are under restraint, is vague and uncertain[86] although it has been held that it is ordinarily sufficient if the injunction informs defendant of the eventualities or results prohibited, and it is not necessary that it set out specifically the acts that will be considered to have the prohibited consequence.[87]

c. Reference to Bill, Writ, or Bond to Ascertain Meaning

The writ or order ordinarily should be sufficiently certain as to the acts prohibited without requiring any reference to the bill or other papers.

The writ or order itself should be sufficiently cer-

Dissolution of injunction for uncertainty see infra § 241.

Violation of indefinite or uncertain injunction see infra § 259.

85. U.S.—Federal Land Bank v. Miles Nat. Farm Loan Ass'n, C.C.A.Tex., 139 F.2d 422, 423, citing **Corpus Juris**—Cleveland Trust Co. v. Schriber-Schroth Co., C.C.A.Ohio, 108 F.2d 109, conforming to mandate Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., 92 F. 2d 330, certiorari denied Schriber-Schroth Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099, rehearing denied 58 S.Ct. 748, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1052, 304 U.S. 587, 82 L.Ed. 1548. Conforming to mandate Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 59 S.Ct. 8, 305 U. S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Aberdeen Motor Supply Co., 92 F. 2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied 58 S.Ct. 749, 303 U.S. 667, 82 L. Ed. 1124, certiorari granted 58 S. Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, conforming to mandate F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. F. E. Rowe Sales Co., 92 F. 2d 330, certiorari denied F. E. Rowe Sales Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied 58 S. Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, certiorari granted 60 S.Ct. 709, 710, 309 U.S. 648, 84 L.Ed. 1000, three cases certiorari denied 60 S.Ct. 710, 711, 309 U.S. 674, 84 L.Ed. 1019, three cases, reversed on other grounds 61 S.Ct. 235, 311 U.S. 211, 85 L.Ed. 132, rehearing denied 61 S.Ct. 727, 728, 312 U.S. 714, 85 L. Ed. 1144, three cases—Great Northern Ry. Co. v. Brosseau, D. C.N.D., 286 F. 414.

Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.

Cal.—Summers v. Farish, 10 Cal. 347—Morris v. George, 135 P.2d 195, 57 Cal.App.2d 665—Wheeler v. Superior Court in and for City and County of San Francisco, 255 P. 275, 82 Cal.App. 202.

Fla.—Henderson v. Coleman, 7 So. 2d 117, 120, 150 Fla. 185, citing **Corpus Juris**—Palm Corporation v. Walters, 4 So.2d 696, 699, 148 Fla. 527, citing **Corpus Juris.**

Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152—Patten v. Miller, 8 S. E.2d 776, 785, 190 Ga. 105, quoting **Corpus Juris.**

Ill.—Roesch Enamel Range Co. v. Carbine, 247 Ill.App. 248.

Ind.—Uservo, Inc. v. Selking, 28 N. E.2d 61, 63, 217 Ind. 567, citing **Corpus Juris.**

Mich.—Hamilton Mfg. Co. v. Poll, 235 N.W. 171, 253 Mich. 324, citing **Corpus Juris.**

N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J. Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J.Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N. E.2d 210, 282 N.Y. 804.

Tex.—Spears v. City of South Houston, 137 S.W.2d 197, affirmed 150 S. W.2d 74, 136 Tex. 218—Thomas v. Mullins, Civ.App., 127 S.W.2d 559, reversed on other grounds Mullins v. Thomas, 150 S.W.2d 83, 136 Tex. 215—Thomas v. International Seamen's Union of America, Civ.App., 101 S.W.2d 328, 332, quoting **Corpus Juris**—Fort Worth Acid Works v. City of Fort Worth, Civ. App., 248 S.W. 822, affirmed City of Fort Worth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919.

32 C.J. p 368 note 52.

"An injunctional order must be complete in detail as to its prohibition or direction so that what the court intends is easily discernible." —Evans v. Johnston, 20 N.E.2d 841, 848, 300 Ill.App. 78, certiorari denied 60 S.Ct. 582, 309 U.S. 662, 14 L. Ed. 1010.

Insufficient compliance with requirement

U.S.—Carter v. Herrin Motor Freight Lines, C.C.A.Ala., 131 F.2d 557.

Ill.—Evans v. Johnston, 20 N.E.2d 841, 300 Ill.App. 78, certiorari denied 60 S.Ct. 582, 309 U.S. 662, 14 L.Ed. 1010—United Dairy Co. v. Berman, 8 N.E.2d 363, 290 Ill.App. 603.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N. Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N.E.2d 210, 282 N.Y. 804.

32 C.J. p 368 note 52 [d].

Orders held sufficient

U.S.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622, reversing, D.C., 36 F.Supp. 138—A. B. Dick Co. v. Fuller, D.C.N.Y., 6 F.2d 393.

Ga.—Patten v. Miller, 8 S.E.2d 776, 190 Ga. 105—Pettett v. Thompson, 136 S.E. 71, 163 Ga. 355.

32 C.J. p 368 note 52 [a]–[c].

Particularity required in indictment

A court should enjoin only specific acts or types of acts with the particularity required in an indictment, and this rule should be applied, even though defendant has consented to the entry of judgment violating the rule.—Fleming v. Salem Box Co., D. C.Or., 38 F.Supp. 997.

86. N.J.—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J. Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545.

Order that writ of injunction be issued "in all things as prayed for" in petition was unenforceable when read with petition, because order prohibited police officers from unlawfully interfering with lawful operation of restaurant, and did not define acts to be restrained.—Hopkins v. Frenchy, Tex.Civ.App., 75 S.W.2d 184.

87. Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.

tain as to the acts prohibited without requiring any reference to the bill or other papers,[88] although there is authority to the effect that the bill may be looked to in order to aid an otherwise indefinite order;[89] and, indeed, it would seem that, where the injunction refers to the bill and defendant has knowledge of the contents of the bill, and the meaning of the injunction is obvious, he cannot insist that the injunction is too vague and uncertain.[90] An order granting a preliminary injunction, when clear and unambiguous, cannot be narrowed or broadened by the terms of the writ or supporting bond, but, where an order is doubtful or ambiguous, a consideration of the writ and bond may be permitted.[91]

d. Character and Extent of Restraint Granted

The restraint imposed must be reasonable and should go no further than is necessary to protect the plaintiff's rights.

In measuring the scope of the order or decree, the court will consider the nature and object of the bill, the property that requires protection, the interest of parties in that property, and will ascertain what order or decree is indispensable, in view of the respective rights of the parties, to afford complete protection.[92] An injunction, compliance with which is left largely to the discretion of defendant, cannot be upheld.[93]

Nevertheless, the restraint imposed must be reasonable;[94] should in no event go further than is absolutely necessary to protect or safeguard plaintiff's rights;[95] should be so framed as to injure defendant's rights as little as possible;[96] and should in no event be broader than that which is asked in the bill or complaint,[97] especially where the injunction is granted on an ex parte hearing;[98] but an injunction will be construed to be in accord with the allegations of the bill if the language used will

88. N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 126, 118 N.J.Eq. 504, citing **Corpus Juris.**
32 C.J. p 369 note 56.

89. U.S.—Sailors' Union of the Pacific v. Hammond Lumber Co., Cal., 156 F. 450, 85 C.C.A. 16, certiorari denied 28 S.Ct. 567, 208 U.S. 615, 52 L.Ed. 646.
32 C.J. p 369 note 57.
Construction of writ or order see infra § 207.

90. U.S.—Whipple v. Hutchinson, C. C.N.Y., 29 F.Cas.No.17,517, 4 Blatchf. 190.

91. U.S.—J. L. Owens Co. v. Officer, Minn., 244 F. 47, 156 C.C.A. 475.

92. U.S.—Gasaway v. Borderland Coal Corp., C.C.A.Ind., 278 F. 56.
Tex.—Beck v. Priddy, Civ.App., 249 S.W. 1105, reversed on other grounds, Com.App., 252 S.W. 476.
Scope of inquiry see supra § 200.
Scope of restraint on final decree see infra § 211.

Injunction against violation of statute

(1) The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.—National Labor Relations Board v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U.S. 638, 85 L.Ed. 406.

(2) In action to enjoin violation of the Fair Labor Standards Act, language in judgment purporting to enjoin violation of any and all provisions of the act was improper notwithstanding stipulation for entry of such judgment.—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997.

93. U.S.—American Steel Foundries v. Tri-City Cent. Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, motion granted 42 S.Ct. 271.
32 C.J. p 369 note 64.

94. N.J.—Cosmos Dyeing & Printing Works v. Calderini, 111 A. 517, 91 N.J.Eq. 378.

95. Kan.—Reno County School Dist. No. 1 v. Shadduck, 25 Kan. 467.
Tex.—State v. Ferguson, 125 S.W. 2d 272, 133 Tex. 60.
32 C.J. p 369 note 66.

Injunctive relief held proper

U.S.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971—Griswold v. President of U. S., C.C.A.La., 82 F.2d 922.
Ga.—Massell Realty Improvement Co. v. MacMillan Co., 147 S.E. 38, 168 Ga. 164.
N.J.—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J.Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545.

Injunctive relief held improper

Ill.—Kelly v. Brice, 49 N.E.2d 742, 319 Ill.App. 513—Kessie v. Talcott, 27 N.E.2d 857, 305 Ill.App. 627—Kellogg v. Kellogg, 14 N.E.2d 960, 295 Ill.App. 386.
Nev.—Home Finance Co. v. Balcom, 127 P.2d 389, 61 Nev. 301.
N.J.—Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.
N.Y.—Goldman v. Cohen, 227 N.Y.S. 311, 222 App.Div. 631.
Tex.—State v. Ferguson, 125 S.W.2d 272, 133 Tex. 60.
32 C.J. p 369 note 66 [a], [b].

96. Conn.—Boardman v. Meriden Brittania Co., 36 Conn. 207.

It should not interfere with legitimate and proper action on the part of those against whom it is directed.—Commission Row Club v. Lambert, Mo.App., 161 S.W.2d 732.

97. Ga.—Watkins v. Wilkerson, 80 S.E. 718, 141 Ga. 163, Ann.Cas. 1915B 1062.
Ill.—O'Brien v. Eustice, 19 N.E.2d 137, 298 Ill.App. 510.
Ind.—Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 216 Ind. 363.
32 C.J. p 369 note 68.

Injunction is void which violates this requirement.
Kan.—State v. Rush County, 10 P. 535, 35 Kan. 150.
Utah.—Leithan v. Cusick, 1 Utah 242.

Interlocutory restraining order must stand or fall on pleadings as they existed at the time order was entered.—Cohen v. Sparberg, 44 N.E.2d 335, 316 Ill.App. 140.

The decree must conform to the pleadings, as well as to the evidence.—Commission Row Club v. Lambert, Mo.App., 161 S.W.2d 732.

Partial relief may be granted.—Bogalusa Ice Co. v. Moffett, La.App., 179 So. 327.

98. Tex.—White v. McFaddin, Civ. App., 209 S.W. 766.

admit of such construction.[99] It has been held that it is the duty of plaintiff to see that the writ is no broader than the order of the court will authorize.[1]

e. Mandatory Injunction

A mandatory injunction should be clear, direct, and unequivocal and should not be hedged about by conditions and qualifications which cannot be performed or which may be confusing.

A mandatory injunction should be in proper form[2] and should be clear, direct, and unequivocal and should not be hedged about by conditions and qualifications which cannot be performed or which may be confusing to a person of ordinary intelligence.[3] It should be phrased in specific and positive terms and those commanded should not be remitted to the pleadings and proofs and required to interpret them to determine their scope and extent.[4]

§ 207. —— Construction, Operation, and Effect

a. In general
b. Operation and effect of order

a. In General

To ascertain the meaning of any part of an injunction, the entire injunction should be looked to; and its language must have a reasonable construction with reference to the subject in connection with which it is employed.

To ascertain the meaning of any part of an injunction, the entire injunction should be looked to;[5] and its language, like that of all other instruments, must have a reasonable construction with reference to the subject in connection with which it is employed.[6] It should be construed in the light of the

99. W.Va.—McEldowney v. Lowther, 38 S.E. 644, 49 W.Va. 348, 350.

1. Ill.—Sturges v. Hart, 45 Ill. 103.

2. **Decree held in proper form**
U.S.—U. S. v. Adler's Creamery, C.C. A.N.Y., 110 F.2d 482, certiorari denied Adler's Creamery v. U. S., 61 S.Ct. 12, 311 U.S. 657, 85 L.Ed. 421.
Mandatory injunction generally see supra § 5.

3. U.S.—National Labor Relations Board v. Bell Oil & Gas Co., C.C.A., 98 F.2d 405, rehearing denied 99 F.2d 56.
Ind.—Uservo, Inc., v. Selking, 28 N. E.2d 61, 217 Ind. 567.

4. Ind.—Uservo, Inc. v. Selking, supra.
N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

5. Colo.—Old Homestead Bread Co. v. Marx Baking Co., 117 P.2d 1007, 1009, 108 Colo. 375, quoting **Corpus Juris.**
32 C.J. p 370 note 79.

Effect of verbal interpretation by judge
Order restraining defendant from engaging in similar business was not enlarged, or rendered erroneous, by judge's threat to jail defendant if he violated order; the order was neither added to by the verbal construction announced by the judge nor given a meaning different from the ordinary signification of its language.—Goldberg v. Soltes, Tex.Civ. App., 32 S.W.2d 246.

Decision refusing to grant injunction and dissolving restraining order theretofore granted should be construed as express refusal of interlocutory injunction.—Free Gift Lodge, No. 25, Brothers and Sisters of Benevolence, v. Edwards, 132 S.E. 206, 161 Ga. 832.

6. Colo.—Old Homestead Bread Co. v. Marx Baking Co., 117 P.2d 1007, 108 Colo. 375.
Tex.—Nystel v. Thomas, Civ.App., 42 S.W.2d 168.
32 C.J. p 370 note 80.
"It is to be construed so as to prevent evasion of its terms, and is to be limited in its implications to the controversy out of which the judgment emerged."—People ex rel. Finkelstein v. Fox, 281 N.Y.S. 143, 144, 155 Misc. 639.

Construction of particular injunctions
(1) Injunction against labor union officials did not prohibit use of lawful propaganda to increase their membership.—Bittner v. West Virginia-Pittsburgh Coal Co., C.C.A.W. Va., 15 F.2d 652.

(2) Where Louisiana court temporarily restrained insured Louisiana resident from prosecuting a Mississippi suit to recover disability benefits under Louisiana policies, the restraint would not be limited to that particular Mississippi suit but would apply to any Mississippi suit seeking to litigate insurer's alleged liability for any disability benefits under the Louisiana policies.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.

(3) Other cases.
Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill. App. 505, affirmed 139 N.E. 887, 308 Ill. 488.
Philippine.—Matter of MacDougall, 3 Philippine 70.

The word "picketing," as used in preliminary injunction restraining newspaper workers' union from picketing any place other than newspaper plant, embraced essentials of a fixed station, beat, or patrol, and the posting of person or persons thereat in an effort to compel a yielding to the strikers' demands.—Evening Times Printing & Publishing Co. v. American Newspaper Guild, 199 A. 598, 124 N.J.Eq. 71, modifying 195 A. 378, 122 N.J.Eq. 545.

"And" as "or"
In construing an injunction order enjoining defendant from selling tea put up in packages like in shape or wrappers to the complainant's and from making use, in connection with the sale of tea, of the designation "Black Package Tea," the court said: "It is substantially admitted that the appellant violated the injunction by the use of packages and wrappers of the form enjoined; but, because he did not also put upon the packages the words 'Black Package Tea,' it is urged that he did not violate the injunction upon the ground that all these things must combine in order to constitute such violation. It is perfectly plain from a reading of the order that the word 'and' was used in a disjunctive and not in a conjunctive sense."—Fischer v. Blank, 31 N.Y.S. 10, 11, 81 Hun 579, affirmed 39 N.E. 857, 144 N.Y. 700.

Interlocutory or final decree
Chancellor's decree, ordering mandatory injunction in vacation without consent of parties, constituted only an interlocutory decree authorizing temporary injunction.—Morris v. Trussell, 109 So. 854, 144 Miss. 343.

Order as one denying application for temporary injunction
Order of trial court stating in part that an injunction would not lie restraining defendants from committing certain acts was construable as one overruling an application for a temporary injunction after fully hearing both pleading and evidence as against contention that order sustained a general demurrer to plaintiffs' application for writ of injunc-

allegations and prayer of the bill.[7] When several words are followed by a clause which is applicable as much to the first and other words as to the last, the clause must be read as applicable to all.[8]

Where disobedience of an injunction is a penal offense and punishable as such, the injunction, like penal and criminal statutes, should be construed strictly in favor of the person charged with violating it.[9]

Official judicial construction. It is improper for an attorney for a party in a suit for injunction to ask the judge unofficially to construe the order; the proper practice is to move for a judicial construction or a modification of it.[10]

b. Operation and Effect of Order

(1) In general
(2) On transfers or agreements in violation of injunction

(1) In General

A temporary injunction does not adjudicate the ultimate rights in controversy and ordinarily it remains in force until superseded by the final decree.

The presumption is that, where an injunction may have been regularly issued, it was so issued.[11] The order relates back to the date of the decision granting an injunction,[12] and, in the absence of a time limitation, a temporary injunction continues in force until dissolved or modified or until final judgment is entered,[13] but if the temporary injunction or the order therefor fixes a certain date for its expiration without the clause "or until the further order of the court" the injunction is no longer in force after the date specified unless it is extended or continued.[14] An injunction restraining the breach of a contract does not extend beyond the expiration of the agreement;[15] and a preliminary injunction against the enforcement of an ordinance on the ground that it was in violation of a contract, even though it is in terms to continue to final hearing, does not operate to extend the life of such contract in case it expires prior to the final hearing.[16]

An injunction is granted to protect or enforce existing rights or liens and does not create any new lien or give rise to any new substantive rights between the person to whom it is granted and the person enjoined,[17] although in some cases the writ

tion, which, when facts were taken as true, clearly entitled them to relief sought.—Gibraltar Sav. & Bldg. Ass'n v. Isbell, Tex.Civ.App., 101 S.W.2d 1029.

7. Ga.—Powell v. Hammond, 8 S.E. 426, 81 Ga. 567.
Tex.—State v. Boyd, 136 S.W.2d 1107, 134 Tex. 600—Nystel v. Thomas, Civ.App., 42 S.W.2d 168.
32 C.J. p 369 note 57.

Injunction in words of prayer
Tenn.—Cheatham County v. Baker, 30 S.W.2d 234, 161 Tenn. 222.

8. Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.

9. Wis.—Wisconsin Cent. R. Co. v. Smith, 8 N.W. 613, 52 Wis. 140.

10. S.C.—State v. Highsmith, 90 S.E. 154, 105 S.C. 205.

11. Ill.—Silver v. Smith, 106 Ill. App. 411.
La.—Stanbrough v. Scott, 1 Rob. 43.
N.Y.—Beebe v. Coleman, 8 Paige 392.

12. N.Y.—Rochester & L. O. Water Co. v. City of Rochester, 82 N.Y.S. 455, 84 App.Div. 71, affirmed 68 N.E. 117, 176 N.Y. 36.
N.C.—Wilson v. Bryan, 142 S.E. 491, 492, 195 N.C. 360, citing **Corpus Juris.**

13. Cal.—People's Ditch Co. v. Foothill Irr. Dist., 284 P. 514, 103 Cal. App. 321.
Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195—Pedrick v. Vidal, 116 So. 857, 95 Fla. 952.
Ill.—Kessie v. Holcott, 27 N.E.2d 857, 305 Ill.App. 627.
Kan.—Allen v. Glitten, 134 P.2d 631, 156 Kan. 550.
N.C.—Wilson v. Bryan, 142 S.E. 491, 492, 195 N.C. 360, citing **Corpus Juris.**
Tex.—McCorkel v. District Trustees of Robinson Springs School Dist. No. 76 of Comanche County, Civ. App., 121 S.W.2d 1048.
Wash.—Rogers v. Kendall, 23 P.2d 862, 173 Wash. 390.
Wis.—State v. Neveau, 295 N.W. 718, 236 Wis. 414.
32 C.J. p 373 note 38.
Duration of restraining order see supra § 8.
Effect of final decree on preliminary injunction see infra § 244.
Nature of preliminary injunction see supra § 2.

14. Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W.2d 431.

"Until further order" means further action by the court in the premises including entry of the final judgment.—State v. Neveau, 295 N.W. 718, 236 Wis. 414.

Until further order of court to be held on certain date
A preliminary injunction restraining defendant "until the further order of the district court . . . to be holden at 10:00 o'clock A.M., Monday, Sept. 8, 1930," expired on the date fixed in the absence of an order continuing the restraint.—English v. Kermit Townsite Co., Tex.Civ. App., 38 S.W.2d 898.

Revival by filing of supersedeas bond
A supersedeas bond filed on appeal from judgment dissolving judgment granting injunction restraining sale to satisfy judgment pending final determination by supreme court of application for certiorari to review case in which judgment was rendered, did not revive injunction which expired when supreme court denied application for certiorari and overruled motion for rehearing on the application.—Slama v. Mills, Tex. Civ.App., 122 S.W.2d 333, error dismissed.

15. Ill.—Match Corporation of America v. Acme Match Corporation, 1 N.E.2d 867, 285 Ill.App. 197—Preble v. Architectural Iron Workers' Union of Chicago, 260 Ill. App. 435.

16. Iowa.—Kimball v. Cedar Rapids, C.C.Iowa, 100 F. 802.

17. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

Restoration of official to public office
Where attorney for fourth-class town was discharged by mayor thereof before application for and issuance of injunctive order restraining town and its officials from interfering with attorney's performance of his duties pending final determination of his right to such office by court, such order did not restore him to office or entitle him to salary

has been held to create an equitable lien.[18] Various other consequences may flow from the granting or denial of an application for injunctive relief.[19]

Conclusiveness; res judicata. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy,[20] is not conclusive on the court on a subsequent hearing,[21] and concludes no rights of the parties;[22] and this is so even after its affirmance on appeal from a decree dissolving it.[23] An order granting or denying a preliminary injunction merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, defendant should, or that he should not, be restrained from exercising the rights claimed by him;[24] and when the cause is finally tried it may be found that the facts require a decision against the party prevailing on the preliminary application,[25] and the order may be modified in the final judgment giving to the respective parties that order or judgment which the rules of equity require.[26]

Persons bound or affected. The rights of persons not parties to the suit are not affected by an injunction,[27] although, as considered infra § 263, certain classes of persons, such as agents and servants, at-

thereof as town's de facto attorney during such interim.—Warnock v. Town of Marysville, 136 P.2d 188, 17 Wash.2d 515.

18. Perpetual injunction against one's alienating his interest in certain property, as against plaintiff's claims on it, gives to plaintiff an equitable lien on that interest to the extent of those claims as against the parties to the suit in which the injunction issued.—Sheafe v. Sheafe, 40 N.H. 516.

19. Injunction on court's own motion after denial of temporary injunction

A trial court is without power in injunction proceeding, after denying temporary injunction and sustaining exception of no cause of action to petition, to issue of its own motion temporary injunction, since to do so would be in effect granting a suspensive appeal which is not permitted by statute from a judgment refusing an injunction.—Knott v. Himel, 179 So. 441, 189 La. 323.

Injunction against purchase of site for school

(1) Injunction against purchase of school site by district board of trustees, resulting in selection of another site, and appeal therefrom, placed it within power of county board of education to make selection, under statute.—McCulley v. McFarland, 118 S.E. 52, 155 Ga. 700.

(2) Injunction restraining school district board of trustees from selecting particular site for schoolhouse, but not purporting to interfere with right of appeal, did not prevent county board of education from selecting such site on appeal from district board's selection of another site, especially as there may have been facts, such as ownership of the site, authorizing injunction against local board, and not against county board.—McCulley v. McFarland, supra.

Courts are not responsible for consequences of injunctions granted, but only for honest interpretation and impartial application of law.—Tebbetts v. McElroy, D.C.Mo., 56 F.2d 621.

20. U.S.—Local Draft Board No. 1 of Silver Bow County, Mont., v. Connors, C.C.A.Mont., 124 F.2d 388.
Cal.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.
Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237—Voyles v. Carr, 160 S.E. 801, 173 Ga. 627—Albany Theatre v. Short, 159 S.E. 688, 173 Ga. 121.
N.Y.—Bond Stores v. Turner, 29 N.Y.S.2d 82, 262 App.Div. 417—Ullman v. Stolzenberg, 256 N.Y.S. 569, 234 App.Div. 463.
Pa.—The Atlantic Refining Co. v. Cohen, 34 Pa.Dist. & Co. 365.
R.I.—Miller v. Tanenbaum, 200 A. 449, 61 R.I. 92.
Wash.—Warnock v. Town of Marysville, 136 P.2d 188, 17 Wash.2d 515.
W.Va.—State v. Baker, 164 S.E. 154, 112 W.Va. 263.
Wis.—Gross v. Peter Pirsch & Sons Co., 247 N.W. 335, 210 Wis. 682.
32 C.J. p 373 note 40.

21. U.S.—O'Connell v. Gentry County Bank, C.C.A.Mo., 55 F.2d 806, 809, citing **Corpus Juris**—Waterbury Buckle Co. v. G. E. Prentice Mfg. Co., D.C.Conn., 294 F. 930.
Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So.2d 880, 148 Fla. 195.
N.Y.—Bard-Baker Co. v. Crescent Mfg. Co., 20 N.Y.S.2d 759, 174 Misc. 356—Aberon Bakery Co. v. Raimist, 254 N.Y.S. 38, 141 Misc. 774—Williams Ice Cream Co. v. Chase Nat. Bank, 199 N.Y.S. 314, 120 Misc. 301, reversed on other grounds 205 N.Y.S. 446, 210 App. Div. 179.
S.C.—Lucius v. Du Bose, 103 S.E. 759, 114 S.C. 375.
Tex.—Gordon v. Hoencke, Civ.App., 253 S.W. 629—City of Seymour v. Montgomery, Civ.App., 209 S.W. 237.
32 C.J. p 374 note 41.
Effect on final hearing of granting or denying temporary injunction see infra § 213.
Second application for preliminary injunction see supra § 199.

22. U.S.—City of Tampa v. Texas Co., C.C.A.Fla., 89 F.2d 221.
Ill.—Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190—Klein's Restaurant Corporation v. McLain, 11 N.E.2d 644, 293 Ill. App. 54.
Md.—Alleghany Corporation v. Aldebaran Corporation, 196 A. 418, 173 Md. 472.
S.C.—Lucius v. Du Bose, 103 S.E. 759, 114 S.C. 375.
Tex.—Wizig v. Jefferson, Civ.App., 74 S.W.2d 428—Dallas Joint Stock Land Bank of Dallas v. Davis, Civ. App., 73 S.W.2d 989—City of Farmersville v. Texas-Louisiana Power Co., Civ.App., 33 S.W.2d 272.
32 C.J. p 374 note 42.

23. Pa.—Casinghead Gas Co. v. Osborn, 112 A. 469, 269 Pa. 395—Appeal of Paxson, 106 Pa. 429.

24. Cal.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.
32 C.J. p 374 note 44.

25. Cal.—Miller v. Madera Canal & Irrigation Co., 99 P. 502, 155 Cal. 59, 22 L.R.A.,N.S., 391.

26. Okl.—Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

27. U.S.—Boynton v. Fox West Coast Theatres Corporation, C.C.A. Kan., 60 F.2d 855.
S.D.—Common School Dist. No. 45 v. Inch, 229 N.W. 380, 56 S.D. 502.
32 C.J. p 375 note 58.

Disregarding injunction against person improperly restrained

Fact that temporary injunction preserving status quo in controversy over office of superintendent of independent school district ran against municipality as well as board of trustees was harmless and would be disregarded as to the municipality, since management of schools was in

torneys, privies, aiders, and abettors, and persons adequately represented in the suit, may by their acts render themselves amenable to punishment as for a contempt of court.

Effect on actions at law. As considered supra § 50, an injunction restraining a person from commencing or further prosecuting an action at law does not operate as a prohibition to the law court in the exercise of its jurisdiction, but only prevents plaintiff therein from proceeding. However, it has been held that it is not competent for a court of law to dismiss a suit commenced in such court, and to enter up judgment for costs against a plaintiff on the ground that plaintiff has been perpetually enjoined in chancery from proceeding.[28] Before judgment in the suit at law it does not operate as a release of errors therein.[29]

(2) On Transfers or Agreements in Violation of Injunction

Transfers and agreements in violation of an injunction are invalid as to the complainant and those claiming under him, except as against innocent third persons.

Transfers and contracts or agreements in violation of an injunction are invalid as to complainant or those claiming under him, and may be set aside[30] except as against an innocent third person[31] or when it appears on final hearing that there was no ground for granting the injunction.[32]

However, it has been held that a conveyance made in violation of an injunction is not void or inoperative as to anyone except those for whose benefit the injunction was granted,[33] and not as to them where they consented to the making of the conveyance without the dissolution of the injunction.[34] A contract or conveyance in violation of an injunction is valid as against the party making it.[35]

Where a contract recognizes the validity of a temporary injunction and provides that the agreement is to take effect only on the contingency that such impediment will be removed, immediately on its removal the contract becomes valid and binding.[36]

§ 208. Service of Writ or Order and Return

a. In general
b. Mode of service and return
c. Technical defects and waiver

a. In General

Service of a copy of a temporary injunction ordinarily must be made on the person enjoined.

To make a temporary injunction effectual, it is generally necessary to serve a copy of the writ or restraining order on the person enjoined;[37] but it has been held that, if defendant is otherwise informed of the issuance of the injunction, he will be bound thereby as though it had actually been served.[38] It has been held that, where a defendant was personally served with the summons and complaint, it was not necessary to serve on him the judgment by default containing the injunction.[39]

hands of trustees.—Temple Independent School Dist. v. Proctor, Tex.Civ.App., 97 S.W.2d 1047, error refused.

Representative capacity

Defendant sued in individual capacity is improperly enjoined in his representative capacity as receiver.—Flint v. Nutt, 221 N.Y.S. 593, 220 App.Div. 413.

28. Ala.—Rogers v. Smiley, 2 Stew. & P. 49.
32 C.J. p 375 note 55.

29. Ill.—McConnel v. Ayres, 4 Ill. 210.
Miss.—Prodot v. Doe, 24 Miss. 169.

30. U.S.—Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., D.C. Del., 264 F. 516, affirmed, C.C.A., 275 F. 916.
N.C.—Hearne v. Stanly County, 123 S.E. 641, 188 N.C. 45.
Tex.—Lindley v. Easley, Civ.App., 59 S.W.2d 927, 929, citing **Corpus Juris.**
32 C.J. p 374 note 48.
Violation of injunction see infra § 257 et seq.

31. N.M.—Southard v. Latham, 138 P. 205, 18 N.M. 503, 50 L.R.A.,N.S., 871.
32 C.J. p 374 note 49.

32. Ky.—Caldwell v. White, 4 T.B. Mon. 561.

After restraining order

Tex.—Rhoton v. Texas Land & Mortgage Co., Civ.App., 80 S.W.2d 763, error refused.

33. Tenn.—Herman v. Sartor, 63 S.W. 1120, 107 Tenn. 235.
32 C.J. p 374 note 51.

Persons not parties to injunction proceeding are unaffected by transfers and agreements violating injunction.—Cohan v. Shibley, App., 289 P. 169.

34. Tenn.—Greenwald v. Roberts, 4 Heisk. 494.

35. U.S.—Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., D.C. Del., 264 F. 516, affirmed, C.C.A., 275 F. 916.
Tenn.—Greenwald v. Roberts, 4 Heisk. 494.

36. Tex.—Dallas Trust & Savings Bank v. Wortham Independent School Dist., Civ.App., 25 S.W.2d 174, error refused.

37. Tenn.—Farnsworth v. Fowler, 1 Swan 1, 55 Am.D. 718.
Tex.—Pioneer Building & Loan Ass'n v. Cowan, Civ.App., 123 S.W.2d 726, 730, citing **Corpus Juris.**
32 C.J. p 372 note 3.
Necessity of service to justify punishment for violation see infra § 261.
Want of service as ground for dissolution of injunction see infra § 241.

Injunctive relief must be accomplished by judicial process and not by judicial proclamation.—Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs & Helpers Union Local No. 366, Mo.App., 115 S.W.2d 89.

38. Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.
Tenn.—Sweetwater Bank & Trust Co. v. Howard, 66 S.W.2d 225, 16 Tenn. App. 91—Farnsworth v. Fowler, 1 Swan 1, 5, 55 Am.D. 718.

39. Wash.—State v. McCoy, 209 P. 1112, 122 Wash. 94.

Time for service. The writ or order of injunction should be served within a reasonable time[40] and within the time prescribed by rule of court.[41]

b. Mode of Service and Return

In the absence of statutory regulations, to effect a regular service of a writ of injunction the writ itself must be shown to the defendant and a true copy delivered; but substituted service is proper where the defendant evades service or other circumstances render it necessary.

Independent of statutory provisions, to effect a regular service of a writ of injunction, the writ itself under the seal of the court must be shown to defendant, and a true copy delivered to him.[42] By statute in some jurisdictions service by delivery of a copy of the writ or order is sufficient and the original need not be shown,[43] unless perhaps in cases where the exhibition of the original is specially requested by defendant.[44] In some states the moving affidavits must also be served with the order,[45] and this requirement is not waived by an agreement between counsel made out of court that a hearing should be had at a certain time.[46]

Service on agent. While under proper circumstances service on an agent may be sufficient to bind the principal,[47] where defendant has been served it is not necessary to serve copies on his agent or employees.[48]

Service on attorney. Where defendants are all jointly interested, service of a copy of the writ or order on the attorney representing them is sufficient.[49]

Substituted service. In accordance with the practice obtaining in the particular jurisdiction, it has been held that, where defendant evades service or other circumstances render it necessary and proper, personal service of the order or writ on defendant may be dispensed with by order of the court,[50] and that service may be had by leaving a copy of the order, writ, or other necessary papers at the residence of defendant.[51] Constructive service, by publication, however, is not sufficient to make an injunction binding on a person who is a nonresident of the state.[52]

Return. Writs of injunction are usually returnable to the county in which the action is pending.[53] They must be returned within the time prescribed by rule of court.[54]

c. Technical Defects and Waiver

Mere technical defects in the service of the writ or order ordinarily are disregarded and the defendant by appearing and contesting the right to an injunction waives defects in the service.

The courts are inclined to disregard mere technical defects in the service of the writ or order.[55] The parties may by agreement waive personal service,[56] and defects in service may be waived by defendant appearing and contesting the right to an injunction.[57]

§ 209. Service of Process in Action

The service of a summons or subpœna as a prerequisite to the issuance of a preliminary injunction is discussed supra § 205 and as a prerequisite to the issuance of a restraining order infra § 210, while supra §§ 179, 180 is discussed the necessity of notice of an application for a restraining order or preliminary injunction and the necessity of service of a summons or subpœna as a condition to the grant of a final injunction.

Examine Pocket Parts for later cases.

§ 210. Restraining Order pending Hearing

A restraining order must comply with statutory regulations and rules of court and be so clear and cer-

40. U.S.—McCormick v. Jerome, C. C.N.Y., 15 F.Cas.No.8,721, 3 Blatchf. 486.

Service held timely

Fact that an injunction granted the day before and issued on the day the next term of court convened, which was the return day, was not served until the following day, did not make it void.—Kibbin v. McFaddin, Tex.Civ.App., 259 S.W. 232.

41. N.J.—Lee v. Cargill, 10 N.J.Eq. 331.

42. N.J.—Haring v. Kauffman, 13 N. J.Eq. 397, 78 Am.D. 102.
32 C.J. p 372 note 14.

43. Cal.—Edmondson v. Mason, 16 Cal. 386.
32 C.J. p 372 note 15.

44. Cal.—Edmondson v. Mason, supra.

45. N.Y.—Penfield v. White, 8 How. Pr. 87.
N.C.—Taylor v. Boone, 89 S.E. 1065, 172 N.C. 93.
32 C.J. p 372 note 17.

46. N.C.—Taylor v. Boone, supra.

47. Ga.—Porcher v. Pearsons-Taft Land Credit Co., 114 S.E. 634, 154 Ga. 483.

48. N.Y.—Daly v. Amberg, 13 N.Y. S. 379, affirmed 27 N.E. 1038, 126 N.Y. 490.

49. N.Y.—Seebor v. Hess, 5 Paige 85.

50. N.J.—Haring v. Kauffman, 13 N. J.Eq. 397, 78 Am.D. 102.
32 C.J. p 373 note 24.

51. Iowa.—Jordan v. Wapello County, 28 N.W. 548, 69 Iowa 177.
32 C.J. p 373 note 25.

52. Ga.—Grimmett v. Barnwell, 192 S.E. 191, 193, 184 Ga. 461, citing **Corpus Juris.**
32 C.J. p 373 note 26.

53. Me.—Androscoggin & K. R. Co. v. Androscoggin R. Co., 49 Me. 392.
Tex.—Allen v. Menard, 5 Tex. 378.

54. N.J.—Lee v. Cargill, 10 N.J.Eq. 331.

55. Ind.—Ades v. Levi, 37 N.E. 388, 137 Ind. 506.
N.Y.—Knudsen v. Friedery, 57 N.Y. S. 581, 27 Misc. 98.

56. Vt.—Waterman v. Clark, 2 A. 578, 58 Vt. 601.

57. N.Y.—Sheffield v. Cooper, 48 N. Y.S. 639, 21 App.Div. 518.
32 C.J. p 373 note 33.

tain that the defendant may readily know what he is restrained from doing.

A restraining order must comply with statutory requirements[58] and rules of court.[59] Under the procedure in some jurisdictions a restraining order may not be issued unless or until an action has been commenced in a proper case by the filing of a complaint, and then only at the time of issuing summons unless affidavits are filed afterward.[60] In other jurisdictions a subpœna is not required to be taken out with a restraining order.[61]

A restraining order should be so clear and certain in its terms that defendant may readily know what he is restrained from doing, and that he must obey it at his peril.[62] In the absence of a statutory requirement or rule of court, a restraining order is not void because it does not disclose on its face that a bond was required or the reason for its issuance,[63] but when required by statute or rule of court the restraining order must state the reasons for its issuance,[64] and define the injury and state why it is irreparable and why the order was granted without notice.[65] It has been held that a temporary restraining order granted pending a hearing may properly include all real parties in interest who are represented by defendant where the number of such parties is so great as to preclude their being made parties.[66]

Service and return. A restraining order must be made returnable in accordance with statutory regulations.[67]

§ 211. Final Judgment or Decree

a. In general
b. Form and contents

a. In General

A permanent injunction is properly granted only by a final decree rendered after a hearing on the merits or after the case has been matured and defendant has been afforded an opportunity for such hearing.

A permanent or perpetual injunction issues as a final judgment which settles the rights of the parties after the determination of all issues raised;[68] and the judgment granting it is clearly distinguishable from an order granting interlocutory injunctive relief.[69] It has been said that the entry of an order of injunction is in some respects analogous to the publication of a penal statute; it is a notice to the parties that certain things must be done or not done under a penalty to be fixed by the court.[70]

58. Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906.

59. Tex.—Crouch v. Crouch, Civ. App., 164 S.W.2d 35.
Duration of restraining order see supra § 8.

60. Mont.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.
Filing of complaint and issuance of process as prerequisite to preliminary injunction see supra § 205.
Order granted on complaint alone without affidavits being filed is void. —Labbitt v. Bunston, supra.

61. N.J.—Elgart v. Mintz, 200 A. 488, 124 N.J.Eq. 136—Packard-Bamberger & Co. v. Guarantee Fruit Market, 182 A. 267, 119 N.J. Eq. 300—Allman v. United Brotherhood of Carpenters, etc., 81 A. 116, 79 N.J.Eq. 150.

62. Ga.—Patten v. Miller, 8 S.E.2d 776, 785, 190 Ga. 105, quoting **Corpus Juris.**
Tex.—Thomas v. International Seamen's Union of America, Civ.App., 101 S.W.2d 328, 332, quoting **Corpus Juris.**
32 C.J. p 368 note 53.
Order held sufficient
Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.
32 C.J. p 368 note 53 [a].
Order held not contradictory
Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.
The terms of restraints imposed pursuant to Anti Injunction Act in labor disputes should be clear and certain on their face.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

63. Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.

64. **Statute applicable only to labor disputes**
Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

65. U.S.—Lawrence v. St. Louis-San Francisco Ry. Co., Okl., 47 S.Ct. 720, 274 U.S. 588, 71 L.Ed. 1219.
Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35.

66. U.S.—San Francisco Gas & Electric Co. v. City and County of San Francisco, C.C.Cal., 164 F. 884.
32 C.J. p 375 note 60.

67. N.C.—Galbreath v. Everett, 84 N.C. 546.
32 C.J. p 373 note 28 [a].

68. N.C.—Galloway v. Stone, 182 S. E. 333, 208 N.C. 739.
Permanent injunction should be expressed in decree
Colo.—Grand River Ditch Co. v. Ruane, 259 P. 514, 82 Colo. 333.
Decree as substitute for writ
(1) In some states it is not necessary or proper to issue a writ of injunction; the function of the writ may be served by an order contained in the decree itself.
N.Y.—Jackson v. Bunnell, 21 N.E. 79, 113 N.Y. 216.
Wis.—German Evangelical Congregation v. Hoessli, 13 Wis. 348.
(2) One result of the abolition of the writ and the substitution of relief by order or decree is that an injunction cannot be granted subsequent to the final decree or judgment, on motion and affidavits.—Jackson v. Bunnell, supra—32 C.J. p 376 note 80.
Construction, operation, and effect of final decree granting or refusing injunction see infra § 215.

69. Tex.—Allen v. Gulf Oil Corporation, Civ.App., 139 S.W.2d 207, error refused.
Order granting injunction was final, rather than interlocutory, judgment where parties made their personal appearance in court and every issue made by pleading was fully developed, and order dissolved a temporary restraining order, notwithstanding judgment required execution of a bond.—Thomas v. International Seamen's Union of America, Tex.Civ.App., 101 S.W.2d 328.
"Preliminary" and "perpetual" injunctions defined and distinguished see supra §§ 2, 3.

70. Ky.—Louisville & N. R. Co. v.

An injunction may be granted after a trial or hearing on the merits of the case[71] and a final decree granting or refusing an injunction should not be entered until after a hearing on the merits[72] where a verified answer containing denials is filed[73] or where no answer is required, or a rule to show cause is equivalent to an answer.[74] It has been said that a final decree may be entered without a hearing on the merits only when a demurrer to the bill has been interposed and overruled and defendant elects to stand by his demurrer.[75] As shown infra § 212, however, some authorities consider it proper to render a final decree where defendant fails to answer a bill stating a cause of action.

Whether a bill may be dismissed on granting a motion to dissolve a temporary injunction is discussed supra § 198.

Conditions on granting or refusing the injunction are discussed supra § 202.

b. Form and Contents

(1) In general
(2) Conformity to pleadings, evidence, and findings

(1) In General

A decree granting permanent injunctive relief should in clear, precise, and definite terms grant the plaintiff the relief to which he is entitled for the protection of his rights; but it should not be too broad in scope, as in respect of granting more relief than is necessary for the protection of plaintiff's rights or in enjoining activities of the defendant which are lawful and a proper exercise of his rights.

The court may, in its final decree in a suit for an injunction, grant such, and only such, permanent injunctive relief as, in view of the facts, circumstances, and situation in the particular case,[76] and the law applicable thereto,[77] is reasonable,[78] prop-

Miller, 66 S.W. 5, 112 Ky. 464, 23 Ky.L. 1714.
32 C.J. p 377 note 92.

71. Mo.—Cavitt v. Fowler, App., 285 S.W. 175.
Tenn.—State ex rel. v. Southern Junior College, 64 S.W.2d 9, 166 Tenn. 535.

72. Ga.—Hargraves v. Lewis, 3 Ga. 162.
Tex.—Ebner v. Nall, Civ.App., 95 S.W.2d 1004, error dismissed.

Case not matured for hearing
(1) Where a motion to dissolve a temporary injunction has been overruled and the case is not matured for hearing, the court cannot proceed to decree settling the principles of the case.—Fadely v. Tomlinson, 24 S.E. 645, 41 W.Va. 606.

(2) Where permanent injunction was granted before complainants' bill was entered on record and before defendants could answer and there were no affidavits or bond filed, decree was void.—Mintzer v. Turnbach, 172 A. 162, 113 Pa.Super. 113.

Interlocutory hearing
Final order requiring parties to vacate premises cannot be granted on interlocutory hearing.—Bond v. Harrison, 168 S.E. 604, 176 Ga. 568.

Where defendant has not been afforded day in court for determination in some proper way of the issues raised by the pleadings, it is error to grant a permanent injunction.—Galloway v. Stone, 182 S.E. 333, 208 N.C. 739.

73. Kan.—McCrea v. Leavenworth, 27 P. 129, 46 Kan. 767.
Tex.—Harbert v. Owen, Civ.App., 26 S.W.2d 670.

74. La.—Dawson v. Duplantier, 15 La. 289.

75. Ill.—Eichelberger v. Robinson, 233 Ill.App. 579.

76. U.S.—Vaughan v. John C. Winston Co., C.C.A.Okl., 83 F.2d 370, affirming, D.C., John C. Winston Co. v. Vaughan, 11 F.Supp. 954.
Ky.—Commonwealth, by and ex rel. State Highway Commission v. McIntire, 61 S.W.2d 31, 249 Ky. 555.
N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.
Wash.—Adams v. Local No. 400 of Cooks and Helpers, Waiters and Waitresses of Spokane, 215 P. 19, 124 Wash. 164.

At close of trial
In action for injunction, relief to be administered will be adapted to exigencies of case at close of trial.—Dubrow Pure Food v. Glazel, 264 N.Y.S. 533, 239 App.Div. 844, affirmed 189 N.E. 712, 263 N.Y. 589.

Decree held proper
U.S.—U. S. v. Mayo, D.C.Fla., 47 F. Supp. 552, affirmed Mayo v. U. S., 63 S.Ct. 1137, 319 U.S. 441, 87 L.Ed. 1504, 147 A.L.R. 761, rehearing denied 64 S.Ct. 27.
Colo.—Weber v. Nonpareil Baking Co., 274 P. 932, 85 Colo. 232.
Mo.—Waller v. Jones, 262 S.W. 455, 218 Mo.App. 131.
N.Y.—In re Epter, 36 N.Y.S.2d 952, 178 Misc. 907.
Conformity to pleadings, evidence, and findings see infra subdivision b (2) of this section.

77. Ky.—Commonwealth, by and ex rel. State Highway Commission v. McIntire, 61 S.W.2d 31, 249 Ky. 555.
Tex.—Southern Travelers' Ass'n v. Cole, Civ.App., 45 S.W.2d 675, error dismissed.

Mandatory injunction
(1) In a state wherein by virtue of statute a mandatory injunction is not authorized, see supra § 5, a judgment granting a permanent injunction which is mandatory will be reversed.—Burns v. Hale, 133 S.E. 857, 162 Ga. 336.

(2) However, judgment, that salaries due deputy sheriffs be paid to them as was done before commissioners passed order abolishing offices and that commissioners be restrained from interfering with payment of deputy sheriffs' salaries, was held not erroneous as granting mandatory injunction, in view of relief sought.—Board of Com'rs of Richmond County v. Whittle, 178 S.E. 534, 180 Ga. 166, followed in Whittle v. Board of Com'rs of Richmond County, 178 S.E. 536, 180 Ga. 170.

Restraining breach of void contract
A judgment which was void because it restrained the breach of a contract which was void because in restraint of trade, could not be upheld on ground that action was one to prevent disclosure of trade secrets gained in a confidential relationship.—Hunter v. Superior Court in and for Riverside County, 97 P. 2d 492, 36 Cal.App.2d 100.

78. Mass.—Metropolitan Ice Co. v. Ducas, 196 N.E. 856, 291 Mass. 403.
Wash.—Sterling Chain Theatres v. Central Labor Council of Seattle, 283 P. 1081, 155 Wash. 217.

Provision held not arbitrary
Wash.—Adams v. Local No. 400 of Cooks and Helpers, Waiters and Waitresses of Spokane, 215 P. 19, 124 Wash. 164.

er,[79] and an appropriate means of exercising the equitable powers of the court,[80] and is not too broad.[81] The injunction should be broad enough to cover the whole case,[82] but it may be granted as to part of the bill and refused as to the rest.[83] While the injunctive relief granted by the decree may and should be coextensive with the danger sought to be avoided by it,[84] afford the relief to which the person in whose favor it is granted is entitled,[85] and protect his rights adequately,[86] the re-

79. Conn.—Gage v. Schavoir, 124 A. 535, 100 Conn. 652.
Ill.—Jennings v. Calumet Nat. Bank, 180 N.E. 811, 348 Ill. 108, affirming 262 Ill.App. 189.
Iowa.—L. H. Henry & Sons v. Rhinesmith, 260 N.W. 9, 219 Iowa 1088—Haggin v. Derby, 229 N.W. 257, 209 Iowa 939.
Ky.—Kentucky Board of Pharmacy ex rel. Attorney General v. Ashland Gem Co., 71 S.W.2d 1006, 254 Ky. 492.
Mass.—Nelson v. Town of Belmont, 174 N.E. 320, 274 Mass. 35.
N.Y.—Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 162 Misc. 177.
Pa.—De Blasiis v. Bartell, 18 A.2d 478, 143 Pa.Super. 485—Boyer v. Schoch, 82 Pa.Super. 513.
Tex.—Smith v. Sinclair Refining Co., Civ.App., 77 S.W.2d 894.

Forms of decree
N.Y.—York & Jersey Steamboat Ferry Co. v. Jersey Co., Hopk. 460; Newburgh & C. Turnp. Road Co. v. Miller, 5 Johns.Ch. 101, 9 Am.D. 274.

80. U.S.—Hague v. Committee for Industrial Organization, N.J., 59 S. Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, and certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389.
Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
Ill.—Almar Forming Mach. Co. v. F. & W. Metal Forming Machinery Co., 31 N.E.2d 415, 308 Ill.App. 151.

Court is required to determine appropriate relief to be granted.—People ex rel. Public Service Commission of New York (State Division, Department of Public Service) v. New York Telephone Co., 21 N.Y.S.2d 405, 174 Misc. 517.

81. U.S.—City of Jamestown v. Pennsylvania Gas Co., C.C.A.N.Y., 1 F.2d 871, modifying, D.C., 263 F. 437, 264 F. 1009.
Cal.—Moore v. Massini, 43 Cal. 389—Foster v. Peters, 117 P.2d 726, 47 Cal.App.2d 204.
Ga.—Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 S.E. 822, 181 Ga. 105.
Ky.—City of Louisville v. Lougher, 272 S.W. 748, 209 Ky. 299.
La.—State ex rel. National Oil Works of Louisiana v. McShane, 106 So. 252, 159 La. 723.
Mass.—A. T. Stearns Lumber Co. v. Howlett, 163 N.E. 193, 264 Mass. 511.
Mich.—Nechman v. Ross, 195 N.W. 677, 225 Mich. 112.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
N.Y.—McCarty v. Constable, 223 N.Y.S. 484, 221 App.Div. 307—Conviser v. J. C. Brownstone & Co., 205 N.Y.S. 82, 209 App.Div. 584.
Or.—Crouch v. Central Labor Council of Portland and Vicinity, 293 P. 729, 134 Or. 612, 83 A.L.R. 193—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.
R.I.—Koppers Products Co. v. Readio, 197 A. 441, 60 R.I. 207.
Tex.—Bettinger v. North Fort Worth Ice Co., Civ.App., 278 S.W. 466.
Utah.—Winters v. Turner, 278 P. 816, 74 Utah 222, appeal dismissed and certiorari denied Turner v. Winters, 50 S.Ct. 238, 281 U.S. 692, 74 L.Ed. 1121.
32 C.J. p 378 note 3 [b] (2), k, p 379 note 4 [a] (1), (2).

Buildings or parts thereof
Ky.—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105.
Mich.—Home Development Co. v. Omeleanchik, 235 N.W. 256, 253 Mich. 568.
Mo.—Frank v. Davis, App., 41 S.W. 2d 830.
Pa.—St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa. Super. 146.
Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635—Schneider v. Eckhoff, 206 N.W. 838, 188 Wis. 550.

Unlawful acts
U.S.—National Labor Relations Board v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U.S. 638, 85 L.Ed. 406—Interstate Commerce Commission v. Keeshin Motor Express Co., C.C.A.Ill., 134 F.2d 228—Fleming v. Salem Box Co., D.C.Or., 38 F.Supp. 997—U. S. v. Elm Spring Farm, D.C.Mass., 38 F.Supp. 508, modified on other grounds, C.C.A., Elm Spring Farm v. U. S., 127 F.2d 920.
Cal.—Mering v. Yolo Grocery & Meat Market, App., 127 P.2d 985.

82. Ill.—Field v. Barling, 37 N.E. 850, 149 Ill. 556, 41 Am.S.R. 311, 24 L.R.A. 406.
32 C.J. p 378 note 99.

83. Kan.—Holloway v. People's Water Co., 167 P. 265, 100 Kan. 414, 2 A.L.R. 161.
32 C.J. p 378 note 1.

84. Cal.—Magill Bros. v. Building Service Employees' International Union, 127 P.2d 542, 20 Cal.2d 506.
Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 20 N.E.2d 482, 303 Mass. 1.
Tenn.—Indian Fork Coal Corporation v. Tennessee Mining & Mfg. Co., 4 Tenn.App. 549.

85. U.S.—Norton v. Agricultural Bond & Credit Corporation, C.C.A. Kan., 92 F.2d 348, certiorari denied Agricultural Bond & Credit Corporation v. Norton, 58 S.Ct. 409, 302 U.S. 763, 82 L.Ed. 592.
Ind.—Glendening v. Federal Land Bank of Louisville, 44 N.E.2d 251, 112 Ind.App. 162.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
N.Y.—People v. F. H. Smith Co., 240 N.Y.S. 807, 136 Misc. 449, modified on other grounds 243 N.Y.S. 446, 230 App.Div. 268.

Continuance of safe methods of work
Pa.—Miller v. Zinn, 53 York Leg.Rec. 189.

86. Colo.—Whittenberg v. Williams, 135 P.2d 228, 110 Colo. 418.
Ky.—City of Catlettsburg v. Davis' Adm'r, 91 S.W.2d 56, 262 Ky. 726—City of Paducah v. Hook Amusement Co., 77 S.W.2d 383, 257 Ky. 19.
Or.—Blumauer v. Portland Moving Picture Mach. Operators' Protective Union Local 159, 17 P.2d 1115, 141 Or. 399.
32 C.J. p 379 note 4 [b].

Decree held to protect plaintiff in enjoyment of rights
U.S.—West Texas Utilities Co. v.

straint imposed by the decree need not, and should not, be more extensive than is reasonably required to protect the interests of such person[87] and afford him the relief warranted by the particular facts[88] without injustice to his adversary.[89] The injunction should not be so broad as to prevent the person against whom it is directed from exercising his rights,[90] or rights that he may acquire in the future,[91] or as to interfere with any legitimate and proper action on his part.[92] Where two persons are engaged in a lawful business and there comes a conflict when neither can enjoy his own property without interfering with his neighbor in the enjoyment of his, the court in determining their respective rights should, where possible, so frame its decree as to avoid the destruction of the rights of either.[93]

Injunction against labor union activities. A decree granting an injunction against labor union activities must be limited to specific unlawful acts except as a broader prohibition has for a legitimate end protection against such acts.[94] Plaintiff may

City of Spur, C.C.A.Tex., 38 F.2d 466.

87. U.S.—Noce v. Edward E. Morgan Co., C.C.A.Ark., 106 F.2d 746—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F. Supp. 127, and certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U. S. 624, 83 L.Ed. 1028.
Cal.—Thompson v. Kraft Cheese Co. of California, 291 P. 204, 210 Cal. 171.
D.C.—Erikson v. Hawley, 12 F.2d 491, 56 App.D.C. 268.
Ill.—Brandenburger v. Martin, 225 Ill.App. 439.
32 C.J. p 378 note 3.

88. Fla.—Rendering Co. v. Conlon, 12 So.2d 882.
32 C.J. p 378 note 3 [c], [f] (1).

89. Fla.—Seaboard Rendering Co. v. Conlon, supra.

90. Cal.—Anderson v. Palladine, 237 P. 758, 72 Cal.App. 433.
Okl.—Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 188 Okl. 690.
32 C.J. p 379 note 4.

91. Mich.—Misch v. Lehman, 144 N. W. 556, 178 Mich. 225.
32 C.J. p 379 note 5.

92. U.S.—Mills v. Board of Education of Anne Arundel County, D. C.Md., 30 F.Supp. 245.
Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 20 N.E.2d 482, 303 Mass. 1—In re Lyon, 16 N.E.2d 74, 301 Mass. 30.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
Ohio.—McGinnis v. Walker, App., 40 N.E.2d 488.
Tex.—Wood v. Bird, Civ.App., 32 S. W.2d 271.
32 C.J. p 378 note 3 [f] (1).

93. U.S.—Bliss v. Anaconda Copper Min. Co., C.C.Mont., 167 F. 342, affirmed 186 F. 789, 109 C.C.A. 133, certiorari denied 34 S.Ct. 327, 231 U.S. 764, 58 L.Ed. 471.

94. N.Y.—J. H. & S. Theatres v. Fay, 183 N.E. 509, 260 N.Y. 315, reversing 258 N.Y.S. 993, 236 App. Div. 744—Nann v. Raimist, 174 N. E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App. Div. 856, and motion denied 175 N.E. 314, 255 N.Y. 564.

Particular injunctions sustained

U.S.—International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., C.C.A W.Va., 18 F.2d 839, certiorari denied International Organization, United Mine Workers of America v. Carbon Fuel Co., 48 S. Ct. 31, 275 U.S. 536, 72 L.Ed. 413—U. S. v. Railway Employees' Department of American Federation of Labor, D.C.Ill., 290 F. 978.
Mass.—Yankee Network v. Gibbs, 3 N.E.2d 228, 295 Mass. 56.
N.Y.—Miller v. Gallagher, 28 N.Y.S. 2d 606, 176 Misc. 647.

Particular injunctions held erroneous

(1) As not justified by the facts.
Ind.—Janalene, Inc., v. Burnett, 41 N.E.2d 942, 220 Ind. 253.
N.J.—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.
32 C.J. p 378 note 3 [i] (2), [j].

(2) As too broad.—J. H. & S. Theatres v. Fay, 183 N.E. 509, 260 N. Y. 315, reversing 258 N.Y.S. 993, 236 App.Div. 744—Wise Shoe Co. v. Lowenthal, 272 N.Y.S. 612, 242 App.Div. 660, modified on other grounds 194 N.E. 749, 266 N.Y. 264.

(3) As forbidding lawful activities.
Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120.
N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N. E.2d 210, 282 N.Y. 804.
32 C.J. p 378 note 3 [i] (1).

(4) As unduly limiting the rights of defendants.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App.Div. 856, and motion denied 175 N.E. 314, 255 N.Y. 564.

Injunction against picketing

(1) Sustained.
Ark.—Riggs v. Tucker Duck & Rubber Co., 119 S.W.2d 507, 196 Ark. 571.
Mo.—Joe Dan Market v. Wentz, 20 S. W.2d 567, 223 Mo.App. 772, transferred, see 13 S.W.2d 641, 321 Mo. 943.
N.Y.—Bieber v. Bininbaum, 6 N.Y.S. 2d 63, 168 Misc. 943.

(2) Should not be too broad.
Cal.—Lund v. Auto Mechanics' Union No. 1414, 106 P.2d 408, 16 Cal. 2d 374.
Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.
N.Y.—Nann v. Raimist, 174 N.E. 690, 255 N.Y. 307, 73 A.L.R. 669, affirming 241 N.Y.S. 832, 228 App. Div. 856, and motion denied 175 N.E. 314, 255 N.Y. 564.

(3) Should be limited to unlawful acts.
U.S.—Lauf v. E. G. Shinner & Co., Wis., 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872, reversing, C.C.A., 90 F. 2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516.
Cal.—Lisse v. Local Union No. 31, Cooks, Waiters, and Waitresses, 41 P.2d 314, 2 Cal.2d 312.
W.Va.—Blossom Dairy Co. v. International Brotherhood of Teamsters, 23 S.E.2d 645.

(4) Should be limited to area affected by coercive conduct.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419.

be entitled, after trial, to a permanent injunction in a labor dispute notwithstanding his failure to comply with a statute relating to injunctions in labor disputes where the statute was enacted after the bringing of the action and is applicable only to the granting of ex parte and temporary injunctions, as distinguished from permanent injunctions.[95]

Provision as to penalty for disobedience. Usually no provision is inserted in the decree granting an injunction for the payment of a pecuniary penalty for its violation.[96]

A provision for modification, or retention of jurisdiction for this purpose, in the event of a change in conditions may,[97] but need not,[98] be inserted in a decree granting a perpetual injunction.

Time of restraint. It may be proper, in view of the facts of the particular case, to provide in a decree granting an injunction that the injunction shall not become effective until a certain future date,[99] or that it shall cover the entire term fixed by a restrictive covenant,[1] or that it shall continue only while a certain status or situation remains unchanged[2] or until a certain result is obtained.[3] An injunction is not objectionable as being without a time limit where the reasonable interpretation thereof is that it shall be operative only while a certain relation exists.[4]

Definiteness. A decree granting a permanent injunction should be as definite, clear, and precise in its terms as possible,[5] and when practicable it should plainly inform defendant of all of the acts which he is restrained from doing,[6] or is commanded to

(5) Should exclude peaceful picketing.

Ill.—Ellingsen v. Milk Wagon Drivers' Union of Chicago, Local 753, 35 N.E.2d 349, 377 Ill. 76—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 38 N.E.2d 972, 313 Ill.App. 24.

N.Y.—Wise Shoe Co. v. Lowenthal, 194 N.E. 749, 266 N.Y. 264, modifying 272 N.Y.S. 612, 242 App.Div. 660—Aberon Bakery Co. v. Raimist, 254 N.Y.S. 38, 141 Misc. 774.

Tex.—Haden Employees' Ass'n v. Lovett, Civ.App., 122 S.W.2d 230, error refused.

(6) May permit limited number of pickets.—Great Northern Ry. Co. v. Brosseau, D.C.N.D., 286 F. 414.

(7) Should not prejudge future controversy.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 10 A.2d 274, 126 N.J.Eq. 520.

(8) Should not forbid acts neither done nor threatened.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120.

95. N.Y.—Micamold Radio Corporation v. Beedie, 282 N.Y.S. 77, 156 Misc. 390.

96. U.S.—Low v. Hauel, C.C.Pa., 15 F.Cas.No.8,560, 1 Wall.Jr. 345.

97. U.S.—Murphy v. North American Co., D.C.N.Y., 24 F.Supp. 471.

98. Wis.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 364.

99. U.S.—U. S. v. City and County of San Francisco, D.C.Cal., 23 F. Supp. 40, reversed on other grounds, C.C.A., City and County of San Francisco v. U. S., 106 F. 2d 569, certiorari granted U. S. v. City and County of San Francisco, 60 S.Ct. 467, 309 U.S. 642, 84 L.Ed. 996, reversed on other grounds 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed. 1050, and rehearing denied 60 S.Ct. 1071, 310 U.S. 657, 84 L.Ed. 1420.

1. Ill.—Vansant v. Rose, 174 Ill. App. 389, affirmed 103 N.E. 194, 260 Ill. 401, 49 L.R.A.,N.S., 186.

2. Mass.—Sheff v. Candy Box, 174 N.E. 466, 274 Mass. 402.

3. U.S.—Mississippi Valley Trust Co. v. Franz, C.C.A.Mo., 51 F.2d 1047.

Obtaining right by performing condition

If defendant may obtain the right to do the act enjoined by performing some condition precedent, the injunction should be granted only until such performance.—Omaha Horse R. Co. v. Cable Tramway Co., C.C.Neb., 30 F. 324, appeal dismissed 11 S.Ct. 1025, 140 U.S. 692, 35 L.Ed. 600—32 C.J. p 379 note 5 [a], p 380 note 15.

4. U.S.—Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, C.C.A. Va., 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

5. U.S.—Borron v. El Paso Nat. Bank of El Paso, C.C.A.Tex., 133 F.2d 698—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663—U. S. v. First National Pictures, D.C. N.Y., 51 F.2d 552, vacating 34 F.2d 815, reversed on other grounds 51 S.Ct. 45, 282 U.S. 44, 75 L.Ed. 151—Robert E. Hicks Corporation v. National Salesmen's Training Ass'n, C.C.A.Ind., 19 F.2d 963—Securities & Exchange Commission v. Okin, D.C.N.Y., 48 F.Supp. 928, modified on other grounds, C.C.A., 137 F.2d 862.

Ga.—Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 S.E. 822, 181 Ga. 105.

Iowa.—L. H. Henry & Sons v. Rhinesmith, 260 N.W. 9, 219 Iowa 1088.

Mass.—Chandler, Gardner & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309.

N.J.—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 231, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, and reargument denied 27 N.E.2d 210, 282 N.Y. 804.

32 C.J. p 377 note 93.

Decrees held sufficiently definite or not too vague or indefinite

U.S.—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028.

Mich.—Hansen v. Facione, 293 N.W. 723, 294 Mich. 473—Detroit Bar Ass'n v. Union Guardian Trust Co., 276 N.W. 365, 282 Mich. 216, followed in Detroit Bar Ass'n v. Detroit Trust Co., 276 N.W. 372, 282 Mich. 237, Detroit Bar Ass'n v. Equitable Trust Co., 276 N.W. 373, 282 Mich. 238, and rehearing denied Detroit Bar Ass'n v. Union Guardian Trust Co., 281 N.W. 432, 282 Mich. 707.

32 C.J. p 377 note 93 [c].

6. Ga.—Patten v. Miller, 8 S.E.2d 776, 190 Ga. 105.

do,[7] without calling on him for inferences or conclusions about which persons might well differ,[8] and without leaving anything for further hearing and decision.[9]

Decree denying relief. It may be proper, under the facts of the particular case, to refuse permanent injunctive relief[10] without prejudice to recovery in an action at law[11] or the commencement of another suit for the protection of plaintiff's rights by injunction or otherwise if it appears in the future that such rights are being violated.[12]

(2) Conformity to Pleadings, Evidence, and Findings

The final decree in a suit wherein injunctive relief is sought may and should be based on, and not go beyond, the pleadings, evidence, and findings supported by the evidence.

It is error to decree a permanent injunction for which there is no warrant in the pleadings.[13] The injunction must be based on the allegations of the bill[14] or cross bill, as discussed infra § 216, a permanent injunction in plaintiff's favor ordinarily not being justifiable, unless the bill or petition therefor sets out facts that are a sufficient basis for granting the relief asked.[15] So also as a general rule an injunction can be granted only where a prayer for relief by injunction is contained in the bill, discussed supra § 182, or answer, discussed supra § 183. When relief by injunction is prayed for, the injunction should be confined to the issues raised by the pleadings[16] and should not be allowed in broader terms than prayed for in the bill.[17] It has been held, however, that a judgment is not necessarily erroneous for exceeding plaintiff's pleadings, where the matter on which it is rendered is pleaded by defendant, and plaintiff's prayer for relief is sufficiently broad to cover that awarded.[18] Also the court may impose a condition on the granting of a permanent injunction to plaintiff, as already discussed supra § 202 notwithstanding it is not asserted or demanded by answer or cross bill.[19] A motion for a permanent injunction is not necessary where the prayer of the petition is sufficient to bring the matter to the attention of the court.[20] Where such a motion is made it will be considered as a motion for final judgment.[21]

An injunction should be warranted by the proofs in the case[22] and not go further than such proofs require.[23] It should not forbid the doing of acts

Ill.—Burton v. Ætna Life Ins. Co., 229 Ill.App. 517.
Mo.—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
Tex.—Thomas v. International Seamen's Union of America, Civ.App., 101 S.W.2d 328.
32 C.J. p 377 note 94.

7. Ind.—Foster v. Malsbary, 157 N. E. 446, 86 Ind.App. 411.

8. N.Y.—Earl v. Brewer, 289 N.Y.S. 150, 248 App.Div. 314, reversing 282 N.Y.S. 922, 156 Misc. 881, and affirmed 8 N.E.2d 339, 273 N.Y. 669.
32 C.J. p 377 note 94.

9. Tex.—Borden Co. v. Local No. 133 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Civ. App., 152 S.W.2d 828, error refused.

10. Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.
N.Y.—Application of Foley, 13 N.Y.S. 2d 625, 257 App.Div. 993, appeal denied.

11. Mass.—O'Reilly v. Frye, 160 N. E. 829, 263 Mass. 318.

12. U.S.—Imperial Irr. Dist. v. Nevada-California Electric Corporation, C.C.A.Cal., 111 F.2d 319—Texas & N. O. R. Co. v. North Side Belt Ry. Co., C.C.A.Tex., 16 F.2d 782, affirming, D.C., 8 F.2d 153, and certiorari granted 47 S.Ct. 768, 274 U.S. 734, 71 L.Ed. 1335, affirmed 48 S.Ct. 361, 276 U.S. 475, 72 L.Ed. 661.

Retention of bill for future amendment
U.S.—Boggus Motor Co. v. Onderdonk, D.C.Tex., 9 F.Supp. 950.

13. U.S.—Western Fruit Growers v. U. S., C.C.A.Cal., 124 F.2d 381, modifying, D.C., U. S. v. Western Fruit Growers, 34 F.Supp. 794.

14. Ill.—Johnson v. Crouch, 224 Ill. App. 105.

15. Ga.—Burrus v. Columbus, 31 S. E. 124, 105 Ga. 42.
32 C.J. p 376 note 81.
Ill.—Sheehy v. Koerber, 282 Ill.App. 543.

16. Md.—Chesapeake & C. B. R. Co. v. Richfield Oil Corporation of New York, 23 A.2d 677, 180 Md. 192, certiorari denied 62 S.Ct. 1297, 316 U.S. 698, 86 L.Ed. 1768.
32 C.J. p 376 note 85.

17. Conn.—Marshall v. Martin, 139 A. 348, 107 Conn. 32.
Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
N.H.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N. H. 426.
Tex.—Fletcher v. King, Civ.App., 75 S.W.2d 980, error refused—Southwestern Sewer Co. v. Morris, Civ. App., 26 S.W.2d 311.
32 C.J. p 376 note 85.

Prayer held to support judgment
Tex.—Nacogdoches Independent School Dist. v. Adams, Civ.App., 36 S.W.2d 567.

Prayer held sufficient basis for decree
N.Y.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

18. Conn.—Rutkoski v. Zalaski, 96 A. 365, 90 Conn. 108.

19. Iowa.—White v. Massee, 211 N. W. 839, 202 Iowa 1304, 66 A.L.R. 1434.
Md.—Brehm v. Richards, 136 A. 618, 152 Md. 126.

20. Ky.—Ramey v. Weddington, 105 S.W.2d 824, 268 Ky. 675.

21. Wis.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

22. U.S.—Western Fruit Growers v. U. S., C.C.A.Cal., 124 F.2d 381, modifying, D.C., U. S. v. Western Fruit Growers, 34 F.Supp. 794.
N.J.—E. L. Kerns Co. v. Landgraf, 16 A.2d 623, 128 N.J.Eq. 441, 131 A.L.R. 1063, reversing 17 A.2d 479, 128 N.J.Eq. 520.

A charge made and not proved has no place in an injunction decree in a labor dispute either under common law or under statute.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.

23. N.J.—Master Weavers' Institute v. Associated Silk Workers' Local No. 1716, Branch 11, American Federation of Silk Workers, 174 A. 437, 116 N.J.Eq. 502.

which are not shown by the evidence to have been committed or threatened to be committed.[24]

The decree may and should be based on, and conform to, findings[25] which are supported by the evidence[26] and are not plainly erroneous.[27]

§ 212. —— By Default

A final decree may be entered where a bill states a good cause of action for an injunction and the defendant, after being duly served, defaults in pleading.

Ordinarily a final decree may be entered against defendant in an injunction suit where, after being duly served, he fails to answer and the bill states a good cause of action;[28] but, under statute, it is not error for the court to take evidence on defendant's failure to answer;[29] and in some states ordinarily an order for proofs is made when a decree is taken pro confesso against defendant.[30]

§ 213. —— Effect of Granting or Denying Temporary Injunction

Injunctive relief is granted on final hearing irrespective of whether or not a preliminary injunction was sought or granted; but, in a proper case, the court may so frame its final decree as to make a temporary injunction permanent.

The fact that a preliminary injunction was granted or continued should not influence the court on final hearing, but the relief granted should be in accordance with the rights as they then appear.[31] This is also true in case the preliminary injunction was denied[32] or was dissolved, as discussed infra § 255, and the court may on final hearing grant a perpetual injunction, although no temporary injunction was sought before such hearing.[33] So the decree may afford complete relief as to injuries that have been consummated since the suit was begun,[34] for, even though no temporary injunction was obtained, defendant acts at his peril in doing pendente lite the acts sought to be enjoined.[35] A permanent injunction may properly be granted on a trial of the merits although the affidavit for a temporary injunction was defective or no bond for the temporary injunction was given.[36] Unless defendant defaults in pleading,[37] it is improper to render a final decree granting a perpetual injunction on the basis of the evidence produced on the hearing of an application for a preliminary injunction.[38]

24. Cal.—People v. Robin, 133 P.2d 436, 438, 56 Cal.App.2d 885, quoting **Corpus Juris**—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 615, 54 Cal.App.2d 120, citing **Corpus Juris.**
Ind.—McConnell v. Thomson, 11 N. E.2d 183, 213 Ind. 16, 113 A.L.R. 1429, denying rehearing 8 N.E.2d 986, 213 Ind. 16, 113 A.L.R. 1429.
N.Y.—Topol v. Smoleroff Development Corporation, 34 N.Y.S.2d 653, 264 App Div. 164.
32 C.J. p 379 note 7.

Acts not proved should not be restrained.—Ellis v. Orendorff, 249 Ill. App. 55.

25. U.S.—Fleming v. Jacksonville Paper Co., C.C.A.Fla., 128 F.2d 395.
Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105—Selectmen of Sudbury v. Garden City Gravel Corporation, 14 N.E.2d 112, 300 Mass. 41.
Utah.—Anderson v. Jensen, 265 P. 745, 71 Utah 295.

Finding necessarily implied from another finding
In suit to enforce building restriction, judgment finding that plaintiffs were entitled to relief as prayed was not erroneous in that there was no finding that building in question constituted violation of restriction, as, necessarily, if plaintiffs were entitled to the relief sought in their petition, defendant must have been found, on the facts, to have violated the restriction.—Frank v. Davis, Mo. App., 41 S.W.2d 830.

26. Cal.—Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America, 128 P.2d 611, 54 Cal.App.2d 120—H. G. Fenton Material Co. v. Challet, 121 P. 2d 788, 49 Cal.App.2d 410.

27. Mass.—Bean v. Severans, 152 N. E. 888, 256 Mass. 547.

28. D.C.—O'Hearne v. U. S., 66 F. 2d 933, 62 App.D.C. 285, certiorari denied 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 589.
32 C.J. p 376 note 74.
Necessity of hearing on merits where no answer is required see supra § 211.
Final decree without further proof where preliminary relief granted on bill and affidavits see infra § 213.

29. Wash.—Cross v. Johnson, 54 P. 1000, 20 Wash. 124.

30. N.J.—Perrine v. Hafeman, 134 A. 860, 100 N.J.Eq. 33.

31. Ky.—Commonwealth, by and ex rel. State Highway Commission v. McIntire, 61 S.W.2d 31, 249 Ky. 555.
32 C.J. p 377 note 87.

Final decree broader than interlocutory order
Ala.—Poyner v. Whiddon, 174 So. 507, 234 Ala. 168.

32. Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.
Ky.—Commonwealth, by and ex rel. State Highway Commission, v. McIntire, 61 S.W.2d 31, 249 Ky. 555.
Mich.—Archer v. City of Grand Rapids, 238 N.W. 267, 255 Mich. 485.
32 C.J. p 377 note 88.

33. Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.
32 C.J. p 377 note 89.

34. Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318.
32 C.J. p 377 note 90.

Acts done pendente lite cannot obstruct court in granting injunction properly moulded, or decreeing other appropriate relief, in the end.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.

35. U.S.—Jones v. Securities and Exchange Commission, N.Y., 56 S.Ct. 654, 298 U.S. 1, 80 L.Ed. 1015, reversing, C.C.A., 79 F.2d 617, affirming, D.C., Securities and Exchange Commission v. Jones, 12 F.Supp. 210, certiorari granted in part Jones v. Securities and Exchange Commission, 56 S.Ct. 497, 297 U.S. 699, 80 L.Ed. 988, certiorari denied in part 56 S.Ct. 497, 297 U.S. 705, 80 L.Ed. 993.
Ga.—Parker v. West View Cemetery Ass'n, 24 S.E.2d 29, 195 Ga. 237.
Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318.

36. Tex.—Smith v. City of Dallas, Civ.App., 36 S.W.2d 547, error dismissed.

37. N.J.—Perrine v. Hafeman, 134 A. 860, 100 N.J.Eq. 33.

38. La.—Ruiz v. Alfonso, App., 1 So.2d 330.

Provided such action is proper under the facts[39] and proceedings[40] in the case, the court may, in its final decree, make a temporary injunction permanent,[41] continue it in effect until final termination of the suit if an appeal is filed or until expiration of the time allowed for appeal from the final decree if no appeal is taken,[42] provide for its modification,[43] or dissolve it in part and perpetuate it in part.[44]

§ 214. —— Persons against Whom Entered

A decree granting a permanent injunction should be rendered only against known persons or suable entities who have the requisite connection with the subject matter of the suit and are parties or agents, associates, or confederates of parties.

A permanent injunction should not be granted by final decree against persons improperly made parties and dismissed from the suit,[45] or against persons not made parties and not in court,[46] unless they are legally identified with a party and privy to his performance of the prohibited act,[47] such as

39. Pa.—Tide-Water Pine Co. v. Bell, 124 A. 351, 280 Pa. 104, 40 A.L.R. 1516.

Facts at particular time

(1) It has been held that right to have temporary injunction made permanent is to be determined by status existing at time of commencement of suit and issuance of temporary injunction.—Herrmann v. Kaiser, Mo. App., 85 S.W.2d 928.

(2) It has also been held, however, that after the cause for an injunction has been removed, equity will not make perpetual a temporary injunction theretofore properly granted.—Wiswell v. Cincinnati First Congregational Church, 14 Ohio St. 31.

(3) The decree may provide for a modification of a preliminary injunction granted in the cause when changed conditions require it.—Holloway v. Peoples Water Co., 167 P. 265, 100 Kan. 414, 2 A.L.R. 161—32 C.J. p 379 note 8.

Lack of right to other equitable relief

In action in which plaintiff's right to injunction depended on his right to other equitable relief sought, and he was properly adjudged not entitled to such other relief, he was not entitled to have temporary injunction continued or made permanent.—Herrmann v. Kaiser, Mo.App., 85 S.W.2d 928.

40. Where no preliminary injunction was formally issued, judgment decreeing that writ of injunction sued out be perpetuated was insufficient to serve as one.—Austin v. Currie, 134 So. 723, 16 La.App. 375.

Final hearing

(1) If a preliminary injunction, although granted on an insufficient bill, has been allowed to stand until final hearing, it may be perpetuated if the showing then made is sufficient. —Smith v. Blake, 55 N.W. 978, 96 Mich. 542.

(2) On final hearing in which applicant sought to perpetuate temporary injunction, applicant had burden of proving his case, and court could not take matters set out in the petition as confessed, where defendant has filed an answer containing a general denial, although not sworn to.—Cruse v. Mann, Tex.Civ.App., 74 S.W.2d 545, error dismissed.

Cause not regularly matured for final hearing

A decree perpetuating a temporary injunction before the cause has been regularly matured for final hearing on the proper proof of the material facts alleged as a basis for such final relief will be reversed on appeal.—Conley v. Brewer, 102 S.E. 607, 85 W.Va. 725.

On preliminary hearing of motion to dissolve temporary injunction, it was error to make injunction permanent, proper procedure being to dissolve or refuse to dissolve.—Mills v. Moore, Tex.Civ.App., 5 S.W.2d 263.

Return to order to show cause

Where return to order to show cause why temporary injunction should not be made permanent raised issue of fact determinable only by testimony, it was error for court to hold the return sufficient, to refuse to permit traverse of issues, and to dismiss rule.—Evans v. Town of Edgefield, 129 S.E. 207, 132 S.C. 380.

Demurrer to sufficient bill

Where the facts alleged in the bill were sufficient to entitle complainant to the injunctive relief sought and were admitted by demurrer, a temporary injunction was properly made permanent.—Penkala v. Tomczyk, 148 N.E. 64, 317 Ill. 356.

Answer removed from files

Perpetuating injunction where defendant had filed answer, but taken it from courthouse without calling court's attention to it, was proper.—National Bank of Hopewell, Va., v. Marshall, Tex.Civ.App., 2 S.W.2d 471, error dismissed.

No answer filed and case not docketed

The court is without jurisdiction to hear an order to show cause why a temporary injunction should not be made permanent where, at the time, no answer has been made to the summons and complaint and the cause has not been docketed.—Evans v. Town of Edgefield, 129 S.E. 207, 132 S.C. 380.

41. Ala.—Jones v. Stollenwerck, 119 So. 844, 218 Ala. 637.

Tex.—Blair v. Paggi, Civ.App., 282 S.W. 627—Main v. Texas Farm Bureau Cotton Ass'n, Civ.App., 271 S.W. 178.

32 C.J. p 377 note 87 [b].

Without requiring bond

La.—Hickman v. Branan, App., 151 So. 113.

Tex.—Johnson v. McMahan, Civ. App., 40 S.W.2d 920, error refused.

42. Mass.—Lydia E. Pinkham Medicine Co. v. Gove, 20 N.E.2d 482, 303 Mass. 1.

Continuing preliminary injunction until final hearing see infra §§ 233–235.

43. Mich.—Misch v. Lehman, 144 N. W. 556, 178 Mich. 225.

32 C.J. p 379 note 8.

44. La.—Perry v. Kearney, 14 La. Ann. 400.

45. Ga.—Fleming v. Sibley, 85 S.E. 999, 144 Ga. 35.

46. Ga.—McWilliams v. Parker, 121 S.E. 818, 157 Ga. 645.

N.J.—Amm v. Amm, 175 A. 186, 117 N.J.Eq. 185.

R.I.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

S.C.—Pilot Life Ins. Co. v. Peebles, 5 S.E.2d 174, 191 S.C. 486.

32 C.J. p 375 note 65.

Injunction against all persons notified

Injunction attempting to restrain all persons to whom notice thereof should come from doing certain things was erroneous as to persons not agents of, or associated with sole defendant.—Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894, reversing, C.C.A., City of Norwalk, Ohio, v. Equitable Trust Co. of New York, 63 F.2d 911, certiorari granted Chase Nat. Bank of City of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537.

Persons not served with process should not be enjoined.—State v. Kizer, 162 S.E. 444, 164 S.C. 383, 81 A.L.R. 722.

47. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894, reversing, C.C.A., City of Norwalk, Ohio v. Equitable Trust Co. of New York, 63 F.2d 911, certiorari grant-

officers, agents, employees,[48] associates, or confederates[49] of such party. Also a judgment is null and void in so far as it grants a permanent injunction against voluntary organizations which are not suable entities and their unknown officers, members, agents, sympathizers, and confederates.[50] Within these limitations, the propriety of imposing a permanent injunctive restraint, which is otherwise appropriate, on a particular individual or corporation depends on his or its relation to the subject matter of the suit.[51] A defendant may be enjoined even though others who are not made parties are participating in the wrongful act causing the injury to complainant;[52] and the fact that the injunction cannot be granted against some of defendants ordinarily,[53] but not universally,[54] does not preclude granting it against others who have been properly summoned. A decree is properly rendered against all of several joint wrongdoers jointly sued.[55]

The persons who may be restrained in general are considered supra § 34.

§ 215. —— Construction, Operation, and Effect in General

General rules govern the construction and conclusiveness of a final decree granting or refusing injunctive relief. After a final decree granting an injunction the suit continues for purposes of review, enforcement, vacation, or modification of the decree, but is at an end for other purposes.

Rules applicable generally to construction of decrees in equity apply in the cases of final decrees awarding or refusing relief by injunction.[56] Also

ed Chase Nat. Bank of City of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537.

48. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, supra.
Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
Wash.—Northern Pac. Ry. Co. v. Richey & Gilbert Co., 232 P. 355, 132 Wash. 526.

49. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894, reversing, C.C.A., City of Norwalk, Ohio, v. Equitable Trust Co. of New York, 63 F.2d 911, certiorari granted Chase Nat. Bank of City of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L. Ed. 537.

All members of labor union may be enjoined where a conspiracy exists.
U.S.—Union Pacific R. Co. v. Ruef, C.C.Neb., 120 F. 102.
Ind.—Muncie Building Trades Council v. Umbarger, 17 N.E.2d 828, 215 Ind. 13.

Injunction against voluntary association need not be directed against it by name, but one against the individual members is effective to restrain illegal action by them in their associated capacity.—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, C.C.Ohio, 90 F. 598.

50. Mo.—National Pigments & Chemical Co. v. Wright, App., 118 S.W.2d 20.

51. **Injunctions held proper**
U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519.
Md.—Rubin v. Leosatis, 166 A. 428, 165 Md. 36.
Mo.—Magee v. Pope, 112 S.W.2d 891, 234 Mo.App. 191.
N.J.—Howell v. Keck, 11 A.2d 365, 127 N.J.Eq. 87.

Injunctions held improper
U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616.
Ark.—Bailey v. Abington, 148 S.W.2d 176, 149 S.W.2d 573, 201 Ark. 1072.
Cal.—Collani v. White, 101 P.2d 767, 38 Cal.App.2d 539.
Mass.—Ciborowski v. Kosciak, 39 N. E.2d 639, 310 Mass. 704.
Tenn.—Henderson v. Henderson, 1 S.W.2d 526, 156 Tenn. 430.
Tex.—Wright v. Wright, Civ.App., 278 S.W. 925.

52. N.Y.—Sammons v. Gloversville, 70 N.Y.S. 284, 34 Misc. 459, affirmed 74 N.Y.S. 1145, 67 App.Div. 628, affirmed 67 N.E. 624, 175 N.Y. 346.

Absence of principal
The court has full power to issue a decree against the actual wrongdoer in the absence of the principal.—Mayer v. Hansen, 20 N.Y. S.2d 698, 260 App.Div. 150, reversing Mayer v. Hutcheson, 18 N.Y.S.2d 691, affirmed Mayer v. Hansen, 35 N.E.2d 501, 285 N.Y. 832.

53. Ga.—Alspaugh v. Adams, 5 S.E. 496, 80 Ga. 345.
32 C.J. p 376 note 67.

54. Kan.—McCarthy v. Marsh, 20 P. 479, 41 Kan. 17.
32 C.J. p 376 note 68.

55. Ind.—Henshaw v. People's Mut. Natural Gas Co., 32 N.E. 318, 132 Ind. 545.

Even though their acts are separately done, joint wrongdoers may be restrained jointly.—Matsell v. Flanagan, 2 Abb.Pr.,N.S., N.Y., 459.

56. Neb.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N.W. 287, 290, 139 Neb. 867, quoting **Corpus Juris.**
32 C.J. p 387 note 92.

Construction in light of entire statute
Wash.—State ex rel. Standard Optical Co. v. Superior Court for Chelan County, 135 P.2d 839, 17 Wash. 2d 323.

Intent as to extent of protection
Neb.—State ex rel. Home Savings & Loan Ass'n v. Davis, 299 N.W. 291, 139 Neb. 875.

Interpretation in light of findings of fact and conclusions of law
N.Y.—Dubrow Pure Food v. Glazel, 264 N.Y.S. 533, 239 App.Div. 844, affirmed 189 N.E. 712, 263 N.Y. 589.

Reading in context of circumstances
U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419.

Reasonable construction
Colo.—Old Homestead Bread Co. v. Marx Baking Co., 117 P.2d 1007, 108 Colo. 375.

Matters determined or not determined
Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386.
La.—Cambais v. Douglas, 120 So 360, 167 La. 791.

the general principles applicable in respect of the conclusiveness of judgments and decrees generally apply in the cases of final decrees awarding or refusing injunctions.[57] A decree for a perpetual injunction operates as a final adjudication which stays the acts threatened;[58] but it does not prevent[59] or require[60] acts which are not within its terms as reasonably construed. Regardless of whether it was properly or erroneously issued, the decree, if not absolutely void and if rendered by a court having full jurisdiction of the cause, the questions presented, and the parties, is binding[61] and must stand[62] and be obeyed,[63] in spirit, as well as literally,[64] until it is vacated or modified by valid orders in the cause, and it continues in operation until it is so vacated or modified,[65] unless the time it is to remain in force is otherwise fixed by the decree[66] or by a statute in effect at the time of the rendition of the decree.[67] In some respects the final decree closes and puts an end to the suit[68] where no trust is involved;[69] and it is not permissible thereafter to engraft on the suit proceedings other than those for review, enforcement, vacation, or modification,[70] nor should the court attempt to retain jurisdiction for the purpose of interpreting and construing the decree or determining in the original case grounds for another action which may arise in the future.[71] However, the final decree is said to continue the

Okl.—Dickerson v. George, 249 P. 292, 121 Okl. 157.
32 C.J. p 388 note 94 [a] (1), (2), (6).

57. Ark.—Harding Const. Co. v. Drainage Dist. No. 17, 13 S.W.2d 312, 178 Ark. 778.
Neb.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N.W. 287, 290, 139 Neb. 867, quoting **Corpus Juris.**
N.M.—Towndrow v. Garcia, 130 P.2d 22, 46 N.M. 418.
32 C.J. p 388 note 94.

Collateral attack

Decree restraining plaintiffs from teaching school cannot be collaterally attacked, in their action for damages for breach of contract to teach. —Gosnell Special School Dist. No. 6 v. Baggett, 290 S.W. 577, 172 Ark. 681.

Persons concluded see infra § 220.

58. Ind.—Lake Erie & W. R. Co. v. Cluggish, 42 N.E. 743, 143 Ind. 247.
Neb.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N.W. 287, 290, 139 Neb. 867, quoting **Corpus Juris.**

Adjudication of facts and law

U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.

Final adjudication of rights of parties

Tex.—Allen v. Gulf Oil Corporation, Civ.App., 139 S.W.2d 207, error refused.

Extent of finality

Although injunctive decree may be "final" as it relates to an appeal, yet where proceedings are of a continuing nature, it is not final.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A. Ill., 133 F.2d 955.

59. U.S.—Electric Bond & Share Co. v. Securities and Exchange Commission, N.Y., 58 S.Ct. 678, 303 U. S. 419, 82 L.Ed. 936, 115 A.L.R. 105, affirming, C.C.A., 92 F.2d 580, affirming, D.C., Securities and Exchange Commission v. Electric Bond & Share Co., 18 F.Supp. 131 and in which certiorari is granted Electric Bond & Share Co. v. Securities and Exchange Commission, 58 S.Ct. 411, 302 U.S. 681, 82 L.Ed. 526—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U. S. 529, 81 L.Ed. 389.
Ala.—Henley v. Rockett, 8 So.2d 852, 243 Ala. 172.
Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.
Iowa.—Nedderman v. City of Des Moines, 268 N.W. 36, 221 Iowa 1352.
La.—Davis-Wood Lumber Co. v. Canulette Shipbuilding Co., 113 So. 855, 164 La. 301.
Mass.—Boston Box Co. v. Rosen, 150 N.E. 177, 254 Mass. 331.
N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501, affirming 9 N.Y.S.2d 964, 170 Misc. 199—People v. Ribas, 276 N.Y.S. 551, 153 Misc. 703.
Tenn.—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450.
32 C.J. p 387 note 92 [a], [b] (1)–(3), p 388 note 94 [a] (3).

Appeal or writ of error

A decree quieting defendant's title to land and enjoining plaintiff from instituting any further suits attacking such title is construed not to enjoin an appeal or writ of error from the decree.—Ellerd v. White, Tex.Civ.App., 251 S.W. 274.

60. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
Minn.—Child v. Washed Sand & Gravel Co., 233 N.W. 586, 181 Minn. 559.

61. N.C.—Hearne v. Stanly County, 123 S.E. 641, 188 N.C. 45.

62. Wyo.—Wikstrom v. City of Laramie, 262 P. 22, 37 Wyo. 389.

63. Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.
32 C.J. p 484 notes 15–17.
Enforcement see infra § 223.
Violation and punishment therefor see infra §§ 257–277.

64. Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, supra.

65. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.

Continuing process

A final or permanent injunction is continuing process, over which equity court retains jurisdiction in order to do equity.—Santa Rita Oil Co. v. State Board of Equalization, 116 P. 2d 1012, 112 Mont. 359, 136 A.L.R. 757, vacating Santa Rita Oil & Gas Co. v. Board of Equalization, 54 P.2d 117, 101 Mont. 268.

66. Fla.—Jackson Grain Co. v. Lee, 7 So.2d 143, 150 Fla. 232.

67. N.Y.—Kronowitz v. Schlansky, 282 N.Y.S. 564, 156 Misc. 717.

68. La.—Cobbs v. City of New Orleans, 95 So. 423, 153 La. 119.

69. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, opinion supplemented 19 N.E.2d 465, 215 Ind. 365.

70. La.—Cobbs v. City of New Orleans, 95 So. 423, 153 La. 119.

71. Ind.—Read v. Beczkiewicz, 18 N. E.2d 789, 215 Ind. 365, opinion supplemented 19 N.E.2d 465, 215 Ind. 365.

life of the equity proceeding for such other relief as the court may in good conscience grant under the law;[72] it is executory[73] and operates only prospectively[74] on present conditions;[75] and it creates no vested right, as discussed in Constitutional Law § 625 b, a vacation or modification thereof, on a showing of a change of circumstances rendering such action just and equitable, being permissible, as discussed infra § 218.

The finality of a judgment for defendant is not affected by the filing of a motion to assess damages on the bond for a temporary injunction.[76]

The termination of the effectiveness of an order for a preliminary injunction by the final decree is discussed infra § 244.

§ 216. —— Relief to Defendant or Intervenor

Direct and affirmative relief may be granted to defendant where he asserts a claim therefor in his answer or cross bill and shows himself entitled thereto.

Not only may equity grant relief indirectly to defendant by issuing an injunction against him on a condition to be performed by complainant, as discussed supra § 202 b, but it is proper to grant him direct relief and make complete final disposition of the entire controversy.[77] When he shows himself entitled to such relief, defendant may be granted an injunction against complainant,[78] or may be awarded damages,[79] or may be granted a decree for damages or in the alternative for specific performance,[80] or may be granted a decree for the cancellation of a contract[81] or deed,[82] or may be granted a decree vesting in him the title to,[83] or an easement over,[84] the land on which it is claimed he is trespassing, or may be granted a decree establishing a disputed boundary line in his favor.[85] While ordinarily equity will not compel a transfer of possession in favor of defendant,[86] yet, where defendant has been erroneously dispossessed of land as the result of a temporary injunction granted plaintiff, defendant should be restored to possession by the final decree.[87] Where complainant fails to make out his case, the bond given to stay an action at law may be ordered delivered to the person entitled for prosecution.[88]

Necessity of pleading claim for relief. In the absence of statute providing otherwise,[89] affirmative relief generally will not be granted, except on defendant's cross bill or counterclaim and prayer therefor,[90] or on answer praying for such relief,[91]

72. Fla.—Jackson Grain Co. v. Lee, 7 So.2d 143, 150 Fla. 232.

73. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.
Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal. 2d 92.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.

74. Ala.—Alabama Power Co. v. City of Guntersville, 177 So. 332, 235 Ala. 136, 114 A.L.R. 181.

75. Wis.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 364.

76. Mo.—Mitchell v. Dabney, App., 71 S.W.2d 165, transferred, see 58 S.W.2d 731, 332 Mo. 410.

77. Ark.—Gosnell Special School Dist. No. 6 v. Baggett, 290 S.W. 577, 172 Ark. 681.
Fla.—Economy Cash & Carry Cleaners v. Florida Dry Cleaning and Laundry Board, 190 So. 31, 138 Fla. 642.
Ill.—Platt v. Fischer, 1 N.E.2d 735, 285 Ill.App. 110.
La.—Industrial Lumber Co. v. Rogers, 104 So. 367, 158 La. 557.
Tex.—Garrett v. Kelley, Civ.App., 6 S.W.2d 414, error refused.
32 C.J. p 386 note 74.

Allowing defendant additional time to perform act restrained
Where landowner's own wrongful act in obtaining injunction restraining grantee under timber deeds from cutting timber before expiration of period prescribed in deeds caused delay in cutting timber, question of reasonable extension of time for grantee's removal of timber was one of fact.—Bevil v. Kirby Lumber Co., Tex.Civ.App., 58 S.W.2d 843.

78. U.S.—Slayter & Co. v. Stebbins-Anderson Co., C.C.A.Md., 117 F.2d 848, affirming, D.C., 31 F.Supp. 96.
Fla.—Miller v. Bay-To-Gulf, 193 So. 425, 141 Fla. 452.
32 C.J. p 386 note 75.

79. Cal.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal. App.2d 726.
Mich.—Pelavin v. Misner, 217 N.W. 36, 241 Mich. 209, 60 A.L.R. 276, affirmed 220 N.W. 665, 243 Mich. 516.
32 C.J. p 386 note 76.

80. Wyo.—Weaver v. Richardson, 132 P. 1148, 21 Wyo. 343.

81. Okl.—Weber v. Barnsdall, 134 P. 842, 39 Okl. 212.

82. Ark.—Du Fresne v. Paul, 221 S. W. 485, 144 Ark. 87.

83. Wis.—Grignon v. Black, 45 N.W. 122, 938, 76 Wis. 674.

84. Cal.—Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 12 Cal. App.2d 726.

85. Minn.—Hackett v. Kanne, 107 N.W. 1131, 98 Minn. 240.

86. Miss.—Starke v. Lewis, 23 Miss. 151.
32 C.J. p 387 note 82.

87. Okl.—Morris v. Gray, 132 P. 1094, 37 Okl. 695.
32 C.J. p 387 note 83.

88. N.Y.—Carpenter v. Acby, Hoffm. p 311.

89. Iowa.—Westfall v. Lee, 7 Iowa 12.
32 C.J. p 387 note 85 [a].

90. Mass.—Les v. Alibozek, 168 N.E. 919, 269 Mass. 153, 66 A.L.R. 1094.
32 C.J. p 387 note 86.
Attaching impleaded condition to plaintiff's relief see supra § 211 b (2)

Dismissal without prejudice
Mass.—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.

91. Mass.—Les v. Alibozek, 168 N. E. 919, 269 Mass. 153, 66 A.L.R. 1094.
32 C.J. p 387 note 87.

Facts alleged in plea admitted by replication
In action on notes, where defendant interposed equitable plea, alleging, among other things, that maker thereof was of unsound mind at time of making of notes, and that plaintiffs had so alleged in another suit, and asking injunction, and replication admitted such facts and did not sufficiently avoid them, action at law on such notes will be enjoined.

but a limitation of the rule is recognized when one seeks to be relieved of a forfeiture.[92] Where defendant's rights are set forth and admitted by plaintiff in his bill, it is sufficient for defendant to ask in his answer for the judgment to which he is entitled on plaintiff's own accounting.[93]

An intervenor is not entitled to a decree that he holds title in fee, even though his showing justifies a dismissal of complainant's bill.[94] In a patent infringement suit, the court, on holding the patent invalid and not infringed, may grant an injunction against infringement suits by plaintiff against any of the customers of an intervenor.[95]

§ 217. —— Additional, Alternative or Incidental Relief

a. In general
b. Damages or security therefor

a. In General

Other relief is granted or refused in a suit for an injunction in accordance with the pleadings and facts in the particular case and the application thereto of general rules of equity jurisprudence.

Under the general rule as to the retention of jurisdiction for the purpose of affording full relief by a court of equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, as considered in Equity § 67, a court of equity which has acquired jurisdiction of a suit for a permanent injunction may, in such suit, grant such other or further appropriate relief as it may see fit,[96] including a decree for an accounting,[97] a judgment or decree for money due,[98] an order or decree for the return or restoration of property[99] or payment of its value,[1] or an order that an instrument, the prosecution of a suit on which is enjoined, be delivered up for cancellation.[2] Where the court has jurisdiction to enjoin the commission of future injuries it may in a proper case prevent by mandatory injunction a continuing injury from acts already committed.[3]

However, other relief should not be granted prematurely[4] or without having acquired jurisdiction of a necessary party;[5] where plaintiff is entitled to an injunction, the court is not authorized to accept in lieu thereof defendant's promise to desist from the acts in question;[6] under the facts of the particular case, and the law applicable thereto, the court may be without authority to create a lien[7] or to can-

—Williams v. Mason, D.C.Fla., 7 F. 2d 143.

92. Ill.—Springfield & N. E. Traction Co. v. Warrick, 94 N.E. 933, 249 Ill. 470, Ann.Cas.1912A 187.
32 C.J. p 387 note 88.

93. Tex.—Bourke v. Vanderlip, 22 Tex. 221.

94. Ark.—Watkins v. Arnold, 62 S. W. 904, 69 Ark. 263.

95. U.S.—Slayter & Co. v. Stebbins-Anderson Co., C.C.A.Md., 117 F.2d 348, affirming, D.C., 31 F.Supp. 96.

96. Ga.—Kniepkamp v. Richards, 16 S.E.2d 24, 192 Ga. 509.
Ill.—Rosehill Cemetery Co. v. City of Chicago, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.
Wis.—Langen v. Borkowski, 206 N. W. 181, 188 Wis. 277, 43 A.L.R. 622.
32 C.J. p 380 note 22.

Extension of lease
Lease could be extended by court to prevent injury to plaintiff lessee, where lessor denied entry on land to cut timber, in suit to restrain interference with timber rights.—Conn v. Southern Pine Lumber Co., Tex.Civ.App., 11 S.W.2d 199.

Enforcement of state statute by federal court
A bill to restrain execution of a judgment in ejectment may be retained by a federal court to enforce a state statute securing to the tenant the value of his improvements.—Leighton v. Young, Neb., 52 F. 439, 3 C.C.A. 176, 18 L.R.A. 266.

Relieving plaintiff from penalties
In a suit to enjoin enforcement of an ordinance, the court may relieve plaintiffs from penalties during the time they were testing its validity.—City of Marysville v. Standard Oil Co., C.C.A.Kan., 27 F.2d 478, certiorari granted Standard Oil Co. v. City of Marysville, 49 S.Ct. 177, 278 U.S. 596, 73 L.Ed. 527, affirmed 49 S.Ct. 430, 279 U.S. 582, 73 L.Ed. 856, rehearing denied 50 S.Ct. 79, interpretation of decision denied 51 S.Ct. 38, 282 U.S. 797, 75 L.Ed. 718.

97. Mich.—Bennett v. Haines, 196 N.W. 206, 225 Mich. 185.
Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178, 209 Minn. 470.
N.Y.—De Mille Co. v. Casey, 201 N. Y.S. 20, 121 Misc. 78.
32 C.J. p 381 note 25—1 C.J. p 617 note 97.

98. U.S.—Tyler County, Tex., v. Town, C.C.A.Tex., 23 F.2d 371, certiorari denied 49 S.Ct. 9, 278 U. S. 601, 73 L.Ed. 530.
32 C.J. p 381 note 26.
Damages see infra subdivision b of this section.

99. Colo.—Cuddigan v. San Juan Federation of Mine, Mill and Smelter Workers, 130 P.2d 923, 110 Colo. 97.
32 C.J. p 381 note 23.

1. N.J.—Moore v. Diament, 7 A. 509, 41 N.J.Eq. 612.
32 C.J. p 381 note 23.

2. N.J.—Metler v. Metler, 19 N.J. Eq. 457.
32 C.J. p 104 note 98, p 96 note 5 [c].
Injunction as relief incidental or additional to cancellation see Cancellation of Instruments § 79 a.

3. U.S.—John C. Winston Co. v. Vaughan, D.C.Okl., 11 F.Supp. 954, affirmed, C.C.A., Vaughn v. John C. Winston Co., 80 F.2d 370.
W.Va.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217, 139 A.L.R. 1199.
32 C.J. p 381 note 27.

Removal of fence may be required.
Ga.—Lockwood v. Daniel, 17 S.E.2d 542, 193 Ga. 122.
Mont.—Grosfield v. Johnson, 39 P. 2d 660, 98 Mont. 412.
Mandatory injunctions generally see supra § 5.

4. Ga.—Kerr v. McAnally, 188 S.E. 687, 183 Ga. 365—Guthrie v. Gaskins, 161 S.E. 810, 173 Ga. 867.

5. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.

6. Tex.—Garrett v. Rose, Civ.App., 161 S.W.2d 893.

7. Cal.—California Corn Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 542.

cel a note constituting an existing obligation,[8] a bond on which liability may have accrued,[9] or a mortgage constituting a lien;[10] and, when enjoining the prosecution of an action at law or the execution of an order of sale, a court of equity should not attempt in its decree to nullify the order of the court of law or to direct that certain further steps be taken in the action at law.[11] That part of an injunctive decree which releases complainant from custody is erroneous where he has been released on his own recognizance.[12] Where a state statute grants the right to sue the state on certain contracts in a particular state court, a federal court cannot render a judgment against the state for money owing to complainant under such contracts.[13]

Where title is in issue, the court may settle the question of title[14] and order the execution of a deed,[15] or it may frame an issue of title and send such issue to a court of law to be tried or so frame its order granting the injunction as to compel the parties themselves to institute such an action.[16]

Where injunction denied. Except where some equitable ground appears for retaining jurisdiction,[17] on refusing an injunction the court ordinarily will not retain the case for the granting of other relief.[18] It is error to render a judgment refusing injunctive relief against the prosecution of other actions and in effect retaining the suit in so far as it sets up defenses, set-offs, or counterclaims to the suits brought by some of the defendants, where other defendants, properly joined in the present action, have brought suits involving similar or related questions.[19] Where an injunction is not authorized, no alternative relief can be granted which is inconsistent with the relief prayed for in the bill[20] or which is beyond the recognized powers of a court of equity to grant;[21] and, where an injunction is the only relief demanded and an injunction is denied, the court cannot retain the bill for the purpose of granting alternative relief without an amendment of the bill;[22] but, where the demand for an injunction is only incidental and not the main purpose or object of the suit, the suit is not abated in case of circumstances arising which would make the granting of the injunction unnecessary;[23] and, even where the suit is for an injunction and incidental relief, the removal during the pendency of the suit of the grounds for injunctive relief does not take away jurisdiction or bar the court from granting incidental relief, if the pleadings disclose a proper case for injunctive relief when the suit was instituted and the proof on the final hearing warrants the incidental relief.[24] Where suit is brought in a court of law for an injunction under a statute conferring jurisdiction on such court only in a designated class of cases, and the court denies relief by injunction, it is without power to retain jurisdiction of the case as a chancery court and award other equitable relief.[25]

Inability of court to grant complete injunctive relief to a judgment debtor is not inconsistent with a power to determine issues and exercise jurisdiction to afford less extensive relief in proceedings rightly before it.[26]

Where an injunction was improperly granted, to restrain proceedings at law, it cannot be made the pretext for retaining a bill for specific performance.[27] Under a proper pleading, however, plain-

Or.—Sandy Holding Co. v. Ferro, 25 P.2d 561, 144 Or. 466.

8. Cal.—California Corn Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 542.

9. Miss.—State ex rel. Rice v. Terry, 146 So. 140, 167 Miss. 558.

10. Cal.—California Thorn Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 542.

11. Cal.—Larue v. Friedman, 49 Cal. 278.
Ill.—Blair v. Reading, 99 Ill. 600.

12. Miss.—Knight v. Johns, 137 So. 509, 161 Miss. 519.

13. U.S.—Handy v. Johnson, D.C. Tex., 51 F.2d 809.

14. Ga.—Lockwood v. Daniel, 17 S. E.2d 542, 193 Ga. 122.
32 C.J. p 381 note 29.

15. N.Y.—Pappenheim v. Metropolitan El. R. Co., 28 N.E. 518, 128 N. Y. 436, 26 Am.S.R. 486, 13 L.R.A. 401.
32 C.J. p 381 note 30.

16. Md.—Baltimore & O. R. Co. v. Silbereisen, 88 A. 252, 89 A. 102, 121 Md. 407.

17. Del.—Travelers Ins. Co. v. Caravasilis, 182 A. 412, 21 Del.Ch. 164.
Ill.—Patterson v. Patterson, 95 N.E. 1051, 251 Ill. 153.
Mich.—Pakulski v. Ludwiczewski, 289 N.W. 231, 291 Mich. 502.
Tenn.—Smith v. Fleisch, 4 Tenn.App. 139.

18. N.Y.—Western Union Telegraph Co. v. Syracuse Electric Light & Power Co., 70 N.E. 866, 178 N.Y. 325.
32 C.J. p 381 note 36 [a].
Accounting
The mere prayer for an injunction to which complainant is not entitled will not warrant the court in retaining jurisdiction to decree an account, where the court would not have assumed jurisdiction for that purpose alone.
Del.—Donoho v. Carvell, 138 A. 680, 15 Del.Ch. 379.
Pa.—Dick's Appeal, 106 Pa. 589.

19. Ga.—Rabun Mineral Development Co. v. Heyward, 136 S.E. 272, 163 Ga. 398.

20. N.C.—Burns v. Campbell, 56 N. C. 410.
32 C.J. p 382 note 37.

21. Cal.—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

22. Idaho.—Wilson v. Boise City, 60 P. 84, 7 Idaho 69.

23. Idaho.—Wilson v. Boise City, supra.
32 C.J. p 382 note 39.

24. U.S.—U. S. v. Bates Valve Bag Corporation, D.C.Del., 39 F.2d 162.

25. Iowa.—Richmond v. Dubuque & S. C. R. Co., 33 Iowa 422, affirmed 19 Wall. 584, and motion denied 15 Wall. 3, 21 L.Ed. 118.

26. Mass.—Goldman v. Adlman, 197 N.E. 632, 291 Mass. 492.

27. Ga.—Printup v. Mitchell, 17 Ga. 558, 63 Am.D. 258.

tiff may have a decree and execution for a debt, notwithstanding an injunction was the main purpose of the suit and was improperly granted.[28]

After dissolution and resumption of jurisdiction by court of law, in the case of an injunction restraining a suit at law, the court of equity should not retain the case for the purpose of awarding other relief. The injunction having been dissolved, the jurisdiction of the court of equity over all questions involved in the suit at law ceases.[29]

b. Damages or Security Therefor

(1) In general
(2) Where injunction denied
(3) Where injunction granted or withheld conditionally

(1) In General

It is proper to award in one suit an injunction against future acts and damages for injuries from past acts; but it is otherwise as to an injunction and an award of full compensation for all injuries, past and future.

Subject to certain exceptions and limitations, a court of equity which has taken jurisdiction of a suit for an injunction may, in doing complete justice between the parties in respect of the subject matter, award damages for an actionable injury which has been sustained.[30] In order to avoid a multiplicity of suits, and to dispose of the entire matter at once, equity may, in addition to an injunction, decree that defendant pay damages to complainants for all past injury,[31] and in addition to this the court may even render a decree for damages for injury that has occurred since the commencement of the suit, and up to the time of the trial and disposition of the case.[32] However, the rule that a court of equity may assess damages in an injunction proceeding is not mandatory.[33] It does not require plaintiff to ask for damages in the chancery suit, but he may still sue at law for damages;[34] and he will not be permitted to claim damages in the injunction suit where there is already an action at law pending for such damages, the proper course for him to pursue in these circumstances being to abandon the suit at law and give the court of equity control of the whole case.[35] Judgments in injunction suits for damages arising from wrongful issuance of injunction are discussed infra §§ 288, 289.

The making of a particular award of damages is contingent on a proper basis therefor in the pleadings[36] and evidence,[37] and likewise, on a proper ba-

28. Mass.—Donohue v. White, 142 N.E. 692, 247 Mass. 479.

29. N.J.—Little v. Cooper, 11 N.J. Eq. 224.

30. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581—Howell v. City of Dothan, 174 So. 624, 234 Ala. 158.
Cal.—Sapiro v. Frisbie, 270 P. 280, 93 Cal.App. 299.
Mass.—McCarthy v. Lane, 16 N.E.2d 683, 301 Mass. 125.
N.J.—Buttinghausen v. Rappeport, 24 A.2d 877, 131 N.J.Eq. 252.
N.M.—Nichols v. Anderson, 92 P.2d 781, 43 N.M. 296.
Pa.—Schultz v. Lechtner, 25 Erie Co. 105.
Retention of equitable jurisdiction to award damages generally see Equity § 72.

31. U.S.—United Electric Coal Cos. v. Rice, D.C.Ill., 22 F.Supp. 221, 226, citing **Corpus Juris.**
Del.—Simon v. Pyrites Co., 128 A. 370, 2 W.W.Harr. 581—Wright v. Scotton, 121 A. 69, 13 Del.Ch. 402, 31 A.L.R. 1162, affirming Scotton v. Wright, 117 A. 131, 13 Del.Ch. 214.
Ga.—Bainbridge Farm Co. v. Ball & Reynolds, 141 S.E. 647, 165 Ga. 582.
Mass.—Hakkila v. Old Colony Broken Stone & Concrete Co., 162 N.E. 895, 264 Mass. 447.
N.Y.—Binns v. Vitagraph Co., 103 N.E. 1108, 210 N.Y. 51, L.R.A.1915C 839, Ann.Cas.1915B 1024.
Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194—Deeb v. Ferris, 193 A. 75, 127 Pa.Super. 489.
Wash.—J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wash.2d 45.
W.Va.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217, 221, 124 W.Va. 118, 139 A.L.R. 1199, quoting **Corpus Juris.**
32 C.J. p 382 note 44.
Punitive damages may be awarded
Pa.—Edwin J. Schoettle Co. v. Oliver Bros., Inc., 13 Pa.Dist. & Co. 529.

32. U.S.—United Electric Coal Cos. v. Rice, D.C.Ill., 22 F.Supp. 221, 226, citing **Corpus Juris.**
W.Va.—Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217, 221, 124 W.Va. 118, 139 A.L.R. 1199, quoting **Corpus Juris.**
32 C.J. p 383 note 45.

33. U.S.—Tennessee Min. & Mfg. Co. v. New River Lumber Co., C.C.A. Tenn., 5 F.2d 559.
Mich.—City of Saginaw v. Consumers Power Co., 8 N.W.2d 149, 304 Mich. 491.
Damages refused
Ill.—Pavlos v. Carlson, 4 N.E.2d 800, 287 Ill.App. 621.

34. N.Y.—Sponenburg v. Gloversville, 89 N.Y.S. 19, 96 App.Div. 157.

35. N.H.—Eastman v. Amoskeag Mfg. Co., 47 N.H. 71.

36. U.S.—United Electric Coal Cos. v. Rice, D.C.Ill., 22 F.Supp. 221.
La.—Garnier v. Louisiana Milk Commission, 8 So.2d 611, 200 La. 594.
Or.—Dairy Co-op. Ass'n v. Brandes Creamery, 30 P.2d 338, 147 Or. 488, followed in 30 P.2d 344, 147 Or. 503.

37. La.—Cunningham v. Mitchel, 7 La.App. 424.
N.Y.—Hammer v. Baum, 240 N.Y.S. 145, 136 Misc. 490—Lyons v. Meyerson, 18 N.Y.S.2d 363, affirmed 23 N.Y.S.2d 557, 260 App.Div. 863.
Pa.—Miller v. Zinn, Com.Pl., 53 York Leg.Rec. 189.
Attorney's fee
In state where counsel fees may be awarded as compensatory damages if facts warrant infliction of exemplary damages, see Damages § 50 b, court, although awarding mandatory injunction, is not authorized to include compensation for plaintiff's attorney in damages assessed, in absence of evidence warranting allowance of punitive or exemplary damages.—New York, C. & St. L. R. Co. v. Grodek, 186 N.E. 733, 127 Ohio St. 22, 89 A.L.R. 1091.
Matters excusing nonproduction of evidence at trial
Where, in a suit to restrain defendant from interfering with plaintiff's pipe lines across lands claimed by

sis therefor in the findings.[38] Plaintiff may be held entitled to an injunction and nominal damages;[39] and, where there is no proof of actual damages, only nominal damages may be awarded on granting the injunction.[40] Damages will not be awarded against merely nominal parties,[41] or against parties other than those liable to plaintiff therefor;[42] but they may be awarded against all defendants who, by reason of participation in a tort, are liable therefor.[43]

Statutory damages. Without express statutory authority, treble damages are not recoverable in a suit for injunctive relief[44] nor can damages without triplication be assessed by a jury summoned by the chancellor where the statute authorizing recovery of damages for violation thereof contemplates recovery only in a common-law action.[45]

Full compensation for past and future injuries. Plaintiff in an injunction suit is entitled to no more than complete relief consisting of an injunction against future injury and damages for past injury;[46] and it would be unjust and inconsistent to award him both an injunction to prevent an act and full damages arising from a consummation of the act[47] or an injunction against a future act and full compensation, by way of liquidated damages or otherwise, for all loss, including that which has occurred and that which may follow in the future.[48]

(2) Where Injunction Denied

According to the weight of modern authority, a court denying the injunctive relief sought may retain the case for the purpose of awarding damages to the plaintiff, especially where the injunction is rendered unnecessary by facts occurring after the bringing of the suit or it is refused on practical considerations.

In respect of the power of courts to award damages in the same suit where the right to injunction is denied, there is lack of harmony in the decisions, even in the same jurisdictions. Notwithstanding some decisions to the contrary,[49] the rule announced in a number of decisions is that, where a court has acquired jurisdiction of a suit for injunction in which the equitable relief sought is refused, it may in order to do complete justice in the premises retain the case for the purpose of awarding damages instead of remitting plaintiff to a separate action

defendant under a tax sale, it could not be known until final decree whether defendant could be held liable for damage or expense or, if he could, to what extent, the fact that plaintiff produced no evidence at the trial to show how much it had been injured did not waive its right to a money decree.—Tide-Water Pipe Co. v. Bell, 124 A. 351, 280 Pa. 104, 40 A.L.R. 1516.

38. Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 303 Mass. 315.

39. Conn.—Max Ams Mach. Co. v. International Ass'n of Machinists, Bridgeport Lodge, No. 30, 102 A. 706, 92 Conn. 297.
Mass.—Menard v. Houle, 11 N.E.2d 436, 298 Mass. 546.

40. Cal.—Steiner v. Long Beach Local No. 128 of Oil Workers International Union, 123 P.2d 20, 19 Cal.2d 676.
Wash.—Adams v. Building Service Employees International Union, Local No. 6, 84 P.2d 1021, 197 Wash. 242.
32 C.J. p 383 note 49.

41. Ga.—Macon v. Harris, 75 Ga. 761.

42. Mass.—Quinton's Market v. Patterson, 21 N.E.2d 546, 303 Mass. 315.
N.Y.—Frank v. David's Fifth Avenue, 21 N.Y.S.2d 627, 174 Misc. 1009, modified on other grounds 26 N.Y.S.2d 147, 261 App.Div. 525, appeal granted 27 N.Y.S.2d 468, 261 App.Div. 1075, affirmed 36 N.E.2d 454, 286 N.Y. 614.

43. Ga.—Braswell v. Palmer, 22 S.E.2d 93, 194 Ga. 484.

44. U.S.—Decorative Stone Co. v. Building Trades Council of Westchester County, C.C.A.N.Y., 23 F.2d 426, affirming, D.C., 18 F.2d 333, and certiorari denied Decorative Stone Co. v. Building Trade Council of Westchester County, Journeymen Stone Cutters Ass'n of North America, 48 S.Ct. 530, 277 U.S. 594, 72 L.Ed. 1005.
N.Y.—Page v. Herkimer Lumber Co., 96 N.Y.S. 272, 109 App.Div. 391.

45. U.S.—Decorative Stone Co. v. Building Trades Council of Westchester County, C.C.A.N.Y., 23 F.2d 426, affirming, D.C., 18 F.2d 333, and certiorari denied Decorative Stone Co. v. Building Trade Council of Westchester County, Journeymen Stone Cutters Ass'n of North America, 48 S.Ct. 530, 277 U.S. 594, 72 L.Ed. 1005.

46. N.Y.—Wirth & Hamid Fair Booking v. Wirth, 192 N.E. 297, 265 N.Y. 214, modifying 269 N.Y.S. 709, 240 App.Div. 413, and motion granted and reargument denied 193 N.E. 295, 265 N.Y. 510.

47. N.Y.—Wirth & Hamid Fair Booking v. Wirth, supra—Merz v. Interior Conduit & Insulation Co., 46 N.Y.S. 243, 20 Misc. 378.

48. N.Y.—Wirth & Hamid Fair Booking v. Wirth, 192 N.E. 297, 265 N.Y. 214, modifying 269 N.Y.S. 709, 240 App.Div. 413, and motion granted and reargument denied 193 N.E. 295, 265 N.Y. 510.

Loss of customers
It would be unjust to award plaintiff full compensation for permanent loss, or transfer to defendant, of certain customers and also restrain defendant permanently from making sales to such customers.—Whiting Milk Cos. v. Grondin, 184 N.E. 379, 282 Mass. 41.

Full value of property
(1) Lessor cannot recover as damages full value of trees wrongfully worked for turpentine purposes and enjoin lessee from working same.—Bainbridge Farm Co. v. Ball & Reynolds, 141 S.E. 647, 165 Ga. 582.

(2) In suit to enjoin adjoining owner from maintaining any part of a wall or garage on the plaintiff's land, to compel him to restore a former wall and for damages, damages for encroachment should have been based on the theory of temporary trespass and not on the theory of full compensation for land seized unless plaintiff sought damages for permanent occupation by such of defendants' structures as were not ordered to be removed.—McCarthy v. Lane, 16 N.E.2d 683, 301 Mass. 125.

49. Miss.—Central Louisiana Power Co. v. Thomas, 111 So. 142, 145 Miss. 352, overruling suggestion of error 110 So. 673, 145 Miss. 352.
N.Y.—D'Aversa v. Guido, 210 N.Y.S. 621, 213 App.Div. 355, affirmed 155 N.E. 909, 244 N.Y. 590.
Pa.—Anderson v. Amalgamated Ass'n of Street and Electric Ry. Employees, 76 Pa.Super. 556.
32 C.J. p 384 note 54.

therefor.[50] This rule is especially applicable in states where, under the statutes, there is only one form of civil action and various kinds of relief can be administered in the same action[51] or where the court is under a statutory duty to disregard a mistaken prayer for relief and to administer the proper relief if it has jurisdiction on any statements of facts properly pleaded and proved.[52] Where there is no ground for equity jurisdiction and also no actual damage, there is no foundation for a judgment for damages.[53] Where suit is brought to enjoin an injury which is merely threatened and an injunction is denied, the court has no power to award damages.[54]

Change in circumstances pendente lite. Where the bill or complaint states sufficient grounds for injunction, but by reason of facts occurring after suit brought, the right to an injunction does not exist at the time of the trial, the court, even though denying the injunction, will retain the cause and award damages,[55] and that, too, although there may be an adequate remedy at law.[56] This rule is, of course, especially applicable where at the time of bringing suit complainant was entitled to equitable relief and defendant hastened the injurious acts complained of to completion before the hearing.[57] The rule has been applied also where by reason of lapse of time injunction has become improper,[58] where by reason of changed conditions at the time of the trial the right sought to be protected by injunction was of very little present value,[59] or where at the time of the trial the acts complained of had ceased.[60]

Damages in lieu of injunction. The court may, under the exigencies of the case, deny the injunctive relief prayed for and award damages in lieu thereof,[61] as where the equity of the bill is established, but an injunction appears impracticable or unjust,[62] or defendant has acted in good faith,[63] or an injunction is refused because it would be of

50. Mass.—Sullivan v. Barrows, 21 N.E.2d 275, 303 Mass. 197—Suburban Coat, Apron & Linen Supply Co. v. Le Blanc, 15 N.E.2d 828, 300 Mass. 509.
Mich.—Morris v. Barker, 235 N.W. 174, 253 Mich. 334.
Neb.—Robinson v. Dawson County Irr. Co., 8 N.W.2d 179, 142 Neb. 811.
N.Y.—Small v. Kronstat, 24 N.Y.S.2d 535, 175 Misc. 626.
Or.—Fisk v. Leith, 299 P. 1013, 137 Or. 459, modified on other grounds 3 P.2d 535, 137 Or. 459.
Pa.—Bailey v. Sharpe, 54 Montg.Co. 100.
Utah.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.
32 C.J. p 72 note 57, p 384 note 55.

Discretion of court

Whether the case shall be retained for the purpose of awarding damages on denying the equitable relief is a matter within the sound discretion of the court.
Mass.—Smith v. New England Aircraft Co., 170 N.E. 385, 270 Mass. 511, 69 A.L.R. 300.
N.Y.—Morse v. Wheeler, 73 N.Y.S. 930, 68 App.Div. 428, affirmed 67 N.E. 1085, 175 N.Y. 502.

Acts of parties in suit

(1) Court, if denying mandatory injunction sought, was entitled to award damages where both parties submitted case on theory that court might find damages, if any, if equitable relief were denied.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

(2) Notwithstanding the refusal of the court to award an injunction, it may, nevertheless, retain the case and award damages where defendant does not insist on his defense that there is an adequate remedy at law, but on the contrary submits himself and his rights solely to the equitable jurisdiction of the court and in addition thereto demands affirmative relief.—Crocker v. Manhattan L. Ins. Co., 70 N.Y.S. 492, 61 App.Div. 226.

Damages in issue

Damages were properly awarded plaintiff, denied injunction prayed in complaint also asking other proper relief, where question of damages was put in issue by pleadings and evidence.—McRae v. Lois Grunow Memorial Clinic, 14 P.2d 478, 40 Ariz. 496.

Grounds for refusing injunction

(1) Delay in asserting right by one whose land is encroached upon will not bar all relief, but equity, although declining to remove trespasser, will award damages.—Soifer v. Stein, 101 Pa.Super. 135.

(2) Where plaintiff has been denied equitable relief by way of mandatory injunction because of laches and the balancing of equities, jurisdiction will be retained for the purpose of assessing compensatory damages.—Foley v. School Dist. of City of Connellsville, Pa.Com.Pl., 2 Fay.L.J. 205.

Transfer to law side

In Kentucky it has been held that, under the civil code of practice, where the court in its discretion refuses an injunction, it should not dismiss the petition absolutely, but should transfer the action to law and permit an amendment to the pleadings setting up a cause of action for damages.—McHugh v. Louisville Bridge Co., 65 S.W. 456, 23 Ky.L. 1546.

51. Utah.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.
32 C.J. p 384 note 56 [a], [b], [d].

52. N.Y.—Small v. Kronstat, 24 N.Y.S.2d 535, 175 Misc. 626.

53. Conn.—Empire Transp. Co. v. Johnson, 55 A. 587, 76 Conn. 79.

54. Conn.—Empire Transp. Co. v. Johnson, supra—Huntting v. Hartford St. R. Co., 46 A. 824, 73 Conn. 179.

55. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 301 Mass. 573.
32 C.J. p 385 note 59.

56. N.Y.—Van Allen v. New York El. R. Co., 38 N.E. 997, 144 N.Y. 174.

57. R.I.—Lewis v. North Kingstown, 11 A. 173, 16 R.I. 15, 27 Am. S.R. 724.
32 C.J. p 385 note 61.

58. U.S.—Cartwright v. Southern Pacific Co., D.C.Or., 206 F. 234.

59. Mass.—Aronson v. Orlov, 116 N.E. 951, 228 Mass. 1, certiorari denied 38 S.Ct. 61, 245 U.S. 662, 62 L.Ed. 536.
32 C.J. p 385 note 63.

60. Mass.—Simon v. Schwachman, 18 N.E.2d 1, 301 Mass. 573—Hubrite Informal Frocks v. Kramer, 9 N.E.2d 570, 297 Mass. 530.
32 C.J. p 385 note 64.

61. Ala.—McGowin v. City of Mobile, 4 So.2d 161, 241 Ala. 576.

62. Ala.—Mobile County v. Barnes-Creary Supply Co., 142 So. 72, 225 Ala. 127.

63. N.Y.—Corley v. Spitzer, 255 N.Y.S. 601, 235 App.Div. 703.

little benefit to complainant and its enforcement would inflict great injury on defendant or the public, or both.[64] There may, however, be nothing in the circumstances of a particular case that would warrant the court in confining relief to the payment of damages;[65] and where equitable principles clearly entitle complainant to an injunction, even though his damage is small in amount, it is error to decree damages in lieu of the injunction asked.[66]

(3) Where Injunction Granted or Withheld Conditionally

The court may make payment, or the giving of security for payment, of ascertained damages a condition of withholding an injunction, or it may grant an injunction on condition that it be dissolved on the giving of a bond by the defendant to pay damages assessed against him.

The court may ascertain the damages and provide for withholding or issuing an injunction accordingly as defendant pays or fails to pay such damages.[67] This course may be pursued where, by reason of acquiescence or other acts on the part of complainants, relief by injunction would be inequitable,[68] or where an inequitable result would follow the granting of a permanent injunction,[69] or where the allowance of an injunction would be of small benefit to plaintiff and would inflict great injury on defendant.[70]

The deposit of adequate security for the payment of damages may be made a condition of withholding the issuance of an injunction.[71] Also the court may grant an injunction conditioned to be dissolved on the giving of a sufficient bond by defendant to pay all damages that may be assessed against him.[72]

§ 218. —— Opening and Vacating or Modifying

The court which rendered a final decree granting a permanent injunction may, on motion and a showing of facts making it equitable to do so, open and vacate or modify such decree; and, according to the weight of authority, it may do so after the expiration of the term at which the decree was rendered.

In the exercise of its inherent power,[73] and without statutory authority[74] or express retention in the decree of jurisdiction to modify,[75] as well as where

64. Cal.—McKean v. Alliance Land Co., 253 P. 134, 200 Cal. 396.
32 C.J. p 386 note 71.

65. Mass.—Gilbert v. Repertory, Inc., 18 N.E.2d 437, 302 Mass. 105.

66. R.I.—Lonsdale Co. v. Woonsocket, 56 A. 448, 25 R.I. 428.
32 C.J. p 386 note 72.

67. Ark.—Jones v. Kelley Trust Co., 18 S.W.2d 356, 179 Ark. 857.
Cal.—Morgan v. Veach, 139 P.2d 976, 59 Cal.App.2d 682.
N.Y.—Squaw Island Freight Terminal Co. v. City of Buffalo, 7 N.E.2d 10, 273 N.Y. 119, modifying 284 N.Y.S. 598, 246 App.Div. 472.
32 C.J. p 380 note 18 [a], p 385 note 67.

Damages for permanent injuries from trespass
A court may award damages for permanent injuries to property caused by trespass only where trespasser has power to acquire legal title to property trespassed upon and trespasser concedes that such trespass is to continue permanently. In making such award equity court merely finds amount of damages which owner will sustain if trespass continues permanently and trespasser may then elect to pay such damages or to discontinue the trespass, whereupon the court will enjoin any future trespass.—Sound Marine & Machine Corporation v. Westchester County, D.C.N.Y., 45 F.Supp. 980, affirmed, C.C.A., 135 F.2d 464.

68. Mich.—Blake v. Cornwell, 32 N.W. 803, 65 Mich. 467.

69. N.Y.—Haber v. Paramount Ice Corporation, 267 N.Y.S. 349, 239 App.Div. 324, affirmed 190 N.E. 163, 264 N.Y. 98—Kraatz v. Certain-Teed Products Corporation, 20 N.Y.S.2d 13.

70. N.J.—Simmons v. Paterson, 45 A. 995, 60 N.J.Eq. 385, 83 Am.S.R. 642, 48 L.R.A. 717.

71. N.J.—Benton & Holden v. Central R. Co. of New Jersey, 194 A. 805, 122 N.J.Eq. 309, affirmed Benton & Holden v. Central R. of New Jersey, 196 A. 532, 123 N.J.Eq. 163.

72. N.H.—Pike v. New Hampshire Trust Co., 38 A. 721, 67 N.H. 227.
32 C.J. p 386 note 73.

73. U.S.—National Popsicle Corporation v. Hughes, D.C.Cal., 32 F. Supp. 397—Washington Water Power Co. v. City of Coeur D'Alene, D.C.Idaho, 24 F.Supp. 790.
Cal.—H. G. Fenton Material Co. v. Challet, 121 P.2d 788, 49 Cal.App. 2d 410—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal.App.2d 92.
Fla.—Jackson Grain Co. v. Lee, 7 So. 2d 143, 150 Fla. 232.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.
Ohio.—Degenhart v. Harford, 18 N.E.2d 990, 59 Ohio App. 552.
Pa.—Kelley v. Earle, 190 A. 140, 325 Pa. 337, modifying 182 A. 501, 320 Pa. 449.
Utah.—Leithan v. Cusick, 1 Utah 242.

Changing permanent to interlocutory injunction
Ga.—Killian v. Cherokee County, 150 S.E. 158, 169 Ga. 318.

Curing uncertainty
An order which is defective in this regard may be cured by a subsequent order modifying it.—Lennox Furnace Co. v. Wrot Iron Heater Co., 160 N.W. 356, 181 Iowa 1331—32 C.J. p 369 note 55.

Discretion of court
(1) It is said that a chancellor has broad judicial discretion in modifying injunctions.—Clark v. Kreidt, 199 So. 333, 145 Fla. 1.

(2) The discretion vested in courts with respect to the modification of injunctions is to be measured by the facts in each case, including the consequences that might be entailed as a result of granting the relief.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.

(3) Discretion as to modification of preliminary injunction see infra § 236.

Striking out part of decree
Ala.—Houlton v. Molton, 11 So.2d 850.
Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811.
Executory and continuing nature of final decree see supra § 215.
Opening or modifying as not denying due process of law see Constitutional Law § 625 b.

74. Neb.—Lowe v. Prospect Hill Cemetery Assoc., 106 N.W. 429, 75 Neb. 85, reheard 108 N.W. 978, 75 Neb. 85.

75. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.

the decree itself reserves the right,[76] a court which has rendered a final decree granting a permanent injunction may open, vacate, or modify such decree where the court believes the ends of justice would be served by such action;[77] where the continuance of the injunction is no longer warranted;[78] where the circumstances and situation of the parties are shown to have so changed as to make it just and equitable to open, vacate, or modify the decree[79] or inequitable,[80] unfair,[81] unjust,[82] and oppressive[83] to continue the injunction; where the law has changed as to the enjoined acts;[84] where a default was taken improperly and final judgment entered;[85] where defendant has misunderstood the

76. U.S.—Murphy v. North American Co., D.C.N.Y., 24 F.Supp. 471.
Fla.—Jackson Grain Co. v. Lee, 7 So. 2d 143, 150 Fla. 232.
Necessity or propriety of provision in decree retaining jurisdiction to modify see supra § 211 b (1).

77. U.S.—Washington Water Power Co. v. City of Coeur D'Alene, D.C. Idaho, 24 F.Supp. 790.
Fla.—Jackson Grain Co. v. Lee, 7 So.2d 143, 150 Fla. 232.
Mont.—Santa Rita Oil Co. v. State Board of Equalization, 116 P.2d 1012, 112 Mont. 359, 136 A.L.R. 757, vacating Santa Rita Oil & Gas Co. v. Board of Equalization, 54 P.2d 117, 101 Mont. 268.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.
Wash.—Adams v. Local No. 400 of Cooks and Helpers, Waiters and Waitresses of Spokane, 215 P. 19, 124 Wash. 164.

78. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955.
Mont.—Santa Rita Oil Co. v. State Board of Equalization, 116 P.2d 1012, 112 Mont. 359, 136 A.L.R. 757, vacating Santa Rita Oil & Gas Co. v. Board of Equalization, 54 P. 2d 117, 101 Mont. 268.

79. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L. Ed. 1419, certiorari granted 60 S. Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419—Washington Water Power Co. v. City of Coeur D'Alene, D.C. Idaho, 24 F.Supp. 790.
Fla.—Jackson Grain Co. v. Lee, 7 So.2d 143, 150 Fla. 232.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.
Md.—Emergency Hospital of Easton v. Stevens, 126 A. 101, 146 Md. 159.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.
Tex.—Uvalde Paving Co. v. Kennedy, Civ.App., 22 S.W.2d 1091.
32 C.J. p 389 note 11.

Adaptation to changed conditions
U.S.—Washington Water Power Co. v. City of Coeur D'Alene, D.C.Idaho, 25 F.Supp. 795.

Landowner's heirs may sue to obtain relief from injunction enforcing building restrictions against land.—Rulnick v. Shulman, 136 A. 865, 106 Conn. 66.

80. U.S.—National Popsicle Corporation v. Hughes, D.C.Cal., 32 F. Supp. 397.
Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.

81. U.S.—Murphy v. North American Co., D.C.N.Y., 24 F.Supp. 471.

82. U.S.—Steinfur Patents Corporation v. Sterling Fur Dyers, D.C.N. Y., 40 F.Supp. 790.
Ohio.—Degenhart v. Harford, 18 N. E.2d 990, 59 Ohio App. 552.

83. U.S.—Steinfur Patents Corporation v. Sterling Fur Dyers, D.C.N. Y., 40 F.Supp. 790.

Consent decree
The inherent powers of an equity court permit it to modify consent decree granting injunction if circumstances which have arisen since the entry of decree make it an "instrument of wrong" and a decree is an instrument of wrong if because of the change in circumstances the moving parties are the "victims of oppression," that is, if the hardships they are suffering because of changed circumstances are so extreme and unexpected that when balanced against substantial dangers which injunction was designed to protect, equity and good conscience require a modification.—Fleming v. Miller, D.C. Minn., 47 F.Supp. 1004, modified on other grounds, C.C.A., Walling v. Miller, 138 F.2d 629, certiorari denied Miller v. Walling, 64 S.Ct. 781.

84. U.S.—Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local Union No. 134, C.C.A.Ill., 133 F.2d 955—Washington Water Power Co. v. City of Coeur D'Alene, D.C.Idaho, 24 F.Supp. 790.
Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal. App.2d 92.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.

Change by statute
N.Y.—Runcie v. Bankers Trust Co., 17 N.Y.S.2d 197, granting application for leave to reopen 11 N.Y.S. 2d 924.

Change by judicial decision
Mont.—Santa Rita Oil Co. v. State Board of Equalization, 116 P.2d 1012, 112 Mont. 359, 136 A.L.R. 757, vacating Santa Rita Oil & Gas Co. v. Board of Equalization, 54 P.2d 117, 101 Mont. 268.

In view of wartime prohibition against use of transportation facilities for delivery of liquor in bottles when individually purchased by householder, injunction restraining wholesaler from selling wine at retail without making delivery thereof to purchaser should be vacated for duration of war, provided wholesaler obtains a winery license.—Koppelman v. Sunset Wine Co., 44 N. Y.S.2d 225, 180 Misc. 812.

85. Iowa.—Brett v. Farr, 10 N.W. 853, 58 Iowa 442.
32 C.J. p 389 note 12.

Excusable default
Default and resulting perpetual injunction may be set aside on motion supported by answer stating complete defense and showing default was excusable.—Ak-Sar-Ben Exposition Co. v. Sorensen, 229 N.W. 13, 119 Neb. 358.

Failure of complaint to state cause of action
Setting aside default in suit to enjoin issuance of warrants was not

meaning of the papers served on him;[86] or where defendant's consent to the decree was given through mistake and in ignorance of his obligations to other persons whose interests would be prejudiced thereby.[87] However, a final decree awarding an injunction will not be opened except on good cause shown;[88] and a modifying order itself should be set aside where the exercise of a right under the order resulted in the use of violence and intimidation.[89]

Modification on appeal from the decree in an injunction suit is discussed in Appeal and Error § 1883 d. Continuing, dissolving, discharging or modifying preliminary injunctions is considered infra §§ 224–256.

Time. It has been held that the decree may be vacated or modified after the term at which it was rendered,[90] and at any time[91] when the cause on which it was granted had been removed and the danger of invading plaintiff's right no longer exists.[92] According to other authorities, however, such action is not permissible after the expiration of the term[93] where the court had jurisdiction to render the decree.[94] Also it has been held that, where a permanent injunction is valid on its face, the court has no jurisdiction more than a year later to modify it by striking from its provisions all reference to certain parties who were properly before the court.[95]

Procedure. A motion to modify or vacate a decree granting a permanent injunction is a proper remedy.[96] Such remedy is not barred by the availability of other remedies, such as defense of a contempt proceeding, certiorari, or habeas corpus to obtain relief from a contempt commitment, or an independent action in equity.[97] Also the filing of an additional bond in an appellate court for continuing a preliminary injunction does not estop plaintiff to move thereafter in the lower court to vacate a decree dismissing his bill.[98] Evidence heard in a contempt proceeding should, on proper application, be considered where the parties and the issues are the same and the same judge is to pass on the issues;[99] but a question tried and determined in the

abuse of discretion, notwithstanding grounds urged by defendants' counsel were weak, where complaint did not state cause of action.—Peterson v. Fugle, 31 P.2d 1030, 96 Mont. 537.

86. N.Y.—Walcutt v. Gaskin, 41 N.Y.S. 678, 18 Misc. 118.
32 C.J. p 389 note 13.

87. Cal.—Sheehan v. Osborn, 69 P. 842, 6 Cal.Unrep.Cas. 979.

88. Mo.—Bloss v. Tacke, 59 Mo. 174.
N.Y.—Delafield v. Commercial Tel. Co., 3 N.Y.S. 921, 22 Abb.N.Cas. 450.

Refusal to set aside held not erroneous
Ark.—Thompson v. Darr, 298 S.W. 1, 174 Ark. 807.
Pa.—Greco v. Lizza, 188 A. 362, 124 Pa.Super. 125.

Petition for modification is properly refused where it is obviously nothing more than an attempt to relitigate matters, finally and conclusively determined on former appeals.—Hempstead v. Meadville Theological School, 29 A.2d 509, 346 Pa. 276.

Opportunity to be heard should be given.—Kirkland v. Ferris, 88 S.E. 680, 145 Ga. 93—Smith v. Wells, 83 S.E. 789, 142 Ga. 774—Howard v. Lowell Mach. Co., 75 Ga. 325.

89. Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill.App. 47.

90. Fla.—Jackson Grain Co. v. Lee, 7 So.2d 142, 150 Fla. 232.
Ky.—Gregory v. Crain, 163 S.W.2d 289, 291 Ky. 194.
Neb.—Lowe v. Prospect Hill Cemetery Assoc., 106 N.W. 429, 75 Neb. 85, reheard 108 N.W. 978, 75 Neb. 85.
Ohio.—Degenhart v. Harford, 18 N.E. 2d 990, 59 Ohio App. 552.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.

Modifying order may be set aside after the expiration of term of court at which it was entered.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E. 2d 700, 316 Ill.App. 47.

91. U.S.—National Popsicle Corporation v. Hughes, D.C.Cal., 32 F. Supp. 397.

92. Neb.—Lowe v. Prospect Hill Cemetery Assoc., 106 N.W. 429, 108 N.W. 978, 75 Neb. 85.

93. Ariz.—Woffenden v. Woffenden, 25 P. 666, 1 Ariz. 328.

94. Mo.—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652.

95. Cal.—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.

96. U.S.—Murphy v. North American Co., D.C.N.Y., 24 F.Supp. 471.
Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal. 2d 92.
Ind.—Uservo, Inc., v. Selking, 28 N.E. 2d 61, 217 Ind. 567.

Summary proceeding on undisputed facts
A perpetual injunction may be modified or vacated in a summary proceeding on motion to modify or vacate the same provided the facts are undisputed.—Lowe v. Prospect Hill Cemetery Assoc., 106 N.W. 429, 75 Neb. 85, reheard 108 N.W. 978, 75 Neb. 85.

New or original proceeding
(1) An order making injunction definite and readily enforceable, if within limits of relief prayed in the bill and intended to be accomplished, is proper without new proceedings. —Evans v. Stinchcomb, 25 A.2d 444, 180 Md. 482.

(2) An original proceeding in same court to vacate decree, rendered at former term, granting injunction, would be considered by court as a motion to modify the injunction.—Degenhart v. Harford, 18 N.E.2d 990, 59 Ohio App. 552.

Duty of defendant to request modification
If a defendant is in doubt as to what acts he may or may not do under injunctive order, he should request a modification or construction of its terms, and if he proceeds under his own construction, he does so at his peril.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.

97. Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal. 2d 92.

98. Ill.—Elshoff v. Murray, 235 Ill. App. 488.

99. Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill. App. 47.

original action cannot be relitigated on a motion to modify or vacate.[1]

Supplementary injunction. The object of a supplementary injunction is not to amplify the original injunction, but rather is to specify and to apply the original injunction to actions and objects nonexistent when the case was decided. The inquiry is whether acts and things that have come into existence since the decree would have been enjoined by that decree had they then existed.[2] In one federal circuit, however, the procedure of employing a supplemental decree for the purpose of expanding the decree so as to make it cover new post-decree practices is not recognized; and it has been held that after the passing of the term the court is without jurisdiction of a motion for a supplemental decree where the motion is made for the purpose of reconstructing the decree and thereby procuring a new decree.[3]

§ 219. —— Stay or Suspension

Either in the decree granting an injunction, or in a subsequent order, the court may stay or suspend the operation of the injunction; but it will not do so unless a necessity for the stay or suspension is made to appear clearly.

The court may in its discretion suspend the operation of an injunction[4] or restraining order.[5] It may in the decree itself provide that the operation of the injunction shall be stayed for a certain length of time or until the happening of a condition;[6] and where an order staying the injunction is made after entry of the decree it becomes in effect a part thereof and operates concurrently therewith.[7] It is within the discretion of the court to stay the operation of the decree pending an appeal therefrom, until the hearing of the appeal on the merits;[8] but taking an appeal does not of itself operate as a stay.[9] After one stay or suspension it is within the power of the court to extend it further or to grant a second suspension;[10] but in no case will a stay or suspension be allowed unless a necessity therefor is clearly made to appear.[11] Where no substantial injury is shown to have resulted from the act complained of, although a technical right has been invaded, the decree entered should deny the injunction with leave at the foot of the decree to apply for an injunction at any time on showing substantial injury and that justice requires the relief.[12]

Time for application for stay. The application for a stay must be made with due diligence or it will not be considered.[13] Sometimes leave of court is granted to defendant to apply for a stay after the decree.[14]

Imposition of conditions. The court may impose conditions to the suspension of an injunction that will properly protect complainant,[15] such as a condition that defendant give a bond to pay all damages to be caused complainant by reason of the suspension.[16]

§ 220. —— Persons Concluded

A person may have such a connection with an in-

1. Neb.—Lowe v. Prospect Hill Cemetery Assoc., 106 N.W. 429, 75 Neb. 85, reheard 108 N.W. 978, 75 Neb. 85.

Error on question going to merits is not open on motion to vacate.—Walling v. Miller, C.C.A.Minn., 138 F.2d 629, modifying, D.C., Fleming v. Miller, 47 F.Supp. 1004, certiorari denied Miller v. Walling, 64 S.Ct. 781.

2. U.S.—Armstrong v. De Forest Radio Telephone & Telegraph Co., C.C.A.N.Y., 10 F.2d 727, certiorari denied De Forest Radio Telephone & Telegraph Co. v. Armstrong, 46 S.Ct. 471, 270 U.S. 663, 70 L.Ed. 787.

3. U.S.—Prang Co. v. American Crayon Co., C.C.A.Del. 58 F.2d 715, affirming D.C., American Crayon Co. v. Prang Co., 50 F.2d 225 and 51 F.2d 737.

4. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291 Ky. 194.
32 C.J. p 388 note 97.

5. Wash.—King County Drain. Dist. No. 1 v. Costello, 101 P. 497, 53 Wash. 67.
32 C.J. p 388 note 98.

6. N.J.—Ocean Tp. Bd. of Health v. White, 110 A. 43, 90 N.J.Eq. 621.
32 C.J. p 388 note 99.

7. Cal.—Tulare Irr. Dist. v. Superior Court of California in and for Tulare County, 242 P. 725, 197 Cal. 649.

8. Idaho.—Waters v. Dunn, 110 P. 258, 18 Idaho 450.
32 C.J. p 388 note 1.

9. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.
32 C.J. p 388 note 1 [b].

10. N.Y.—Sponenburgh v. Gloversville, 89 N.Y.S. 19, 96 App.Div. 157, affirming 87 N.Y.S. 602, 42 Misc. 563.
32 C.J. p 388 note 2.

11. N.Y.—Fulton Bank v. New York & Sharon Canal Co., 3 Paige 31.

Improper suspension
Where defendant city violated statute against dumping garbage and plaintiff was interested party, court improperly suspended operation of injunction.—Lambert v. City of Port Arthur, Tex.Civ.App., 22 S.W.2d 320, error refused.

12. N.Y.—Loukes v. Payne, 125 N.Y. S. 850, 140 App.Div. 776.

13. N.J.—Doremus v. Paterson, 84 A. 571, 79 N.J.Eq. 63.

14. Md.—Mayor and City Council of Baltimore v. Brack, 3 A.2d 471, 175 Md. 615, 120 A.L.R. 543.

15. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291 Ky. 194.
N.Y.—Hine v. New York El. R. Co., 43 N.E. 414, 149 N.Y. 154, affirming 28 N.Y.S. 66, 8 Misc. 18.

16. N.Y.—Genet v. Delaware & H. Canal Co., 21 N.E. 390, 113 N.Y. 472 —Pach v. Geoffroy, 19 N.Y.S. 583.

Decree against tenant for a mandatory injunction may provide that, in lieu of immediate compliance therewith, defendant may give a bond in a specified sum conditioned on compliance at the expiration of his lease.—Lexington & Fortieth Corporation v. Callaghan, 24 N.E.2d 316, 281 N.Y. 526, affirming 11 N.Y. S.2d 554, 256 App.Div. 978, leave to appeal denied 12 N.Y.S.2d 362, 257 App.Div. 806, and motion denied 25 N.E.2d 147, 282 N.Y. 594.

junction suit or a party thereto as to be bound by the final decree thereof, of which he has knowledge, even though he is not formally and specifically named a party to the suit.

Generally an injunction binds only those persons who are parties to the suit[17] and are named in the decree;[18] and a statute limiting the binding effect of an injunction to parties to the suit is merely declaratory of the common law.[19] However, the term "parties to the suit," as used in such a statute, includes persons who, although not formally defendants, assume defense of the suit openly and to plaintiff's knowledge;[20] an injunction against a corporation binds both the corporate entity and all persons who act for the corporation in the transaction of its business and have knowledge of the decree;[21] and an injunction may bind all officers and members of a union, at least as soon as they have knowledge of it.[22] Also it is held that a shopper's league having knowledge of the submission to the court of a labor dispute between employer and employees is bound by the injunction granted in the suit.[23] The sureties on an injunction bond assume such a connection with the suit that they are concluded by the decree.[24]

As between defendants, a final decree refusing an injunction is not res judicata of the questions involved where it does not appear that their interests were adverse.[25]

§ 221. Costs

Although usually made to the successful party, the allowance of costs in an injunction suit is within the discretion of the court, as in other equitable suits, except where the matter is specially regulated by statute; and considerable variation in allowances is found, due to the circumstances of particular cases and the varying degrees of success of particular parties.

The general rule that the allowance of costs in equitable actions is within the discretion of the court, as discussed in Costs § 10 a, is applicable in suits for injunction,[26] except in so far as the question of costs may be subject to special statutory regulation.[27] Costs on dissolution of injunction are considered infra § 254.

In favor of complainant against defendant. A complainant who on final hearing is decreed a perpetual injunction according to his prayer usually is entitled to costs;[28] where a bill is brought for discovery as well as an injunction, if plaintiff succeeds in part he may be awarded costs;[29] and, where plaintiff is in the main successful on his motion for a temporary injunction, defendant may be held liable for the fees of a referee and stenographer incurred on the hearing of the motion.[30] On the oth-

17. Mo.—Southwest Pump & Machinery Co. v. Forslund, 29 S.W.2d 165, 225 Mo.App. 262.
N.Y.—People v. Ribas, 276 N.Y.S. 551, 153 Misc. 703.
Tex.—Gordon v. Hawkins, Civ.App., 66 S.W.2d 432.

Person not party or privy to party is not bound by the decree.—State ex rel. Schmitt v. Davis, 197 N.E. 124, 49 Ohio App. 235.

Capacity in which party bound

A decree enjoining a named person from instituting and further maintaining in any capacity any suit the purpose of which is to attack the validity of a certain judgment is effective to enjoin the named person as temporary administrator from maintaining such a suit.—Elliott v. Ferguson, Tex.Civ.App., 127 S.W.2d 323, error dismissed.

Injunction against prosecution of action at law as binding parties only and not court at law see supra § 50.

18. Wis.—In re Zur Ruhe Cemetery, 213 N.W. 657, 193 Wis. 108.

Landlord informed of injunction against tenant alone is not bound thereby where not party to proceedings.—Watkins v. Mowbray & Robinson Co., 278 S.W. 557, 212 Ky. 118.

Absent parties

The provision of former Equity Rules, rule 48, permitting a few individuals to be sued as representing a numerous class, that "the decree shall be without prejudice to the rights and claims of absent parties" prevented the decree from being conclusive as to such parties.—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3, C.C.Ohio, 90 F. 598.

19. U.S.—National Labor Relations Board v. Blackstone Mfg. Co., C.C.A., 123 F.2d 633.

20. U.S.—Aluminum Colors v. Empire Plating Co., D.C.Ohio, 5 F. Supp. 687.

21. Cal.—Katenkamp v. Superior Court in and for Santa Barbara County, 108 P.2d 1, 16 Cal.2d 696.

22. N.J.—Newark International Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 7 A.2d 170, 125 N.J.Eq. 575.

Officer with notice

In action against co-operative dairymen's union, president of union who appeared by attorney in proceeding and opposed application for injunction was deemed to have had notice of injunction and was bound thereby as officer of association.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal. App.2d 641.

All defendants

Injunction against named officers and other unnamed officers and members of labor union is applicable to all defendants, where answer was on behalf of defendants having common interest and fairly represented by those named.—Armstrong Cork & Insulation Co. v. Walsh, 177 N.E. 2, 276 Mass. 263.

23. N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 5 A.2d 682, 125 N.J.Eq. 250.

24. N.H.—Towle v. Towle, 46 N.H. 431.
32 C.J. p 388 note 94 [c].

25. Iowa.—Tama County v. Melendy, 7 N.W. 669, 55 Iowa 395.

26. Cal.—People's Ditch Co. v. Foothill Irr. Dist., 297 P. 71, 112 Cal. App. 273.
Ga.—Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 S.E. 822, 181 Ga. 105.
Mass.—Daudelin v. Lee, 154 N.E. 252, 258 Mass. 7.

27. U.S.—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602.

28. Or.—Jones v. Conn, 64 P. 855, 65 P. 1068, 39 Or. 30, 87 Am.S.R. 634, 5 L.R.A. 630.
32 C.J. p 389 note 30.

29. Ky.—Ross v. Adams, 5 Dana 509.

30. N.Y.—Bellin v. Millinery Workers' Union, Local No. 24, 216 N.Y.S. 68, 127 Misc. 53.

er hand, complainant, when unsuccessful, is not entitled to an allowance of costs;[31] and even when he is successful, costs are refused him under some circumstances, as where the action enjoined was undertaken by defendant through the fault of complainant.[32] A party suing to enjoin the foreclosure of a mortgage who does not offer to do equity should not be awarded costs in either court, although he succeeds in getting a reduction of the amount of the mortgage.[33]

In favor of defendant against complainant. In case relief by injunction is denied on the final hearing, complainant must in general pay costs of the suit,[34] although damages are awarded to him[35] or a temporary injunction was obtained;[36] but sometimes no costs are allowed defendant in view of his motive to injure plaintiff.[37] On the other hand, it is error to tax costs against plaintiff where he brought the action in good faith and was entirely successful after being compelled by defendant to go to trial;[38] and even though a temporary injunction is perpetuated only in part, it may be error to tax costs against complainant.[39] Under a statute authorizing the court to award costs against the successful party for good cause, the court has power to award costs against plaintiff on making an injunction perpetual where the necessity for the perpetuation of the writ of injunction was due to his own carelessness and dereliction of duty;[40] and, where an injunction is perpetuated on grounds that did not exist when it was originally granted, it has been held that costs may be taxed against complainant.[41] Taxing plaintiff with costs on dismissal of the action on the hearing of an order to show cause is premature where the motion to dismiss should have been heard at term and not on the hearing of the order to show cause.[42]

Against both complainant and defendant. Where the evidence is so conflicting that the bill is retained with leave to renew the application for an injunction, each party may be compelled to pay his own costs.[43] So, where each party is successful in part, costs may be divided between the parties;[44] where plaintiff obtains approximately one half of the relief sought, it may be held that neither party is entitled to costs;[45] and where, after the filing of, and prior to the hearing on, a bill to restrain violation of a building restriction, defendant made alterations in a concededly offending portion of a building so as to leave it in unobjectionable form, costs incurred up to the hearing may be taxed against defendant, and costs arising by reason of the hearing and thereafter may be taxed against complainant.[46]

Items taxable. Costs unnecessarily made by complainant cannot be taxed in his favor.[47] Where a penalty amounting to a certain percentage is allowed by statute, it is recoverable only under the conditions prescribed by statute.[48] Defendant, if successful, is entitled to the costs of a previous motion to dissolve a preliminary injunction, whether such motion was granted or denied,[49] unless the court at the time of hearing the motion ordered that neither party should be entitled to costs of the motion.[50] The costs in an enjoined action at law may be given defendant in equity where he actually had

31. U.S.—Fidler v. Roberts, C.C.A. Ill., 41 F.2d 305.

Allowance out of fund refused
Tenn.—Dalton v. Kimsey, 52 S.W.2d 465, 165 Tenn. 116.

Controversy becoming moot pendente lite
(1) In one state it was held that employer suing to enjoin picketing and other allegedly unlawful features of strike would not be deprived of costs by cessation of defendants' wrongful conduct pendente lite.—General Leather Products Co. v. Luggage & Trunk Makers Union, Local No. 49, 183 A. 165, 119 N.J.Eq. 432, appeal dismissed 187 A. 582, 121 N.J.Eq. 101.

(2) Later, however, it was held, in suit to enjoin picketing, that, where order for preliminary injunction was reversed and subsequently vice chancellor refused to proceed to final hearing and dismissed the bill on ground that issues had become moot, vice chancellor abused his discretion in awarding costs to complainant.—Dolan Dining Co. v. Cooks' and Assistants' Union, Local No. 399, A. F. of L., 15 A.2d 453, 128 N.J.Eq. 210, reversing 9 A.2d 503, 126 N.J.Eq. 445.

32. N.Y.—Johnson v. Taber, 10 N.Y. 319.

33. Mich.—Miller v. Ashton, 216 N. W. 448, 241 Mich. 46.

34. Pa.—Orr v. Peters, 47 A. 849, 197 Pa. 606.
32 C.J. p 389 note 33.

35. U.S.—Andrus v. Berkshire Power Co., D.C.Conn., 197 F. 1016.
32 C.J. p 389 note 34.

36. U.S.—General Broadcasting System v. Bridgeport Broadcasting Station, D.C.Conn., 53 F.2d 664.

37. N.Y.—Addesleigh Park Homes v. Bouchey, 13 N.Y.S.2d 208.

38. Wash.—Weyerhaeuser Timber Co. v. Skaglund, 132 P.2d 724, 16 Wash.2d 29.

39. Ky.—Golden v. Maupin, 2 J.J. Marsh 236.
32 C.J. p 389 note 35.

40. Tex.—Pickerell v. Irby, 125 S.W. 332, 59 Tex.Civ.App. 52.

41. Tex.—Tucker v. Brackett, 28 Tex. 336.

42. N.C.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275.

43. Pa.—McCaffrey's Appeal, 105 Pa. 253.

44. Mo.—Baum Mercantile Co. v. Levin, 174 S.W. 442, 189 Mo.App. 237.

45. N.Y.—Tecla Corporation v. Salon Tecla, 234 N.Y.S. 544, 226 App. Div. 168.

46. Del.—McDermott v. Wilson, 174 A. 282, 20 Del.Ch. 212.

47. N.J.—People's Brewing Co. v. Levin, 81 A. 1114, 78 N.J.Eq. 583.
32 C.J. p 390 note 41.

48. Tex.—Quarles v. Hardin, Civ. App., 197 S.W. 1112.
32 C.J. p 390 note 42.

49. N.Y.—Mann v. Rice, 3 Barb.Ch. 42—Otis v. Forman, 1 Barb.Ch. 30.

50. N.Y.—Van Wyck v. Alliger, 4 How.Pr. 164.

a legal demand for a portion of his claim at law admitted to be due.[51]

Sheriff's fees have been held taxable but should first be ascertained and allowed by the court.[52]

While it has been held or recognized to be proper under some circumstances to allow plaintiff attorney's fees for suing out and maintaining an injunction,[53] attorney's fees usually will not be allowed to complainant.[54] In some cases defendant has been refused attorney's fees.[55]

§ 222. Defects, Objections, and Exceptions

A party may be precluded by his acts, conduct, or omissions, or by provisions in the order or decree which are excessively favorable to him, from objecting to the order or decree or the mode of granting the injunction; and irregularities in the procedure may be of such a technical nature as not to affect the validity of the decree.

Noncompliance with the technical formalities relating to pleadings or procedure may not affect the validity of the decree.[56] Petitioner may not except to an order granting him the relief to which he is entitled;[57] nor can he successfully complain of relief properly awarded against him.[58] Where plaintiff is entitled to an absolute and unconditional judgment for injunction, it is not error of which defendant can complain that the judgment gave defendant the option of paying damages or being enjoined.[59] Also defendants against whom a decree for a mandatory injunction has been rendered have no just ground of complaint because the decree simply prescribes the work to be done and leaves to them free choice of means and method of performing the work.[60] It does not lie in the mouths of those who have brought about the situation necessitating injunctive relief to complain that the border line drawn in the decree between permissible and nonpermissible acts seems to them somewhat blurred and that there is a zone near the border line in which they feel uneasy.[61] Furthermore defendant may, by reason of his own iniquitous conduct, not be in a position to complain that the decree is impossible of performance.[62]

51. Ind.—Harvey v. Crawford, 2 Blackf. 43.
32 C.J. p 390 note 45.

52. Ill.—Fox v. Oriel Cabinet Co., 70 Ill.App. 322.

53. La.—Marine Bank & Trust Co. v. Shaffer, 116 So. 838, 166 La. 164 —Buclow v. Abell, 121 So. 657, 9 La.App. 624.
N.J.—Walter v. Danisch, 29 A.2d 897, 133 N.J.Eq. 127.
32 C.J. p 390 note 46.

Where defendant attempted to evade injunction and caused extra suit
N.Y.—Jewelers' Mercantile Agency v. Rothschild, 39 N.Y.S. 700, 6 App. Div. 499.

54. La.—Jackson v. Bouanchaud, 150 So. 567, 178 La. 26.
Ohio.—New York, C. & St. L. R. Co. v. Grodek, 186 N.E. 733, 127 Ohio St. 22, 89 A.L.R. 1091.
32 C.J. p 390 note 47.

Lack of showing of malice
Wife who enjoined execution on her property wrongfully seized for husband's debt was not entitled to recover attorney's fees as damages, where no malice was shown on part of seizing creditor and seizure was made on advice of counsel.—Marlatt v. Citizens' State Bank & Trust Co., 156 So. 426, 180 La. 387.

Where complainant is not entitled to costs, he is not entitled to attorney's fees.
N.J.—Dolan Dining Co. v. Cooks' and Assistants' Union, Local No. 399, A. F. of L., 15 A.2d 453, 128 N.J.Eq. 210, reversing 9 A.2d 303, 126 N.J. Eq. 445.
Tenn.—Dalton v. Kimsey, 52 S.W.2d 465, 165 Tenn. 116.

55. Tex.—Garrett v. Kelley, Civ. App., 6 S.W.2d 414, error refused.

Case not within statute
Pa.—Ralston v. Cunningham, 18 A.2d 112, 143 Pa.Super. 421.

Insufficient evidence of amount of fee
To authorize recovery of counsel fees necessarily incurred in the dissolution of a conservatory writ, the proof must definitely establish the amount of fee paid or agreed to be paid for such services.—Gaar v. Prudhomme, La.App., 181 So. 604.

56. Iowa.—Geyer v. Douglass, 52 N. W. 111, 85 Iowa 93.
32 C.J. p 375 note 64.

Disregard of statute requiring injunction order to specify acts restrained without reference to other document does not vitiate decree.—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491.

Failure to state reasons for decree enjoining orders of state authorities, although improper, does not invalidate decree.—Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co., Ark., 47 S.Ct. 724, 274 U.S. 597, 71 L.Ed. 1224.

Improper prohibition
Where equity court had jurisdiction, injunction was not wholly void because it contained some prohibitions that should not have been made.—Minerich v. U. S., C.C.A.Ohio, 29 F.2d 565, certiorari denied 49 S. Ct. 264, 279 U.S. 843, 73 L.Ed. 989.

Failure to strike prayer for mandatory injunction is not cause for setting aside interlocutory injunction, in a state where a mandatory injunction is not permitted, where the court did not heed the prayer and granted an injunction which was merely preventative and not mandatory.—McCluskey v. Rakestraw, 144 S.E. 761, 167 Ga. 199.

57. Ga.—Burch v. Atlantic Life Ins. Co., 134 S.E. 84, 162 Ga. 376.

58. **Accounting**
Although insurance companies are not entitled to the injunctive relief sought, if one of the grounds on which they invoked the equitable jurisdiction of the court was that, since the policies provided that each company should only be liable for the proportion of any loss which the amount of its insurance bore to the whole insurance, an equitable accounting was proper, they cannot complain of a judgment against them respectively for their proportionate shares of the loss.—Spring Garden Ins. Co. v. Amusement Syndicate Co., Kan., 178 F. 519, 102 C.C.A. 29.

59. N.Y.—Eno v. Metropolitan El. R. Co., 8 N.Y.S. 197, 56 N.Y.Super. 313.
Wash.—Hart v. Seattle, 88 P. 205, 45 Wash. 300, 13 Ann.Cas. 438.

60. U.S.—Converse v. Portsmouth Cotton Oil Refining Corp., C.C.A. Va., 281 F. 981, certiorari denied 43 S.Ct. 13, 260 U.S. 724, 67 L.Ed. 482.

61. U.S.—U. S. v. First National Pictures, D.C.N.Y., 51 F.2d 552, vacating 34 F.2d 815, reversed 51 S.Ct. 45, 282 U.S. 44, 75 L.Ed. 151.

62. N.Y.—Conviser v. J. C. Brownstone & Co., 205 N.Y.S. 82, 209 App.Div. 584.

Objections to the granting of a preliminary injunction usually must be taken before final hearing.[63] The right to object may be waived by the acts of defendant,[64] or at least it may be so waived in respect of irregularities in the granting of the injunction;[65] but notice to defendant as a prerequisite for the issuance of a preliminary injunction is not waived by a motion to vacate or set aside the order granting the injunction.[66] Whether the objection that equitable jurisdiction is lacking because of the existence of an adequate remedy at law is waived by failure to appear or answer depends on whether the existence of an adequate remedy at law does not or does so plainly or clearly appear that the trial court should of its own motion raise the objection.[67] Where defendant, after filing an answer, took it from the courthouse without calling the trial court's attention thereto and requesting a hearing, there was such negligence on his part as to deprive him after the term of any right to complain of an adverse judgment.[68]

§ 223. Enforcement

Where the court which granted an injunction had jurisdiction to do so, its jurisdiction continues for the purpose of enforcing the order or decree at the instance of the party who obtained it.

Where, by reason of lack of notice required by statute, the court was without jurisdiction to make the restraining order in question, any act looking to the enforcement of such order is clearly in excess of the jurisdiction of the court;[69] but where the court had jurisdiction to make or render the injunctive order or decree jurisdiction continues in it to enforce such order or decree.[70] The court which granted an injunction is invested with large discretion in enforcing obedience to its mandate;[71] and an objection that the decree cannot be enforced is without substance or validity where all the parties who acted in concert to create the condition complained of are before the court and subject to its mandate.[72] The writ or decree may be enforced by contempt proceedings, as discussed infra § 257 et seq, and sometimes a writ of assistance is proper.[73] The court which has ordered that a particular use of property shall cease can stop the operation of the property, to insure that it will not be operated in a forbidden way, until such time as the court is satisfied that its orders will be obeyed.[74] However, a court of equity has no jurisdiction to police complainant's property in anticipation of future violations threatened.[75]

Subject to appropriate limitations,[76] the party who obtained an injunction has a right to have it enforced by the court;[77] but the injunction ordinarily will not be enforced at the instance of a third person who is not himself entitled to the restraint.[78]

63. Kan.—Freeland v. Stillman, 30 P. 235, 49 Kan. 197.
32 C.J. p 375 note 61.

64. Kan.—Freeland v. Stillman, supra.

65. Ala.—Badham v. Johnston, 193 So. 420, 239 Ala. 48—Barnett v. State ex rel. Simpson, 179 So. 208, 235 Ala. 326, followed in Broadfoot v. State ex rel. Simpson, 179 So. 208, 235 Ala. 388.
Wis.—Joachim v. Madison Dental Clinic, 257 N.W. 143, 216 Wis. 261.

66. Ill.—Rossman v. Chapman, 37 N.E.2d 911, 312 Ill.App. 185.
32 C.J. p 375 note 62 [a].

67. U.S.—Central Power Co. v. Nebraska City, C.C.A.Neb., 112 F.2d 471—Church v. Hubbard, C.C.A. Mich., 91 F.2d 406.

68. Tex.—National Bank of Hopewell, Va., v. Marshall, Civ.App., 2 S.W.2d 471, error dismissed.

69. Mo.—State ex rel. Kansas City Exchange Co. v. Harris, 81 S.W.2d 632, 229 Mo.App. 721.

70. Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.
Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, opinion supplemented 19 N.E.2d 465, 215 Ind. 365.

Chancellor has power and duty to see that injunction granted pendente lite to preserve status quo is not violated by defendant.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

Scope of authority
La.—McDonogh v. Calloway, 7 Rob. 442.
N.Y.—Hammond v. Fuller, 1 Paige 197.
Tex.—Herring v. Houston Nat. Exch. Bank, 255 S.W. 1097, 113 Tex. 337.

71. Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654.
32 C.J. p 508 note 86.
Discretion as to punishment in contempt proceedings see infra § 276.

72. N.Y.—Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 162 Misc. 177.

73. Md.—Garretson v. Cole, 1 Harr. & J. 370.
32 C.J. p 389 note 22.

74. Colo.—United Gilpin Corporation v. Wilmore, 68 P.2d 34, 100 Colo. 453.

75. U.S.—Consolidated Coal & Coke Co. v. Beale, D.C.Ohio, 282 F. 934.

76. N.Y.—City of Albany v. Newhof, 246 N.Y.S. 100, 230 App.Div. 687, affirmed 177 N.E. 183, 256 N.Y. 661.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Wis.—Ward v. Prospect Manor Corporation, 231 N.W. 172, 202 Wis. 179.

77. Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

Name in which proceedings brought
Where an injunction was granted, subsequent proceedings for a coercive order to compel compliance with decree were not required to be brought in name of the state.—Delorme v. International Bartenders' Union, Local 624, 139 P.2d 619, 18 Wash.2d 444.

78. U.S.—Weideman v. Newton Arms Co., D.C.N.Y., 260 F. 348.
32 C.J. p 389 note 25.

Provision in decree for payments to employees
A consent judgment restraining an employer from violating certain provisions of a statute and providing for payment by the employer of certain amounts of money to his employees is not enforceable by means of an execution at law, the employees being at the most only beneficiaries, and not parties to the proceeding, and there being no money

V. CONTINUING, DISSOLVING, DISCHARGING, OR MODIFYING INJUNCTIONS

§ 224. Persons Entitled to Make Application

As a general rule, only a party with a substantial interest may move to dissolve an injunction. One who has violated the injunction is not thereby absolutely barred from moving its dissolution; but if he has been found in contempt he cannot ordinarily move to dissolve until he purges himself of contempt.

Although there is authority to the contrary,[79] it is generally held that only a party to the suit can move to dissolve the injunction,[80] and he must have a substantial interest;[81] but defendant who has not been served may appear and move to dissolve,[82] although by the practice of the particular jurisdiction, he may be required to obtain leave of court so to do.[83] The mere fact that the moving party has violated the injunction, where he has not been adjudged guilty of contempt, does not preclude the motion,[84] especially where the nature and extent of the punishment to be inflicted for the contempt must depend somewhat on the determination of the motion to dissolve.[85] In any event, when the court entertains the motion, the fact that defendant has violated the injunction will influence the court against granting his motion in so far as the decision is discretionary.[86] A person who has not complied with an injunction has no right to ask for a modification of it.[87]

Parties in contempt. Although there is some authority to the effect that the court may in its discretion dissolve an injunction, even though defendant is in contempt for violating it,[88] the general rule is that one who is in contempt of court for disobeying its injunction cannot move to dissolve until he purges himself of the contempt,[89] although he has a legal right to demand a hearing respecting the regularity and propriety of an ex parte order granting the injunction.[90]

§ 225. Persons Who May Oppose Application

New parties brought in as complainants, as well as the original complainants, may oppose the dissolution of an injunction.

Aside from the original complainants, the dissolution of an injunction may be opposed by new parties who have been properly brought in as complainants;[91] but interveners cannot oppose unless they show that they themselves would have been entitled to the issuance of the injunction.[92]

§ 226. Discretion of Court

The continuation, modification, or dissolution of an injunction or restraining order is very largely a matter of discretion.

The continuing or dissolving of an injunction,[93]

judgment in their favor.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622, reversing, D.C., 36 F.Supp. 138.

79. La.—Robertson v. Bosque, 6 La. 306.
32 C.J. p 408 note 13.

80. Nev.—State ex rel. Garaventa Land & Livestock Co. v. Second Judicial Dist. Court in and for Washoe County, 128 P.2d 266, 268, 61 Nev. 350, citing **Corpus Juris.**
32 C.J. p 409 note 14.

Parties held entitled
Defendant against whom mandatory preliminary injunction was granted.—State v. Mart, 295 P. 459, 135 Or. 603.

81. N.C.—James v. Norris, 57 N.C. 225.
32 C.J. p 409 note 15.

Interest sufficient
Where lease was deposited with bank for delivery to plaintiff on payment of draft attached and plaintiff refused to accept lease, and enjoined bank from returning lease to defendant, bank had an interest in seeking dissolution of injunction, although it was a mere stakeholder.—Witbeck v. Rea, 105 So. 43, 158 La. 1003.

Part not operative against movant
Where part of temporary injunction in judgment creditors' mandamus action against town prohibited other judgment creditors from bringing separate actions and judgment creditors did not object thereto, vacating entire injunction on motion of town alone was error.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 187 S.C. 89.

82. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
32 C.J. p 409 note 16.

83. N.J.—Allman v. United Brotherhood C. & J. A., 81 A. 116, 79 N.J.Eq. 150, affirmed 83 A. 1118, 79 N.J.Eq. 641.
32 C.J. p 409 note 17.

84. Mont.—State v. Clancy, 61 P. 987, 24 Mont. 359.
32 C.J. p 409 note 20.

85. Ala.—Crabtree v. Baker, 75 Ala. 91, 51 Am.R. 424.
32 C.J. p 409 note 21.

86. N.Y.—Michel v. O'Brien, 27 N.Y.S. 173, 6 Misc. 408.
Va.—Turpin v. Jefferson, 4 Hen. & M. 483, 14 Va. 483.

Effect of consent of parties
In suit against labor organization and individual defendants wherein injunction was granted, motion to set aside judgment and dismiss suit made by all parties after agreement had been reached was required to be denied where, after injunction was granted, witness for complainant was assaulted on return to his home after which contempt rule was made and contempt proceeding transferred to district where alleged assault was committed, and term at which judgment was issued had expired.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262.

87. Puerto Rico.—Semidey v. Central Aguirre Co., 6 Puerto Rico Fed. 212.

88. Ala.—Crabtree v. Baker, 75 Ala. 91, 51 Am.R. 424.
W.Va.—Swinburn v. Smith, 15 W.Va. 483.

89. Mass.—Campbell v. Justice Super. Ct., 73 N.E. 659, 187 Mass. 509, 69 L.R.A. 311, 2 Ann.Cas. 462.
32 C.J. p 409 note 19.

90. Wis.—Kaehler v. Dobberpuhl, 14 N.W. 631, 56 Wis. 497.

91. N.J.—Warren v. Pim, 55 A. 66, 65 N.J.Eq. 36.

92. Tex.—Taylor v. Gillean, 23 Tex. 508.

93. Ala.—Cruce v. McCombs, 129 So. 279, 221 Ala. 507—Jenkins v. Steel

or restraining order,[94] or the modification of an injunction[95] or restraining order,[96] like the granting or refusing of an injunction or restraining order, considered supra § 14, is very largely a matter of judicial discretion to be determined by the facts of each particular case. This discretion is not an arbitrary one, but a sound legal discretion to be exercised with a proper regard to established rules;[97] and should be so exercised as to prevent injury, having in mind the situation of the parties.[98] The court which is to exercise this discretion is the court of original jurisdiction and not the appellate court.[99]

Prospect of irreparable injury. By express provisions of some statutes this discretion does not exist at all where the act prohibited by injunction is such as may work irreparable injury to plaintiff;[1] but even in such cases the court must, on defendant's giving bond to dissolve, determine whether the act prohibited is not such as may cause irreparable injury to plaintiff,[2] and its judgment in such respect is subject to review by the appellate court in the exercise of its supervisory jurisdiction.[3] In the ab-

Cities Chemical Co., 95 So. 22, 208 Ala. 643.
Conn.—Olcott v. Pendleton, 22 A.2d 633, 128 Conn. 292.
Fla.—Daoud v. City of Miami Beach, 199 So. 582, 145 Fla. 449—Clark v Kreidt, 199 So. 333, 145 Fla. 1—Davis v. Wilson, 190 So. 716, 139 Fla. 698—Masser v. London Operating Co., 145 So. 72, 106 Fla. 474—Willis v. Hathaway, 117 So. 89, 95 Fla. 608.
Ga.—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536—Brinson v. Youmans, 23 S.E.2d 89, 68 Ga.App. 378.
Ill.—Kuhl v. Clark, 261 Ill.App. 491—Fishwick v. Lewis, 258 Ill.App. 402.
Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845—Usailis v. Jasper, 271 N.W. 524, 222 Iowa 1360—People's Sav. Bank v. McCarthy, 222 N.W. 372, 207 Iowa 162.
La.—W. L. Douglas Shoe Co. v. Vredenberg, 104 So. 309, 158 La. 512—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174—David Bernhardt Paint Co. v. Rud D. Bernhardt Co., 95 So. 420, 153 La. 113—Guidry v. Board of Com'rs, Lafourche Basin Levee Dist., 129 So. 688, 19 La.App. 696.
Mich.—Furniture Mfrs.' Ass'n of Grand Rapids v. Grand Rapids Guild of Exhibitors, 256 N.W. 595, 268 Mich. 685—Flemming v. Heffner & Flemming, 248 N.W. 900, 263 Mich. 561.
Minn.—East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1352, 298 N.W. 722, 210 Minn. 433.
N.J.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 51, 120 N.J.Eq. 307.
N.Y.—R. Prescott & Son v. Nye, 228 N.Y.S. 156, 223 App.Div. 356.
Okl.—Wright v. City of Guthrie, 1 P.2d 162, 150 Okl. 171—Miller v. White, 265 P. 646, 129 Okl. 134—Stout v. Pardoe, 261 P. 866, 128 Okl. 3—Midland Valley R. Co. v. Imler, 225 P. 919, 101 Okl. 298.
Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Iden v. Lippard, Civ. App., 153 S.W.2d 642—Pancake v. Kansas City Life Ins. Co., Civ. App., 134 S.W.2d 776—Sheppard v. Jacksboro Refining Co., Civ.App., 123 S.W.2d 497, error dismissed, judgment correct—Mast v. Oakley-Metcalf Funeral Home, Civ.App., 101 S.W.2d 819—Aldridge Seed Farms v. Texas Centennial Central Exposition, Civ.App., 95 S.W.2d 1051—Fisher v. Frito Co., Civ.App., 81 S.W.2d 282—Pearce v. Atlantic Life Ins. Co., Civ.App., 36 S.W.2d 553—City of Lufkin v. Behannon, Civ.App., 8 S.W.2d 329—Hudson v. Kerby, Civ.App., 5 S.W.2d 1007—Merrell v. Moore, Civ.App., 300 S. W. 953—Capy v. Redlinger, Civ. App., 297 S.W. 276—Dilworth v. Buchanan, Civ.App., 275 S.W. 177—Meyer v. Cockcroft, Civ.App., 273 S.W. 665—Wilmut v. Franklin, Civ. App., 268 S.W. 971—Fry v. Jackson, Civ.App., 264 S.W. 612—Moon v. Thomas, Civ.App., 261 S.W. 476.
W.Va.—Huffman v. Chedester, 27 S. E.2d 272—State v. Navy, 17 S.E. 2d 626, 123 W.Va. 722—Kessel v. Cohen, 140 S.E. 15, 104 W.Va. 296.
Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.
32 C.J. p 390 note 50.

Where facts pleaded conflict

Where facts alleged in verified pleadings are conflicting on the issue finally to be determined, the matter of dissolving temporary injunction is largely within trial court's discretion.—Tips v. Railroad Commission of Texas, Tex.Civ.App., 110 S.W.2d 585, error dismissed.

94. U.S.—Central Hanover Bank & Trust Co. v. Callaway, C.C.A.Ga., 135 F.2d 592, affirming, D.C., In re Central of Georgia Ry. Co., 48 F.Supp. 445.
Ark.—Riggs v. Hill, 144 S.W.2d 26, 201 Ark. 206.
Fla.—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.
Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 52 Idaho 728.
Minn.—East Lake Drug Co. v. Pharmacists and Drug Clerks' Union, Local No. 1353, 298 N.W. 722, 210 Minn. 433.
Tex.—Crouch v. Crouch, Civ.App., 164 S.W.2d 35—Aldridge Seed Farms v. Texas Centennial Central Exposition, Civ.App., 95 S.W.2d 1051—Johnson v. Martinez, Civ.App., 289 S.W. 198.
32 C.J. p 391 note 51.

95. Cal.—Hobbs v. Amador & Sacramento Canal Co., 4 P. 1147, 66 Cal. 161.
N.Y.—Stanley v. Pollard, 25 N.Y.S. 766, 5 Misc. 490.

96. Fla.—Thursby v. Stewart, 138 So. 742, 103 Fla. 990.

97. W.Va.—Huffman v. Chedester, 27 S.E.2d 272.
32 C.J. p 391 note 56.

Discretion held not abused

Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Davis, Civ.App., 73 S.W.2d 989—Lewis Ice & Cold Storage Co. v. Gibbons, Civ.App., 49 S.W.2d 958—City of Lufkin v. Behannon, Civ.App., 8 S.W.2d 329—Capy v. Redlinger, Civ.App., 297 S.W. 276.

Where facts are undisputed or conceded, it is an abuse of discretion by the court to rule on a motion to dissolve without applying the law to such facts.—Southland Life Ins. Co. v. Egan, 86 S.W.2d 722, 126 Tex. 160, reversing, Civ.App., 79 S.W.2d 899.

98. Wyo.—Anderson v. Englehart, 108 P. 977, 18 Wyo. 409—Collins v. Stanley, 88 P. 620, 15 Wyo. 282, 123 Am.S.R. 1022.

99. U.S.—Kemmerer v. Midland Oil & Drilling Co., Okl., 229 F. 872, 144 C.C.A. 154.

1. La.—New Orleans Live Stock Exch. v. Crescent City Stock Yards & Slaughter House Co., 86 So. 659, 148 La. 77.

2. La.—Cameron v. Godchaux, 20 So. 710, 48 La.Ann. 1345.
32 C.J. p 391 note 61.

3. La.—New Orleans Live Stock Exch. v. Crescent City Stock Yards

sence of such a statute, however, even though complainant swears that an irreparable injury will occur, the court has discretion to dissolve the injunction on security to be given by defendant.[4]

Decision dependent on question of law. It has been held that the rule that the dissolution of a temporary injunction rests in the sound discretion of the trial court does not apply to cases involving questions of law arising on the face of the petition itself.[5] Thus, the court has no discretion, but must dissolve the injunction, where the only question is as to the validity of a statute, and from the face of the pleadings it appears that as a matter of law complainant has no right to an injunction.[6]

Dissolution for want of jurisdiction by the issuing court is not a matter of discretion.[7]

Control of discretion by reviewing court. As considered in Appeal and Error § 1591, in the absence of manifest abuse of discretion, an appellate court will not review or control discretionary rulings as to the continuance, dissolution, or modification of an injunction or restraining order. The reviewing court will require a very clear case of prejudicial error before reversing a ruling affecting an interlocutory injunction, for the ruling does not operate as a final adjudication, and ordinarily the rights of the parties may be fully protected when the case is heard on its merits.[8] It is similarly held, as considered in the C.J.S. title Mandamus § 110, also 38 C.J. p 653 note 59, that the discretion of the court in continuing, dissolving, or modifying injunctions will not ordinarily be controlled by mandamus.

§ 227. Relative Convenience or Injury

The relative convenience or injury to the parties likely to result from the court's decision may be of controlling weight in determining whether an injunction should be continued or dissolved.

The principle, considered supra § 30, that the relative convenience or inconvenience that may be suffered by the parties by the allowance of a temporary injunction may be of controlling weight in determining whether such an injunction may be granted, applies with equal force to applications to dissolve injunctions.[9] Where the dissolution would work greater injury to complainant than its continuance would cause defendant, the injunction will ordinarily be continued.[10] If the continuance will

& Slaughter House Co., 86 So. 659, 148 La. 77—Lake Charles v. Lake Charles R. L. & Waterworks Co., 80 So. 260, 144 La. 217.

4. Ga.—Fouché v. Rome St. R. Co., 10 S.E. 726, 84 Ga. 233—Doolittle v. East Tennessee, V. & G. R. Co., 6 S.E. 918, 80 Ga. 658—Moore v. Atlanta, 70 Ga. 611.

5. Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845.

6. Iowa.—Burlington, C. R. & N. R. Co. v. Dey, 48 N.W. 98, 82 Iowa 312, 31 Am.S.R. 477, 12 L.R.A. 436.

7. Tex.—Price v. County School Trustees of Navarro County, Civ. App., 192 S.W. 1140.

Want of jurisdiction as ground for dissolution see infra § 241 a.

8. Iowa.—H. W. Gossard Co. v. Crosby, 109 N.W. 483, 132 Iowa 155, 6 L.R.A.,N.S., 1115.

32 C.J. p 391 note 65.

9. Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394.

La.—David Bernhardt Paint Co. v. Rud D. Bernhardt Co., 95 So. 420, 153 La. 113.

N.J.—Wilentz v. Hendrickson, 33 A. 2d 366, 133 N.J.Eq. 447.

N.Y.—Squier v. Houghton, 226 N.Y.S. 172, 131 Misc. 136.

N.C.—Banner v. Carolina Button Corporation, 184 S.E. 508, 209 N.C. 697—Little v. Wachovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Porter v. Jefferson Standard Life Ins. Co., 178 S.E. 223, 207 N.C. 646—Boushiar v. Willis, 177 S.E. 632, 207 N.C. 511—Troutman v. Shuford, 174 S.E. 230, 206 N.C. 909—Teeter v. Teeter, 171 S.E. 620, 205 N.C. 438—Holder v. Home Mortg. Co., 170 S.E. 630, 205 N.C. 207—Cullins v. North Carolina State College of Agriculture and Engineering, 151 S.E. 646, 198 N.C. 337—Brown v. Aydlett, 136 S.E. 721, 193 N.C. 832—Wentz v. Piedmont Land Co., 135 S.E. 480, 193 N.C. 32—Brinkley v. Norman, 129 S.E. 145, 190 N.C. 851—Johnson v. Jones, 119 S.E. 231, 186 N.C. 235.

Tex.—Iden v. Lippard, Civ.App., 153 S.W.2d 642—Sheppard v. Jacksboro Refining Co., Civ.App., 123 S.W.2d 497, error dismissed, judgment correct—Pearce v. Atlantic Life Ins. Co., Civ.App., 36 S.W.2d 553—Great Plains Oil & Gas Co. v. Cox, Civ. App., 5 S.W.2d 796, 798, quoting **Corpus Juris**—Genitempo v. Anderson, Civ.App., 246 S.W. 742.

W.Va.—Tennant v. Coyne, 196 S.E. 559, 120 W.Va. 137.

32 C.J. p 392 note 69.

"In deciding whether it . . . should be continued or dissolved, the court is called upon to balance the results which may be caused to one party or the other, and if it appears that to dissolve it may result in great harm to the plaintiff and little to the defendant, the court may well exercise its discretion in favor of its continuance, unless indeed, it is very clear that the plaintiff is without legal right."—Olcott v. Pendleton, 22 A.2d 633, 635, 128 Conn. 292.

10. Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394.

Conn.—Olcott v. Pendleton, 22 A.2d 633, 128 Conn. 292.

Ill.—Fishwick v. Lewis, 258 Ill.App. 402.

N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J. Eq. 283.

N.C.—Banner v. Carolina Button Corporation, 184 S.E. 508, 209 N.C. 697—Little v. Wachovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Hare v. Hare, 178 S.E. 545, 207 N. C. 849—Porter v. Jefferson Standard Life Ins. Co., 178 S.E. 223, 207 N.C. 646—Boushiar v. Willis, 177 S.E. 632, 207 N.C. 511—Troutman v. Shuford, 174 S.E. 230, 206 N.C. 909—Teeter v. Teeter, 171 S.E. 620, 205 N.C. 438—S. B. Parker Co. v. Commercial Nat. Bank of High Point, 157 S.E. 419, 200 N. C. 441—Cullins v. North Carolina State College of Agriculture and Engineering, 151 S.E. 646, 198 N.C. 337—Wentz v. Piedmont Land Co., 135 S.E. 480, 193 N.C. 32—Brinkley v. Norman, 129 S.E. 145, 190 N.C. 851—Johnson v. Jones, 119 S.E. 231, 186 N.C. 235.

Pa.—York Rys. Co. v. Driscoll, 45 Dauph.Co. 83.

work no injury but will merely maintain the status quo the injunction will not be dissolved.[11] On the other hand, the injunction will be dissolved in case it appears that greater injury is being done by its continuance than will be done by its dissolution,[12] especially where the equities of the bill are fully answered;[13] and even though the equity of the bill is not answered, the court may in its discretion dissolve the injunction on grounds of relative convenience.[14]

§ 228. Injury or Inconvenience to Public or Third Persons

In considering a motion to dissolve, the interests of the public and third persons will be given weight.

As in the case of granting or refusing an injunction, considered supra § 31, the interests of the public and third persons will be given weight in considering a motion to dissolve.[15] For instance, where a public improvement is being interfered with by the continuance of the injunction, a dissolution will be favored;[16] while if the dissolution of an injunction would cause interference with, and confusion in, the public schools, the injunction will be continued.[17]

Tex.—Iden v. Lippard, Civ.App., 153 S.W.2d 642—Sheppard v. Jacksboro Refining Co., Civ.App., 123 S.W.2d 497, error dismissed, judgment correct—Pearce v. Atlantic Life Ins. Co., Civ.App., 36 S.W.2d 553—Great Plains Oil & Gas Co. v. Cox, Civ.App., 5 S.W.2d 796, 798, quoting **Corpus Juris**—Genitempo v. Anderson, Civ.App., 246 S.W. 742.

32 C.J. p 392 note 70.

Where serious controversy exists

Refusal to dissolve restraining order and continuance thereof to hearing is not error, where serious controversy exists and continuance cannot harm defendant, while dissolution might injure plaintiff.—Ferebee v. Thomason, 171 S.E. 64, 205 N.C. 263—Holder v. Home Mortg. Co., 170 S.E. 630, 205 N.C. 207—Brown v. Aydlett, 136 S.E. 721, 193 N.C. 832.

11. Ill.—Fishwick v. Lewis, 258 Ill. App. 402.

N.J.—Peters v. Public Service Corporation, 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J. Eq. 283.

N.Y.—City of Utica v. Park-Mill Corporation, 41 N.Y.S.2d 248—Bohl v. Schenectady, 220 N.Y.S. 349, 128 Misc. 863.

32 C.J. p 392 note 71.

12. Ala.—B. F. White Sacred Harp Musical Soc. of Alabama v. Jackson, 97 So. 706, 210 Ala. 218.

La.—David Bernhardt Paint Co. v. Rud D. Bernhardt Co., 95 So. 420, 153 La. 113.

N.Y.—Jenkins v. Marsh, 233 N.Y.S. 360, 225 App.Div. 401—Squier v. Houghton, 226 N.Y.S. 172, 131 Misc. 136.

N.C.—Tobacco Growers' Co-op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.

W.Va.—Tennant v. Kilcoyne, 196 S.E. 559, 120 W.Va. 137.

32 C.J. p 392 note 72.

Mandatory injunction

N.Y.—Byrnes v. Kaufwein Realty Co., 200 N.Y.S. 585, 206 App.Div. 306.

13. Ala.—B. F. White Sacred Harp Musical Soc. of Alabama v. Jackson, 97 So. 706, 210 Ala. 218.

N.Y.—Byrnes v. Kaufwein Realty Co., 200 N.Y.S. 585, 206 App.Div. 306.

32 C.J. p 392 note 72.

14. N.J.—Bechtel v. Carslake, 11 N. J.Eq. 244.

N.Y.—Jenkins v. Marsh, 233 N.Y.S. 360, 225 App.Div. 401.

15. Pa.—Appeal of Reynoldsville & F. C. R. Co., 19 A. 674, 134 Pa. 541.

32 C.J. p 393 note 76.

16. Ala.—Mobile & M. R. Co. v. Alabama Midland R. Co., 23 So. 57, 116 Ala. 51.

N.J.—Scanlan v. Howe, 24 N.J.Eq. 273.

17. Pa.—Edinboro Normal School v. Cooper, 24 A. 348, 150 Pa. 78.

18. Tex.—Wilkenfeld v. Ballard, Civ. App., 84 S.W.2d 279.

§ 229. Authority of Court or Officer

a. In general
b. In vacation or at chambers
c. Appellate courts or judges

a. In General

The court or judge who issued a temporary injunction has the power to dissolve or modify it; and, although a number of authorities hold otherwise, it is very generally held that a motion to dissolve or modify can be heard only by the judge granting the injunction, except in unusual circumstances.

On a motion to dissolve a temporary injunction, all reasonable intendments will be indulged in favor of the power of the court to act.[18] Except where otherwise provided by statute, the court or judge who issued the temporary injunction has also the implied power to dissolve or modify it.[19] Such power has been held to be inherent in a court of equity;[20] and clearly it exists where the right to dissolve or modify is reserved in the injunction order,[21] or where it is expressly given by statute.[22] If the court in which the injunction was obtained has lost jurisdiction of the subject matter, it has no jurisdiction to hear a motion to modify or dissolve the injunction.[23]

19. U.S.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F. 2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.

Ark.—Dobbins Bros. v. Anderson, 135 S.W.2d 325, 199 Ark. 635.

Cal.—Ward v. McKinsey, 276 P. 403, 98 Cal.App. 108.

Ga.—Brinson v. Youmans, 23 S.E.2d 89, 68 Ga.App. 378.

Ill.—Litzelman v. Town of Fox, 1 N. E.2d 915, 285 Ill.App. 7.

La.—Morgan v. Morgan Plan Co. of New Orleans, 113 So. 795, 164 La. 140.

32 C.J. p 393, notes 80, 81.

20. U.S.—Indiana Quartered Oak Co. v. Federal Trade Commission, C.C. A., 58 F.2d 182, modifying 26 F.2d 340, certiorari denied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544.

21. Cal.—Wheeler v. Superior Court in and for City and County of San Francisco, 255 P. 275, 82 Cal.App. 202.

22. Neb.—Browne v. Edwards & McCulloch Lumber Co., 62 N.W. 1070, 44 Neb. 861.

32 C.J. p 393 note 83.

23. Cal.—Danley v. Superior Court,

It is very generally held that motions to dissolve or modify an injunction or restraining order can be heard only by the judge granting it.[24] However, a number of authorities, some by reason of statutory provision, hold otherwise,[25] and it has been variously held that such a motion may or should be heard at special term,[26] or by the court that granted the injunction,[27] or by the chancellor of the district in which the suit is pending,[28] or by a judge sitting in the suit in which the preliminary injunction was granted.[29] The motion to dissolve must generally be heard in the district and in the same court in which the suit is pending.[30] It has been held that even where statutory authority is conferred on one judge to review the order of another, or to modify or dissolve an injunction granted by another judge, the power exists only in respect of injunctions granted by judges expressly designated in the statute.[31]

However, exceptions to the rule are sometimes made when rendered necessary by the exigencies of the particular case. Thus, an injunction may be modified or dissolved by a judge or judges other than the judge granting it, after the death of the latter.[32] A succeeding judge may modify a preliminary injunction issued by his predecessor.[33] So it is proper for the regular judge to dissolve or modify an injunction granted by another temporarily called in from another court by reason of the absence of the regular judge,[34] and conversely, a judge of a circuit adjoining that of a judge issuing an injunction pendente lite has jurisdiction to hear a motion to vacate the injunction, where the latter judge was absent from his circuit when the notice of motion was served.[35] Where one judge has issued a temporary injunction with leave to other persons interested to become parties and move for a dissolution thereof, another judge has jurisdiction to dissolve the injunction on the motion of such new party.[36]

Three-judge court. Under the provisions of an act of congress, a single judge has no power to dissolve a restraining order suspending the enforcement of a state statute on the ground of unconstitutionality. The hearing of an application for this purpose must, by the express provisions of the statute, be had by three judges.[37] The federal statute providing that no interlocutory or permanent injunction restraining the enforcement of an act of congress on the ground that it is unconstitutional shall be granted except on an application to, and a hearing and determination by, a three-judge court, does not require a petition to modify an existing permanent injunction theretofore issued pursuant to a final decree.[38]

A court commissioner has only such power to dissolve an injunction as is conferred on him by the court referring the matter to him.[39]

On court's own motion. Where it appears certain that an injunction has been issued in a case where the party asking it had no right to it, the court may dissolve the injunction on its own mo-

in and for Merced County, 222 P. 362, 64 Cal.App. 594.

24. U.S.—Westerly Waterworks v. Westerly, C.C.R.I., 77 F. 783.
32 C.J. p 393 note 86.

25. N.Y.—Ramsey v. Erie R. Co., 7 Abb.Pr.,N.S., 156, 38 How.Pr. 193.

26. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371—Ramsey v. Erie R. Co., 7 Abb.Pr.,N.S., 156, 38 How.Pr. 193.

27. Utah.—Thompson v. Liquor Control Commission of Utah, 52 P.2d 463, 87 Utah 578.

28. Miss.—Edward E. Morgan Co. v. City of Natchez, 196 So. 251, 188 Miss. 781.

In vacation

Motion in vacation to dissolve preliminary injunction granted by special judge under agreement of attorneys was held improperly presented to chancellor of another district.—Canal Bank & Trust Co. v. Brewer, 113 So. 552, 147 Miss. 885, motion overruled 114 So. 127, 147 Miss. 885.

29. Or.—State v. Mart, 295 P. 459, 135 Or. 603.

30. Miss.—Adams v. Kyzer, 61 Miss. 407.
32 C.J. p 393 note 87.

Power of judge of other district

Although, under Code Civ.Proc. § 188, a judge of a district other than that in which a case is pending had authority to issue a restraining order in the case, he could not vacate or modify the same.—Mauney v. Montgomery County, 71 N.C. 486.

31. Ark.—Sanders v. Plunkett, 40 Ark. 507.
32 C.J. p 393 note 85 [a].

32. U.S.—Westerly Waterworks v. Westerly, C.C.R.I., 77 F. 783.
32 C.J. p 393 note 89.

33. Puerto Rico.—Semidey v. Aguirre Co., 7 Puerto Rico Fed. 185.

34. Mo.—State v. Bird, 202 S.W. 436, 199 Mo.App. 76.
32 C.J. p 393 note 91.

Chancellor acting in absence of judge cannot dissolve order issued for him.—Dobbins Bros. v. Anderson, 135 S.W.2d 325, 199 Ark. 635.

35. S.C.—Coward v. Jones, 166 S.E. 96, 167 S.C. 118.

36. S.C.—Bouknight v. Davis, 12 S.E. 96, 33 S.C. 410.

37. U.S.—Ex parte Metropolitan Water Co., Kan., 31 S.Ct. 600, 220 U.S. 539, 55 L.Ed. 575.
Jurisdiction of three-judge court with respect to injunctions generally see supra § 168.

Amendment of decree

Single judge has jurisdiction to amend decree granting permanent injunction after hearing before three judges, if necessary to conform to proof.—Great Falls Gas Co. v. Public Service Commission of Montana, D.C.Mont., 39 F.2d 176.

38. U.S.—Washington Water Power Co. v. City of Coeur D'Alene, D.C. Idaho, 24 F.Supp. 790.

39. Cal.—Stone v. Bunker Hill Copper, Gold & Silver Mining Co., 28 Cal. 497.

tion,[40] and without hearing[41] or notice.[42]

b. In Vacation or at Chambers

A judge may modify or dissolve an injunction at chambers or in vacation where, and only where, he is authorized to do so by statute.

While, in the absence of statutory authorization an injunction cannot be dissolved except in term time in the absence of consent of the parties,[43] in many jurisdictions, either by authority incidental to his power to grant injunctions at chambers or in vacation, or by express statutory authority permitting him to do so, a judge may modify or dissolve an injunction at chambers or in vacation,[44] provided the necessary notice has been given complainant;[45] and in such cases he necessarily has jurisdiction to settle all questions preliminary and incidental to the exercise of his authority.[46] Except as otherwise controlled by statute, a judge having power to modify or dissolve an injunction at chambers or in vacation has no power to determine the merits of the controversy,[47] the only question to be settled on the motion to modify or dissolve being whether or not the injunction shall be modified, dissolved, or continued.[48]

Place of hearing. Where power is conferred to dissolve an injunction in vacation without any provision as to where the hearing should occur, the judge may act in vacation in any county within his district.[49]

c. Appellate Courts or Judges

In some jurisdictions appellate courts have power to suspend, modify, or dissolve an injunction on appeal.

In some jurisdictions appellate courts have power to suspend, modify, or dissolve an injunction on appeal.[50]

In Kentucky the statutes giving a judge of the court of appeals power to dissolve a temporary injunction on motion do not apply to a permanent injunction granted by a final decision of the circuit court;[51] although the statutes authorize dissolution of a temporary injunction by a single judge of the court of appeals, this does not prevent the moving party from asking more than one judge or all the judges, if they will, to hear the motion, and their joint action is as efficacious as that of any one of their number.[52]

In Ohio it has been held that the general assembly cannot confer on a judge of the supreme court jurisdiction at chambers to grant or dissolve an injunction in a cause pending in another court;[53] and it has been held that the supreme court cannot dissolve an injunction issued in a suit in chancery pending in the court of common pleas.[54]

In South Carolina, although the supreme court may issue injunctions, it cannot dissolve an injunction granted by the circuit court.[55]

§ 230. Imposition of Terms

The court may in its discretion impose terms as a condition for the granting of an order continuing, modifying, or dissolving an injunction.

The court may in its discretion impose terms on the granting of an order continuing or dissolving an injunction,[56] such as will protect both parties,[57] but it is of course necessary that good grounds for

40. Ga.—Brinson v. Youmans, 23 S.E.2d 89, 68 Ga.App. 378.
Ill.—Litzelman v. Town of Fox, 1 N.E.2d 915, 285 Ill.App. 7.
32 C.J. p 394 note 4.

Writ issued ex parte
Court granting preliminary injunction ex parte to continue until further order may dissolve it of its own motion, if satisfied order was improvidently made.—Ward v. McKinsey, 276 P. 403, 98 Cal.App. 108.

41. Ga.—Brinson v. Youmans, 23 S.E.2d 89, 68 Ga.App. 378.

42. N.J.—Conover v. Ruckman, 33 N.J.Eq. 303.
32 C.J. p 394 note 5.

43. La.—Teacle v. Hughes, 83 So. 457, 146 La. 195.
32 C.J. p 394 note 7.

44. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.
Tex.—Pulte v. Keel, Civ.App., 297 S.W. 241, reversed on other grounds Keel v. Pulte, Com.App., 10 S.W.2d 694.
W.Va.—McGibson v. Roane County Court, 121 S.E. 99, 95 W.Va. 338.
32 C.J. p 394 note 10.

45. W.Va.—Highland v. Strosnider, 191 S.E. 531, 118 W.Va. 647.

46. **Ruling on exceptions to answer**
The injunction plaintiff cannot deprive defendant of the benefit of his answer on the hearing in vacation of his motion to dissolve or postpone it until the next term by filing exceptions to the answer, and the motion and the exceptions may be taken up and heard at the same time and in vacation.—Sandusky v. Faris, 38 S.E. 563, 49 W.Va. 150.

47. S.C.—Seabrook v. Mostowitz, 29 S.E. 202, 51 S.C. 433.
32 C.J. p 394 note 13.

48. S.C.—Seabrook v. Mostowitz, 29 S.E. 202, 51 S.C. 433.
32 C.J. p 394 note 14.

49. Tex.—Wier v. Hill, 125 S.W. 366, 58 Tex.Civ.App. 370.
32 C.J. p 395 note 15.

50. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.

51. Ky.—Mooneyham v. Morris, 58 S.W.2d 246, 248 Ky. 124—Cox v. Jones, 235 S.W. 365, 193 Ky. 242.

52. Ky.—Thomas v. Thompson, 102 S.W. 849, 31 Ky.L. 524.

53. Ohio.—Pittsburg, Ft. W. & C. R. Co. v. Hurd, 17 Ohio St. 144.
32 C.J. p 394 note 93.

54. Ohio.—Carey v. Wyandot County, 20 Ohio 624—Griffith v. Crawford County, 20 Ohio 609.

55. S.C.—State v. Westmoreland, 7 S.E. 256, 27 S.C. 625.

56. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
32 C.J. p 395 note 16.
Bond see infra § 231.

57. Ga.—Read v. Dews, R.M.Charlt. 358.

the imposition of terms should be made to appear.[58] The court may also impose terms as a condition to the allowance of the modification of an injunction.[59] The modification of a temporary injunction granted plaintiff on condition that his rights in the suit should not be prejudiced does not affect his right to relief.[60]

§ 231. —— Giving Bond

a. In general
b. Validity and operation

a. In General

As a general rule the court has discretionary power to continue, dissolve, or modify an injunction on condition that the party in whose favor the order is made give bond for the protection of his adversary.

If the right is doubtful and the continuance of the injunction will cause defendant much greater damage than its dissolution will cause complainant, or if whatever damage complainant will suffer may be amply compensated in money, it is proper to dissolve the injunction on the giving of a proper indemnity bond by defendant,[61] and this is especially true if any public interests will suffer by continuing the injunction in force pending the litigation.[62] Where, however, the right to a dissolution of the injunction on giving bond is regulated by statute, a strict compliance with the statutory requirements is necessary;[63] and it is only in cases where the facts bring the case within the provisions of the statute that an injunction will be dissolved on giving bond.[64] The court will not dissolve an injunction on the giving of bond where the legal right is plain and clear and the violation of it is undoubted;[65] where complainant is likely to suffer an irreparable loss not to be adequately estimated or compensated in money in case the injunction is dissolved;[66] where the court finds that the status should be preserved;[67] or where, by the terms of a criminal or a quasi-criminal statute, it is made the mandatory duty of the attorney general to enjoin persons from violating its provisions.[68] An injunction, at the suit of a city to restrain defendant from carrying on a business until his license is paid, cannot be dissolved on bond.[69] In any event the matter rests largely in the discretion of the court,[70] and this discretion is not affected by reason of a sworn allegation in the petition that the acts apprehended will cause irreparable injury, for such allegations are not conclusive;[71] but allegations of fact as to the consequences of dissolving the injunction must be taken as true on a motion to dissolve on bond.[72] Where it appears that plaintiff is not entitled to a trial on the merits, a statutory bond is not required on dissolution of the injunction.[73]

On modification of an injunction, defendant may likewise be required to give a proper indemnity bond.[74]

58. N.J.—Northeastern Telephone & Telegraph Co. v. Hepburn, 69 A. 249, 73 N.J.Eq. 657.
32 C.J. p 395 note 18.

59. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
32 C.J. p 433 note 65.

60. Conn.—Pinney v. Winsted, 66 A. 337, 79 Conn. 606.

61. U.S.—Cox v. Marsh, D.C.Fla., 291 F. 97.
Ga.—White v. Cook, 140 S.E. 874, 165 Ga. 361.
La.—O'Beirne v. Police Jury of Red River Parish, 95 So. 862, 153 La. 357—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174—Guidry v. Board of Com'rs, Lafourche Basin Levee Dist., 129 So. 688, 19 La.App. 696.
Miss.—Davis v. Whittington, 99 So. 377.
32 C.J. p 427 note 76.

62. U.S.—Northern Pac. R. Co. v. St. Paul, M. & M. R. Co., C.C.Minn., 4 F. 688, 2 McCrary 260.
W.Va.—Campbell v. Point Pleasant & O. R. Co., 23 W.Va. 448.

63. N.Y.—Chamberlin v. Buffalo, N. Y. & P. R. Co., 31 Hun 339.
N.C.—Kelly v. Enterprise Lumber Co., 72 S.E. 957, 157 N.C. 175.

64. La.—O'Beirne v. Police Jury of Red River Parish, 95 So. 862, 153 La. 357.
N.C.—Kelly v. Enterprise Lumber Co., 72 S.E. 957, 157 N.C. 175.

65. Ga.—McRae v. Smith, 137 S.E. 390, 164 Ga. 23.
La.—Castell Land & Harbor Co. v. Roberts, 95 So. 421, 153 La. 115.
N.Y.—Thayer v. Rochester City & B. R. Co., 15 Abb.N.Cas. 52.

66. Ga.—White v. Cook, 140 S.E. 874, 165 Ga. 361.
La.—Castell Land & Harbor Co. v. Roberts, 95 So. 421, 153 La. 115.
32 C.J. p 428 note 83.

Injury to another

Under the statute authorizing dissolution of injunction on bond, when the act prohibited is not such as may work irreparable injury to plaintiff, it is not sufficient that injury may be done to some one else.—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174.

What is irreparable injury

If injury from dissolution of injunction on bond is one for which party cannot be adequately compensated in damages, or if damages cannot be measured by pecuniary standard, or if act prohibited is contrary to public policy, injury is irreparable.—O'Beirne v. Police Jury of Red River Parish, 95 So. 862, 153 La. 357.

67. Ga.—Wells v. Rountree, 45 S.E. 215, 117 Ga. 839.
La.—Guidry v. Board of Com'rs, Lafourche Basin Levee Dist., 129 So. 688, 19 La.App. 696.

68. La.—State v. Crozier, 23 So. 288, 50 La.Ann. 245.

69. La.—New Orleans v. Becker, 31 La.Ann. 644.
32 C.J. p 428 note 86.

70. Ga.—Taylor v. Nix, 195 S.E. 416, 185 Ga. 536.
La.—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174—Guidry v. Board of Com'rs, Lafourche Basin Levee Dist., 129 So. 688, 19 La.App. 696.
32 C.J. p 428 note 87.

71. La.—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174.
32 C.J. p 428 note 88.

72. La.—O'Beirne v. Police Jury of Red River Parish, 95 So. 862, 153 La. 357.

73. Tex.—Ellis v. Lamb-McAshan Co., Civ.App., 278 S.W. 858.

74. W.Va.—Campbell v. Point Pleasant & O. R. Co., 23 W.Va. 448.

On continuance. On an application to vacate an injunction, the injunction may be continued on condition that an undertaking be given for the benefit of applicant.[75] If, at any time pending the litigation, it is made to appear to the court that the undertaking is insufficient, the court must require an increase of the undertaking as the condition of continuance of the injunction.[76]

Amount of the bond to be given on dissolution must be commensurate with the damages which plaintiff will sustain if the acts of defendant shall be committed.[77]

b. Validity and Operation

General rules govern the validity and operation of dissolution bonds. The dissolution itself is sufficient consideration for the execution of the undertaking.

The dissolution of a temporary injunction is sufficient consideration for the execution of the undertaking.[78] Although the instrument does not name the obligee, the obligee may be sufficiently designated by referring to him as plaintiff in the suit pending.[79] Even though there is no express promise to pay, the surety is liable where the undertaking provides that it shall be void if defendant carries out any decree rendered against him.[80] In the absence of a statutory provision for the giving of a dissolution bond, a voluntary undertaking executed pursuant to an order dissolving an injunction will be enforced as a common-law obligation.[81] A bond executed by purchasers of property who had been enjoined from removing it during the pendency of an action to enforce a lien against it is discharged by the causing of an attachment to be levied against it and by taking possession of the property under the writ.[82] Where, pending an injunction suit, defendants executed a bond to stay the injunction, agreeing to pay any damages recovered in an action thereon, the filing of an amended complaint in the injunction suit, instead of the institution of a new action, on which complaint damages were recovered, did not prevent the judgment from becoming conclusive on the surety.[83]

The measure of damages for which the surety is liable is governed by general rules.[84]

Substitution of surety. Where, to dissolve an interlocutory injunction, defendants as principal and a surety company executed a bond conditioned as provided in the injunctive order, even though the trial judge may have been authorized to order a substitution of surety without notice to plaintiff before the verdict and final judgment, he could not do so after the determination of the case.[85]

§ 232. Successive Applications

After denial of a motion to dissolve, a second motion based on the same grounds will ordinarily be denied unless the first denial was without prejudice. A second motion is proper, however, after amendment of the answer.

A defendant who has once moved unsuccessfully for the dissolution of an injunction as a rule is not permitted to make a second motion for the same object on the same papers, without leave of the court first obtained,[86] and hence a second motion to dissolve an injunction based on the same grounds as the first ordinarily will be denied,[87] although the fact that the court has erroneously refused to dissolve on the first motion may require a dissolution on a second motion where the facts are the same.[88] Where the denial of the first motion was without prejudice to a second motion, a second or further motion is proper.[89] A second motion is also prop-

75. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.

76. Cal.—Porter v. Superior Court of California in and for Los Angeles County, 248 P. 1077, 78 Cal.App. 790.

77. La.—Baldwin v. Bellocq, 35 La. Ann. 982.

78. Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, opinion adhered to 7 P.2d 805, 138 Or. 467.

79. Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., supra.

80. Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., supra.

81. Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., supra.

Matters constituting breach

Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 22 P.2d 1035, 147 Or. 255—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 7 P.2d 805, 138 Or. 467, rehearing 1 P.2d 1100, 138 Or. 467.

Who may enforce

Trustee appointed for beneficiaries in suit in which they were plaintiffs had authority to institute action to recover on undertaking executed as condition of dissolving injunction therein.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, opinion adhered to 7 P.2d 805, 138 Or. 467.

82. Cal.—Jensen v. Allen, 180 P. 623, 40 Cal.App. 309.

83. Wash.—Costello v. Bridges, 142 P. 687, 81 Wash. 192, L.R.A.1915A 853.

84. **Suit to recover bequests**

Damages sustained by legatees who brought suit to enforce payment of bequests, wherein defendants executed undertaking for dissolution of injunction, were held difference between value of bequests, if paid pursuant to decree, and value thereof without such payment.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 7 P.2d 805, 138 Or. 467, rehearing 1 P.2d 1100, 138 Or. 467.

85. Ga.—American Surety Co. of New York v. Ricks, 127 S.E. 147, 159 Ga. 866.

86. N.Y.—Williams v. Huber, 25 N.Y.S. 327, 5 Misc. 488.

32 C.J. p 410 note 46.

87. Tex.—International Creosoting & Construction Co. v. Hidalgo County Drainage Dist. No. 1, Civ.App., 63 S.W.2d 234, error dismissed.

32 C.J. p 411 note 47.

88. W.Va.—Arbuckle v. McClanahan, 6 W.Va. 101.

89. Ala.—Hudson v. Crutchfield, 12 Ala. 433.

er after an amendment of the answer.[90] The refusal to entertain a motion to vacate an ex parte order because proper notice of the motion had not been given does not preclude a second motion for the same purpose.[91] Unreasonable delay interposed to the trial of the action by defendant is a sufficient ground for a renewal of a motion to vacate an injunction.[92] A defendant who, by moving to dissolve an injunction without raising objections to its having been issued without notice or bond, waived such objections could not raise them by an amended motion.[93]

§ 233. Continuing Injunction

Whether or not an injunction shall be continued to full proof on final hearing depends on a variety of considerations.

Many considerations are influential with the chancellor in determining whether he shall continue an injunction to full proof on final hearing.[94] Thus the court will consider the equities of all the parties,[95] the solvency of defendant and his ability to respond in damages,[96] whether defendant is protected by adequate security against any loss which he may sustain,[97] whether complainant will suffer more from the dissolution than the respondent from its retention, as discussed supra § 227, and, in general, whether any of those grounds for dissolution discussed infra § 241 are present. To justify continuance of a restraining order, it must appear from the verified complaint or from the affidavits that sufficient grounds exist therefor.[98] Under a statute providing that a temporary restraining order issued under it should be effective for no longer than five days, at the end of which time it should become void, it has been held proper for the court to continue such an order beyond the five-day period where the hearing is begun within the period but cannot be completed until some time later.[99]

§ 234. —— Grounds

As a general rule an injunction should be continued where it is necessary to the protection of plaintiff's rights or public interests, and where no adequate ground for its dissolution is presented. It is proper to continue an injunction where to dissolve it would require the determination of issues which could be better determined on final hearing.

A temporary or preliminary injunction should be continued and not dissolved where it is necessary to the protection of plaintiff's rights[1] or public interests,[2] especially where injunction is the main relief sought.[3] In general it may be said that, where it appears that a preliminary injunction was properly granted and there is no adequate ground for dissolution, as discussed infra § 241, the injunction will be continued and not dissolved.[4]

Iowa.—Carrothers v. Newton Min. Spring Co., 17 N.W. 43, 61 Iowa 681.

90. Ga.—Thomas v. Horn, 21 Ga. 177.
N.C.—Edney v. Motz, 40 N.C. 233.

91. S.C.—Northwestern R. Co. v. Colclough, 65 S.E. 950, 84 S.C. 37.

92. N.Y.—Reilly v. Frias, 143 N.Y.S. 869, 159 App.Div. 883.

93. Ill.—Grossman v. Grossman, 30 N.E.2d 123, 307 Ill.App. 246.

94. Ill.—People v. Sears, 230 Ill.App. 484.
32 C.J. p 395 note 20.

95. U.S.—Columbia Casualty Co. v. Thomas, D.C.Fla., 20 F.Supp. 251.

Continuance justified as to one party
Where two have properly joined in asking a preliminary injunction, it will be continued if it appears that either one is entitled thereto.—Linden Land Co. v. Milwaukee Electric R. & Lighting Co., 83 N.W. 851, 107 Wis. 493.

96. Kan.—Tivis v. Hulsey, 73 P.2d 1111, 146 Kan. 851.
N.C.—Lawhon v. McArthur, 195 S.E. 786, 213 N.C. 260.
Tex.—Webb v. Downing, Civ.App., 2 S.W.2d 474.
32 C.J. p 395 note 21.

97. Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394.
Iowa.—Iowa Motor Vehicle Ass'n v. Board of Railroad Com'rs of State of Iowa, 209 N.W. 511, 202 Iowa 85.
N.C.—Little v. Wachovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Hare v. Hare, 178 S.E. 545, 178 N.C. 849.
32 C.J. p 395 note 22.

98. Cal.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.

99. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A.Ill., 132 F.2d 265.

1. U.S.—Connasauga River Lumber Co. v. Shippen, C.C.A.Ga., 293 F. 579.
Kan.—Tivis v. Husley, 73 P.2d 1111, 146 Kan. 851.
Miss.—Rickets v. Rickets, 119 So. 194, 152 Miss. 792.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Little v. Wachovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Teeter v. Teeter, 171 S.E. 620, 205 N.C. 438.
Pa.—Altmiller v. City of Hazleton, Com.Pl., 35 Luz.Leg.Reg. 325.
Tex.—Kelsay v. Lone Star Gas Co., Civ.App., 296 S.W. 954.
32 C.J. p 395 note 26.

Payment of liquidated damages
Where contract provided for employment by one party of other party, who agreed not to compete in county, and for five hundred dollars liquidated damages in case of breach by either party, and judgment for five hundred dollars was entered against insolvent party, who competed in county, it was proper to continue an injunction restraining further competition until satisfaction of the judgment.—Bynum v. McFee, Tex.Civ.App., 70 S.W.2d 499.

2. N.Y.—Craig v. Commissioners of Sinking Fund of City of New York, 203 N.Y.S. 236, 208 App.Div. 412.

3. N.C.—Sineath v. Katzis, 14 S.E.2d 418, 219 N.C. 434—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Tobacco Growers' Co-op. Ass'n v. Pollock, 121 S.E. 763, 187 N.C. 409—Johnson v. Jones, 119 S.E. 231, 186 N.C. 235.
S.C.—Jordan v. Wilson, 48 S.E. 37, 69 S.C. 52.

4. U.S.—Shellmar Products Co. v. Allen-Qualley Co., C.C.A.Ill., 87 F.2d 104, certiorari denied 57 S.Ct. 923, 301 U.S. 695, 81 L.Ed. 1350—U. S. v. Mayo, D.C.Fla., 47 F.Supp. 552, affirmed Mayo v. U. S., 63 S.Ct. 1137, 319 U.S. 441, 87 L.Ed. 1504, 147 A.L.R. 761, rehearing denied 64 S.Ct. 27.

Decision dependent on ultimate rights. Where the decision on whether to continue or dissolve a temporary injunction requires the determination of important questions relating to the merits of the case and the ultimate rights of the parties, which questions it will be necessary to decide on final disposition of the case, it is proper to continue the temporary injunction.[5] So a motion to dissolve presenting the same questions as would arise on the trial should not be granted;[6] and, where a suit to enjoin sale of real estate was dismissed, and on appeal a temporary restraining order was issued, a motion to dissolve such order will be denied where to determine such motion it is necessary to decide the merits of the appeal.[7] Where an injunction has been issued to restrain trespass, and title is in dispute, the injunction should be continued for the purpose of having title settled by an action at law.[8]

Irreparable injury. The prospect that a dissolution might work an irreparable injury to complainant is a ground for continuing the injunction to the hearing,[9] particularly where there are doubtful questions of law and fact to be determined.[10]

Where dissolution would amount to denial of relief to which complainant might show himself entitled on final hearing, the injunction should be continued,[11] especially where no material injury will result to defendant by continuing the injunction.[12]

Prima facie case and probability of success. The fact that complainant's bill shows a prima facie case is a ground for continuing to the hearing a preliminary injunction theretofore granted;[13] but it has been held that this rule does not apply where important public works or improvements are sought to be stopped.[14] It is not necessary to the continuance of an injunction that it should be clear that complainant will succeed at the hearing; it is sufficient to warrant continuance if on the whole case there is probable cause to believe that he will succeed.[15]

Serious dispute or conflicting evidence. A preliminary injunction or restraining order may be continued on the ground that there is presented a serious dispute or controversy between the parties as to the merits of the cause.[16] So, too, it is proper

Ill.—People v. Sears, 230 Ill.App. 484.
N.J.—Health Products Corporation v. Weber, 127 A. 30, 97 N.J.Eq. 159.
N.C.—Justice v. Carland, 140 S.E. 724, 194 N.C. 819.
Pa.—Salus v. Lawrence, Com.Pl., 46 Dauph.Co. 286, appeal dismissed 3 A.2d 417, 332 Pa. 429—Atlantic Refining Co. v. Colley, 33 Pa.Dist. & Co. 389, 32 Luz.Leg.Reg. 193—Demas v. Perdikis, Com.Pl., 34 Luz. Leg.Reg. 334—Norris v. Holzinger, Com.Pl., 32 Luz.Leg.Reg. 84.
Tex.—Cleere v. Wise, Civ.App., 153 S.W.2d 311—Lennox v. Texas Farm Bureau Cotton Ass'n, Civ.App., 283 S.W. 619.
32 C.J. p 395 note 29.

5. La.—Titche v. Hiller, 5 La.App. 375.
Miss.—Jennings v. Shapira, 95 So. 305, 131 Miss. 596.
N.J.—Huffman v. Hummer, 17 N.J. Eq. 263.
N.Y.—Rubin v. Worrall, 8 N.Y.S.2d 348, 255 App.Div. 965, reargument denied 9 N.Y.S.2d 896, 256 App. Div. 806.
32 C.J. p 395 note 28.

Where right protected is in process of determination in either the same or another court, it is proper to continue the injunction until such determination is had to stand or fall at that time according to the event. —Halsted Calumet River Golf Ass'n v. Riverdale Coal & Dock Co., 32 N.E. 2d 375, 308 Ill.App. 670—Kuhl v. Clark, 261 Ill.App. 491—Scherzer v. Keller, 228 Ill.App. 600—32 C.J. p 397 note 48.

Questions of law
The injunction should be continued where the equity of complainant's case rests on important questions of law which cannot be met by an answer.
N.J.—Messler v. Gillen, 130 A. 843, 98 N.J.Eq. 123.
N.C.—Camel City Coach Co. v. Griffin, 146 S.E. 203, 196 N.C. 559.
32 C.J. p 397 note 45.

6. Iowa.—Wingert v. Snouffer, 108 N.W. 1035, 134 Iowa 97, rehearing overruled 111 N.W. 432, 134 Iowa 97.

7. Or.—Malagamba v. McLean, 161 P. 560, 89 Or. 302.

8. Ala.—Hamilton v. Brent Lumber Co., 28 So. 698, 127 Ala. 78.
32 C.J. p 397 note 49.

9. Ill.—Fishwick v. Lewis, 258 Ill. App. 402.
La.—W. L. Douglas Shoe Co. v. Vredenberg, 104 So. 309, 158 La. 512.
N.J.—Milmoe v. Sapienza, 142 A. 360, 106 N.J.Eq. 101—Messler v. Gillen, 130 A. 843, 98 N.J.Eq. 123.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—McFarland v. Quinn, 125 S.E. 185, 188 N.C. 645.
32 C.J. p 396 note 30.

Cutting timber
Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394.
N.C.—Lawhon v. McArthur, 195 S.E. 786, 213 N.C. 260.

10. Nev.—Rhodes Min. Co. v. Belleville Placer Min. Co., 106 P. 561, 32 Nev. 230, rehearing denied 118 P. 813, 32 Nev. 230.

11. Idaho.—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Miss.—Calmes v. Cunningham, 191 So. 488, 186 Miss. 520—Rickets v. Rickets, 119 So. 194, 152 Miss. 792.
S.C.—Cudd v. Calvert, 32 S.E. 503, 54 S.C. 457.
32 C.J. p 396 note 31.

12. N.J.—Connelly Mfg. Co. v. Wattles, 23 A. 123, 49 N.J.Eq. 92.
N.Y.—West v. Guaranty Trust Co., 147 N.Y.S. 421, 162 App.Div. 301.

13. Ill.—Schuler v. Wolf, 24 N.E. 2d 162, 372 Ill. 386.
N.C.—Hare v. Hare, 178 S.E. 545, 207 N.C. 849—S. B. Parker Co. v. Commercial Nat. Bank of High Point, 157 S.E. 419, 200 N.C. 441—Camel City Coach Co. v. Griffin, 146 S.E. 203, 196 N.C. 559.
32 C.J. p 396 note 37.

14. N.C.—Jones v. Lassiter, 86 S.E. 710, 169 N.C. 750.

15. Miss.—Rickets v. Rickets, 119 So. 194, 152 Miss. 792.
N.C.—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Little v. Wachovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Wentz v. Piedmont Land Co., 135 S.E. 480, 193 N.C. 32.
W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 131 S.E. 713, 101 W.Va. 73.
32 C.J. p 397 note 40.

16. Ill.—Fishwick v. Lewis, 258 Ill. App. 402.
N.C.—Lawhon v. McArthur, 195 S.E. 786, 213 N.C. 260—Little v. Wa-

to continue a preliminary injunction where the evidence raises a serious question or where there is a substantial conflict in the evidence as to whether grounds for an injunction exist,[17] especially where no harm will result to defendant by continuing the injunction and where a dissolution thereof may cause great injury to plaintiff.[18]

Harmlessness of continuance. The fact that continuance of an injunction would do no harm has been deemed an important reason for continuing the order;[19] but it has been held on the other hand that the fact that an injunction will do no harm will not of itself justify its continuance.[20]

Injunction restraining action at law. It is proper to continue an injunction restraining the prosecution of an action at law until the equitable rights involved are determined on final hearing,[21] and, if an injunction has been granted to restrain prosecution of an action at law until discovery can be had, the injunction should be continued until defendant shall have had a reasonable time to answer interrogatories, and plaintiff a reasonable time to coerce such answers.[22]

Indefiniteness of moving papers. Equity is justified in refusing to grant an order continuing pendente lite an injunction where the papers on the motion are so indefinite that it is difficult to arrive at the real merits of the controversy.[23]

Miscellaneous. It has been variously held that a preliminary or temporary injunction will be continued and not dissolved where dissolution will not benefit defendant, and the only acts enjoined were unlawful and the restraining order has proved efficacious;[24] where the equities are equally balanced, and defendant is protected by security from loss, and there are other considerations that weigh in favor of the injunction;[25] where sufficient time has elapsed after the granting of a temporary injunction within which the case could have been reached for trial and disposed of on the merits;[26] where plaintiff consents to a restriction of the scope of a restraining order, although in the absence of such consent the court might doubt the justice and propriety of granting the restraining order in the terms given;[27] where the temporary injunction has been violated during its pendency;[28] where the parties have entered into a stipulation to continue pending final determination of cause;[29] where continuing the injunction will prevent a multiplicity of suits;[30] and where previous conduct or agreements of defendant have the effect of estopping him from questioning complainant's right to the injunction.[31]

chovia Bank & Trust Co., 182 S.E. 491, 208 N.C. 726—Teeter v. Teeter, 171 S.E. 620, 205 N.C. 438—Johnson v. Jones, 119 S.E. 231, 186 N.C. 235—Moore v. Rosser, 118 S.E. 891, 186 N.C. 766.

Constitutional questions

In suit to restrain enforcement of statute requiring dealers purchasing milk from producers to file bonds for payment for milk, under bill raising grave questions of constitutional law which could only be properly considered after careful appraisal of all relevant circumstances, continuing preliminary injunction until final hearing was proper.—Harrisburg Dairies v. Eisaman, 195 A. 337, 328 Pa. 195.

17. Ala.—Cruce v. McCombs, 129 So. 279, 221 Ala. 507.
Miss.—Rickets v. Rickets, 119 So. 194, 152 Miss. 792—Jennings v. Shapira, 95 So. 305, 131 Miss. 596.
N.C.—Bailey v. Bryson, 198 S.E. 622, 214 N.C. 212—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474—Scott v. Gillis, 148 S.E. 315, 197 N.C. 223—Tobacco Growers' Co-op. Ass'n v. Spikes, 121 S.E. 636, 187 N.C. 367—Tobacco Growers' Co-op. Ass'n v. Battle, 121 S.E. 629, 187 N.C. 260—Cain v. Rouse, 119 S.E. 13, 186 N.C. 175.
32 C.J. p 396 note 35.

18. N.C.—Seip v. Wright, 91 S.E. 359, 173 N.C. 14.
Relative convenience or injury generally see supra § 227.

19. U.S.—Purdum v. Durrance, D.C. Fla., 8 F.2d 781.

20. D.C.—Macfarland v. Washington, A. & Mt. V. R. Co., 18 App. D.C. 456.
N.J.—Mullen v. Jennings, 9 N.J.Eq. 192.

21. Ga.—Wohlwender v. Franklin, 194 S.E. 359, 185 Ga. 73.
32 C.J. p 397 note 53.

Pending appeal

Where stockbroker was threatened with more than one hundred suits based on claim that contracts whereby stock was sold on installment plan were void, bill to prevent multiplicity of suits would not be dismissed, and injunction restraining prosecution of suits would not be dissolved notwithstanding court held that contracts were void, in view of probability of appeal because of importance of controversy, pending which prosecution of multiplicity of suits would be prevented.—Doherty v. McAuliffe, D.C.Mass., 7 F.Supp. 49, vacated on other grounds, C.C.A., 74 F.2d 800, certiorari denied McAuliffe v. Doherty, 55 S.Ct. 639, 294 U.S. 730, 79 L.Ed. 1260.

22. W.Va.—Eskridge v. Thomas, 91 S.E. 7, 79 W.Va. 322, L.R.A.1918C 769.
32 C.J. p 397 note 54.

23. N.Y.—Shulman v. Star Suburban Realty Co., 99 N.Y.S. 419, 113 App. Div. 759.

24. N.Y.—United Tract Co. v. Droogan, 189 N.Y.S. 39, 115 Misc. 672.
32 C.J. p 397 note 41.

25. N.Y.—Lawrence v. Lawrence, 172 N.Y.S. 146.

26. N.Y.—Consolidated Gas Co. v. New York, 17 N.Y.S. 826.

27. N.C.—Quickel v. Gastonia, 88 S.E. 754, 171 N.C. 404.

28. N.J.—218-220 Market St. Corporation v. Delicatessen and Cafeteria Workers' Local 410, 179 A. 689, 118 N.J.Eq. 448.

29. Ill.—Halsted Calumet River Golf Ass'n v. Riverdale Coal & Dock Co., 32 N.E.2d 375, 308 Ill. App. 670.
Wash.—Maggs v. Morgan, 71 P. 188, 30 Wash. 604.

30. Pa.—Reading Co. v. Driscoll, 198 A. 140, 330 Pa. 116.

31. U.S.—Shellmar Products Co. v. Allen-Qualley Co., C.C.A.Ill., 87 F. 2d 104, certiorari denied 57 S.Ct. 923, 301 U.S. 695, 81 L.Ed. 1350.
Ill.—Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 174 Ill.App. 381.

§ 235. —— Proceedings to Obtain

A temporary restraining order cannot be continued in effect pendente lite without notice and hearing.

As appears supra § 2, a temporary restraining order is effective to maintain the status quo only for a reasonable time necessary to enable notice to be given for a hearing as to whether such order shall be made effective pendente lite; accordingly, such an order cannot be continued in effect pendente lite without such notice and hearing.[32] On a motion to continue a temporary restraining order on the ground that the action is one entitling plaintiff to such an order, the complaint cannot be aided by plaintiff's affidavits.[33] The continued existence of a temporary injunction through judicial action may be effected by an order of the court refusing to dissolve it; hence in considering proceedings to obtain a continuance of an injunction it is well to bear in mind the proceedings for dissolution, as discussed infra §§ 247–255.

Order. On an application to extend an injunction against picketing, the court may appoint a committee to settle the underlying dispute.[34]

§ 236. Modification of Injunction

The court has discretionary power to modify a preliminary injunction where the equities of the case render such action necessary.

The court has power to modify a preliminary injunction where the peculiar equities of the case render such action necessary in order to do exact justice between the parties,[35] and it is the duty of the court to allow modifications or not according to the circumstances and the character of the relief sought.[36] In some jurisdictions the power to modify a temporary injunction extends only to such injunctions as have been granted without notice, the court being without power to modify before trial an injunction pendente lite which has been granted after notice and hearing.[37] The power to modify is in no way affected by the fact that the decree granting the injunction has been affirmed on appeal,[38] or by the fact that the court in granting the injunction may have chosen to discuss the merits of the case.[39] Whether or not a modification should be permitted is discretionary with the court;[40] and the order of modification will not be disturbed unless there has been an abuse of such discretion.[41] The modification may be made either by the trial court[42] or by the appellate court.[43]

At what time permissible. A decree retaining the cause "for further orders should the same be deemed necessary in the future, to in justice and equity conserve and protect the rights of respective parties hereto," leaves the court with jurisdiction to modify or change the decree at a subsequent term, and before final dismissal;[44] and independently of a recital of this character in the decree it has been held that an injunction may be modified at any time,[45] even though several terms have elapsed since

32. Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.

33. N.Y.—Wick v. Crane Co., 251 N.Y.S. 741, 141 Misc. 31.

34. N.Y.—Busch Jewelry Co. v. United Retail Employees Union Local 830, 9 N.Y.S.2d 167, 169 Misc. 854.
Order on motion to dissolve see infra § 253.

35. U.S.—Trautwein v. Moreno, C.C.A.Cal., 22 F.2d 374.
Cal.—Consolidated People's Ditch Co. v. Foothill Ditch Co., 269 P. 915, 205 Cal. 54.
Fla.—Sharp v. Bussey, 176 So. 763, 129 Fla. 775.
N.J.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.
N.Y.—Witbeck v. Lockport Light & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.
32 C.J. p 431 note 38.
Opening and vacating or modifying injunction see supra § 218.

Where original injunction void
Void injunction or restraining order is not subject to modification, and attempted modification on motion to dissolve is not effective.
U.S.—Nottebaum v. Leckie, C.C.A.N.J., 31 F.2d 556, certiorari denied Guaranty Trust Co. of New York v. Noxon Chemical Products Co., 50 S.Ct. 17, 280 U.S. 558, 74 L.Ed. 613.
Mont.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.

36. U.S.—Newton v. Laclede Steel Co., C.C.A.Ill., 80 F.2d 636, affirming, D.C., Laclede Steel Co. v. Newton, 6 F.Supp. 625.
32 C.J. p 432 note 39.

37. Mont.—Winnett Pacific Oil Co. v. Wilson, 229 P. 850, 71 Mont. 250.

38. Hawaii.—McBryde Sugar Co., Ltd. v. Andrade, 22 Hawaii 578.

39. U.S.—Westerly Waterworks v. Town of Westerly, C.C.R.I., 77 F. 783.

40. Cal.—Hobbs v. Amador Sacramento Canal Co., 4 P. 1147, 66 Cal. 161.
32 C.J. p 432 note 42.

41. Cal.—Hobbs v. Amador & Sacramento Canal Co., 4 P. 1147, 66 Cal. 161.
Ga.—Hollis v. Williams, 43 Ga. 214.

42. U.S.—In re Arkansas Railroad Rates, C.C.Ark., 168 F. 720.
Fla.—Sharp v. Bussey, 176 So. 763, 129 Fla. 775.

43. U.S.—In re Arkansas Railroad Rates, C.C.Ark., 168 F. 720.
N.J.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506.
Pending appeal from order granting temporary injunction, the appellate court may grant leave to apply to the trial court for modification.—Sharp v. Bussey, 176 So. 763, 129 Fla. 775.
The cause may be remanded with instructions to modify.—Seneca Securities Corporation v. Medinah Athletic Club, C.C.A.Ill., 74 F.2d 108.

44. Kan.—Holloway v. Peoples Water Co., 167 P. 265, 100 Kan. 414, 2 A.L.R. 161.

45. U.S.—Newton v. Laclede Steel Co., C.C.A.Ill., 80 F.2d 636, affirm-

the order allowing it was made.[46] On the other hand there is authority to the effect that an order of injunction entered at a prior term is not open to modification on a rule to show cause at a subsequent term, the only power residing in the court in respect of such injunction being to construe and enforce it.[47]

§ 237. —— Grounds

Generally speaking, an injunction may be modified where it is proper in part and improper in part, where it is unjust or oppressive, or where there has been a change of circumstances warranting modification.

An injunction may be modified where it clearly appears that it is proper in part and improper in part;[48] where it appears that great injustice is being done by reason thereof, and that the injunction is unjust, oppressive, and unmindful of defendant's rights;[49] where the restraint imposed is broader than is necessary for plaintiff's protection;[50] where some of the acts enjoined are lawful;[51] or where a modification is necessary in order to allow defendant to maintain his property in its then existing condition by repair or otherwise,[52] or to establish his rights at law.[53] An injunction may be modified where the law, common or statutory, has changed, been modified or extended, and where there is a change in the controlling facts on which the injunction rested.[54] Thus, if defendant has obtained certain rights by statute or ordinance, an injunction theretofore granted should be so modified as to allow the exercise of those rights.[55] An order granting a temporary injunction but not requiring a bond may be so amended as to require the giving of a bond,[56] or to render the injunction ineffective until plaintiff has given a sufficient bond.[57] Where defendant had been enjoined from further proceedings at law, a modification may be allowed under some circumstances so far as to permit a trial of the action.[58] An injunction may be modified so as to include plaintiff in the restraint,[59] or it may be modified so far as it is mandatory, and continued so far as it is prohibitory.[60] Vagueness or uncertainty in an injunction may be cured by appropriate modification.[61]

Injunction erroneously permanent in form. Where an interlocutory injunction is authorized by the evidence, but the injunction granted was in the form of a permanent injunction, it should be so modified as to make the injunction merely interlocutory.[62]

Modifications not permissible. An unnecessary modification will not be allowed, nor will one be granted when there is no sufficient showing that the restraint as originally ordered is improper.[63] A motion to modify an injunction granted after notice

ing, D.C., Laclede Steel Co. v. Newton, 6 F.Supp. 625.

46. Puerto Rico.—Semidey v. Central Aguirre Co., 7 Puerto Rico Fed. 185.

47. U.S.—L. E. Waterman Co. v. Standard Drug Co., Ohio, 202 F. 167, 120 C.C.A. 455—Loeser v. Savings Deposit Bank & Trust Co., Ohio, 163 F. 212, 89 C.C.A. 642.

48. U.S.—Trautwein v. Moreno Mut. Irr. Co., C.C.A.Cal., 22 F.2d 374.

Wis.—A. H. Stange Co. v. Merrill, 115 N.W. 115, 134 Wis. 514.

49. U.S.—Seneca Securities Corporation v. Medinah Athletic Club, C.C. A.Ill., 74 F.2d 108.

32 C.J. p 432 note 49.

50. Cal.—Consolidated People's Ditch Co. v. Foothill Ditch Co., 269 P. 915, 205 Cal. 54.

N.Y.—Goldman v. Cohen, 227 N.Y.S. 311, 222 App.Div. 631.

32 C.J. p 432 note 50.

Restraining interference with property

Fla.—Binnicker v. Leeper, 190 So. 6, 138 Fla. 738.

51. Minn.—Minnesota Stove Co. v. Cavanaugh, 155 N.W. 638, 131 Minn. 458.

32 C.J. p 432 note 51.

52. Wis.—Webster v. Douglas County, 77 N.W. 885, 102 Wis. 181, 72 Am.S.R. 870, reheard 78 N.W. 451, 102 Wis. 181, 72 Am.S.R. 870.

32 C.J. p 433 note 52.

Modifications held proper

Injunction, prohibiting state highway commission from paying out any of its revenues until deposit in court under mandamus order of sum required to be paid to city for maintenance and construction of streets, should be modified to permit commission to use such of its funds as may be necessary to keep highways, bridges, and ferries already built open and in operation.—State ex rel. City of New Orleans v. Louisiana Highway Commission, 156 So. 896, 180 La. 512.

53. Tex.—Parriss v. Jewell, 122 S. W. 399, 57 Tex.Civ.App. 199.

32 C.J. p 433 note 53.

Limitation running against claim

Claimants enjoined from suing receiver or owners of property may petition for modification of injunction and for leave to sue or file intervening petition, if claim is liable to be tolled by statute of limitations.—Commissioner of Insurance v. Bristol Mut. Liability Ins. Co., 181 N.E. 208, 279 Mass. 325.

54. Pa.—Ladner v. Siegel, 148 A. 699, 298 Pa. 487, 68 A.L.R. 1172.

55. Mich.—Erin Tp. v. Detroit & Erin Plank-Road Co., 73 N.W. 556, 115 Mich. 465.

32 C.J. p 433 note 54.

56. S.C.—State v. Pattersen, 79 S.E. 522, 96 S.C. 29.

57. W.Va.—Conley v. Brewer, 102 S.E. 607, 85 W.Va. 725.

58. Miss.—Hill v. Billingsly, 53 Miss. 111.

59. Kan.—Downing v. Reeves, 24 Kan. 167.

60. La.—New Orleans & N. E. R. Co. v. Mississippi, T. B. & L. R. Co., 36 La.Ann. 561.

61. N.J.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J.Eq. 613, modifying 22 A.2d 796, 130 N.J.Eq. 506—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

As to property protected

Where the language of an injunction is not clear as to the property intended to be protected, the injunction should be modified on proper application.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

62. Ga.—Bono v. Orlow, 94 S.E. 251, 147 Ga. 388.

32 C.J. p 433 note 62.

63. Ill.—Jaffe v. Auto Mechanics

and hearing cannot be maintained on the same facts theretofore set up in defense.[64]

§ 238. —— Proceedings to Obtain

Modification of an injunction may be obtained by motion or other appropriate application.

Modification of an injunction may be obtained by motion[65] or other appropriate application.[66] On motion to modify, the court may consider all matters submitted in the original hearing as well as matters supplemental thereto in the proceedings on motion to modify.[67] If the facts appear on the face of the record and from the pleadings sufficient to authorize the court to modify a temporary injunction, the hearing of further evidence is unnecessary to authorize the modification.[68] An application for modification of an injunction may be denied on the ground of laches.[69]

Review. A modifying order may be reviewed on final hearing of the cause.[70]

§ 239. Suspension of Injunction

Subject to statutory regulation, the court has inherent power in its discretion to suspend an injunction when the exigencies of the case require it.

The court has inherent power in its discretion temporarily to suspend an injunction when the exigencies of the case require it,[71] but the question may be affected by special statutory regulation.[72] Ordinarily, where the injunction will cause defendant great loss, it may be temporarily suspended on terms that will properly protect complainant,[73] and the suspension of an injunction may be authorized by reason of a change in conditions subsequent to the allowance of the injunction.[74] It has been held that a final injunction restraining the construction of a building on complainant's land until the parties agree on the proper damages for plaintiff will not be suspended until condemnation proceedings are brought to fix the damages, although the court issuing the injunction would itself be willing to consider a method to determine the damages.[75] A restraining order against violation of an existing statute cannot be suspended so as to have the effect of suspending the operation of the statute merely on the ground that the statute is to expire in a few months and that its enforcement would work a hardship on defendants.[76]

§ 240. Dissolution or Discharge of Injunction

An injunctive order is generally subject to a motion to dissolve, although it has been held irregular to move for the dissolution of a temporary restraining order issued to maintain the status quo pending a hearing on the issuance of a temporary injunction. In some jurisdictions, a motion to discharge rather than a motion to dissolve is the proper remedy for irregularity in the granting of the writ.

An injunctive order is subject to a motion to dissolve,[77] at least where it has been granted without notice;[78] and it has been held that, where an ex parte preliminary injunction has been granted, de-

Local No. 1049, International Ass'n of Machinists, 22 N.E.2d 723, 301 Ill.App. 624.
32 C.J. p 433 note 60.

Where restraint is adequate
Where temporary restraining order was ample to preserve status quo, court would not rule on request for further injunctional relief against superintendent of banks pending proceeding before governor for his removal.—State v. Smith, 234 N.W. 525, 57 S.D. 582.

64. Mont.—Butte Consol. Min. Co. v. Frank, 62 P. 922, 24 Mont. 506.

65. N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
S.C.—Coward v. Jones, 166 S.E. 96, 167 S.C. 118.

66. U.S.—Newton v. Laclede Steel Co., C.C.A.Ill., 80 F.2d 636, affirming, D.C., Laclede Steel Co. v. Newton, 6 F.Supp. 625.

67. Mich.—Colburn v. McNutt, 188 N.W. 357, 219 Mich. 4.

68. Mo.—Wegenka v. St. Joseph, App., 212 S.W. 71.

69. N.Y.—McLean v. F. E. McAllister Co., 57 N.Y.S. 1097, 40 App.Div. 623.

70. Okl.—Herring v. Wiggins, 54 P. 483, 7 Okl. 312.

71. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291, 291 Ky. 194, quoting **Corpus Juris.**
N.J.—Mullins v. Merchandise Drivers Local Union No. 641, 185 A. 51, 54, 120 N.J.Eq. 307, quoting **Corpus Juris.**
N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.
32 C.J. p 433 note 73.

72. **Reservation of right**
In California a superior court which has granted a temporary injunction without reserving any right of revocation or modification has no power subsequently to make an order staying the injunction until a contemplated appeal has been heard.—United R. Cos. v. San Francisco, 151 P. 129, 170 Cal. 755, Ann.Cas.1916E 199.

73. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291, 291 Ky. 194.
32 C.J. p 433 note 75.

74. Ky.—Gregory v. Crain, 163 S.W. 2d 289, 291, 291 Ky. 194, quoting **Corpus Juris.**
32 C.J. p 433 note 76.

75. Puerto Rico.—Insular Dock Co. v. P. J. Carlin Constr. Co., 8 Puerto Rico Fed. 70.

76. Wis.—State ex rel. Department of Agriculture v. McCarthy, 299 N.W. 58, 238 Wis. 258.

77. Ark.—Jefferies v. Hutchins, 103 S.W.2d 357, 193 Ark. 865.
N.Y.—Witbeck v. Lockport Light, Heat & Power Co., 212 N.Y.S. 236, 214 App.Div. 371.

Motion to dismiss
The validity of a preliminary restraining order is properly raised by defendant appearing specially and moving to dismiss such order.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648.

78. Mont.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.
S.C.—Coward v. Jones, 166 S.E. 96, 167 S.C. 118—Ex parte Jones, 158 S.E. 134, 160 S.C. 63, 77 A.L.R. 235.

Alternative remedy
The procedure by which respondent moves to dissolve injunction pendente lite on ten days' notice and appeal is taken from order granting or denying motion to dissolve is alternate to procedure by which hear-

fendant should be permitted to move for dissolution without jeopardizing his rights or position ultimately in the litigation.[79] However, where a restraining order is granted only to maintain the status quo until the hearing of the order to show cause why a temporary injunction should not be granted, it has been said that a motion to dissolve such a restraining order is ordinarily irregular.[80]

Discharge of injunction. In jurisdictions where the rule prevailing is that a motion to dissolve can be founded only on a want of equity in the bill or on the full and complete denial of its equity by the answer, and that a motion to dissolve is a waiver of any irregularity which has accrued in the granting of the writ, as discussed infra § 241, such an irregularity constitutes a ground for motion to discharge the injunction which is the only procedure by which it can be availed of,[81] and in any event the injunction should not be discharged until opportunity is given to amend.[82]

§ 241. —— Grounds in General

a. General rules
b. Procedural defects and irregularities

a. General Rules

A preliminary injunction may be dissolved for a variety of reasons including want of equity in the bill, want of jurisdiction to issue, and improvident issuance.

A preliminary injunction or restraining order may be dissolved for a variety of reasons,[83] a number of which are more fully discussed below.

Want of equity in the bill is a sufficient ground for the dissolution of an injunction;[84] and, where an injunction is granted on a bill defective in this regard, it should be dissolved at the earliest opportunity.[85] As appears infra § 247, while there is some authority to the contrary, it has generally been held that an injunction granted on a bill without equity may be dissolved on motion before the filing of the answer or after the coming in of the answer. Also it may be dissolved on sustaining a demurrer to the bill[86] in the absence of an amendment.[87] Nevertheless, plaintiff will generally be given an opportunity to amend his bill before dissolution;[88] and, as appears infra § 249, amended and supplemental bills will be considered on a motion to dissolve an injunction granted on the original bill; the injunction will not be dissolved where the amended bill justifies its continuance.[89] However, it has been held that, where the defect in the petition is radical, a temporary injunction should be dissolved, even though plaintiffs might make the necessary allegations and immediately obtain another.[90]

ing may be had before injunction pendente lite issues and appeal is prosecuted from order granting or refusing injunction.—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293.

79. Pa.—Wanamaker v. Wanamaker, 172 A. 846, 315 Pa. 229.

80. Mont.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.

81. Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.
32 C.J. p 434 note 79.
The distinction between the dissolution and the discharge of an injunction lies in the fact that a motion to dissolve an injunction, and action thereon, touch the equity of the bill, while one to discharge presents the question of sufficiency.—Grooms v. Brown-Marx Co., 184 So. 698, 236 Ala. 655.
Filing both motions
Under statute, filing of motion to dissolve temporary injunction does not waive a previously filed motion to discharge injunction, but the two motions can be made and considered at the same time without prejudice to either.—Barnett v. State ex rel. Simpson, 179 So. 208, 235 Ala. 326, followed in Broadfoot v. State ex rel. Simpson, 179 So. 208, 235 Ala. 388.

82. Ala.—Lauderdale v. McAllister, 68 So. 984, 193 Ala. 175.
32 C.J. p 434 note 80.

83. Pa.—In re Hughes' Estate, 179 A. 582, 319 Pa. 330—Luzerne Anthracite v. E. Boston Coal Co., Com.Pl., 36 Luz.Leg.Reg. 396—Lombardi v. Vudragovich, Com. Pl., 22 West.Co. 23.
S.C.—Coward v. Jones, 166 S.E. 96, 167 S.C. 118.

84. Ala.—Fisher v. McDuff, 172 So. 637, 233 Ala. 499.
Fla.—Hernandez v. Board of Com'rs of Hillsborough County, 153 So. 790, 114 Fla. 219—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.
Ill.—Ritholz v. Andert, 24 N.E.2d 573, 303 Ill.App. 61.
Iowa.—Wood Bros. Thresher Co. v. Eicher, 1 N.W.2d 655, 231 Iowa 550.
La.—Bowers v. Riegal, 96 So. 680, 153 La. 851.
Mo.—Marbury v. City of Farmington, App., 5 S.W.2d 677.
Okl.—MacInnis v. Perram, 229 P. 168, 103 Okl. 15.
Pa.—Klahr v. Baldwin, Com.Pl., 28 Erie Co. 345—Pulici v. International Union of United Brewery, Flour, Cereal & Soft Drink Workers of America, Local Union No. 115, Com.Pl., 42 Lack.Jur. 164—Freidlin v. Conway, Com.Pl., 36 Luz.Leg. Reg. 148—Lombardi v. Vudragovich, Com.Pl., 22 West.Co. 23.
Tex.—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73—Bledsoe v. Wesley, Civ.App., 22 S.W.2d 718, error dismissed.
Wis.—Angers v. Sabatinelli, 293 N.W. 173, 235 Wis. 422, 128 A.L.R. 1491.
32 C.J. p 399 note 72.
Injunction against cutting timber
Fla.—Blume v. Giles, 197 So. 344, 143 Fla. 615.

85. Fla.—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.
32 C.J. p 400 note 73.

86. Ill.—Thomsen v. McCormick, 26 N.E. 373, 136 Ill. 135.
32 C.J. p 400 note 75.

87. Ind.—Clark v. Noblesville, 44 Ind. 83.
Tex.—Fawver v. First Texas Joint Stock Land Bank of Houston, Civ. App., 115 S.W.2d 1217.

88. W.Va.—Whetsell v. Elkins, 70 S.E. 754, 68 W.Va. 709.
32 C.J. p 400 note 77.

89. Miss.—Belzoni Oil Co. v. Yazoo & M. V. R. Co., 47 So. 468, 94 Miss. 58.

90. La.—Bowers v. Riegal, 96 So. 680, 153 La. 851.

Want of jurisdiction to issue. An injunction will always be dissolved where the court by which it was granted was for any reason without jurisdiction to grant it,[91] as where the amount involved was insufficient to give jurisdiction,[92] where suit was brought in the wrong county,[93] or where an injunction was issued by a court or judge without power to award the injunction,[94] or who was disqualified.[95]

Improvident issuance of injunction. As a general rule, where an injunction has been improvidently issued through some mistake or misapprehension of the chancellor, it may be dissolved;[96] and in these circumstances the fact that an injunction bond has been given,[97] or that defendant has asked a continuance until the termination of another suit involving title to the property in dispute,[98] does not affect defendant's right to ask a dissolution of the injunction. Nevertheless, an injunction, although improvidently sued out, will not be dissolved if the facts of the case show that on the dissolution the party will immediately be entitled to that form of remedy on other grounds.[99]

Lack of reasonable probability of success. While, as appears supra § 234, it is not necessary to the continuance of an injunction that it should be clear that complainant would succeed at the hearing, it being sufficient that on the whole case there is a probable cause to believe that he will succeed, it is nevertheless essential that he should show a reasonable probability that he will be able to establish his case at the hearing, and, if this appears very doubtful, the injunction will be dissolved.[1] A fortiori is this so where it is obvious that there is no merit in plaintiff's case;[2] and the fact that great loss will result to plaintiff from a dissolution of the injunction is immaterial.[3]

Conduct of plaintiff. It is sufficient ground for the dissolution of an injunction that plaintiff's conduct in respect of the subject matter of the suit in which it was granted is such as disentitles him to the consideration of a court of equity,[4] or that the suit is collusive or in bad faith.[5] Delay in obtaining an injunction is not ground for dissolving it,[6] unless defendant is prejudiced thereby.[7] Plaintiff's failure, on learning of defendant's minority, to take any action to have him properly represented warrants dissolution of the injunction.[8]

Misrepresentation or suppression of facts. When it is shown on a motion to dissolve an ex parte in-

91. Ill.—Litzelman v. Town of Fox, 1 N.E.2d 915, 285 Ill.App. 7.
32 C.J. p 398 note 66.

92. Ill.—York v. Kile, 67 Ill. 233.

93. Ga.—Kinney v. Crow, 199 S.E. 198, 186 Ga. 851.
32 C.J. p 399 note 68.

94. Or.—Burggraf v. Brocha, 145 P. 639, 74 Or. 381.
32 C.J. p 399 note 69.

95. Ky.—Petrey v. Holliday, 199 S. W. 67, 178 Ky. 410.

96. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615.
Hawaii.—Manibog v. Low, 33 Hawaii 660.
Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill. App. 272.
La.—Morgan v. Morgan Plan Co. of New Orleans, 113 So. 795, 164 La. 140.
Mo.—Marbury v. City of Farmington, App., 5 S.W.2d 677—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
N.Y.—Deligtisch v. Borson, 241 N.Y. S. 847, 229 App.Div. 201.
Tex.—Pancake v. Kansas City Life Ins. Co., Civ.App., 134 S.W.2d 776—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079—Fisher v. Frito Co., Civ.App., 81 S.W.2d 282.
32 C.J. p 402 note 14.

Restraining interference with receiver
Where receiver of building and loan association had been improvidently appointed, injunction restraining officers and agents of association from interfering with receiver must be dissolved.—Lone Star Building & Loan Ass'n of Houston v. State ex rel. Atty. Gen., Tex.Civ.App., 91 S.W.2d 941, error dismissed.

Restraining testimony in other suit
In suit to enjoin former attorneys from testifying in proceeding in which plaintiff was a party, as to information acquired while attorney and client relationship existed between them, trial court properly dissolved temporary injunction, since questions of law affecting admissibility of attorneys' testimony would have to be determined by the judge in the proceeding in which the testimony of the attorneys was sought to be introduced.—Ragsdale v. Dorbandt, Tex.Civ.App., 140 S.W.2d 219.

97. Cal.—King v. Hall, 5 Cal. 82.
32 C.J. p 402 note 15.

98. Miss.—Davis v. Davis, 4 So. 554, 65 Miss. 498.

99. La.—Chambliss v. Atchison, 2 La.Ann. 488.
32 C.J. p 402 note 17.

1. Ala.—Williams v. Prather, 196 So. 118, 120, 239 Ala. 524, citing **Corpus Juris.**
32 C.J. p 402 note 19.

Validity of statute
Provisions of Agricultural Adjustment Act relating to marketing agreements and handling orders were held not of such doubtful validity as to justify dissolution of temporary restraining order obtained in injunction suit against fruit company allegedly violating order of secretary of agriculture issued pursuant to act.—U. S. v. Goldsmith Fruit Co., D.C. Fla., 19 F.Supp. 147.

2. N.Y.—West Virginia Pulp & Paper Co. v. Peck, 143 N.Y.S. 720, 82 Misc. 72.

3. N.Y.—West Virginia Pulp & Paper Co. v. Peck, supra.

4. Ill.—Public Service Co. of Northern Illinois v. McCloskey, 235 Ill. App. 387.
32 C.J. p 403 note 23.

Misconduct apart from subject matter
The fact that complainant belongs to an illegal association does not constitute a ground for dissolution where such membership is not connected with the controversy.—Cœur d'Alene Consolidated & Mining Co. v. Miners' Union, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.

5. N.Y.—Devlin v. McAdoo, 101 N. Y.S. 546, 116 App.Div. 224.
32 C.J. p 403 note 24.

6. N.C.—Pugh v. Maer, 11 N.C. 362.

7. Ark.—Riggs v. Hill, 144 S.W.2d 26, 201 Ark. 206.
32 C.J. p 403 note 26.

8. La.—Lutcher & Moore Cypress Co. v. Schexnaydre, 122 So. 911, 11 La.App. 72.

junction that plaintiff has misstated the case by the misrepresentation of material facts, the injunction will be dissolved on that ground alone.[9] Such, also, is the case where he has suppressed material facts which good faith required him to disclose.[10] Where an injunction has been obtained on a misrepresentation of facts, it does not alter the case that the misrepresentation was through inadvertence, misinformation, or otherwise.[11] Nevertheless, a misrepresentation or suppression must be of material facts and must affect the merits; and, if the facts misrepresented are misstated and are not such as to lead the court to grant the injunction, it will not be dissolved therefor.[12]

Right to same remedy on new application. It is very generally held that, where it is apparent that complainant, in case his injunction is dissolved, would be immediately entitled to the same remedy on a new application, the motion to dissolve should be denied.[13] This rule, of course, has no application in cases where it appears that the party is not immediately entitled or would perhaps not be entitled to another injunction.[14]

Vagueness and uncertainty of writ. If an injunction is so vague and uncertain in its terms that defendant is not able to determine therefrom what he is restrained from doing, the injunction may be dissolved,[15] although, as appears supra § 237, vagueness or uncertainty may also be cured by appropriate modification.

b. Procedural Defects and Irregularities

As a general rule, mere technical errors or inaccuracies in the proceedings connected with the issuance of the injunction do not constitute grounds for dissolution, but the rule is otherwise in most jurisdictions as regards substantial errors.

Mere technical errors or inaccuracies of form in the bill on which the injunction is granted, or in the order granting the injunction, or in the other proceedings connected with its issue, are not available.[16] On the other hand in most jurisdictions, if the irregularities are not merely technical, but are substantial, the rule is that the injunction should be dissolved,[17] after giving opportunity to amend the bill;[18] but some courts make a distinction between discharge and dissolution of an injunction and hold that a motion to dissolve may be founded only on a want of equity in the bill or on the full and complete denial of its equity by the answer,[19] and that a motion to dissolve operates as a waiver of any irregularity which has accrued in the granting of the writ,[20] unless there is some statutory provision to the contrary.[21]

Misjoinder or nonjoinder of parties. A misjoinder of complainants is not such a material defect as to constitute a ground for the dissolution of the injunction;[22] nor is a defect of parties necessarily a ground for dissolution,[23] until plaintiff has been given an opportunity to amend his bill,[24] since, as appears supra § 186, the bill may be amended without prejudice to the injunction; but in case it appears to the court that justice cannot be done in the absence of certain parties, the injunction will be dissolved unless such parties can be and are brought in.[25] A preliminary injunction restraining the prosecution of an action in another state should be dis-

9. U.S.—Cœur d'Alene Consolidated & Mining Co. v. Miners' Union, C. C.Idaho, 51 F. 260, 19 L.R.A. 382.
32 C.J. p 403 note 27.

10. Md.—Tifel v. Jenkins, 53 A. 429, 95 Md. 665.
32 C.J. p 403 note 28.

11. N.J.—Endicott v. Mathis, 9 N.J. Eq. 110.

12. N.J.—Frome v. Warren County, 33 N.J.Eq. 464.
32 C.J. p 403 note 31.

13. Ala.—Kemper v. Walker, 1 So. 2d 376, 377, 241 Ala. 115, citing **Corpus Juris.**
La.—Soniat v. Village of Krotz Springs, 109 So. 840, 161 La. 1066—Bowers v. Riegal, 96 So. 680, 153 La. 851.
32 C.J. p 404 note 33.

14. La.—Bowers v. Riegal, 96 So. 680, 153 La. 851—Tremont Lumber Co. v. May, 78 So. 650, 143 La. 389.

15. Utah.—Thompson v. Liquor Control Commission of Utah, 52 P.2d 463, 87 Utah 578.
32 C.J. p 401 note 6.

16. Iowa.—Dennison v. Brotherhood of American Yeomen, 182 N.W. 873, 191 Iowa 698.
32 C.J. p 398 note 59.

Defective pleading showing real controversy
Appellate court will not dissolve temporary injunction because of defective pleading, if latter is sufficient to indicate existence of real controversy, which may be fully stated by amended petition.—City of Dallas v. Fry, Tex.Civ.App., 263 S. W. 653.

17. La.—Tensas Delta Land Co. v. Fleischer, 62 So. 129, 132 La. 1021.
32 C.J. p 398 note 60.

18. Wis.—Carstens v. Fond du Lac, 119 N.W. 117, 137 Wis. 465.

19. Ala.—Barnett v. State ex rel. Simpson, 179 So. 208, 235 Ala. 326, followed in Broadfoot v. State ex rel. Simpson, 179 So. 208, 235 Ala. 388—Burch v. Burch, 165 So. 387, 231 Ala. 464—Acker v. Green, 113 So. 411, 216 Ala. 445.
32 C.J. p 398 note 62.

20. Cal.—Fuhn v. Weber, 38 Cal. 636.
32 C.J. p 398 note 63.

21. **In Alabama** Code, 1907, § 4526 "authorizes motions to dissolve and discharge to be made and heard at the same time without prejudice; consequently a motion to dissolve is not a waiver of the right to discharge, as was formerly held."—Woodward v. State, 55 So. 506, 173 Ala. 7.

22. N.J.—Johnson v. Vail, 14 N.J.Eq. 423.
32 C.J. p 400 note 80.

23. N.J.—Morgan v. Rose, 22 N.J. Eq. 583.
32 C.J. p 400 note 81.

24. W.Va.—United Fuel Gas Co. v. Morley Oil & Gas Co., 131 S.E. 713, 101 W.Va. 73.

25. U.S.—Eldred v. American Pal-

solved as to one not a party to such action.[26]

Want of or defective verification. An injunction may be dissolved for lack of, or material defects in, the form or substance of the verification of the bill;[27] but it has been held that even in case of such defects an opportunity to amend should be allowed,[28] and that the injunction should not be dissolved if before the hearing on the motion the bill has been correctly verified by amendment.[29] Some authorities hold that the irregularity of granting a temporary injunction on an unverified bill is not ground for dissolution, although it may be ground for a motion to discharge or vacate the injunction.[30] Failure to verify an unnecessary amendment to the bill is no ground for dissolution.[31] A federal court will not dissolve an injunction on removal of the cause from a state court on the ground that the bill filed in the state court was not verified according to federal chancery practice.[32]

Want of notice of application for injunction. If, under the rules considered supra § 180, notice of an application is required by statute, or if the circumstances of the case are such that defendant is entitled to notice, the want of it will constitute a good ground for dissolving the injunction.[33] However, the court will not set aside the injunction for want of notice if the case appears to be one in which the rule to give notice might properly be dispensed with,[34] but in such case it will retain the injunction and order complainant to pay the costs of the application.[35] Even where the issuance of an injunction without notice or hearing is considered an irregularity which can be cured, it is not improper to dissolve an injunction so issued without giving plaintiff an opportunity to cure the irregularity where plaintiff had a considerable time before the motion to dissolve was heard in which to cure the irregularity and made no effort to do so.[36] It has been held that mere insufficiency of notice is not a ground for dissolution.[37]

Irregularities connected with service of process. Although a contrary rule has been recognized,[38] it is generally held that the injunction will not be dissolved for mere irregularities in the service of the injunction or the subpœna;[39] but a total failure to serve may be sufficient ground,[40] and a failure to make a return of the service may be ground for dissolution.[41]

Failure to serve points and authorities. Under a statute substantially so providing, if a party who has obtained a temporary restraining order does not serve on the opposite party, two days prior to the

ace-Car Co., N.J., 105 F. 457, 44 C. C.A. 554.
32 C.J. p 400 note 83.

26. Miss.—Davis v. Natchez Hotel Co., 128 So. 871, 158 Miss. 43.

27. N.D.—State v. Stutsman County Dist. Ct., 186 N.W. 381, 49 N. D. 27.
32 C.J. p 400 note 85.

28. Ala.—Greenwood v. State ex rel. Bailes, 161 So. 498, 230 Ala. 405.
32 C.J. p 400 note 86.

29. Kan.—Kent Oil Co. v. Waddill, 274 P. 1113, 127 Kan. 704.
Mont.—Claussen v. Chapin, 221 P. 1073, 69 Mont. 205.

30. Ala.—Burch v. Burch, 165 So. 387, 231 Ala. 464.

31. Ga.—Maddox v. Rowe, 28 Ga. 61.

32. U.S.—Smith v. Schwed, C.C.Mo., 6 F. 455, 4 McCrary 441.

33. Fla.—Kilgore Groves v. Mayo, 187 So. 256, 136 Fla. 615.
Ill.—Weinstein v. Levin, 45 N.E.2d 891, 317 Ill.App. 383—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill. App. 272.
Iowa.—Bowman v. City of Waverly, 128 N.W. 950, 155 Iowa 745.
La.—Rapides Dairy Dealers' Co-op. Ass'n v. Mathews, App., 158 So. 247.
32 C.J. p 401 note 91.

34. Ill.—Weinstein v. Levin, 45 N.E. 2d 891, 317 Ill.App. 383—Hoffman v. Engelking, 28 N.E.2d 351, 306 Ill.App. 272.
N.J.—Buckley v. Corse, 1 N.J.Eq. 504.

35. N.J.—Buckley v. Corse, supra.

36. Ala.—Rochell v. City of Florence, 182 So. 50, 236 Ala. 313.

37. Fla.—Gamble v. Campbell, 6 Fla. 347.
32 C.J. p 401 note 98.

38. N.Y.—Johnson v. Casey, 26 N.Y. Super. 710, 28 How.Pr. 492.
32 C.J. p 401 note 1.

39. N.J.—Corey v. Voorhies, 2 N.J. Eq. 5.
32 C.J. p 401 note 2.

Delay

Where citizen protested that four-inch mains laid by water company were not contemplated by company's contract with city, and restraining order was served before joints of mains were sealed, or made leakage proof, or excavation filled in, delay in service of writ until main was laid and connected was held not to work hardship or oppression so as to warrant dissolution.—Alabama Water Co. v. City of Jasper, 100 So. 486, 211 Ala. 280.

40. N.J.—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 133 A. 774, 99 N.J.Eq. 696—Reliable Cloak Co. v. Sorbella, 129 A. 137, 98 N.J.Eq. 354.
N.C.—Hirsh v. J. D. Whitehead & Co., 65 N.C. 516.
32 C.J. p 401 note 3.

Defense attorney's knowledge

In ancillary interpleader suit, failure to serve injunction order on defendant was held not ground for vacating injunction where defendant's attorney learned thereof.—Marine Midland Trust Co. of New York v. Eybro Corporation, C.C.A.N.Y., 58 F. 2d 165, dismissing appeal, D.C., Marine Midland Trust Co. of New York v. Irving Trust Co., 56 F.2d 385.

Affidavit

In grantor's action to cancel a deed of record, where a temporary restraining order and injunction pendente lite were issued on grantor's affidavit, as expressly provided for by statute, but without service on defendant grantee of a copy of the affidavit, as required by the same statute, the grantee who made no appearance at the hearing was entitled on subsequent motion to a dissolution of the restraining order and injunction.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.

41. N.J.—Tantum v. West, Ch., 3 A. 338.

hearing, a copy of points and authorities in support of the application, the order will be dissolved.[42]

Defective or insufficient bond. It is very generally held a sufficient ground for dissolving a temporary injunction that no bond was given or that the bond given was insufficient.[43] However, it is a rule supported by many decisions that in such cases an injunction should not be dissolved absolutely and unconditionally because of failure to give bond or because the bond given is for any reason defective, but that the proper practice on motion to dissolve is to make an order that within a reasonable time a sufficient bond shall be given or that the injunction shall be dissolved.[44] If it is apparent that irrespective of the absence of a bond no injunction should have been granted, the injunction should be dissolved without giving to complainant an opportunity to file bond.[45] Even after an injunction has been allowed without requiring security, the chancellor may, in his discretion, order the injunction to be dissolved, unless plaintiff shall give security.[46]

Laches in seeking dissolution. After a long acquiescence in an order for an injunction an application for its dissolution will be refused in cases where the delay and acquiescence of defendant in the injunction have so changed the status of the parties that the subsequent dissolution would injuriously and inequitably affect complainant or permit defendant to exercise some inequitable or unfair advantage acquired by reason of his acquiescence or delay.[47] However, where no circumstances appear which would render the dissolution of the injunction inequitable or injurious to complainants by reason of the delay of defendant in moving for a dissolution, or by reason of his acquiescence therein for a long period of time, such delay and acquiescence will constitute no ground for refusing to dissolve the injunction.[48]

§ 242. —— Causes Subsequent to Granting Injunction in General

A preliminary injunction will be dissolved when the reasons for granting it have ceased to exist and it can no longer serve a useful purpose, or where the plaintiff by his conduct has forfeited the right to have it continue in effect.

A preliminary injunction will be dissolved when the reasons for granting it have ceased to exist and it can no longer serve any useful purpose;[49] and this is so, although the injunction will do no harm to defendant.[50] So, where acts have been discontinued, against which injunction is sought, and there is no evidence of any intention to renew them, the injunction will not be continued.[51] So, too, it will be dissolved in case complainant has subsequently obtained in some other way all that he asked in his bill.[52] An injunction against an official is not dissolved merely on the official's ceasing to hold the office.[53]

Laches in prosecuting cause. After an injunction has been granted complainant must use due diligence in the prosecution of his case or the injunction will be dissolved,[54] especially where defendant is being deprived of the use of property or is otherwise suffering loss because of the restraint.[55] In applying the rule as stated, it has frequently been held that the neglect of complainant to take out and

42. Cal.—Northcutt v. Superior Court in and for Los Angeles County, 226 P. 25, 66 Cal.App. 350.

43. Mich.—Quail v. Wayne Circuit Judge, 228 N.W. 775, 249 Mich. 425.
32 C.J. p 401 note 9.

44. Fla.—Fuller v. Cason, 7 So. 870, 26 Fla. 476.
32 C.J. p 401 note 10.

45. Fla.—Fuller v. Cason, supra.

46. N.Y.—Beebe v. Coleman, 8 Paige 392.

47. U.S.—Standard Bonded Warehouse Co. v. Cooper & Griffin, D.C. N.C., 30 F.2d 842.
32 C.J. p 404 note 40.

48. Fla.—Perry v. Wittich, 20 So. 238, 37 Fla. 237.

49. Mo.—Putnam v. Coates, 283 S.W. 717, 220 Mo.App. 218.
Okl.—Whitson v. City of Kingfisher, 54 P.2d 616, 622, 173 Okl. 145, citing **Corpus Juris.**
Tenn.—Greene County Union Bank v. Miller, 75 S.W.2d 49, 18 Tenn.App. 239.
Tex.—Ragsdale v. Dorbandt, Civ. App., 140 S.W.2d 219—Polk v. Holland Texas Hypotheek Bank, Civ. App., 66 S.W.2d 1112, 1116, citing **Corpus Juris**—City Central Bank & Trust Co. v. Jackson, Civ.App., 45 S.W.2d 433.
32 C.J. p 405 note 60.

Compliance with statute formerly violated.—Koch v. Johnson, 243 P. 611, 30 Ariz. 14.

Interference with possession after ejection

Dissolution of temporary restraining order in action to restrain tenant from interfering with possession of landlord after tenant had been ejected from the premises in forcible entry and detainer was held not abuse of discretion where officer had removed tenant personally and had levied on part of tenant's property for costs, but had not removed remainder of tenant's property and tenant had perfected his appeal and obtained a stay order prior to removal of personalty.—Usailis v. Jasper, 271 N.W. 524, 222 Iowa 1360.

50. N.J.—Mullen v. Jennings, 9 N.J. Eq. 192.

51. U.S.—Brookings State Bank v. Federal Reserve Bank, D.C.Or., 281 F. 222.

52. U.S.—Baird v. Shore Line R. Co., C.C.Conn., 2 F.Cas.No. 759, 6 Blatchf. 461.
32 C.J. p 406 note 62.

53. Me.—Clark v. Wardwell, 55 Me. 61.
N.Y.—People v. Connolly, 2 Abb.Pr., N.S., 315.

54. Cal.—Palm Springs-La Quinta Development Co. v. Kieberk Corporation, 100 P.2d 346, 37 Cal.App. 2d 642.
N.J.—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 133 A. 774, 99 N.J.Eq. 696.
W.Va.—Shrewsbery v. Meadows, 174 S.E. 688, 115 W.Va. 98.
32 C.J. p 406 note 65.

55. Pa.—Shenkin v. Schermerhorn, 18 Pa.Dist. & Co. 470.
32 C.J. p 406 note 66.

serve a subpœna within a reasonable time, or within the time fixed by rules of court, is just ground for dissolving the injunction.[56] So it has been held a ground to dissolve that plaintiff has failed to use due diligence in filing or serving a copy of the bill,[57] or in taking testimony,[58] and setting down the cause for hearing;[59] and it is no answer to say that both parties are actors and that defendant might have entered a rule to close the testimony taken as evidence, and brought the case on for hearing.[60] So an injunction may be dissolved because complainant has failed to bring all the parties interested before the court[61] or has failed to use due diligence in obtaining an answer from defendants.[62]

The rule that want of diligence is ground for dissolving the injunction does not apply where the situation of the cause enables defendant to proceed.[63] If there is a reasonable excuse for the delay, a dissolution will not be granted on the ground of laches.[64]

Noncompliance with terms. As a general rule, it is ground for dissolving the injunction that plaintiff has not complied with the terms imposed on him by the court,[65] such for instance as to bring an action at law,[66] or to give bond,[67] or to make a deposit in court,[68] or to stay proceedings at law.[69]

Abuse of process by plaintiff. Acts of plaintiff subsequent to the granting of the injunction amounting to an abuse of the process of the court may likewise authorize the dissolution of the injunction.[70]

Statute legalizing acts enjoined or protecting complainant. An injunction will be dissolved where, subsequent to its issuance, a statute is enacted which legalizes the acts restrained,[71] or which provides adequate protection for the complainant;[72] and the possibility that such statute may be repealed does not prevent dissolution of the injunction.[73]

Lapse of time. A preliminary injunction or temporary restraining order will expire without motion to dissolve, in case it was granted to continue until a specified time and that time has elapsed.[74] Otherwise it will continue in effect until the hearing, unless sooner dissolved by order of court.[75] The restraint contained in an order to show cause "until the further order of this court," or "until this order be discharged or made absolute," does not become ineffective unless or until there is an order by court to the contrary, notwithstanding the hearing on the order to show cause is informally continued after date of its return, or is not continued at all.[76]

Consent of parties. Complainant may at any time waive the benefits of the injunction and consent to its dissolution, or he may render it ineffective by an agreement inconsistent with the terms of the injunction.[77]

56. N.J.—Forstmann & Huffmann Co. v. United Front Committee of Textile Workers of Passaic and Vicinity, 133 A. 774, 99 N.J.Eq. 696.
42 C.J. p 406 note 67.

57. Del.—Prettyman v. Ratcliffe, 4 Del.Ch. 29.
N.Y.—Furgison v. Robinson, Hopk. 8.

58. Fla.—Perry v. Wittich, 20 So. 238, 37 Fla. 237.
N.J.—Hoagland v. Titus, 14 N.J.Eq. 81.

59. N.J.—Hoagland v. Titus, supra.
Conduct held not laches
Plaintiff securing ex parte preliminary injunction, followed after hearing by preliminary injunction, was not guilty of laches for failure to proceed to final hearing, where neither party made any move for ten years, and preliminary decree adequately protected plaintiff.—Anderson v. Council of Associated Building Trades, 99 Pa.Super. 100.

60. N.J.—Hoagland v. Titus, 14 N.J. Eq. 81.

61. Ill.—Atkins v. Billings, 72 Ill. 597.
32 C.J. p 406 note 72.

62. N.Y.—Depeyster v. Graves, 2 Johns.Ch. 148.
32 C.J. p 406 note 73.

63. N.Y.—Schermerhorn v. Merrill, 1 Barb. 511.
Failure to issue process
Granting motion to dismiss injunction for complainant's failure to cause process to issue was erroneous where, before hearing of motion, process did issue.—Owens v. Evans, 139 S.E. 476, 104 W.Va. 102.

64. Pa.—Zaengle v. Smith, 20 Pa. Dist. & Co. 434.
32 C.J. p 406 note 75.

65. U.S.—Twenty-One Mining Co. v. Original Sixteen to One Mine, Cal., 240 F. 106, 153 C.C.A. 142.
Ind.—Mowrer v. State, 8 N.E. 561, 107 Ind. 539.
32 C.J. p 406 note 76.

66. Md.—Clayton v. Shoemaker, 98 A. 635, 67 Md. 216.

67. Ga.—Brown v. Cole, 75 S.E. 334, 138 Ga. 433.

68. N.J.—Morris Canal & Banking Co. v. Bartlett, 3 N.J.Eq. 9.

69. N.Y.—Livingston v. Kane, 3 Johns.Ch. 224.

70. U.S.—Pacific Gas & Electric Co. v. City and County of San Francisco, D.C.Cal., 211 F. 202.
32 C.J. p 407 note 81.

71. N.D.—Simmons v. Board of Education of Crosby, 237 N.W. 700, 704, 61 N.D. 212, quoting **Corpus Juris.**
32 C.J. p 407 note 96.
Restraining prosecution
Injunction restraining prosecution under allegedly inoperative city ordinance for maintenance of snooker hall would be dissolved where subsequent to issuance of injunction valid ordinance authorizing such prosecution was enacted.—Whitson v. City of Kingfisher, 54 P.2d 616, 176 Okl. 145.

72. U.S.—Handy v. Johnson, D.C. Tex., 51 F.2d 809.

73. U.S.—Handy v. Johnson, supra.

74. Tex.—Beirne v. North Texas Gas Co., Civ.App., 221 S.W. 301.
32 C.J. p 408 note 7.

75. Fla.—Scarlett v. Hicks, 13 Fla. 314.
S.C.—Jamison v. Knotts, 46 S.C.L. 190.

76. N.J.—Republic Trading Co. v. Hay, 108 A. 83, 90 N.J.Eq. 336.

77. N.Y.—General Acc. Fire & Life Assur. Co. v. Kelly, 157 N.Y.S. 1106, 93 Misc. 320.
32 C.J. p 408 note 10.

§ 243. —— Proceedings in Action

The bill may be so amended as to furnish ground for dissolution of an injunction previously granted. The grant of a temporary injunction is sufficient ground for the dissolution of a temporary restraining order theretofore issued.

Although the amendment of a bill after a temporary injunction has been granted ordinarily does not operate to dissolve or vacate the injunction as of course, as discussed supra § 186, or in itself furnish a ground for dissolution,[78] an amendment of a bill may be such as to furnish a ground for dissolving or discharging an injunction previously granted on application for that purpose,[79] as, for instance, where there is a change in the purpose of the suit and in the relief prayed for.[80]

Issuance of further injunction. A temporary restraining order issued to maintain the status quo until the hearing and decision of an application for injunction pendente lite is no longer effective after hearing and issuance of an injunction pendente lite,[81] and this is true even though the injunction pendente lite is void for noncompliance with statutory requirements.[82] Accordingly, where a restraining order has been replaced by a temporary injunction, it is not error to deny a motion to dissolve the restraining order.[83]

§ 244. —— Dismissal or Termination of Action

Generally speaking, a temporary injunction is and should be dissolved when the cause is disposed of on its merits, as by dismissal or discontinuance or by entry of final decree.

Generally speaking, a temporary injunction, being provisional in character, becomes functus officio when the cause is disposed of on its merits,[84] and is dissolved as a matter of course;[85] but the ultimate settling of the rights of the parties on the merits does not determine whether the temporary injunction should or should not have been dissolved, since at the hearing of a motion to dissolve the court considers the circumstances as they appear at the time.[86]

Dismissal or discontinuance. On the dismissal,[87] or discontinuance,[88] or other similar disposition[89] of the suit, a preliminary injunction granted on such bill is thereby dissolved; and it has been held error to include in the decree dismissing the suit an order continuing the temporary injunction.[90]

Entry of final decree generally. Where a decree for a perpetual injunction is rendered, the order for a preliminary injunction is merged and ceases to have any further effect.[91] Also a preliminary in-

78. Ill.—Francis v. Galbreath, 278 Ill.App. 389.
Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.

79. Ill.—Court Rose No. 12 Foresters of America v. Corna, 117 N.E. 144, 279 Ill. 805.
Pa.—Rogers v. Ashbridge, 9 Pa.Dist. 195, 23 Pa.Co. 492.

80. Ill.—Court Rose No. 12 Foresters of America v. Corna, 117 N.E. 144, 279 Ill. 805.
Pa.—Rogers v. Ashbridge, 9 Pa.Dist. 195, 23 Pa.Co. 492.

81. Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, 107 P.2d 885, 111 Mont. 241.
Entry of final decree see infra § 244.

82. Mont.—State ex rel. McKenzie v. District Court of Fifteenth Judicial Dist. in and for Sheridan County, supra.

83. Okl.—Jennings v. Elliott, 97 P. 2d 67, 186 Okl. 285.

84. Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386.

85. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51.

86. Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386.

87. Ark.—Sullivan v. Wilson Mercantile Co., 271 S.W. 30, 168 Ark. 262.
Ga.—Lathrop v. Miller, 138 S.E. 50, 164 Ga. 167.
Idaho.—Independent Irr. Co. v. Baldwin, 252 P. 489, 43 Idaho 371.
Iowa.—People's Sav. Bank of Avoca v. McCarthy, 231 N.W. 487, 210 Iowa 952.
La.—Day v. Bailey, 41 So. 448, 117 La. 154.
N.Y.—Ettlinger v. Trew, 24 N.Y.S.2d 57, 175 Misc. 744.
Pa.—Klahr v. Baldwin, 28 Erie Co. 345.
Tex.—International Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory Workers, 130 S.W.2d 282, 133 Tex. 624, dismissing appeal International Ass'n of Machinists Union, Local No. 1488 v. Federated Ass'n of Accessory Workers, Civ.App., 109 S. W.2d 301.
Wis.—State v. Neveau, 295 N.W. 718, 236 Wis. 414.

Before entry of decree
Where, on hearing of merits of bill for injunction, the judge found for defendants and entered order authorizing defendant to prepare decree of dismissal, a temporary restraining order, theretofore issued and by order extended until further order of court, was thereupon terminated, and did not remain in force until entry of final decree, in absence of order continuing it in force pending appeal.—Stathopoulos v. Reeksting, 147 N.E. 853, 252 Mass. 542.

88. N.Y.—Kelly v. City of Yonkers, 11 N.Y.S.2d 424, affirmed 14 N.Y.S. 2d 142, 257 App.Div. 966.
32 C.J. p 408 note 98.

89. Iowa.—Horrabin v. Iowa City, 130 N.W. 150, 160 Iowa 650, reheard 142 N.W. 212, 160 Iowa 650.

Nonsuit
Granting of nonsuit, on plaintiff's refusal to try case in mode directed by court, works dissolution of temporary injunction previously made against defendant.—Duncan v. Duncan, 126 S.E. 763, 131 S.C. 238.

90. Ill.—Hawthorne Kennel Club v. Swanson, 257 Ill.App. 499, transferred, see 171 N.E. 140, 339 Ill. 220.

91. Ark.—Citizens' Pipe Line Co. v. Twin City Pipe Line Co., 39 S.W.2d 1017, 1020, 183 Ark. 1006, quoting **Corpus Juris.**
Cal.—Shahen v. Superior Court of San Bernardino County, 115 P.2d 516, 46 Cal.App.2d 187—People's Ditch Co. v. Foothill Irr. Dist., 284 P. 514, 103 Cal.App. 321.
Ind.—Wallace v. Simpson, 27 N.E. 2d 130, 108 Ind.App. 54.
Tex.—Kimbrough v. State, Civ.App., 139 S.W.2d 165.
32 C.J. p 408 note 3.

junction comes to an end by the entry of the final decree in the cause making no provision for an injunction,[92] even though an appeal has been taken therefrom[93] and no formal order of dissolution is necessary to effect such dissolution.[94]

Denial of principal relief. If the temporary restraint is merely ancillary to protect pendente lite a right of complainant, it is dissolved on a determination in another action that complainant has no such right, or on a finding in the suit for an injunction in favor of defendant.[95]

Mandamus directing act restrained. An injunction restraining a drainage district from paying any claim against it until determination of a suit pending should be dissolved on the motion of one who had obtained a final judgment against the district in which judgment was embodied a mandamus to the district to pay such judgment.[96]

§ 245. —— Death of Party

If the suit abates by death of either party, generally it is held that the party enjoined or his representative may have an order requiring the opposite party or representative to revive the suit, failing which the injunction shall be dissolved.

While in some cases it has been held that an injunction falls with the death of defendant,[97] there is also authority to the contrary,[98] and generally it is held that, if the suit abates by the death either of plaintiff or of defendant, the party against whom the injunction issued or his representatives may have an order requiring plaintiff or his representatives to revive the suit within a stated time, or that the injunction be dissolved.[99] A motion to dissolve an injunction on account of plaintiff's death will be disallowed as premature when made before decedent's estate is represented.[1]

§ 246. —— Other Causes or Grounds

Various circumstances not lending themselves readily to general statement have been held to constitute grounds for dissolution of injunctions.

In addition to the grounds discussed supra §§ 241-245, other circumstances have been held to constitute sufficient grounds for dissolution of injunctions among which are: That the acts sought to be restrained had been completed before the injunction was granted;[2] that complainant's interest could have been properly protected in another equitable action to which he was a party and to which he filed an answer;[3] that complainant is shown to have an adequate remedy at law;[4] that there is no danger of irreparable injury;[5] that defendant has shown a complete defense to the case made by plaintiff;[6] that the effect of the injunction is to change the possession of real property,[7] or to disturb rather than maintain the status quo of the subject matter;[8] that a lis pendens affording adequate protection has been filed;[9] that the statements to sustain

Waiver

Where a judgment perpetuating a preliminary injunction had already been entered, the irregularity of serving a rule to lift the injunction thereafter was not waived by counsel's acceptance of service of the rule and waiver of citation, where all rights were reserved by counsel in accepting service.—Beasley Motor Co. v. Town of Ruston, 156 So. 179, 180 La. 72.

92. U.S.—Montfort v. Korte, C.C.A. Ind., 100 F.2d 615.
Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 667, 674, 96 Mont. 48, citing **Corpus Juris.**
Tenn.—Badger v. Boyd, 65 S.W.2d 601, 16 Tenn.App. 629.
32 C.J. p 408 note 4.

93. N.Y.—Gardner v. Gardner, 87 N. Y. 14, reversing 24 Hun 627.

94. Md.—Musgrave v. Staylor, 36 Md. 123.
Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 667, 674, 96 Mont. 48, citing **Corpus Juris.**

95. Kan.—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762.
Va.—Danville Warehouse Co. v. Tobacco Growers Co-op. Ass'n, 129 S. E. 739, 143 Va. 741.
32 C.J. p 408 note 1.

Affirmance of decision

In suit for injunction pending petitioner's appeal from judgment denying mandamus, dissolving temporary injunction will not be held error, where judgment denying mandamus was affirmed.—Phenix City v. County Board of Education, 108 So. 589, 214 Ala. 432.

96. Tex.—International Creosoting & Construction Co. v. Hidalgo County Drainage Dist. No. 1, Civ. App., 63 S.W.2d 234, error dismissed.

97. Ga.—Gewinner v. McCrary, 25 S.E. 648, 99 Ga. 299.
Miss.—Yocona Mills v. Gibbs, 27 So. 647.

98. N.C.—Collier v. Newbern Bank, 21 N.C. 328.

99. N.J.—Cummins v. Cummins, 8 N.J.Eq. 173.
32 C.J. p 407 note 84.

1. N.C.—Hill v. Jones, 5 N.C. 211.

2. Miss.—Dixon v. Greene County, 25 So. 665, 76 Miss. 794.
32 C.J. p 404 note 42.

3. Ill.—Kingsbury v. Andrews, 119 Ill.App. 35.

4. N.C.—Merchants Oil Co. v. Mecklenburg County, 194 S.E. 114, 212 N.C. 642.
Tex.—Long v. Collins, Civ.App., 12 S. W.2d 252, error dismissed—Allen & Yarbrough v. Texas & P. Ry. Co., 7 S.W.2d 1102.
32 C.J. p 404 note 44.

5. La.—Salomon v. Equitable Life Assur. Soc. of U. S., 13 So.2d 329, 202 La. 1001.
S.C.—Metcalf v. Huntley-Richardson Lumber Co., 170 S.E. 162, 170 S.C. 226.
Tex.—Texas Co. v. Watkins, Civ.App., 82 S.W.2d 1079.

6. Ga.—Smith v. Wells, 83 S.E. 789, 142 Ga. 774.

7. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., 119 N.W. 261, 142 Iowa 459.

8. Tex.—Humble Oil & Refining Co. v. Neeks Drilling Co., Civ.App., 119 S.W.2d 169, error dismissed.

9. N.Y.—Babcock v. Jones, 17 N.Y. S. 67, 62 Hun 565.
32 C.J. p 404 note 47.

the bill are improbable;[10] and that to allow the injunction to remain in force would be practically to give to plaintiff all the relief which he could obtain by means of a final decree.[11] As appears supra § 27, an injunction should be dissolved where it is based on a new bill containing the same grounds as one on which an injunction had been previously allowed and dissolved. It should likewise be dissolved where a suit against the same defendant and involving the same questions as the suit to which the temporary injunction is auxiliary has been decided in favor of defendant,[12] but this is not so in case the prior injunction is merely to the same effect as the later one.[13] Existence of a previous injunction inconsistent with the one dissolution of which is sought is sufficient ground for granting the motion.[14]

Grounds held insufficient for dissolving an injunction include a ground which, although good at the time the injunction was obtained, is no longer so by the time of the trial,[15] and a misjoinder of causes of action where the rights of defendant will not suffer any prejudice by reason thereof.[16] A temporary injunction restraining eviction proceedings in the county judge's court should not be dissolved on the ground that relief may be obtained by a plea on equitable grounds in the eviction proceedings in such court.[17]

§ 247. —— Motion to Dissolve

a. In general
b. Time for motion

a. In General

A formal motion to dissolve ordinarily is necessary, unless the answer contains a prayer for dissolution. A motion to dissolve which does not urge the grounds of want of notice or bond is taken as a waiver of such grounds.

Ordinarily there must be a formal motion to dissolve,[18] but it has been held that a formal motion to dissolve is not necessary where the answer contains a prayer for dissolution.[19]

Requisites. It has been held that a motion to dissolve an injunction must deal only with facts alleged as a basis for relief by injunction.[20]

As waiver of procedural defects. While it has been said broadly that a motion to dissolve a preliminary injunction constitutes a waiver of want of notice,[21] the more precise rule has been said to be that such a motion waives want of notice[22] or bond[23] where these irregularities are not urged in the motion, but that a motion to dissolve does not constitute a waiver of notice where the failure to give notice is expressly urged[24] as the sole ground,[25] or as one of the grounds,[26] for the dissolution.

Imminence of trial. The fact that the trial is near at hand has been held no reason for denying the motion to dissolve.[27]

Lapse of time before motion. The fact that an order granting an injunction was entered on the minutes of the court and that between the date of the order and the motion to vacate it and open the case for a further hearing a term of court had intervened does not deprive the court of power to vacate the order and rehear the application.[28]

Pendency of other proceedings in the suit may require a postponement of the motion.[29]

10. N.J.—Fowler v. Roe, 11 N.J.Eq. 367.

11. Ill.—Fox Film Corporation v. Collins, 236 Ill.App. 281.
N.Y.—Byrnes v. Kaufwein Realty Co., 200 N.Y.S. 585, 206 App.Div. 306.
Tex.—Cleere v. Wise, Civ.App., 153 S.W.2d 311—Bledsoe v. Grand Lodge of United Brothers of Friendship of Texas, Civ.App., 53 S.W.2d 73.
W.Va.—Tennant v. Kilcoyne, 196 S. E. 559, 120 W.Va. 137.
32 C.J. p 404 note 49.

12. Iowa.—Bratt v. Bankers' Life Co. of Des Moines, 226 N.W. 724, 209 Iowa 881.

13. Tenn.—McKim v. Fulton, 1 Overt. 238.
32 C.J. p 405 note 57.

14. N.Y.—People's R. Co. v. Syracuse, B. & N. Y. R. Co., 6 N.Y.S. 326, 22 Abb.N.Cas. 427.

15. La.—Southern Lumber Co. v. Holt, 55 So. 986, 129 La. 273.
32 C.J. p 404 note 51.

16. Wis.—Hoffman v. Wheelock, 22 N.W. 713, 716, 62 Wis. 434.
32 C.J. p 404 note 52.

17. Fla.—Hobbs v. Chamberlain, 45 So. 988, 55 Fla. 661.
32 C.J. p 404 note 53.

18. N.J.—Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J.Eq. 251.
32 C.J. p 408 note 11.

19. Tex.—Smith v. Palo Pinto County, 128 S.W. 1193, 60 Tex.Civ.App. 531.

20. Tex.—Ollison v. Norman, Civ. App., 31 S.W.2d 364.

21. Ill.—Utterback v. Estill, 224 Ill. App. 151.
32 C.J. p 309 note 88.
Waiver of notice of application for preliminary injunction see supra § 180.

22. Ill.—Decker v. West, 273 Ill. App. 532.

23. Ill.—Grossman v. Grossman, 30 N.E.2d 123, 307 Ill.App. 246—Grossman v. Grossman, 26 N.E.2d 678, 304 Ill.App. 507.

24. Ill.—Grossman v. Grossman, supra.

25. Ill.—Balaban & Katz Corporation v. Rose, 283 Ill.App. 615—Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill.App. 356.

26. Ill.—Wagner v. Okner, 29 N.E.2d 385, 306 Ill.App. 601—Kessie v. Talcott, 27 N.E.2d 857, 305 Ill.App. 627.

27. N.Y.—Secor v. Weed, 30 N.Y.Super. 67.
32 C.J. p 410 note 44.

28. Ga.—Kirkland v. Ferris, 38 S. E. 680, 145 Ga. 93.
Laches in seeking dissolution see supra § 241 b.

29. Fla.—Baird v. Ellsworth Trust Co., 34 So. 565, 45 Fla. 187.
32 C.J. p 410 note 43.

b. Time for Motion

Although there are decisions to the contrary, the weight of authority is that an injunction may be dissolved on motion before answer is filed, except in certain cases. The defendant may move to dissolve after filing his answer.

No general rule can be stated as to the time at which a motion to dissolve an injunction may be made; the matter is regulated to some extent by statutes differing in their provisions.[30] Where, under the principles discussed supra §§ 241–246, sufficient grounds exist, the rule in most jurisdictions is that defendant may apply for the dissolution of an injunction as soon as he has knowledge that it has been issued against him,[31] without waiting until he is served with either the injunction or a subpœna.[32]

Before answer. The weight of authority is that an injunction may, as a general rule, be dissolved on motion before an answer is filed,[33] at least where the bill discloses no equity;[34] but some authorities hold that ordinarily it is irregular to file a motion to dissolve an injunction prior to answer,[35] except where the bill discloses no equity.[36] However, even the majority rule permitting such motions before answered filed has some limitations and does not apply where the bill shows sufficient grounds for its issuance,[37] especially where fraud is alleged,[38] or where the injunction is granted until further answer and further order,[39] or where a discovery is sought,[40] or where the motion is unverified and contains no denial of the allegations of the bill.[41] Where injunction is the sole relief sought, and the motion to dissolve is addressed to the merits of the cause and is filed before answer, the motion should be treated as an answer and the cause decided on the merits, or defendant should be directed to answer the petition.[42]

After answer. Defendant may move to dissolve after the filing of his answer[43] and, although it has been held that ordinarily this will not be done,[44] the injunction may be dissolved even though the answer fails to deny the equities of the bill,[45] or admits all the allegations of the bill,[46] or is defective in form or substance;[47] and the fact that a replication had been filed has been held to be no objection to a motion to dissolve on bill and answer.[48] A motion entered after answer denying the allegations of the bill and alleging special defenses does not operate as a demurrer.[49]

30. Pa.—Clause v. Hoppes, Com.Pl., 8 Sch.Reg. 262.

31. Pa.—Wanamaker v. Wanamaker, 172 A. 846, 315 Pa. 229.
32 C.J. p 409 note 28.

32. N.Y.—Waffle v. Vanderheyden, 8 Paige 45.
32 C.J. p 409 note 29.

33. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So. 2d 880, 148 Fla. 195.
Ill.—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318.
Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845—People's Sav. Bank v. McCarthy, 222 N.W. 372, 207 Iowa 162.
N.C.—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S.E. 545, 189 N.C. 494, 47 A.L.R. 928, distinguishing Ransom v. Shuler, 43 N.C. 304.
Wyo.—Hubert v. Delong, 91 P.2d 53, 54 Wyo. 240.
32 C.J. p 409 note 32.

34. Mo.—Marbury v. City of Farmington, App., 5 S.W.2d 677.
W.Va.—Bungalow Gas Co. v. Swanson, 188 S.E. 235, 117 W.Va. 763.

35. Mich.—Detroit City Gas Co. v. Wayne Circuit Judge, 231 N.W. 557, 251 Mich. 268.
Tenn.—Rentfroe v. Dickinson, 1 Overt. 196.
Tex.—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S.W. 2d 586.

Answer by one of several defendants is not enough to warrant dissolution of the injunction where fraud is charged.—Orr v. Moore, 1 Tex.A.Civ.Cas. § 587.

36. Mich.—Detroit City Gas Co. v. Wayne Circuit Judge, 231 N.W. 557, 251 Mich. 268.

Motion admitting sufficiency of bill
Granting motion to dissolve temporary injunction is error, in absence of answer to merits, where there was admission that petition stated sufficient grounds.—Arcola Sugar Mills Co. v. Rodriquez, Tex. Civ.App., 18 S.W.2d 844.

37. Ill.—George v. International Printing Ink Corporation, 24 N.E. 2d 889, 303 Ill.App. 234.
32 C.J. p 410 note 34.

38. N.J.—Shotwell v. Smith, 20 N. J.Eq. 79.
32 C.J. p 410 note 35.

39. U.S.—Read v. Consequa, Pa., 20 F.Cas.No.11,606, 4 Wash.C.C. 174.

40. N.J.—Shotwell v. Smith, 20 N. J.Eq. 79.

41. Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845.

42. La.—In re Morgan & Co., 99 So. 696, 155 La. 915.

Where motion resembles answer
Refusal to refer to the merits of a motion to dissolve a temporary restraining order was error, where averments of the motion resembled the answer.—Sliman v. Mayor and Board of Aldermen of Village of Palmetto, La.App., 142 So. 846.

43. Fla.—Smith v. Housing Authority of City of Datriba Beach, 3 So. 2d 880, 148 Fla. 195.
Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 230 Iowa 845.
32 C.J. p 410 note 38.

44. Iowa.—Simmermaker v. International Harvester Co., supra.

45. N.J.—Quackenbush v. Van Riper, 1 N.J.Eq. 476.
32 C.J. p 410 note 39.

46. Ala.—Nelson v. Dunn, 15 Ala. 501.

47. Fla.—Thebaut v. Canova, 11 Fla. 143.
32 C.J. p 410 note 41.

48. N.Y.—Grandin v. Le Roy, 2 Paige 509.

49. Iowa.—Sioux City Night Patrol v. Mathwig, 277 N.W. 457, 224 Iowa 748.

Statement of facts as evidence
Motion to dissolve injunction could not be treated as general demurrer, presenting only questions of law, where on hearing court had before it, as evidence, agreed statement of facts.—Atlas Metal Works v. City of Dallas, Tex.Civ.App., 30 S.W.2d 431.

§ 248. —— Notice of Motion

Except in extreme cases, notice of motion generally is held necessary. The notice must state the time and place of the application, the proper court or judge, and the grounds on which dissolution is sought; and it must be properly served.

Except as controlled by statute,[50] the general rule is that an injunction will not be dissolved or modified on motion unless notice has been given to complainant,[51] and this is so although the injunction was obtained ex parte[52] or whether dissolution is effected by motion or by a counterinjunction.[53] However, it has been recognized in a number of decisions that in extreme cases an injunction may be dissolved without notice or hearing,[54] as where delay will result in serious loss,[55] and, in some states, where the bill on its face shows a lack of equity,[56] or where the motion is made in term and in open court.[57]

Form and requisites. If want of equity in the bill is relied on as a ground for dissolving the injunction, a general notice setting up want of equity will be sufficient;[58] but if grounds other than want of equity in the bill or that the equity in the bill had been answered are relied on as grounds for dissolution, they should be set out in the notice,[59] and grounds other than those specified will be regarded as waived.[60] The proper court or judge must be specified with certainty.[61] The time and place at which the application to dissolve was made must be stated.[62] Immaterial mistakes do not vitiate the notice,[63] and it is not necessary to specify in detail the affidavits that are to be used in support of the motion.[64] An order dissolving a temporary injunction issued against several defendants is not vitiated because the notice of motion to dissolve did not specify the particular defendant who purposed to present the motion, where it appears that a particular defendant was the real party in interest, and that the appearance was on its behalf, if not for others.[65]

Service. Service usually should be made on plaintiff's attorney.[66] In the absence of a statute fixing the time, the notice must be served a reasonable time before the day fixed for hearing.[67]

Waiver of notice. Defendant's failure to give notice, or defects in the notice or in the service thereof, may be waived,[68] and are waived by defendant's appearing and contesting the motion.[69] However, a defect in the service of a rule to dissolve an injunction is not cured by the appearance of the party merely to appeal from the decision on the rule to dissolve.[70]

§ 249. —— Use and Effect of Bill or Complaint

On motion before answer or evidence, or at any time for want of equity in the bill, the allegations of fact properly made in the bill will be taken as true. In considering the motion the court will consider amended and supplemental bills.

On a motion to dissolve a preliminary injunction before answer or any evidence,[71] or at any time for

50. Miss.—Strong v. Harrison, 62 Miss. 61.
32 C.J. p 411 note 53.

51. Fla.—Smith v. Housing Authority of City of Daytona Beach, 3 So. 2d 880, 148 Fla. 195.
La.—Phœnix Building & Homestead Ass'n v. Maloney, 151 So. 427, 178 La. 853.
Tex.—Walker v. Meyers, 266 S.W. 499, 114 Tex. 225, affirming Meyers v. Walker, Civ.App., 264 S.W. 314.
W.Va.—Highland v. Strosnider, 191 S.E. 531, 118 W.Va. 647.
32 C.J. p 411 note 54.

If petition shows right to relief, court cannot, sua sponte and without notice, dissolve temporary injunction.—Bledsoe v. Wesley, Tex. Civ.App., 22 S.W.2d 718, error dismissed.

52. Cal.—Page v. Vaughn, 65 P. 740, 133 Cal. 335.
32 C.J. p 411 note 55.

53. La.—Conservation Dept. v. Louisiana Gas & Fuel Co., 81 So. 454, 144 La. 962—Petite Anse Drain Dist. v. Iberia & V. R. Co., 42 So. 433, 117 La. 940.

54. La.—Lafourche Parish Police Jury v. Thibodaux, 86 So. 664, 148 La. 91.
32 C.J. p 411 note 58.

55. La.—Teacle v. Hughes, 83 So. 457, 146 La. 195.
32 C.J. p 411 note 59.

56. Idaho.—Thayer v. Bellamy, 71 P. 544, 9 Idaho 1.
32 C.J. p 411 note 60.

57. Tenn.—James County v. Hamilton County, 14 S.W. 601, 89 Tenn. 237.
32 C.J. p 411 note 61.

58. N.J.—Morris Canal & Banking Co. v. Bartlett, 3 N.J.Eq. 9.

59. Mont.—Lee v. Watson, 38 P. 1077, 15 Mont. 228.
32 C.J. p 411 note 63.

60. Iowa.—Brigham v. White, 44 Iowa 677.
32 C.J. p 411 note 64.

61. Ala.—Florence v. Paschal, 48 Ala. 458.
32 C.J. p 411 note 65.

62. Ala.—Florence v. Paschal, supra.

63. Miss.—Hiller v. Cotten, 54 Miss. 551.
32 C.J. p 411 note 67.

64. Kan.—Kemper v. Campbell, 26 P. 53, 45 Kan. 529.

65. Cal.—Flood v. E. L. Goldstein Co., 110 P. 916, 158 Cal. 247.

66. Ga.—Moore v. Ferrell, 1 Ga. 7.
Miss.—Hiller v. Cotten, 54 Miss. 551.

67. U.S.—Caldwell v. Walters, D.C., 4 F.Cas.No.2,305, 4 Cranch C.C. 577.
32 C.J. p 412 note 72.

68. Miss.—Penrice v. Wallis, 37 Miss. 172.

69. Tex.—Richardson v. Mayes, Civ. App., 223 S.W 546.
32 C.J. p 412 note 74.

70. La.—Marin v. Thierry, 29 La. Ann. 362.

71. Ill.—Bachechi v. Inlander Paper Co., 252 Ill.App. 178—United Electric Coal Cos. v. Keefer, 249 Ill. App. 222.
Ky.—Halcomb v. Phipps, 240 S.W. 363, 194 Ky. 648.
Tex.—Arcola Sugar Mills Co. v. Rodriquez, Civ.App., 18 S.W.2d

want of equity in the bill,[72] the allegations of fact properly made in the bill will be taken as true, and the injunction or restraining order dissolved or not according to whether the complaint or bill shows sufficient grounds for it,[73] at least where no other sound reason for dissolution is presented.[74] In this respect the motion operates the same as a demurrer.[75] All amendable defects in the bill may be considered, for the purposes of the motion, as having been amended.[76] After the filing of the answer the bill may be read as an affidavit to contradict the answer.[77] On motion to dissolve, amended and supplemental bills will be considered by the court,[78] even though they may have been filed after the motion was made;[79] but it has been held that amendments made after the motion has been presented and denied cannot affect the propriety of the decision.[80] If the answer does not deny the equity of the bill, the continuance or dissolution of the injunction depends on the sufficiency of the bill.[81]

§ 250. —— Use and Effect of Answer

a. In general
b. Limitations and exceptions
c. Nature of answer justifying dissolution
d. Effect of exceptions to answer

a. In General

In the absence of statute providing otherwise, it is a general rule that if the allegations of a sworn answer meet and deny all the equities of the bill the preliminary injunction theretofore issued will be dissolved.

The general rule is that, on a motion to dissolve an injunction made on the filing of a verified answer, the allegations of the answer, as far as they are responsive to the bill, will be taken as true,[82] at least in the absence of replication;[83] and this has been held to be true as to an unverified answer where answer under oath has been waived by plaintiff.[84] Although there is some contrary authority,[85] in the absence of statutory change or modification of the rule,[86] the general rule is that, in case the

844—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S.W. 2d 586.
32 C.J. p 412 note 76.

72. Ala.—Auto Mut. Indemnity Co. v. Moore, 179 So. 368, 235 Ala. 426—Poyner v. Whiddon, 174 So. 507, 234 Ala. 168—Burch v. Burch, 165 So. 387, 231 Ala. 464.
Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 630, 52 Idaho 728, citing **Corpus Juris.**
Ill.—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318—Wendt v. City of Elgin, 264 Ill. App. 433.
32 C.J. p 412 note 76.

73. Cal.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.
Tex.—Arcola Sugar Mills Co. v. Rodriquez, Civ.App., 18 S.W.2d 844.

74. Okl.—Hayes v. Hoffsommer, 250 P. 1009, 120 Okl. 157.

75. Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 630, 52 Idaho 728, citing **Corpus Juris.**
Ill.—Toledo, P. & W. R. R. v. City of East Peoria, 273 Ill.App. 318—Wendt v. City of Elgin, 264 Ill. App. 433—Bachechi v. Inlander Paper Co., 252 Ill.App. 178—United Electric Coal Cos. v. Keefer Coal Co. of Illinois, 249 Ill.App. 222.
Ky.—Halcomb v. Phipps, Ky., 240 S. W. 363, 194 Ky. 648.
Ohio.—Hering v. Limbach, 197 N.E. 490, 50 Ohio App. 78.
Tex.—Arcola Sugar Mills Co. v. Rodriquez, Civ.App., 18 S.W.2d 844—City of Beaumont v. Sam's Loan Office, Inc., Civ.App., 4 S.W.2d 586.
32 C.J. p 412 note 77.

76. Ala.—Badham v. Johnston, 193 So. 420, 239 Ala. 48—Union Central Life Ins. Co. of Cincinnati, Ohio, v. Thompson, 157 So. 852, 229 Ala. 433—Holcomb v. Forsyth, 113 So. 516, 216 Ala. 486.
32 C.J. p 398 note 65, p 412 note 78.

77. N.C.—Peterson v. Matthis, 56 N. C. 31—Lloyd v. Heath, 45 N.C. 39.

78. Idaho.—Blue Creek Land & Livestock Co. v. Battle Creek Sheep Co., 19 P.2d 628, 52 Idaho 728.
Miss.—Mississippi Valley Trust Co. v. Brewer, 117 So. 540, 151 Miss. 170.

79. Tex.—Woods v. Kiersky, Civ. App., 297 S.W. 518, reversed on other grounds, Com.App., 14 S.W. 2d 825.

80. Ill.—Cohen v. Sparberg, 44 N.E. 2d 335, 316 Ill.App. 140.

81. Md.—North Ave. Market v. Keys, 164 A. 152, 164 Md. 185.

82. Ill.—Kuhl v. Clark, 261 Ill.App. 491.
Tex.—Owen v. Willis, Civ.App., 20 S. W.2d 338, error dismissed.
W.Va.—Stybr v. Caflisch Lumber Co., 158 S.E. 669, 110 W.Va. 337.
32 C.J. p 412 note 80.

83. W.Va.—Kessel v. Cohen, 140 S. E. 15, 104 W.Va. 296.

84. Va.—Ingles v. Straus, 21 S.E. 490, 91 Va. 209, 223.
32 C.J. p 413 note 81.

85. La.—Orleans Nav. Co. v. New Orleans, 1 Mart. 23.

86. **In Alabama**
(1) The rule "has been considerably modified" by statute which provides that, on the hearing of a motion to dissolve a temporary injunction, the court may consider the sworn bill and answer and also such affidavits as any party may introduce. Under the statute, it has been held that an injunction should not be dissolved merely because the answer denies the material averments of the bill, since the denials of the answer are no longer conclusive.—Dudley v. Whatley, 14 So.2d 141—West v. State ex rel. Matthews, 173 So. 46, 233 Ala. 588—Castleman v. Knight, 110 So. 911, 215 Ala. 429—32 C.J. p 413 note 83 [a] (1).

(2) The question whether the injunction should be dissolved on the sworn denials of the answer rests in the sound discretion of the court.—Lindsey v. Viking Refrigerators, 3 So.2d 65, 241 Ala. 425—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394—West v. State ex rel. Matthews, supra—First Nat. Bank v. Forman, 160 So. 109, 230 Ala. 185—Union Central Life Ins. Co. of Cincinnati, Ohio, v. Thompson, 157 So. 852, 229 Ala. 433—Fleming v. Bryars, 151 So. 846, 227 Ala. 660—Stout v. Thomas, 130 So. 189, 221 Ala. 675—Cruce v. McCombs, 129 So. 279, 221 Ala. 507—Holcomb v. Forsyth, 113 So. 516, 216 Ala. 486—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.

(3) In exercising this discretion the court will weigh the probable consequences that will result to the respective parties from retention or dissolution of the injunction.—Lindsey v. Viking Refrigerators, 3 So.2d 65, 241 Ala. 425—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394—Union Central Life Ins. Co. of Cincinnati, Ohio, v. Thompson, 157 So. 852, 229 Ala. 433—Stout v. Thomas, 130 So. 189, 221 Ala. 675

allegations of a sworn answer meet and deny all the equities of the bill, the preliminary injunction theretofore issued will be dissolved,[87] at least where complainant has had an opportunity and has failed to substantiate the allegations of his bill,[88] and this, as is discussed supra § 6, was the rule applicable to the so called "common injunction," restraining the further prosecution of an action at law in which defendant could not assert his equity, and issued for the purpose of compelling an appearance and full answer by plaintiff in the law action. The rule applies even though the answer may be open to exception on other grounds,[89] since it may be good as an affidavit although insufficient as an answer to the bill generally.[90] Especially is this rule applicable where the answer is verified positively, while the allegations of the bill are not verified at all or are verified merely on information and belief,[91] where plaintiff will suffer no irreparable injury in case of dissolution,[92] or where great injury would result to defendant if the injunction were continued to the hearing and no serious loss would be sustained by plaintiff if it were dissolved.[93] The fact that a sworn answer was not required by the bill will not prevent a dissolution on motion in case the answer is verified.[94] Even though the bill does not require a sworn answer, such an answer may be used as an affidavit on behalf of defendant, on the hearing of his motion to dissolve;[95] but under some statutory provisions, where a sworn answer is waived, such an answer cannot be used as evidence for defendant, at least where it is not expressly offered in evidence as a statutory affidavit.[96] An application to dissolve the injunction on the bill and answer brings up the question whether the equities of the bill are sufficient to justify the writ in the first instance.[97]

Limitations and exceptions to the rule are considered infra subdivision b of this section.

Amendment of bill after answer. Where the bill is so amended as to make a new case, defendant cannot ask a dissolution on the denials contained in his answer to the original bill, but must answer the bill as amended;[98] but where the amendment presents no new case, and the equities of the bill remain the same, the answer to the original bill may be relied on.[99]

Dissolution in part. Where the injunction enjoins the performance of several acts, and the answer denies the allegations of the bill which entitle plaintiff to an injunction against certain acts, the injunction should be dissolved as to such acts, but not as to the other acts complained of.[1]

—Holcomb v. Forsyth, 113 So. 516, 216 Ala. 486—32 C.J. p 413 note 83 [a] (2).

(4) Where the submission is on motion to dissolve on the sworn answer and affidavits, dissolution may properly be predicated on the want of equity in the bill.—Ford v. Southern Motor Car Co., 93 So. 902, 208 Ala. 170.

87. Ala.—Watson v. Hamilton, 101 So. 609, 211 Ala. 688.
Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 107 Fla. 304.
Ill.—Northwest Side Lumber Co. v. Layton, 239 Ill.App. 82.
Iowa.—Sioux City Night Patrol v. Mathwig, 277 N.W. 452, 224 Iowa 748.
N.J.—Metropolitan Lumber Co. v. Fordham Nat. Bank, 144 A. 879, 104 N.J.Eq. 248, affirming Metropolitan Lumber Co. v. Fordham Nat. Bank in New York, 141 A. 742, 102 N.J.Eq. 514.
N.C.—Sineath v. Katzis, 14 S.E.2d 418, 219 N.C. 434—Boone v. Boone, 9 S.E.2d 383, 217 N.C. 722—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S.E. 545, 189 N.C. 494, 47 A.L.R. 928.
Tenn.—Darwin v. Town of Cookeville, 97 S.W.2d 838, 170 Tenn. 508.
Tex.—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.—Hill v. Lady of the Lake Gardens Co., Civ.App., 4 S.W.2d 204—Webb v. Downing, Civ.App., 2 S.W.2d 474—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454—Henderson v. Parish, Civ.App., 265 S.W. 226—Moon v. Thomas, Civ.App., 261 S.W. 476.
W.Va.—Stybr v. Caflisch Lumber Co., 158 S.E. 669, 110 W.Va. 337.
32 C.J. p 413 note 84.

Denial of intention to do acts restrained

Temporary injunction granted relator to restrain respondents from procuring issuance of writs of garnishment was dissolved, in view of respondents' denial of any intention to institute further garnishment proceedings.—Teas v. Swearingen, Tex. Civ.App., 101 S.W.2d 334.

88. Tex.—Crouch v. Crouch, Civ. App., 164 S.W.2d 35.
W.Va.—Huffman v. Chedester, 27 S.E.2d 272—McGhee v. Stevens, 3 S.E.2d 615, 121 W.Va. 430—Snodgrass v. Mohr, 177 S.E. 190, 115 W.Va. 507—Seal v. Gwinn, 168 S.E. 139, 113 W.Va. 382—Kessel v. Cohen, 140 S.E. 15, 104 W.Va. 296.

89. U.S.—Brooks v. Bicknell, C.C. Ohio, 4 F.Cas.No.1,944, 3 McLean 250.
32 C.J. p 414 note 85.

An answer filed in vacation to a bill for an injunction may be considered on motion to dissolve a temporary injunction.—Tennant v. Kilcoyne, 196 S.E. 559, 120 W.Va. 137.

90. Del.—Amburgen Hydraulic Constr. Co. v. Eastern Cement Gun Co., 88 A. 559, 10 Del.Ch. 207.

91. Cal.—Yuba County v. Cloke, 21 P. 740, 79 Cal. 239.
32 C.J. p 415 note 87.

92. Ala.—Turner v. Stephens, 17 So. 706, 106 Ala. 546.
32 C.J. p 415 note 88.

93. Tex.—Owen v. Willis, Civ.App., 20 S.W.2d 338, error dismissed.
W.Va.—Shonk v. Knight, 12 W.Va. 667.

94. N.J.—Ireland v. Kelly, 47 A. 51, 60 N.J.Eq. 308.
32 C.J. p 415 note 90.

95. U.S.—Purdum v. Durrance, D.C. Fla., 8 F.2d 781.
32 C.J. p 415 note 91.

96. Miss.—Davis v. Natchez Hotel Co., 128 So. 871, 158 Miss. 43.

97. Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 107 Fla. 304.

98. Ga.—Mahone v. Central Bank, 17 Ga. 111.
32 C.J. p 415 note 93.

99. Ga.—Mahone v. Central Bank, supra.

1. Ga.—Edwards v. Perryman, 18 Ga. 374.
32 C.J. p 415 note 95.

b. Limitations and Exceptions

The general rule that a preliminary injunction will be dissolved on the coming in of the answer is not absolute, but depends in a large measure on the nature and circumstances of the case and is subject to the sound discretion of the court.

The general rule, discussed supra subdivision a of this section, that an injunction will be dissolved on the coming in of the answer is not absolute, but depends in a large measure on the nature and circumstances of the case and is to be applied subject to the sound discretion of the court,[2] which will refuse to dissolve the injunction if circumstances are apparent which call for a departure from the general rule.[3]

Where injunctive relief is primary relief sought. Where the preventive aid of the court is the primary equity and the ultimate and only relief sought, and a temporary injunction has been granted to prevent irreparable injury, the rule is that the injunction will not be dissolved on the coming in of the answer, even though it denies all the equities of the bill, if there is probable cause for supposing that plaintiff will be able to maintain his primary equity;[4] and, as is discussed supra § 6, this is the rule applicable to the so called "special injunction," as distinguished from the "common injunction."

Answer not entitled to as much credit as bill. If the answer does not appear to be entitled to as much credit as the bill, the injunction will not be dissolved.[5] If, after the answer comes in, there remains a reasonable doubt as to whether the equity of the bill is sufficiently negatived the court may continue the injunction to the hearing;[6] and especially is this rule applicable where it appears that the subject matter of the case will remain unimpaired.[7] A fortiori an injunction will not be dissolved where the answer is improbable and unworthy of belief,[8] or where notwithstanding the answer there is a strong presumption of the existence of plaintiff's equity.[9]

Irreparable injury. Where irreparable injury may result from such dissolution, the court may in its discretion continue the injunction, even though the equities of the bill are denied in the answer,[10] or may make the dissolution conditional.[11]

Where fraud is basis of complaint. Where fraud is the gravamen of an application for an injunction, the court may continue the injunction until the final hearing notwithstanding an answer denying all the material allegations of the bill.[12] However, notwithstanding the gravamen of the bill is fraud, the injunction may be denied on the denials contained in the answer where there are facts stated in the bill which give support to such denials;[13] and, although fraud is charged in the bill, the injunction may be dissolved on the coming in of an answer fully denying the equity of the bill, where the bill presents a case which will not bear scrutiny in foro conscientiæ or where plaintiff does not come into equity with clean hands.[14]

Where construction of written instrument necessary. Where the answer denies the rights of plaintiff as alleged in the bill to exist under a written instrument, the court will not be bound by the answer, but will itself construe the instrument and, in its discretion, continue the injunction.[15]

Other exceptions. Notwithstanding an answer denying the material allegations of the bill, a dissolution of the injunction ordinarily will be denied if important questions are to be decided, for the solution of which further information is necessary,[16] where from the nature of the case the injunction cannot harm defendant,[17] where there are questions of doubt and difficulty on which the merits of the

2. Ala.—Watson v. Hamilton, 101 So. 609, 211 Ala. 688.
Fla.—Davis v. Wilson, 190 So. 716, 139 Fla. 698.
Tex.—Hill v. Lady of the Lake Gardens Co., Civ.App., 4 S.W.2d 204, 205, citing **Corpus Juris.**
W.Va.—Huffman v. Chedester, 27 S.E.2d 272.
32 C.J. p 415 note 97.

3. W.Va.—Snodgrass v. Mohr, 177 S.E. 190, 115 W.Va. 507.
32 C.J. p 416 note 98.

4. N.C.—Sineath v. Katzis, 14 S.E.2d 418, 219 N.C. 434.
32 C.J. p 415 note 92.

5. W.Va.—Robrecht v. Robrecht, 34 S.E. 801, 46 W.Va. 738.
32 C.J. p 416 note 99.

6. Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 676, 107 Fla. 304, citing **Corpus Juris.**
32 C.J. p 397 note 43, p 416 note 1.

7. N.C.—Whittaker v. Hill, 1 S.E. 639, 96 N.C. 2.

8. N.J.—Morris Canal & Banking Co. v. Jersey City, 11 N.J.Eq. 13.
32 C.J. p 416 note 2.

9. W.Va.—Huffman v. Chedester, 27 S.E.2d 272—Snodgrass v. Mohr, 177 S.E. 190, 115 W.Va. 507—Seal v. Gwinn, 168 S.E. 139, 113 W.Va. 382—Meyer v. Meyer, 56 S.E. 209, 60 W.Va. 473.

10. Ala.—Watson v. Hamilton, 101 So. 609, 211 Ala. 688.
32 C.J. p 416 note 4.

11. Ala.—Columbus & W. R. Co. v. Witherow, 3 So. 23, 82 Ala. 190.
Imposition of terms generally see supra § 239.

12. Iowa.—Stewart v. Johnston, 44 Iowa 435.
32 C.J. p 416 note 6.

13. N.J.—East Newark Co. v. Gilbert, 12 N.J.Eq. 78.

14. N.J.—Leigh v. Clark, 11 N.J.Eq. 110.

15. N.J.—Morris Canal & Banking Co. v. Matthiesen, 17 N.J.Eq. 385.
32 C.J. p 417 note 9.

16. N.Y.—Duryea v. Auerbach, 149 N.Y.S. 432, 164 App.Div. 44.
32 C.J. p 417 note 10.

17. N.J.—Jersey City Printing Co. v. Cassidy, 53 A. 230, 63 N.J.Eq. 759.
32 C.J. p 417 note 11.

case may depend,[18] where the dissolution would work greater hardship and injury than its continuance,[19] or where there remains an issue of fact which is undetermined, the result of which may show complainant to be entitled to relief;[20] nor does the rule as to the effect of the answer apply if the injunction was granted after hearing, defendant having filed affidavits.[21]

c. Nature of Answer Justifying Dissolution

(1) In general
(2) Denials on information and belief
(3) Fullness
(4) Verification
(5) New matter in answer
(6) Answers to bills for discovery
(7) Answer by only some of defendants

(1) In General

To authorize dissolution the denials must be clear, positive, and unqualified; argumentative denials, or allegations of opinion or conclusions of law, are insufficient.

To authorize the dissolution of an injunction the denials of the answer must be clear, explicit, positive, and unqualified.[22] The material allegations of the bill must be denied with the same clearness and certainty as they are charged;[23] and the denials must be of the same positive character as the averments on which plaintiff's equities rest,[24] although it has been held that, where the charges in the bill are general and indefinite, great strictness will not be required in the answer.[25] Defendant must answer directly, without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge; and, if the answer is deficient in frankness, candor, or precision, or is illusory, it will not entitle defendant to a dissolution of the injunction.[26] Argumentative or inferential denials are not sufficient;[27] neither are denials of inferences from the facts sufficient since they are not denials of the facts themselves.[28] Where the answer consists of mere allegations of opinion founded on belief only, it is insufficient to authorize the dissolution of the injunction.[29] It is insufficient for the answer to state mere conclusions of law; unless the facts on which such conclusions are based are alleged, the answer will have no weight on a motion to dissolve.[30] An answer is not sufficient which consists in mere denials of legal conclusions; the denial must be of material facts alleged in the bill.[31]

(2) Denials on Information and Belief

Subject to some limitations, the general rule is that denials on information and belief are insufficient except where the allegations of the bill are also on information and belief.

It is very generally held that the answer is insufficient as ground for dissolving if its denials are not positive and of personal knowledge, but are merely on information and belief,[32] except where the allegations of the bill or complaint are also on information and belief;[33] and the fact that denials on information and belief are authorized by statute as matters of pleading does not affect the operation of this rule.[34] The fact that defendant's personal knowledge is not sufficient to enable him to answer the bill directly from his own personal knowledge will not authorize him to make up the deficiency by affidavits, but he must wait until a hearing can be had on the merits.[35] Much less is a mere denial of all knowledge on the part of defendant sufficient,[36] even though defendant is an executor or adminis-

18. N.Y.—Haywood v. Lockwood, 132 N.Y.S. 483, 90 Misc. 31.
32 C.J. p 417 note 12.

19. Ala.—East & W. R. Co. v. East Tennessee, V. & G. R. Co., 75 Ala. 275.
32 C.J. p 417 note 13.
Relative convenience or injury generally see supra § 227.

20. N.C.—Raleigh & A. A. L. Air-Line R. Co. v. Aberdeen & W. R. Co., 34 S.E. 197, 125 N.C. 96.
32 C.J. p 417 note 14.

21. N.J.—Sinnickson v. Johnson, 3 N.J.Eq. 374.
32 C.J. p 417 note 15.

22. Tex.—Yonack v. Emery, Civ. App., 4 S.W.2d 293, affirmed, Com. App., 13 S.W.2d 667, 70 A.L.R. 684.
32 C.J. p 417 note 16.

23. Ala.—Columbus & W. R. Co. v. Witherow, 3 So. 23, 82 Ala. 190.
Miss.—Buckner v. Bierne, 17 Miss. 304.

24. S.D.—Huron Water-works Co. v. Huron, 54 N.W. 652, 3 S.D. 610.

25. Ala.—Wingo v. Hardy, 10 So. 659, 94 Ala. 184.

26. N.C.—Tobacco Growers' Co-op. Ass'n v. Patterson, 121 S.E. 631, 187 N.C. 252.
Tex.—Yonack v. Emery, Civ.App., 4 S.W.2d 293, affirmed, Com.App., 13 S.W.2d 667, 70 A.L.R. 684.
32 C.J. p 418 note 23.

27. Miss.—Coleman v. Hudspeth, 49 Miss. 562.
N.J.—Teasey v. Baker, 19 N.J.Eq. 61.

28. N.J.—Teasey v. Baker, supra.

29. Ga.—Callaway v. Jones, 19 Ga. 277.
32 C.J. p 418 note 22.

30. Fla.—Indian River Steamboat Co. v. East Coast Transp. Co., 10 So. 480, 28 Fla. 387, 29 Am.S.R. 258.
Mich.—Attorney General v. Oakland County Bank, Walk. p 90.

31. Ala.—Columbus & W. R. Co. v. Witherow, 3 So. 23, 82 Ala. 190.
32 C.J. p 418 note 25.

32. U.S.—Nelson v. Robinson, C.C. Ark., 17 F.Cas.No.10,114, Hempst. 464.
32 C.J. p 420 note 42.

33. N.J.—Kaighn v. Fuller, 14 N.J. Eq. 419.
32 C.J. p 420 note 43.

34. Cal.—Porter v. Jennings, 26 P. 965, 89 Cal. 440.
32 C.J. p 420 note 44.

35. N.J.—Perkins v. Collins, 3 N.J. Eq. 482.

36. N.J.—Quackenbush v. Van Riper, 1 N.J.Eq. 476.
32 C.J. p 421 note 46.

trator and could not have personal knowledge of his decedent's transactions.[37]

Limitations of rule. The general rule above stated is not inflexible in its application,[38] but certain limitations of it have been recognized.[39] Thus it has been held that a denial on belief, or on information and belief may be so strengthened by the allegations in the bill itself that the truth of the denial will appear probable, in which event the injunction will be dissolved;[40] and that, notwithstanding the answer merely denies belief in the facts stated in the bill, the equity of the bill may be so greatly impaired by reason of the facts and circumstances stated in the answer that the court will dissolve the injunction.[41] Where plaintiff knows that an answer on information and belief is all the answer defendant can make, and has omitted to make a defendant one who should have been made a defendant, and who can answer from his own knowledge to the existence or nonexistence of the matters charged in the bill, an answer on information and belief is sufficient to authorize the dissolution of the injunction.[42]

(3) Fullness

The answer must deny all the material allegations of the bill so as to leave it without equity.

The injunction will not be dissolved on the bill and answer where the answer does not deny all the equities of the bill.[43] On a motion to dissolve an injunction on bill and answer, the allegations of the bill which are neither admitted nor denied will be taken as true,[44] and if any material allegation is admitted or not denied the injunction will not be dissolved on the coming in of such incomplete answer;[45] but, where defendant so far denies the allegations of the bill as to leave it without equity as respects the remaining facts not denied by the answer, injunction will be dissolved notwithstanding the failure of defendant to deny such matters as constitute no ground for sustaining the injunction;[46] and although the answer contains admissions, yet if averments in the bill denied which, if taken from the bill, would divest it of every equity on which relief can be based, the injunction should be dissolved.[47] Also an answer which denies such averments of the bill as are essential to give it equity will justify the dissolution of an injunction, although it fails to deny details leading up to the main allegations.[48]

Defendant's right to answer fully. Defendant, in denying a charge against himself, has a right to state the whole transaction.[49]

(4) Verification

The injunction will not be dissolved on the coming in of an unverified answer.

It is a general rule that the injunction will not be dissolved on the coming in of an unverified answer,[50] and this rule has been held to be applicable even though the bill for the injunction did not require a sworn answer.[51] However, it has been held that a statute prohibiting dissolution of an injunction on an unverified answer denying the allegations of the petition before final hearing contemplates a dissolution on a denial alone, and does not

37. Ga.—Coffee v. Newsom, 8 Ga. 444.
32 C.J. p 421 note 47.

38. N.J.—Campbell v. Runyon, 8 A. 298, 42 N.J.Eq. 483.

39. N.C.—Evans v. Lovengood, 54 N. C. 298.
32 C.J. p 421 note 50.

40. U.S.—Carter v. Carlisle, 5 F.Cas. No.2,474, 1 Hayw. & H. 246.
32 C.J. p 421 note 51.

41. N.C.—Clayton v. Lyle, 55 N.C. 188—McFarland v. McDowell, 4 N. C. 15.

42. N.J.—De Groot v. Wright, 7 N.J. Eq. 516.
32 C.J. p 421 note 53.

43. N.C.—Tobacco Growers' Co-op. Ass'n v. Patterson, 121 S.E. 631, 187 N.C. 252.

Denying plaintiff's title

Temporary injunction, restraining defendants from mining coal to which plaintiffs have shown prima facie title, should not be dissolved on answers not legally controverting such title.—Thomas v. Haynes, 130 S.E. 673, 100 W.Va. 478.

44. Ala.—Dudley v. Whatley, 14 So. 2d 141—Union Central Life Ins. Co. of Cincinnati, Ohio, v. Thompson, 157 So. 852, 229 Ala. 433—Holcomb v. Forsyth, 113 So. 516, 216 Ala. 486.
32 C.J. p 418 note 27.

45. Tex.—Red Ball Stage Lines v. Griffin, Civ.App., 275 S.W. 454.
32 C.J. p 418 note 28.

46. Ala.—Rice v. Tobias, 3 So. 670, 83 Ala. 348.
32 C.J. p 419 note 29.

47. Iowa.—Clark v. American Coal Co., 53 N.W. 281, 86 Iowa 451.
Tex.—Tips v. Railroad Commission of Texas, Civ.App., 110 S.W.2d 585, error dismissed.

48. Ala.—Hall v. Atlanta, B. & A. R. Co., 48 So. 365, 158 Ala. 271.
32 C.J. p 419 note 31.

49. N.J.—Youle v. Richards, 1 N.J. Eq. 534, 23 Am.D. 722.
32 C.J. p 419 note 32.

50. Miss.—Little v. Hamlin, 27 So. 528.
32 C.J. p 422 note 58.

Want of equity in bill

Where a motion to dissolve a temporary injunction is made on the grounds that there is no equity in the bill, and that the answer denies the equity thereof, and the submission is on an unverified answer, such an answer is tantamount to no answer, and the injunction cannot be dissolved on the denials of the answer, but it may be dissolved on the ground that there is no equity in the bill.—Auto Mut. Indemnity Co. v. Moore, 179 So. 368, 235 Ala. 426.

51. Ala.—Mobile & M. R. Co. v. Alabama Midland R. Co., 26 So. 324, 123 Ala. 145.
32 C.J. p 422 note 59.

Whether deemed affidavit

On motion to vacate injunctional order and discharge receiver, answer not sworn to, answer under oath being waived by bill, will not be considered as affidavit.—Purdum v. Durrance, D.C.Fla., 8 F.2d 781.

apply to a dissolution on demurrer on full hearing.[52] It is generally held that the oath to the answer must be made by defendant himself.[53]

Answers of corporation. The rule requiring verification of the answer applies to corporations as well as to natural persons.[54] The answer of the corporation must be verified by the oath of some officer or other person acquainted with the facts.[55]

Defective verification. Objections because defective verification of the answer may be waived.[56] If the affidavit to the bill was insufficient, the defect should have been pointed out at the proper time; and such defect cannot be relied on to cure a defective verification of the answer.[57]

(5) New Matter in Answer

Dissolution on the coming in of the answer may be sought on so much of the answer only as is responsive to the bill, and matters in avoidance cannot be relied on.

On the coming in of the answer defendant can ask for a dissolution of the injunction on so much of his answer only as is responsive to the bill, and matters in avoidance cannot be relied on in support of the motion to dissolve.[58] The burden of proving such new matter is on defendant, and to support his burden he must produce evidence.[59] Where, however, the answer denies the whole equity of the bill, defendant's right to a dissolution is not affected by the fact that he has set up new matters by way of avoidance.[60]

Explanatory matter. It frequently happens that defendant, in making his denial, is under the necessity of stating fully facts and circumstances going to show the falsity of plaintiff's averments, and such an answer is not obnoxious to the objection that it sets up new matter.[61]

(6) Answers to Bills for Discovery

Where a bill merely asks for discovery in aid of a defense at law, the injunction will be dissolved on the coming in of the answer even though the charges of the bill are not denied.

Where the bill merely asks discovery in aid of a defense at law, the injunction will be dissolved of course on the coming in of the answer, even though the charges of the bill are not denied.[62] Also, if defendant makes no discovery, but on the contrary negatives the allegation of the bill, the injunction should be dissolved.[63] On the other hand if the bill prays for relief also, as well as discovery, the injunction is not to be dissolved as of course,[64] but will be continued if indispensable to a protection of plaintiff's interests.[65]

(7) Answer by Only Some of Defendants

Subject to a number of exceptions, it is a well recognized rule that where there are several defendants all must answer before a motion to dissolve on the denials of the answer can properly be made.

It is an ancient and well-settled rule that, where there are several defendants, all of whom are implicated in the same charge, no motion to dissolve the injunction on the ground that the equity of the bill has been denied by the answer can be made until all defendants have answered.[66] Nevertheless, this rule is subject to limitations and the court may, in its discretion, dissolve the injunction, although all defendants have not answered;[67] for example, if plaintiff has neglected to take the requisite steps with all diligence to compel answers, he cannot set up the want of an answer against those defendants who have answered and have no power to compel their codefendants to answer.[68] So it has been held sufficient that those defendants who have answered are the ones against whom the gravamen of the

52. Tex.—Crowell v. Howard, Civ. App., 200 S.W. 911—Smith v. Palo Pinto County, 128 S.W. 1193, 60 Tex.Civ.App. 531.

53. Miss.—McGuffie v. Planters' Bank, Freem. p 383.
32 C.J. p 422 note 61.

54. Ala.—Griffin v. State Bank, 17 Ala. 258, overruling Hogan v. Decatur Branch Bank, 10 Ala. 485.
32 C.J. p 422 note 62.

55. Ala.—Empire Guano Co. v. Jefferson Fertilizer Co., 45 So. 657, 154 Ala. 409.
32 C.J. p 422 note 63.

56. Ala.—Steiner v. Scholze, 18 So. 79, 105 Ala. 607.
32 C.J. p 422 note 64.

57. Ala.—Empire Guano Co. v. Jefferson Fertilizer Co., 45 So. 657, 154 Ala. 409.

58. Ala.—Union Central Life Ins. Co. of Cincinnati, Ohio, v. Thompson, 157 So. 852, 229 Ala. 433—Holcomb v. Forsyth, 113 So. 516, 216 Ala. 486.
Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 676, 107 Fla. 304, citing **Corpus Juris.**
Miss.—Coleman v. Hudspeth, 49 Miss. 562.
Tex.—Burnley v. Cook, 13 Tex. 586, 65 Am.D. 79.
32 C.J. p 421 note 54.

59. Miss.—Richardson v. Lightcap, 52 Miss. 508.
32 C.J. p 421 note 55.

60. Iowa.—Shricker v. Field, 9 Iowa 366.
32 C.J. p 422 note 56.

61. N.J.—Cornelius v. Post, 9 N.J. Eq. 196.
32 C.J. p 422 note 57.

62. N.Y.—King v. Clark, 3 Paige 76.
32 C.J. p 422 note 66.

63. N.J.—Grafton v. Brady, 7 N.J. Eq. 79.
Va.—Webster v. Couch, 6 Rand. 519, 27 Va. 519.

64. N.J.—Paterson v. Kamlah, 6 A. 444, 42 N.J.Eq. 93.
32 C.J. p 423 note 68.

65. N.J.—Paterson, N. & N. Y. R. Co. v. Kamlah, 6 A. 444, 42 N.J.Eq. 93.
32 C.J. p 423 note 69.

66. U.S.—Robinson v. Cathcart, D.C., 20 F.Cas.No.11,946, 2 Cranch C.C. 590.
32 C.J. p 419 note 33.

67. Ala.—Hartley v. Matthews, 11 So. 452, 96 Ala. 224.
32 C.J. p 419 note 34.

68. N.J.—Stoutenberg v. Peck, 4 N.J.Eq. 446.
32 C.J. p 419 note 35.

charges is really directed,[69] and the answers of merely nominal defendants are not required;[70] nor are the answers of those who would have no knowledge of the facts and are not charged with such knowledge necessary.[71] Answer being waived by the bill, the injunction may be dissolved on the coming in of the answer of only one of several defendants.[72]

Independent interests. If the interests of defendants are independent, and the answer of one defendant not yet filed cannot affect the rights of the other defendants, dissolution may be granted on motion of those answering.[73]

Nonresident defendants. Where one of defendants is out of the jurisdiction of the court and cannot be compelled to answer, the chancellor may, in his discretion, dissolve the injunction without awaiting his answer.[74]

d. Effect of Exceptions to Answer

The filing of exceptions to an answer does not prevent dissolution of the injunction on motion of defendant.

The filing of exceptions to an answer does not prevent dissolution of the injunction on motion of defendant; the exceptions and the motion may be considered together.[75] If, despite the exceptions, it appears that the equity of the bill has been fully answered, as where the exceptions are not well taken, or are too immaterial, or are unresponsive portions of the answer, or are for impertinence merely, the motion to dissolve may be granted.[76] Further, the injunction may be dissolved on motion, even though the exceptions have not been disposed of.[77] On the other hand, if the exceptions have been submitted to, or allowed by, the court, the injunction will not be dissolved until the answer is perfected, unless the court is fully satisfied that the answer to them cannot have any possible bearing on the question of dissolution.[78] Exceptions well taken, on the ground that the answer fails to make discovery, are sufficient ground for continuing the injunction until the hearing.[79]

Objections considered without exceptions. The uniform practice of the court is to refuse to dissolve an injunction unless the answer denies fully and explicitly all the equities of the bill, although no exceptions are taken to the answer.[80]

§ 251. —— Affidavits and Other Evidence

a. In support of motion
b. In opposition to motion

a. In Support of Motion

The authorities are in disagreement as to whether, or in what circumstances, affidavits are admissible in support of a sufficient answer on a motion to dissolve.

There is considerable conflict of authority on the question whether affidavits are admissible in support of a sufficient answer on a motion to dissolve the preliminary injunction, and decisions even in the same jurisdiction are sometimes conflicting. Many decisions hold apparently without qualification that affidavits are admissible for this purpose,[81] and sometimes the statute expressly permits this to be done.[82] Other decisions have held directly to the contrary,[83] the view being taken that if the answer is not sufficient to authorize a dissolution it cannot be aided by affidavits.[84] According to some decisions, where a motion is made to dissolve an injunction on the answer, affidavits annexed to the answer can be read only in denial of affidavits annexed to the bill;[85] but, in case supporting affidavits are filed with the bill by complainant, they may be rebutted by evidence in support of the answer.[86]

Before answer. In some decisions it has been held that affidavits may be used before answer with much the same effect that the answer itself would

69. Ala.—Mobile School Commissioners v. Putnam, 44 Ala. 506.
32 C.J. p 419 note 36.

70. Md.—Annapolis v. Harwood, 32 Md. 471, 3 Am.R. 161.
32 C.J. p 420 note 37.

71. N.C.—Ijams v. Ijams, 62 N.C. 39.
32 C.J. p 420 note 38.

72. Ga.—Woolfolk v. Rumph, 37 Ga. 684.

73. N.C.—Evans v. Lovengood, 54 N. C. 298.
32 C.J. p 420 note 40.

74. Md.—Heck v. Vollmer, 29 Md. 507.
32 C.J. p 420 note 41.

75. W.Va.—Sandusky v. Faris, 38 S. E. 563, 49 W.Va. 150.
32 C.J. p 423 note 71.

76. Tex.—Lindsey v. Hart, Civ.App., 260 S.W. 286, modified on other grounds, Com.App., 276 S.W. 199.
32 C.J. p 423 note 72.

77. N.J.—Mitchell v. Mitchell, 20 N. J.Eq. 234.
32 C.J. p 423 note 73.

78. N.Y.—Noble v. Wilson, 1 Paige 164.

79. N.C.—Symons v. Reid, 58 N.C. 327.

80. U.S.—Robinson v. Cathcart, D.C., 20 F.Cas.No.11,946, 2 Cranch C.C. 590.
32 C.J. p 423 note 76.

81. Ill.—Dunne v. Rock Island County, 112 N.E. 342, 273 Ill. 53.
32 C.J. p 423 note 80.

82. Ala.—Lindsey v. Viking Refrigerators, 3 So.2d 65, 241 Ala. 425—Hancock v. Watt, 169 So. 704, 233 Ala. 29.
32 C.J. p 423 note 81.

83. N.Y.—Hoffman v. Livingston, 1 Johns.Ch. 211.
32 C.J. p 423 note 82.

84. N.Y.—Hoffman v. Livingston, supra.

85. N.J.—Muloch v. Muloch, 26 N. J.Eq. 461—Gariss v. Gariss, 13 N.J. Eq. 320.

86. N.Y.—Brown v. Haff, 5 Paige 235, 28 Am.D. 425.
32 C.J. p 424 note 85.

have,[87] thus permitting a dissolution on affidavits fully and positively denying the equities of the bill, unless plaintiff by sworn answer or reply overcomes the showing made by such affidavits.[88] To have such effect, the affidavits must contain a specific denial of the facts and not a mere general denial of the equity.[89] Although there is authority to the contrary,[90] it has been held that, on a motion to dissolve an injunction before answer, an affidavit is admissible which goes to show that the injunction was irregularly issued,[91] or that the officer allowing the injunction was misled and induced to grant the injunction contrary to law.[92] Other decisions hold that affidavits cannot be used as a substitute for an answer for the purpose of obtaining the dissolution of an injunction,[93] but that defendant must put in his answer denying the material allegations of the bill and then move to dissolve on bill and answer, except, according to some other decisions, only in cases of waste and of partnership, where an injunction may be dissolved on affidavits alone.[94]

Supplemental affidavits ordinarily cannot be filed where the opposing affidavits merely rebut, and set up no new matters.[95]

Exhibits attached to a motion to dissolve may be considered by the court and constitute a basis for dissolution.[96]

Oral evidence may be admissible on a motion to set aside a temporary injunction under the practice of the particular jurisdiction,[97] but, under a statute providing that on a motion to dissolve the court shall consider the bill and answer and also such affidavits as any party may introduce, it has been held proper to exclude oral testimony sought to be introduced by defendant.[98]

b. In Opposition to Motion

The authorities are in conflict as to whether affidavits are admissible in opposition to a motion to dissolve.

As in the case of affidavits offered in support of a motion to dissolve, discussed supra subdivision a of this section, there is considerable conflict of authority as to whether affidavits are admissible in opposition to a motion to dissolve, and the decisions even in the same jurisdiction are not always in accord. Many decisions hold that affidavits are not admissible to support the bill,[99] or to contradict the answer,[1] except, perhaps, in a limited number of excepted cases,[2] such as an injunction to stay waste,[3] a nuisance, or an infringement of patent rights, or in cases to dissolve and settle partnership and other joint adventures where extreme misdemeanor is charged against defendant partner or joint adventurer,[4] or where irreparable injury might ensue;[5] but in most of these decisions in which the exceptions were stated the statements are dicta. On the other hand, it has been laid down broadly in some cases, usually perhaps because of some statutory authorization, that on motion to dissolve plaintiff is entitled to read affidavits in opposition to the motion.[6] It has also been variously held either because of, or independent of, statutes that after answer filed denying the allegations of the bill, on motion to dissolve an injunction, affidavits are admissible in support of the bill;[7] that where the answer is used as an affidavit on such motion plaintiff may file counteraffidavits;[8] that where the motion to dissolve is supported by affidavits plaintiff may file counter-

87. Cal.—Palm Springs-La Quinta Development Co. v. Kieberk Corporation, 100 P.2d 346, 37 Cal.App. 2d 642.
Iowa.—People's Sav. Bank v. McCarthy, 222 N.W. 372, 207 Iowa 162.
N.C.—Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 127 S.E. 545, 189 N.C. 494, 47 A.L.R. 928.
Va.—Wood v. City of Richmond, 138 S.E. 560, 148 Va. 400.
Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.
32 C.J. p 424 note 86.

88. Tex.—Tips v. Railroad Commission of Texas, Civ.App., 110 S.W.2d 585, error dismissed.

89. Pa.—Galland v. Butler Coal Co., 4 Kulp 406.

90. N.Y.—Strange v. Longley, 3 Barb.Ch. 650.

91. Mich.—Carroll v. Farmers' & Mechanics' Bank, Harr. p 197.

92. Mich.—Carroll v. Farmers' & Mechanics' Bank, supra.

93. Cal.—Marks v. Weinstock, 53 P. 362, 121 Cal. 53.
32 C.J. p 424 note 91.

94. Mich.—Sacket v. Hill, 2 Mich. 182.
N.Y.—Strange v. Longley, 3 Barb.Ch. 650.

95. U.S.—Hardt v. Liberty Hill Consolidated Mining & Water Co., C.C. Cal., 27 F. 788.
N.Y.—Jacobs v. Miller, 10 Hun 230.

96. Ark.—Sager v. Hibbard, 158 S.W.2d 922, 203 Ark. 672.

97. Miss.—Rickets v. Rickets, 119 So. 194, 152 Miss. 792.
32 C.J. p 424 note 95.
Equivalent to answer
A motion to dissolve supported by testimony should be accorded the effect as though the same facts had been pleaded in the answer.—People's Sav. Bank v. McCarthy, 222 N.W. 372, 207 Iowa 162.

98. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.

99. Ala.—Roman v. Long Distance Telephone & Telegraph Co., 41 So. 292, 147 Ala. 389.
32 C.J. p 421 note 98.

1. U.S.—Poor v. Carleton, C.C.Mass., 19 F.Cas.No.11,272, 3 Sumn. 70.
32 C.J. p 424 note 99.

2. U.S.—Poor v. Carleton, supra.
32 C.J. p 424 note 1.

3. Ala.—Harrison v. Maury, 37 So. 361, 140 Ala. 523.
32 C.J. p 424 note 2.

4. Ala.—Barnard v. Davis, 54 Ala. 565.

5. Ga.—Lewis v. Leak, 9 Ga. 95.
Md.—Bellona Co.'s Case, 3 Bland 442.

6. Ala.—Rice v. Davidson, 89 So. 600, 206 Ala. 226.
32 C.J. p 425 note 9.

7. Ill.—Dunne v. Rock Island County, 112 N.E. 342, 273 Ill. 53.
32 C.J. p 425 note 10.

8. N.C.—Howerton v. Sprague, 64 N.C. 451.
32 C.J. p 425 note 11.

affidavits;[9] that where the application to dissolve is founded on the answer and affidavits plaintiff may introduce counteraffidavits;[10] that where the application to dissolve is made on proofs by affidavits or otherwise, instead of resting the motion on the papers on which the injunction was granted, plaintiff may oppose the motion by like proofs,[11] but only when the application is made on proofs by affidavits or otherwise;[12] that where a defendant moves on a verified answer to dissolve the injunction plaintiff is entitled to read additional affidavits in support of the complaint,[13] although there is also contrary authority;[14] and that where new matter is contained in the answer not responsive to the bill and which is relied on as a ground for setting aside the injunction affidavits may be read to contradict such new matter,[15] unless defendant's counsel disclaim and waive reliance on any irresponsive matter.[16] So it has been held that, where waste or irreparable injury may occur prior to the final hearing, affidavits in contradiction of the answer and in opposition to the motion to dissolve are admissible,[17] and, as stated supra note 3, some decisions limit the use of affidavits in opposition to motions to dissolve to cases of this character.

Answer used for benefit of complainant. There is authority for the view that the answer may show that the injunction was proper, and it will not be dissolved, even though on complainant's showing it was improvidently issued.[18] So it has been held that complainant may use the answer of one of defendants in his favor.[19]

Reply. There is authority for the view that after the filing of a verified motion to dissolve complainant may by sworn reply or answer allege facts to overcome the allegations of the motion.[20] Facts alleged for the first time in plaintiff's unverified reply to defendant's motion to dissolve a temporary injunction need not be accredited with any significance by the court.[21]

Oral evidence. Under the statutes of some states on a hearing to dissolve a temporary injunction on motion, oral evidence is admissible in opposition to the motion.[22]

§ 252. —— Hearing and Determination

a. In general
b. Time of hearing
c. Matters considered
d. Burden of proof and sufficiency of evidence

a. In General

Unless the motion can be disposed of on the pleadings alone there should be a hearing.

Unless, under the principles discussed supra §§ 250, 251, the motion can be disposed of on the pleadings alone, there should be a hearing to enable the court to determine whether or not the injunction should be dissolved.[23] The admission of evidence on the hearing of a motion to dissolve is not discretionary, and for error a reversal of the order may be obtained.[24] The court may, if necessary, hear evidence other than that mentioned in the notice of motion.[25] The absence or neglect of complainant's solicitor to attend the hearing of a motion to dissolve furnishes no ground against the dissolution.[26]

View of premises. Notwithstanding a statute providing that a motion to dissolve shall be determined on the bill, answer, and affidavits, it is within the court's discretion to view the premises on which

9. Neb.—Armstrong v. Sweeney, 91 N.W. 570, 65 Neb. 676.
32 C.J. p 425 note 12.

10. Iowa.—Palo Alto Banking & Investment Co. v. Mahar, 21 N.W. 187, 65 Iowa 74.
N.Y.—Blatchford v. New York & N. H. R. Co., 7 Abb.Pr. 322.

11. Cal.—Delger v. Johnson, 44 Cal. 182.
32 C.J. p 425 note 14.

12. Cal.—Falkinburg v. Lucy, 35 Cal. 52, 95 Am.D. 76.

13. N.Y.—Jaques v. Areson, 4 Abb. Pr. 282.
32 C.J. p 425 note 16.

14. N.Y.—Blatchford v. New York & N. H. R. Co., 7 Abb.Pr. 322.
32 C.J. p 425 note 17.

15. N.J.—Merwin v. Smith, 2 N.J.Eq. 182.
N.Y.—Society v. Diers, 60 Barb. 152.

16. N.J.—Miller v. English, 6 N.J. Eq. 304.

17. U.S.—Poor v. Carleton, C.C. Mass., 19 F.Cas.No.11,272, 3 Sumn. 70.
32 C.J. p 425 note 21.

18. N.C.—Smith v. McLeod, 38 N.C. 390.

19. N.C.—Blossom v. Van Amringe, 62 N.C. 65.

20. Tex.—Tips v. Railroad Commission of Texas, Civ.App., 110 S.W.2d 585, error dismissed.

21. Tex.—Wilmut v. Franklin, Civ. App., 268 S.W. 971.

22. Mont.—Butte & Boston Consolidated Mining Co. v. Montana Ore-Purchasing Co., 55 P. 112, 21 Mont. 539.
32 C.J. p 425 note 28.

23. Ill.—Lewis v. West Side Trust & Savings Bank of Chicago, 6 N.E.2d 481, 288 Ill.App. 271.
Ohio.—Herring v. Limbach, 197 N.E. 490, 50 Ohio App. 78.

Equivalent to hearing on show cause order

Where a motion to dissolve a restraining order ordinarily is irregular but is proper where the effect of the order is more in the nature of an injunction than a mere restraining order, a hearing on such a motion at which both parties present their claims is equivalent to a hearing on an order to show cause on a restraining order as respects the right to appeal from the decision following such hearing.—Labbitt v. Bunston, 260 P. 727, 80 Mont. 293.

24. Mont.—Bennett Bros. Co. v. Congdon, 50 P. 556, 20 Mont. 208.

25. Cal.—Younglove v. Steinman, 22 P. 189, 80 Cal. 375.

26. Md.—Heck v. Vollmer, 29 Md. 507.

a nuisance is sought to be abated.[27]

b. Time of Hearing

The time for the hearing varies in the several jurisdictions.

Depending on the practice obtaining in the respective jurisdictions in which the question arose, on a motion to dissolve a temporary injunction it has been variously held that the hearing may be had at any time the cause is reached in calling the motion docket or at the calling of the cause for trial;[28] that in emergency cases the hearing will be set at an early day;[29] that a hearing of a motion to dissolve a restraining order issued ex parte in advance of answer should be had with all possible dispatch, consistent with a fair consideration of the subject;[30] that the motion will not be heard before the expiration of the time allowed for taking testimony,[31] or for excepting to the answer in case it has been filed;[32] and that a statute directing decisions on the motion to be within twenty days after submission is directory only.[33] It has been held that, where no motion is made to dissolve until the cause is regularly set for hearing on the court docket, the hearing shall then be final.[34] Where complainant moves to continue an injunction, and defendant's death is suggested, that fact should be tried instanter, unless the court is satisfied that there is a strong probability of his death.[35] In a cause removed to a federal court the hearing must await the return day.[36] On rehearing a motion must be disposed of as of the time originally submitted.[37]

Continuance. The court may in its discretion continue the hearing of a motion to dissolve,[38] but ordinarily only on a showing of great necessity.[39] A continuance will not be granted, even to allow complainant to procure further evidence, in case he already has had plenty of time to secure it.[40] Where a motion is continued at plaintiff's request, but, when again called for trial neither plaintiff nor his attorney is present or accounted for, the judge does not act illegally or arbitrarily in dissolving the injunction on bond.[41]

c. Matters Considered

On the hearing of a motion to dissolve the court ordinarily will not consider extraneous matters not based on the motion papers, questions previously determined or waived, or questions going to the merits.

While the court may properly consider all questions involved in the grounds for the motion as set out therein,[42] it has been held that the sole question to be determined is whether or not, on the facts disclosed, the court should have granted the injunction or restraining order in the first instance,[43] that is to say, whether a sufficient or prima facie showing has been made justifying the order.[44] It has also been held, however, that on a motion to dissolve an injunctive order the inquiry is limited to determining whether the order should be continued, and does not extend to whether it was regularly issued.[45] The court will not as a rule consider extraneous matters not based on the motion papers,[46] or questions previously determined on demurrer to the bill,[47] or contentions waived by failure to raise them at an earlier stage of the proceedings.[48] After answer, all facts therein except those by way of confession and avoidance, and all facts in the bill, may be considered;[49] but, except

27. Ala.—Jenkins v. Steel Cities Chemical Co., 95 So. 22, 208 Ala. 643.

28. Tex.—Rosenfield v. Gilmore, 32 Tex. 659.
32 C.J. p 425 note 29.

29. Md.—Williamson v. Carnan, 1 Gill & J. 184.
32 C.J. p 425 note 30.

30. Del.—Whitmer v. Whitmer, 98 A. 940, 11 Del.Ch. 185.

31. Fla.—Richardson v. Kittlewell, 33 So. 984, 45 Fla. 551.

32. Miss.—Carraway v. Odeneal, 56 Miss. 223.
N.Y.—Satterlee v. Bargy, 3 Paige 142.

33. N.Y.—Watson v. Coe, 5 N.Y.S. 614, 2 Silv.Sup. 339.

34. Va.—Byrne v. Lyle, 1 Hen. & M. 7, 11 Va. 7.

35. N.C.—Thompson v. Allen, 3 N.C. 237.

36. U.S.—New Orleans City R. Co. v. Crescent City R. Co., C.C.La., 5 F. 160.

37. N.J.—Gibbs v. Ward, Ch., 48 A. 243.

38. N.J.—Smith v. Painter, 10 N.J. Law J. 182.
N.C.—Dillin v. Sessoms, 59 N.C. 256.

39. W.Va.—Steelsmith v. Fisher Oil Co., 35 S.E. 15, 47 W.Va. 391.
32 C.J. p 426 note 42.

40. Va.—Emmons v. Pidcock, 24 S.E. 905, 93 Va. 146.
32 C.J. p 426 note 43.

41. La.—First Evangelist Baptist Church v. Smith, 95 So. 595, 153 La. 174.

42. Okl.—McLain Land & Investment Co. v. Kelly, 66 P. 282, 11 Okl. 26.
32 C.J. p 426 note 44.

43. Mont.—Blinn v. Wolf Creek Hutterische Soc., 194 P. 140, 58 Mont. 542.
32 C.J. p 426 note 45.

44. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.

45. U.S.—Cherry v. Insull Utility Investments, D.C.Ill., 58 F.2d 1022, reversed on other grounds, C.C.A., Guaranty Trust Co. of New York v. Fentress, 61 F.2d 329.

46. Ala.—Cox v. Lerman, 169 So. 724, 233 Ala. 58.
32 C.J. p 426 note 46.
Former adjudication
On hearing of plaintiff's motion to dissolve temporary injunction granted on cross bill, court could consider as fact auxiliary to allegations of bill its former adjudication on hearing to dissolve temporary writ issued for plaintiff.—Pearce v. Atlantic Life Ins. Co., Tex.Civ.App., 36 S.W. 2d 553.

47. Ga.—McGinnis v. Justices Gordon County Inferior Ct., 30 Ga. 47.

48. U.S.—Central Power Co. v. Nebraska City, C.C.A.Neb., 112 F.2d 471.

49. Ala.—Mabel Min. Co. v. Pearson Coal & Iron Co., 25 So. 754, 121 Ala. 567.
32 C.J. p 426 note 48.

in so far as this may be necessary to a determination of the propriety of continuing or dissolving the injunction,[50] questions going to the merits will not be considered[51] unless the parties consent.[52]

Reference. Matters of fact may be referred to a referee on hearing the motion, and as long as his report is not set aside the court will determine the motion in accordance with it.[53]

d. Burden of Proof and Sufficiency of Evidence

The burden of proof is on the movant, although he is not required to make out as strong a case as he must on final hearing.

It is the general rule that on the hearing of a motion to dissolve the burden of proof is on the movant to establish the grounds for dissolution,[54] but it has also been held that the ultimate burden is on complainant to show the necessity of the restraining order, and that the question as to which party should be required to go forward on the motion to dissolve is largely within the discretion of the trial judge.[55] It cannot be said that any particular amount of evidence is necessary either to dissolve or to sustain the injunction, and in the final analysis the judge or chancellor must be guided by the weight of evidence;[56] but there must be sufficient evidence to warrant the court's reaching a conclusion.[57] Movant is not required to make out as strong a case as he must on final hearing,[58] or one which would entitle him to relief at all events on final hearing.[59] The injunction will be dissolved if the showing is clearly in favor of defendant,[60] or if the evidence is such as should prevent the allowance of an injunction.[61] On the other hand, the injunction will be continued if the preponderance of evidence is with complainant,[62] or if movant's evi-

Affirmative defenses not relied on

Dissolution of temporary injunction, on motion grounded on denials in answer and want of equity in bill, was error, where admissions in answer constituted foundation of bill's equity and affirmative matters of defense could not be considered because motion was limited to denials in answer.—Cox v. Lerman, 169 So. 724, 233 Ala. 58.

Law question

Court had right to decide law question whether defendant forfeited rights under timber contracts by ceasing to cut and remove timber on facts submitted by pleadings, exhibits, and affidavits at hearing on defendant's motion to dissolve temporary injunction against resumption of such operations.—Metcalf v. Huntley-Richardson Lumber Co., 170 S.E. 162, 170 S.C. 226.

50. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.

51. U.S.—New York Life Ins. Co. v. Ruhlin, D.C.Pa., 25 F.Supp. 65, conforming to mandate Ruhlin v. New York Life Ins. Co., 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526.
Ala.—Irwin Fishing & Hunting Club v. Cobb, 179 So. 183, 235 Ala. 394.
Fla.—Tampa Northern R. Co. v. City of Tampa, 107 So. 364, 91 Fla. 241.
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Ill.—Kuhl v. Clark, 261 Ill.App. 491.
N.J.—Wilentz v. Hendrickson, 33 A. 2d 366, 133 N.J.Eq. 447.
N.C.—Dennis v. Redmond, 188 S.E. 807, 210 N.C. 780.
Wis.—Fassbender v. Peters, 191 N.W. 973, 179 Wis. 587.
32 C.J. p 426 note 49.

52. N.C.—Dennis v. Redmond, 188 S.E. 807, 210 N.C. 780.

53. Mont.—Fabian v. Collins, 2 Mont. 510.
N.Y.—Stubbs v. Ripley, 39 Hun 620.

Findings of fact

Order continuing temporary injunction would not be disturbed on ground that master's report contained no findings of fact in view of fact that part of proof was taken before chancellor, and chancellor in arriving at decision had before him the proof taken before master as well as additional proof.—Kuhl v. Clark, 261 Ill.App. 491.

54. Fla.—Orlando Orange Groves Co. v. Hale, 144 So. 674, 107 Fla. 304.
Iowa.—Simmermaker v. International Harvester Co., 298 N.W. 911, 913, 230 Iowa 845, citing **Corpus Juris.**
32 C.J. p 426 note 51.

Where injunction granted ex parte

the rule is the same.—Rickets v. Rickets, 119 So. 194, 152 Miss. 792.

55. Mont.—Gibbons v. Huntsinger, 74 P.2d 443, 105 Mont. 562.

56. Fla.—Masser v. London Operating Co., 145 So. 72, 106 Fla. 474—Orlando Orange Groves Co. v. Hale, 144 So. 674, 107 Fla. 304.
Ill.—Kuhl v. Clark, 261 Ill.App. 491.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562.

57. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 122 A. 142, 14 Del.Ch. 64, 117.

58. Ky.—Bibb v. Prather, Ky.Dec. 136, 2 Am.D. 711.
Va.—Ingles v. Straus, 21 S.E. 490, 91 Va. 209.
32 C.J. p 426 note 55 [a].

59. Ind.—McCann v. Mt. Gilead Cemetery, 77 N.E. 1090, 166 Ind. 573.

60. Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
Ark.—Sager v. Hibbard, 158 S.W.2d 922, 203 Ark. 672.
Cal.—Palm Springs-La Quinta Development Co. v. Kieberk Corporation, 100 P.2d 346, 37 Cal.App.2d 642.
Ill.—Ritholz v. Andert, 24 N.E.2d 573, 303 Ill.App. 61.
Iowa.—People's Sav. Bank v. McCarthy, 222 N.W. 372, 207 Iowa 162.
La.—Acosta v. Nunez, 13 So.2d 860, 203 La. 275, affirming, App., 5 So. 2d 574.
N.C.—Tobacco Growers' Co-op. Ass'n v. Bland, 121 S.E. 636, 187 N.C. 356.
32 C.J. p 426 note 53.

61. U.S.—Hamilton v. Western Union Telegraph Co., D.C.Ohio, 34 F. Supp. 928—Cary v. Domestic Spring-Bed Co., C.C.N.J., 26 F. 38.
Ala.—Hazlewood v. Walker, 101 So. 450, 211 Ala. 634.
Ark.—Riggs v. Hill, 144 S.W.2d 26, 201 Ark. 206.
Md.—Chayt v. Marylahd Jockey Club of Baltimore City, 18 A.2d 856, 179 Mo. 390.
Tex.—Sanitary Appliance Co. v. French, Civ.App., 34 S.W.2d 673.
Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.

Plaintiff's failure to support case

Preliminary writ of injunction depriving tenant of property was improperly issued on landlord's verified petition and should have been dissolved on failure of landlord to present evidence of right to possession, when motion to dissolve was heard. —Barton v. Tharp, Tex.Civ.App., 27 S.W.2d 885.

62. Iowa.—Des Moines Drug Co. v. Doe, 211 N.W. 694, 202 Iowa 1162.
Miss.—Canal Bank & Trust Co. v.

dence is weak and unsatisfactory.[63] If the evidence is evenly balanced, the injunction may be continued.[64]

§ 253. —— Order

Entry of a formal order or decree of dissolution or continuance generally is not required. Final disposition of the cause should not be made; nor should affirmative relief be granted to defendant in the absence of a cross bill asking it.

While it has been held that an order or decree dissolving an injunction should be set aside if the reasons on which it is based are not placed on record by the court,[65] the weight of authority is to the effect that the entry of a formal order or decree usually is not necessary to effect the dissolution or the continuance of an injunction.[66] Nevertheless it has been held that a mere expression of the chancellor's opinion that an amendment operated as a dissolution of the injunction does not have this effect.[67]

Character and scope of relief granted. The injunction may be dissolved either in whole or in part;[68] or it may be modified instead of dissolved in toto.[69] It should be dissolved only as to such defendants as move for dissolution.[70] It may be dissolved conditionally, as discussed supra § 230, or without prejudice.[71] Final disposition of the cause should not be made on hearing of the motion to dissolve,[72] or a decree rendered as to matters which should be disposed of only on a final hearing.[73] On dissolving an injunction affirmative relief ordinarily cannot be granted to defendant in the absence of a cross bill asking it;[74] and it has been held that, although defendant in his answer asks for damages by way of statutory penalty because the injunction suit is brought merely for delay, such penalty cannot be allowed by way of damages where the issue was not submitted to the jury;[75] but it has been held that, where the injunction has taken property from defendant, the order may grant restitution thereof.[76] So, on a mere motion to continue, the court has no power to grant defendant relief for which he has not moved.[77]

Construction and effect of particular orders. An order continuing a temporary writ of injunction previously issued until the next regular term of the district court of the designated county fixed the date of the convening of the district court in that county as the date for termination of the injunction, unless further action was taken by the court, and was not equivalent to an order continuing the injunction during the pendency of the cause.[78] An order denying a motion to dissolve a temporary injunction and providing that it continue in force until further order of the court had the effect of curing the error, if any, in granting the temporary injunction ex parte on a petition not specifically requesting such relief.[79] The affirmance of an order and decree vacating a temporary injunction on a condition which has been complied with by defendant constitutes a complete dissolution of the temporary writ.[80]

Brewer, 113 So. 552, 147 Miss. 885, motion overruled 114 So. 127, 147 Miss. 885.
N.C.—Salmon v. McFarland, 149 S.E. 682, 197 N.C. 493—Scott v. Gillis, 148 S.E. 315, 197 N.C. 223.
Pa.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.
W.Va.—State v. Navy, 17 S.E.2d 626, 123 W.Va. 722.
32 C.J. p 427 note 57.

63. Kan.—Kansas Wheat Growers' Ass'n v. Floyd, 227 P. 336, 116 Kan. 522.
32 C.J. p 427 note 58.

64. Ala.—Cruce v. McCombs, 129 So. 279, 221 Ala. 507.
N.C.—Camel Coach Co. v. Griffin, 146 S.E. 203, 196 N.C. 559.
32 C.J. p 427 note 59.

65. La.—Nathan v. Lee, 2 Mart.,N. S., 32.
32 C.J. p 427 note 61.

66. U.S.—Parker v. Judges of Circuit Court of Maryland, Md., 12 Wheat. 561, 6 L.Ed. 729.
32 C.J. p 427 note 62.

67. Ala.—Robertson v. Montgomery Base Ball Assoc., 37 So. 241, 140 Ala. 320.

68. Fla.—Smetal Corporation v. Family Loan Co., 161 So. 438, 119 Fla. 497.
32 C.J. p 427 note 64.

69. W.Va.—Spencer v. Ohio River Salt Co., 144 S.E. 571, 106 W.Va. 26.
32 C.J. p 427 note 65.
Modification of temporary injunctions generally see supra § 236.

70. Ill.—Duncan v. State Bank, 2 Ill. 262.
N.Y.—Teller v. Van Deusen, 3 Paige 33.

71. Miss.—Davis v. Hart, 6 So. 318, 66 Miss. 642.
32 C.J. p 427 note 68.

72. Ga.—Jones v. Graham, 1 S.E.2d 635, 187 Ga. 622.
N.C.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275.
32 C.J. p 427 note 69.

73. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
32 C.J. p 427 note 70.

74. Ark.—Earle v. Hale, 31 Ark. 473.
32 C.J. p 427 note 71.

75. Tex.—Quarles v. Eaton-Blewett Co., Civ.App., 210 S.W. 596.

76. Okl.—Brown v. Donnelly, 91 P. 859, 19 Okl. 296.
32 C.J. p 427 note 73.
Possession of real property
If plaintiff obtained possession of premises by serving restraining order, court, on dissolving restraining order could direct restoration of premises; and a judgment dissolving a restraining order and ordering that possession be restored to defendants must be taken as showing that court found plaintiff acquired possession through restraining order.—State v. District Court of Eighth Judicial Dist. within and for Natrona County, 260 P. 174, 37 Wyo. 169.

77. N.Y.—Kelly v. Jeroloman, 30 N. Y.Super. 158.

78. Tex.—Hudson v. Sunshine Oil Corp., Civ.App., 245 S.W. 765.
Change into restraining order
Such an order has the effect of changing the temporary injunction into a restraining order.—Wood v. Bird, Tex.Civ.App., 20 S.W.2d 221.

79. Tex.—Temple Independent School Dist. v. Proctor, Civ.App., 97 S.W.2d 1047, error refused.

80. Iowa.—People's Sav. Bank of

The denial of a motion to dissolve the injunction is not conclusive of the rights of the parties;[81] it is res judicata only on the question whether there was a sufficient showing to warrant the preliminary injunction or restraining order,[82] and on final hearing complainant may be refused relief.[83]

§ 254. —— Costs

Costs are largely within the discretion of the court; generally they will be awarded to a successful movant.

While the costs of proceedings to dissolve an injunction are largely in the discretion of the court,[84] and while they may be left to abide the event of the final hearing,[85] costs generally will be awarded to defendant on granting his motion to dissolve,[86] and it has been held error to award costs against a successful movant where no good cause is shown therefor;[87] indeed it has been held that, even though the motion is denied, movant may be awarded costs in case complainant has not diligently prosecuted the suit[88] or subsequently withdraws his suit before trial.[89] Complainant will not be required to pay costs on dissolution in case the injunction was rightfully obtained, but is dissolved because of matters arising subsequently,[90] but, on the contrary, may be awarded costs.[91] Movant is not entitled to costs where the motion to dissolve was unnecessary in view of the fact that it was made on the return day of the restraining order, at which time an application for a temporary injunction was denied and the restraining order expired as of course.[92]

What costs allowable. Movant is entitled only to costs of the dissolution and not to costs of the suit.[93] He is not entitled to an allowance for superfluous and unnecessary expenses[94] or for the expenses of a proper adjournment at complainant's instance.[95] Costs of an appeal are allowable under some statutes,[96] but not under others.[97]

Cost of ascertaining damages. Movant is entitled to the expense of the proceedings taken to ascertain the damages sustained by reason of the injunction,[98] in case there were any such damages as to render a reference necessary.[99]

§ 255. —— Effect of Dissolution

Dissolution of the injunction is res judicata only as to the issues raised on the dissolution; it is presumed not to be a final determination of the rights of the parties, and does not prevent the granting of a permanent injunction.

The dissolution of an injunction is conclusive and res judicata as to the issues raised on the dissolution,[1] but only as to such issues;[2] hence the general effect of the dissolution of a temporary injunction is merely to put the parties in the same position in which they were prior to granting of the injunction.[3] Since, as discussed supra § 198, the court is without power, on granting a motion to dissolve a

Avoca v. McCarthy, 231 N.W. 487, 210 Iowa 952.

81. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
32 C.J. p 430 note 19.
Effect of dissolution see infra § 255.

Entitled to weight

In action by owner of mining rights against owner of surface, to enjoin interference with construction of miners' houses, in which the determination of the question turned largely on construction of title papers, and the facts presented to court of appeals on appeal from judgment making temporary injunction perpetual were the same as those presented on motion to dissolve temporary injunction, which motion was overruled by a judge of the court of appeals, the whole court sitting with him, the court's judgment in determining such motion was entitled to great weight in determination of the appeal.—Bolen v. Standard-Elkhorn Coal Co., 275 S.W. 372, 210 Ky. 43.

Hearing in vacation, on motion to dissolve temporary injunction, does not preclude further hearing on merits after overruling of motion or granting of permanent relief when case is duly reached for hearing, although appeal is allowed under Rev. St. art 4644, as amended in 1919.—Railroad Commission of Texas v. San Antonio Compress Co., Civ.App., 264 S.W. 214, error denied 278 S.W. 1115, 114 Tex. 582.

82. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.

83. Iowa.—Western Fruit & Candy Co. v. McFarland, 174 N.W. 57, 188 Iowa 204.
32 C.J. p 430 note 20.

84. Ill.—Howard v. Bennett, 72 Ill. 297.
32 C.J. p 429 note 91.

85. N.Y.—Mann v. Rice, 3 Barb.Ch. 42.
32 C.J. p 429 note 92.

86. Miss.—Herron v. McLean, 191 So. 59.
Tex.—Bridges v. Williams, Civ.App., 154 S.W.2d 669.
32 C.J. p 429 note 93.

87. Tex.—Cohen v. Strange, Civ. App., 175 S.W. 1107.

88. N.J.—Randall v. Morrell, 17 N. J.Eq. 343.

89. Conn.—Conlon v. Prior, 26 A. 1057, 62 Conn. 489.

90. Tex.—Ross v. Veltmann, Civ. App., 161 S.W. 1073.
32 C.J. p 429 note 98.

91. Ind.—Paul v. Barnbrook, 106 N. E. 425, 58 Ind.App. 607.
32 C.J. p 429 note 99.

92. Wash.—Kastner v. Algase, 227 P. 504, 130 Wash. 362.

93. Ark.—State v. Fort, 18 Ark. 202.
32 C.J. p 429 note 1.

94. Ill.—Hayes v. Chicago & N. W. Sand & Gravel Co., 37 Ill.App. 19.

95. N.J.—Smith v. Painter, 10 N.J.L. J. 182.

96. Tex.—Bridges v. Williams, Civ. App., 154 S.W.2d 669.

97. Mo.—Teasdale v. Jones, 40 Mo. App. 243.

98. N.Y.—O'Connor v. New York & Y. Land Impr. Co., 28 N.Y.S. 544, 8 Misc. 243.
32 C.J. p 429 note 7.

99. N.Y.—Sweet v. Mowry, 25 N.Y. S. 32, 71 Hun 381.

1. Ky.—Clark v. Young, 2 B.Mon. 57.
La.—Lemeunier v. McCearley, 6 So. 338, 41 La.Ann. 411.

2. N.Y.—Appollinaris Co., Ltd. v. Venable, 32 N.E. 555, 136 N.Y. 46.
32 C.J. p 429 note 11.

3. Ga.—Bowman v. Thomas, 121 S. E. 682, 157 Ga. 481.
Kan.—Baker v. Craig, 10 P.2d 838,

temporary injunction, to consider the merits and dismiss the bill, an order dissolving an injunction is merely interlocutory and, at least presumptively,[4] not a final determination of the rights of the parties,[5] although the merits may have been considered in so far as was necessary to a determination of the question whether or not a dissolution should have been granted,[6] and the order does not operate to prevent the granting of a permanent injunction.[7] Ordinarily the dissolution of a restraining order bars a second application for interlocutory relief, unless such application is based on facts not known or reasonably ascertainable at the time of the first application;[8] but this rule will not be invariably applied,[9] and it has been held that an order dissolving a temporary injunction because of the absence of an appropriate prayer for relief is not res judicata of a subsequent application for a temporary injunction.[10] A judgment which recognizes that an injunction was properly sued out which dissolves it, owing to the happening of events subsequently occurring, is not one deciding that the injunction was wrongfully obtained.[11] The ultimate dissolution of a temporary injunction after a trial on the merits does not amount to a finding that the injunction was not properly issued,[12] since, as is discussed supra § 244, a temporary injunction generally is dissolved as a matter of course after the rights of the parties have been determined.

Order self-executing. An order dissolving an injunction is self-executing, and is not superseded by filing an appeal bond.[13]

§ 256. Reinstatement

As long as the cause remains undetermined, a dissolved injunction may be reinstated for good cause shown. A special order of the court is necessary for reinstatement.

As long as the cause remains undetermined, the court after dissolution of an injunction may reinstate it for good cause shown,[14] on a motion therefor,[15] which is in the nature of an original application for an injunction,[16] after notice,[17] or on a rehearing of the order dissolving the injunction.[18] The

839, 135 Kan. 316, citing **Corpus Juris.**

Tex.—Woods v. Wichita Falls Building & Loan Ass'n, Civ.App., 66 S.W.2d 718, reversed on other grounds 96 S.W.2d 64, 128 Tex. 1.

32 C.J. p 429 note 12.

Resumption of enjoined acts

After dissolution of injunction, party acts at his peril with reference to reinstatement of injunction, but prior to such reinstatement party may act as though no injunction had been granted.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.

4. Iowa.—McMurray v. Faust, 276 N.W. 95, 224 Iowa 50.

W.Va.—McClung v. Sewell Valley R. Co., 159 S.E. 521, 110 W.Va. 621, amended on other grounds State v. Sharp, 160 S.E. 302, 111 W.Va. 39.

5. Conn.—Olcott v. Pendleton, 22 A. 2d 633, 128 Conn. 292.

Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 127 A. 414, 14 Del.Ch. 368.

Ga.—Bowman v. Thomas, 121 S.E. 682, 157 Ga. 481.

Ky.—Bolen v. Standard-Elkhorn Coal Co., 275 S.W. 372, 210 Ky. 43.

Okl.—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.

Tex.—State v. Boyd, 136 S.W.2d 1107, 134 Tex. 600.

32 C.J. p 430 note 14.

Mandatory injunction

Licenses issued under mandatory injunctive order beyond superior court's jurisdiction, because not limited to time suit was pending, gave foreign insurance companies no right to continue business in state after dissolution of injunction.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N.H. 426.

6. Del.—Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 127 A. 414, 14 Del.Ch. 368.

Ky.—Simrall v. Grant, 79 Ky. 435.

7. Conn.—Olcott v. Pendleton, 22 A. 2d 633, 128 Conn. 292.

Iowa.—McMurray v. Faust, 276 N.W. 95, 224 Iowa 50.

Okl.—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.

32 C.J. p 430 note 16.

8. S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.

Application not barred

Where an order restraining a pastor from holding meetings in a church has been dissolved because the showing as to the number of members voting for his dismissal was unsatisfactory, such dissolution did not bar the rights of the church to a second order for the same purpose sought after another meeting of the church members, whereat the vote to dismiss was unanimous.—Roediger v. Caldwell, 246 S.W. 451, 197 Ky. 164.

9. Conn.—Olcott v. Pendleton, 22 A. 2d 633, 128 Conn. 292.

10. Tex.—City of Amarillo v. Garwood, Civ.App., 63 S.W.2d 888, error refused.

11. La.—Butchers' Union & Slaughterhouse Co. v. Howell, 37 La.Ann. 280.

12. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51.

13. Iowa.—Manning v. Poling, 83 N. W. 895, 114 Iowa 20, reheard 86 N. W. 30, 114 Iowa 20.

14. Ala.—Acker v. Green, 113 So. 411, 412, 216 Ala. 445, citing **Corpus Juris.**

Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.

32 C.J. p 430 note 21.

Acts committed in interim

Fact that plaintiff, temporarily enjoined from doing certain acts, sold its business during period of suspension of injunction, did not affect defendants' right to reinstatement of injunction, where sale of business by plaintiff was not one of acts enjoined.—Maison Dorin Société Anonyme v. Arnold, C.C.A.N.Y., 16 F. 2d 977, certiorari denied 47 S.Ct. 571, 273 U.S. 766, 71 L.Ed. 881.

15. Va.—Beal v. Gibson, 4 Hen. & M. 481, 14 Va. 481.

32 C.J. p 430 note 22.

Where application made

The application must in the first instance be presented to, and heard by, the judge before whom the cause is pending and who pronounced the order of dissolution.

Ala.—Acker v. Green, 113 So. 411, 216 Ala. 445.

N.Y.—Jewett v. Albany City Bank, Clarke p 59.

16. Fla.—Peck v. Spencer, 7 So. 642, 26 Fla. 23.

32 C.J. p 430 note 23.

17. La.—State v. Second City Ct. Judge, 37 La.Ann. 285.

18. Fla.—Peck v. Spencer, 7 So. 642, 26 Fla. 23.

reinstatement is not a matter of course, but cause usually must be shown by further evidence,[19] especially where the dissolution was by consent.[20] A reinstatement will be denied after dissolution on final judgment, in which case the remedy is by appeal;[21] and an injunction will not usually be reinstated pending an appeal from the order dissolving it;[22] but, if the order dissolving the injunction was reversed on appeal, complainant is entitled to reinstatement of the injunction;[23] and it has been held that a trial court may reinstate an injunction even though the order of dissolution has been affirmed on appeal.[24] An opinion or order of an appellate court denying reinstatement of a preliminary injunction theretofore dissolved by a trial court will, if sound, be followed on a subsequent appeal from the final judgment.[25] A reinstatement will not be allowed where statutory requirements as to bond have not been complied with.[26]

Relation back. An order reinstating an injunction does not relate back so as to render invalid proceedings in the interim.[27]

A special order of court is necessary for the reinstatement of an injunction.[28] There must be a new exercise of judicial power.[29]

VI. VIOLATION AND PUNISHMENT

§ 257. In General

Violation of an injunction or restraining order which is valid and operative is punishable as a contempt of court.

Violation of a valid injunction or restraining order which is in full force and effect constitutes a contempt of court and is punishable as such.[30] Such violation is an indirect contempt where it does not occur in the immediate presence of the court or so close as to interrupt or disturb court proceedings.[31]

N.Y.—Van Bergen v. Demarest, 4 Johns.Ch. 37.

Notice

Kan.—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762.

19. U.S.—Tucker v. Carpenter, C.C. Ark., 24 F.Cas.No.14,217, Hempst. 440.

32 C.J. p 430 note 26.

20. N.Y.—Livingston v. Gibbons, 5 Johns.Ch. 250.

21. Ky.—Elizabethtown, L. & B. S. R. Co. v. Ashland & C. R. Co., 22 S.W. 855, 94 Ky. 478, 15 Ky.L. 258.

22. N.Y.—Spears v. Mathews, 66 N. Y. 127—Jewett v. Albany City Bank, Clarke p 59.

23. Cal.—Harris v. McGregor, 29 Cal. 124.

N.C.—Beaufort County Lumber Co. v. Price, 56 S.E. 684, 144 N.C. 50.

24. N.Y.—Tone v. Brace, Clarke p 503, affirmed 11 Paige 566.

32 C.J. p 431 note 32.

Reinstatement of injunction after dissolution by appellate court see Appeal and Error § 632.

25. Ky.—Progress Laundry Co. v. Hamilton, 270 S.W. 834, 208 Ky. 348.

26. Ky.—St. Bernard Coal Co. v. Pittsburg Coal Co., 64 S.W. 288, 112 Ky. 418, 23 Ky.L. 52.

32 C.J. p 431 note 33.

27. Ky.—Young v. Davis, 1 T.B.Mon. 152.

Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.

28. Ill.—Blount v. Tomlin, 26 Ill. 531.

29. Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474—Crum v. Fillers, 6 Tenn.App. 547.

30. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092—In re Sterling, C.C.A.Cal., 125 F.2d 104—Locke v. U. S., C.C.A.Tex., 75 F.2d 157, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1681—Heiman v. Stoutamire, D.C.Fla., 26 F.Supp. 301—Patton v. U. S., C.C. A.W.Va., 288 F. 812, followed in Barrett v. U. S., 288 F. 815—McGibbony v. Lancaster, C.C.A.La., 286 F. 129—U. S. v. Debs, C.C.Ill., 64 F. 724, error denied In re Debs, 15 S.Ct. 1039, 159 U.S. 251.

Cal.—Eureka Lake & Yuba Canal Co. v. Superior Court of the County of Yuba, 5 P. 490, 66 Cal. 311, affirmed 6 S.Ct. 429, 116 U.S. 410, 29 L.Ed. 671—Golden Gate Hydraulic Min. Co. v. Superior Court of Yuba County, 65 Cal. 187—Ex parte Fortenbury, 101 P.2d 105, 38 Cal.App.2d 284—Houser v. Superior Court in and for Los Angeles County, 8 P.2d 483, 121 Cal.App. 31.

Colo.—Bennett v. Joseph W. Bowles Reservoir Co., 63 P.2d 443, 99 Colo. 346.

Ill.—Master Barbers Ass'n of Chicago v. Balata, 26 N.E.2d 187, 304 Ill.App. 252—Roesch Enamel Range Co. v. Carbine, 247 Ill.App. 248—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.

Iowa.—Orr v. Hamilton, 209 N.W. 285, 202 Iowa 345.

Mass.—Wireless Specialty Apparatus Co. v. Priess, 140 N.E. 793, 246 Mass. 274.

Minn.—Johnson v. Froelich, 264 N. W. 232, 196 Minn. 81.

Mont.—Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 60 P. 807, 24 Mont. 117.

N.J.—Roseberg v. American Hotel & Garden Co., 123 A. 717, 95 N.J.Eq. 640, affirming, Ch., 121 A. 9.

N.Y.—Busch Jewelry Co. v. Silvers, 8 N.Y.S.2d 592, 169 Misc. 305.

Tex.—Ex parte Kottwitz, 8 S.W.2d 508, 117 Tex. 583.

Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

W.Va.—State v. Robertson, 22 S.E.2d 287, 124 W.Va. 648.

Wis.—State ex rel. Attorney General v. Fasekas, 269 N.W. 700, 223 Wis. 356—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

32 C.J. p 501 note 49.

Restraining order embodied in order to show cause

Cal.—Ex parte Fortenbury, 101 P.2d 105, 38 Cal.App.2d 284.

Minn.—Town of Linden v. Fischer, 191 N.W. 901, 154 Minn. 354.

Incorporation of stipulation for payment of money

U.S.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622, reversing, D.C., 36 F.Supp. 138.

Power to punish for contempt see infra § 270.

Transfers or agreements in violation of injunction see supra § 207 b (2).

31. Ind.—Oakland Coal Co. v. Wilson, 149 N.E. 54, 196 Ind. 501.

Kan.—State ex rel. Kansas State Board of Medical Registration and Examination v. Martin, 130 P.2d 601, 155 Kan. 801.

§ 258. Writ or Mandate Violated

a. General considerations
b. Effect of termination of injunction
c. Effect of modification or resettlement of injunction

a. General Considerations

A valid injunction or restraining order must be obeyed while it is in full force and effect.

An injunction or restraining order which is not void must be obeyed while it remains in full force and effect,[32] that is, in general, until the injunction or restraining order has been vacated or modified by the court which granted it,[33] or until the order or decree awarding it has been reversed on appeal or error,[34] no matter how unreasonable and unjust the injunction may be in its terms.[35]

Defendant cannot avoid compliance with the commands, or excuse his violation, of the injunction by simply moving to dissolve it,[36] or by the pendency of a motion to modify it.[37]

An injunction is not retroactive so as to make unlawful an act done before the injunction was granted;[38] but a judgment providing that a mandatory injunction should issue has been regarded as a mandatory injunction, for violation of which a person bound thereby is punishable for contempt.[39]

Where the issuance of an injunction is conditioned on the performance of certain acts by plaintiff, there can be no violation and no contempt before such acts are performed.[40]

32. U.S.—McLeod v. Majors, C.C.A. Fla., 102 F.2d 128, reversing, D.C., Majors v. McLeod, 26 F.Supp. 206—Heiman v. Stoutamire, D.C.Fla., 26 F.Supp. 301—U. S. v. French, D.C.Mich., 9 F.Supp. 30.
Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49—Ex parte Fortenbury, 101 P.2d 105, 38 Cal.App.2d 284.
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 139 N.E. 887, 308 Ill. 488, affirming 226 Ill. App. 505, 532—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372.
Iowa.—Orr v. Hamilton, 209 N.W. 285, 202 Iowa 345.
Mass.—Wireless Specialty Apparatus Co. v. Priess, 140 N.E. 793, 246 Mass. 274.
Miss.—Redding v. State, 185 So. 560, 184 Miss. 371—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
N.Y.—Busch Jewelry Co. v. Silvers, 8 N.Y.S.2d 592, 169 Misc. 805—People ex rel. Interborough Rapid Transit Co. v. Lavin, 228 N.Y.S. 218, 131 Misc. 758—In re City Equitable Fire Ins. Co., Limited, of London, England, 198 N.Y.S. 869, 120 Misc. 245—Smith v. Reno, 6 How.Pr. 124.
Tenn.—Sweetwater Bank & Trust Co. v. Howard, 66 S.W.2d 225, 16 Tenn.App. 91.
Tex.—Ex parte Kimberlin, 86 S.W. 2d 717, 126 Tex. 60—Lytle v. Galveston, H. & S. A. Ry. Co., 90 S. W. 316, 41 Tex.Civ.App. 112.
Va.—Deeds v. Gilmer, 174 S.E. 87, 162 Va. 157.
W.Va.—State v. Robertson, 22 S.E. 2d 287, 124 W.Va. 648.
Wis.—State ex rel. Attorney General v. Fasekas, 269 N.W. 700, 223 Wis. 356—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
32 C.J. p 484 notes 15, 16.

Order not constituting restraint or prohibition
La.—Canone v. Pailet, 106 So. 118, 159 La. 698.

33. U.S.—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F. 2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444—Patton v. U. S., C.C.A.W.Va., 288 F. 812, followed in Barrett v. U. S., 288 F. 815.
Cal.—Ex parte Wood, 92 P.2d 1058, 34 Cal.App.2d 546.
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.
N.J.—Roseberg v. American Hotel & Garden Co., 123 A. 717, 95 N.J.Eq. 640, affirming, Ch., 121 A. 9.
Tex.—Floyd v. Eggleston, Civ.App., 137 S.W.2d 182, 184, citing **Corpus Juris,** error refused, and certiorari denied 61 S.Ct. 314, 311 U.S. 708, 85 L.Ed. 460, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1143.
32 C.J. p 484 note 15.

34. U.S.—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F. 2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444—Locke v. U. S., C.C.A.Tex., 75 F.2d 157, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1681—Patton v. U. S., C. C.A.W.Va., 288 F. 812, followed in Barrett v. U. S., 288 F. 815.
Cal.—Ex parte Wood, 92 P.2d 1058, 34 Cal.App.2d 546.
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Ill.—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.
N.J.—Roseberg v. American Hotel & Garden Co., 123 A. 717, 95 N.J.Eq. 640, affirming, Ch., 121 A. 9.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
32 C.J. p 484 note 16.

35. Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Vt.—Stimpson v. Putnam, 41 Vt. 238.
Fact that injunction or restraining order is erroneous as excuse for disobedience see infra § 259.

36. N.Y.—McCardel v. Peck, 28 How.Pr. 120.
Effect of termination of injunction see infra subdivision b of this section.

37. Iowa.—Young v. Rothrock, 96 N. W. 1105, 121 Iowa 588.
Effect of modification of injunction see infra subdivision c of this section.

38. Cal.—Bowes v. Superior Court in and for City and County of San Francisco, 57 P.2d 583, 13 Cal.App. 2d 656.
N.Y.—Reimers Electric Appliance Co. v. D. & D. Electric Co., 287 N. Y.S. 380, 247 App.Div. 354—People v. Albany & V. R. Co., 12 Abb.Pr. 171, 20 How.Pr. 358.
Wis.—Witter v. Lyon, 34 Wis. 564.

Assurance by defendant before injunction granted
N.Y.—Welt v. The Beachcomber, Inc., 1 N.Y.S.2d 177, 166 Misc. 29.

Acting at his peril
Defendant in a suit in which injunctive relief is sought acts at his peril, however, where, pending appeal from an order denying the injunction and dismissing the bill, he performs acts the restraint of which is sought in such suit.—Austin v. Van Horn, 228 N.W. 761, 249 Mich. 347.

39. Cal.—Katenkamp v. Superior Court in and for Santa Barbara County, 108 P.2d 1, 16 Cal.2d 696.

40. Ala.—Ex parte Miller, 30 So. 611, 129 Ala. 130, 87 Am.S.R. 49.

b. Effect of Termination of Injunction

(1) Acts intermediate granting and termination

(2) Acts subsequent to termination

(1) Acts Intermediate Granting and Termination

According to some cases the termination of an injunction or restraining order does not necessarily relieve from liability for a violation of the injunction or order while it was in force, at least where the proceeding for violation is one for criminal contempt; but some authorities deny liability for a violation occurring prior to termination, at least where the proceeding to punish is one for civil contempt and the injunction or restraining order was granted erroneously.

According to some cases the fact that an injunction or restraining order has been dissolved or terminated[41] or has expired[42] does not necessarily protect a person in a proceeding against him for a violation of the injunction or order while it was in force, at least where the proceeding is one to punish for a criminal contempt.[43] It has been stated broadly, however, with respect to violations committed while the injunction was in force, that contempt proceedings may not be maintained after the injunction has been dissolved, abrogated, or otherwise terminated,[44] and it has been held or recognized that a proceeding for civil contempt for violation of a temporary injunction prior to dissolution cannot be maintained after such injunction has been merged and terminated by judgment in the main action,[45] especially where, after litigation of the merits, the prayer for a permanent injunction is denied on the merits.[46] Where the main suit in which an injunction is awarded is settled and discontinued, a proceeding in the cause for civil contempt in violating the injunction necessarily ends with the settlement of the main cause of which it is a part.[47] There is authority to the effect, however, that a person may be adjudged guilty of civil contempt for violation of a temporary mandatory injunction notwithstanding a final decree in favor of plaintiff was entered after such violation,[48] and that a proceeding for civil contempt pending when an injunction was dissolved will not be discontinued if the mischiefs resulting from the violation of the injunction were irreparable so that the further continuance of the injunction was useless.[49]

Reversal of order or decree for injunction. It has been held or recognized that violation of an injunction or restraining order subsequently reversed on appeal is not punishable as a contempt.[50] According to some authorities the rule is otherwise with respect to liability for criminal contempt,[51] and the reversal of a judgment granting an

W.Va.—State v. Irwin, 4 S.E. 413, 30 W.Va. 404.
32 C.J. p 484 note 24.

Injunction not subject to condition
Ill.—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372.
Kan.—Newbern v. Service Pipe Line & Mining Co., 267 P. 29, 126 Kan. 76.
Conditions on granting injunction see supra § 202.

41. U.S.—Shuler v. Raton Waterworks Co., N.M., 247 F. 634, 160 C.C.A. 44.
32 C.J. p 486 note 49.

42. Mass.—Wireless Specialty Apparatus Co. v. Priess, 140 N.E. 793, 246 Mass. 274.

43. Minn.—Red River Potato Growers' Ass'n v. Bernardy, 150 N.W. 383, 128 Minn. 153.
N.D.—State ex rel. Heffron v. District Court for Stark County in Tenth Judicial Dist., 143 N.W. 143, 26 N.D. 32.

Restraining order superseded by injunction pendente lite
Cal.—Houser v. Superior Court in and for Los Angeles County, 8 P. 3d 488, 121 Cal.App. 31.

Effect of settlement between parties
The fact that the parties to the suit in which the injunction is granted have entered into a settlement of the matters involved in the suit does not prevent the court whose order was violated from punishing the party in contempt by criminal proceedings properly instituted.—Gompers v. Buck's Stove & Range Co., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874, reversing 33 App. D.C. 516.

44. Ill.—Crook v. People, 16 Ill. 534.
N.Y.—Taber v. Manhattan Ry. Co., 35 N.Y.S. 465, 14 Misc. 189, affirmed 42 N.E. 1093, 148 N.Y. 743.

Time proceedings begun
(1) It has been held that proceedings begun after the dissolution of the injunction, on the ground of an infringement of it while in force, could not be sustained.—Moat v. Holbein, 2 Edw., N.Y., 188.

(2) However, the view has been taken that dissolution of the injunction does not protect defendant for prior violations where proceedings to punish were instituted prior to dissolution of the injunction.—Smith v. Reno, 6 How.Pr., N.Y., 124—32 C.J. p 486 note 50 [a].

45. N.M.—Canavan v. Canavan, 139 P. 154, 18 N.M. 640, 51 L.R.A.,N.S., 972, Ann.Cas.1915D 1007.
Wis.—State v. Neveau, 295 N.W. 718, 236 Wis. 414.
32 C.J. p 485 note 38.

46. Wis.—State v. Neveau, supra.

47. U.S.—Gompers v. Buck's Stove & Range Co., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874, reversing 33 App.D.C. 516.

48. U.S.—Parker v. U. S., C.C.A. Mass., 136 F.2d 370.

49. Ill.—Crook v. People, 16 Ill. 534.

50. U.S.—Bessette v. W. B. Conkey Co., Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997—Securities and Exchange Commission v. Okin, C.C.A. N.Y., 137 F.2d 862, modifying, D. C., 48 F.Supp. 928—Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, C.C.A.N.Y., 86 F.2d 727—Republic Electric Co. v. General Electric Co., C. C.A.N.J., 30 F.2d 99.
Ill.—Madson v. Clark, 166 Ill.App. 442.
N.Y.—People ex rel. Interborough Rapid Transit Co. v. Lavin, 228 N.Y.S. 218, 131 Misc. 758.
N.C.—State v. Nathans, 27 S.E. 52, 49 N.C. 199.
13 C.J. p 62 note 45 [a].

Effect of reversal on order for punishment
N.Y.—Krone v. Kings County El. R. Co., 3 N.Y.S. 149, 50 Hun 431.

51. U.S.—Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, C.C.A.N.Y., 86 F. 2d 727.
N.C.—State v. Nathans, 27 S.E. 52, 49 N.C. 199.
13 C.J. p 62 note 45 [a].

injunction does not prevent punishment for criminal contempt for violation of a restraining order which the trial court had power to grant.[52]

(2) Acts Subsequent to Termination

Acts committed after an injunction or restraining order has duly been terminated or dissolved are not punishable as contempts of court.

Where the force of an injunction or restraining order is spent by reason of the fact that it has been dissolved or terminated,[53] or has expired by its own terms,[54] there can be no punishment for acts prohibited but committed subsequent to the dissolution or termination of the injunction or restraining order, and the fact that the decision of the court in dissolving the injunction was erroneous does not affect the operation of the rule;[55] but where the injunction has been dissolved by a court without jurisdiction to dissolve a violation thereafter will be a contempt.[56]

c. Effect of Modification or Resettlement of Injunction

As to acts subsequent to modification of an injunction, the injunction as modified controls in determining whether the injunction is violated; as to violations prior to modification, liability, at least with respect to civil contempt, may be affected by the modification.

Where the injunction has been modified, defendant therein cannot be punished for contempt in violating the order as originally granted where the act does not violate the injunction as modified.[57] Where, however, on appeal an injunction was affirmed in all its essential details, disobedience thereof is not justified, although modified in some respects.[58]

It has been held that contempt proceedings may not be prosecuted after modification of an injunction, with respect to violations prior to modification by acts removed from the operation of the injunction by the modification,[59] even where such proceedings were commenced before the injunction was modified.[60] There apparently is authority for the view, however, that modification of an injunction does not necessarily purge a contempt committed prior to modification.[61] It has been held that formal resettlement of a temporary injunction does not relieve from liability for past disobedience of a provision of the injunction which is continued in effect by the order of resettlement.[62]

§ 259. —— Validity and Regularity

a. General considerations
b. Necessity of definiteness and certainty

a. General Considerations

The fact that an injunction or restraining order is merely erroneous, or was improvidently granted, or was granted or obtained irregularly, does not of itself excuse a violation of such injunction or order; but disobedience of a void injunction or restraining order is not a punishable contempt of court.

In accordance with general rules stated in Contempt § 14, in a proceeding for violation of an in-

52. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

53. U.S.—Dakota Corporation v. Slope County, N. D., C.C.A.N.D., 75 F.2d 584, certiorari denied 56 S.Ct. 106, 296 U.S. 593, 80 L.Ed. 420—Neblett v. U. S., C.C.A.Cal., 62 F. 2d 181.
Alaska.—U. S. v. Price, 1 Alaska 204.
Cal.—Miller v. Railroad Commission, 70 P.2d 164, 9 Cal.2d 190, 112 A.L. R. 221.
Mich.—Red Star Motor Drivers' Ass'n v. Merriam, 223 N.W. 217, 245 Mich. 635.
N.Y.—Ettlinger v. Trew, 24 N.Y.S. 2d 57, 175 Misc. 744—Gardner v. Gardner, 87 N.Y. 14, reversing 24 Hun 627.
Wis.—State v. Neveau, 295 N.W. 718, 236 Wis. 414.
32 C.J. p 485 note 35.

Injunction order not carried into final decree
Wash.—Jones v. Jones, 134 P. 528, 75 Wash. 50.

Effect of order granting rehearing
Kan.—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762.

Acts committed after expiration of time for appeal
Kan.—Epperson v. Kansas State Department of Inspections and Registration, supra.

Effect of application for review
Wis.—Mueller v. Brotz, 173 N.W. 219, 169 Wis. 526.
32 C.J. p 485 note 42.

54. Tex.—Ex parte Rains, 257 S.W. 217, 113 Tex. 428.
32 C.J. p 485 note 36.

55. Ark.—Ex parte Simmons, 150 S. W. 141, 105 Ark. 19.

56. N.Y.—People v. Van Buren, 18 N.Y.S. 734, affirmed 32 N.E. 775, 136 N.Y. 252, 20 L.R.A. 446—Koelehr v. Farmers' & Drovers' Nat. Bank, 6 N.Y.S. 470, 3 Silv.Sup. 141, 17 N.Y.Civ.Proc. 307, affirmed 22 N.E. 1134, 117 N.Y. 661.

57. N.M.—Warder v. Shufeldt, 62 P. 2d 812, 40 N.M. 442, motion denied 71 P.2d 653, 41 N.M. 507.
32 C.J. p 485 note 31.

Modification creating condition precedent
Where a temporary injunction is modified, with the consent of plaintiff, by an order requiring the performance of certain acts by plaintiff as a condition precedent to the operation of the injunction, plaintiff must obey such order before he may charge defendant with contempt for alleged violation of such injunction after modification.—Ziegfeld v. Northworth, 133 N.Y.S. 208, 148 App. Div. 185.

58. N.Y.—Hathorn v. National Carbonic Gas Co., 121 N.Y.S. 683, 137 App.Div. 557.

59. N.M.—Warder v. Shufeldt, 62 P. 2d 812, 40 N.M. 442, motion denied 71 P.2d 653, 41 N.M. 507.
N.Y.—Peck v. Yorks, 32 How.Pr. 408.

60. N.M.—Warder v. Shufeldt, 62 P. 2d 812, 40 N.M. 442, motion denied 71 P.2d 653, 41 N.M. 507.

61. Ill.—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.

62. U.S.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F.2d 862, modifying, D.C., 48 F.Supp. 928.

junction the judgment or decree for injunction, if rendered by a court having jurisdiction, is not subject to collateral attack,[63] at least for irregularities.[64] Where the court had jurisdiction, the fact that the injunction or restraining order, or the order for the same is merely erroneous, or was improvidently granted or irregularly obtained, is no excuse for violating it;[65] and this rule applies with equal force to a prosecution for contempt instituted for the purpose of punishing a person for disobeying an order of the court on the ground that its authority or dignity is in question, and one which is instituted to enforce the authority of the court in the administration of justice between litigants.[66] Also, where the court had jurisdiction, disobedience is not excused by the fact that the bill or complaint on which the injunction or restraining order was issued was insufficient,[67] that the injunction is broader than that authorized by the order for injunction,[68] or that the injunction is broader than the statute authorizing the injunction.[69]

Where the injunction or restraining order is void and not merely voidable, disobedience thereof is not a contempt of court and not punishable as such,[70]

63. Ill.—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.
Md.—Burton v. Taxicab Co., 143 A. 799, 156 Md. 183.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395—Acequia del Llano v. Acequia de las Joyas del Llano Frio, 179 P. 235, 25 N.M. 134.
32 C.J. p 482 notes 9, 13.

64. Cal.—Ex parte Valterza, 100 P. 2d 337, 37 Cal.App.2d 682.
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40.
Utah.—Liquor Control Commission v. McGillis, 65 P.2d 1136, 91 Utah 586.
32 C.J. p 482 note 9.

65. U.S.—McLeod v. Majors, C.C.A. Fla., 102 F.2d 128, reversing, D.C., Majors v. McLeod, 26 F.Supp. 206—Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, C.C.A.N.Y., 86 F.2d 727—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F.2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444—Locke v. U. S., C.C.A. Tex., 75 F.2d 157, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1681—Patton v. U. S., C.C.A.W.Va., 288 F. 812, followed in Barrett v. U. S., 288 F. 815—U. S. v. Debs, C.C.Ill., 64 F. 724, error denied In re Debs, 15 S.Ct. 1039, 159 U.S. 251.
Cal.—Ex parte Valterza, 100 P.2d 337, 37 Cal.App.2d 682.
Colo.—Smith v. Schlink, 99 P. 566, 44 Colo. 200.
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Ill.—Pure Milk Ass'n v. Wagner, 2 N.E.2d 288, 363 Ill. 316, transferred, see 6 N.E.2d 503, 288 Ill. App. 630—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.
Iowa.—Orr v. Hamilton, 209 N.W. 285, 202 Iowa 345.
Miss.—Redding v. State, 185 So. 560, 184 Miss. 371—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
N.Y.—People ex rel. Interborough Rapid Transit Co. v. Lavin, 228 N. Y.S. 218, 131 Misc. 758—Smith v. Reno, 6 How.Pr. 124.
N.C.—Elder v. Barnes, 14 S.E.2d 249, 219 N.C. 411—Hearne v. Stanly County, 123 S.E. 641, 188 N.C. 45.
Pa.—Bowers v. Reitz, 172 A. 707, 709, 315 Pa. 310, quoting **Corpus Juris.**
Tenn.—Sweetwater Bank & Trust Co. v. Howard, 66 S.W.2d 225, 16 Tenn. App. 91.
Tex.—Lytle v. Galveston, H. & S. A. Ry. Co., 90 S.W. 316, 41 Tex.Civ. App. 112.
Utah.—Liquor Control Commission v. McGillis, 65 P.2d 1136, 91 Utah 586.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
32 C.J. p 482 notes 10, 11, 13.

Injunction too broad
N.Y.—In re City Equitable Fire Ins. Co., Limited, of London, England, 198 N.Y.S. 869, 120 Misc. 245.
Tex.—Ex parte Kimberlin, 86 S.W.2d 717, 126 Tex. 60—Ex parte Roper, 134 S.W. 334, 61 Tex.Cr. 68.

Consent to injunction
U.S.—Fleming v. Alderman, D.C. Conn., 51 F.Supp. 800.
Colo.—Wyman v. Bell, 41 P.2d 242, 96 Colo. 223.

Injunction based on invalid statute or regulation
U.S.—McLeod v. Majors, C.C.A.Fla., 102 F.2d 128, reversing, D.C., Majors v. McLeod, 26 F.Supp. 206—Heiman v. Stoutamire, D.C.Fla., 26 F.Supp. 301.
Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49.
Ill.—Pure Milk Ass'n v. Wagner, 2 N.E.2d 288, 363 Ill. 316, transferred, see 6 N.E.2d 503, 288 Ill. App. 630.
N.Y.—People v. Bouchard, 27 N.Y.S. 201, 6 Misc. 459.
Wis.—State ex rel. Attorney General v. Fasekas, 269 N.W. 700, 223 Wis. 356.
32 C.J. p 482 note 13 [j].

Irregularity in form of writ
Kan.—State v. Pierce, 32 P. 924, 51 Kan. 241.
32 C.J. p 482 note 13 [c], [l].

68. Ill.—Barnes v. Chicago Typographical Union No. 16, 83 N.E. 932, 232 Ill. 402, 122 Am.S.R. 129, 14 L.R.A.,N.S., 1150.
Pa.—Bowers v. Reitz, 172 A. 707, 709, 315 Pa. 310, quoting **Corpus Juris.**
Criminal or civil nature of contempt proceeding as affecting punishment see infra § 276.

67. Cal.—Ex parte Valterza, 100 P. 2d 337, 37 Cal.App.2d 682—Gilman v. Superior Court in and for Nevada County, 260 P. 922, 86 Cal.App. 259.
Mont.—State ex rel. Mungas v. District Court of Third Judicial Dist. in and for Granite County, 59 P. 2d 71, 102 Mont. 533.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
32 C.J. p 482 note 13 [e].

Want of equity in bill
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
32 C.J. p 482 note 13 [e], p 483 note 13 [h].

Broader than prayer
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
N.J.—Roseberg v. American Hotel & Garden Co., 123 A. 717, 95 N.J.Eq. 640, affirming, Ch., 121 A. 9.
Tex.—Ex parte Roper, 134 S.W. 334, 61 Tex.Cr. 68.

68. U.S.—Sickels v. Borden, C.C.N. Y., 22 F.Cas.No.12,833, 4 Blatchf. 14.

69. Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

70. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724, error denied In re Debs, 15 S.Ct. 1039, 159 U.S. 251.
Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.

but the fact that an injunction is void in part does not excuse violation of the valid part.[71] In general it is only when the court which grants or makes the injunction or restraining order does not have jurisdiction that such injunction or order may be disregarded and cannot be made the basis of a contempt proceeding.[72] It has been held or recognized, however, that an injunction is void and, therefore, insufficient as the basis of punishment for contempt if it has no support of any applicable law,[73] or where the court is without jurisdiction to grant the particular restraining order.[74]

Record. It has been held that one may not be held guilty of contempt on the basis of an order which is not of record and which rests solely on a mere oral announcement of the court,[75] but the order is not void merely because the minute entry by the clerk of court does not conform to the oral decision by the trial judge.[76] However, it has been held that there may be a contempt of court in disobeying the terms of an injunction order which is neither entered nor filed.[77]

b. Necessity of Definiteness and Certainty

To support a proceeding for contempt the writ of injunction or restraining order should be sufficiently clear and definite in its terms to enable a person bound by the writ or order to determine what he may and may not do.

To support a proceeding for contempt the writ of injunction or the restraining order should be clear and specific in its terms,[78] and sufficient to

Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
Ill.—Bottom v. City of Edwardsville, 139 N.E. 5, 308 Ill. 68.
Iowa.—Dayton v. Patterson, 250 N. W. 595, 216 Iowa 1382—Carter v. Utterback, 204 N.W. 446, 200 Iowa 32.
Miss.—Redding v. State, 185 So. 560, 184 Miss. 371.
Mo.—Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs & Helpers Union Local No. 366, App., 115 S.W.2d 89.
Mont.—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387.
N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y. S. 9, 164 Misc. 355.
Tex.—Ex parte Richards, 155 S.W.2d 597, 137 Tex. 520—Staples v. State, Civ.App., 260 S.W. 641.
32 C.J. p 482 note 12.

Want of jurisdiction in general
U.S.—Abbott v. Eastern Massachusetts St. Ry. Co., C.C.A.Mass., 19 F.2d 463.
Ill.—Bottom v. City of Edwardsville, 139 N.E. 5, 308 Ill. 68—People v. McWeeney, 102 N.E. 233, 259 Ill. 161, Ann.Cas.1916B 34.
Tex.—Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co., 83 S.W. 1100, 37 Tex.Civ.App. 334.
32 C.J. p 482 note 12.

Want of notice or jurisdiction of person
Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.
Iowa.—Dayton v. Patterson, 250 N. W. 595, 216 Iowa 1382.
N.Y.—Wattman v. Wattman, 272 N. Y.S. 860, 242 App.Div. 706—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

Want of bond
Ark.—Harrahan Viaduct Improvement Dist. v. Martineau, 288 S. W. 10, 172 Ark. 189.
Cal.—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.
Idaho.—MacWatters v. Stockslager, 162 P. 671, 29 Idaho 803.
Mo.—Losee v. Crawford, 5 S.W.2d 105, 222 Mo.App. 683.
32 C.J. p 318 notes 15, 16, p 482 note 12 [b] (1).

71. Ala.—Ex parte Connor, 198 So. 850, 240 Ala. 327.
Utah.—Liquor Control Commission v. McGillis, 65 P.2d 1136, 91 Utah 586.

72. Ala.—Ex parte Connor, 198 So. 850, 240 Ala. 327.
Cal.—Ex parte Wood, 93 P.2d 1058, 34 Cal.App.2d 546.
32 C.J. p 482 note 13.

Restraining order pending hearing
U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

Effect of determination as to jurisdiction
W.Va.—State v. Robertson, 22 S.E. 2d 287, 124 W.Va. 648.

73. Colo.—People ex rel. Industrial Commission of Colorado v. Aladdin Theatre Corporation, 44 P.2d 1022, 96 Colo. 527.
Miss.—Redding v. State, 185 So. 560, 184 Miss. 371.

74. **Labor dispute**
Cal.—Fortenbury v. Superior Court in and for Los Angeles County, 106 P.2d 411, 16 Cal.2d 405.

75. Cal.—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.

76. Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734.

77. N.Y.—Ehret v. George Ringler & Co., 129 N.Y.S. 546, 70 Misc. 627.

Entry nunc pro tunc
Tex.—Crum v. Fillers, 6 Tenn.App. 547.

Oral order
Wash.—State ex rel. Curtiss v. Erickson, 120 P. 104, 66 Wash. 639.

78. Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.
Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 204, prior opinions, App., 116 P.2d 643, and 114 P.2d 45—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
Ind.—Uservo, Inc., v. Selking, 28 N. E.2d 61, 217 Ind. 567.
Md.—International Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.
Mo.—Temco Mfg. Co. v. National Electric Ticket Register Co., 18 S.W.2d 142, 223 Mo.App. 420—Oliver v. Orrick, 288 S.W. 966, 220 Mo. App. 614.
32 C.J. p 484 note 20.

Mandatory injunction
U.S.—National Labor Relations Board v. Bell Oil & Gas Co., C.C. A., 98 F.2d 405, rehearing denied 99 F.2d 56.

Writ, restraining order, or decree sufficient to support contempt proceeding
U.S.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622, reversing, D.C., 36 F.Supp. 138.
Ala.—Ex parte Connor, 198 So. 850, 240 Ala. 327.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases.
Colo.—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.
Conn.—Walden v. Siebert, 128 A. 702, 102 Conn. 353.
Iowa.—Orr v. Hamilton, 209 N.W. 285, 202 Iowa 345.
Pa.—City of Scranton v. People's Coal Co., 117 A. 673, 274 Pa. 63.
Requisites and sufficiency of:
Final decree in injunction proceeding in general see supra § 211.
Writ or restraining order in general see supra § 206.

enable a person bound by the writ or order to determine from its terms what he may and may not do.[79] If such party does not in fact know to what the injunction applies he will not be punished for contempt.[80] The party enjoined, is not, however, justified in disobeying an injunction merely because it is ambiguous,[81] and the fact that part of the writ is so vague as to be a nullity does not excuse a violation of the valid parts of the writ.[82]

§ 260. —— Pendency of Stay

The pendency of a motion for a new trial does not suspend the operation of an injunction decree as respects liability and punishment for contempt.

The fact that a motion for a new trial is pending does not suspend the operation of the decree as respects liability for contempt for violation of the decree.[83] The effect of an appeal from a decree or order granting an injunction with respect to staying the operation of such decree or order is discussed in Appeal and Error § 672.

§ 261. Knowledge or Notice of Injunction

A person is not guilty of contempt in violating an injunction or restraining order unless he has, or is chargeable with, knowledge or notice of such injunction or order, but actual notice is sufficient to bind a party to the proceedings regardless of want of, or defective, service of the injunction or order.

In general one cannot be punished for violating an injunction or an order for an injunction unless it is shown that such injunction or order was served on him personally or that he had notice of the issuance or making of such injunction or order.[84] Where, however, a party has actual notice of an injunction, clearly informing him from what he must abstain, he is bound by the injunction from that time, and will be punished for a violation thereof, even though it may not have been served,[85] or may have been served on him defectively.[86]

A party may not avoid the effect of service of an injunction order and resultant liability for contempt for disobedience by refusing to accept service and to read the order.[87]

It is altogether immaterial how defendant acquires information of the existence of the injunction; when once he has been apprised of the fact he is legally bound to desist from what he is restrained and inhibited from doing.[88] Where an injunction has been ordered or decreed, a party having knowledge of that order, who deliberately violates the injunction that has been ordered or decreed, although not yet issued, is guilty of con-

79. Md.—International Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.
Mo.—Oliver v. Orrick, 288 S.W. 966, 220 Mo.App. 614.
N.Y.—Moat v. Holbein, 2 Edw. 188.
32 C.J. p 484 note 20.

80. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 202, prior opinions, App., 116 P.2d 643, and 114 P.2d 45.
32 C.J. p 484 note 20.

81. Ill.—Flannery v. People, 80 N.E. 60, 225 Ill. 62.
Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Pa.—City of Scranton v. People's Coal Co., 117 A. 673, 274 Pa. 63.
32 C.J. p 484 note 20.
Indefiniteness as to time limit
U.S.—A. B. Dick Co. v. Fuller, D.C. N.Y., 6 F.2d 393.

82. Ala.—Ex parte Connor, 198 So. 850, 240 Ala. 327.

83. Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.

84. U.S.—Hill v. U. S., C.C.A.Okl., 33 F.2d 489, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640.
Iowa.—Harris v. Hutchinson, 140 N. W. 830, 160 Iowa 149, 44 L.R.A.,N. S., 1035.
N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42.
N.Y.—Wattman v. Wattman, 272 N. Y.S. 860, 242 App.Div. 706.
Tex.—Hudgens v. Yancey, Civ.App., 284 S.W. 347.
32 C.J. p 486 note 55.
Knowledge of, and notice to, person not party to suit see infra § 263.
Reinstatement of injunction
La.—First Evangelist Baptist Church v. Smith, 95 So. 594, 153 La. 171.

85. U.S.—Radio Corporation of America v. Cable Radio Tube Corporation, C.C.A.N.Y., 66 F.2d 778, certiorari denied Cable Radio Tube Corporation v. Radio Corporation of America, 54 S.Ct. 373 (two cases) 290 U.S. 703, 78 L.Ed. 604—Hill v. U. S., C.C.A.Okl., 33 F.2d 489, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640—Seattle Brewing & Malting Co. v. Hansen, C.C.Cal., 144 F. 1011.
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
Ill.—State v. Ajster, 149 N.E. 297, 318 Ill. 230.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.
Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89—Perlman v. Perlman, 165 A. 646, 113 N.J.Eq. 3.
N.Y.—U. S. v. Sumner, 217 N.Y.S. 645, 127 Misc. 907.
N.C.—Wilson v. Bryan, 142 S.E. 491, 492, 195 N.C. 360, citing **Corpus Juris.**
Tex.—Dickson v. Wilson, Civ.App., 21 S.W.2d 1072.
W.Va.—State v. Robertson, 22 S.E. 2d 287, 124 W.Va. 648.
32 C.J. p 372 note 5, p 486 note 56.

86. Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
Wis.—Ramstock v. Roth, 18 Wis. 522.
32 C.J. p 373 note 31, p 482 note 13 [g], p 486 note 56.
Want of affidavit
Cal.—Ex parte Brambini, 218 P. 569, 192 Cal. 19, error dismissed Brambini v. U. S., 45 S.Ct. 461, 267 U. S. 584, 69 L.Ed. 799.
Service of the writ on a legal holiday will not render void contempt proceedings for violation of the injunction.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194.
Service of process, writ, or notice on holiday in general see Holidays § 5 b.

87. W.Va.—State v. Robertson, 22 S. E.2d 287, 124 W.Va. 648.

88. N.J.—Perlman v. Perlman, 165 A. 646, 113 N.J.Eq. 3.
32 C.J. p 486 notes 56, 57.

tempt of court;[89] but, in order to convict of contempt, however, it must be shown clearly that the party had knowledge of the order for the injunction in such a way that it can be held that he understood it, and with that knowledge committed a willful violation thereof.[90]

Where an order of injunction forms part of a decree rendered in regular course, on issue joined by answer, the parties to the suit are bound to take notice of the order and are not entitled to have a certified copy of the decree served on them.[91] Where defendants or their attorneys are in court when the decree of injunction is rendered, they are chargeable with knowledge of its contents, and the decree need not be served on them, to render them guilty of contempt for violating it.[92] Mere want of specific or formal notice of filing and approval of bond on which the operative effect of an injunction is conditioned does not excuse a violation of the injunction or release from liability for contempt.[93]

§ 262. Ability to Obey

Impossibility of complying with mandatory injunction may, it seems, constitute a defense in a proceeding to punish for contempt for noncompliance with such injunction.

It seems that impossibility of performance, as, for instance, by reason of poverty or sickness, may constitute a defense in a proceeding to punish for contempt because of failure to comply with a mandatory injunction.[94]

§ 263. Persons Liable

a. General considerations

b. Agents and employees in general
c. Aiders and abettors
d. Persons in privity with parties enjoined; successors in interest
e. Attorneys
f. Parties to suit not named in order
g. Complainant or his agent
h. Private corporation and its officers, agents, and employees
i. Voluntary association and its officers, agents, and members
j. Public officials in general
k. Municipal corporation and its officers and agents

a. General Considerations

Under some circumstances a person not a party to the main action may be amenable to an injunction or restraining order and punishable for contempt; a party enjoined may under some circumstances be liable for contempt by reason of acts of others for whose conduct such party is responsible.

In general one not a party to the suit or served with the injunction and who has no connection of any character with those bound by it, and who acts independent of them, cannot be punished as for contempt for a breach of the injunction,[95] and in such cases there is no technical "breach" or "violation" of the injunction in the well recognized sense of the terms as applicable to the parties to the injunction suit.[96] However, such a person, like other members of the public, is bound to observe the restrictions of the injunction, when known, to the extent that they must not aid or abet its violation by others nor set the known command of the court

89. U.S.—Radio Corporation of America v. Cable Radio Tube Corporation, C.C.A.N.Y., 66 F.2d 778, certiorari denied Cable Radio Tube Corporation v. Radio Corporation of America, 54 S.Ct. 373 (two cases), 290 U.S. 703, 78 L.Ed. 604.
Ill.—State v. Ajster, 149 N.E. 297, 318 Ill. 230.
Md.—Wingert v. State, 103 A. 437, 132 Md. 243.
N.M.—State v. Dunn, 13 P.2d 557, 558, 36 N.M. 258, citing **Corpus Juris.**
32 C.J. p 487 note 58.

90. U.S.—Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., C.C.Minn., 124 F. 736, affirmed 129 F. 1005, 64 C.C.A. 122.
32 C.J. p 485 note 58.

91. Ind.—Hawkins v. State, 26 N.E. 43, 126 Ind. 294.

92. Cal.—Mattos v. Superior Court in and for Merced County, 36 P.2d 1056, 30 Cal.App.2d 641.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187, 189, citing **Corpus Juris.**
32 C.J. p 487 note 61.
Notice to attorney as notice to client in general see Attorney and Client § 60.

93. U.S.—Burr v. Kimbark, C.C.Ill., 29 F. 428.
Presumption of legality
La.—Woodard v. Johnson, 152 So. 65, 178 La. 501.

94. Mich.—Scott v. Layng, 26 N.W. 220, 791, 59 Mich. 43.
Inability to comply with order as affecting liability for contempt in general see Contempt § 19.

95. U.S.—Dadirrian v. Gullian, C.C. N.J., 79 F. 784.
Cal.—Berger v. Sacramento County Super. Ct., 167 P. 143, 175 Cal. 719, 15 A.L.R. 373—Kirby v. San Francisco Savings & Loan Soc., 273 P. 609, 95 Cal.App. 757.
N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union, No. 20378, 6 A.2d 660, 125 N.J.Eq. 539.
N.M.—Acequia del Llano v. Acequia de las Joyas del Llano Frio, 179 P. 235, 25 N.M. 134.
N.Y.—Rigas v. Livingston, 70 N.E. 107, 178 N.Y. 20—Strawberry Island Co. v. Cowles, 140 N.Y.S. 333, 79 Misc. 279.
32 C.J. p 488 notes 72–78.
Who liable in contempt proceeding for violation of injunction against liquor nuisance see the C.J.S. title Intoxicating Liquors § 426, also 33 C.J. p 702 notes 32–41.

Under some special statutory provisions it has been held that a person not a party to the injunction suit is not punishable for contempt for alleged violation of the injunction.—Barthe v. Larquié, 7 So. 80, 42 La.Ann. 131—32 C.J. p 487 note 64.

96. N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union, No. 20378, 6 A.2d 660, 125 N.J.Eq. 539—In re Staire, 162 A. 195, 111 N.J.Eq. 285.
32 C.J. p 488 note 66.

at defiance by interference with or the obstruction of the administration of justice,[97] and the general rule is that, in order to render a person amenable to an injunction, it is not indispensable that he should have been a party to the suit in which the injunction issued or that he should actually have been served with a copy of it.[98] Thus a person not a party to the main action may be amenable to the injunction or restraining order by reason of the fact that he is adequately represented in such suit,[99] or is within the class of persons whose conduct is restrained.[1] While such persons may be liable in contempt even though not served with a copy of the injunction or order,[2] ordinarily actual knowledge of the injunction is essential.[3]

Various applications of the foregoing rules are considered in the following subdivisions of this section.

Liability for acts of others. A person against whom an injunction or restraining order has been issued is bound not only to abstain from violating it in person, but also to endeavor in good faith to prevent its violation by his agents, employees[4] or assignees.[5] Such person cannot evade liability by permitting the act enjoined to be done by others in his presence and with his acquiescence,[6] and he may render himself punishable by aiding, counseling, or abetting others in the violation of the injunction or restraining order.[7] Thus a principal may be liable where the act charged as contempt is performed by the agent with the knowledge of, and pursuant to authorization by, the principal,[8] and a lessor is guilty of contempt if his tenant by his direction acts in violation of the injunction.[9]

On the other hand, a party against whom an injunction is granted is not punishable in a contempt proceeding for an act with which he had no connection and for which he is not responsible,[10] or for acts done by strangers without his knowledge

97. Colo.—United Gilpin Corporation v. Wilmore, 68 P.2d 34, 100 Colo. 453.
N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union No. 20378, 6 A.2d 660, 125 N.J.Eq. 539—In re Staire, 162 A. 195, 111 N.J.Eq. 285.
32 C.J. p 488 notes 66, 79.

98. U.S.—Hill v. U. S., C.C.A.Okl., 33 F.2d 489, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640—Andrews v. Andrews & Andrews, D.C.N.Y., 42 F.Supp. 5—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3, C.C.A.Ohio, 90 F. 598—U. S. v. Elliott, C.C.Mo., 64 F. 27.
Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
Md.—Standard Founders v. Oliver, 178 A. 223, 168 Md. 317.
Mo.—In re Coggshall, 75 S.W. 183, 100 Mo.App. 585—Ex parte Dillon, App., 96 S.W.2d 1095—Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 695, 230 Mo.App. 137, citing **Corpus Juris.**
32 C.J. p 487 note 65.

Restraining holding of political convention
W.Va.—State v. Robertson, 22 S.E.2d 287, 124 W.Va. 648.

Knowledge of itself insufficient
W.Va.—State v. Komar, 168 S.E. 810, 113 W.Va. 526.

99. Cal.—Cohan v. Shibley, Cal.App., 289 P. 169.
32 C.J. p 488 note 71.

1. W.Va.—State v. Komar, 168 S.E. 810, 113 W.Va. 526.

2. U.S.—Ex parte Lennon, Ohio, 17 S.Ct. 658, 166 U.S. 548, 41 L.Ed. 110, affirming 64 F. 320, 12 C.C.A. 134—Hill v. U. S., C.C.A.Okl., 33 F. 2d 489, certiorari denied 50 S.Ct. 39, 280 U.S. 592, 74 L.Ed. 640.
Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641—Ex parte Morford, 31 P.2d 406, 137 Cal.App. 662.
Mo.—Ex parte Dillon, App., 96 S.W. 2d 1095—Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 695, 230 Mo.App. 137, citing **Corpus Juris**—In re Coggshall, 75 S.W. 183, 100 Mo.App. 585.
Pa.—York Mfg. Co. v. Oberdick, 11 Pa.Dist. 616.
32 C.J. p 487 note 65.

3. U.S.—McCauley v. First Trust & Savings Bank, C.C.A.Ill., 276 F. 117.
N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42.
Pa.—York Mfg. Co. v. Oberdick, 11 Pa.Dist. 616.
Wash.—State ex rel. Lindsley v. Wallace, 195 P. 1049, 114 Wash. 692.
32 C.J. p 486 note 55.

4. N.J.—Reed v. Philadelphia, etc., R. Co., Ch., 24 A. 922.
N.Y.—Schieffelin v. Hylan, 181 N.Y.S. 725, 191 App.Div. 324, affirming 179 N.Y.S. 413, 109 Misc. 369, and appeal dismissed 129 N.E. 937, 229 N.Y. 633.
Wis.—Poertner v. Russel, 33 Wis. 193.
32 C.J. p 491 note 17.

5. U.S.—U. S. v. Bancroft, D.C.N.Y., 24 F.Cas.No.14,513, 6 Ben. 392.
32 C.J. p 491 note 18.

6. Ga.—Dunn v. Harris, 86 S.E. 556, 144 Ga. 157.

Act done by employee
Mich.—Hipp v. Buhl Optical Co., 275 N.W. 792, 282 Mich. 128.

7. U.S.—Dadirrian v. Gullian, C.C.N.J., 79 F. 784.
Neb.—Widener v. Sharp, 192 N.W. 726, 109 Neb. 766.
N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.
Va.—Deeds v. Gilmer, 174 S.E. 87, 162 Va. 157.
32 C.J. p 491 note 31.
Liability of aider and abettor who is not a party see infra subdivision c of this section.

Labor disputes
Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill. App. 47—Roesch Enamel Range Co. v. Carbine, 247 Ill.App. 248.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

8. Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

Acts of copartner
N.Y.—Neale v. Osborne, 15 How.Pr. 81.
Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

9. Or.—State v. Lavery, 49 P. 852, 31 Or. 77.

10. N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J. Eq. 42.
32 C.J. p 491 notes 21, 26 [a].

Directors of institution
Pa.—Commonwealth v. Kelly, 161 A. 737, 307 Pa. 525.

Lessor
N.Y.—Batterman v. Finn, 32 How.Pr. 501.
Tex.—State v. Barry, Tex.Civ.App., 217 S.W. 957.

or consent.[11] A person who in good faith has made an earnest effort to secure obedience to the injunction will not be held in contempt for disobedience by those in his employ.[12] So too a person who is not a party is not liable for acts of a party in violation of an injunction where such person is not connected with, and is not responsible for, such acts.[13]

b. Agents and Employees in General

Agents or employees of a party against whom an injunction is directed may under some circumstances violate such injunction and render themselves liable for contempt.

Agents or employees of one against whom an injunction has been granted and who have knowledge of such fact, are bound by the injunction as long as such status continues and are punishable for contempt in disobeying its provisions, although not made parties to the injunction suit,[14] and although they were not served with process,[15] at least where the injunction runs against the agents, servants, or employees of a party;[16] and they cannot excuse themselves on the ground that they acted under the orders of the employer or principal.[17] It has been held, however, that one who ceases to be the agent or employee of another is free to act for himself in the protection of his own rights and in the prosecution of his own interests, even though it involves his doing the thing which his former master was prohibited from doing;[18] but it has also been held that the injunction continues to restrain him from afterward committing the acts forbidden as a mere wrongdoer having no reasonable pretense of a right to do them.[19]

If the agent or employee has no notice of the injunction, he cannot be in contempt for a disobedience of its provisions.[20] With respect to an injunction against both employer and his employees, an employee is not punishable for an act of the employer in which such employee did not participate and with respect to which the employee has no duty, authority, or control.[21]

c. Aiders and Abettors

Persons who are not parties to the proceedings but who, with knowledge of the injunction, aid parties to the suit to whom the injunction is directed in violating the injunction are punishable for contempt.

It is very generally held that all persons who aid and abet parties to the suit, against whom an injunction has been rendered, in disobeying it,[22] or who conspire with them for its violation,[23] are guilty of a contempt of court if they have actual knowledge of the injunction, although not themselves parties to the suit or named in the order granting the injunction.

Nature of offense. Such aiders and abettors are not chargeable for "breach" or "violation" of the injunction in the well recognized sense of those terms applicable to parties,[24] and are not subject to commitment for contempt for a technical violation of the injunction but for aiding and assisting in the violation thereof,[25] being bound with other members of the public to observe the restrictions of the injunction when known to them.[26] No remedial con-

Acts of some defendants
Ill.—Off v. Exposition Coaster, 167 N. E. 782, 336 Ill. 100.

11. N.Y.—Slater v. Merritt, 75 N.Y. 268—Batterman v. Finn, 32 How. Pr. 501.

12. Ind.—Shirk v. Cox, 40 N.E. 750, 141 Ind. 301.
32 C.J. p 491 note 20.

13. Wis.—Haring v. Hamilton, 82 N. W. 698, 107 Wis. 112.

14. Cal.—Cohan v. Shibley, App., 289 P. 169.
32 C.J. p 488 note 80.

Partner
Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

15. Ind.—Shaughnessy v. Jordan, 111 N.E. 622, 184 Ind. 499.
32 C.J. p 489 note 81.

16. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
32 C.J. p 488 note 80.

17. Pa.—Patterson v. Building Trades' Council No. 2, 14 Pa.Dist. 843.

18. U.S.—Dadirrian v. Gullian, C.C. N.J., 79 F. 784.
32 C.J. p 489 note 83.

19. Ont.—Brown v. Sage, 12 Grant Ch. 25.
32 C.J. p 489 note 84.

20. Iowa.—Harris v. Hutchinson, 140 N.W. 830, 160 Iowa 149, 44 L. R.A.,N.S., 1035.
32 C.J. p 489 note 86.

Actual or constructive notice
Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.

21. Mich.—Hipp v. Buhl Optical Co., 275 N.W. 792, 282 Mich. 128.

22. U.S.—National Labor Relations Board v. Blackstone Mfg. Co., C. C.A., 123 F.2d 633—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382.
Cal.—Ex parte Morford, 31 P.2d 406, 137 Cal.App. 662—Cohan v. Shibley, App., 289 P. 169.
N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union, No. 20378, 6 A.2d 660, 125 N.J.Eq. 539.
32 C.J. p 489 note 87.
Liability of party enjoined for aiding and abetting violation see supra subdivision a of this section.

Labor disputes
U.S.—McCourtney v. U. S., C.C.A.Mo., 291 F. 497, certiorari denied 44 S. Ct. 134, 263 U.S. 714, 68 L.Ed. 520.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

Mere presence insufficient
Del.—State v. Nouris, 136 A. 887, 15 Del.Ch. 282.

23. U.S.—W. B. Conkey Co. v. Russell, C.C.Ind., 111 F. 417, appeal dismissed 133 F. 165, 66 C.C.A. 291, certiorari denied 25 S.Ct. 793, 196 U.S. 638, 49 L.Ed. 630.
32 C.J. p 489 note 88.

24. N.J.—In re Staire, 162 A. 195, 111 N.J.Eq. 285.
32 C.J. p 489 note 89.

25. N.J.—In re Staire, supra.
32 C.J. p 489 note 90.

26. U.S.—Garrigan v. U. S., Ill., 163

tempt proceedings for the benefit and enforcement of the rights of the parties to the injunction suit can be maintained against them,[27] but the proceedings and conviction must be regarded as distinctly criminal in their nature and solely to punish for acts in contempt of the power and dignity of the court.[28]

d. Persons in Privity with Parties Enjoined; Successors in Interest

Persons who are in privity with, or who are successors in interest of, a party to whom the injunction is directed may be liable in contempt with respect to a violation of the injunction where such persons act with knowledge of the injunction.

As a general rule persons in privity with parties against whom the injunction was issued and who have knowledge of its provisions may be punished for contempt in disobeying it, although not parties to the record or named in the order granting the injunction.[29]

Successors in interest. While there is authority to the contrary,[30] it has been held that one who succeeds to the interest of a party to whom the injunction is directed and who has notice of the injunction, is bound by the judgment and punishable for contempt for disobedience.[31] However, the rule does not apply where the successor acquired all rights before the injunction was granted and the injunction does not relate to or affect any property acquired by the successor in interest.[32]

e. Attorneys

An attorney may by his own acts in disobedience of an injunction render himself liable to punishment for contempt, and he may be liable by reason of his advice to his client to disobey the injunction.

The attorney for the party to whom an injunction or restraining order is directed may be amenable to such injunction or order[33] and may by his own acts of disobedience render himself liable to punishment for contempt.[34]

An attorney who deliberately advises his client to disobey an injunction is guilty of contempt.[35] Attorneys who give erroneous advice as to whether certain acts would violate an injunction do not thereby subject themselves to punishment for contempt, however, where their construction of the injunction is reasonable and made in good faith, and does not amount in effect to advice to disregard the injunction.[36]

f. Parties to Suit Not Named in Order

Parties to the suit may be punishable for disobedience of the injunction notwithstanding they were not named in the injunction order.

Persons who were parties to the bill, but not named in the injunction order because they were not shown to have participated in the acts sought to be enjoined, are nevertheless bound with notice of the order granting the injunction and punishable for a disobedience of its provisions;[37] and a like rule applies to persons made parties but dismissed from the suit.[38]

g. Complainant or His Agent

The party who obtains an injunction is not liable in contempt if he performs the acts enjoined unless he is restrained in that regard by the terms of the injunction.

Unless the injunction in terms restrains the person who obtains its allowance, he is not liable in contempt for doing the acts enjoined,[39] the effect

F. 16, 89 C.C.A. 494, 23 L.R.A.,N.S., 1295, reversing, C.C., 141 F. 79, and certiorari denied 29 S.Ct. 696, 214 U.S. 514, 53 L.Ed. 1063.

27. U.S.—Garrigan v. U. S., supra.

28. U.S.—Garrigan v. U. S., supra.

Civil proceeding

It has been stated that one who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt.—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F. Supp. 382.

29. Neb.—Skinner v. Ashford, 268 N.W. 81, 131 Neb. 338.
32 C.J. p 490 notes 96, 98.

30. Iowa.—Buhlman v. Humphrey, 53 N.W. 318, 86 Iowa 597.
Liability in contempt in case of injunction against liquor nuisance see the C.J.S. title Intoxicating Liquors § 426, also 33 C.J. p 702 notes 35-39.

31. U.S.—Rivera v. Lawton, C.C.A. Puerto Rico, 35 F.2d 823.
Mont.—State ex rel. Mungas v. District Court of Third Judicial Dist. in and for Granite County, 59 P. 2d 71, 102 Mont. 533—State ex rel. Tague v. District Court of First Judicial Dist. in and for Broadwater County, 47 P.2d 649, 100 Mont. 383.
Neb.—Skinner v. Ashford, 268 N.W. 81, 131 Neb. 338.
32 C.J. p 490 note 98.

Lessee

Mo.—Ex parte Dillon, App., 96 S.W. 2d 1095.

32. U.S.—Bate Refrigerating Co. v. Gillett, C.C.N.J., 30 F. 685.
Cal.—Ex parte McDonald, 16 P.2d 995, 217 Cal. 29.
Tex.—Shelby v. Burtis, 18 Tex. 644.

33. Attorney as assignee

Miss.—Equitable Life Assur. Soc. of U. S. v. Gex' Estate, 186 So. 659, 184 Miss. 577.

34. Cal.—Cohan v. Shibley, App., 289 P. 169.
32 C.J. p 490 note 2.

Good faith

U.S.—Odell v. Bausch & Lomb Optical Co., C.C.A.Ill., 91 F.2d 359, certiorari denied 58 S.Ct. 284, 302 U. S. 756, 82 L.Ed. 585, rehearing denied 58 S.Ct. 408, 302 U.S. 780, 82 L.Ed. 603.

35. Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.
32 C.J. p 491 note 25.

36. Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.

37. U.S.—Pope Motor Car Co. v. Keegan, C.C.Ohio, 150 F. 148.
W.Va.—State v. Freshwater, 148 S.E. 6, 107 W.Va. 210, quoting Corpus Juris.

38. U.S.—Union Pac. R. Co. v. Ruef, C.C.Neb., 120 F. 102.

39. U.S.—Higgins v. California Prune & Apricot Growers, C.C.A.N.Y., 287 F. 129.
Kan.—Porter v. Smock, 281 P. 924,

of the injunction generally being only to restrain defendant and subject him to punishment in case of a violation thereof.[40] Acts done by one acting only as an agent of plaintiff do not violate an injunction running only against defendants, their agents, and confederates.[41]

However, where the purpose of the writ is to preserve the existing status of property in litigation until a final adjudication may be had, it is a gross abuse of the process of the court for plaintiff to disregard his own injunction after having by means thereof tied the hands of his adversary,[42] and, while plaintiff is not liable to punishment as for contempt, the court has ample power otherwise to prevent or redress such abuse,[43] and may do so by ordering plaintiff to restore the property to defendant and to abstain from any further interference with the possession thereof pending suit.[44]

h. Private Corporation and Its Officers, Agents, and Employees

A private corporation is subject to punishment for contempt for violation of an injunction, and officers, agents, or others who act for a corporation may be punishable for contempt under some circumstances.

A private corporation is subject to punishment for a contempt.[45] Officers, agents, or others who act for a corporation and who knowingly violate or disobey an injunction against the corporation are punishable for contempt[46] even though the injunction is issued only against the corporation,[47] and, where an injunction is granted against the treasurer of a corporation, restraining him from collecting any royalties or dividends of stock due the corporation, and such royalties and dividends are afterward paid into its treasury, the treasurer and corporation are alike guilty of contempt.[48]

Where the injunction does not operate against an officer, agent, or employee of a corporation personally, it has been held that an officer, agent, or employee who has severed his connection with the corporation does not violate the injunction so as to render himself liable for contempt by doing the forbidden act himself or by assisting outsiders to do it,[49] unless his purpose was to avoid the effect of the injunction.[50] An individual who, after being enjoined, forms a connection with a corporation which with his assistance commits acts in violation of the injunction is punishable for contempt.[51]

Officers or agents of a corporation are not liable for the violation of an injunction against the corporation if they neither do anything contrary to the injunction nor conduce to its violation by concealing the fact that it has been issued.[52]

i. Voluntary Association and Its Officers, Agents, and Members

While the propriety of punishing a voluntary, unin-

925, 129 Kan. 114, quoting **Corpus Juris.**
32 C.J. p 491 note 11.

40. U.S.—Vanzandt v. Argentine Min. Co., C.C.Colo., 48 F. 770.
Kan.—Porter v. Smock, 281 P. 924, 925, 129 Kan. 114, quoting **Corpus Juris.**

41. Wis.—State v. Meese, 229 N.W. 31, 200 Wis. 454, vacating mandate 225 N.W. 746, 200 Wis. 454.

42. U.S.—Vanzandt v. Argentine Min. Co., C.C.Colo., 48 F. 770.
Ind.—Mowrer v. State, 8 N.E. 561, 107 Ind. 539.

43. U.S.—Vanzandt v. Argentine Min. Co., C.C.Colo., 48 F. 770.
Ind.—Mowrer v. State, 8 N.E. 561, 107 Ind. 539.

44. U.S.—Vanzandt v. Argentine Min. Co., C.C.Colo., 48 F. 770.

45. Mass.—New York Cent. R. Co. v. Conlin Bus Lines, 155 N.E. 601, 258 Mass. 498.
32 C.J. p 490 notes 4, 5.

46. U.S.—Parker v. U. S., C.C.A. Mass., 126 F.2d 370—Teele Soap Mfg. Co. v. Pine Tree Products Co., D.C.N.H., 8 F.Supp. 546.
Cal.—Katenkamp v. Superior Court in and for Santa Barbara County, 108 P.2d 1, 16 Cal.2d 696—Morton v. Tulare County Superior Court, 4 P. 489, 65 Cal. 496—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
Mass.—New York Cent. R. Co. v. Conlin Bus Lines, 155 N.E. 601, 258 Mass. 498.
Mont.—State ex rel. Mungas v. District Court of Third Judicial Dist. in and for Granite County, 59 P.2d 71, 102 Mont. 533.
N.J.—Vander May v. Schoone-Jongen, 21 A.2d 819, 130 N.J.Eq. 227, affirming 16 A.2d 198, 128 N.J.Eq. 336.
32 C.J. p 491 note 28.

Managing officers
U.S.—Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, Mo., 201 F. 20, 120 C.C.A. 582.

Injunction directed to corporation, its officers, agents, servants, or employees
U.S.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370.
Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
32 C.J. p 488 note 80 [b].

The receiver of a corporation may not avoid liability for contempt for violation of an injunction which is binding on him by showing that the acts complained of were actually performed by others, since it was the duty of such receiver to prevent violation of the injunction.—Safford v. People, 85 Ill. 558.

47. Cal.—Katenkamp v. Superior Court in and for Santa Barbara County, 108 P.2d 1, 16 Cal.2d 696.
32 C.J. p 491 note 28.

48. Tenn.—Heck v. Bulkley, Ch. App., 1 S.W. 612.

49. U.S.—Hoover Co. v. Exchange Vacuum Cleaner Co., D.C.N.Y., 1 F.Supp. 997.
32 C.J. p 489 note 83, p 488 note 75 [a], note 80 [a].

50. Cal.—Morton v. Tulare County Superior Court, 4 P. 489, 65 Cal. 496.

51. U.S.—Hoover Co. v. Exchange Vacuum Cleaner Co., D.C.N.Y., 1 F.Supp. 997.

52. U.S.—Teele Soap Mfg. Co. v. Pine Tree Products Co., D.C.N.H., 8 F.Supp. 546.
N.J.—Trimmer v. Pennsylvania, S. & N. E. R. Co., 36 N.J.Eq. 411.
32 C.J. p 491 note 29.

corporated association for contempt with respect to violation of an injunction has been denied, if such association is a judicial entity, it may be subject to such punishment; officers, agents, and members of such an association may be punishable.

While the propriety of punishing a voluntary, unincorporated association for contempt in violating an injunction has been denied,[53] if such association has the status of a judicial entity, it may be liable.[54] The officers or agents of such an association also may be punishable for contempt in violating an injunction,[55] as may members of such association who participate in the violation of the injunction.[56]

j. Public Officials in General

Public officers may be punishable for contempt because of acts in violation of injunctions.

Public officers and others acting in legal proceedings may be guilty of contempt in doing acts prohibited by the court and punishable therefor.[57]

k. Municipal Corporation and Its Officers and Agents

According to some, but not all, authorities a municipal corporation may not be punished in a contempt proceeding for violation of an injunction; officers or agents or a municipal corporation may be liable.

There have been holdings or expressions to the effect that a municipal corporation cannot be guilty of contempt in disobeying an injunction,[58] but there is authority to the contrary.[59]

An injunction against such corporation is binding on all individuals acting for the corporation to whose knowledge the injunction comes, although not parties to the suit,[60] and the officers and agents of a municipal corporation through whom it acts may be punished where they had notice of the injunction.[61]

§ 264. Acts or Conduct Constituting Violation

a. In general
b. Erection or maintenance of buildings or other structures
c. Conveyance or disposition of property
d. Labor disputes
e. Acts of public officials
f. Miscellaneous

a. In General

Whether particular acts constitute a violation of an injunction depends on the language of the injunction decree, construed in the light of its purpose and the mischief it was designed to remedy. Observance of the letter of the decree will not suffice if by some subterfuge or scheme its spirit has been violated, and the place of violation or the means by which it is accomplished are immaterial.

An injunction is violated by performance of the acts prohibited thereby,[62] regardless of the means employed by the restrained party to accomplish the violation.[63] Whether or not particular acts constitute a violation of an injunction depends largely on its special provisions,[64] and the language of the

53. U.S.—Allis-Chalmers Co. v. Iron Molders' Union No. 125, C.C.Wis., 150 F. 155, modified on other grounds 166 F. 45, 91 C.C.A. 631, 20 L.R.A.,N.S., 315.

54. Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill.App. 47.

Labor union or council

Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill. App. 47—Anderson & Lind Mfg. Co. v. Carpenters' District Council, 226 Ill.App. 532, affirmed 139 N.E. 887.

N.Y.—Utz & Dunn Co. v. Sheridan, 201 N.Y.S. 46, 121 Misc. 378.

55. Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill.App. 47.

Injunction against officers, agents, and employees of association

Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.

Officers or agents of labor organization

U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092—U. S. v. Debs, C.C.Ill., 64 F. 724.

Ill.—Christensen v. People, 114 Ill. App. 40, affirmed O'Brien v. People ex rel. Kellogg Switchboard & Supply Co., 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966.

N.Y.—Utz & Dunn Co. v. Sheridan, 201 N.Y.S. 46, 121 Misc. 378.

32 C.J. p 491 note 17 [a].

56. **Members of labor union**

U.S.—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, C.C.Ohio, 90 F. 598—Lake Erie & W. R. Co. v. Bailey, C.C.Ind., 61 F. 494.

N.Y.—Utz & Dunn Co. v. Sheridan, 201 N.Y.S. 46, 121 Misc. 378.

32 C.J. p 488 notes 71 [a], 80 [c].

57. N.Y.—People v. Sturtevant, 9 N. Y. 263, 59 Am.D. 536.

32 C.J. p 490 note 3.

58. Ill.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 110 Am.S.R. 248, 4 L.R.A.,N.S., 1101, affirming 121 Ill.App. 647.

Minn.—Bass v. Shakopee, 4 N.W. 619, 6 N.W. 776, 27 Minn. 250.

59. N.Y.—Marson v. City of Rochester, 97 N.Y.S. 881, 112 App.Div. 51, affirmed 78 N.E. 1106, 185 N. Y. 602.

13 C.J. p 40 note 70 [a].

60. N.Y.—People v. Sturtevant, 9 N.Y. 263, 59 Am.D. 536, affirming 8 N.Y.Super. 451.

Successor in office

La.—Crucia v. Behrman, 84 So. 525, 147 La. 144.

Absence of knowledge

Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.

61. Kan.—State v. Coffeyville, 133 P. 711, 90 Kan. 164.

N.Y.—People v. Dwyer, 90 N.Y. 402, affirming 27 Hun 548.

32 C.J. p 490 notes 8, 9.

Officers not punishable

Ill.—Chambers v. City of Chicago, 270 Ill.App. 217.

62. Ind.—Locrasto v. State, 173 N.E. 456, 202 Ind. 277.

63. Conn.—Walden v. Siebert, 128 A. 702, 102 Conn. 353.

64. Ga.—Reid v. McRae, 9 S.E.2d 176, 181, 190 Ga. 323, quoting **Corpus Juris.**

32 C.J. p 492 note 33.

decree or order should not be extended to cover acts not fairly and reasonably within its meaning.[65] In order to authorize punishment for a violation of an injunction the acts complained of must be clearly embraced within the restraining clause of the injunction,[66] and if it is doubtful whether the injunction has been violated the court is not justified in punishing for contempt.[67] A mere agreement between the parties enjoined and other persons to violate an injunctive order, without any overt act, has been held not to constitute contempt.[68]

While the party restrained must do something which constitutes a violation of the letter or spirit of the injunction,[69] injunction orders must be honestly and fairly obeyed,[70] and the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court,[71] which will not allow its process to be disregarded or evaded on merely technical grounds.[72] No scheme or subterfuge, however artfully designed to disguise its real nature and purpose, will be allowed to succeed if it constitutes in effect a substantial violation of the injunction.[73] One who violates the letter of an injunction in reliance on his judgment that he does not violate its spirit acts at his peril,[74] for, as shown infra § 267, good faith or the absence of an intention to violate the injunction is generally considered no defense in a contempt proceeding. He cannot set up his opinion as to the meaning of the injunction against the court's opinion, and, if he has any doubt as to what he may do without violating the injunction, he should ask a modification of the injunction or a construction of its terms.[75]

In determining whether there has been a breach or violation of an injunction, the decree or order for the injunction is to be construed with reference to the nature of the proceeding and the purpose of the injunction,[76] as shown by the pleadings and the relief prayed for.[77] It is important to consid-

65. Ill.—People v. Diedrich, 30 N. E. 1038, 141 Ill. 665.
32 C.J. p 492 note 36.

66. Ga.—Reid v. McRae, 9 S.E.2d 176, 181, 190 Ga. 323, quoting **Corpus Juris.**
32 C.J. p 492 note 32.

67. U.S.—City of Campbell, Mo., v. Arkansas-Missouri Power Co., C.C. A.Mo., 65 F.2d 425.

68. Cal.—Ex parte Morford, 31 P.2d 406, 137 Cal.App. 662.

69. U.S.—City of Campbell, Mo., v. Arkansas-Missouri Power Co., C.C. A.Mo., 65 F.2d 425.

Test of responsibility

In determining whether a party is responsible for the violation of an injunction, one of the tests is whether the course of action pursued by him was intentionally instrumental in causing a breach of the mandate.—Widener v. Sharp, 192 N.W. 726, 109 Neb. 766.

70. Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 260 Ky. 60.
Neb.—Widener v. Sharp, 192 N.W. 726, 109 Neb. 766.

71. U.S.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F.2d 862, modifying, D.C., 48 F.Supp. 928—John B. Stetson Co. v. Stephen L. Stetson Co., C.C.A.N. Y., 128 F.2d 981.
Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.
Ga.—Reid v. McRae, 9 S.E.2d 176, 181, 190 Ga. 323, quoting **Corpus Juris.**
Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 260 Ky. 60.
Wash.—Hanley v. Most, 115 P.2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.
W.Va.—State v. Freshwater, 148 S. E. 6, 107 W.Va. 210, citing **Corpus Juris.**
32 C.J. p 492 note 37.

"A party enjoined must not do the prohibited thing nor permit it to be done by his connivance, nor effect it by trick or evasion. The order of the court must be obeyed implicitly, according to its spirit, and in good faith."—Hanley v. Most, 115 P.2d 951, 952, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 398, 173 Wash. 435.

Corpus Juris cited in holding that letter and spirit of restraining order were violated.—Greenwood County v. Shay, 23 S.E.2d 825, 827, 202 S.C. 16.

72. N.J.—Endicott v. Mathis, 9 N. J.Eq. 110.

73. Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.
Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 260 Ky. 60.
Mich.—Hipp v. Buhl Optical Co., 275 N.W. 793, 282 Mich. 128—Glover v. Mailloska, 217 N.W. 896, 242 Mich. 34.
Neb.—Widener v. Sharp, 192 N.W. 726, 109 Neb. 766.
32 C.J. p 492 note 39.

74. Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
32 C.J. p 493 note 40.

Interference with public officials

"Where a party is enjoined from interfering with public officials in discharging their official duty and is told by a court not to do certain things, he acts at his peril when, without any resort to the courts, he undertakes to undo or ignore the things which the public officer does."—Guiraud v. Nevada Canal Co., 245 P. 485, 487, 79 Colo. 289,

75. Ga.—Patten v.. Miller, 8 S.E.2d 786, 190 Ga. 152.
Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
32 C.J. p 493 note 41.

Variance between injunction and clerk's entry

The party enjoined could not successfully contend that an injunction which expressly prohibited transfers and gifts of community property was to be construed as prohibiting gifts only, notwithstanding the clerk's minute entry mentioned only gifts.—Hanley v. Most, 115 P.2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.

76. U.S.—Camille, Inc., v. F. W. Fitch Co., D.C.Iowa, 30 F.Supp. 532.
Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 503, 184 Ark. 1153, citing **Corpus Juris.**
Ga.—Reid v. McRae, 9 S.E.2d 176, 181, 190 Ga. 323, quoting **Corpus Juris.**
32 C.J. p 492 note 34, p 497 note 92 [h] (2).
Construction, operation, and effect of injunction generally see supra § 215.

77. Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 260 Ky. 60.
32 C.J. p 492 note 34 [a].

er the objects for which relief was granted as well as the circumstances attending it.[78] In doubtful cases, an injunction order should not be so construed as to forbid the discussion of matters of public interest,[79] such as matters which vitally affect an industry on which the prosperity of a community, whether large or small, depends.[80]

Place of violation. The party enjoined is at no more liberty to violate the provisions of a binding injunction outside the jurisdiction of the court than within, as the contempt lies in the fact, not in the place, of the disobedience.[81]

Procuring or permitting violation by another. The obligation to obey an injunction cannot be avoided by procuring or permitting a third person to violate it.[82]

Construction of agreement. It has been held that, where an agreement between the parties to a suit for the entry of a consent decree for an injunction also contained provisions intended to modify the operation of the decree, and inconsistent with its terms, the court would not impose a fine for violation of the decree as for a civil contempt for the benefit of the other party, when such violation arose from a difference of opinion as to the construction of the agreement.[83]

b. Erection or Maintenance of Buildings or Other Structures

Violation of an injunction occurs by the erection or maintenance of buildings, walls, fences, or other structures contrary to the terms of the injunction decree; but an injunction against the erection of a new structure is not violated by repairing or occupying a structure already erected.

Adjudications have been made as to whether there has been a violation of injunctions relating to the erection or maintenance of buildings or other structures of a particular type or character,[84] such as injunctions prohibiting the erection or maintenance of a wall,[85] a spite fence,[86] structures interfering with the view of plaintiff's lot,[87] or buildings other than a residence or a required type thereof.[88] An injunction against "constructing" or "erecting" is not violated by repairing property constructed before the injunction was granted,[89] or by moving in and occupying a structure already erected.[90] An injunction against building on an alley is only technically violated by putting additional stories on a building formerly erected.[91] The location, opening, and improvement of a street to connect with a proposed bridge and passenger elevator are not in disregard of an order enjoining construction of the bridge and elevator.[92]

78. U.S.—John B. Stetson Co. v. Stephen L. Stetson Co., C.C.A.N.Y., 128 F.2d 981.
Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 503, 184 Ark. 1153, citing **Corpus Juris.**
N.C.—Weston v. John L. Roper Lumber Co., 73 S.E. 799, 158 N.C. 270, Ann.Cas.1913D 873.

79. Colo.—Fort v. People, 256 P. 325, 81 Colo. 420.

80. Colo.—Fort v. People, supra.

81. U.S.—Leman v. Krentler-Arnold Hinge Last Co., Mass., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389—Aerovox Corporation v. Concourse Electric Co., C.C.A.N.Y., 90 F.2d 615.

82. U.S.—Société Anonyme de la Distillerie la Liqueur Benedictine, etc., v. Western Distilling Co., C.C.Mo., 42 F. 96.
32 C.J. p 493 note 42.
Persons liable see supra § 263.

Independent contractor
Where defendants were enjoined from erecting spite fence, which was alleged to be an illegal act in itself, and were held in contempt for continuing to build such fence, it was not available as a defense that construction of fence was in control of an independent contractor, as it was the doing of the illegal act which was enjoined, and it made no difference what means were employed by defendants in so doing.—Walden v. Siebert, 128 A. 702, 102 Conn. 353.

83. U.S.—Encyclopaedia Britannica Co. v. Werner Co., C.C.N.J., 172 F. 1012.

84. **Railroad depot**
A judgment enjoining a railroad from changing the location of a depot, unless the public benefit should require and the railroad commission should so order, is not violated by an order of the commission for the removal of the depot made four years later, reciting a different state of facts than those existing at the time of the judgment.—Mosel v. San Antonio & A. P. Ry. Co., Tex.Civ. App., 249 S.W. 893.

Rope
An injunction against the maintenance of a "rope" has been held not violated by the maintenance of a mooring rope for a pile driver where the rope mentioned in the injunction referred to a cable rope used for a ferry.—Cole v. Austin, 140 A. 108, 107 Conn. 252.

"Walk, leadway, or causeway"
An injunction against the erection of a "walk, leadway, or causeway" has been held not violated by driving piles for the extension of a pier. —Cole v. Austin, 140 A. 108, 107 Conn. 252.

Water pipe
A decree restraining interference with the right to maintain a water pipe over land of another has been held violated by refusal of the owner of the servient estate to allow the other party to go on the land to make necessary repairs.—Baskin v. Livers, 43 P.2d 42, 181 Wash. 370.

85. **Violation held shown**
Minn.—Johnson v. Froelich, 264 N. W. 232, 196 Minn. 81.

86. **Violation held shown**
Conn.—Walden v. Siebert, 128 A. 702, 102 Conn. 353.

87. **Violation held shown**
Mass.—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487.

88. **Violation held shown**
Md.—Newell v. Dundalk Co., 131 A. 148, 149 Md. 182.
Wis.—Roberts v. Gerber, 217 N.W. 691, 194 Wis. 509.

Violation held not shown
Wis.—Ward v. Prospect Manor Corporation, 231 N.W. 172, 202 Wis. 179.

89. Mich.—Detroit & B. Plank-Road Co. v. Detroit Citizens' St. R. Co., 56 N.W. 940, 97 Mich. 583.
32 C.J. p 495 note 68.

90. Kan.—Hartman v. Wolverton, 263 P. 789, 125 Kan. 202.

91. Ky.—Bannon v. Rohmeiser, 9 S. W. 293, 10 Ky.L. 395.

92. Or.—Chase v. Oregon City, 143 P. 629, 72 Or. 112.

c. Conveyance or Disposition of Property

An injunction prohibiting conveyance or disposition of particular property may be violated by conversion or delivery of the property, an execution sale thereof, allowing another to take the property, and even by an offer to sell; nor can such an injunction be evaded by the subterfuge of collusive legal proceedings.

Adjudications have been made as to whether particular acts constituted a violation of injunctions prohibiting the conveyance or disposition of property,[93] and injunctions restraining such conveyance or disposition have been held violated by a conversion of the property,[94] a conveyance or transfer intended to confirm one made prior to the injunction,[95] delivery of property which was sold before the injunction issued,[96] voluntarily allowing the property to be taken by one having no right to take it,[97] and even, it has been held, by an offer or agreement to sell the property.[98] Such an injunction is violated by any active interference by defendant or his agents for the purpose of having the legal title transferred to another.[99] Where a person is enjoined from disposing of property, he will not be permitted to obtain a transfer by means of collusive proceedings at law.[1] An injunction against the sale of property by a trustee does not prevent his suing at law to recover the trust property.[2]

Execution sales. Where the enforcement of an order of sale or the collection of a judgment has been enjoined, a sale of the property under execution is a violation of the injunction;[3] and placing an execution in the hands of the sheriff constitutes a violation thereof, although no sale takes place under it.[4]

d. Labor Disputes

The general rules governing the determination of the acts deemed violative of an injunction, including the rule against procuring others to violate an injunction, have had frequent application to injunctions arising out of labor disputes, and in particular have been applied to injunctions prohibiting boycotts, picketing, coercion of employees or customers, and the obstruction or seizure of property.

In determining what does or does not constitute a breach or violation of an injunction issued prohibiting acts in the course of labor disputes, the general rules discussed supra subdivision a of this section have had frequent application.[5] Denunciation of the official action of a judge in granting an injunction in a labor dispute and the application to him personally of opprobrious and abusive epithets is a contempt of court.[6] One who urges others to violate an injunction issued in a labor dispute may thereby subject himself to punishment for contempt.[7] Where an injunction has been issued, mandatory in form, commanding employees to perform the duties for which they were employed, they may, without rendering themselves liable for contempt, avoid obedience to the injunction by actually ceasing to be employees,[8] but, if they continue in service and refuse to perform the duties incident thereto, they are punishable for contempt.[9]

Persuasion or coercion of employees or customers; picketing. Preventing employees or others, or inducing them to refrain, from working or accepting employment may constitute a breach or violation of an injunction prohibiting interference with business.[10] Procuring the discharge of members

93. Violation held not shown
U.S.—In re Rubin, D.C.N.Y., 193 F. 425.
Tex.—Rhoton v. Texas Land & Mortgage Co., Civ.App., 80 S.W.2d 763, error refused.

94. Ga.—Reid v. McRae, 9 S.E.2d 176, 182, 190 Ga. 323, quoting **Corpus Juris.**
Mich.—White v. Wadhams, 179 N.W. 245, 211 Mich. 658.

95. N.Y.—Black v. Sully, 123 N.Y.S. 371, 138 App.Div. 562.
32 C.J. p 495 note 57.

96. N.J.—Jewett v. Bowman, 27 N.J.Eq. 171.

97. N.Y.—Van Wagonen v. Terpenning, 25 N.E. 254, 122 N.Y. 222.

98. N.Y.—Tyler v. Poppe, 4 Edw. 430.
Wash.—Hanley v. Most, 115 P.2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.

99. Ga.—Reid v. McRae, 9 S.E.2d 176, 182, 190 Ga. 323, quoting **Corpus Juris.**
N.Y.—Lansing v. Easton, 7 Paige 364.

1. N.H.—Sheafe v. Sheafe, 40 N.H. 516.
N.Y.—Ross v. Clussman, 5 N.Y.Super. 676, Code Rep.,N.S., 91.

2. N.J.—Continental Securities Co. v. Northern Securities Co., 57 A. 876, 66 N.J.Eq. 274.
Va.—Nichols v. Campbell, 10 Gratt. 560, 51 Va. 560.

3. Tex.—Ward v. Billups, 11 S.W. 308, 76 Tex. 466.
32 C.J. p 495 note 66.

4. Miss.—Sugg v. Thrasher, 30 Miss. 135.

5. Promotion of organization hostile to unions
U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas and Louisiana v. Texas & N. O. R. Co., D.C.Tex., 24 F.2d 426, motion to vacate denied and order modified on other grounds 25 F.2d 876, affirmed, C.C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F. 2d 13, certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

6. U.S.—U. S. v. Gehr, C.C.W.Va., 116 F. 520—U. S. v. Haggerty, C.C. W.Va., 116 F. 510.

7. U.S.—Minerich v. U. S., C.C.A. Ohio, 29 F.2d 565, certiorari denied 49 S.Ct. 264, 279 U.S. 843, 73 L. Ed. 989.
N.Y.—Sum v. Independent Retail Fruit Merchants' Ass'n of Greater New York, 258 N.Y.S. 609, 144 Misc. 684.

8. U.S.—Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., C.C.Ohio, 54 F. 730, 19 L.R.A. 387, appeal dismissed Ex parte Lennon, 14 S.Ct. 123, 150 U.S. 393, 37 L.Ed. 1120.
32 C.J. p 496 note 80.

9. U.S.—Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., C.C.Ohio, 54 F. 746, 19 L.R.A. 395, appeal dismissed Ex parte Lennon, 14 S.Ct. 123, 150 U.S. 393, 37 L.Ed. 1120.
32 C.J. p 496 note 81.

10. U.S.—McGibbony v. Lancaster, C.C.A.La., 286 F. 129.

of a union from employment for refusal to join another union is in violation of an injunction against interference with the employment of such persons and punishable as a contempt.[11] It has been held that payment by strikers of money to employees of the company against which the strike is in operation to induce them to join the strike is not a violation of an injunction prohibiting "unlawful" persuasion and does not render them liable as for a contempt;[12] but it has also been held that payment of a consideration to an employee on condition that he refuse to go to work for plaintiff after having engaged so to do violates an injunction prohibiting the doing of any act which would in any manner tend to interfere with the running of plaintiff's business.[13] Imposing or threatening to impose injuries or penalties, such as fines or expulsion, on members of a labor organization for obeying an injunction may constitute a breach or violation of the injunction.[14]

An injunction against picketing is violated by distribution of handbills to customers and carrying a sign stating that complainant does business with another who is unfair to organized labor.[15] It has been held that while, in itself, there may be no harm in one person or even two or more, loitering or standing in the neighborhood of a factory or other place, nevertheless, this act, in itself, associated with the facts that there is a lockout or strike, that the men who loiter and patrol and picket are employees who have been discharged, that they are members of the union whose purpose it is to stop the operation of plaintiff's factories as far as they can, until the workers therein have been discharged, or have joined the union, violates an injunction against picketing plaintiff's factory or intimidating his employees.[16]

Picketing, even though peaceful, when it is intended to compel plaintiff to accede to the demands of a union and take back its members on terms dictated by the union, is in violation of an injunction prohibiting the doing of any act tending or intended to compel plaintiff to operate its factory, or employ or discharge workmen, in the manner or on the terms demanded by the union.[17] It has also been held that an officer of a union is in contempt of an injunction against picketing where, notwithstanding the injunction, he went to complainant's plant believing that the court had no authority to issue an injunction, and although he said nothing to the employees and made no disturbance.[18] Only persons who resort to, or who aid or assist in, the commission of acts of violence can be held in contempt for violating an injunction against unlawful picketing where the language of the injunction is limited to such acts.[19] An injunction obtained by an employer for the protection of his property and employees against violence is not violated by violence against property of a defendant;[20] nor is violence committed by an agent of the employer a violation of an injunction running only against labor union members, their agents, or confederates.[21]

Pa.—J. V. H. Cook & Sons v. Dolan, 6 Pa.Dist. 524, 19 Pa.Co. 401.
32 C.J. p 497 note 89.

Assault after termination of employment

An injunction restraining interference with employees by violence or threats is violated by assaulting one who took the place of a striker, even though such person had left the employment before the assault, since the effect of the assault would be to prevent others from taking employment.—Winkle v. U. S., C.C.A. Mo., 291 F. 493.

Newspaper articles

An injunction prohibiting individuals from jeering at or insulting employees was held limited in its scope to personal actions and interference and hence was not violated by an article in a newspaper characterizing strikebreakers generally in opprobrious terms.—Cohen v. U. S., C.C. A.Tenn., 295 F. 633.

Reference to employees as "traitors"

An injunction restraining union members from referring to employees as "scabs, or other offensive, scurrilous, or opprobrious names," has been held not violated by calling them "traitors."—Vulcan Detinning Co. v. St. Clair, 145 N.E. 657, 315 Ill. 40.

Display in shop window

One who at the request of strikers, displayed in the window of his barber shop, facing a street along which employees passed, going to and from their work, a placard bearing in large letters the words "No Scabs Wanted in Here," violated an order enjoining the strikers and "all persons conspiring or associated with them" from interfering with, annoying, or insulting employees of the company about the premises or on their way to or from their work.—Taliaferro v. U. S., C.C.A.Va., 290 F. 906, affirming, D.C., U. S. v. Taliaferro, 290 F. 214.

11. Mo.—Swaine v. Blackmore, 75 Mo.App. 74.

12. Ohio.—Iron Moulders' Union of North America v. I. & E. Greenwald Co., 16 Ohio S. & C. P. 678, 4 Ohio N.P.,N.S., 161.

13. Pa.—Titusville Iron Co. v. Quinn, 13 Pa.Dist. 416.

14. D.C.—Re Gompers, 40 App.D.C. 293.
32 C.J. p 495 note 76.

A bombing for the purpose of inciting members of a labor union or their confederates to activities violative of an injunction is an indirect violation of the injunction and contrary to its spirit and purpose.—State v. Meese, 229 N.W. 31, 200 Wis. 454, reversing 225 N.W. 746, 200 Wis. 454.

15. Ga.—Mason and Dixon Lines v. Odom, 18 S.E.2d 841, 193 Ga. 471.

16. Ohio.—Brunsman v. Atherton, 12 Ohio S. & C. P. 553.

17. Wis.—Vilter Mfg. Co. v. Humphrey, 112 N.W. 1095, 132 Wis. 587, 13 L.R.A.,N.S., 591.

18. Mich.—In re Langell, 144 N.W. 841, 178 Mich. 305, 50 L.R.A.,N.S., 412.

19. Ill.—Roesch Enamel Range Co. v. Carbine, 247 Ill.App. 248.

20. Wis.—State v. Meese, 229 N.W. 31, 200 Wis. 454, reversing 225 N. W. 746, 200 Wis. 454.

21. Wis.—State v. Meese, supra.

Boycott. Acts that continue or tend to continue the maintenance of a boycott against which an injunction has been granted,[22] such as publishing and using letters, circulars, and other printed matter,[23] may constitute a breach or violation of the injunction. The calling of strikes against complainant's customers to prevent the use of materials manufactured by complainant may amount to threats, coercion, and intimidation within the meaning of an injunction against interfering with complainant's business by such means, even though no violence is used.[24]

Physical obstruction or seizure of property. If an injunction prohibits interference in any way with any person delivering or hauling plaintiff's product, the obstruction of a passageway leading to plaintiff's place of business, which prevents the passage in that direction of a vehicle sent out by plaintiff,[25] or the forcible stopping of a team to prevent its egress from plaintiff's factory,[26] is a violation thereof, rendering those participating in such acts punishable for contempt. Where members of a labor union combine and confederate together to seize the property of a company, in violation of a restraining order, they are punishable for contempt.[27]

e. Acts of Public Officials

Public officials restrained from proceeding with a specified contract or enforcing a designated ordinance do not violate the injunction by making a new contract or ordinance and proceeding thereunder, unless the new one is substantially identical with the old and constitutes a colorable evasion of the decree. In a great variety of cases the terms of particular injunctions against public officials have been held violated or not, depending on the language of the injunction and the surrounding facts and circumstances.

Public officials who have been restrained from proceeding under a particular contract on the ground that the contract is invalid cannot be held in contempt for entering into a new contract and proceeding thereunder, unless it is clear that the new contract is a mere colorable departure from the old;[28] and this result is not changed by the fact that the new contract may be illegal, where any illegality rests on a different ground from that which invalidated the old contract.[29] Such officials are guilty of contempt, however, if the new contract is in substance the same as the old, is subject to the same objection, and constitutes merely a colorable evasion of the court's decree.[30] Officials restrained from expending money under a construc-

22. Wash.—Delorme v. International Bartenders' Union, Local 624, 139 P.2d 619.
32 C.J. p 496 note 77.

Misleading customers as to existence of controversy

An injunction against picketing and boycotting a nonunion store was violated by patrolling the streets adjacent to such store, displaying banners calling attention to the injunction, and requesting friends of organized labor to abide thereby, where the banners were of such character as to attract attention of persons in the vicinity of store and falsely to lead them to believe that a labor controversy existed between the proprietors of such store and their employees, and to work a boycott generally of such store.—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.

Notifying of union action

Where union members unanimously voted not to load or unload trucks of a particular employer, and it did not appear that officers of the union counseled the members to take such course or were in any way responsible for it, the union officers, by notifying other employers of the action taken by the members, were held not to have violated an injunction enjoining them from hindering the employer in the course of its business.—Henderson v. Coleman, 7 So.2d 117, 150 Fla. 185.

Calling attention to violations of union rules

A union agent was held not to have violated the terms of a restraining order by directing the attention of contractors to violations of the union rules.—In re Larkin, 142 A. 822, 103 N.J.Eq. 195.

Influencing contractor's choice of subcontractors

Labor union representatives were held not to have violated an order restraining them from inducing contractors to let no subcontracts to particular employers where such representatives attempted merely to compel a contractor to keep his promise to use subcontractors employing only union labor, and to compel him to terminate his agreement with one which did not employ union labor and which was not one of the particular parties mentioned in the injunction order.—In re Starrett, D.C.N.Y., 45 F.2d 399.

23. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
32 C.J. p 496 note 79.

24. Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill.App. 505, judgment affirmed 139 N.E. 887, 308 Ill. 488.

Strikes on buildings using boycotted product

An injunction restraining a labor union, its officers, and members from coercing any person to refrain from dealing in the product of a certain mill, from interfering with work on buildings using such product, and from boycotting the manufacturer and the product, is violated by calling strikes on buildings using the product and not permitting workmen to return to work until union-made material is substituted for such product.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, supra.

25. Ohio.—Hoster Brewing Co. v. Giblin, 14 Ohio S. & C. P. 305.

26. Ohio.—Hoster Brewing Co. v. Giblin, supra.

27. U.S.—Lake Erie & W. R. Co. v. Bailey, C.C.Ind., 61 F. 494.

28. U.S.—City of Campbell, Mo. v. Arkansas-Missouri Power Co., C.C. A.Mo., 65 F.2d 425.

Dissimilar plant

Where light and power plant authorized to be constructed by resolution of council of city was found to be dissimilar to original undertaking, which had been permanently enjoined on ground that it exceeded powers conferred on city by statute, city was not subject to citation for contempt for violation of injunction. —Williamson v. City of High Point, 200 S.E. 388, 214 N.C. 693.

29. U.S.—City of Campbell, Mo. v. Arkansas-Missouri Power Co., C.C. A.Mo., 65 F.2d 425.

30. U.S.—City of Campbell, Mo. v.

tion contract, bids for which have been irregularly advertised for, do not violate the restraining order by canceling the contract, readvertising properly for bids, and entering into a new contract.[31] Where the enforcement of an ordinance has been enjoined on the ground that certain provisions of the ordinance are invalid, the passage and enforcement of a new ordinance on the same subject, without such invalid provisions, are not violations of the injunction;[32] but an attempt to evade the injunction by passing another ordinance similar to the one enjoined is a contempt.[33] A municipality and its officials who have been restrained from the operation of a public utility in an improper manner are not guilty of contempt because of mere errors in judgment or discretion in connection with their operation or management of the utility, but are guilty only in case of fraud, dishonesty, or abuse of discretion in their official activities.[34] An injunction restraining a city and its officers from making a certain grant is violated by a vote of the city council to make such grant.[35] Officials who have been restrained from interfering with another official in the performance of his duties do not violate the injunction by simply declining to consult with such other official or to ask him to perform any services.[36]

In addition to the foregoing, other adjudications have been made as to whether there has been a violation of injunctions prohibiting particular acts by public officials, or by individuals claiming to be public officials,[37] as, for example, injunctions prohibiting enforcement of a scale of rates for insurance companies[38] or public utilities,[39] redemption of bonds,[40] interference by an insurance commissioner with the business of an insurance broker,[41] enforcement of an order of county commissioners directing the improvement of a highway,[42] the taking or examination of bank records by a congressional investigating committee,[43] seizure of certain vending machines,[44] disobedience by a chief of police of orders issued by the superintendent of public safety,[45] and attempts by one claiming the right to hold a particular public office to exercise the acts or duties of the office.[46]

f. Miscellaneous

The general rules governing the determination of what acts constitute a violation of an injunction have been applied to injunctions pertaining to the maintenance of legal proceedings, engagement in or the practices of particular businesses or professions, and many miscellaneous matters.

There have been many adjudications concerning

Arkansas-Missouri Power Co., supra.

31. Ga.—King v. Casey, 187 S.E. 776, 164 Ga. 117.

32. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 835, 20 Cal.2d 202, citing **Corpus Juris.**
Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 501, 260 Ky. 60, quoting **Corpus Juris.**
32 C.J. p 494 note 52.

33. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 835, 20 Cal.2d 202, citing **Corpus Juris.**
Ill.—Perry v. Kinnear, 42 Ill. 160.
Ky.—Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497, 501, 260 Ky. 60, quoting **Corpus Juris.**
Imposition of tax
Police jurors restrained from enforcement of an ordinance levying a tax on gasoline without submitting the matter to the voters were guilty of a technical contempt in repealing the ordinance and then immediately passing a new ordinance imposing the very same tax without submitting the matter to the voters. —Ray v. Parish of Rapides, 128 So. 663, 170 La. 644.

34. Mich.—Wolgamood v. Village of Constantine, 4 N.W.2d 697, 302 Mich. 384.

35. N.Y.—People v. Sturtevant, 9 N.Y. 263, 59 Am.D. 536, affirming 8 N.Y.Super. 451.

36. Wash.—State ex rel. Cooper v. Warnock, 134 P.2d 706, 16 Wash.2d 697, followed in Warnock v. Town of Marysville, 134 P.2d 710, 16 Wash.2d 710.

37. **Violation held shown**
N.J.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
32 C.J. p 497 note 92 [h].
Violation held not shown
Tex.—State v. Ferguson, 125 S.W.2d 272, 133 Tex. 60.

38. **Reduction other than one enjoined**
Order restraining superintendent of insurance from enforcing a particular rate reduction was not violated by making a different reduction, there being no showing of bad faith on the part of the superintendent.—State ex rel. Hyde v. Westhues, 290 S.W. 443, 316 Mo. 457.

39. **New scale after another investigation**
Public service commission did not violate injunction against enforcement of rates previously prescribed where, after another rate investigation, it promulgated a new rate scale ameliorating the original rate reduction, the new scale not being on its face a mere repetition of the enjoined scale.—Georgia Continental Telephone Co. v. Georgia Public Service Commission, D.C.Ga., 8 F.Supp. 434.

40. **Violation held not shown**
Tex.—Dallas Trust & Savings Bank v. Wortham Independent School Dist., Civ.App., 25 S.W.2d 174, error refused.

41. **Violation held not shown**
Cal.—Mitchell v. Superior Court in and for City and County of San Francisco, 23 P.2d 423, 132 Cal.App. 468.

42. **Violation held not shown**
Kan.—Stark v. Bradford, 287 P. 228, 130 Kan. 614.

43. **Violation held not shown**
U.S.—McGrain v. Daugherty, Ohio, 47 S.Ct. 319, 273 U.S. 135, 71 L.Ed. 580, 50 A.L.R. 1, reversing, D.C., Ex parte Daugherty, 299 F. 620.

44. **Violation held not shown**
La.—Tonahill v. Molony, 101 So. 130, 156 La. 753.

45. **Violation held not shown**
La.—Dawkins v. Bazer, 155 So. 3, 179 La. 724.

46. **Violation held shown**
Pa.—Bowers v. Reitz, 172 A. 707, 315 Pa. 310.

the alleged violation of injunctions pertaining to engagement in, regulation of, or the mode of carrying on, particular businesses or professions,[47] including injunctions prohibiting: unauthorized practice of a profession;[48] engagement in a particular line of business, either generally,[49] or within a particular territory,[50] or except as an employee;[51] solicitation of another's customers;[52] unfair competition;[53] in-

47. Tex.—Bancroft v. Russell, 22 S. W. 240, 3 Tex.Civ.App. 95.
32 C.J. p 494 note 55 [e].

Violation held shown
Mich.—Glover v. Mailloska, 217 N. W. 896, 242 Mich. 34.
32 C.J. p 497 note 92.

Violation held not shown
Colo.—Fort v. People, 256 P. 325, 81 Colo. 420.
N.Y.—Transit Commission v. Long Island R. Co., 10 N.E.2d 562, 274 N.Y. 582, affirming 294 N.Y.S. 183, 250 App.Div. 448—Ginsberg v. Samuels, 274 N.Y.S. 429, 242 App. Div. 780.
R.I.—Kennedy v. Frechette, 126 A. 641.
32 C.J. p 498 note 93.

48. Examination and diagnosis
The examination of patient's back and diagnosis of trouble as nerve pressure and the administering of manual treatment or adjustments for a fee constituted the practice of medicine and surgery in violation of an injunction against the unlicensed practice thereof.—State ex rel. Kansas State Board of Medical Registration and Examination v. Martin, 130 P.2d 601, 155 Kan. 801.

Lease to practitioner
A corporation which leases store space to an optician is not guilty of contempt for violating an injunction prohibiting it from practicing optometry, notwithstanding the lessee unlawfully practices optometry, in the absence of the corporation's participation in, or knowledge of, the illegal practice; and such a lease was held not to create relation of licensor and licensee so as to put corporation in contempt for violation of injunction against unlawful practice of optometry by the corporation or its "licensees."—Rowe v. Standard Drug Co., 9 N.E.2d 609, 132 Ohio St. 629.

Payment for advertisement
An arrangement whereby optician's newspaper advertisement was billed to corporation which leased store space to him, he in turn repaying corporation for advertising, was not illegal so as to put corporation in contempt for violation of injunction against advertising that it was engaged in practice of optometry if advertisement itself was legal.—Rowe v. Standard Drug Co., supra.

Window display
A corporation was guilty of holding itself out as engaged in practice of optometry in violation of injunction by inclusion on window of its business place, with corporate name, legend "Eyes examined—Glasses fitted," or "Registered Optometrist—Eyes examined."—Rowe v. Standard Drug Co., supra.

Concealment by pretended contracts with employees
Unlicensed owner of hospital, restrained from practice of medicine personally or through others, was guilty of contempt, where he entered into pretended contracts with employees to conceal operation of hospital and treatment of patients by such employees under his direction and control.—State v. Baker, 270 N. W. 359, 222 Iowa 903.

49. Violation by seller of business
(1) Seller who was enjoined from directly or indirectly being interested in ice cream or milk business was not in contempt by working for, and being paid by, an ice cream company, although not as one of its proprietors, if such acts did not impair buyer's full enjoyment of business and good will.—State v. Baker, 169 A. 598, 20 Del.Ch. 48.

(2) An injunction prohibiting a defendant who sold a gasoline and oil business from entering into the same or a similar kind of business precludes him from participating in the sales of gasoline and motor oils as though he were sole proprietor of the business, although he is in fact only an employee or sales agent.—Taylor v. Morris-Forrester Oil Co., 142 S.E. 153, 166 Ga. 43.

Violation held not shown
Ga.—Stovall v. Mendenhall, 16 S.E.2d 546, 192 Ga. 796.
N.Y.—Buffalo General Laundries Corporation v. Munzert, 231 N.Y. S. 1, 132 Misc. 803.

50. Transportation of passengers
(1) An injunction restraining operation of a bus line over a particular route is violated by an unlicensed bus company which, by carrying passengers gratuitously, selling tickets to places beyond prohibited points, and affording liberal use of passes, thereby impairs the business of the complaining party.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.

(2) An injunction against solicitation or receipt of passengers along a certain route is violated by a taxi operator who makes regular prearranged trips for the transportation of certain individuals within the territory in which the injunction was operative.—State v. Koon, 15 S.E.2d 133, 197 S.C. 300.

51. Violation held not shown
Wis.—General Bronze Corporation v. Schmeling, 250 N.W. 412, 213 Wis. 150, 93 A.L.R. 114.

52. Ill.—Loven v. People, 42 N.E. 82, 158 Ill. 159.
32 C.J. p 497 note 92 [g], p 498 note 93 [f] (1).

Solicitation by act
An order restraining a party from soliciting the former customers of an ice vending concern has been held violated by stopping in front of the customers' homes and delivering ice to them without definite orders, such conduct amounting to solicitation by act if not by word; and expressions by customers indicating their willingness to purchase have been held not equivalent to orders, so as to justify the party restrained in stopping at their homes with ice.—Burnham v. Burnham, 140 A. 361, 154 Md. 349.

Purchases without solicitation
A decree enjoining solicitation of a former employer's customers is not violated by selling to customers who make the first suggestion to purchase and who go to the store of the former employee to make the purchase, or by soliciting customers to whom the former employee has previously made unsolicited sales.—Jackson Furniture Co. v. Lieberman, 14 A.2d 27, 65 R.I. 224.

Gifts to customers' organizations
Giving gifts of merchandise to clubs and churches to which some former customers belonged has been held not to constitute indirect solicitation of such customers in violation of an injunctive decree prohibiting solicitation.—Jackson Furniture Co. v. Lieberman, supra.

Sales of different class of merchandise
In contempt proceeding for violation of decree enjoining former employee from selling "additional merchandise" to former employer's customers, where the term "additional merchandise," as used in the decree, meant household furnishings and similar merchandise, sale of shirts by former employee was not within purview of decree.—Jackson Furniture Co. v. Lieberman, supra.

53. Violation held shown
U.S.—Produce Reporter Co. v. Fruit Produce Rating Agency, D.C.Ill., 1 F.2d 58—California Fruit Growers Exchange v. Sunkist Drinks, D.C. N.Y., 25 F.Supp. 401—Bradstreet Co. v. Bradstreet Collecting Bureau, N.Y., 249 F. 958, 162 C.C.A. 156.
32 C.J. p 497 note 92 [c].

fringement of a copyright[54] or trade-mark;[55] sale of products in violation of the provisions of a license;[56] and production of oil in excess of a specified rate.[57]

Bringing or continuing legal proceedings. Where the bringing or continuing of legal proceedings is prohibited by injunction, any steps, although merely preliminary or incidental, taken for the purpose of bringing or continuing such proceedings, constitute a violation of the injunction.[58]

Other acts. In addition to the particular breaches or violations already discussed, there have been other cases in which the courts have determined whether there has been a violation of particular injunction orders,[59] including injunctions prohibiting: the assertion of a claim or title to particular property, or interference with its possession;[60] interference with an easement or right of way;[61] diversion,[62] overflowage,[63] or pollution[64] of water; the cutting of timber except for certain restricted purposes;[65] the expulsion of particular individuals from an organization;[66] the making of false or misleading statements concerning certain specified topics;[67] interference with public officials in the performance of their duties;[68] and the exercise of corporate privileges and franchises.[69]

54. Violation held shown
U.S.—Produce Reporter Co. v. Fruit Produce Rating Agency, D.C.Ill., 1 F.2d 58.

55. Violation held shown
U.S.—California Fruit Growers Exchange v. Sunkist Drinks, D.C.N.Y., 25 F.Supp. 401.

Violation held not shown
U.S.—Tubular Heating & Ventilating Co. v. Mt. Vernon Furnace & Mfg. Co., D.C.Ill., 2 F.2d 982.

56. Failure to pay assessment
An injunction prohibiting the sale of macaroni in violation of the provisions of a license for the macaroni industry issued by the director of agriculture was held not violated by sales made before payment of an assessment, where the injunction had been sought only to prevent sales at less than a prescribed price and the injunction decree had been entered pursuant to a stipulation waiving all rights arising out of violations occurring before entry of the decree.—Ex parte Ferrigno, 71 P.2d 329, 22 Cal.App.2d 472.

57. Violation held shown
U.S.—Locke v. U. S., C.C.A.Tex., 75 F.2d 157, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1681.

58. U.S.—In re Hudson River Electric Power Co., D.C.N.Y., 173 F. 934, affirmed 183 F. 701, 106 C.C.A. 139, 33 L.R.A.,N.S., 454.
32 C.J. p 494 note 54.

Settlement of a suit by the parties or their attorneys would be a direct violation of an injunction against proceeding with the suit "in any manner."—Gorsch v. Birkhahn, 151 A. 121, 8 N.J.Misc. 491.

Action on judgment
An injunction which prohibited the prosecution of an action at law or a cause in equity on a claim or demand on a bond was not violated by an action brought not on the bond, but on a judgment in which the cause of action on the bond had become merged.—Price v. Price, 7 S.E.2d 510, 122 W.Va. 122, 128 A.L.R. 1088.

Contempt held not shown
Okl.—Missouri-Kansas-Texas R. Co. v. Wilkins, 297 P. 262, 148 Okl. 45.

59. Violation held shown
Ga.—Reid v. McRae, 9 S.E.2d 176, 190 Ga. 323.
Pa.—State Grand Lodge of Pennsylvania v. Morrison, 120 A. 769, 277 Pa. 41.
32 C.J. p 497 note 92.

Violation held not shown
Mass.—Home Inv. Co. v. Iovieno, 141 N.E. 78, 246 Mass. 346.
Pa.—Daugirda v. Karalus, 159 A. 216, 104 Pa.Super. 404.
32 C.J. p 498 note 93.

60. N.Y.—Hudson v. Plets, 11 Paige 180.
32 C.J. p 494 note 55.

Violation held shown
Cal.—Gilman v. Superior Court in and for Nevada County, 260 P. 922, 86 Cal.App. 259.
N.J.—Roseberg v. American Hotel & Garden Co., 123 A. 717, 95 N.J.Eq. 640, affirming, Ch., 121 A. 9.
32 C.J. p 494 note 55 [a], [d], [j] (1).

Violation held not shown
Cal.—Newport v. Superior Court of Stanislaus County, 230 P. 168, 192 Cal. 92.
Ga.—Purvis v. Calvert Mortgage Co., 124 S.E. 702, 158 Ga. 879.
32 C.J. p 494 note 55 [b], [j] (2).

61. Violation held shown
Ky.—Stratton & Terstegge Co. v. Meriwether, 159 S.W. 613, 154 Ky. 839.
32 C.J. p 494 note 55 [h].

Violation held not shown
Cal.—Pomin v. Superior Court in and for El Dorado County, 112 P. 2d 17, 44 Cal.App.2d 206.

62. Utah.—Spanish Fork City v. Spanish Fork East Bench Irrigation & Mining Co., 151 P. 46, 46 Utah 487.
32 C.J. p 494 note 55 [i].

Prima facie violation
The diversion of entire flow of creek's tributary by party enjoined from diverting waters of creek and its tributaries was prima facie violation of decree and contempt of court.—State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 69 P.2d 972, 105 Mont. 106.

63. Violation held shown in maintenance of a water trough in such fashion as to discharge water from defendant's house on plaintiff's lot.—Johnson v. Froelich, 264 N.W. 232, 196 Minn. 81.

64. Violation held shown
N.J.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.

65. Vt.—Lillie v. Lillie, 55 Vt. 470.
32 C.J. p 494 note 55 [f].

66. Dispute within labor union
Where, in a dispute concerning the internal affairs of a labor union, an injunction was issued prohibiting the expulsion of certain individuals from the union, a union official who took charge of a meeting and forced the expulsion of such individuals was held thereby to have violated the injunction.—Edrington v. Hall, 148 S.E. 407, 168 Ga. 491.

67. Injunction held violated
U.S.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F. 2d 862, modifying, D.C., 48 F.Supp. 928.

Injunction held not violated
U.S.—Securities and Exchange Commission v. Okin, supra.

68. Injunction held violated
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.

Injunction held not violated
Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.

69. Authorization and execution of bankruptcy petition
Where an injunction forbids a corporation and its officers to exercise any of the corporate privileges and franchises, directors who meet and pass a resolution authorizing the filing of a voluntary petition in

§ 265. Separate Contempts

Each violation of an injunction is a separate contempt, punishable as such.

Each act done in violation of the injunction constitutes a separate contempt,[70] although continuous,[71] which may be punished as such.[72]

§ 266. Excuses and Justification

a. In general
b. Acts or conduct of complainant
c. Authorization by court, legislature, or third parties

a. In General

Violation of an injunction is excused if the court which granted it was without jurisdiction, or if the acts performed were necessary to preserve the property in controversy. On the other hand, violation is not necessarily excused because of inconvenience in complying with the injunction, violation of the injunction by others, absence of injury to complainant or profit to the party enjoined, a change in the status which the injunction was granted to preserve, obedience to the injunction after a violation has occurred, or, in the case of a temporary injunction to maintain the status quo, final determination of the litigation adverse to complainant.

Since disobedience of a void injunction does not constitute a contempt of court, as discussed supra § 259, a perfect defense is made out where it is shown that the court was without jurisdiction to grant the injunction;[73] but, if the court had jurisdiction to award the injunction, a violation thereof cannot be excused on the ground that it was improvidently granted or irregularly obtained, as discussed supra § 259, although such fact may be considered in mitigation of punishment, as discussed infra § 269. A violation of an injunction cannot be justified by reason of difficulty in complying with its provisions,[74] or on the ground of public convenience.[75] It is no defense to contempt proceedings for violation of an injunction restraining particular acts that third persons also performed the forbidden acts.[76] The high character of defendants, and the distinguished position which they have attained among their fellowmen, are matters which cannot amount to a defense.[77] The fact that there are circumstances which, in the opinion of the party restrained, warrant a delay in complying with the provisions of an injunction does not excuse disobedience thereof, his remedy being to apply for a modification or temporary stay of the injunction.[78]

A person will not be punished for contempt for acts done in violation of an injunction when such acts are necessary to the preservation of the property in controversy.[79]

Profit or injury. It is no excuse for disobeying an injunction that the disobedience of the injunction was harmless and caused no injury to complainant,[80] although, as shown infra § 269, the absence of substantial injury may be considered in mitigation of punishment; nor is it an excuse that the party enjoined derived no profit from performance of the forbidden acts,[81] especially where, although the party enjoined derives no profit, complainant is nevertheless injured and the spirit of the injunction is thereby violated.[82] The fact that the injury complained of was done before the service of the in-

bankruptcy and officers who execute such petition are guilty of a contempt.—Cavagnaro v. Indian Tire & Rubber Co., 107 A. 643, 90 N.J.Ch. 532.

70. Cal.—Solano Aquatic Club v. Solano County Super. Ct., 131 P. 874, 165 Cal. 278—Golden Gate Cons. Hydraulic Min. Co. v. Yuba County Super. Ct., 3 P. 628, 65 Cal. 187.

71. Cal.—Solano Aquatic Club v. Solano County Super. Ct., 131 P. 874, 165 Cal. 278.
32 C.J. p 498 note 95.

72. Cal.—Solano Aquatic Club v. Solano County Super. Ct., supra.

73. Tex.—Ex parte Duncan, 95 S.W. 2d 675, 127 Tex. 507.
32 C.J. p 498 note 99.
Defenses in contempt proceedings generally see Contempt §§ 37-42.

74. N.J.—Hilton v. Hilton, 105 A. 65, 89 N.J.Eq. 417.
32 C.J. p 499 note 11.
Ability to obey see supra § 262.

Unusual rainfall
Violation of a decree requiring a dam to be so maintained as not to allow the water to rise above a certain level was not excused by the fact that there was an unusually heavy rainfall, where the level of the water could have been controlled by the timely operation of gates.—Clear Lake Water Co. v. Superior Court in and for Mendocino County, 92 P.2d 921, 33 Cal.App.2d 710.

75. Ky.—Kentucky & Indiana Bridge Co. v. Krieger, 16 S.W. 824, 91 Ky. 625, 13 Ky.L. 219.

76. Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.

77. D.C.—Gompers v. Buck's Stove & Range Co., 33 App.D.C. 516.
32 C.J. p 501 note 47.

78. N.J.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.

79. Ind.—Mowrer v. State, 8 N.E. 561, 107 Ind. 539.
N.Y.—McQueen v. Babcock, 41 Barb. 337, affirmed 3 Abb.Dec. 129, 3 Keyes 428.

80. Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.
N.Y.—People v. Dwyer, 90 N.Y. 402, 2 N.Y.Civ.Proc. 379.

Interference with patronage of store
In a proceeding to punish members of a labor union for violation of an injunction against picketing and boycotting complainants' store, the question of injury is not properly before the court; but injury is nevertheless sufficiently shown by evidence that during the continuance of the acts complained of there was almost a complete cessation of patronage of complainants' store.—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.

81. Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.

82. Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., supra.

junction on defendant, and that his acts since the service of the injunction have done complainant no further injury, will not, when those acts were intended to make the injury complete, and the obvious intention of the interdict was to prohibit him from continuing the injury, relieve defendant from the effects of his violation of the injunction.[83]

Final determination adverse to complainant. Violation of a temporary injunction granted pendente lite is not excused merely because on final decree the complaint is dismissed and defendant adjudged entitled to a decree in his favor,[84] or where the injunction was granted pending determination of a question of jurisdiction which, although doubtful, was within the authority of the court to decide in the first instance, because it was ultimately determined that the court had no jurisdiction to grant final relief.[85]

Change in conditions or rights. It is no excuse for disobeying an injunction that there has been a change in the status which the injunction was granted to preserve,[86] or such a change in conditions or circumstances as would justify vacation, dissolution, or modification of the injunction,[87] at least where the changed condition is not due to operation of law.[88] Notwithstanding the acquisition of rights pendente lite, after preliminary injunction has been granted, which rights must or may be considered on final hearing in the cause, the preliminary injunction must be obeyed until modified.[89]

The effect of modification of the injunction on the liability of defendant for violation thereof is considered supra § 258.

Subsequent obedience. The fact that after violating the injunction defendant thereafter obeys it does not discharge his liability for previous violation of the injunction;[90] and diligence in ceasing to perform the acts enjoined is clearly immaterial as to the fact of prior disobedience of the injunction where there are statutes expressly providing that disobedience of any lawful judgment, order, or process of a court constitutes a contempt.[91]

Miscellaneous. In addition to the excuses considered supra this section, and those considered infra §§ 267, 268, and in the succeeding subdivisions of this section, there have been other adjudications as to the sufficiency of particular facts to excuse or justify a violation of particular injunction decrees.[92]

83. N.J.—Thropp v. Field, 25 N.J. Eq. 166.

84. Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

Reason for rule

Notwithstanding the dismissal of the bill and an order dissolving the injunction on final hearing by the lower court, the jurisdiction of an appellate court may be thereafter invoked to continue the injunction in force by way of supersedeas pending appeal.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., supra.

85. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

86. Ill.—Fishwick v. Lewis, 260 Ill. App. 230.

Development of additional water supply

It is no defense to contempt proceedings for violation of an injunction restraining the diversion of waters that conditions have changed and an additional supply of water developed for the use of the party seeking to enforce the injunction.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.

87. Colo.—De La Mater v. Graves, 193 P. 552, 69 Colo. 255.

Ill.—Fishwick v. Lewis, 260 Ill.App. 230.

Md.—Emergency Hospital of Easton v. Stevens, 136 A. 101, 146 Md. 159.

Mo.—St. Joseph Brewing Co. v. Hauber, 132 S.W. 54, 151 Mo.App. 433.

N.J.—Alcorn v. Newark & Hackensack Traction Co., Ch., 48 A. 235.

Use of hospital facilities

Hospital enjoined from interfering with performance of operations by physician was guilty of contempt of court in refusing to permit such physician to perform operations, notwithstanding after injunction it had amended its constitution or by-laws so that such physician would be without right to operate without permission.—Emergency Hospital of Easton v. Stevens, 126 A. 101, 146 Md. 159.

88. Wash.—State v. Haiman, 171 P. 529, 100 Wash. 632.

89. N.J.—Alcorn v. Newark & Hackensack Traction Co., Ch., 48 A. 235. 32 C.J. p 498 note 5.

90. N.Y.—Stubbs v. Ripley, 39 Hun 626—Root v. Conkling, 177 N.Y.S. 610, 108 Misc. 234.

Subsequent obedience as mitigating punishment see infra § 269.

91. Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.

92. Expression of opinion

Where a stockholder was restrained from making false and misleading statements about the management of a corporation, he could not excuse his violation of the injunction by the fact that in sending out letters containing misstatements he added the words "in my opinion," notwithstanding his claim that the phrase was added at the suggestion of the Securities and Exchange Commission, the misstatements complained of had appeared in a previous letter, and no objection thereto has been made by the commission at the argument of the motion for a preliminary injunction.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F.2d 862, modifying, D.C., 48 F.Supp. 928.

Stockholder's presence after giving proxy

Where an injunction prohibited interference with the voting of certain shares of stock by a stockholder, and the parties restrained declined to count votes cast by the stockholder's proxy, contempt was not avoided because of a statute providing that the powers of a proxy shall be suspended if the person who executed the proxy is present at the meeting and elects to vote in person, where the stockholder, although present at the meeting, did not elect to vote in person.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 836, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases.

Complainant's inability to supply electricity

A power company was held in no position to invoke contempt proceedings against another company against which it had obtained an injunction preventing such other company from furnishing electricity to consumers within the corporate limits of a particular town, where the

b. Acts or Conduct of Complainant

The acts or conduct of complainant may be such as to excuse a violation of an injunction granted to protect a private right, as, for example, where complainant has consented to, or acquiesced in, the violation; but such acts, to constitute an excuse, must be unequivocal, and done by one empowered to waive the particular violation.

Violation of an injunction granted to protect a private right may be excused by complainant's voluntary waiver of the right to have the injunction remain effective,[93] and the party enjoined will not be punished in contempt proceedings for breach of the injunction when the breach was committed with the consent or acquiescence of complainant.[94] Where the parties have entered into a stipulation that the injunction shall be dissolved, defendant cannot be punished for disobedience of its provisions,[95] even though an order vacating the writ is needed to complete the record.[96]

Waiver on the part of complainant, to constitute an excuse, must be clear and unequivocal,[97] and must not be of acts which the party restrained is required to perform by law and which cannot be dispensed with by agreement of the parties.[98] Acquiescence by plaintiff in the violation of the injunction by defendant must be of such a nature that it would have defeated the granting of the injunction had it been available to defendant at the time the injunction was granted.[99] Seeking a second injunction to prevent new and additional wrongs to the same property does not prevent complainant from instituting proceeding for acts constituting a violation of the first injunction granted to protect the property,[1] although there is authority holding that the commencement of a second action for injunction in itself affords evidence that the first action was abandoned, or in some manner disposed of.[2]

Wrongful acts by the party in whose favor an injunction was issued, committed after the violation of the injunction, do not prevent a punishment for the contempt;[3] a fortiori, the acts of the mayor of the city in favor of which the injunction was issued could not have that effect.[4] It is not a defense that plaintiff is infringing rights of defendant, the proper remedy being by an independent action at law or in equity.[5]

Use of decoy by complainant. The party enjoined has been held punishable for contempt for a violation of the injunction occurring in dealings with a decoy acting on behalf of the party at whose in-

controversy involved the supply of electric current to a large consumer within the limits of the town whose demands the complaining power company was unable to supply.—Arkansas Power & Light Co. v. West Memphis Power & Water Co., 79 S.W.2d 991, 190 Ark. 594.

Advising order and obedience

Where a strike is inaugurated by a labor union and it sets in motion the force which results in coercion, intimidation, and violence, it cannot excuse itself for the part which it took in the conspiracy by the statement of its officers that they advised the members of the union to be orderly and obey the law.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 110 Am.S.R. 248, 4 L.R.A.,N.S., 1001.

93. Wash.—Reed v. Reed, 270 P. 1028, 149 Wash. 352.

94. Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 374, 169 Miss. 314, citing **Corpus Juris.**

Wash.—Reed v. Reed, 270 P. 1028, 1029, 149 Wash. 352, citing **Corpus Juris.**

32 C.J. p 493 notes 43, 44.

Advice or consent of complainant as defense in contempt proceedings generally see Contempt § 39.

95. Ga.—Howard v. Durand, 36 Ga. 346, 360, 91 Am.D. 767.

Mich.—Ten Eyck v. Wing, 1 Mich. 40.

32 C.J. p 500 note 84.

96. Mich.—Ten Eyck v. Wing, supra.

97. Wash.—Reed v. Reed, 270 P. 1028, 149 Wash. 352.

Conditional stipulation

Attorney general's stipulation, subject to sheriff's approval, for sale of gasoline and payment of proceeds to sheriff by one enjoined from selling gasoline until payment of excise tax, did not justify violation of injunction, where sheriff's approval of stipulation was not shown nor any reason given for not obtaining it.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

Inducement by plaintiff held not shown

A stockholder restrained by injunction from making false or misleading statements could not successfully claim that his violation in sending out such misstatements was induced by plaintiff, where he was explicitly warned by plaintiff not to send out a letter containing such misstatements.—Securities and Exchange Commission v. Okin, C.C.A. N.Y., 137 F.2d 862, modifying, D.C., 48 F.Supp. 928.

98. Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

Sale of gasoline without permit

Attorney general could not stipulate to allow the sale of gasoline without a permit and thereby allow the gasoline vendor to violate an injunction prohibiting such sale.—Hanna v. State ex rel. Rice, supra.

99. Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

1. U.S.—Bond v. Pennsylvania Co., Ill., 126 F. 749, 61 C.C.A. 355.

2. S.C.—South Carolina & G. R. Co. v. American Telephone & Telegraph Co., 43 S.E. 970, 65 S.C. 459. 32 C.J. p 499 note 18.

3. Pa.—Scranton v. People's Coal Co., 117 A. 673, 247 Pa. 63.

4. Pa.—Scranton v. People's Coal Co., supra.

5. Mo.—Breimeuer v. Star Bottling Co., 147 S.W. 526, 165 Mo.App. 383. 32 C.J. p 498 note 3.

Control of waters by plaintiff

Violation of a decree prohibiting defendant's diversion of waters beyond a prescribed extent, and providing for the appointment of a commissioner to supervise the distribution of the waters according to the terms of the decree, is not excused by the fact that the court did not appoint a commissioner and that plaintiff did not consent to any such appointment but instead took control of the waters, the extent to which defendant could use the waters being dependent on the terms of the decree and not on the appointment of a commissioner.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.

stance the injunction was granted.[6]

c. Authorization by Court, Legislature, or Third Parties

A party may ordinarily be relieved from the operation of an injunction only by the court which issued it, and not, for example, by municipal ordinances or directions of a third person. However, an act originally enjoined because it was illegal will not be punished after such act has been expressly authorized by the legislature.

Ordinarily a party may be relieved from the operation of an injunction absolutely prohibiting a certain act only by the court which granted it,[7] and cannot, for example, excuse the performance of the forbidden acts by showing that such acts were permitted by the resolutions or ordinances of a municipality,[8] or were done by authority and direction of a third person,[9] such as a governmental department[10] or a private organization.[11] However, where the basis for the issuance of an injunction was the lack of statutory or other authority to do the forbidden acts, and, subsequent to the issuance of an injunction defendant is expressly authorized by federal or state legislature to do the acts prohibited by the injunction, he is not guilty of a contempt in committing such acts,[12] at least if the legislation authorizing the acts is not unconstitutional and void.[13] Disobedience of an injunction against proceeding with an action may be punished as contempt notwithstanding a court of law allows the action to proceed;[14] but one who acts in obedience to the mandate of a higher court, although such acts are in contravention of an injunction issued by the lower court, is not guilty of contempt.[15]

§ 267. —— Good Faith

While the rule is not inflexible, it is generally considered that good faith, oversight, or absence of intent to violate an injunction does not excuse such violation. However, an injunction prohibiting only fraudulent or dishonest acts is not violated by acts done in good faith.

The general rule is that good faith, or the absence of an intention to violate the injunction, is no defense in a contempt proceeding,[16] and that defendant cannot purge himself of contempt by disavowing that he intended any disrespect to the court.[17] It is not a defense that defendant overlooked the provisions in the order which he disobeyed,[18] or that he failed or was unable to understand the scope of the injunction.[19] However, the rule that good faith affords no defense is not inflexible,[20] especially where, in addition to the cir-

6. U.S.—Missouri, K. & T. R. Co. v. McCrary, C.C.Mo., 182 F. 401.
32 C.J. p 493 note 45.

7. U.S.—Muller v. Henry, C.C.Cal., 17 F.Cas.No.9,916, 5 Sawy. 464.
Md.—Williamson v. Carnan, 1 Gill & J. 184.

8. N.H.—Fowler v. Beckman, 30 A. 1117, 66 N.H. 424.
32 C.J. p 500 note 32.

9. N.Y.—Krom v. Hogan, 4 How.Pr. 225, 2 Code Rep. 144.
32 C.J. p 498 note 6.

10. U.S.—Carlson v. Washington, 34 S.Ct. 717, 234 U.S. 103, 58 L.Ed. 1237, affirming 120 P. 104, 66 Wash. 639.
32 C.J. p 498 note 6[a].

11. U.S.—In re Higgins, C.C.Tex., 27 F. 443.
32 C.J. p 498 note 6 [b].

Union rules and regulations

The obligation of members of a labor union to obey its constitution, by-laws, rules, and regulations, and to refuse to work except with union-made materials, does not justify the officers and members of such union in a direct violation of the terms of an injunction restraining the calling of strikes or the institution of a boycott against complainant or products made in an open shop.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill.App. 505, affirmed 139 N.E. 887, 308 Ill. 488.

12. Mass. Newton Rubber Works v. De las Casas, 84 N.E. 119, 198 Mass. 156.
32 C.J. p 500 note 30.

Permit from administrative board pursuant to statute

In summary proceeding for contempt for violating injunction and for order restraining violation of such injunction restraining defendants, pending appeal from injunction judgment, from interfering with relators' fishing in certain waters, neither motion nor order could be granted where defendants claimed waters under title acquired under permit from board of water engineers pursuant to statute, subsequent to injunction judgment and appeal therefrom.—Diversion Lake Club v. Heath, Tex.Civ.App., 52 S.W. 2d 380.

13. U.S.—State of Pennsylvania v. Wheeling & Belmont Bridge Co., Pa., 18 How. 421, 15 L.Ed. 435.

14. N.Y.—Bennett v. Leroy, 5 Abb. Pr. 156.

15. Or.—State v. Jacobs, 8 P. 332, 11 Or. 314.

16. U.S.—Lustgarten v. Felt & Tarrant Mfg. Co., C.C.A.N.J., 92 F.2d 277.
Cal.—Clear Lake Water Co. v. Superior Court in and for Mendocino County, 92 P.2d 921, 33 Cal.App.2d 710.
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
N.J.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.
Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct.
Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
32 C.J. p 499 note 23, p 498 note 40.
Want of intention as defense in contempt proceedings generally see Contempt § 42.

Violation by indirection

Bus company's avowed intention not to violate injunction against doing intra-state business was of no avail, where other conduct by it amounted to doing the prohibited acts by indirection.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.

17. N.C.—In re Parker, 99 S.E. 342, 177 N.C. 463.

18. Cal. Lake v. Kern County Super. Ct., 131 P. 371, 165 Cal. 182.

19. Pa.—Ferri v. Mulhern, Com.Pl., 36 Luz.Leg.Reg. 310.
Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
32 C.J. p 500 note 25.

20. U.S.—International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, D.C.Cal., 25 F.Supp. 870, reversed on other grounds, C.C.A., International Brotherhood of Teamsters, Chauffeurs, Stablemen

cumstance that the violation was unintentional, it appears that no damage was caused to the party who obtained the injunction;[21] and an injunction which in effect prohibits only such acts as show fraud, dishonesty, or abuse of discretion is not violated by acts done in good faith, although they constitute an error in judgment or discretion.[22] As shown infra § 269, good faith is a proper matter to be considered in mitigation of punishment.

§ 268. —— Advice of Counsel

The violator of an injunction cannot defend his violation on the ground that he acted on advice of counsel.

It is no defense to the person violating the injunction that he acted on advice of counsel;[23] and especially is this so where defendant goes further than he is advised that he can go.[24] Parties alleged to have violated an injunction were held to have purged themselves of any contempt by showing that they were not lawyers and relied solely on the advice of the judge who tried the suit that their acts would not put them in contempt.[25]

§ 269. Matters in Mitigation

In mitigation of punishment the court may consider any fact properly affecting its discretion, such as the fact that the injunction was erroneously issued, that the acts complained of were done in good faith and caused no injury, and that the offender acted on advice of counsel.

Many facts which would not constitute a complete defense to contempt proceedings for violation of an injunction may nevertheless be considered in mitigation of the punishment,[26] such as the fact that the injunction was erroneously issued,[27] that the acts in violation were done in good faith and without intention to disobey the injunction[28] or to show disrespect to the court,[29] that they caused no substantial injury to the adverse party,[30] that the acts amounting to a violation constituted merely a technical contempt,[31] or that there had been a compliance with the injunction subsequent to the violation thereof.[32]

Advice of counsel. If the acts charged as constituting a contempt were committed under advice of counsel given and accepted in good faith, this fact may be considered in mitigating the punishment which shall be imposed for violation of the injunction.[33] However, advice of counsel cannot be urged in mitigation where disclosure is withheld as to what statement of facts was submitted to counsel or what advice was received.[34]

§ 270. Power to Punish

The court which issues an injunction has power to punish violations thereof as a contempt, such power being incident to the power to grant the injunction; and punishment may be imposed notwithstanding the violation occurred in a county, district, or division other than

and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, 106 F.2d 871.
Cal.—Ryan v. Busick, 194 P. 514, 50 Cal.App. 26.
N.Y.—Oakley v. Cokalete, 44 N.Y.S. 1070, 16 App.Div. 65.
32 C.J. p 499 note 22.

Bona fide attempt to comply with order
Neb.—Whipple v. Nelson, 293 N.W. 382, 138 Neb. 514.

Honest belief as to effect of appeal
N.Y.—City of Buffalo v. Kissinger, 40 N.Y.S.2d 188.

21. N.Y.—Strawberry Island Co. v. Cowles, 140 N.Y.S. 333, 79 Misc. 279.
32 C.J. p 499 note 22 [b], [c].

22. Mich.—Wolgamood v. Village of Constantine, 4 N.W.2d 697, 302 Mich. 384.

23. Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
W.Va.—State v. Fink, 161 S.E. 557, 111 W.Va. 334.
32 C.J. p 500 note 27.
Advice of counsel:
As defense in contempt proceedings generally see Contempt § 38.
Considered in mitigation of punishment see infra § 269.

24. U.S.—Société Anonyme de la Distillerie de la Liqueur Benedictine, etc., v. Western Distilling Co., C.C.Mo., 42 F. 96.

25. Tex.—Lundberg v. City of Raymondville, Civ.App., 299 S.W. 539.

26. **Failure to realize character of neglect** to cease pollution of stream in violation of the injunction may be considered in mitigation of punishment.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.

Attorney general's agreement to sale of gasoline and payment of proceeds to sheriff by one enjoined from selling it without permit was competent evidence in mitigation of seller's conduct in violating injunction.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

27. Wis.—State v. Green Lake County Cir. Ct., 73 N.W. 788, 98 Wis. 143.
32 C.J. p 500 note 39.

28. U.S.—Lustgarten v. Felt & Tarrant Mfg. Co., C.C.A.N.J., 92 F.2d 277.
Cal.—Clear Lake Water Co. v. Superior Court in and for Mendocino County, 92 P.2d 921, 33 Cal.App.2d 710.
Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct.
32 C.J. p 500 note 40.
Lack of intent as mitigating punishment in contempt proceedings generally see Contempt § 98.

29. N.J.—In re Borough of Fort Lee, 155 A. 473, 108 N.J.Eq. 425.
Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct.
32 C.J. p 501 note 41.

30. U.S.—Comly v. Buchanan, C.C. Pa., 81 F. 58.
32 C.J. p 501 note 42.

31. U.S.—Merrimack River Sav. Bank v. City of Clay Center, Kan., 21 S.Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas.1912A 513.
32 C.J. p 501 note 43, p 500 note 40 [a].

32. W.Va.—State v. Fink, 161 S.E. 557, 111 W.Va. 334.
32 C.J. p 501 note 44.

33. W.Va.—State v. Fink, supra.
32 C.J. p 501 note 45.

34. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724.
32 C.J. p 501 note 46.

that in which the court is located. Courts other than the one which issued the injunction may by statute be empowered to punish violations as for contempt.

The violation of an injunction is punishable as a contempt of court, as discussed supra § 257, and, while provision for such punishment is sometimes found in the statutes,[35] the power so to punish exists independently of statute[36] and is inherent in the court and incident to its power to grant injunctions or restraining orders.[37] The power to punish a violation of an injunction vests in the court which granted the injunction and, in the absence of statute, in that court alone.[38] However, under statutes making willful disobedience of the lawful process or other mandate of a court a crime, and vesting jurisdiction of such crimes in a designated criminal court, willful violation of an injunction is punishable not only by the court which issued the injunction but also by the court having jurisdiction of the criminal prosecution,[39] it being considered, under such statutes, that the act is not less punishable as a crime by the criminal court because it is also punishable as a contempt by the civil court.[40]

The court which issued the injunction may punish violations thereof notwithstanding the violations occur in another county;[41] and this result is not changed by constitutional provisions giving defendants in criminal prosecutions the right to be tried in the county in which the offense was committed.[42] By express statutory provisions in some jurisdictions the court may, in vacation[43] or at chambers,[44] punish one for violation of an injunction.

Action by, or appeal to, higher court. The vio-

35. N.Y.—Boon v. McGucken, 22 N.Y.S. 424, 67 Hun 251, 23 N.Y.Civ. Proc. 115.
32 C.J. p 501 note 49 [a].

Punishment for resistance to orders

Statutes providing for punishment of any willful disturbance calculated to interrupt the due course of the court's official proceedings and of any illegal resistance to any order or process made or issued by it obviously provide for punishment for contempt in the violation of an injunction.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

36. Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628.

37. Ind.—Bangs v. Northern Indiana Power Co., supra.
32 C.J. p 501 note 49.
Power to punish for contempt generally see Contempt § 43.

Purpose of punishment

The court may always punish the violator for the purpose of upholding and vindicating the authority and dignity of the court, and in appropriate cases it may punish the violator for the purpose of preserving and enforcing the rights of the persons for whose protection the injunction was granted.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

38. U.S.—Teele Soap Mfg. Co. v. Pine Tree Products Co., D.C.N.H., 8 F.Supp. 546—Steers v. U. S., C.C.A.Mo., 297 F. 116.
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
Ill.—Ossey v. Retail Clerks' Union, 158 N.E. 162, 326 Ill. 405—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.
La.—Pizzolato v. Cataldo, 12 So.2d 677, 202 La. 675—Woodard v. Johnson, 152 So. 65, 178 La. 501.
32 C.J. p 501 note 51.
"The court which issues the injunction is the court against which the contempt is committed, and the court which has jurisdiction to deal with it."—Sullivan v. U. S., C.C.A. Okl., 4 F.2d 100, 101.

Judge of different circuit

Where the judge of the circuit before whom defendants, against whom a restraining order had been issued, were directed to appear was not absent from the circuit, the judge of another circuit had no jurisdiction over a contempt charge, notwithstanding the latter judge had, because of the absence of the former, granted the restraining order.—Casey v. King, 137 S.E. 546, 164 Ga. 28.

Change of judge

The Indiana statutes providing for a change of venue from the judge are limited to criminal contempt cases and do not apply to civil contempt proceedings; and, where a change of judge has been granted at the request of one who, although not a defendant in the original injunction suit, was a defendant in the contempt proceeding, the rights of all defendants to a further change are thereby exhausted.—Bangs v. Northern Indiana Power Co., 6 N.E. 2d 563, 211 Ind. 628.

Notwithstanding dismissal as against an attorney, because of lack of evidence of his participation in the acts complained of, the court retained sufficient jurisdiction to punish him later for contempt where the final injunction ran against "defendants, their agents, servants, attorneys and counsellors, and anyone acting by, or through, or for them, or any of them, and all to whom notice of this injunction shall come."—Odell v. Bausch & Lomb Optical Co., C.C.A.Ill., 91 F.2d 359, 360, certiorari denied 58 S.Ct. 284, 302 U.S. 756, 82 L.Ed. 585, rehearing denied 58 S.Ct. 408, 302 U.S. 780, 82 L.Ed. 603.

In Kansas, under statute, disobedience of an injunction may be punished as a contempt by the court or any judge who might have granted it in vacation.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

The National Labor Relations Act did not defeat jurisdiction of equity court, which had issued preliminary injunction against sit-down strikers in unlawful possession of employer's property, to punish the strikers for contempt of court for violating the preliminary injunction.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

39. Mo.—Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs & Helpers Union Local No. 366, App., 115 S.W.2d 89.
N.Y.—People ex rel. Frank v. McCann, 170 N.E. 898, 253 N.Y. 221, affirming 237 N.Y.S. 85, 227 App. Div. 57.

40. N.Y.—People ex rel. Frank v. McCann, supra.

41. Colo.—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.

42. Colo.—Guiraud v. Nevada Canal Co., supra.

43. Tex.—Ex parte Looper, 184 S.W. 345, 91 Tex.Cr. 129, Ann.Cas. 1918B 32.
W.Va.—Powhatan Coal & Coke Co. v. Ritz, 56 S.E. 257, 60 W.Va. 395, 9 L.R.A.,N.S., 1225.

44. S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
32 C.J. p 501 note 51 [d].

lation of an injunction after a writ of prohibition has been issued by a supreme court directing a lower court to take no further action is punishable by the supreme court.[45] After a dissolved injunction has been reinstated by the appellate court, the lower court has authority to punish for a breach thereof.[46] There is authority holding that the violation of an injunction is a contempt of the lower court which granted it, and not of a court to which an appeal has been subsequently taken;[47] but, under the statutory provisions in some jurisdictions, the rule is that, where an appeal is taken from an order granting an injunction, the appellate court, and not the original trial court, has jurisdiction to punish, as for contempt of court, any disobedience of the injunction.[48]

Division or district of federal court. The federal district court of a particular division of a district may punish a violation of an injunction issued by it, notwithstanding the violation has occurred in another division of the same district,[49] or in another district of the same state[50] or circuit,[51] but, in the absence of waiver or consent by defendant,[52] the district court of a different division of the district may not punish,[53] even for a violation which has occurred in its division.[54]

§ 271. Proceedings to Punish

a. In general
b. Determination of character of proceeding
c. Who may institute proceedings
d. Time for instituting proceedings
e. Notice or process
f. Parties
g. Trial or hearing

a. In General

Although relief may be obtained for injuries sustained from violations of an injunction by an action for damages or for the penalty prescribed in the injunction order, injunctions are customarily enforced or their violation punished by contempt proceedings, which are sui generis and as a general rule may be either civil or criminal in nature.

Although the right to bring an action for the damages actually sustained by reason of the violation of the injunction or to recover the penalty prescribed in the injunction as an alternative remedy for the same injury is recognized,[55] the customary procedure by which an injunction is enforced or its violation punished is by proceedings in contempt.[56] Contempt proceedings have been held sui gener-

45. Colo.—People v. Tenth Judicial Dist. Ct., 68 P. 242, 29 Colo. 182.
La.—State v. Judge Eleventh Judicial Dist. Ct., 21 So. 94, 48 La.Ann. 1501.

46. U.S.—Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., Minn., 124 F. 735, 61 C.C.A. 57.
Ala.—Gates v. McDaniel, 3 Port. 356.

47. Vt.—Alfred v. Alfred, 90 A. 580, 87 Vt. 542.

48. Ohio.—Menuez v. Grimes Candy Co., 83 N.E. 82, 77 Ohio St. 386, 11 Ann.Cas. 1037.
Tex.—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ.App., 97 S.W.2d 379.
32 C.J. p 501 note 52 [a].

49. U.S.—Myers v. U. S., Mo., 44 S. Ct. 272, 264 U.S. 95, 68 L.Ed. 577—Steers v. U. S., C.C.A.Mo., 297 F. 116—McCourtney v. U. S., C.C.A. Mo., 291 F. 497, certiorari denied 44 S.Ct. 134, 263 U.S. 714, 68 L.Ed. 520.

50. U.S.—Sullivan v. U. S., C.C.A. Okl., 4 F.2d 100—Steers v. U. S., C.C.A.Mo., 297 F. 116.

Contrary authority
It has been held by a district court, without reference to the cases cited in support of the text proposition, that, under 29 U.S.C.A. § 111, individuals who violated a restraining order by acts committed outside the district of the court which granted the injunction were entitled to a trial in the district in which the violation allegedly occurred.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, D.C.Tex., 27 F.Supp. 154.

51. U.S.—McGibbony v. Lancaster, C.C.A.La., 286 F. 129.

Extension of receivership to other districts
Where the jurisdiction of railroad receivers appointed by a federal district court is extended to other districts within the circuit, and an injunction is granted prohibiting interference with the receivers, the court issuing the injunction has jurisdiction to inflict punishment for a violation committed in one of the districts to which the receivership has been extended.—McGibbony v. Lancaster, supra.

52. U.S.—Cole v. U. S., C.C.A.Mo., 298 F. 86—Steers v. U. S., C.C.A. Mo., 297 F. 116.

53. U.S.—Cole v. U. S., C.C.A.Mo., 298 F. 86.

54. U.S.—Steers v. U. S., C.C.A.Mo., 297 F. 116.

Clayton Act inapplicable
The rule set forth in the text is not affected by the provisions of the Clayton Act to the effect that trial for certain contempts thereunder "shall be directed at a time and place fixed by the court," the words "time and place," as used, meaning a time or place within a statutory division of the district.—Steers v. U. S., supra.

55. Cal.—Kirby v. San Francisco Savings & Loan Soc., 273 P. 609, 95 Cal.App. 757.
32 C.J. p 509 note 8.

Recovery in one form of action will bar all recourse to another.—Lawton v. Herrick, 76 A. 986, 83 Conn. 417—Gorham v. City of New Haven, 66 A. 505, 79 Conn. 670.

56. U.S.—In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Cal.—Smith v. Smith, 116 P.2d 3, 18 Cal.2d 462.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
Tex.—Kimbrough v. State, Civ.App., 139 S.W.2d 165.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Contempt proceedings for violation of injunction:
Abating a nuisance:
Generally see the C.J.S. title Nuisances § 135, also 46 C.J. p 799 note 69—p 801 note 13.
Liquor nuisance see the C.J.S. title Intoxicating Liquors § 426, also 33 C.J. p 701 note 21—p 704 note 71.

is,[57] and have been regarded as being of two classes, one criminal and punitive in nature and the other civil, remedial, and coercive in nature;[58] and, although there is authority to the contrary,[59] it has been held that where a single act of disobedience constitutes both a criminal and civil contempt the contempt proceeding must be either civil or criminal in nature and cannot combine both aspects.[60] There is also some authority which, either by force of special statutory provisions, or apparently without relying on any statute specifically so providing, holds that all contempt proceedings are criminal in nature.[61]

Contempt proceedings for violation of an injunction, except as modified by statutes relating specifically thereto, conform to, and are controlled by, the rules and statutes applicable in contempt proceedings generally.[62]

Entitling. If the contempt proceeding is criminal in nature it should ordinarily be prosecuted in the name of the state and entitled in the same manner as criminal prosecutions generally;[63] but if it is civil in nature, it should bear the same title as the injunction proceeding,[64] and may be prosecuted in the name of the injured party.[65] Where all contempt proceedings are considered criminal in nature, the practice in some jurisdictions is to prosecute them in the cause or proceeding out of which they arose, and they are properly entitled in the

Against infringement of patent see the C.J.S. title Patents § 356, also 48 C.J. p 381 note 78—p 385 note 46.

Contempt proceeding improper

Tex.—Stanolind Oil & Gas Co. v. Edgar, Civ.App., 107 S.W.2d 631, followed in Stanolind Oil & Gas Co. v. Railroad Commission of Texas, Civ.App., 107 S.W.2d 633.

57. U.S.—Myers v. U. S., Mo., 44 S. Ct. 272, 264 U.S. 95, 68 L.Ed. 577—Armstrong v. U. S., C.C.A.Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—U. S. v. Balaban, D.C.Ill., 26 F. Supp. 491—U. S. v. French, D.C. Mich., 9 F.Supp. 30.

Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

Mont.—State v. District Court of Eighth Judicial Dist., in and for Cascade County, 232 P. 204, 72 Mont. 206.

32 C.J. p 502 note 67.

Neither civil actions nor prosecutions for offenses

U.S.—Myers v. U. S., Mo., 44 S.Ct. 272, 264 U.S. 95, 68 L.Ed. 577—Armstrong v. U. S., C.C.A.Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

Contempt and crime

Acts violating an injunction may constitute a crime and contempt.—U. S. v. Debs, C.C.Ill., 64 F. 724, affirmed In re Debs, Ill., 15 S.Ct. 900, 158 U.S. 564, 39 L.Ed. 1092.

58. U.S.—Wasserman v. U. S., C.C. A.Mo., 161 F. 722, 88 C.C.A. 582, reversed on other grounds 166 F. 1022, 92 C.C.A. 669—Baltimore Transit Co. v. Flynn, D.C.Md., 50 F.Supp. 382.

Ind.—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind. App. 100.

Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

Mo.—Limerick v. Riback, 224 S.W. 45, 201 Mo.App. 321.

N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

N.D.—Merchant v. Pielke, 83 N.W. 18, 9 N.D. 245.

Utah.—Davidson v. Munsey, 80 P. 743, 29 Utah 181.

Wyo.—Laramie Nat. Bank v. Steinhoff, 53 P. 299, 7 Wyo. 464.

32 C.J. p 502 note 68.

When question arises

Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 54 N.E 2d 462, 386 Ill. 368, dismissing error 44 N.E.2d 613, 316 Ill.App. 306, and reversing 48 N.E.2d 781, 319 Ill. App. 252.

Ky.—Allen v. Black Bus Lines, 164 S.W.2d 482, 291 Ky. 278.

Md.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194, 28 A.L.R. 33.

Quasi-criminal

Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

Criminal

U.S.—Hammond Lumber Co. v. Sailors' Union of the Pacific, C.C.Cal., 167 F. 809.

Civil

N.Y.—People ex rel. Negus v. Dwyer, 90 N.Y. 402, 2 N.Y.Civ.Proc. 379.

59. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

60. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

61. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.

La.—Pizzolato v. Cataldo, 12 So.2d 677, 202 La. 675.

Mont.—State v. District Court of Eighth Judicial Dist., in and for Cascade County, 232 P. 204, 72 Mont. 206.

Tex.—Ex parte Cox, 127 S.W.2d 443, 133 Tex. 152.

W.Va.—State v. Lewis, 168 S.E. 812, 113 W.Va. 529.

32 C.J. p 502 notes 60–61—13 C.J. p 59 note 97.

62. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

Criminal contempts

U.S.—U. S v. Balaban, D.C.Ill., 26 F.Supp. 491.

N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147—In re Larkin, 142 A. 822, 103 N.J.Eq. 195.

63. U.S.—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S. Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.

Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

Wis.—Vilter Mfg. Co. v. Humphrey, 112 N.W. 1095, 132 Wis. 587, 13 L. R.A.,N.S., 591.

Proper titles

N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89—Dorrian v. Davis, 147 A. 338, 341, 105 N.J.Eq. 147.

64. U.S.—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S. Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.

Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

La.—Pizzolato v. Cataldo, 12 So.2d 677, 202 La. 675.

Withdrawal of named party immaterial

La.—Pizzolato v. Cataldo, supra.

65. Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

style of the injunction proceeding and not as separate actions.[66]

b. Determination of Character of Proceeding

Various matters have been considered in determining whether the nature of a contempt proceeding is civil or criminal.

In jurisdictions where contempt proceedings for violation of an injunction may be either civil or criminal in nature, a number of elements have been resorted to in the determination of the nature of the proceeding.[67] In some instances the character of the proceeding is tested by a consideration of who conducts the prosecution,[68] or who is being prosecuted.[69] However, factors more generally considered as determinative are the character and manner of the violation and the purpose of the proceeding.[70] A criminal contempt is directed against the power and dignity of the court,[71] and a proceeding for contempt is of a criminal nature where its primary purpose is to preserve and vindicate public authority and dignity and punish for violation of the injunction.[72] On the other hand, where the primary purpose of the proceeding is the enforcement of civil rights and remedies of a party to a suit, the proceeding is civil in its nature.[73] While the character and manner of the violation may also be important in determining the nature of the proceedings, it is not always easy to classify a particular act as being either a civil or criminal contempt,[74] as it may partake of the characteristics of both, being neither wholly civil nor wholly criminal,[75] in which case the form in which the proceeding is brought may determine its character.[76]

66. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.

67. U.S.—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F.2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444.

68. U.S.—McCann v. New York Stock Exchange, supra.
Wis.—Vilter Mfg. Co. v. Humphrey, 112 N.W. 1095, 132 Wis. 587, 13 L.R.A.,N.S., 591.

69. U.S.—Bessette v. W. B. Conkey Company, Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997.

Person not party to injunction suit
U.S.—Bessette v. W. B. Conkey Co., supra.
32 C.J. p 503 note 76.

70. U.S.—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874—Dunham v. U. S., C.C.A.La., 289 F. 376.
Md.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194, 28 A.L.R. 33.
Pa.—Patterson v. Building Trades Council, 14 Pa.Dist. 839, 31 Pa.Co. 9, 401, 12 Luz.Leg.Reg. 241, 445, 9 North.Co. 330, 6 Lack.Jur. 193, affirmed Patterson v. Wyoming Val. Dist. Council, 31 Pa.Super. 112.

Proceedings held criminal
U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858—Dunham v. U. S., C.C.A. La., 289 F. 376.

71. U.S.—Bessette v. W. B. Conkey Co., Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997.
32 C.J. p 503 note 74.

72. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40.
Md.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194, 28 A.L.R. 33.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Utah.—Davidson v. Munsey, 80 P. 743, 29 Utah 181.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
32 C.J. p 502 note 73.

Offense against society
N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89.

73. Ill.—People v. Diedrich, 30 N.E. 1038, 141 Ill. 655.
Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.
Ky.—Allen v. Black Bus Lines, 164 S.W.2d 482, 291 Ky. 278.
Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89.
Or.—State v. Mart, 295 P. 459, 135 Or. 603.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
32 C.J. p 503 note 77.

Contempt proceeding held civil
(1) In general.
Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.
Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.

(2) If, in the progress of a suit, a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding.—Bessette v. W. B. Conkey Co., Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997.

(3) While the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the public interest, merely.
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966.
Wyo.—Laramie Nat. Bank v. Steinhoff, 53 P. 299, 7 Wyo. 464.

Strike injunction
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill. App. 40—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill.App. 505, affirmed 139 N.E. 887, 308 Ill. 488.
Pa.—Patterson v. Building Trades Council, 14 Pa.Dist. 839, 31 Pa.Co. 9, 401, 12 Luz.Leg.Reg. 241, 445, 9 North.Co. 330, 6 Lack.Jur. 193, affirmed Patterson & Wyoming Val. Dist. Council, 31 Pa.Super. 112.

74. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
32 C.J. p 502 note 69.

Contempt held criminal
U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940.
Del.—State v. Nouris, 136 A. 887, 15 Del.Ch. 282.

75. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
Wis.—Vilter Mfg. Co. v. Humphrey, 112 N.W. 1095, 132 Wis. 587, 13 L.R.A.,N.S., 591.
32 C.J. p 502 note 70.

76. Wis.—Vilter Mfg. Co. v. Humphrey, supra.

If the petitioner seeks to establish both civil and criminal liability for the contempt, the criminal feature must be regarded as dominant and fixing the character of the trial.[77] The intent with which the violation was made may be a distinguishing element in determining the nature of the contempt,[78] willfulness having been held a necessary element of a criminal contempt,[79] but, although willful disobedience of an injunction may constitute a criminal contempt,[80] it may also constitute a civil contempt.[81] A test by which the nature of the proceedings may sometimes,[82] although not always,[83] be distinguished is whether the conduct with which defendant is charged is the refusing to do an act commanded or the doing of a prohibited act. If the proceedings are for disobedience of an injunction by acts committed in violation of what defendant has been ordered not to do they will ordinarily be considered as criminal and not civil in nature.[84]

Ancillary or independent proceeding. Although it has been stated generally that a contempt proceeding for violation of an injunction is an independent proceeding and not part of the original cause,[85] it has been held that the civil or criminal nature of the contempt proceeding determines whether it is ancillary or independent of the injunction proceeding.[86] If the contempt proceeding is criminal in nature, it is a distinct or independent proceeding,[87] but where it is civil in nature it is a part of, or ancillary to, the main cause in which the injunction was issued.[88]

Style of proceeding. The style of the proceeding is not controlling as to its nature, and the mere fact that it was not instituted in the name of the state will not change its character from a criminal to a civil nature.[89]

c. Who May Institute Proceedings

Contempt proceedings for violation of an injunction may be instituted by the party in whose favor the injunction was granted, but not by strangers where the proceeding is civil in nature. If criminal, the state is a proper party to institute the proceeding.

In accordance with general rules, contempt proceedings of a civil nature for violation of an injunction may be instituted by the party in whose favor the injunction was granted,[90] and it has been held not necessary that the persons who institute such proceedings be parties to the original action.[91] If the injunction operates in rem and affects the use of realty, an assignee or transferee becomes a

77. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

78. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

79. Ind.—Denny v. State, supra.

80. Ind.—Denny v. State, supra.
N.Y.—Stubbs v. Ripley, 39 Hun 626.
32 C.J. p 502 note 65.

81. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

82. U.S.—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Ind.—Locrasto v. State, 173 N.E. 456, 202 Ind. 277.
N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

83. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

84. U.S.—Reeder v. Morton-Gregson Co., C.C.A.Neb., 296 F. 785.
Ind.—Oakland Coal Co. v. Wilson, 149 N.E. 54, 196 Ind. 501.
Md.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194, 28 A.L.R. 33.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Mo.—Limerick v. Riback, 224 S.W. 45, 204 Mo.App. 321.
N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89.
32 C.J. p 503 note 84.
Contumacious violation
N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

85. U.S.—U. S. v. French, D.C.Mich., 9 F.Supp. 30.

86. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

87. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40.
Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.
N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Proceeding at law
U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940.
Failure to make separate cause is a fatal infirmity.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89.

88. U.S.—Leman v. Krentler-Arnold Hinge Last Co., Mass., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389, reversing in part Krentler-Arnold Hinge Last Co. v. Leman, C.C.A., 50 F.2d 699, certiorari granted Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 33, 284 U.S. 605, 76 L.Ed. 519—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187—Fiedler v. Bambrick Bros. Constr. Co., 142 S. W. 1111, 162 Mo.App. 528.
Okl.—Fagin v. Thoroughman, 136 P. 2d 982, 190 Okl. 649.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Motion in original cause
N.D.—Merchant v. Pielke, 33 N.W. 18, 9 N.D. 245.

89. Mo.—Limerick v. Riback, 224 S. W. 45, 204 Mo.App. 321.

90. Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
N.D.—Merchant v. Pielke, 33 N.W. 18, 9 N.D. 245.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

91. Cal.—McFarland v. Superior Court of Merced County, 238 P. 1033, 194 Cal. 407.

successor to the right of plaintiff and may initiate the contempt proceeding;[92] but if the injunction operates only in personam, in order for one to be entitled to institute the proceeding as a successor in right, he must occupy a status such as the personal representative substituted for deceased plaintiff after final decree, or the receiver of a corporation which was plaintiff in the injunction suit.[93] However, only those who have a present interest in the right or property protected may institute civil contempt proceedings, that is, the offense complained of must be injurious to the rights of plaintiff in the action,[94] as distinguished from those of the general public,[95] and it has been held that one who was not a party to the injunction proceeding and is not in privity with him is not entitled to have remedial punishment for his benefit imposed on the violator.[96]

While a criminal contempt proceeding may be instigated at the instance of the person in whose favor the injunction violated was granted,[97] the courts and the people are interested in its prosecution,[98] and where the injunction forbids acts which are in themselves an offense against the criminal laws of the state, the public is interested and every citizen has a right to make a complaint against persons who in violating the order of the court at the same time violate the criminal laws of the state.[99]

Where the court which granted the injunction took no steps toward holding defendant in contempt for disregarding its injunction, but instead granted an appeal, the appellate court is not called on, of its own motion, to proceed in the matter of contempt.[1]

d. Time for Instituting Proceedings

Although a reasonable time is allowed in which to commence contempt proceedings for violation of an injunction, laches after the violation may justify a denial of the application.

Where plaintiff in the injunction suit is suffering damage by reason of acts committed by defendant in violation of the injunction, he need not wait until the injurious acts have been fully completed and the full extent of the damages ascertained before proceeding against defendant to punish him for contempt.[2] However, while plaintiff is entitled to a reasonable time in which to commence contempt proceedings,[3] a long delay after the violation before making application to punish for contempt may be sufficient to justify the court in denying the application;[4] but the mere lapse of time since the rendition of the injunction decree will not bar a contempt proceeding against a person amenable to the injunction for its violation,[5] especially where the proceedings are criminal in character.[6] Hence, mere lapse of time between entry of the injunction order and its ultimate execution by issuance and service of the writ will not bar a proceeding for contempt against one who has knowingly violated it,[7] except where plaintiff's failure to obtain issuance of and to serve the injunction writ is of such a nature as to mislead defendant and make it reasonable for him to suppose that plaintiff does not intend to execute the order for an injunction.[8]

92. La.—Pizzolato v. Cataldo, 12 So. 2d 677, 202 La. 675.
Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.

93. Mo.—Popsicle Corporation of U. S. v. Pearlstein, supra.

94. Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105, 109, citing **Corpus Juris.**
32 C.J. p 504 note 93.

95. U.S.—Castner v. Pocahontas Collieries Co., C.C.Va., 117 F. 184.

96. N.Y.—People v. Ribas, 276 N.Y. S. 551, 153 Misc. 703.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

97. Va.—Deeds v. Gilmer, supra.

Head of government bureau who is authorized by statute to bring all actions to restrain violations of a particular statute may institute contempt proceedings for violation of an injunction granted to restrain violations of such statute.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F. 2d 622, reversing, D.C., 36 F.Supp. 138.

98. Ind.—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind.App. 100.

99. U.S.—Castner v. Pocahontas Collieries Co., C.C.Va., 117 F. 184.
32 C.J. p 504 note 95.

1. Tenn.—Illinois Cent. R. Co. v. Miles, 130 S.W.2d 111, 174 Tenn. 676.

2. Wis.—Stollenwerk v. Klovenow, 139 N.W. 203, 151 Wis. 355.

3. Tex.—Gulf, C. & S. F. R. Co. v. Ft. Worth & N. O. R. Co., 2 S. W. 199, 68 Tex. 98, reheard 3 S.W. 564, 68 Tex. 98.

4. U.S.—Matheson v. Hanna-Schoellkopf Co., C.C.Pa., 122 F. 836.
Limitations and laches in contempt proceedings generally see Contempt § 67.

Laches not shown
U.S.—California Fruit Growers Exchange v. Sunkist Drinks, D.C.N.Y., 25 F.Supp. 401.

5. Kan.—State v. Durein, 27 P. 148, 46 Kan. 695.
32 C.J. p 504 note 2.

Delay held excessive
Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist in and for Glacier County, 69 P.2d 746, 105 Mont. 72.

6. U.S.—Tosh v. West Kentucky Coal Co., Ky., 252 F. 44, 164 C.C. A. 156, 15 A.L.R. 376.

7. U.S.—Radio Corporation of America v. Cable Radio Tube Corporation, C.C.A.N.Y., 66 F.2d 778, certiorari denied Cable Piano Tube Corporation v. Radio Corporation of America, 54 S.Ct. 373, two cases, 290 U.S. 703, 78 L.Ed. 604.
Kan.—State v. Durein, 27 P. 148, 46 Kan. 695.
Knowledge or notice of injunction see supra § 261.

8. U.S.—Radio Corporation of America v. Cable Radio Tube Corporation, C.C.A.N.Y., 66 F.2d 778, certiorari denied Cable Piano Tube Corporation v. Radio Corporation of America, 54 S.Ct. 373, two cases, 290 U.S. 703, 78 L.Ed. 604—McCormick v. Jerome, C.C.N.Y., 15 F.Cas.No.8,721, 3 Blatchf. 486.

A statute imposing a limitation period on proceedings for criminal contempt is inapplicable to a civil contempt proceeding.[9]

e. Notice or Process

The party charged with contempt is entitled to due notice of the proceedings.

Whether the proceedings to punish for contempt in violating the provisions of an injunction are civil or criminal in their character the party charged with the contempt is entitled to due notice of the proceedings,[10] and general rules apply in determining the character and sufficiency of the notice.[11]

f. Parties

In general contempt proceedings for violation of an injunction, if of a civil nature, are between the parties to the injunction proceeding, and, if of a criminal nature, are between the state and the violator of the injunction.

As a general rule contempt proceedings of a civil nature are between the parties to the injunction proceeding.[12] Ordinarily the party in whose favor the injunction was granted and for the protection of whose private rights and interests the contempt proceeding was instituted is the chief or real party in interest.[13] However, where the gravity of the situation warrants it, the state may properly be made a party to contempt proceedings instituted by a private party for the enforcement of its civil rights.[14]

Where the contempt proceeding is of a criminal nature it is between the public and the violator of the injunction;[15] private parties have little, if any, interest in proceedings for the punishment of a criminal contempt,[16] and the parties in whose favor the injunction was granted are not ordinarily proper parties to a criminal contempt proceeding for its violation.[17]

Misjoinder of parties. Persons who were not parties to the injunction proceeding cannot properly be joined as defendants with persons who were parties thereto in a contempt proceeding for violation of the injunction.[18]

g. Trial or Hearing

(1) In general
(2) Scope of inquiry

(1) In General

In general the alleged contemnor is entitled to a trial or hearing, which is summary and by the court, and is in substantial conformity with that followed in contempt proceedings generally.

A person charged with contempt for violation of an injunction is entitled to a hearing thereon.[19] Where not controlled by statute, the conduct of the hearing is in substantial conformity with that attending the hearing of issues in contempt proceedings generally.[20] Ordinarily the trial of the con-

9. U.S.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370—Odell v. Bausch & Lomb Optical Co., C.C.A.Ill., 91 F. 2d 359, certiorari denied 58 S.Ct. 284, 302 U.S. 756, 82 L.Ed. 585, rehearing denied 58 S.Ct. 408, 302 U. S. 780, 82 L.Ed. 603.

10. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.
Wyo.—Federal Land Bank of Omaha v. Sells, 280 P. 98, 40 Wyo. 498.
32 C.J. p 504 note 4.

Reasonable notice
Mo.—Sands v. Richardson, App., 252 S.W. 990.

11. Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.
Wyo.—Federal Land Bank of Omaha v. Sells, 280 P. 98, 40 Wyo. 498.

Citation insufficient
Mo.—Sands v. Richardson, App., 252 S.W. 990.

Precept
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

Rule to show cause
Ill.—Parsons v. People, 51 Ill.App. 467.
Wash.—State v. Plese, 235 P. 961, 134 Wash. 443.

12. U.S.—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S. Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

13. Ind.—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind.App. 100.
32 C.J. p 503 note 82.

14. Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

Labor dispute
Iowa.—Carey v. District Court of Jasper County, supra.

15. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940—Gompers v. Buck's Stove & Range Company, App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

16. U.S.—Bessette v. W. B. Conkey Co., Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997.
D.C.—Gompers v. Buck's Stove & Range Company, 33 App.D.C. 516.

17. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

18. Ga.—Tomlin v. Rome Stove & Range Co., 187 S.E. 879, 183 Ga. 183—Morris Fertilizer Co. v. Boykin, 101 S.E. 799, 149 Ga. 673.

19. Ohio.—Albert v. Gus Juengling & Son Co., 152 N.E. 29, 115 Ohio St. 64.

Person not party to injunction proceeding
Ohio.—Albert v. Gus Juengling & Son Co., supra.

Grounds for dismissal
Wis.—State v. Meese, 229 N.W. 31, 200 Wis. 454, reversing 225 N.W. 746, 200 Wis. 454.

20. Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 48 N. E.2d 781, 319 Ill.App. 252, reversed on other grounds 54 N.E.2d 462, 386 Ill. 368, and dismissing error 44 N.E.2d 613, 316 Ill.App. 306.
N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

Time for trial
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

Refusal of continuance held proper
Iowa.—Carey v. District Court of Jasper County, supra.

Reception of evidence
All the evidence relating to the acts of several defendants charged in separate petitions with violating the

tempt proceeding is summary[21] and by the court,[22] since, as appears in the C.J.S. title Juries §§ 35, 79, also 35 C.J. p 170 note 63–p 171 note 64, p 194 note 14–p 195 note 22, in the absence of statute authorizing it there is no right of trial by jury. Where the trial is by jury, on conflicting evidence, questions of fact are for the jury.[23]

Testimony of defendant. If the proceeding for contempt is criminal in its nature defendant may testify on the hearing if he chooses,[24] and if he does he may be cross-examined on the whole case;[25] but he cannot be compelled to testify against himself.[26] On the other hand, if the proceeding is civil in its nature the petitioner may call defendant as a witness.[27]

Dismissal. Where the case presented is insufficient to warrant an adjudication of contempt against defendant a motion to dismiss the contempt proceeding may be granted.[28]

Reopening case. The propriety of reopening the case after the judge has announced his opinion rests in the sound discretion of the court.[29]

(2) Scope of Inquiry

In general the only questions open for consideration are the jurisdiction of the court to award the injunction and whether it has been violated.

In general the only questions open for consideration in proceedings for contempt in violating an injunction are whether the court had jurisdiction to award the injunction[30] and whether it has been violated.[31] The court will not inquire into the merits of the case in which the injunction was issued,[32]

injunction may be taken before a master in one hearing of testimony. —Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 139 N.E. 887, 308 Ill. 488, affirming 226 Ill.App. 505, 532.

21. Kan.—State v. Cutler, 13 Kan. 131.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

22. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940, certiorari granted 44 S.Ct. 229, 263 U.S. 698, 68 L.Ed. 512.
Ill.—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372.

23. U.S.—McCourtney v. U. S., C.C. A.Mo., 291 F. 497, certiorari denied 44 S.Ct. 134, 263 U.S. 714, 68 L. Ed. 520.

24. N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

25. N.J.—Dorrian v. Davis, supra.

26. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940, certiorari granted 44 S.Ct. 229, 263 U.S. 698, 68 L.Ed. 512—U. S. v. Balaban, D. C.Ill., 26 F.Supp. 491.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.
32 C.J. p 503 note 89.

27. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

Documentary evidence
Pa.—Patterson v. Building Trades Council, 14 Pa.Dist. & Co. 839, 31 Pa.Co. 9, 401, affirmed Patterson v. Wyoming Val.Dist. Council, 31 Pa.Super. 112.

28. U.S.—International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, D.C.Cal., 25 F.Supp. 870, reversed on other grounds, C.C.A., International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, 106 F. 2d 871.

29. Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

30. Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 54 N. E.2d 462, 386 Ill. 368, dismissing error 44 N.E.2d 613, 316 Ill.App. 306, and reversing 48 N.E.2d 781, 319 Ill.App. 252—Court Rose No. 12, Foresters of America, of Spring Valley v. Corna, 117 N.E. 144, 279 Ill. 605—Farwell v. Horton, 22 N. E.2d 958, 301 Ill.App. 372.
32 C.J. p 506 note 42.
Validity of injunction order as affecting power in general to punish in contempt for violation see supra § 259.

Jurisdiction of court held to exist
Cal.—Gomes v. Superior Court in and for Merced County, 86 P.2d 1060, 30 Cal.2d 650.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

31. Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 54 N. E.2d 462, 386 Ill. 368, dismissing error 44 N.E.2d 613, 316 Ill.App. 306, and reversing 48 N.E.2d 781, 319 Ill.App. 252—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 139 N.E. 887, 308 Ill. 488, affirming 226 Ill.App. 505, 532—Court Rose No. 12, Foresters of America, of Spring Valley v. Corna, 117 N. E. 144, 279 Ill. 605—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Fishwick v. Lewis, 260 Ill. App. 230.
Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.
Mass.—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487.
N.J.—In re Martin, 171 A. 488, 12 N.J.Misc. 245, 358.
N.C.—Williamson v. City of High Point, 200 S.E. 388, 214 N.C. 693.
32 C.J. p 506 note 43.

Indirect violation
Wis.—State v. Meese, 229 N.W. 31, 200 Wis. 454, reversing 225 N.W. 746, 200 Wis. 454.

Good faith
Cal.—Gomes v. Superior Court in and for Merced County, 86 P.2d 1060, 30 Cal.2d 650.

32. U.S.—U. S. v. French, D.C.Mich., 9 F.Supp. 30.
Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases.
Colo.—Blanc v. People ex rel. Wilcoxson, 28 P.2d 801, 94 Colo. 10.
Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill. App. 505, affirmed 139 N.E. 887, 308 Ill. 488.
Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628.
Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.
Mass.—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487.
Neb.—Skinner v. Ashford, 268 N.W. 81, 131 Neb. 338.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
32 C.J. p 506 note 40.

Cannot modify injunction
N.C.—Williamson v. City of High Point, 200 S.E. 388, 214 N.C. 693.

and matters which were or could have been adjudicated in the original suit cannot be considered in the contempt proceedings[33] unless they involve the jurisdiction of the court.[34] Thus the sufficiency of the bill on which the injunction was granted cannot be questioned,[35] nor can objections that the order for the injunction was made erroneously,[36] or that it is too broad,[37] be considered.

It has been held, however, that it is essential to sustain the conviction of a person for a civil contempt of court that there shall exist not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party;[38] and in jurisdictions where remedial punishment will not be imposed on the violator if the injunction should not have been granted error in granting the injunction may be considered in a civil proceeding for contempt.[39] Also it would seem that, in jurisdictions where error in granting the injunction may affect the extent of punishment to be imposed in proceedings criminal in nature, inquiry as to the propriety of granting the injunction would be proper on the question of the extent of, but not the liability to, punishment.[40] Furthermore it has been held that the fact that the injunction has been dissolved may be taken into consideration in determining the equities in the proceedings for contempt.[41]

§ 272. —— Pleadings and Affidavits

a. In general
b. Sufficiency
c. Issues, proof, and variance

a. In General

The accusatory pleadings should be written and vary in form according to the practice in the particular jurisdiction.

In accordance with the rules applicable to contempt proceedings generally for acts committed out of the presence of the court, proceedings for contempt based on acts in violation of an injunction, whether of a civil or criminal nature, must be instituted by a written accusation,[42] at least where the contemnor was not a party to the injunction proceeding,[43] and various forms of accusation have been held permissible or required.[44] Thus it has been held that they may be instituted by petition,[45] affidavit,[46] or by information, if the proceedings are

Issues in main case held not determined
N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.

33. Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases.
Ill.—Ossey v. Retail Clerks' Union, 158 N.E. 162, 326 Ill. 405—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 139 N.E. 887, 308 Ill. 488, affirming 226 Ill.App. 505, 532.
Neb.—Skinner v. Ashford, 268 N.W. 81, 131 Neb. 338.
32 C.J. p 506 note 41.

Law of the case
N.Y.—S. Blechman & Sons v. Osman, 296 N.Y.S. 285, 251 App.Div. 271.

34. N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.
Collateral attack on adjudication of contempt see infra § 274.

Existence of labor dispute
N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, supra.

35. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724.
Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P. 2d 474, two cases.
Ill.—Lyon & Healy v. Piano, Organ & Musical Instrument Workers' International Union, 124 N.E. 443, 289 Ill. 176—O'Brien v. People, 75 N. E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 400.

Failure to state cause of action
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
N.Y.—People v. McKane, 28 N.Y.S. 981, 78 Hun 154.

36. U.S.—Brotherhood of Railway and S. S. Clerks, Freight Handlers, Express and Station Employees, Southern Pac. Lines in Texas and Louisiana, v. Texas & N. O. R. Co., D.C.Tex., 24 F.2d 426, affirmed, C.C. A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L. Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.
Ill.—People v. Dyer, 108 N.E. 994, 268 Ill. 156, Ann.Cas.1916D 785.
N.J.—In re Martin, 171 A. 488, 12 N. J.Misc. 245, 358.
32 C.J. p 506 note 44.

37. Ill.—Lyon & Healy v. Piano, Organ & Musical Instrument Workers' International Union, 124 N.E. 443, 289 Ill. 176.
Mass.—Bacon v. Onset Bay Grove Ass'n, 190 N.E. 713, 286 Mass. 487—Irving & Casson-A. H. Davenport Co. v. Howlett, 118 N.E. 901, 229 Mass. 560.
N.J.—In re Martin, 171 A. 488, 12 N.J.Misc. 245, 358.

Injunction broader than bill
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 400.

38. N.Y.—People v. McKane, 28 N.Y. S. 981, 78 Hun 154—Northland Rubber Co., Inc. v. International Auto League, 143 N.Y.S. 9.

39. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

40. Va.—Deeds v. Gilmer, supra.

41. U.S.—Shuler v. Raton Waterworks Co., N.M., 247 F. 634, 160 C. C.A. 44.

42. Okl.—Fagin v. Thoroughman, 126 P.2d 982, 190 Okl. 649—Rocher v. Williams, 83 P.2d 867, 183 Okl. 613.
Tex.—Ex parte Cox, 127 S.W.2d 443, 133 Tex. 152.

43. Ohio.—Albert v. Gus Juenglung & Son Co., 152 N.E. 29, 115 Ohio St. 64.

44. U.S.—Hammond Lumber Co. v. Sailors' Union of the Pacific, C.C. Cal., 149 F. 577.

Alternative forms permitted
U.S.—Hammond Lumber Co. v. Sailors' Union of the Pacific, supra.
Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.
Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

45. Ill.—Hake v. People, 82 N.E. 561, 230 Ill. 174.
32 C.J. p 504 note 9.

Petition as indictment
N.J.—In re Staire, 162 A. 195, 111 N.J.Eq. 285.

46. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

of a criminal character;[47] but even in criminal proceedings for contempt an information or indictment has been held not necessary,[48] so long as the charges are set forth in a verified complaint or affidavit.[49]

An affidavit filed after the trial, without notice to defendant, is not a sufficient basis for contempt proceedings.[50]

Answer and reply. Defendant may file a formal answer to the accusatory pleading.[51] In some jurisdictions he may answer either by affidavit, verified answer, or plea of not guilty.[52] The filing of replies is proper only in a civil contempt case.[53]

b. Sufficiency

The complaint or affidavit in contempt proceedings for violation of an injunction should allege sufficient facts to charge a contempt by defendant.

In accordance with general rules, the initiatory pleadings in contempt proceedings for violation or disregard of an injunction must allege sufficient facts to charge a contempt by defendant,[54] as no intendment or presumption will be indulged in to aid the complaint or affidavit.[55] The charges must be clearly set forth,[56] and, while it has been held that general declarations or ultimate facts only are required,[57] and that it is not necessary to set forth the evidence by which the general declarations are to be established,[58] in a proper case,[59] a bill of particulars may be exacted.[60] It has also been held that the complaint must clearly and fairly apprise the person charged of the nature and cause of the accusation against him,[61] and that the acts con-

Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—Ex parte Wood, 227 P. 908, 194 Cal. 49—Ex parte Wenzler, 74 P.2d 297, 23 Cal.App.2d 726—Ex parte Morford, 31 P.2d 406, 137 Cal.App. 662.

Kan.—State v. Cutler, 13 Kan. 131.

Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

Utah.—Liquor Control Commission v. McGillis, 65 P.2d 1136, 91 Utah 586.

Wyo.—Federal Land Bank of Omaha v. Sells, 280 P. 98, 40 Wyo. 498.

32 C.J. p 504 note 10.

47. U.S.—Castner v. Pocahontas Collieries Co., C.C.Va., 117 F. 184.

48. U.S.—Jennings v. U. S., C.C.A. Mo., 264 F. 399—U. S. v. Agler, C. C.Ind., 62 F. 824.

49. U.S.—Jennings v. U. S., C.C.A. Mo., 264 F. 399.

32 C.J. p 504 note 13.

50. Wyo.—Federal Land Bank of Omaha v. Sells, 280 P. 98, 40 Wyo. 498.

51. U.S.—Hammond Lumber Co. v. Sailors' Union of the Pacific, C.C. Cal., 149 F. 577.

52. Mont.—State v. District Court of Eighth Judicial Dist., in and for Cascade County, 232 P. 204, 72 Mont. 206.

53. Ind.—Denny v. State, 182 N.E. 318, 203 Ind. 682.

54. Cal.—Ex parte McDonald, 16 P. 2d 995, 217 Cal. 29—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—Ex parte Wood, 227 P. 908, 194 Cal. 49—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641—Ex parte Wenzler, 74 P.2d 297, 23 Cal.App.2d 726—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal. App. 713.

Colo.—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.

Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 262 N.W. 762, 273 Mich. 153.

Wash.—State v. Piese, 235 P. 961, 134 Wash. 443.

W.Va.—State v. Lewis, 168 S.E. 812, 113 W.Va. 529—State ex rel. Mineral State Coal Co. v. Komar, 168 S.E. 810, 113 W.Va. 526.

32 C.J. p 504 note 17.

Averments held sufficient

Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—Ex parte Wood, 227 P. 908, 194 Cal. 49—Clear Lake Water Co. v. Superior Court in and for Mendocino County, 92 P.2d 921, 33 Cal.App.2d 710—Ex parte Morford, 31 P.2d 406, 137 Cal.App. 662.

Ga.—Roberson v. Orr, 122 S.E. 781, 158 Ga. 34.

Ill.—Sefcik Dairy Co. v. Jurca, 6 N.E. 2d 481, 288 Ill.App. 618, transferred, see 194 N.E. 508, 359 Ill. 237.

Mass.—State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 69 P.2d 972, 105 Mont. 106.

Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.

Averments held insufficient

U.S.—Edwards v. U. S., C.C.A.Cal., 123 F.2d 465.

55. Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.

56. U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491.

Utah.—Liquor Control Commission v. McGillis, 65 P.2d 1136, 91 Utah 586.

Pleadings held sufficient

U.S.—U. S. v. French, D.C.Mich., 9 F.Supp. 30.

Pleadings held insufficient

Kan.—Heatherman v. Board of Com'rs of Kingman County, 296 P. 707, 132 Kan. 590.

57. Colo.—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.

58. Colo.—Guiraud v. Nevada Canal Co., supra.

59. Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966.

60. U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491—U. S. v. French, D. C.Mich., 9 F.Supp. 30.

Dismissal on failure to make more specific

Kan.—Heatherman v. Board of Com'rs of Kingman County, 296 P. 707, 132 Kan. 590.

61. U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491—In re Reese, Kan., 107 F. 942, 47 C.C.A. 87.

Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.

Mont.—State ex rel. Young v. District Court of Twelfth Judicial Dist., 58 P.2d 1243, 102 Mont. 487.

Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

Tex.—Ex parte Cox, 127 S.W.2d 443, 133 Tex. 152.

Wash.—State v. Piese, 235 P. 961, 134 Wash. 443.

32 C.J. p 505 note 22.

Crime not charged

U.S.—Taliaferro v. U. S., C.C.A.Va., 290 F. 906, affirming, D.C., U. S. v. Taliaferro, 290 F. 214.

Accusations held sufficient

Okl.—Fagin v. Thoroughman, 126 P. 2d 982, 190 Okl. 649—Seifried v. State ex rel. Bash, 86 P.2d 1008, 184 Okl. 299—Rocher v. Williams, 83 P. 2d 867, 183 Okl. 613.

Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

stituting the contempt must be stated.[62] Technical accuracy,[63] or the particularity required in an indictment,[64] has been held not necessary, although it has been held that the pleadings must charge the offense as explicitly,[65] or with as great certainty,[66] as is required in a criminal proceeding.

Particular matters. Although there is authority to the contrary,[67] it has been held that the injunction charged to have been violated must be alleged or set forth in some appropriate manner;[68] and it must be alleged, or appear from the facts averred, that the injunction was in effect when the violation occurred;[69] that defendant was within the terms of, and bound by, the injunction;[70] that the act complained of was the act restrained;[71] that defendant and not some other person caused or was responsible for the violation complained of;[72] and that he had notice or actual knowledge of its contents.[73] However, an express recital that defendant had notice of the injunction is unnecessary where the contempt proceeding is prosecuted as a part of the injunction proceeding and defendant appeared therein.[74]

A specific charge of willfulness is not necessary where the facts charged show it,[75] as where the pleadings contain allegations of specific facts showing a direct violation of the injunction order.[76] While there is authority which indicates that, regardless of whether the contempt proceeding is civil or criminal in nature, injury to plaintiff need not be alleged,[77] it has been held that injury to plaintiff must be alleged if the proceeding is civil in character;[78] but that such an averment is unnecessary if the proceeding is criminal in character, for the purpose of vindicating the power and dignity of the court.[79]

Pendency of the proceedings in which the injunction issued need not be alleged or shown.[80] Generally both in civil and criminal proceedings for contempt it is not necessary to set out in detail the prior orders and proceedings in the injunction pro-

62. U.S.—Armstrong v. U. S., C.C.A. Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.
Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.
32 C.J. p 505 note 20.

Acts constituting crime
Where the proceeding is brought under a statute which is applicable when the act charged as a contempt is of such character as also to constitute a crime, it is sufficient if the acts alleged prima facie constitute a crime.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940.

Averments held sufficient
U.S.—Armstrong v. U. S., C.C.A.Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—Dunham v. U. S., C.C.A.La., 289 F. 376.
Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734.
Colo.—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.

Averments held insufficient
Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 262 N.W. 762, 273 Mich. 153.

63. U.S.—Armstrong v. U. S., C.C.A. Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—U. S. v. French, D.C. Mich., 9 F.Supp. 30.
32 C.J. p 504 note 16.

Petition held sufficient
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

64. U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491.
32 C.J. p 505 note 21.

65. N.J.—In re Staire, 162 A. 195, 111 N.J.Eq. 285.

Time, place, and nature of the acts must be alleged in criminal contempt proceedings.
U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491.
Ind.—Oakland Coal Co. v. Wilson, 149 N.E. 54 196 Ind. 501.

66. W.Va.—State v. Lewis, 168 S. E. 812, 113 W.Va. 529.

67. Ill.—Hake v. People, 82 N.E. 561, 230 Ill. 174.

68. U.S.—Armstrong v. U. S., C.C. A.Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

Pleading held sufficient
Cal.—Ex parte Wenzler, 74 P.2d 297, 23 Cal.App.2d 726.
Ind.—Locrasto v. State, 173 N.E. 456, 202 Ind. 277.
Utah.—Larsen v. Madsen, 48 P.2d 429, 87 Utah 48.
Wash.—State v. Plese, 235 P. 961, 134 Wash. 443.

69. Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.

70. Cal.—Ex parte McDonald, 16 P. 2d 995, 217 Cal. 29.
W.Va.—State v. Lewis, 168 S.E. 812, 113 W.Va. 529—State v. Komar, 168 S.E. 810, 113 W.Va. 526.
32 C.J. p 505 note 18.

71. Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.
Mo.—Sands v. Richardson, App., 252 S.W. 990.

72. Mich.—Hipp v. Buhl Optical Co., 275 N.W. 793, 282 Mich. 128.
Mont.—State ex rel. Young v. District Court of Twelfth Judicial Dist., 58 P.2d 1243, 102 Mont. 487.

73. Ga.—Tomlin v. Rome Stove & Range Co., 187 S.E. 879, 183 Ga. 183.
32 C.J. p 505 note 19.

Persons not parties to injunction proceeding
Ga.—Tomlin v. Rome Stove & Range Co., 187 S.E. 879, 183 Ga. 183.

Pleadings held sufficient
U.S.—Dunham v. U. S., C.C.A.La., 289 F. 376.
Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.

74. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.

75. Okl.—Fagin v. Thoroughman, 126 P.2d 982, 190 Okl. 649.

76. Okl.—Fagin v. Thoroughman, supra.

77. Utah.—Utah Power & Light Co. v. Richmond Irr. Co., 13 P.2d 320, 80 Utah 105.

78. Ill.—People v. Diedrich, 30 N.E. 1038, 141 Ill. 665.

To warrant jail sentence
Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

79. Ill.—People v. Diedrich, 30 N.E. 1038, 141 Ill. 665.

80. Cal.—Mattos v. Superior Court in and for Merced County, 86 P. 2d 1056, 30 Cal.App.2d 641.
32 C.J. p 505 note 24.

ceeding,[81] as the court will take judicial notice of its own order and records in the cause.[82] The pleadings need not show that a bond was given prior to the issuance of the restraining order claimed to have been violated.[83]

Surplusage. As much of the petition as charges the commission of acts which are in no sense in violation of the injunction will be stricken out on motion.[84] It has been held that the mere conclusion of the petition that defendant should be held for a civil contempt should not tie the hands of the court in punishing a willful disregard of its authority, and may be rejected as surplusage.[85]

Prayer for punishment. Whether the proceedings be civil or criminal in nature the petition or affidavit should contain a prayer that defendant be punished.[86] If the proceeding is criminal in nature, defendant may be required to show cause why he should not be attached and punished for contempt;[87] but, if it is civil in nature, the relief sought should be that the court take all necessary measures to require defendant to repair the damages cause by his violation of the injunction,[88] and he should not be required to show cause why he should not be attached and punished.[89]

Verification; information and belief. Conformably to general rules, verification by the oath of the moving party or by the affidavit of others is ordinarily necessary,[90] and the requirement is held jurisdictional.[91] The pleading must be sworn to by complainant on his personal knowledge or supported by the affidavit of the person or persons who have personal knowledge of the facts set out in the pleading.[92] If the contempt proceeding is of a civil nature, the answer need not be verified.[93]

In some jurisdictions the facts stated in the affidavit may be averred on information and belief.[94] If a criminal contempt is charged the facts in the information must be verified by the oath of the informant and on his personal responsibility,[95] and it must contain an averment that the petitioner believes them and charges them to be true.[96]

Amendment. In a proper case, the pleadings may be amended.[97]

Action for damages. In an independent action for damages for violation of an injunction the rules applicable to the pleadings in actions for damages generally apply.[98]

Return, answer, or plea. General rules apply to the return, plea, or answer in a contempt proceeding for violation of an injunction.[99] A plea which denies the jurisdiction of the court both as to the persons cited and as to the subject matter of the proceeding is in the nature of a demurrer and should be set down for a hearing so that its sufficiency may be considered,[1] and a demurrer to such plea is improper.[2]

c. Issues, Proof, and Variance

The general rules governing issues, proof, and variance apply to contempt proceedings for the violation of injunctions.

81. Ill.—Hake v. People, 82 N.E. 561, 230 Ill. 174.
32 C.J. p 505 note 25.

82. Ill.—Hake v. People, supra.
Utah.—Utah Power & Light Co. v. Richmond Irr. Co., 13 P.2d 320, 80 Utah 105.
32 C.J. p 505 note 26.

83. Cal.—Gardner v. Superior Court in and for Los Angeles County, 276 P. 363, 97 Cal.App. 713.

84. U.S.—Hammond Lumber Co. v. Sailors' Union of the Pacific, C.C. Cal., 149 F. 577.

85. U.S.—Employers' Teaming Co. v. Teamsters Joint Counsel, C.C.Ill., 141 F. 679, reversed on other grounds 163 F. 16, 89 C.C.A. 494, 23 L.R.A.,N.S., 1295, certiorari denied 29 S.Ct. 696, 214 U.S. 514, 53 L.Ed. 1063.
32 C.J. p 505 note 34.

86. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
32 C.J. p 505 note 29.

Same relief by state and private party
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

87. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

88. Ind.—Denny v. State, supra.

89. Ind.—Denny v. State, supra.

90. Ind.—Denny v. State, supra.
Me.—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148.
Md.—Murdock's Case, 2 Bland 461, 20 Am.D. 381.
Tex.—Ex parte Cox, 127 S.W.2d 443, 133 Tex. 152.

91. Me.—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148.

Cannot be waived
Me.—Charles Cushman Co. v. Mackesy, supra.

92. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

93. Ind.—Denny v. State, supra.

94. Mont.—State ex rel. Young v. District Court of Twelfth Judicial Dist., 58 P.2d 1243, 102 Mont. 487.
Tex.—Ex parte Dupree, 105 S.W. 493, 101 Tex. 150.
32 C.J. p 505 note 32.

95. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

96. N.J.—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

97. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

Permissible amendments
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.

98. Complaint held sufficient
Cal.—Kirby v. San Francisco Savings & Loan Soc., 273 P. 609, 95 Cal. App. 757.

99. Return held sufficient
Fla.—Anderson v. Tower Amusement Co., 160 So. 523, 118 Fla. 895, vacating 159 So. 782, 118 Fla. 437.
S.C.—Ex parte Evans, 129 S.E. 210, 138 S.C. 112.

1. Ill.—Chambers v. City of Chicago, 270 Ill.App. 217.

2. Ill.—Chambers v. City of Chicago, supra.

General rules governing issues, proof and variance apply to contempt proceedings for the violation or disregard of an injunction,[3] and defenses which were not pleaded may not be considered.[4] In some jurisdictions where the contempt proceeding is criminal in nature defendant is entitled to a discharge on his verified answer, if the answer, considered with the information, is sufficient to show lack of intent to defy the authority of the court;[5] but where the contempt proceeding is civil in nature a sworn answer, however full and unequivocal, will not entitle him to a discharge.[6]

Defendant cannot be found guilty of any acts, or an offense, other than those charged.[7] If defendant was merely an aider and abettor and not in terms enjoined by the injunction order the charge made in the pleadings in the contempt proceeding must be for contempt in knowingly assisting in the breach,[8] and not for contempt in disobeying and violating the injunction.[9]

Proof that plaintiff has been injured by the violation is essential where the proceeding is of a civil nature,[10] but where the proceeding is of a criminal nature such proof is not required.[11] While both parties are entitled to introduce evidence,[12] the scope thereof depends on the issues formed by the pleadings,[13] and evidence of any acts other than those charged is not admissible.[14] However, it has been held that, although the petition alleges that defendant has committed a civil contempt, evidence that defendant has committed a criminal contempt is admissible where the affidavits incorporated in the petition aver facts showing a criminal contempt and furnish notice for the introduction of such facts.[15]

§ 273. —— Evidence

a. In general
b. Weight and sufficiency

a. In general

The burden of proof to establish the fact that a contempt has been committed is on the party asserting it. General rules govern the admissibility of evidence.

If the contempt proceeding is criminal in its nature, defendant is entitled to the benefit of the criminal law presumption of innocence, with its strict requirement of proof for conviction.[16] In a civil contempt proceeding, where it appears that the interests protected by the injunction are being violated, and that plaintiff still retains such interest, the injury to him will be presumed from a violation of the injunction without direct proof of that fact.[17]

Whether the proceedings are civil or criminal in their nature, the burden of proof to establish the fact that a contempt has been committed is on the party asserting it,[18] but if an affirmative defense

3. **Framing of issues**
N.Y.—American Fur Liners Contractors Ass'n v. Lucchi, 293 N.Y.S. 1, 249 App.Div. 513.

4. Ala.—Ft. Payne Co. v. City of Ft. Payne, 114 So. 63, 216 Ala. 679.
Under plea of not guilty
Mont.—State v. District Court of Eighth Judicial Dist., in and for Cascade County, 232 P. 204, 72 Mont. 206.

5. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

6. U.S.—U. S. v. Debs, C.C.Ill., 64 F. 724.
Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40—Loven v. People, 42 N.E. 82, 158 Ill. 159.
Ind.—Locrasto v. State, 178 N.E. 456, 202 Ind. 277—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind.App. 100.

7. Cal.—Mattos v. Superior Court in and for Merced County, 86 P.2d 1056, 30 Cal.App.2d 641.
N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union No. 20378, 6 A.2d 660, 125 N.J.Eq. 539—In re Staire, 162 A. 195, 111 N.J.Eq. 285.
Tex.—Ex parte Cox, 127 S.W.2d 443, 133 Tex. 152.
32 C.J. p 505 note 87.

8. U.S.—American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3, C.C.Ohio, 90 F. 598.
32 C.J. p 490 note 94.
Approved practice
N.J.—In re Wholesale Licensed Alcoholic Beverage Salesmen's Union No. 20378, 6 A.2d 660, 125 N.J.Eq. 539.

9. U.S.—In re Reese, Kan., 107 F. 942, 47 C.C.A. 87.
32 C.J. p 490 note 95.

10. N.Y.—Stubbs v. Ripley, 39 Hun 626.
Extent of injury
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

11. N.Y.—Stubbs v. Ripley, 39 Hun 626.

12. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind.App. 100.

13. U.S.—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491.

14. Or.—State v. Sieber, 88 P. 313, 49 Or. 1.
32 C.J. p 505 note 86.

15. U.S.—Garrigan v. U. S., Ill., 163 F. 16, 89 C.C.A. 494, 23 L.R.A.,N.S., 1295, certiorari denied 29 S.Ct. 696, 214 U.S. 514, 53 L.Ed. 1063.

16. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940, certiorari granted 44 S.Ct. 229, 263 U.S. 698, 68 L. Ed. 512—U. S. v. Balaban, D.C.Ill., 26 F.Supp. 491.
Del.—State v. Nouris, 136 A. 887, 15 Del.Ch. 282.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42—In re Larkin, 142 A. 822, 103 N.J.Eq. 195.
32 C.J. p 506 note 49.

17. Ill.—Loven v. People, 42 N.E. 82, 158 Ill. 159—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.

18. U.S.—Cohn v. Kramer, C.C.A. Mich., 136 F.2d 293—U.S. v. Balaban, D.C.Ill., 26 F.Supp. 491.
Cal.—Ex parte Clarke, App., 140 P. 2d 92.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

is set up or called for the burden is on defendant to sustain it.[19] Thus, if defendant desires to justify his conduct under an exception stated in the injunction, the burden is on him to bring his acts within the exception.[20]

Admissibility. The rules governing the admissibility of evidence in contempt proceedings generally apply in contempt proceedings for violation of an injunction.[21]

b. Weight and Sufficiency

While a preponderance of the evidence is sufficient to prove a civil contempt, in contempt proceedings of a criminal nature the guilt of the defendant ordinarily must be established beyond a reasonable doubt.

Although contempt may be proved by circumstantial evidence,[22] in conformity with the rules governing the weight and sufficiency of the evidence in contempt proceedings generally, one should not be adjudged in contempt for violation of an injunction except on clear proof of such violation,[23] and defendant is entitled to the benefit of every reasonable doubt.[24] In order for acquiescence by plaintiff in the violation to be available to defendant as a defense it must be established by clear and convincing evidence.[25]

Although it has been held that a defendant's guilt need not be established beyond a reasonable doubt, but that more than a mere preponderance of the evidence is required,[26] as a general rule in contempt proceedings of a criminal nature for the violation of an injunction the guilt of defendant must be established beyond a reasonable doubt.[27] In cases of civil contempt it has been held that the proof need not be beyond a reasonable doubt;[28] and, in accordance with the rules governing in civil cases generally,[29] a preponderance of evidence is necessary and sufficient.[30] Although an act charged may be a crime or criminal in its nature, yet unless charged as a crime, the rules of evidence applicable to civil cases will apply.[31]

Although the failure of defendant to deny the truth of the charges on the hearing has been held to admit the truth thereof,[32] neither defendant's denial of a violation of the injunction, by affidavit or otherwise[33] nor his answers to interrogatories[34] are conclusive, but may be contradicted by evidence. Evidence, even though conflicting, may be sufficient to sustain the finding of a referee that defendant has been guilty of a contempt.[35] Where there is no evidence that defendant had directly or indirectly violated the injunction, the contempt proceedings must be dismissed.[36]

Illustrations of sufficient evidence. In the notes may be found cases in which the evidence was held sufficient: To show that defendant was guilty of contempt;[37] to show that defendant was not guilty

Mo.—Temco Mfg. Co. v. National Electric Ticket Register Co., 18 S.W.2d 142, 223 Mo.App. 420.
N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42.
R.I.—Jackson Furniture Co. v. Lieberman, 14 A.2d 27, 65 R.I. 224.
32 C.J. p 506 note 51.

19. Tenn.—Higgins v. Lewis, 137 S.W.2d 308, 23 Tenn.App. 648.

20. N.J.—Thompson v. Pennsylvania R. Co., 21 A. 182, 48 N.J.Eq. 105, reversed on other grounds 24 A. 544, 49 N.J.Eq. 318.

21. Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.
32 C.J. p 506 note 55.

Evidence held admissible
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

Evidence held inadmissible
U.S.—Camille, Inc., v. F. W. Fitch Co., D.C.Iowa, 30 F.Supp. 532.
Ill.—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
Utah.—Clover Leaf Dairy Co. v. Van Gerven, 275 P. 9, 73 Utah 471.

22. U.S.—U. S. v. Taliaferro, D.C. Va., 290 F. 214, affirmed Taliaferro v. U. S., C.C.A., 290 F. 906.

23. R.I.—Kennedy v. Frechette, 126 A. 641.

24. Mo.—Temco Mfg. Co. v. National Electric Ticket Register Co., 18 S.W.2d 142, 223 Mo.App. 420.

25. Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

26. Iowa.—Kochen v. District Court of Woodbury County, 199 N.W. 290, 198 Iowa 1.

27. U.S.—Michaelson v. U. S. ex rel. Chicago, St. P., M. & O. Ry. Co., Wis., 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, reversing, C.C.A., 291 F. 940, certiorari granted 44 S.Ct. 229, 263 U.S. 698, 68 L.Ed. 512—U. S. v. Balaban, D.C. Ill., 26 F.Supp. 491.
Del.—State v. Baker, 169 A. 598, 20 Del.Ch. 48—State v. Nouris, 136 A. 887, 15 Del.Ch. 282.
Mont.—State v. District Court of Eighth Judicial Dist., in and for Cascade County, 232 P. 204, 72 Mont. 206.
N.J.—In re Larkin, 142 A. 822, 103 N.J.Eq. 195.
32 C.J. p 507 note 61.

28. Ill.—Flannery v. People, 80 N.E. 60, 225 Ill. 62.
32 C.J. p 507 note 58.

29. Ill.—Flannery v. People, supra.

30. Ill.—McBride v. People ex rel. Goodman Mfg. Co., 80 N.E. 306, 225 Ill. 315.
32 C.J. p 507 note 57.

31. Ill.—Flannery v. People, 80 N.E. 60, 225 Ill. 62.
N.Y.—Typothetæ v. Typographical Union No. 6, 117 N.Y.S. 70, 132 App Div. 921.

32. Cal.—Ex parte Wood, 227 P. 908, 194 Cal. 49.

By party who testified
N.J.—In re Martin, 171 A. 488, 12 N.J.Misc. 245, 358.

33. Ill.—Loven v. People, 42 N.E. 82, 158 Ill. 159.
Tenn.—In re Underwood, 2 Humphr. 46.

34. Ill.—Crook v. People, 16 Ill. 534.
Ind.—Anderson v. Indianapolis Drop Forging Co., 72 N.E. 277, 34 Ind. App. 100.

35. U.S.—Hennessey v. Budde, C.C. N.Y., 82 F. 541.

36. Wash.—Power v. Geck, 206 P. 838, 120 Wash. 49.

37. U.S.—In re La Varre, D.C.Ga., 48 F.2d 216.

of contempt;[38] to show violation of the injunction;[39] to show that defendant had actual knowledge of the injunction or restraining order;[40] to show lack of good faith by defendant;[41] to show that the injunction order was not void;[42] to show that officers of a corporation or association violated an injunction;[43] or to show that the court in sentencing defendant abused its discretion in view of mitigating circumstances.[44]

Illustrations of insufficient evidence. In the notes may be found cases in which the evidence was held insufficient: To establish a contempt;[45] to show a breach or violation of the injunction;[46] to show that defendant was guilty of contempt;[47] to show

Ala.—Bankston v. Lakeman, 122 So. 819, 219 Ala. 508—Frutiger v. State ex rel. Davis, 188 So. 695, 28 Ala. App. 503.

Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407—Clear Lake Water Co. v. Superior Court in and for Mendocino County, 92 P.2d 921, 33 Cal. App.2d 710—Gomes v. Superior Court in and for Merced County, 86 P.2d 1060, 30 Cal.App.2d 650.

Fla.—State ex rel. Buckner v. Culbreath, 9 So.2d 111, 150 Fla. 876.

Ga.—Roberson v. Orr, 122 S.E. 781, 158 Ga. 34.

Ill.—Edelman Bros. v. Baikoff, 38 N.E.2d 534, 312 Ill.App. 381—Farwell v. Horton, 22 N.E.2d 958, 301 Ill. App. 372—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill. App. 323—Pure Milk Ass'n v. Wagner, 6 N.E.2d 503, 288 Ill.App. 630, transferred, see 2 N.E.2d 288, 363 Ill. 316—Sefcik Dairy Co. v. Jurca, 6 N.E.2d 481, 288 Ill.App. 618, transferred, see 194 N.E. 508, 359 Ill. 237—Edelman Bros. v. Baikoff, 2 N.E. 2d 579, 284 Ill.App. 651.

Iowa.—Eicher v. Tinley, 264 N.W. 591, 221 Iowa 293.

N.J.—In re Martin, 171 A. 488, 12 N. J.Misc. 245, 358.

N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.

Or.—State v. Rogers, 265 P. 784, 124 Or. 656.

32 C.J. p 507 note 66.

Circumstantial evidence

U.S.—U. S. v. Taliaferro, D.C.Va., 290 F. 214, affirmed, C.C.A., Taliaferro v. U. S., 290 F. 906.

Labor union or members thereof

Ill.—Ossey v. Retail Clerks' Union, 158 N.E. 162, 326 Ill. 405—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 139 N.E. 887, 308 Ill. 488, affirming 226 Ill.App. 505, 532—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28—Nusbaum v. Retail Clerks' International Protective Ass'n, 227 Ill.App. 206.

N.J.—L. Balk Co-op. Co. v. International Fur Workers' Union of the U. S. and Canada, 123 A. 298, 95 N.J.Eq. 691.

Tex.—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ.App., 97 S.W.2d 379.

Aiders and abettors

Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

38. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 202, prior opinions, App., 116 P.2d 643, and 114 P.2d 45.

N.Y.—Panagiotou v. Worlock Stone Co., 33 N.Y.S.2d 352, 263 App.Div. 165, appeal denied 34 N.Y.S.2d 270, 263 App.Div. 1037.

Utah.—Clover Leaf Dairy Co. v. Van Gerven, 275 P. 9, 73 Utah 471.

32 C.J. p 507 note 67.

39. U.S.—Armstrong v. U. S., C.C.A. Ind., 18 F.2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—Lawson v. U. S., C.C.A.Ark., 297 F. 418.

Ark.—Southwestern Loan & Finance Corporation v. Arkansas Transp. Co., 45 S.W.2d 501, 184 Ark. 1153.

Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.

Colo.—Wyman v. Bell, 41 P.2d 242, 96 Colo. 223.

Ill.—Ossey v. Retail Clerks' Union, 158 N.E. 162, 326 Ill. 405—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 4 L.R.A.,N.S., 1001, 110 Am.S.R. 248, affirming 121 Ill.App. 647—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28.

Kan.—State ex rel. Kansas State Board of Medical Registration and Examination v. Martin, 130 P.2d 601, 155 Kan. 801.

Ky.—Allen v. Black Bus Lines, 164 S.W.2d 482, 291 Ky. 278.

Mont.—State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 69 P.2d 972, 105 Mont. 106.

Technical violation

Ark.—Jones v. State, 281 S.W. 663, 170 Ark. 863.

40. U.S.—Minerich v. U. S., C.C.A. Ohio, 29 F.2d 565, certiorari denied 49 S.Ct. 264, 279 U.S. 843, 73 L.Ed. 989.

32 C.J. p 507 note 68.

41. U.S.—In re La Varre, D.C.Ga., 48 F.2d 216.

Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

42. Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734.

43. U.S.—Davis v. Securities and Exchange Commission, C.C.A.Ill., 109 F.2d 6, certiorari denied 60 S. Ct. 889, 309 U.S. 687, 84 L.Ed. 1030.

Ill.—Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago, Local 753, 43 N.E.2d 700, 316 Ill. App. 47.

Pa.—City of Scranton v. People's Coal Co., 117 A. 673, 274 Pa. 63.

44. Mo.—Willett v. Tichenor, App., 220 S.W. 709.

45. Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

Del.—State v. Baker, 169 A. 598, 20 Del.Ch. 48.

Ind.—Moore v. Polk Sanitary Milk Co., 200 N.E. 228, 209 Ind. 558.

Tex.—Ex parte Garza, 95 S.W. 1059, 50 Tex.Cr. 106.

46. Cal.—Ex parte Clarke, App., 140 P.2d 92.

Conn.—Palverari v. Finta, 26 A.2d 229, 129 Conn. 38.

Mich.—Wolgamood v. Village of Constantine, 4 N.W.2d 697, 302 Mich. 384.

N.Y.—Siegel v. New York Telephone Co., 300 N.Y.S. 8, 252 App.Div. 908—Woodworth v. Village of Nunda, 211 N.Y.S. 284, 213 App.Div. 57—Seed Filter & Manufacturing Co. v. Stocking, 158 N.Y.S. 687, 172 App.Div. 726.

R.I.—Jackson Furniture Co. v. Lieberman, 14 A.2d 27, 65 R.I. 224.

Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.

Wis.—General Bronze Corporation v. Schmeling, 250 N.W. 412, 213 Wis. 150, 93 A.L.R. 114.

32 C.J. p 507 note 72.

47. U.S.—Edwards v. U. S., C.C.A. Cal., 123 F.2d 465—Davis v. Securities and Exchange Commission, C. C.A.Ill., 109 F.2d 6, certiorari denied 60 S.Ct. 889, 309 U.S. 687, 84 L.Ed. 1030.

Mich.—Wolgamood v. Village of Con-

that defendant had knowledge of the injunction;[48] or to show that defendant is unable to obey a mandatory injunction.[49]

§ 274. —— Judgment

The judgment or order should comply as to form, rendition, and entry with the rules applicable in contempt proceedings generally; it should show jurisdiction and the facts constituting the contempt, and should be definite and certain as to the punishment imposed, and conform to, and be supported by, the pleadings, issues, and proof.

The rules governing the form, rendition, and entry of judgments or orders in contempt proceedings generally apply in contempt proceedings for the violation of an injunction.[50] Clerical errors in the order will not invalidate a judgment against defendant.[51]

The judgment or order should not be made until after defendant has presented, or had an opportunity to present, his case and the court has made appropriate findings.[52] It should be sufficient on its face to show jurisdiction, and justification for the punishment;[53] and, although there is also authority to the contrary,[54] it has been held that it should contain a statement of the facts constituting the contempt and that mere conclusions are insufficient.[55] It must be definite and certain as to the punishment imposed,[56] and if a fine is imposed it should designate the person to whom it is to be paid.[57] However, it has been held that the fact that an order imposing a fine for contempt does not provide for the disposition of the fine does not render the order a nullity, but that at most the error is an informality not vitiating the judgment.[58]

Conformity to pleadings, issues and proof. In accordance with general rules, the judgment or order rendered should conform to, and be supported by, the pleadings and be within the issues made by them.[59] The failure formally to introduce the injunction order in evidence will not invalidate an adjudication of contempt in proceedings of a criminal nature, at least where the omission was not made the basis of a motion to dismiss or in any way called to the attention of the court.[60] In the absence of statutory authorization therefor the judgment cannot include as a part thereof a modification of the injunction order.[61]

Modification. In a proper case the court may modify a contempt order previously entered.[62]

Collateral attack. Where an injunction is void for want of jurisdiction, an adjudication of contempt against a party for its violation is also void[63] and may be attacked collaterally.[64]

Commitment. An order for commitment should state the circumstances of the contempt.[65] If the commitment is regarded as one for a criminal con-

stantine, 4 N.W.2d 697, 302 Mich. 384.
N.J.—In re Larkin, 142 A. 822, 103 N.J.Eq. 195—L. Balk Co-op. Co. v. International Fur Workers' Union of the U. S. and Canada, 123 A. 298, 95 N.J.Eq. 691—In re Martin, 171 A. 488, 12 N.J.Misc. 245, 358.
N.Y.—People ex rel. Finkelstein v. Fox, 281 N.Y.S. 143, 155 Misc. 639.
R.I.—Jackson Furniture Co. v. Lieberman, 14 A.2d 27, 65 R.I. 224.
Utah.—Gunnison Irr. Co. v. Peterson, 280 P. 715, 74 Utah 460.
32 C.J. p 507 note 73.

48. U.S.—In re Rice, C.C.Ala., 181 F. 217.

49. Tenn.—Higgins v. Lewis, 137 S.W.2d 308, 23 Tenn.App. 648.

50. Ill.—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.
N.Y.—Panagiotou v. Worlock Stone Co., 33 N.Y.S.2d 352, 263 App.Div. 165, appeal denied 34 N.Y.S.2d 270, 263 App.Div. 1037.

51. U.S.—Scoric v. U. S., W.Va., 217 F. 871, 133 C.C.A. 581.
32 C.J. p 508 note 77.

52. U.S.—Cohn v. Kramer, C.C.A. Mich., 136 F.2d 292.

53. Ill.—Loven v. People, 42 N.E. 82, 158 Ill. 159.
32 C.J. p 507 note 76.

54. Colo.—Shore v. People, 59 P. 49, 26 Colo. 516.

55. Mo.—Sands v. Richardson, App., 252 S.W. 990.
Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.
32 C.J. p 507 note 76 [c].

56. Tex.—Ex parte Kottwitz, 8 S.W.2d 508, 117 Tex. 583.
Effect of statute
Tex.—Ex parte Kottwitz, supra.

57. Ill.—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372.

58. Mo.—Fiedler v. Bambrick Bros. Constr. Co., 142 S.W. 1111, 162 Mo. App. 528.

59. Minn.—Burns v. Essling, 194 N.W. 404, 156 Minn. 171.
Judgment held proper
Tenn.—Higgins v. Lewis, 137 S.W.2d 308, 23 Tenn.App. 648.
Amended pleadings
Minn.—Burns v. Essling, 194 N.W. 404, 156 Minn. 171.
Matters considered on reference
U.S.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370.

60. U.S.—Rossi v. U. S., C.C.A.Colo., 293 F. 896.

61. Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.

62. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas & Louisiana, v. Texas & N. O. R. Co., D.C.Tex., 25 F.2d 876, affirmed, C.C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U. S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.
Md.—Newell v. Dundalk Co., 131 A. 148, 149 Md. 182.

63. U.S.—Ex parte Robinson, Wash., 144 F. 835, 75 C.C.A. 663.
Tex.—Ex parte Barrett, 37 S.W.2d 741, 120 Tex. 311—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1.
Void injunction or restraining order as basis for contempt proceeding in general see supra § 259 a.
Recitals in injunction decree unavailing
Iowa.—Carter v. Utterback, 204 N.W. 446, 200 Iowa 82.

64. U.S.—Ex parte Robinson, Wash., 144 F. 835, 75 C.C.A. 663.

65. Mo.—Sands v. Richardson, App., 252 S.W. 990.
N.Y.—People ex rel. Sandnes v. Sher-

tempt the order should state that the contempt was willful;[66] if the commitment is regarded as one for a civil contempt the order should state that the alleged offense was calculated to, or actually did, impair, impede, or prejudice the rights and remedies of plaintiff.[67]

§ 275. —— Review

a. In general
b. Scope of review; determination

a. In General

The rules applicable in contempt proceedings generally control the review of a proceeding in contempt for violation of an injunction.

There is some confusion and lack of agreement among the authorities concerning the right of review of a judgment in a contempt proceeding for violation of an injunction.[68] In the absence of statutory regulation, the right, nature, and form of review conforms to that applicable in contempt proceedings generally.[69] In a civil contempt proceeding, although there is some authority which holds that an adjudication of contempt is in its nature not appealable,[70] by the weight of authority the judgment of the court is such that the aggrieved party may appeal from it.[71] In some jurisdictions, an adjudication in a criminal contempt proceeding for violation of an injunction is not appealable,[72] but in certain of these jurisdictions it is reviewable on a writ of error.[73]

In a number of jurisdictions the judgment in the contempt proceeding cannot be reviewed by appeal,[74] but the proper remedy is by certiorari.[75] Also, under the statutes in force in certain jurisdictions a review may be obtained in a proper case through the procedure of a reservation, certification, or report of the case to an appellate court for its determination.[76]

General rules apply with respect to the persons entitled to institute proceedings for review,[77] and the necessity for, and sufficiency of, the record.[78]

Stay pending appeal. An appeal from an order adjudging defendant guilty of contempt in violating an injunction stays proceedings pending the appeal only under the order appealed from and does not affect other violations so as to prevent an adjudication of contempt for violations subsequent to the appeal.[79]

b. Scope of Review; Determination

The scope and extent of the review of an adjudication in a contempt proceeding for violation of an injunction is governed by the rules applicable in proceedings to review contempt proceedings generally, and varies with the character of the contempt and the method of review.

The scope and extent of the review of an adjudication in a contempt proceeding for violation of an injunction is governed by the rules applicable in proceedings to review contempt proceedings gener-

iff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

66. N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, supra.

67. N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, supra.

68. Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

69. Kan.—Smith v. Clothier, supra.

Statutory procedure for appeal

Kan.—State ex rel. Kansas State Board of Medical Registration and Examination v. Martin, 130 P.2d 601, 155 Kan. 801.

70. U.S.—Rivers v. Miller, C.C.A. Ga., 112 F.2d 439, reversing, D.C., Miller v. Rivers, 31 F.Supp. 540.

Interlocutory order

U.S.—In re Merchants' Stock & Grain Company, Mo., 32 S.Ct. 339, 223 U.S. 639, 56 L.Ed. 584.

71. Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 466.

Kan.—Smith v. Clothier, 213 P. 1071, 113 Kan. 47.

Ky.—Allen v. Black Bus Lines, 164 S.W.2d 482, 291 Ky. 278—Gibson v. Rogers, 109 S.W.2d 402, 270 Ky. 159.

Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.

Proceeding held civil

Mo.—Oliver v. Orrick, 288 S.W. 966, 220 Mo.App. 614.

Pecuniary limitations

Ky.—Allen v. Black Bus Lines, 164 S.W.2d 482, 291 Ky. 278.

Punishment must be imposed

Md.—Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.

72. Md.—Kelly v. Montebello Park Co., 118 A. 600, 141 Md. 194, 28 A.L.R. 33.

Minn.—Red River Potato Growers' Ass'n v. Bernardy, 150 N.W. 383, 128 Minn. 153.

Mo.—State ex rel. Hawkins v. Utley, App., 124 S.W.2d 684—Oliver v. Orrick, 288 S.W. 966, 220 Mo.App. 614.

73. U.S.—In re Merchants' Stock & Grain Company, Mo., 32 S.Ct. 339, 223 U.S. 639, 56 L.Ed. 584.

74. Ala.—Riddle v. Adams, 165 So. 848, 231 Ala. 596—Bankston v. Lakeman, 122 So. 819, 219 Ala. 508—Frutiger v. State ex rel. Davis, 188 So. 695, 28 Ala.App. 503.

Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal. 2d 244.

Appeal from other matter not prevented

Ala.—Preskitt v. Chandler, 107 So. 750, 214 Ala. 278.

75. Ala.—Bankston v. Lakeman, 122 So. 819, 219 Ala. 508—Frutiger v. State ex rel. Davis, 188 So. 695, 28 Ala.App. 503.

Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal.2d 244.

76. Mass.—Wilbur v. City of Newton, 29 N.E.2d 689, 307 Mass. 191.

Interlocutory decree

Mass.—Wilbur v. City of Newton, supra.

77. Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal.2d 244.

Iowa.—Cedar Falls Nat. Bank v. Boslough, 255 N.W. 665, 218 Iowa 502.

78. U.S.—Cohn v. Kramer, C.C.A. Mich., 136 F.2d 293.

Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.

79. N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.

ally, and varies with the character of the contempt and the method of review.[80] Where the jurisdiction of the lower court sufficiently appears, every intendment will be made in favor of the action of the lower court.[81] While questions which were not raised on the trial or hearing may not be considered on review,[82] the jurisdiction of the trial court and its power to pronounce sentence is always open to review.[83] In some jurisdictions and under some modes of review the inquiry of the appellate court is limited to whether the lower court had jurisdiction,[84] and the reviewing court will not inquire further than to ascertain if the court below had jurisdiction in the premises and regularly pursued the practice and procedure to be observed in such cases.[85] Ordinarily, the court will not review questions of fact,[86] and, although the court will look to the merits as disclosed by the facts,[87] and will decide for itself the question of violation,[88] it is generally held that the decision of the lower court will not be disturbed if there is reasonable evidence to support the judgment,[89] or if the evidence is conflicting;[90] and according to some authorities the decision of the lower court adjudging a party guilty of contempt in violating an injunction will not be disturbed unless the evidence convinces the court on appeal beyond a reasonable doubt that he is not guilty.[91]

Validity or propriety of injunction order. The reviewing court may consider the validity of the injunction order in so far as it is dependent on the jurisdiction of the court which rendered it,[92] and also whether it is sufficiently definite and certain to enable the court to determine whether it has been violated,[93] but the jurisdiction to make the injunction order is, however, the only question relative to the injunction proceedings which can be consid-

80. Cal.—Pomin v. Superior Court in and for El Dorado County, 112 P.2d 17, 44 Cal.App.2d 206.
Iowa.—Orr v. Hamilton, 209 N.W. 285, 202 Iowa 345.
Mo.—Oliver v. Orrick, 288 S.W. 966, 220 Mo.App. 614.
On report to reviewing court, whether certain conduct constitutes a violation of the injunction is considered.—Wilbur v. City of Newton, 29 N.E.2d 689, 307 Mass. 191.

81. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P. 2d 474, two cases.
Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
Utah.—Larsen v. Madsen, 48 P.2d 429, 87 Utah 48.

82. Ill.—Edelman Bros. v. Baikoff, 38 N.E.2d 534, 312 Ill.App. 381.

83. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 202, prior opinions, App., 116 P.2d 643, 114 P.2d 45.
Me.—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A. L.R. 148.
Inaccurate designation of pleadings
Ill.—Chambers v. City of Chicago, 270 Ill.App. 217.

84. Iowa.—Orr v. Hamilton, 209 N. W. 285, 202 Iowa 345—Barber v. Brennan, 119 N.W. 142, 140 Iowa 678.

85. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Colo.—United Gilpin Corporation v. Wilmore, 68 P.2d 34, 100 Colo. 453—State ex rel. McKinney v. Lowry, 66 P.2d 334, 100 Colo. 144—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.

86. Colo.—United Gilpin Corporation v. Wilmore, 68 P.2d 34, 100 Colo. 453—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448.
La.—Delta Securities Co. v. Dufresne, 160 So. 620, 181 La. 891.
Case not triable de novo
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717—Kochen v. District Court of Woodbury County, 199 N.W. 290, 198 Iowa 1.
Evidence on issue of jurisdiction
Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal.2d 244.

87. Iowa.—Carter v. Utterback, 204 N.W. 446, 200 Iowa 82—Barber v. Brennan, 119 N.W. 142, 140 Iowa 678.
13 C.J. p 105 note 24.

88. Cal.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 202, prior opinions, App., 116 P.2d 643, 114 P.2d 45.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.
Ky.—Gibson v. Rogers, 109 S.W.2d 402, 270 Ky. 159.
La.—Delta Securities Co. v. Dufresne, 160 So. 620, 181 La. 891.
Only question before reviewing court
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

89. Cal.—McFarland v. Superior Court of Merced County, 228 P. 1033, 194 Cal. 407.
Colo.—Fort v. Co-operative Farmers' Exchange, 256 P. 319, 81 Colo. 431, followed in Western Seed Co. v. Co-operative Farmers' Exchange, 256 P. 329, 81 Colo. 448—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.
Ga.—Patten v. Miller, 8 S.E.2d 786, 190 Ga. 152.
Ill.—Oehler v. Levy, 99 N.E. 912, 256 Ill. 178.
Iowa.—Carter v. Utterback, 204 N. W. 446, 200 Iowa 82—Barber v. Brennan, 119 N.W. 142, 140 Iowa 678.
13 C.J. p 105 note 25.
Effect of absence of certificate of evidence
Ill.—People v. Lee, 143 N.E. 196, 311 Ill. 552, error dismissed Lee v. People of State of Illinois ex rel. Emmerson, 46 S.Ct. 23, 269 U.S. 593, 70 L.Ed. 429.
Affirmance of dismissal held authorized
Colo.—State ex rel. McKinney v. Lowry, 66 P.2d 334, 100 Colo. 144.
Consideration given to court's findings
Iowa.—Kochen v. District Court of Woodbury County, 199 N.W. 290, 198 Iowa 1.

90. U.S.—Gravely v. U. S., C.C.A.W. Va., 288 F. 837.
Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

91. Wash.—State v. Erickson, 120 P. 104, 66 Wash. 639.

92. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Iowa.—Dayton v. Patterson, 250 N. W. 595, 216 Iowa 1382.

93. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

ered,[94] and the propriety of the order, or other matters proper for adjudication in the injunction proceeding, cannot be considered.[95]

Determination and disposition of cause. In a proper case the reviewing court may affirm or reverse the case in whole or in part[96] or it may modify the judgment or order of the lower court.[97] Where the appellate court determines that reversible error not going to the merits exists, it will remand the case for a new trial,[98] and it will not adjudicate as to the law or other matters which on the record are not clear or may be unnecessary.[99] The court will not reverse the judgment because of harmless error,[1] or because of invited error.[2]

§ 276. Punishment

a. In general
b. Fine or imprisonment
c. Damages
d. Restoration of status quo or undoing the wrong
e. Denial of privileges as litigant

a. In General

The punishment imposed on violation of an injunction should be either remedial or punitive in character, dependent on whether the proceeding is civil or criminal in nature, and its extent, subject to statutory limitations, is within the sound discretion of the court.

In proceedings for violation of an injunction the punishment imposed is as for contempt.[3] The punishment for civil contempt is to enforce obedience to the injunction and protect the civil rights and remedies of a party to the injunction suit, while the punishment for criminal contempt is to vindicate the honor and dignity of the court and to compel respect for its authority,[4] and which character of punishment is imposed depends on whether the contempt proceeding is of a civil or criminal nature.[5] Ordinarily, if it is civil in nature, coercive and remedial measures only may be imposed,[6] but if it is criminal in nature the punishment must be of a

94. Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 54 N.E.2d 462, 386 Ill. 368, dismissing error 44 N.E.2d 613, 316 Ill.App. 306, and reversing 48 N.E.2d 781, 319 Ill.App. 252.

Injunction court's determination of jurisdictional facts

Iowa.—Dayton v. Patterson, 250 N.W. 595, 216 Iowa 1382.

95. U.S.—Locke v. U. S., C.C.A.Tex., 75 F.2d 157, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1681—Simon v. U. S., C.C.A.Hawaii, 62 F.2d 13.

Cal.—Meyberg v. Superior Court of Los Angeles County, 121 P.2d 685, 19 Cal.2d 336, prior opinions, App., 113 P.2d 473, two cases, and 113 P.2d 474, two cases.

Ill.—Cummings-Landau Laundry Machinery Co. v. Koplin, 54 N.E.2d 462, 386 Ill. 368, dismissing error 44 N.E.2d 613, 316 Ill.App. 306, and reversing 48 N.E.2d 781, 319 Ill.App. 252—Pure Milk Ass'n v. Wagner, 2 N.E.2d 288, 363 Ill. 316, transferred, see 6 N.E.2d 503, 288 Ill.App. 630—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

La.—Woodard v. Johnson, 152 So. 65, 178 La. 501.

Mont.—State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 69 P.2d 972, 105 Mont. 106.

Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

96. Cal.—Taylor v. Superior Court of Los Angeles County, 125 P.2d 1, 20 Cal.2d 244.

N.J.—In re Hudson County Newspaper Guild, 4 A.2d 843, 125 N.J.Eq. 270, certiorari denied Shapiro v. Evening Times Printing & Publishing Co., 60 S.Ct. 79, 308 U.S. 566, 84 L.Ed. 475.

A fine imposed in a contempt proceeding, civil in nature, for the benefit of the party injured by the violation of the injunction will not be upheld on review where the order for the injunction was unwarranted as a matter of law.—Worden v. Searls, Mich., 7 S.Ct. 814, 121 U.S. 14, 30 L.Ed. 833.

Different entities

On appeal an adjudication of civil contempt cannot be upheld on a basis of liability of different corporate entities than those on which liability was sought and determined in the lower court.—Parker v. U. S., C.C.A. Mass., 126 F.2d 370.

97. Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.

Wis.—General Bronze Corporation v. Schmeling, 250 N.W. 412, 213 Wis. 150, 93 A.L.R. 114.

98. U.S.—Cohn v. Kramer, C.C.A. Mich., 136 F.2d 293.

99. U.S.—Cohn v. Kramer, supra.

1. Mont.—State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 69 P.2d 972, 105 Mont. 106.

2. N.Y.—American Fur Liners Contractors Ass'n v. Lucchi, 293 N.Y.S. 1, 249 App.Div. 513.

3. Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 183 So. 759, 134 Fla. 1, 119 A.L.R. 956.

4. U.S.—In re Merchants' Stock & Grain Company, Mo., 32 S.Ct. 339, 223 U.S. 639, 56 L.Ed. 584—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.

Ill.—O'Brien v. People, 75 N.E. 108, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40.

N.Y.—Bachman v. Harrington, 77 N.E. 657, 184 N.Y. 458.

Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

5. Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.

6. U.S.—Gompers v. Buck's Stove & Range Co., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874, reversing 33 App.D.C. 516—McCann v. New York Stock Exchange, C.C.A.N.Y., 80 F.2d 211, certiorari denied McCann v. Leibell, 57 S.Ct. 233, 299 U.S. 603, 81 L.Ed. 444.

Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628—Denny v. State, 182 N.E. 313, 203 Ind. 682.

N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89—Dorrian v. Davis, 147 A. 338, 105 N.J.Eq. 147.

Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

To prevent future interference

Wash.—Baskin v. Livers, 43 P.2d 42, 181 Wash. 370.

punitive nature.[7] While it has been held that punishment for both a civil and criminal contempt should not be imposed in one and the same proceeding,[8] it has also been held that a sentence may be imposed which is partly remedial and partly punitive, partaking of both civil and criminal features.[9]

The punishment must be in accordance with the controlling statutes,[10] and cannot be greater or other than that fixed thereby.[11] It should be adapted and determined with regard to the circumstances, character, and extent of the violation,[12] and should not be determined absolutely by any penalty prescribed before the offense, such as a penalty prescribed in the injunction order for its violation.[13] In some jurisdictions where the proceeding is civil in nature the punishment which may be imposed is not limited to a fine, or imprisonment, or both,[14] but may be adapted to what is necessary to afford the injured party remedial relief for the injury or damage done by the violation of the injunction to his property or rights which were under the protection of the injunction.[15]

Discretion of court in general. Subject to the above limitations, the court granting the injunction is clothed with a large discretion in enforcing obedience to it, and in a proceeding for its violation the extent of the punishment to be inflicted rests in the sound legal discretion of the court;[16] and in a proper case the court may afford defendant an opportunity to purge himself of the contempt of which he has been adjudged.[17] A light punishment may be imposed where the court is convinced that defendant intended no violation of its order,[18] or the acts of disobedience are done without violence or coercion and result in no injury to the person in whose favor the injunction was granted.[19] Leniency will not be shown, however, where the acts of disobedience are flagrant or frequently repeated.[20]

In a civil proceeding if complainant has not been damaged by the violation of the injunction he is not entitled to have any remedial punishment imposed on the violator.[21] If, however, the proceeding is of

7. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Ind.—Denny v. State, 182 N.E. 313, 203 Ind. 682.
N.J.—Wieczerzak v. Wieczerzak, 169 A. 632, 115 N.J.Eq. 89.

8. U.S.—Board of Trade of City of Chicago v. Tucker, C.C.A.N.Y., 221 F. 305, 137 C.C.A. 255.
32 C.J. p 508 note 94.

9. Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

10. Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

11. Iowa.—Eicher v. Tinley, 264 N. W. 591, 221 Iowa 293—Scavo v. Utterback, 205 N.W. 858.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.
Okl.—Fagin v. Thoroughman, 126 P. 2d 982, 190 Okl. 649—Ex parte Hibler, 281 P. 144, 139 Okl. 157.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
32 C.J. p 508 note 84.

Punishment held within court's power to impose
N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.

12. Mass.—Wireless Specialty Apparatus Co. v. Priess, 140 N.E. 793, 246 Mass. 274.
32 C.J. p 508 note 82.

Punishment considered proper
U.S.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F. 2d 862, modifying, D.C., 48 F.Supp. 928.
N.Y.—Busch Jewelry Co. v. Silvers, 8 N.Y.S.2d 592, 169 Misc. 305—Busch Jewelry Co. v. United Retail Employees' Union Local 830, 7 N.Y.S.2d 872, 169 Misc. 156.

Punishment held improper
U.S.—Securities and Exchange Commission v. Okin, C.C.A.N.Y., 137 F. 2d 862, modifying, D.C., 48 F.Supp. 928.

13. Conn.—Lawton v. Herrick, 76 A. 986, 83 Conn. 417.

14. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Fine or imprisonment as proper punishment see infra subdivision b of this section.

15. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

16. Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—American Cigar Co. v. Berger, 221 Ill.App. 285.
Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 567, 211 Ind. 628, citing **Corpus Juris.**
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
32 C.J. p 508 note 86.

Punishment held proper
Ill.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 4 L.R.A.,N.S., 1001, 110 Am.S.R. 248, affirming 121 Ill.App. 647—Hoeffken v. Belleville Trades and Labor Assembly, 229 Ill.App. 28—American Cigar Co. v. Berger, 221 Ill. App. 285.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.

Punishment held excessive
Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654.
Iowa.—Carey v. District Court of Jasper County, 285 N.W. 236, 226 Iowa 717.

17. Wash.—Delorme v. International Bartenders' Union, Local 624, 139 P.2d 619, 18 Wash.2d 444.

18. Ark.—Jones v. State, 281 S.W. 663, 170 Ark. 863.
Tex.—Herring v. Houston Nat. Exch. Bank, 255 S.W. 1097, 113 Tex. 337.
32 C.J. p 508 note 87.

Technical violation
Ark.—Jones v. State, 281 S.W. 663, 170 Ark. 863.

Limited to cost of proceedings
Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct.

19. Wis.—Vilter Mfg. Co. v. Humphrey, 112 N.W. 1095, 132 Wis. 587, 13 L.R.A.,N.S., 591.

20. Ill.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 110 Am.S.R. 248, 4 L.R.A.,N.S., 1001.
32 C.J. p 508 note 89.

21. Ky.—Dunbar v. Johnson, 162 S. W.2d 25, 290 Ky. 581.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

Costs
Ky.—Dunbar v. Johnson, 162 S.W.2d 25, 290 Ky. 581.

a criminal nature, punishment may be imposed even though the violation caused no loss or injury to the party intended to be protected by the injunction;[22] and, provided the injunction order is not absolutely void, the fact that the court erred in granting it will not prevent the punishment of the violator,[23] although it may affect the extent of the punishment to be imposed.[24]

It has been held that the fact that the punishment is greater than is imposed by a criminal statute for like offenses does not render the order of the court unconstitutional or void,[25] although there is authority apparently to the contrary.[26] Where the injunction has been violated by officers of a municipality, the court will impose a more severe penalty on the officers having the greater power and responsibility.[27]

Separate acts of disobedience. Where defendants were found guilty of separate acts of disobedience to an injunction, the sentence should not be imposed generally for all offenses, but the punishment for each offense should be specified.[28]

What law governs. One who violates an injunction subsequently to the passage of an amendatory statute, changing the penalty for violation of an injunction "to fine and imprisonment" instead of "fine or imprisonment" in the discretion of the court is punishable under the amendatory law, although the injunction was granted prior to its passage.[29]

Security. Under some statutes the court may require security to obey the injunction from the contemnor.[30]

b. Fine or Imprisonment

As a general rule punishment by fine or imprisonment, or both, may be imposed for violation of an injunction.

As a general rule one who violates an injunction is liable to punishment by fine[31] or imprisonment,[32] or both,[33] especially where the violation of the injunction is willful;[34] and even where there is no willful purpose to violate the injunction the court may punish defendant by both fine and imprisonment where the violation of injunction was the result of gross carelessness on defendant's part.[35] However, under certain circumstances only a fine[36] or only imprisonment[37] is authorized. If punishment by fine is imposed the court may further pro-

22. N.Y.—Stubbs v. Ripley, 39 Hun 626.

23. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

24. Va.—Deeds v. Gilmer, supra.
Wash.—Hanley v. Most, 115 P.2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.

25. Ill.—Hake v. People, 82 N.E. 561, 230 Ill. 174.
32 C.J. p 508 note 90.

26. D.C.—Re Gompers, 40 App.D.C. 293.
32 C.J. p 508 note 91.

27. Kan.—State v. Coffeyville, 133 P. 711, 90 Kan. 164.

28. U.S.—Oates v. U. S., W.Va., 223 F. 1013, 39 C.C.A. 389.

29. Kan.—State v. Durein, 27 P. 148, 46 Kan. 695.

30. Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

31. U.S.—Parker v. U. S., C.C.A. Mass., 126 F.2d 370.
Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill. App. 595, affirmed 139 N.E. 887, 308 Ill. 488.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
N.Y.—Stubbs v. Ripley, 39 Hun 626.
N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.
Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
Tex.—Lundberg v. City of Raymondville, Civ.App., 299 S.W. 539.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
Wash.—State v. Flora Co., 13 P.2d 467, 169 Wash. 120.
32 C.J. p 509 note 98.

32. Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill. App. 372—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
Or.—State v. Rogers, 265 P. 784, 124 Or. 656.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.
Tex.—Lundberg v. City of Raymondville, Civ.App., 299 S.W. 539.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
32 C.J. p 509 note 99.
Until contempt purged
Tex.—Ex parte Kottwitz, 8 S.W.2d 508, 117 Tex. 583.

33. Ga.—Taylor v. Morris-Forrester Oil Co., 142 S.E. 153, 166 Ga. 43.
Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.
Miss.—Hanna v. State ex rel. Rice, 153 So. 371, 169 Miss. 314.
Mo.—Lademan v. Lamb Const. Co., App., 297 S.W. 187.
Tex.—Lundberg v. City of Raymondville, Civ.App., 299 S.W. 539.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
32 C.J. p 509 note 1.

34. U.S.—Missouri, K. & T. R. Co. v. McCrary, C.C.Mo., 182 F. 401.
32 C.J. p 509 note 2.

35. U.S.—Indianapolis Water Co. v. American Strawboard Co., C.C.Ind., 75 F. 972.

36. Corporation may be fined, but cannot be imprisoned, for violation of injunction.—Franklin Union No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 4 L.R.A.,N.S., 1001, 110 Am.S.R. 248, affirming 121 Ill.App. 647—32 C.J. p 490 note 6.

37. Tex.—International Ladies' Garment Workers' Local Union No. 123

vide for commitment until the fine is paid.[38] Also the court may order the offender to pay a fine within a certain time, with a conditional penalty for disobedience of such order.[39]

In some jurisdictions in civil contempt proceedings the contemnor may not be imprisoned for disobeying the injunction,[40] but only for failure to pay the fine imposed or failure to make restitution to the injured party as required by order of court or for failure to give security to obey the injunction.[41] Imprisonment for civil contempt is imposed where defendant has refused to do an affirmative act required by the injunction and the purpose thereof is to compel him to do what he had refused to do.[42]

Under statutes authorizing punishment of criminal contempts by fine or imprisonment it has been held that the imposition of both a fine and imprisonment is improper,[43] even though more than one act of contempt is shown;[44] but, if acts of contempt are separately prosecuted, they may be severally punished by a fine or by imprisonment.[45] If punishment by imprisonment is imposed it may be for a definite period,[46] or, if the equities of the case require it, the court may order an imprisonment of defendant until he manifests a willingness fairly to comply with the order.[47]

To whom fine paid. In a criminal contempt proceeding any fine imposed goes to the people.[48]

c. Damages

In contempt proceedings of a civil nature a compensatory fine may be imposed on the defendant and awarded to the plaintiff to indemnify him for any loss or injury caused him by the violation of an injunction.

Although it has been held in some jurisdictions that in the absence of statutory authorization therefor no part of the fine imposed in contempt proceedings for violation of an injunction may be awarded to the party injured thereby,[49] it is generally held, sometimes by virtue of statutory provisions, that where the disobedience of the injunction has resulted in loss or injury to plaintiff the court in imposing punishment on defendant may impose a compensatory fine or judgment for damages, and award it to plaintiff to indemnify him for the loss and injury so occasioned.[50] However, de-

v. Dorothy Frocks Co., Civ.App., 97 S.W.2d 379.

38. Colo.—Shore v. People, 59 P. 49, 26 Colo. 516.
Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626.
Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628.
In civil proceeding
Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill. App. 505, affirmed 139 N.E. 887, 308 Ill. 488.
Not a violation of constitutional rights
Cal.—Ex parte Fortenbury, 101 P.2d 105, 38 Cal.App.2d 284.
Subsequent inability to perform
U.S.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370.

39. Pa.—Roberts v. Thomas, 13 Lanc.Bar 63.

40. Okl.—Fagin v. Thoroughman, 126 P.2d 982, 190 Okl. 649—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

41. Okl.—Fagin v. Thoroughman, 126 P.2d 982, 190 Okl. 649—Ex parte Hibler, 281 P. 144, 139 Okl. 157.

42. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
Ill.—O'Brien v. People, 75 N.E. 103, 216 Ill. 354, 108 Am.S.R. 219, 3 Ann.Cas. 966, affirming 114 Ill.App. 40.
32 C.J. p 503 note 83.

43. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.
S.C.—Greenwood County v. Shay, 23 S.E.2d 825, 202 S.C. 16.

44. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

45. U.S.—Carter v. U. S., supra.

46. Ill.—Stern v. Rogers, 37 N.E.2d 568, 311 Ill.App. 654—Farwell v. Horton, 22 N.E.2d 958, 301 Ill.App. 372—Schmook v. Fane, 22 N.E.2d 450, 301 Ill.App. 626.

47. N.Y.—Stolts v. Jackson, 81 N.Y. S. 638, 82 App.Div. 81.
32 C.J. p 509 note 4.

48. N.Y.—Bachman v. Harrington, 77 N.E. 657, 184 N.Y. 458.

49. Conn.—Lawton v. Herrick, 76 A. 986, 83 Conn. 417.
32 C.J. p 509 note 7.

50. U.S.—Leman v. Krentler-Arnold Hinge Last Co., Mass., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389, reversing in part, C.C.A., Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, certiorari granted Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 33, 284 U.S. 605, 76 L.Ed. 519—Rivers v. Miller, C.C.A.Ga., 112 F.2d 439, reversing, D.C., Miller v. Rivers, 31 F.Supp. 540—St. Louis-San Francisco Ry. Co. v. Lawrence, D.C.Okl., 30 F.2d 454—A. B. Dick Co. v. Fuller, D.C.N.Y., 6 F.2d 393.
Ind.—Bangs v. Northern Indiana Power Co., 6 N.E.2d 563, 211 Ind. 628—Moore v. Polk Sanitary Milk Co., 200 N.E. 228, 209 Ind. 558.
Kan.—Holloway v. People's Water Co., 167 P. 265, 100 Kan. 414, 2 A.L.R. 161.
Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.
N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.
Okl.—Ex parte Hibler, 281 P. 144, 139 Okl. 157.
Va.—Deeds v. Gilmer, 174 S.E. 37, 79, 162 Va. 157, citing **Corpus Juris.**
Wash.—State v. Flora, 13 P.2d 467, 169 Wash. 120.
32 C.J. p 509 notes 9, 10.

A distinction between liquidated and unliquidated damages has been made, to the effect that the court has the power to compel one who has violated an injunction to the injury of plaintiff to pay the damages so inflicted if they are capable of liquidation in a court of equity, but that, if the damages are unliquidated in their nature and not ascertainable by the machinery of a court of equity, it will not in the absence of special circumstances commit the offender until he compensates the injured party but will leave the latter to his remedy at law.—Thompson v. Pennsylvania R. Co., 21 A. 182, 48 N.J. Eq. 105, reversed on other grounds 24 A. 544, 49 N.J.Eq. 318—32 C.J. p 510 note 15.

fendant will not be required to indemnify plaintiff for the violation of an injunction which ought never to have been granted.[51]

Whatever the form of the proceeding for relief, whether an independent action for damages,[52] or an action for the penalty prescribed in the injunction order for its violation,[53] or a contempt proceeding in which a compensatory fine is awarded,[54] the measure of damages to be awarded is the actual damages sustained by the aggrieved party. The amount should be limited to damages resulting from a violation of the injunction,[55] and the loss must be established by satisfactory evidence.[56] If no damages are shown none will be allowed,[57] although in some jurisdictions it is discretionary with the court in such case to impose a nominal fine.[58]

Exemplary damages will not be awarded where defendant has acted in good faith.[59]

d. Restoration of Status Quo or Undoing the Wrong

One violating an injunction ordinarily may be required to restore the status quo as it existed before the violation.

While it has been held that a restoration of the property involved to its former condition is not within the province of an order punishing for contempt, as the punishment therefor consists of either fine or imprisonment or both,[60] it has also been held that the contemnor, in appropriate cases, may be punished by being forced to restore the status quo as it existed before the violation,[61] or by an adjudication against him as though that status quo had not been interrupted.[62] This, it has been held, is merely a method of enforcing the court's order and not a punishment for contempt unauthorized by statute.[63] Without this power the authority of the court to compel respect of its judgments in cases of this character would be without force and effect.[64] Thus, where defendant has interfered with property in violation of an injunction, he may be required to restore the property to its former condition,[65] and the court may order defendant imprisoned until the order has been complied with;[66] or the court may make an alternative order giving

51. Va.—Deeds v. Gilmer, 174 S.E. 37, 79, 162 Va. 157, citing **Corpus Juris.**
32 C.J. p 510 note 11.

52. Conn.—Lawton v. Herrick, 76 A. 986, 83 Conn. 417.

53. Conn.—Lawton v. Herrick, supra.

54. U.S.—Leman v. Krentler-Arnold Hinge Last Co., Mass., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389, reversing in part, C.C.A., Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, certiorari granted Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 33, 284 U.S. 605, 76 L. Ed. 519.
Ind.—New York, C. & St. L. R. Co. v. Meek, 1 N.E.2d 611, 210 Ind. 322—Moore v. Polk Sanitary Milk Co., 200 N.E. 228, 209 Ind. 558.
32 C.J. p 510 note 16.

Equitable principles controlling
U.S.—Leman v. Krentler-Arnold Hinge Last Co., Mass., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389, reversing in part, C.C.A., Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, certiorari granted Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 33, 284 U.S. 605, 76 L. Ed. 519.

Costs and expenses
U.S.—Odell v. Bausch & Lomb Optical Co., C.C.A.Ill. 91 F.2d 359, certiorari denied 58 S.Ct. 284, 302 U. S. 756, 82 L.Ed. 585, rehearing denied 58 S.Ct. 408, 302 U.S. 780, 82 L.Ed. 603—A. B. Dick Co. v. Fuller, D.C.N.Y., 6 F.2d 393.
N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.
Wash.—State v. Flora Co., 13 P.2d 467, 169 Wash. 120.

Payments made under other contempt proceedings
U.S.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370.

55. Mich.—Wilkinson v. Dunkley-Williams Co., 114 N.W. 387, 150 Mich. 253.

Damages before injunction granted
Mich.—Wilkinson v. Dunkley-Williams Co., supra.

56. U.S.—Catalin Corporation of America v. Slosse, D.C.N.Y., 31 F. Supp. 89.
Ind.—New York, C. & St. L. R. Co. v. Meek, 1 N.E.2d 611, 210 Ind. 322—Moore v. Polk Sanitary Milk Co., 200 N.E. 228, 209 Ind. 558.

Affidavit
U.S.—Catalin Corporation of America v. Slosse, D.C.N.Y., 31 F.Supp. 89.

57. Ind.—Moore v. Polk Sanitary Milk Co., 200 N.E. 228, 209 Ind. 558.
32 C.J. p 510 note 14.

58. N.D.—Northern Pac. Ry. Co. v. Northern Reo Co., 259 N.W. 95, 65 N.D. 414.
32 C.J. p 510 note 14 [a].

One dollar
Ind.—New York, C. & St. L. R. Co. v. Meek, 1 N.E.2d 611, 210 Ind. 322.

59. N.Y.—Power v. Athens, 19 Hun 165.
32 C.J. p 510 note 17.

60. Tex.—Lundberg v. City of Raymondville, Civ.App., 299 S.W. 539.

61. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas & Louisiana, v. Texas & N. O. R. Co., D.C.Tex., 25 F.2d 876, affirmed, C.C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U. S. 550, 74 L.Ed. 608, affirmed 50 S. Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

Restoration of rights and privileges of discharged employees
U.S.—Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, C.C.A.Tex., 33 F.2d 13, affirming, D.C., Brotherhood of Railway and Steamship Clerks v. Texas & N. O. R. Co., 24 F.2d 426, and 25 F.2d 873, 876, certiorari granted Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

62. Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

63. N.C.—Keys v. Alligood, 100 S.E. 113, 178 N.C. 16.

64. Minn.—State v. McLeod County Dist. Ct., 129 N.W. 583, 113 Minn. 304.

65. Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
32 C.J. p 510 note 18.

66. Mo.—Ex parte Crenshaw, 80 Mo. 447.

defendant the chance to make restoration before passing sentence of fine or imprisonment.[67] Also, where a restoration is not entirely effectual, defendant may be required to meet any expenditure of money necessary to remedy the wrong done.[68]

However, unless defendant acquired possession of property in breach of the injunction, he cannot be required to give up the possession thereof.[69] Also, if the injunction should never have been granted and hence plaintiff has not been injured by its violation, the court will not require the contemnor to restore the status quo.[70]

Divorce obtained in violation of injunction. Where defendant has obtained a divorce in violation of an injunction, he cannot be ordered to have it set aside, as he has no power to do so,[71] but he may be required to present the truth to the court which granted the divorce and in good faith urge that its decree be set aside.[72]

e. Denial of Privileges as Litigant

In general one in contempt for violation of an injunction may be denied certain privileges of a litigant in the injunction proceeding until he has purged himself of the contempt.

In accordance with the general rule, one in contempt for breach or violation of an injunction may be denied certain favors of court and privileges of a litigant until he has purged himself of the contempt.[73] For instance, the court, until defendant has purged himself of contempt, may refuse to hear defendant in his defense on the merits[74] or to discharge a ne exeat,[75] or may make an order that his appeal be dismissed on a day named unless on or before that day it shall be made to appear that he has faithfully and fairly obeyed the order requiring him to comply with the injunction.[76] However, it is error to punish the violation of a preliminary injunction by defendant by instructing that testimony in his own behalf is in that event not to be considered,[77] nor can the violation of a restraining order be punished by denying defendant a hearing on an order to show cause why an injunction should not issue.[78]

§ 277. Costs

In general costs may be imposed in civil contempt proceedings against the unsuccessful party, but in criminal contempt proceedings they are not ordinarily imposed.

In proceedings for civil contempt complainant is entitled, if successful, to costs incurred in the proceedings,[79] and this is so, although the injunction was improvidently issued,[80] or punishment is not imposed on the contemnor because he acted in good faith;[81] but, where complainant is unsuccessful, the costs may be taxed against him,[82] and defendant is entitled thereto.[83]

In proceedings for a criminal contempt costs are not usually imposed,[84] at least they are not usually allowed to defendant and against the prosecutor,[85] and, where a statute prescribes punishment for criminal contempt by fine and imprisonment, and is silent as to costs, the court has no power to impose them.[86] However, under the statutes in force in

67. Fla.—Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 134 So. 529, 101 Fla. 468.
N.C.—Keys v. Alligood, 100 S.E. 113, 178 N.C. 16.

68. N.J.—Ashby v. Ashby, 50 A. 473, 62 N.J.Eq. 618.

69. S.C.—Columbia Water Power Co. v. Columbia, 4 S.C. 388.

70. Wash.—Hanley v. Most, 115 P. 2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.

71. N.J.—Kempson v. Kempson, 52 A. 360, 625, 63 N.J.Eq. 783, 92 Am. S.R. 682, 58 L.R.A. 484, modifying 48 A. 244, 61 N.J.Eq. 303.

72. N.J.—Perlman v. Perlman, 165 A. 646, 113 N.J.Eq. 3—Kempson v. Kempson, 52 A. 360, 625, 63 N.J. Eq. 783, 92 Am.S.R. 682, 58 L.R.A. 484, modifying 48 A. 244, 61 N.J. Eq. 303.

73. N.Y.—Stubbs v. Ripley, 89 Hun 626.
32 C.J. p 511 note 27.

Postponement of hearing
The penalty imposed for contempt may carry with it as an incident the postponement of the hearing while the party is undergoing his punishment for his contumacious conduct. —Harley v. Montana Ore Purchasing Co., 71 P. 407, 27 Mont. 388.

74. Conn.—William Rogers Mfg. Co. v. Rogers, 38 Conn. 121.

75. N.Y.—Evans v. Van Hall, Clarke 22.

76. Ky.—Kentucky Heating Co. v. Louisville Gas Co., 59 S.W. 1090, 22 Ky.L. 1139.

77. Tex.—Lake v. Copeland, 72 S. W. 99, 31 Tex.Civ.App. 358.

78. Mont.—Harley v. Montana Ore Purchasing Co., 71 P. 407, 27 Mont. 388.
32 C.J. p 511 note 34.

79. U.S.—A. B. Dick Co. v. Fuller, D.C.N.Y., 6 F.2d 393.
Ill.—Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 226 Ill. App. 505, affirmed 139 N.E. 887, 308 Ill. 488.
32 C.J. p 511 note 36.

80. N.Y.—Smith v. Fitch, Clarke 265.
32 C.J. p 511 note 37.

81. Tex.—Lewis v. Clark, Civ.App., 129 S.W.2d 421, error dismissed, judgment correct.

82. Ala.—In re Willis, 5 So.2d 716, 242 Ala. 284.
N.Y.—Panagiotou v. Worlock Stone Co., 33 N.Y.S.2d 352, 263 App.Div. 165, appeal denied 34 N.Y.S.2d 270, 263 App.Div. 1037.

83. U.S.—Parkhurst v. Kinsman, C. C.N.Y., 18 F.Cas.No.10,759, 2 Blatchf. 76.
32 C.J. p 511 note 38.

84. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.
N.J.—Magennis v. Parkhurst, 4 N.J. Eq. 433.

85. N.J.—In re United Hatters of North America, 158 A. 435, 110 N. J.Eq. 42.

86. N.Y.—People v. Gilmore, 38 N.Y. 626.
32 C.J. p 511 note 42.

some jurisdictions they may be allowed,[87] and it is within the discretion of the court to allow counsel fees to defendant on his discharge.[88] Where costs are awarded against defendant, they go to the government.[89]

Enforcing payment of costs. In some jurisdictions parties adjudged guilty of contempt cannot be confined to jail by reason of inability to pay court costs.[90] Where the contempt proceeding is civil in its nature, the costs constitute merely a money judgment to be collected in the usual way and cannot be collected by a body execution;[91] and, whether the proceedings are civil or criminal where the statute on which the contempt proceedings are based merely authorize imprisonment for nonpayment of the fine imposed, defendant cannot be imprisoned for nonpayment of costs.[92]

VII. DAMAGES ARISING FROM ISSUANCE OF INJUNCTION

§ 278. Persons Entitled

All defendants who have been enjoined and as a consequence have suffered loss can claim and recover damages on a bond given for their protection.

Generally all defendants who have been enjoined, and have obeyed the injunction, and who in consequence of the allowance of the injunction and their obedience thereto have suffered loss, can claim and recover damages on a bond given for their protection.[93] On the other hand, one not a party to the suit,[94] or who is not a necessary or proper party,[95] is not, in general, entitled to damages. It has been held that, where an injunction is obtained against one defendant, against whom the suit is successfully prosecuted, another defendant who has not been enjoined cannot have judgment on the bond.[96] Only persons who are fairly within the covenant of an injunction bond can sue thereon.[97] Likewise a person restrained from doing what he had no legal right to do has no right of action for damages, even

87. N.J.—In re United Hatters of North America, 158 A. 435, 110 N.J.Eq. 42.

88. N.J.—In re United Hatters of North America, supra.

89. U.S.—Gompers v. Buck's Stove & Range Co., App.D.C., 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797, 34 L.R.A.,N.S., 874.

90. Tex.—International Ladies' Garment Workers' Local Union No. 123 v. Dorothy Frocks Co., Civ. App., 97 S.W.2d 379.

91. U.S.—Chicago Bd. of Trade v. Tucker, N.Y., 221 F. 305, 137 C.C.A. 255.

92. Ohio.—Miller v. Toledo Grain & Milling Co., 21 Ohio Cir.Ct. 325, 11 Ohio Cir.Dec. 629.
Wyo.—Porter v. State, 92 P. 385, 16 Wyo. 131.

93. Ill.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.
Ind.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.
Kan.—Kennedy v. Liggett, 295 P. 675, 677, 132 Kan. 413, quoting **Corpus Juris.**
Miss.—Bank of Clarksdale v. Planters' Nat. Bank, 125 So. 837, 156 Miss. 269.
32 C.J. p 436 note 13.

Facts held to establish that defendant moving to assess damages on injunction bond was party to temporary restraining order.—Laumeier v. Sammelmann, 279 S.W. 249, 218 Mo.App. 468.

Not named in order

One who is a defendant to an injunction bill, but is not named in the injunction order, who must nevertheless abide by the provisions of the order, is a person enjoined, and he may recover such damages as he incurs by reason of the mandate, in case it is dissolved.—State v. Freshwater, 148 S.E. 6, 107 W.Va. 210.

Partnership

(1) An injunction against a partner has the effect of enjoining the partnership, and the partnership, although not made a defendant save to the extent that the partner enjoined may have represented the firm, has a right of action to recover damages occasioned by the injunction.—Drews v. Williams, 23 So. 897, 50 La. Ann. 579.

(2) Reserving right to liquidator of partnership and deceased partner's heirs to sue jointly the other partner, third opponent for wrongful issuance of injunction, was proper.—Duplantis v. Barrow, 116 So. 568, 165 La. 1091.

Order determinative

Where petition was filed and restraining order made in term time, the order entered of record, and not the order signed and filed, controls in determining parties restrained and entitled to damages on bond.—Laumeier v. Sammelmann, 279 S.W. 249, 218 Mo.App. 468.

94. Ill.—Rice v. Goldberg, 26 Ill. App. 603.
Ky.—White v. Strong, 18 S.W.2d 960, 961, 230 Ky. 119, citing **Corpus Juris.**
N.Y.—Lewittes & Sons v. Perlow, 3 N.Y.S.2d 916, 254 App.Div. 94.

95. Ind.—State v. Allen, 124 N.E. 634, 71 Ind.App. 160.

96. Tenn.—Meek v. Mathis, 1 Heisk. 534.

97. Ky.—White v. Strong, 18 S.W.2d 960, 230 Ky. 119.

A vendee who purchased the subject matter of the injunction after the injunction was issued has been held not to be entitled to hold the surety on the injunction bond for any damage he may have sustained after he acquired the property.—Benguiat v. Gotham Nat. Bank of New York, 24 N.Y.S.2d 836, 261 App. Div. 199, motion denied 37 N.E.2d 36, 286 N.Y. 687, and affirmed 39 N.E.2d 939, 287 N.Y. 733.

Employees

Where the bond required provided for the payment of damages resulting to employees of defendant, it has been held that such employees were entitled to recover on the bond notwithstanding they were not technically parties to the injunction suit.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

Not named as obligee

(1) Where the statute does not require the names of defendants to appear in the bond, the bond goes to the protection of all parties to the action who are restrained and damaged thereby, even though they are not named in the bond as obligees.—Kennedy v. Liggett, 295 P. 675, 132 Kan. 413.

(2) Party not mentioned in injunction bond may bring action thereon only if he is member of class mentioned in bond whose members are defendants in injunction proceedings.—Watkins v. Mowbray & Robinson Co., 278 S.W. 557, 212 Ky. 118.

though the injunction has been wrongfully issued.[98] The right to recover damages may be forfeited by reason of the conduct of the party claiming them.[99]

§ 279. Persons Liable

Parties not shown to have instigated injunction proceedings and who were not instrumental in procuring it are not liable for damages.

Parties not shown to have instigated injunction proceedings and not in any manner instrumental in procuring the injunction are not liable for damages.[1]

Personal representatives. In case of an injunction obtained by one acting in a representative capacity, damages on dissolution, if any, are to be assessed against the representative personally;[2] but damages are not to be assessed against him if he acted disinterestedly and in good faith.[3]

County. Where by statute a county is entitled to all the actions and remedies to which individuals are entitled, it is liable for costs and damages which it has caused by the wrongful suing out of an injunction.[4]

§ 280. —— Obligors on Bond

Only those who sign the injunction bond or undertaking are liable on it.

Only those who sign the injunction bond or undertaking are liable on it.[5] Where the security in the bond is held insufficient, and a new bond is executed with other sureties, the sureties on both bonds are equally liable on a dissolution of the injunction.[6]

In Louisiana the rule seems to be well settled that the principal and sureties on an injunction bond are liable in solido.[7]

Where an executor or administrator is required as a condition to the grant of an injunction applied for by him to execute an injunction bond, if he does so it will be binding on him and his sureties in their individual capacity.[8]

Where the suit is in the name of the state, on the relation of certain persons, who are required to give security for the costs, it is the suit of the relators, and not of the state, so that they and the sureties on their injunction bond are liable to defendant for any damages consequent on the wrongful suing out of the injunction.[9]

§ 281. Nature of Right and Extent of Liability

a. In general
b. Injunction rightfully obtained
c. Where no restraint actually imposed

a. In General

Aside from liability arising from bond required as a condition to the granting of the injunction, as a general rule damages are not recoverable for the wrongful issuance of an injunction unless malicious prosecution is shown.

Complainant's liability for the wrongful issuance of an injunction at his instance may, of course, be

98. Tex.—Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, 164, error dismissed, citing **Corpus Juris.**
32 C.J. p 436 note 18.

Public contracts

(1) A statute prohibiting contracts by a district requiring a levy of a higher rate of taxation than that allowed by law does not make the contracts void except as to the district, and contractors delayed by taxpayers' injunction are entitled to recover on the injunction bond.—Independent School Dist. No. 35 v. Oliver Min. Co., 210 N.W. 856, 169 Minn. 15, rearguing 208 N.W. 952, 169 Minn. 15.

(2) Where voters approved expenditure for erection of school under contracts let in contravention of statute, contractors were not trespassers, and may not be denied recovery on taxpayer's injunction bond for wrongful interference with completion of work.—Independent School Dist. No. 35 v. Oliver Min. Co., supra.

99. Ill.—Vanderpoel v. Cravens, 139 Ill.App. 463.
Tenn.—Heck v. Bulkley, 1 S.W. 612.
32 C.J. p 437 note 19.

Appearance in opposition

(1) Any damages to be awarded should be in favor of those only who were named in the bond and who appeared in opposition to the motion for the injunction.—Lewittes & Sons v. Perlow, 3 N.Y.S.2d 916, 254 App. Div. 94.

(2) Motion for reference to ascertain damages sustained by certain defendant must be denied, where order continuing injunction did not recite its appearance.—Gagnon v. Aracoma Kenton Co., 240 N.Y.S. 446, 228 App.Div. 524.

Instigation of action

Rule that a party, who has procured the institution of proceedings against him, may not recover damages on bonds posted in such proceeding, applies only where the party has either directly or indirectly instigated the particular proceeding for which the bond was given.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58.

1. U.S.—Roche v. District of Columbia, 18 Ct.Cl. 217.
N.Y.—Watters v. Weed, 36 N.Y.S. 955, 92 Hun 607.

2. Miss.—Nixon v. Seal, 29 So. 399, 78 Miss. 363.
32 C.J. p 437 note 21.

3. La.—Lamorere v. Cox, 32 La. Ann. 246.
32 C.J. p 437 note 22.

4. Miss.—Freeman v. Lee County, 5 So. 516, 66 Miss. 1.

5. N.Y.—Kelly v. Myrick, 200 N.Y.S. 90, 205 App.Div. 637.
32 C.J. p 437 note 24.

6. Va.—Bentley v. Harris, 2 Gratt. 357, 43 Va. 357.
32 C.J. p 437 note 25.

7. La.—Lallande v. Trezevant, 2 So. 573, 5 So. 862, 39 La.Ann. 830—Wentzel v. Robinson, 23 La.Ann. 451—Perry v. Kearney, 14 La.Ann. 400.

8. Miss.—Brown v. Speight, 30 Miss. 45.

9. Tenn.—State v. Springfield, Ch. App., 48 S.W. 613.

fixed by the bond that he was required to give as a condition to the granting of the injunction.[10] Although there is contrary authority,[11] the general rule, unless changed by statute,[12] is that without a bond for the payment of damages, or other obligation of like effect, a person against whom an injunction has been wrongfully issued can recover no damages unless he can make out a case of malicious prosecution by showing malice and want of probable cause on the part of the person who obtained the injunction.[13] Nevertheless, if a person in prosecuting an action for injunction is actuated by malice, and proceeds without probable cause, the injured person has a common-law remedy for malicious prosecution;[14] and, while there is some authority to the contrary,[15] the prevailing view is that the fact that a bond is required as a condition of the issuance of the injunction merely provides an additional remedy in case the injunction was sued out maliciously and without probable cause, and does not in any way affect the right to bring an action on the case for malicious prosecution if the grounds for an action of this character exist.[16]

Under a statute relieving a city of the necessity of giving bond, but providing that the city shall be liable in the same manner and to the same extent as though a bond had been given, a city is liable for damages arising from a wrongful issuance of an injunction to the same extent as an ordinary suitor.[17]

10. Ill.—Gorton v. Brown, 27 Ill. 489, 81 Am.D. 245.
32 C.J. p 434 note 81.

Complainant and surety held liable
for damages arising from wrongful issuance of injunction.—Maiatico v. Mortgage Sec. Corporation of America, 60 F.2d 1081, 61 App.D.C. 245.

Remedy is on bond
(1) In the absence of circumstances of malicious prosecution, the remedy of defendant in the injunction suit is on the injunction bond.
Ky.—Brandenberg v. Addison, 298 S. W. 1091, 221 Ky. 442.
Miss.—Staple Cotton Co-op. Ass'n v. Borodofsky, 108 So. 807, 143 Miss. 585.
N.Y.—Brooklyn Consol. Lumber Corporation v. City Plastering Co., 259 N.Y.S. 561, 236 App.Div. 799—Bedell Co. v. Harris, 240 N.Y.S. 550, 228 App.Div. 529.
Pa.—Azar v. Markle, 166 A. 889, 311 Pa. 296.
Tenn.—Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn.App. 115.
(2) Injunction plaintiff is not liable for damages after dissolution of injunction without bond.—Losee v. Crawford, 5 S.W.2d 105, 222 Mo.App. 683.
(3) "If an injunction is improvidently issued, the one who has suffered damages as a result does not have two causes of action, one based upon the bond and the other based upon the acts which were carried out under the protection of the restraining order and bond. Those two are not different causes of action, but merely different ways of stating the same cause of action, a cause of action upon the bond."—Junction Irr. Co. v. Snow, 118 P.2d 130, 132, 101 Utah 71.

11. La.—Davis v. Poitevant & Favre Lumber Co., 132 So. 790, 15 La. App. 657—Jackson v. Whitbeck, 3 La.App. 487.
32 C.J. p 434 note 82.

Amount of bond
Suit was maintainable for all alleged damages by reason of wrongful injunction, although exceeding amount of bond filed in federal court granting injunction.—Davis v. Poitevant & Favre Lumber Co., 132 So. 790, 15 La.App. 657.

Time injunction in force
A cause of action exists for the wrongful issuance of an injunction, irrespective of how short a time the injunction was in force.—Davis v. Poitevant & Favre Lumber Co., supra.

12. Ill.—Miovsky v. Georgeoff, 2 N. E.2d 740, 363 Ill. 60—2068 Lawrence Avenue Bldg. Corporation v. Van Heck, 45 N.E.2d 687, 317 Ill. App. 59.
32 C.J. p 434 note 83.

13. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F. 2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, and certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014—United Motors Service v. Tropic-Aire, C.C. A.Minn., 57 F.2d 479—Becker v. Stander, D.C.La., 17 F.2d 772—Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., C.C.A.La., 12 F.2d 245, 45 A.L.R. 1513—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F. Supp. 419.
Ga.—Spires v. Spires, 117 S.E. 255, 30 Ga.App. 228.
Kan.—Jackman v. Kansas Electric Power Co., 251 P. 431, 122 Kan. 19.
Ky.—Brandenberg v. Addison, 298 S. W. 1091, 1093, 221 Ky. 442, quoting **Corpus Juris.**
N.H.—Tilton v. Sharpe, 146 A. 159, 84 N.H. 43—Rogers v. Clough, 81 A. 1075, 76 N.H. 272.
N.Y.—Brooklyn Consol. Lumber Corporation v. City Plastering Co., 259 N.Y.S. 561, 236 App.Div. 799—McColgan v. Dodds, 209 N.Y.S. 707, 125 Misc. 36.
R.I.—Johnson Wholesale Perfume Co. v. Blumen, 9 A.2d 857, 859, 63 R.I. 485, citing **Corpus Juris.**
Utah.—Junction Irr. Co. v. Snow, 118 P.2d 130, 101 Utah 71.
Wis.—Williams v. Ainsworth, 99 N. W. 327, 121 Wis. 600.
32 C.J. p 434 note 84.

Damages exceeding bond
Malice and want of probable cause are necessary to recover damages for wrongful injunction, in addition to amount provided by bond.—Baker v. Craig, 275 P. 216, 127 Kan. 811, modified on other grounds 280 P. 771, 128 Kan. 676.

Person not party to bond
Where a buyer of hay obtained an injunction in an action against the seller, restraining any disposition of hay shipped to the buyer but not accepted by him, and gave the usual injunction bond to pay the damages occasioned to defendant by reason of the injunction, a bank, which had acquired title to the hay by paying a draft attached to the bill of lading therefor, could not recover its damages on the injunction bond, since it was not a party thereto, and therefore the rule that recovery for wrongful injunction is limited to an action on the bond, or an action for malicious prosecution, does not apply.—Interstate Nat. Bank v. McCormick, 214 P. 949, 67 Mont. 80, 34 A.L.R. 721.

14. Ill.—Crate v. Kohlsaat, 44 Ill. App. 460.
Ky.—Brandenberg v. Addison, 298 S. W. 1091, 1093, 221 Ky. 442, quoting **Corpus Juris.**
N.Y.—Brooklyn Consol. Lumber Corporation v. City Plastering Co., 259 N.Y.S. 561, 236 App.Div. 799.
32 C.J. p 434 note 86.

15. Ill.—Gorton v. Brown, 27 Ill. 489, 81 Am.D. 245.
32 C.J. p 435 note 87.

16. Md.—Rieger v. Knight, 97 A. 358, 128 Md. 139, L.R.A.1916E 1277.
32 C.J. p 435 note 88.

17. U.S.—Corpus Christi Gas Co. v.

b. Injunction Rightfully Obtained

The injunction must have been wrongfully obtained, or wrongfully continued, to authorize the recovery of damages.

To authorize the recovery of damages, the issuance of the injunction must have been wrongful in its inception,[18] or at least it must have been continued owing to some wrong on the part of plaintiff.[19] If rightfully awarded, but afterward properly dissolved, because of matters done or arising subsequent to its issuance, there can be no recovery of damages.[20] On the other hand, if the injunction is dissolved for good cause, the right to an assessment of damages is not affected by the fact that the bill states a good cause of action.[21]

c. Where No Restraint Actually Imposed

The defendant is not entitled to damages for the wrongful issuance of an injunction where no restraint was actually imposed on him.

In case defendant has never actually been restrained, he has suffered no damage because of an injunction, and he is not entitled to damages on dissolution,[22] as where the injunction was absolutely void,[23] or where there was no restraint because the injunction was suspended pendente lite,[24] or was granted on a condition not complied with.[25] A fortiori, defendant is not entitled to damages where no injunction was actually granted;[26] but it has been held that if defendant had notice of the order for the writ so as to be bound thereby he may secure damages on dissolution of the order,[27] that an order to "desist and refrain" is an injunction such as to entitle defendant to damages on disso-

City of Corpus Christi, C.C.A.Tex., 46 F.2d 962, reversing, D.C., 36 F. 2d 972, and certiorari denied City of Corpus Christi, Texas v. Corpus Christi Gas Co., 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541.

In New York

(1) Civil Pract. Act § 820, providing that in any action in which a domestic municipal corporation is excused from giving security on procuring an injunction order such corporation shall be liable for all damages sustained by the opposite party to the same extent as sureties to an undertaking would have been liable, is not self executing; and if the amount of the responsibility of the municipal corporation for damages is not specified in the injunction order, there is no liability whatever on the municipal corporation in the event it is later determined that it was not entitled to the injunction.—City of Yonkers v. Federal Sugar Refining Co., 116 N.E. 998, 221 N.Y. 206—City of White Plains v. Griffen, 8 N.Y.S.2d 32, 169 Misc. 706, affirmed 8 N.Y.S.2d 462, 255 App.Div. 1003.

(2) If there is expressly included in the order the general provision that the municipal corporation shall be liable for all damage, then the responsibility of the corporation is to be determined under the provisions of the order without arbitrary limitation on the amount of the responsibility.—City of Utica v. Hanna, 162 N.E. 573, 249 N.Y. 26—City of White Plains v. Griffen, supra.

18. Iowa.—Scott v. Frank, 96 N.W. 764, 121 Iowa 218.
La.—Simon v. Barnett, 135 So. 743, 169 La. 642—Kansas City, S. & G. Terminal Co. v. Interurban Motor Transp. Co., 95 So. 258, 152 La. 1093—Richards v. Roudilion, 140 So. 274, 19 La.App. 585.
Miss.—Caston v. Hutson, 104 So. 698, 139 Miss. 890.
N.Y.—Williams Ice Cream Co. v. Chase Nat. Bank, 199 N.Y.S. 314, 120 Misc. 301, reversed on other grounds 205 N.Y.S. 446, 210 App. Div. 179.
Tex.—Briscoe v. Snodgrass, Civ.App., 103 S.W.2d 837—Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, 164, error dismissed, citing **Corpus Juris**—Hudspeth v. Guggenheim, Civ.App., 12 S.W.2d 238, error dismissed.

Conditional dissolution

Where the pleadings in an injunction suit are not in the record by exhibit or allegation, so that the issues may be known, the fact that the final order dissolving the injunction and dismissing the case was on conditions thereafter to be complied with by defendants, and until compliance the injunction was to remain in force, was not a sufficient decision that injunction ought not to have been granted in the first instance, to show a breach of the injunction bond.—Drainage Dist. No. 2 of Dakota County v. O'Neill, 191 N. W. 685, 109 Neb. 552.

Emergency bond

There can be no judgment for defendant on an emergency bond given on the granting of a temporary restraining order without notice because of an alleged emergency, where the trial court did not adjudge that no emergency existed or that plaintiff created it or connived at its creation by neglect or otherwise.—Nazarenus v. Wigle, 212 P. 826, 72 Colo. 538.

Improper dissolution

Damages were erroneously allowed after improper dissolution of injunction restraining proposed sale of goods, under trust deed covering only mortgagor's interest.—Ellis-Jones Drug Co. v. Coker, 125 So. 826, 156 Miss. 775, suggestion of error overruled and setting aside judgment refused 127 So. 283, 156 Miss. 775.

Issuance held wrongful

Ariz.—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7.

19. Iowa.—Scott v. Frank, 96 N.W. 764, 121 Iowa 218.

20. Mo.—Pierce v. Campbell, 274 S. W. 875, 217 Mo.App. 179.
32 C.J. p 435 note 99.

Conversely, if the injunction was not authorized, the fact that it was dissolved because of the expiration of the statute under which it was sought does not affect liability on the bond.—Investors' Syndicate v. Thomas, Tex.Civ.App., 73 S.W.2d 93.

21. Ill.—People v. Eisenberg, 212 Ill. App. 337, affirmed 123 N.E. 532, 288 Ill. 304.
32 C.J. p 436 note 1.

22. La.—Hyde v. Teal, 15 So. 416, 46 La.Ann. 645.
32 C.J. p 436 note 2.

23. N.Y.—Mark v. Hyatt, 31 N.E. 1099, 135 N.Y. 306, 18 L.R.A. 275.
32 C.J. p 436 note 3.

24. La.—Hyde v. Teal, 15 So. 416, 46 La.Ann. 645.

Rule inapplicable

Rule that no action lies on injunction bond where there is no restraint did not apply, where restraining order was modified and continued.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

25. Cal.—Carter v. Mulrein, 22 P. 1086, 82 Cal. 167, 16 Am.S.R. 99.
32 C.J. p 436 note 5.

26. La.—Austin v. Currie, 134 So. 723, 16 La.App. 375.
32 C.J. p 436 note 6.

27. Ill.—Danville Banking & Trust Co. v. Parks, 88 Ill. 170.
Ohio.—Bishop v. Bascoe, 8 Ohio Dec., Reprint, 423, 7 Cinc.L.Bul. 342.

lution,[28] and that, where the injunction is ineffective merely because the act was completed before issuance, defendant may be entitled to a dissolution and to his expenses in securing it.[29] It has been held that a defendant who obeys an injunction, although never served therewith, is entitled after judgment in his favor to claim the damages provided for in the undertaking to procure such injunction.[30]

Acquiescence in obedience to an ambiguous writ will prevent complainant from objecting to a recovery of damages sustained by defendant, by reason of such obedience, and complainant's bondmen will be liable on their bond for such damages.[31]

§ 282. —— Liability on Bond

Liability on a bond given to procure the issuance of an injunction is measured by the terms of the bond.

Liability on an injunction bond is measured by the terms of the contract contained in the instrument,[32] and not by the terms of the order requiring the bond.[33] A surety cannot be held liable beyond the express terms of his undertaking,[34] which cannot be extended by implication beyond the terms therein expressed.[35] Conversely, while liability of sureties cannot be extended beyond the precise terms of the bond, such liability is nevertheless coextensive with the terms of the bond reasonably interpreted.[36]

28. Ill.—Lindblom v. Williams, 51 Ill.App. 483.

29. Ill.—Mead v. Cleland, 62 Ill.App. 294.

30. S.C.—Bell v. Brinkley, 156 S.E. 348, 351, 159 S.C. 171, quoting **Corpus Juris.**
32 C.J. p 436 note 10.

31. S.C.—Bell v. Brinkley, 156 S.E. 348, 351, 159 S.C. 171, quoting **Corpus Juris.**
32 C.J. p 436 notes 11, 12.

32. Cal.—Wilshire Mortg. Corporation v. O. A. Graybeal Co., 105 P. 2d 996, 41 Cal.App.2d 1.
Hawaii.—Manibog v. Low, 33 Hawaii 660.
Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P.2d 75, 52 Idaho 795—Rowland v. Kellogg Power & Water Co., 233 P. 869, 40 Idaho 216.
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

33. Mich.—Graff v. Epstein, 213 N. W. 190, 238 Mich. 227.
32 C.J. p 437 note 29.

The court cannot interpolate a new condition into a bond which is free from ambiguity, in order to enforce a correspondence between the bond and the order under which it was executed.—American Exch. Nat. Bank v. Goubert, 104 N.E. 928, 210 N.Y. 421, affirming 130 N.Y.S. 1103, 146 App.Div. 875—32 C.J. p 438 note 36.

34. U.S.—Western Willite Co. v. Trinidad Asphalt Mfg. Co., C.C.A. Mo., 32 F.2d 487, certiorari denied Trinidad Asphalt Mfg. Co. v. Western Willite Co., 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 616.
Ala.—Federal Land Bank of New Orleans v. Southmont Mfg. Co., 122 So. 426, 219 Ala. 447.
Cal.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App. 2d 905.
Iowa.—Moore v. Miller, 298 N.W. 646, 230 Iowa 736.
Ky.—Vicars v. Frazier, 295 S.W. 169, 220 Ky. 356.
Minn.—Johnson v. Maryland Casualty Co., 224 N.W. 700, 177 Minn. 103.
N.M.—Walters v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 288 P. 1044, 35 N.M. 4.
Okl.—Callaway v. Sparks, 89 P.2d 275, 276, 184 Okl. 569, citing **Corpus Juris.**
Or.—Kruse v. Blair, 272 P. 265, 127 Or. 393.
Tenn.—Brown v. Brown, 296 S.W. 356, 155 Tenn. 530.
32 C.J. p 437 note 30.

Amount
The amount specified in the bond is the limit of the sureties' liability.
Ky.—Brandenberg v. Addison, 298 S. W. 1091, 221 Ky. 442.
Mich.—Graff v. Epstein, 213 N.W. 190, 238 Mich. 227.
S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278.

Restraining order
(1) A bond wherein the sureties obligate themselves only with reference to a restraining order becomes functus officio on the granting of a temporary injunction.—Reagan v. Dick, 240 P. 337, 78 Colo. 148.

(2) The judge is powerless to extend sureties' liability on such a bond beyond the precise terms of their contract.—Maier v. Luce, 215 P. 399, 61 Cal.App. 552.

(3) The fact that the bond is a common-law bond and does not answer statutory requirements for a restraining order bond does not justify a judgment on it until the condition is fulfilled on which liability will arise according to its terms.—Reagan v. Dick, supra.

Taxes
Where suit was brought to restrain a sale of property for taxes and the bond was conditioned to pay all damages which the collector of taxes might sustain by reason of the restraining order, the bondsmen did not guarantee payment of subsequent taxes.—Logan City v. Allen, 44 P.2d 1085, 86 Utah 375.

35. S.D.—Chamberlain v. Quarnberg, 119 N.W. 1026, 23 S.D. 55.
32 C.J. p 438 note 31.

Material omissions in the bond cannot be filled by insertion or addition of things which according to law should have been put into it, or which it is merely supposed the parties intended to include.—Ballard v. Logan, 70 S.E. 558, 68 W.Va. 655.

Service on another
Rights of sureties on injunction bond were not affected by service of copy of injunction on another than obligees after sureties signed bond. —White v. Strong, 18 S.W.2d 960, 230 Ky. 119.

36. Cal.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal.App. 434.
Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P. 2d 75, 52 Idaho 795.
Ind.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.
Kan.—Newbern v. Service Pipe Line & Mining Co., 267 P. 29, 126 Kan. 76.
Mich.—Graff v. Epstein, 213 N.W. 190, 238 Mich. 227.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N. W. 856, 169 Minn. 15.
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.
N.Y.—Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., 41 N.Y.S.2d 375.
Okl.—First Nat. Bank v. Duncan, 285 P. 957, 142 Okl. 121.
S.C.—Smith v. J. F. Prettyman & Sons, 148 S.E. 361, 150 S.C. 438.
Tenn.—Southland Portland Cement Co. v. Melvin, 5 Tenn.App. 459.
Tex.—Bridges v. Williams, Civ.App., 154 S.W.2d 669—Puett v. Stringer, Civ.App., 270 S.W. 941.
Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 435.
32 C.J. p 438 note 32.

Attorney's fees and costs
(1) Attorney's fees and costs, in-

The undertaking of the surety in an injunction bond, where there are several complainants, is, in law, for the principals severally as well as jointly, that is, the surety is bound in effect that each and all of his principals shall perform and fulfill whatever decree may be rendered in the cause against all or either of them.[37]

Construction. In endeavoring to ascertain the precise terms of the contract actually made by the parties to the bond, courts resort to the same rules of interpretation as apply in cases of other contracts.[38] Bonds will be so construed as to give effect to the intention of the parties.[39] It is generally held that the bond is to be construed strictly,[40] although there is authority to the effect that a lib-

curred in hearings on injunction pendente lite, and for permanent injunction are not recoverable in action on injunction bond, where terms of bond required only payment of damages incurred by reason of restraining order.—Hecla Mining Co. v. Smith, 238 P. 996, 136 Wash. 148.

(2) Under injunction bond conditioned to pay and satisfy all damages occasioned by improper issuance of an injunction, the word "damages", however, has been held broad enough to include counsel fees incurred in establishing impropriety of injunction.—Gowen v. Swain, N.H., 26 A.2d 682.

(3) It has also been held that the omission of word "expenses" did not bar expenses incurred in establishing impropriety of injunction from being included in word "damages."—Gowen v. Swain, supra.

(4) A provision to pay all damages includes costs.—Morris v. Bowen, 153 So. 779, 26 Ala.App. 22, certiorari denied 153 So. 780, 228 Ala. 402.

Right to recover attorney's fees as item of damages generally see infra § 315.

Emergency bond

(1) Under a bond wherein the obligors agree to pay a stated sum to defendant in the event it should be determined that the emergency did not exist or that plaintiff created or connived thereat by his neglect or otherwise, the condition is breached where it is determined that there is no cause of action.—First State Bank of Sulphur Springs v. Becker, 242 P. 678, 78 Colo. 436.

(2) An additional promise in the bond to the effect that in case the temporary restraining order or temporary injunction shall not issue plaintiff will pay to defendant all costs and damages as shall be awarded against complainants does not prevent the bond from being an emergency bond.—First State Bank of Sulphur Springs v. Becker, supra.

Execution returned unsatisfied

Where the condition is that plaintiff will pay any damages or costs assessed against him, the obligation is broken as soon as a decree awarding damages is made and the execution thereon is returned unsatisfied.—Morris v. Barker, 235 N.W. 174, 253 Mich. 334—Lothrop v. Southworth, 5 Mich. 436.

Payment of all damages

(1) Where the bond is conditioned to secure payment of damages caused by the wrongful issuance of the writ, the writ was wrongfully issued if the court would not have issued it had it had full knowledge of the facts.—Travelers Mut. Casualty Co. of Des Moines v. Skeer, D.C. Mo., 24 F.Supp. 805, appeal dismissed, C.C.A., Skeer v. Travelers Mut. Casualty Co., 106 F.2d 1017, and Travelers Mut. Casualty Co. v. Skeer, 106 F.2d 1018.

(2) Under such a bond, given to restrain the collection of taxes, the collector of taxes was held to have sustained damage as against a contention that the right to collect the tax had been barred by limitations.—Fidelity & Deposit Co. of Maryland v. Helvering, 112 F.2d 205, 72 App. D.C. 120.

(3) Acts done by plaintiff's assignee, to whom the injunction was also available, are covered by the bond.—Draffen v. U. S. Fidelity & Guaranty Co., 17 P.2d 121, 217 Cal. 43.

(4) Where no damage was sustained there can be no recovery on the bond.

U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, and certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.

Ohio.—Pfaff Const. Co. v. Leonard, 178 N.E. 328, 40 Ohio App. 246.

Pa.—Smyth v. Fidelity & Deposit Co. of Maryland, 192 A. 640, 326 Pa. 391, 111 A.L.R. 481.

(5) If defendant was left in the same position, with reference to the subject of the controversy, which he intended to occupy if the writ had not been issued, he was not damaged by it, however wrongful it may have been.—Schmidt v. Meredith, 228 N. W. 568, 209 Iowa 621—Bank of Monroe v. Gifford, 31 N.W. 881, 70 Iowa 580.

(6) Other items of damage held to be within the terms of bonds conditioned on paying all damages which defendant may sustain as a result of a wrongful issuance of the writ.—Garden City Co. v. Detroit Fidelity & Surety Co., 278 P. 755, 128 Kan. 492, followed in Garden City Co. v. U. S. Fidelity & Guaranty Co., 283 P. 493, 129 Kan. 452.

Profits

The fact that defendant, restrained from selling certain heels, made a profit on the sale of other heels during the existence of the injunction did not absolve plaintiff from payment of damages on dissolution of injunction, but the profits so made are to be applied in reduction of damages.—I. R. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A. Ohio, 295 F. 479.

37. Tenn.—Kelly v. Gordon, 3 Head 683.

38. Ala.—Alabama Power Co. v. Hamilton, 77 So. 356, 201 Ala. 62.
Ill.—Shreffler v. Nadelhoffer, 25 N.E. 630, 133 Ill. 536, 23 Am.S.R. 626.

An injunction bond is nothing more or less than a contract.—DaFoe v. Starek, 9 Tenn.App. 668.

Separate obligations

Bonds given by surety in connection with restraining order and temporary injunction must be regarded as creating separate obligations as though they had been given by different sureties.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App.2d 905.

39. U.S.—I. T. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479.
Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 435.
32 C.J. p 438 note 39.

Knowledge of order

Where surety on injunction bond knew of pendency of action, he was chargeable with knowledge of nature of order requiring bond.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal.App. 434.

Restraining order

Where the bond voluntarily delivered to secure the issuance of a restraining order undertakes to indemnify for damages resulting from the injunction, the term "injunction" includes restraining order.—Behrens v. Smith Baking Co., 266 N.W. 61, 130 Neb. 651.

40. U.S.—U. S. v. Boyd, Miss., 15 Pet. 187, 10 L.Ed. 706.
32 C.J. p 438 note 40.

eral construction is proper.[41] It has been held that, where the surety is a paid surety, if there is any ambiguity in the bond it must be determined against the surety.[42] Where an injunction bond was taken by a federal court in a proceeding pending therein, its interpretation and construction, including the scope of the obligations imposed, must be governed by the federal law applicable to the subject, although such law emanates from the opinions of the federal courts.[43]

Effect of statutes. Where the conditions of an injunction bond are prescribed by statute, the bond is to be construed with reference to the statute in force at the time it is given in determining the liability thereon,[44] and the contractual liability of the surety is determinable by the terms of the bond and the provisions of the statute;[45] but the surety thereon will not be liable beyond the statutory requirements,[46] although the conditions may be broader than those prescribed by the statute and in express terms.[47]

Time of accrual. Damages sustained after the issuance of the injunction, but before the giving of the bond, may be recovered if within the terms of the bond,[48] but such damages cannot be recovered where they are not within the terms of the bond.[49] A second bond may be broad enough to cover all damages under both bonds.[50] It has been held that damages accruing after the preliminary injunction is made permanent cannot be recovered, although the decree should be afterward reversed and the action dismissed;[51] but, where the bond is conditioned to pay all damages incurred in case the injunction is dissolved, the bond has been held to be in force until the case is finally disposed of on appeal, even though the injunction was made permanent in the lower court and was then reversed on appeal.[52] Where bond was given in the lower court and judgment rendered against plaintiff, and a second bond was given on appeal, and a like judgment against plaintiff was again rendered, and suit was thereafter brought on the first bond, and judgment rendered for the full amount named therein, and a second suit was brought on the second bond, it will be presumed that all damages sustained were suffered before the first action was brought and were assessed by the jury in that action.[53] In a proper case damages accruing after suit brought on a bond may be recovered;[54] but there can be no recovery for any damages accruing after dissolution of an injunction or restraining order.[55]

Stipulation of principals. Liability of the sureties cannot be varied or extended by any stipulation of the parties to the injunction suit.[56]

§ 283. Assessment of Damages in Injunction Suit

a. In general
b. Exclusiveness of procedure

41. Ind.—Connon v. Paxson, 1 Blackf. 207—Crawford v. Spindler, 103 N.E. 338, 55 Ind.App. 1.

42. Minn.—Johnson v. Maryland Casualty Co., 224 N.W. 700, 177 Minn. 103.

43. Ky.—U. S. Fidelity & Guaranty Co. v. Travelers' Ins. Mach. Co., 224 S.W. 496, 188 Ky. 841.

Not simple contract

An injunction bond is not a simple contract to be interpreted by the common law of the state where made, since such a bond is a condition imposed by a federal court as a prerequisite to the issuance of its injunction.—Travelers Mut. Casualty Co. of Des Moines v. Skeer, D.C.Mo., 24 F.Supp. 805 appeal dismissed, C. C.A., Skeer v. Travelers Mut. Casualty Co., 106 F.2d 1017, and Travelers Mut. Casualty Co. v. Skeer, 106 F.2d 1018.

44. Ala.—Alabama Power Co. v. Hamilton, 77 So. 356, 201 Ala. 62.
32 C.J. p 438 note 42.

45. Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245—Foster v. Royal Indemnity Co., 271 P. 609, 83 Mont. 170.

46. Cal.—Lambert v. Haskell, 22 P. 327, 80 Cal. 611.
32 C.J. p 438 note 45.

47. Tenn.—Hubbard v. Fravell, 12 Lea 304—Horton v. Cope, 6 Lea 155.

48. Ala.—Fidelity & Deposit Co. of Maryland v. Walker, 48 So. 600, 158 Ala. 129.
32 C.J. p 435 note 89.

49. **Prospective operation**

Bonds given to indemnify against damage which may result from injunctive process are construed as operating prospectively unless they are so worded as to express intent of surety to assume liability for damage which has accrued before giving of bond.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App.2d 905.

50. N.H.—Towle v. Towle, 46 N.H. 431.
32 C.J. p 435 note 90.

51. Cal.—Lambert v. Haskell, 22 P. 327, 80 Cal. 611.
Mo.—Toothaker v. Pleasant, App., 9 S.W.2d 670.
32 C.J. p 435 note 92.

52. Tex.—Southern Properties v. Carpenter, Civ.App., 50 S.W.2d 876, error refused.
Va.—Columbia Amusement Co. v. Pine Beach Inv. Corp., 63 S.E. 1002, 109 Va. 325, 16 Ann.Cas. 1120.

53. Ohio.—Zurhorst v. Judson, 23 Ohio Cir.Ct.,N.S., 299.
32 C.J. p 435 note 94.

54. Ala.—Salmon v. Salmon, 69 So. 304, 13 Ala.App. 510.

55. Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.
32 C.J. p 435 note 96.

Injunction dissolved by lapse of time

Where temporary injunction restraining foreclosure sale under deed of trust had dissolved itself by lapse of time, announcement by trustee and beneficiary in open court that they would not foreclose under deed of trust until cause was tried on merits did not amount to "extension" of injunction, but was merely a voluntary "waiver" of right to foreclose without restraint of injunction or protection of bond.—Boatmen's Nat. Bank of St. Louis v. Cantwell, Mo. App., 161 S.W.2d 431.

56. Ill.—Keith v. Henkleman, 50 N. E. 692, 173 Ill. 137.
32 C.J. p 438 note 47.

a. In General

In some jurisdictions a court, on dissolving an injunction in which a bond has been given to protect the defendant against loss, has inherent power to assess the amount of damages due on the bond; but in other jurisdictions the contrary is held.

A federal court, on dissolving an injunction in which a bond has been given to protect defendants against loss occasioned thereby if shown to be wrongfully issued, has power to determine the question of liability on the bond and assess the amount of damages thereon by reference, or otherwise, although there is no statute or rule of court authorizing this practice, or although the provisions of the bond itself do not expressly confer such authority,[57] and this practice has been adopted by the courts in some other jurisdictions[58] but the majority of decisions hold that, in the absence of express statutory authority or of some provision in the bond itself authorizing it, the court granting the injunction has no power on dissolution thereof to assess the damages resulting from the wrongful issuance of the injunction;[59] even in jurisdictions where the power of the court to assess damages independently of statute or rule of court is recognized, this power is conditioned on the fact that an injunction bond has been given.[60]

Cross petition. In an action for damages by the one obtaining the restraining order, where plaintiff insists and the court orders defendant to present in that action by cross petition whatever damages he may claim to have for wrongful issuance of the restraining order, plaintiff, by insisting on the making of such an order, waived the right to object thereto or assign such order and subsequent proceedings thereunder as error.[61]

b. Exclusiveness of Procedure

Where available, the remedy of assessment of damages in the injunction suit generally is not exclusive.

Both in jurisdictions where the power to assess damages in the injunction suit exists independently of statute or rule of court[62] and in jurisdictions where the power is thus conferred[63] it is generally held that this remedy is not exclusive, and, as discussed infra § 292, the assessment may be made in an action on the bond if it is so conditioned as to permit it, the court being vested with a discretion, it is said, either to determine the liability on the bond or to leave the injunction defendant to his remedy by an action at law.[64] Nevertheless, under

57. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Shell Oil Co. v. Dye, C.C.A.Ill., 135 F.2d 365—General Broadcasting System v. Bridgeport Broadcasting Station, D.C.Conn., 53 F.2d 664—Owl Creek Coal Co. v. Big Horn Collieries Co., D.C.Wyo., 36 F.2d 485—Martin v. Barth, C.C.A.Ind., 25 F.2d 95—Becker v. Stander, D.C.La., 17 F.2d 772.
32 C.J. p 439 note 50.

Discretion

The awarding of damages under temporary injunction bond is not a matter of right, and is a matter resting in the sound discretion of the court.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, and certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.

Earlier federal decisions maintained a contrary view.—Bein v. Heath, La., 12 How., U.S., 168, 13 L.Ed. 939—Merryfield v. Jones, C.C. Mass., 17 F.Cas.No.9,486, 2 Curt. 306.

58. Hawaii.—Manibog v. Low, 33 Hawaii 660.
Pa.—See Klahr v. Baldwin, Com.Pl., 23 Erie Co. 345.
Vt.—Spaulding & Kimball Co. v. Ætna Chemical Co., 126 A. 588, 98 Vt. 169.
32 C.J. p 439 note 51.

Notwithstanding statutory reference

As between parties to suit, chancery court has inherent power to assess injunction damages, notwithstanding statutory provision relating to assessment by reference to master.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

59. Neb.—Higgins v. Adelson, 270 N.W. 502, 507, 131 Neb. 820, quoting **Corpus Juris.**
Pa.—Miller v. South Hills Trust Co., 96 Pa.Super. 273.
Utah.—Junction Irr. Co. v. Snow, 118 P.2d 130, 131, 101 Utah 71, quoting **Corpus Juris.**
32 C.J. p 439 note 53.

No notice to sureties

On dissolution of temporary injunction restraining sale under chattel mortgage, petition to assess deficiency against injunction bond could not be granted as to sureties who had no notice of application, not having had their day in court, but remedy should have been by action on bond.—Epstein v. Graff, 203 N.W. 836, 231 Mich. 232.

60. U.S.—Russell v. Farley, Minn., 105 U.S. 433, 26 L.Ed. 1060.
32 C.J. p 439 note 53.

61. Kan.—Sterling v. Goulden, 12 P.2d 812, 136 Kan. 18.

62. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Stoody Co. v. Mikels, D.C. Cal., 40 F.Supp. 53.
Hawaii.—Manibog v. Low, 33 Hawaii 660.
32 C.J. p 440 note 67.

63. N.Y.—Fuller v. American Surety Co., 275 N.Y.S. 113, 153 Misc. 482—Bolton v. Thacher, 214 N.Y.S. 290, 126 Misc. 675.
Tenn.—James v. Williams, 99 S.W.2d 331, 20 Tenn.App. 420—Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn.App. 115—DaFoe v. Starek, 9 Tenn.App. 668.
Tex.—Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, error dismissed.
32 C.J. p 440 note 68.

64. Hawaii.—Manibog v. Low, 33 Hawaii 660.
Mass.—Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357.
32 C.J. p 440 note 70.

Discretion abused

Under the circumstances of the case, refusal to assess damages in injunction suit held an abuse of discretion.—Public Service Commission of Missouri v. Brashear Freight

some statutes it is the duty of the court in which the injunction suit is being tried to assess the damages,[65] and, as discussed infra § 292, until this is done no action can be maintained on the bond.

§ 284. —— Statutory Provisions

Under some statutes the court is authorized, or authorized in particular cases, to assess damages in the injunction suit.

In many jurisdictions the court in which the injunction suit is brought is by express statutory provision vested with power on dissolution of the injunction to assess the damages resulting from its wrongful issuance.[66] In other jurisdictions there are provisions not quite so broad, but which authorize the assessment of damages on the dissolution of an injunction against proceedings on judgments of final orders generally,[67] or on judgments for money,[68] or where the purpose of the injunction was delay,[69] or where the injunction was issued to stay proceedings at law in actions of ejectment after verdict;[70] and, where the power to assess damages in the injunction suit is thus restricted by the statute conferring it, it can, of course, be exercised in no cases other than those designated.[71] In the absence of a statute directing the judge to

Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

65. Ark.—Sullivan v. Wilson Mercantile Co., 271 S.W. 30, 168 Ark. 262.
32 C.J. p 440 note 70.

66. Ark.—Lesser-Goldman Cotton Co. v. Adams, 249 S.W. 371, 158 Ark. 10.
Ill.—Crozier v. Freeman Coal Mining Co., 2 N.E.2d 293, 363 Ill. 362—Babcock v. Chicago Rys. Co., 155 N.E. 773, 325 Ill. 16—Leonard v. Pearce, 271 Ill.App. 428—Kahn v. Rasof, 253 Ill.App. 546—Hayes v. Kellums, 224 Ill.App. 533.
Minn.—Midland Loan Finance Co. v. Temple Garage Co., 288 N.W. 853, 206 Minn. 434.
Mo.—Farasy v. Hindert, App., 110 S.W.2d 785.
Philippine.—Macatangay v. San Juan de Bocboc, 9 Philippine 19.
Tenn.—James v. Williams, 99 S.W. 2d 831, 20 Tenn.App. 430.
32 C.J. p 439 note 55.

All costs

Where judgment of trial court granting temporary injunction was reversed by appellate court and injunction dissolved, all costs, including those in lower court and on appeal, were adjudged against plaintiff and the sureties on his injunction bond as provided in statute.—Railroad Commission v. Young, Tex.Civ. App., 132 S.W.2d 147.

Damages assessed against plaintiff

Miss.—Herron v. McLean, 191 So. 59.

Deposits

The court has jurisdiction to dispose of deposits made into the court to secure defendant for damages if the writ should be wrongfully issued.
Fla.—Masser v. London Operating Co., 145 So. 72, 106 Fla. 474.
Ill.—Leslie v. Wyant, 17 N.E.2d 618, 297 Ill.App. 643.

Emergency bond

(1) Where sureties in an emergency bond consent that the court shall enter judgment against them for the amount of the bond if the court adjudges that the emergency alleged does not exist, or, existing, was brought about by the act or omission of or for plaintiff, on a finding that an emergency does not exist, judgment may be entered for the amount of the bond without resort to an independent action.—First State Bank of Sulphur Springs v. Becker, 242 P. 678, 78 Colo. 436—Cary v. Mine & Smelter Supply Co., 129 P. 230, 53 Colo. 556.

(2) For purpose of judgment on such a bond, it is immaterial whether defendant has sustained any damage from temporary restraining order.—Axelson v. Columbine Laundry Co., 254 P. 990, 81 Colo. 254.

Defendant held entitled to recover on injunction bond.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.

Purpose of statute

(1) The statute relating to assessment of damages on dissolution of a temporary injunction was intended to provide relief against wrongful issuance of an injunction.—Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190.

(2) The statute was designed to give to a defendant, against whom an injunction issued, damages on equitable principles whenever the injunction issued was an infringement on defendant's legal rights. It is not necessary for him to prove that the obtaining of the injunction was a tortious act.—2063 Lawrence Avenue Bldg. Corporation v. Van Heck, 45 N.E.2d 687, 317 Ill.App. 59.

Reconventional demand

Under a statute providing that in case of an injunction defendant may in the same suit, by reconventional demand, recover from plaintiff the damages he may have suffered by the illegal resort to such writ, a temporary restraining order is an injunction, and defendant is entitled to sue for his damages by reconventional demand.—Richards v. Roudillon, 140 So. 274, 19 La.App. 535.

Statute held valid

Ill.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.

67. Ark.—Felker v. Rice, 161 S.W. 162, 110 Ark. 70.
32 C.J. p 439 note 56.

68. La.—Simon v. Barnett, 125 So. 743, 169 La. 642—Timkan v. Wisner Estate, 95 So. 711, 153 La. 262.
32 C.J. p 439 note 57.

69. Tex.—Mitchell v. Gregory, Civ. App., 283 S.W. 211.
32 C.J. p 440 note 58.

70. Vt.—Powell v. Woodbury, 83 A. 541, 85 Vt. 504, Ann.Cas.1914D 606.

71. La.—Testart v. Belot, 33 La. Ann. 1469.
32 C.J. p 440 note 60.

Partition sale

A statute providing for damages on dissolution of an injunction obtained for delay where collection of money was enjoined has no application to a temporary injunction restraining a partition sale.—Mitchell v. Gregory, Tex.Civ.App., 283 S.W. 211.

Restraining orders

(1) Damages were allowable where restraining order was dissolved on a motion separately filed, tried, and disposed of prior to the trial of the rule nisi, since restraining orders granted on furnishing bond have, under statute, same temporary effect as preliminary injunctions.—Vidal v. Sterlington Gas Corporation, 161 So. 6, 182 La. 19.

(2) Under the same statute, however, it has been held that a temporary restraining order cannot be classified as an injunction.—Inter City Express Lines v. Guarisco, La. App., 165 So. 727.

(3) A temporary restraining order is not "an injunction to stay proceedings upon a judgment or final

assess damages,[72] ordinarily, notwithstanding the power conferred by statute, it is largely within the discretion of the court whether or not it should be exercised.[73] An application for damages or for a reference to ascertain damages will be denied where it is apparent that defendant suffered no damage.[74] The discretion of the court as to the amount of damages awarded will not in general be interfered with.[75]

§ 285. —— Conditions Precedent

A final decision that the injunction was wrongfully obtained usually is a condition precedent to the assessment of damages in the injunction suit.

As in the case of suits brought on injunction bonds, discussed infra § 292, so in jurisdictions where it is permissible for the court trying the injunction suit to assess the damages by the assistance of a referee or without such assistance it is a condition precedent to such assessment and allowance that there shall have been a final decision on the merits,[76] or something equivalent to such a decision,[77] and there can be no assessment of damages on a mere dissolution of the injunction except where this requirement is expressly abrogated by statute.[78] Within the rule stated there is no final adjudication in case the injunction is merely dissolved on the coming in of the answer,[79] or where an injunction wrongfully issued was dissolved by a voluntary discontinuance of the case before the expiration of the time for defendant to enter his appearance,[80] or pending an appeal.[81] Ordinarily, however, where plaintiff obtained an injunction and where thereafter plaintiff discontinues the action without defendant's consent, such discontinuance constitutes an adjudication that plaintiff was not entitled to the injunction;[82] but even in case of a final determination of the action resulting from a dismissal of the bill at the instance of complainant damages should not be assessed if the dissolution and dismissal were made pursuant to an agreement of the parties.[83] Also a dissolution on the matter of the bill only,[84] or a dissolution which follows a dismissal of the complaint,[85] may be regarded as a final adjudication.

Attempt to dissolve. It has been held that no damages can be awarded because of a temporary restraining order where no effort was made to dissolve it while it was in effect.[86]

order" of the county court within a statute providing that, on the dissolution of an injunction to stay proceedings upon a judgment or final order, damages shall be assessed by the court.—Adcock v. Coker, 151 S. W. 253, 105 Ark. 210.

72. La.—Hollingsworth v. Gleissner, 7 La.App. 728.

73. Tex.—Clare v. Maroney, Civ. App., 152 S.W.2d 410, error dismissed.
32 C.J. p 440 note 62.

74. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 531.

75. Ark.—Moore v. Granger, 30 Ark. 574.
Tex.—Clare v. Maroney, Civ.App., 152 S.W.2d 410, error dismissed.

76. N.Y.—Dickinson v. Springer, 158 N.E. 74, 246 N.Y. 203, reversing 219 N.Y.S. 799, 218 App.Div. 831, and motion denied 159 N.E. 642, 246 N.Y. 539—Lockwood's Dollar Cleaners v. Lockwood, 244 N.Y.S. 281, 137 Misc. 446.
32 C.J. p 440 note 76.

Partial dissolution of an injunction by a final decree is such a breach of the obligation of the bond as to entitle defendant to a reference to ascertain the damages.—Tecla Corporation v. Salon Tecla, 234 N. Y.S. 544, 226 App.Div. 168.

77. N.Y.—Wilson v. Wilson, 114 N. Y.S. 455, 130 App.Div. 70.

78. Ill.—Schuler v. Wolf, 24 N.E.2d 162, 372 Ill. 386—Crozier v. Freeman Coal Mining Co., 2 N.E.2d 293, 363 Ill. 362—Hayes v. Kallums, 224 Ill.App. 533.
32 C.J. p 441 note 78.

Under former statutes in Illinois, where an injunction was ancillary to the cause of action, where the only prayer of the bill was for an injunction, it was premature and improper to assess damages until a final disposition of the case.—Terry v. Hamilton Primary School, 72 Ill. 476—32 C.J. p 441 note 78 [a] (2).

79. Ill.—Terry v. Hamilton Primary School, 72 Ill. 476.
32 C.J. p 441 note 79.

80. Vt.—Powell v. Woodbury, 83 A. 541, 85 Vt. 504, Ann.Cas.1914D 606.
32 C.J. p 441 note 80.

81. N.Y.—Musgrave v. Sherwood, 76 N.Y. 194—Howard v. Park, 59 How.Pr. 344.

82. **Without costs**
Granting of leave to discontinue without costs in no way ordinarily affects question of damages sustained by reason of injunction.—Wise Shoe Co. v. Fischer, 286 N.Y.S. 14, 158 Misc. 514.

83. Ill.—Cassen v. Ernst, 84 Ill.App. 70, affirmed 55 N.E. 646, 183 Ill. 137.
"Where a statute or a bond provides for an allowance of damages for the wrongful suing out of an injunction, if it shall be dissolved, this means a dissolution by order of court, or upon the failure of complainant to prosecute his suit."—Sackett v. Morris, 149 Ill.App. 152, 165.

Adjustment of differences
Where, after injunction was granted, but before discontinuance was sought by plaintiff, plaintiff and defendant adjusted their differences, discontinuance of action was not determination that plaintiff was not entitled to injunction, and did not entitle defendant to damages sustained by reason thereof.—Wise Shoe Co. v. Fischer, 286 N.Y.S. 14, 158 Misc. 514.

84. N.Y.—Brown v. Utopia Land Co., 103 N.Y.S. 53, 118 App.Div. 190.
32 C.J. p 441 note 82.

85. S.C.—Lewis v. Jones, 43 S.E. 525, 65 S.C. 157.
32 C.J. p 441 note 83.

86. Ill.—Leonard v. Pearce, 271 Ill. App. 428.
La.—Inter City Express Lines v. Guarisco, App., 165 So. 727—First Nat. Bank v. Corell, App., 149 So. 326, amending 145 So. 395, rehearing denied 146 So. 479—Austin v. Currie, 134 So. 723, 16 La.App. 375.

It is elementary that no damages can be awarded because of the wrongful issuance of any conservatory writ, unless the writ is dissolved on a motion tried separately from the merits.—Falgout v. Boudreaux, La.App., 188 So. 421—Coleman v. Currie, 134 So. 733, 16 La. App. 403.

Prayer in answer. In some jurisdictions a prayer for damages must be made in defendant's answer in the injunction suit in order to recover such damages on dissolution of the injunction.[87]

§ 286. —— Proceedings for Assessment

a. Motion or suggestion of damages
b. Mode of assessment
c. Hearing and determination

a. Motion or Suggestion of Damages

A timely and proper motion or suggestion of damages ordinarily is necessary in order to secure an assessment of damages in an injunction suit.

To authorize an assessment of damages in an injunction suit it is necessary that a motion for, or suggestion of, damages should be made.[88] Under some statutes the motion may be made orally,[89] but under others it has been held that a motion for, or suggestion of, damages must be in writing.[90] The motion should set forth facts sufficient to constitute a cause of action,[91] and it must be so framed as to inform the other party with reasonable certainty of the nature and amount of the damages claimed.[92] A motion for the appointment of a referee to assess damages must be made within the judicial district within which the action was triable.[93]

Who may move and parties. The enjoined parties are proper parties to move for an assessment of damages on the injunction bond.[94] Real parties in interest not formally enjoined, after being made parties defendant at their own request and after obtaining dissolution of the injunction, may move for an assessment of damages.[95] An obligee incorrectly named in the bond may, in his true name, move for an assessment of his damages.[96]

As a general rule, all the obligees should join in the motion to assess damages on an injunction bond,[97] but the rule is not one of universal application and is subject to exceptions.[98] If separate motions are filed by the joint obligees who are the real parties in interest, the motions should be treated and tried as one motion, and at the same time, to the end that all the parties plaintiff therein who are united in interest should be before the court, and that one final judgment should be rendered on the bond.[99]

Under some statutes the sureties on the injunction bond may, if they wish, appear in the proceeding to assess damages.[1]

Time of making. The motion ordinarily should be filed at the same term of court at which the

87. La.—City of Shreveport v. Dickason, 107 So. 427, 160 La. 563.

88. Ill.—Albright v. Smith, 68 Ill. 181.
32 C.J. p 441 note 86.

89. Me.—Andrews v. Nalley, 111 A. 804, 119 Me. 500.

90. Ill.—Albright v. Smith, 68 Ill. 181.
32 C.J. p 441 note 88.

91. Mo.—Laumeier v. Sammelmann, 279 S.W. 249, 218 Mo.App. 468.

Supplemental motion

Where the motion to assess damages for suing out an injunction was filed immediately on the dissolution of the injunction by the trial court, and a supplemental motion was filed which did not demand damages as the actual, natural, and proximate result of the injunction, the supplemental motion was without effect, and the original motion was the motion justifying the assessment of damages.—C. H. Albers Commission Co. v. Spencer, 139 S.W. 321, 236 Mo. 608, Ann.Cas.1912D 705.

92. Mo.—C. H. Albers Commission Co. v. Spencer, supra.
32 C.J. p 441 note 89.

93. N.Y.—Wilson v. Dreyer, 72 N.Y.S. 578, 65 App.Div. 249.

94. Obedience before service

A defendant, even though he obeys the injunction before being served, may have a reference to ascertain damages, since the undertaking is for the benefit of all defendants who are enjoined.—Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 39 Barb.,N.Y., 16, 20 How.Pr. 62.

State officers

(1) Where injunction bonds ran to state officials and agencies enjoined from collecting fees and licenses under state bus and truck law, the enjoined parties were "proper parties" to invoke court's protection of the state's interest by assessment of damages, since the bonds were required to protect the state through its officials, as against contention that the state treasurer was given statutory power to collect the fees and licenses which were in part the basis of motion to assess damages. —Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

(2) It is particularly true that the enjoined officials are proper parties where one of the officers enjoined is the attorney general, who has exclusive authority to bring suit on behalf of the state.—Public Service Commission of Missouri v. Brashear Freight Lines, supra.

95. Ill.—District No. 181 School Directors v. Mathis, 168 Ill.App. 174.

96. Mo.—Stine v. Southwest Bank of St. Louis, App., 108 S.W.2d 633.

97. Mo.—Barrett v. Stoddard County, 197 S.W. 914, 272 Mo. 129—Ohnsorg v. Turner, 33 Mo.App. 486.

98. Mo.—C. H. Albers Commission Co. v. Spencer, 139 S.W. 321, 236 Mo. 608, Ann.Cas.1912D 705.
32 C.J. p 441 note 92.

99. Mo.—Helmkampf v. Wood, 84 Mo.App. 261—August Gast Bank Note & Lithographing Co. v. Fennimore Ass'n of St. Louis, 79 Mo. App. 612.

1. Wis.—Schlitz Realty Corporation v. City of Milwaukee, 247 N.W. 459, 211 Wis. 62, followed in Alaska Land Co. v. City of Milwaukee, 247 N.W. 462, 211 Wis. 71, Uihlein v. City of Milwaukee, 247 N.W. 463 (two cases), 211 Wis. 72, Continental Realty Co. v. City of Milwaukee, 247 N.W. 463, 211 Wis. 73, New Jersey Theatre Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 75, Werdehoff Realty Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 76, Majestic Realty Corporation v. City of Milwaukee, 247 N.W. 464, 211 Wis. 77, and Glenogle Co. v. City of Milwaukee, 247 N.W. 465, 211 Wis. 78.

judgment dissolving the injunction was entered.[2] Where plaintiff appeals from the judgment of dissolution, it has been held that the court has jurisdiction to assess damages at its next term after such judgment is affirmed,[3] although if the appeal is taken without bond, so that it does not operate as a supersedeas, the motion may properly be made at the term in which the decree is entered.[4] Under a statute providing that the court, after dissolution of the injunction and before finally disposing of the suit, on a suggestion of damages, shall assess damages, a suggestion of damages may be filed at any time after dissolution of the injunction and before the decree is signed and filed,[5] but, in the absence of an express reservation of jurisdiction to assess damages,[6] a filing of a suggestion after final disposition comes too late where the final decree has not been vacated.[7]

It has been held, in the absence of a statute to the contrary, that the court cannot and should not order a reference to assess damages on a motion made long after the entry of the final decree which dissolved the injunction and disposed of the litigation.[8] Nevertheless, irrespective of any particular statutory provision on the subject, circumstances attending the case may be such that a long delay in making application for assessment of damages will not bar the right to have such assessment made.[9] Where plaintiff appeared and consented that a motion for the assessment of damages on an injunction bond be set for trial at a subsequent day, when he appeared, waived a jury, and proceeded to trial, he thereby waived any informality as to the time of the filing of the motion.[10]

b. Mode of Assessment

In the absence of a statute to the contrary, the judge may assess the damages himself or he may order a reference therefor.

In the absence of a statute to the contrary, the assessment ordinarily may be made by the judge or chancellor himself.[11] Under some statutes the assessment may be had by reference or otherwise, as the court may see fit to direct,[12] although it has been said that a reference is very much a matter of course;[13] and under other statutes defendant is entitled to such a reference if he demands it,[14] and, independent of any special statutory provision, such a reference has been allowed.[15]

In the absence of a statute providing otherwise, it may be discretionary with the chancellor whether or not a jury trial will be granted to fix the amount of damages;[16] but under some statutes the party asking damages is entitled to have the amount of damages fixed by a jury unless he waives the right.[17]

c. Hearing and Determination

The proceeding to assess damages is in the nature of a suit on the bond.

The proceeding to assess damages in the injunction suit is in the nature of a suit on the bond,[18] and has all the elements of the trial of an issue raised by the pleadings;[19] and, as is the case where suit is brought on an injunction bond, discussed infra § 293, it is not permissible to go into the merits of the main cause,[20] but the inquiry is only as to

2. Mo.—Robertson v. Glenn, 218 S.W. 920, 205 Mo.App. 89.
32 C.J. p 442 note 98 [a], [b] (1).

Notice

Where the motion to assess damages is filed at a term subsequent to the order dissolving the injunction, notice must be given.—Pegram v. Wm. H. Lee & Co., Mo.App., 199 S.W. 433—32 C.J. p 442 note 98 [b] (4).

3. Mo.—Houston v. Welch, 241 S.W. 991, 211 Mo.App. 300.
32 C.J. p 442 note 98 [b] (2).

4. Mo.—Fears v. Riley, 48 S.W. 828, 147 Mo. 453.

5. Ill.—Wing v. Dodge, 80 Ill. 564.
32 C.J. p 442 note 97 [a].

The only condition imposed on the party claiming damages is that his written suggestion must be made after the injunction is dissolved and before final disposition of the suit.—Leonard v. Pearce, 271 Ill.App. 428.

6. Ill.—Hillmer v. Behr, 106 N.E. 481, 264 Ill. 562.

Parties entitled to benefit

An enjoined party who filed no suggestions of damages prior to the entry of the final decree is not entitled to join in a suggestion of damages filed by other parties who had been granted leave to file such after the final decree.—Leonard v. Pearce, 271 Ill.App. 428—32 C.J. p 442 note 97 [b].

7. Ill.—H. E. Lacy Mfg. Co. v. Lacy Products Corporation, 5 N.E.2d 616, 287 Ill.App. 633.
32 C.J. p 442 note 97 [c].

8. **Eight months**

Motion made eight months after entry of final decree denied.—Stoody Co. v. Mikels, D.C.Cal., 40 F.Supp. 53.

9. N.Y.—Holcomb v. Rice, 23 N.E. 1112, 119 N.Y. 598.
32 C.J. p 442 note 2.

10. Mo.—Sutliff v. Montgomery, 92 S.W. 515, 115 Mo.App. 592.

11. Miss.—New Orleans, M. & C. R. Co. v. Martin, 62 So. 228, 105 Miss. 230.
32 C.J. p 442 note 5.

12. Vt.—Spaulding & Kimball Co. v. Ætna Chemical Co., 126 A. 588, 98 Vt. 169.
32 C.J. p 442 note 8.

13. N.Y.—Waterbury v. Bouker, 10 Hun 262.

14. Tenn.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682—James v. Williams, 99 S.W.2d 831, 20 Tenn. App. 420—Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115.
32 C.J. p 443 note 10.

15. Vt.—Sturgis v. Knapp, 33 Vt. 486.

16. Ill.—Holmes v. Stateler, 57 Ill. 209.

17. Mo.—Nolan v. Jones, 18 S.W. 1107, 108 Mo. 431.
32 C.J. p 443 note 14.

18. Mo.—Laumeier v. Sammelmann, 279 S.W. 249, 218 Mo.App. 468.
Tenn.—Smith v. Ruohs, Ch.App., 58 S.W. 1101.

19. N.M.—McCoy v. Torrance County Sav. Bank, 144 P. 283, 19 N.M. 422.

20. Miss.—McLeod v. Barnes, 156

the amount of damages, if any, and not as to the right to recover them.[21] Where the proper steps have been taken by the party claiming damages, the court or referee, in case the question of damages has been referred, will proceed to hear evidence and to assess the damages.[22] On the evidence presented, the grant or denial of damages ordinarily rests in the sound discretion of the court.[23]

In case the question of damages is referred, it has been held that findings of fact and conclusions of law need not be reported by the referee.[24] The sureties are entitled to appear and resist the application for a reference to fix the damages sustained by the issuance of the injunction.[25] Although the sureties are not liable beyond the amount of the bond, and although plaintiff is not liable for an unwarranted injunction except by an action for malicious prosecution, yet, on a reference to ascertain damages, the full amount thereof, although in excess of the bond, is properly found and reported.[26] Sureties are entitled to be heard on an application to set aside the referee's report and to send it back for correction if it is wrong.[27] Where a rehearing is ordered for error of the referee or for other cause, it is within the discretion of the court to permit the evidence formerly taken to be submitted on the rehearing together with such other evidence as may be adduced by the parties in order to prevent a possible loss of evidence and reduce the expense of litigation.[28]

Notice of assessment. In the federal courts it has been held that proceedings to assess damages on the injunction bond in the injunction suit are not binding on the sureties when there is no notice to, or process against, them.[29] In the state courts, while it has been said that it is the safer and fairer course to give the sureties notice of proceedings to assess damages,[30] it usually is held that such notice is not indispensable;[31] but a limitation of the rule has been recognized where the proceedings to assess damages occur at a term subsequent to that in which the injunction was dissolved, in which circumstances it has been held that notice is necessary,[32] unless notice is waived,[33] even though the motion to assess damages was filed at the term in which the judgment dissolving the injunction was given.[34]

Time of hearing. In some jurisdictions when an injunction is dissolved before the termination of the suit damages may then be awarded on the injunction bond if the suit be for no other relief than the injunction itself; but if the injunction is merely ancillary to the relief sought the award of damages should await the termination of the suit.[35] In other jurisdictions the court, before final disposition of the proceedings, on a proper showing, may dissolve a temporary injunction if it was wrongfully obtained and award to defendant such damages as he may have suffered, or the court may defer action until the final hearing of the cause.[36] Where it is essential, by the provisions of the statute, that the motion for damages should be made before the suit is finally disposed of, if the motion or suggestion of damages is filed in time, the hearing and determination thereof may be held after final decree,[37] or indeed at any subsequent term;[38] and the hearing may be continued from time to time on proper showing made to the court.[39] Where the stat-

So. 517, 170 Miss. 880—Day v. McCandless, 142 So. 486, 167 Miss. 832.
32 C.J. p 443 note 18.

Conclusively established
Appellate court's reversal of order thereby dissolving the injunction conclusively established that it was wrongfully sued out as regards recovery of damages therefor.—Babcock v. Chicago Rys. Co., 155 N.E. 773, 325 Ill. 16.

Party seeking temporary injunction assumes risk of obtaining favorable final decree.—Saunders v. Piggly-Wiggly Corporation, C.C.A.Tenn., 30 F.2d 385, modifying, D.C., Piggly-Wiggly Corporation v. Saunders, 1 F. 2d 572.

21. Ky.—Hayden v. Phillips, 11 S. W. 951, 89 Ky. 1, 11 Ky.L. 239.
32 C.J. p 443 note 19.

22. S.D.—Quarnberg v. Chamberlain, 137 N.W. 405, 29 S.D. 377.
32 C.J. p 443 note 20.

23. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F. 2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, and certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.

24. N.Y.—Matthews v. Murchison, 14 Abb.N.Cas. 512.

25. Tenn.—Henley v. Cliborne, 3 Lea 213—Smith v. Ruohs, Ch.App., 58 S.W. 1101.

26. N.Y.—Harrison v. Hind & Harrison Plush Co., 112 N.Y.S. 834, 128 App.Div. 460.

27. N.Y.—Methodist Churches v. Barker, 18 N.Y. 463.

28. N.Y.—Roberts v. White, 73 N.Y. 375, affirming 43 N.Y.Super. 455.

29. U.S.—Terry v. Robbins, C.C.N. C., 122 F. 725—Leslie v. Brown, Ky., 90 F. 171, 32 C.C.A. 556.
32 C.J. p 444 note 41.

30. N.Y.—Jordan v. Volkenning, 72 N.Y. 300.

31. Mo.—Southern Surety Co. v. Young, 198 S.W. 476, 197 Mo.App. 640.
32 C.J. p 444 note 43.

32. Mo.—Pegram v. William H. Lee Co., App., 199 S.W. 433.
32 C.J. p 444 note 44.

33. Mo.—Konta v. St. Louis Stock Exchange, 131 S.W. 380, 150 Mo. App. 617.

34. Mo.—Konta v. St. Louis Stock Exchange, supra.

35. Miss.—Staple Cotton Co-op. Ass'n v. Borodofsky, 104 So. 91, 139 Miss. 368.

Award properly withheld until final determination of the case.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757.

36. Hawaii.—Manibog v. Low, 33 Hawaii 660.

37. Ill.—Wing v. Dodge, 60 Ill. 564.

38. Ill.—Hovorka v. Hemmer, 107 Ill.App. 312.

39. Ill.—Poyer v. Village of Des

ute does not designate the time for filing the motion, the court has jurisdiction, subsequent to a final decree on the merits, to hear and determine injunction damages;[40] but it has been held that the assessment should in general be made during the term at which the cause is finally disposed of by the court.[41] This is, however, not absolutely necessary;[42] and the rule does not apply where there is an appeal from the final order on dissolution.[43]

Where, in an action for injunction, the damage issue was deferred, by stipulation, to be tried later, and an order made that plaintiffs might later file an amended complaint with respect to the issue of damages, after appeal from the decree of injunction, the court did not lose jurisdiction because the damage issue was not tried during the term at which the injunction was granted and no application was made within six months after the term.[44]

Defenses. Any defense is available which might be set up in an action on the bond.[45]

Evidence. The usual presumptions arising in civil actions generally will be indulged in proceedings of this character.[46] In the absence of a statute providing otherwise,[47] the burden is on the enjoined defendant to establish his damages by proper evidence.[48] Where, in obedience to an order of the court, defendant has filed a bill of particulars stating the damages sustained by him, he should, at the hearing, be confined to the items of damages set out in the bill of particulars.[49] It is not necessary for

Plaines, 13 N.E. 819, 123 Ill. 111, 5 Am.S.R. 494, reheard 15 N.E. 768, 124 Ill. 310—Holmes v. Stateler, 57 Ill. 209—Curtis v. Wright, 40 Ill. App. 494.

40. Decree during vacation

Where a temporary injunction was dissolved by decree of court during vacation, but where no formal decree was entered, the court had jurisdiction subsequently to assess damages on the theory that the case was pending for that purpose.—Spaulding & Kimball Co. v. Ætna Chemical Co., 126 A. 588, 98 Vt. 169.

Retention of jurisdiction

Where defendant in injunction suit filed cross complaint against codefendants for temporary injunction and attached codefendants' realty, and attachment was vacated and defendant's cross complaint dismissed without order of reference or reservation of power of reference for purpose of assessing damages sustained by codefendants, court retained jurisdiction to adjudicate question of damages caused by temporary injunction, since the order of dismissal was only an adjudication of the primary issue of the propriety of injunctive relief.—Walker v. Preacher, 198 S.E. 168, 188 S.C. 60.

41. Mo.—Loehner v. Hill, 19 Mo. App. 141—Moore v. Mexico Sav. Bank, 58 Mo.App. 469—Neiser v. Thomas, 46 Mo.App. 47.

Overruling plaintiff's objection to assessing damages on injunction bond did not prevent order overruling motion to assess damages at subsequent term.—Losee v. Crawford, 5 S.W.2d 105, 222 Mo.App. 683.

42. Mo.—Sutliff v. Montgomery, 92 S.W. 515, 115 Mo.App. 592.

43. Mo.—Neiser v. Thomas, 46 Mo. App. 47.

44. Utah.—Utah Oil Refining Co. v. District Court of Salt Lake County, 209 P. 624, 60 Utah 428.

45. Tenn.—Henley v. Cliborne, 3 Lea 213.

32 C.J. p 444 note 29.

Consent to an extension of a temporary injunction, which was originally granted over objection, conditioned on extension of injunction bond, did not prevent assessment of damages on the bond resulting from such temporary injunction as granted and extended.—Boatmen's Nat. Bank of St. Louis v. Cantwell, Mo. App., 161 S.W.2d 431.

46. Liability for counsel fees

It will be presumed that liability was incurred for services of counsel representing defendants in injunction proceeding.—Renaldo v. Lamas, 117 So. 528, 151 Miss. 207.

47. Penalty

Under Code Pract. art 304, where injunction was directed against execution of money judgment, the judge on dissolution might allow damages to the amount of twenty per cent of the judgment without proof.—Timkan v. Wisner Estate, 95 So. 711, 153 La. 262.

48. Ill.—Bohm v. Gerdes, 32 N.E.2d 1000, 309 Ill.App. 206—Commissioners of Nutwood Levee and Drainage Dist. of Greene and Jersey Counties v. Reardon, 25 N.E.2d 425, 303 Ill.App. 443.

Ky.—Pacific Coal Mining Co. v. Horn, 291 S.W. 767, 218 Ky. 554.

La.—Three Rivers Oil Co. v. Laurence, 95 So. 652, 153 La. 224—Richards v. Roudillion, 140 So. 274, 19 La.App. 535.

Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W. 2d 431.

Vt.—Spaulding & Kimball Co. v. Ætna Chemical Co., 126 A. 588, 98 Vt. 169.

32 C.J. p 443 note 26.

Collectability of judgment

(1) Person, wrongfully enjoined from prosecuting law action, must, to recover damages, prove extent to which collectability of judgment in law action suffered by reason of restraint.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

(2) Where stock at time injunction restraining prosecution of suit was granted had no value unless by reason of voting control, person obtaining judgment after dissolution of injunction and claiming damage because of inability to obtain satisfaction from stock must show pecuniary value of stock by reason of voting control, and that he could have collected it except for injunction.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

(3) Evidence held to show that defendant could not have secured any part of his judgment obtained in the law action.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

(4) Allowance of certain credit for failure to reach property of certain value held all plaintiff was entitled to.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

Evidence held to show damage

D.C.—Fidelity & Deposit Co. of Maryland v. Helvering, 112 F.2d 205, 72 App.D.C. 120.

Tenn.—Southland Portland Cement Co. v. Melvin, 5 Tenn.App. 459.

Knowledge of records

Bank wrongfully suing out injunction against improvement was charged with knowledge of district's recorded contract to pay contractors for delay.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Tex. Civ.App., 2 S.W.2d 305, error refused.

Prima facie evidence

(1) The dissolution of a preliminary injunction is prima facie evidence of damage.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.

(2) A direct invasion of legal rights imports damage.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 348.

49. N.C.—Gruber v. Ewbanks, 154 S.E. 318, 199 N.C. 335.

defendant to introduce the record entries of the case on trial of a motion to assess damages, as such record is before the court.[50] It may be necessary to preserve the evidence in the record to support the decree awarding damages,[51] especially where there is no such finding of facts in the decree as will dispense with the necessity of preserving the evidence.[52]

Findings. The findings must be supported by the evidence.[53] Irregularities in the findings as to immaterial matters may be disregarded.[54] The findings will be given a reasonable construction.[55]

Decree. The decree or award assessing the damages on dissolution should fix the amount thereof.[56] Where the erroneous injunction was against a defendant in his official capacity, the failure of the decree awarding him damages to designate his official capacity has been held not to be fatal.[57]

§ 287. —— Effect of Assessment

Unless reversed on appeal or procured by fraud or mistake, an assessment of the damages sustained because of the wrongful issuance of an injunction is conclusive.

The order confirming the report of the referee or the decision of the court as to the amount of the damages is conclusive on all persons who have executed the undertaking, unless the decision or order is reversed on appeal,[58] or unless it is shown that the decision was reached by fraud or mistake.[59] It is none the less conclusive because the sureties were not parties to the suit in which the decree assessing damages on dissolution of the injunction was made,[60] or because no notice of the motion for reference or of motion to confirm the referee's report was given in case the matter of assessing damages was delegated to a referee.[61] An order of the court awarding damages to defendant must be regarded as a finding that the injunction damaged him to that extent.[62]

§ 288. Enforcement of Liability in Injunction Suit

In some jurisdictions an assessment of damages may be enforced in the injunction suit, but in the absence of a statute providing therefor the courts generally hold to the contrary.

A federal court taking an injunction bond for the purpose of saving defendant from loss resulting from the injunction, as discussed supra § 283, has power, independent of any express authority conferred by the provisions of the bond or by express statute or rule of court, to determine the question of liability on the bond, assess the amount of damages by reference or otherwise, and render judgment therefor against both principal and sureties, as an incident to the principal suit,[63] or it may leave defendant to his remedy by an action at law,[64] the whole matter being within the sound discretion of the chancellor.[65] The rule of the federal courts has been followed in some of the states and territories.[66] As a general rule, however, a court of equity, on dissolving the injunction, cannot award damages except by the consent of the obligors expressed in the bond, or in some other appropriate mode.[67] If relief is sought independently of the bond, the party must be left to his remedy by action at law.[68] It seems that even where plaintiff

50. Mo.—Linneman v. Hawkins, App., 27 S.W.2d 1046.

51. Ill.—Baird v. Powers, 22 N.E. 796, 131 Ill. 66.
32 C.J. p 443 note 27.

52. Ill.—Mitchell v. Northwestern Manufacturing Co., 26 Ill.App. 295.

53. Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Evidence held to support finding
Vt.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

54. Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

55. Vt.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.

56. Ky.—Harrison v. Lee, 7 J.J. Marsh. 171.
32 C.J. p 444 note 30.

57. Ill.—Hayes v. Kallums, 224 Ill. App. 533.

58. Ill.—Conlon v. Gindele, 198 Ill. App. 364.
N.Y.—Methodist Churches of New York v. Barker, 18 N.Y. 463.
32 C.J. p 444 note 47.

59. Mo.—Jones v. Mastin, 60 Mo. App. 578.
32 C.J. p 444 note 48.

60. Ill.—McAllister v. Clark, 86 Ill. 236.

61. N.Y.—Methodist Churches of New York v. Barker, 18 N.Y. 463.
32 C.J. p 444 note 50.

62. D.C.—Fidelity & Deposit Co. of Maryland v. Helvering, 112 F.2d 205, 72 App.D.C. 120.

63. U.S.—Owl Creek Coal Co. v. Big Horn Collieries Co., D.C.Wyo., 36 F.2d 485—Becker v. Stander, D.C. La., 17 F.2d 772—Travelers Mut. Casualty Co. of Des Moines v. Skeer, D.C.Mo., 24 F.Supp. 805, appeal dismissed, C.C.A., Skeer v. Travelers Mut. Casualty Co., 106 F.2d 1017, and Travelers Mut. Casualty Co. v. Skeer, 106 F.2d 1018.
32 C.J. p 445 note 53.

Early federal cases held to the contrary.—Bein v. Heath, La., 12 How., U.S., 168, 13 L.Ed. 939—Meryfield v. Jones, C.C.Mass., 17 F.Cas. No.9,486, 2 Curt. 306.

64. U.S.—Baker & Bennett Co. v. N. D. Cass Co., N.Y., 224 F. 439, 140 C.C.A. 133.
32 C.J. p 446 note 63.

65. U.S.—Redlich Mfg. Co. v. John H. Rice & Co., D.C.Pa., 203 F. 722—Cimiotti Unhairing Co. v. American Fur Refining Co., C.C.N.J., 158 F. 171, affirmed 168 F. 529, 93 C.C.A. 546.

66. Hawaii.—Young Chun v. Robinson, 21 Hawaii 193.
32 C.J. p 445 note 56.

67. N.Y.—Lewittes & Sons v. Perlow, 3 N.Y.S.2d 916, 254 App.Div. 94.
32 C.J. p 445 notes 57, 59.

68. Ark.—Greer v. Stewart, 2 S.W. 251, 48 Ark. 21.

On partial dissolution
If defendant sues at law on the injunction bond on partial dissolution of the injunction, he cannot on total dissolution of the injunction have an execution from the court in the injunction proceedings.—Harrison v. Casey, 21 N.C. 322.

and his sureties undertake to abide by such order respecting damages as the court may make, the question of their liability may be submitted to the judgment of the common-law courts.[69]

§ 289. —— Statutory Provisions

Various statutes have been construed to give, or not to give, the court power to enter judgment on the bond in an injunction suit.

Special statutes in some jurisdictions have been held to confer or not to confer power on the court trying the injunction suit to render judgment for damages on dissolution of the injunction against plaintiff, or against plaintiff and his sureties as the case may be.[70] Ordinarily, under such statutes, the

69. N.J.—Easton v. New York & L. B. R. Co., 26 N.J.Eq. 359.
43 C.J. p 445 note 61.

70. Ark.—Felker v. Rice, 161 S.W. 162, 110 Ark. 70.
32 C.J. p 445 note 62.

In Colorado

(1) Under a statute so providing, in the event a temporary restraining order shall issue without notice and it shall afterward appear that the emergency alleged therefor did not exist, or, existing, was brought about by plaintiff's act or omission, the court shall summarily enter judgment on the emergency bond.—Axelson v. Columbine Laundry Co., 254 P. 990, 81 Colo. 254.

(2) Summary judgment cannot be entered on a so-called emergency bond which is insufficient to meet statutory requirements.—Roe v. Stanley Fruit Co., 19 P.2d 755, 92 Colo. 267—Axelson v. Columbine Laundry Co., supra.

In Georgia

(1) The court cannot enter judgment against the surety unless the bond is conditioned for the payment of the eventual condemnation money. —Georgia Power Co. v. Parker, 173 S.E. 730, 48 Ga.App. 807—32 C.J. p 445 note 62 [b] (2).

(2) Other particulars of Georgia rule see 32 C.J. p 445 note 62 [b].

In Louisiana

(1) The right to recover from the surety on an injunction bond in the same suit in which the injunction is dissolved is granted only in cases where money judgments are enjoined.—Vidal v. Sterlington Gas Corporation, 161 So. 6, 182 La. 19—32 C.J. p 445 note 62 [d] (3).

(2) Other particulars of Louisiana rule see 32 C.J. p 445 note 62 [d].

In Minnesota, while damages from a wrongful issuance of an injunction may be determined in the injunction suit, they are recoverable, unless the writ was procured by malice, only by action on the bond.—Midland Loan Finance Co. v. Temple Garage Co., 288 N.W. 853, 206 Minn. 434—32 C.J. p 445 note 62 [e].

In Mississippi

(1) It has been held, under Code 1906 § 623, Hemingway Code § 383, that a judgment on an injunction bond should not be included in the decree dissolving the injunction.—Bruister v. Tansil, 99 So. 258.

(2) Such a judgment, however, while erroneous, is not void, and it is the duty of the clerk of the court to obey its command to issue execution.—Bruister v. Tansil, supra.

(3) Other particulars of Mississippi rule see 32 C.J. p 445 note 62 [f].

In New York, under the statutes authorizing an assessment of damages by the court on which the injunction suit is brought by reference or otherwise making the assessment conclusive as to damages on all persons executing the bond, it has been uniformly held that while the court has power to assess the damages, it has no power to enforce payment thereof and suit must be brought on the injunction bond.—Kelly v. Myrick, 200 N.Y.S. 90, 205 App.Div. 637—32 C.J. p 445 note 62 [h].

In Tennessee

(1) A summary judgment can be entered on an injunction bond in only one instance, on the dissolution of an injunction to stay proceedings on a judgment for money.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682—32 C.J. p 445 note 62 [l] (1).

(2) In such instance the judgment cannot exceed the penalty of the bond, except on proof of malice and want of probable cause.—Phillips v. Landess, supra.

(3) Unless the bond is so conditioned as to justify a summary judgment by motion, the court cannot read such a condition into the bond. —Phillips v. Landess, supra.

(4) Accordingly, a decree, rendering summary judgment on injunction bond failing to state nature, condition, and penalty of bond, is void.—Phillips v. Landess, supra.

(5) Other particulars of Tennessee rule see 32 C.J. p 446 note 62 [l].

In Texas

(1) Under the revised statutes, parties seeking to enforce a demand for damages to the amount of an injunction bond may bring an original action on the bond or may in the pending suit attain the same object by pleading over in reconvention and setting forth in appropriate terms the facts on which his claim for judgment is based.—Sanitary Appliance Co. v. French, Civ.App., 58 S.W. 2d 159, error dismissed—32 C.J. p 445 note 62 [m].

(2) Sureties on an injunction bond, who for all practical purposes are parties to the suit, are subject to the jurisdiction of the court and their liability can be declared by the court.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Civ.App., 2 S. W.2d 305, error refused.

(3) Accordingly it is proper for the court in its judgment dissolving an injunction to render judgment for damages.—R. R. Stolley Corporation of Austin, Tex., v. Quebedeaux, Civ. App., 70 S.W.2d 266, error dismissed —Lindsey v. Hart, Civ.App., 260 S.W. 286, modified on other grounds, Com. App., 276 S.W. 199.

(4) Pleadings in reconvention held to allege a cause of action.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, supra.

(5) Allegation of special damages in amount paid improvement contractors for delay by injunction was unnecessary.—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, supra.

(6) Evidence held sufficient to sustain judgment for damages for loss of profits.—Southern Properties v. Carpenter, Civ.App., 50 S.W.2d 876, error refused.

(7) Where the court trying the injunction suit renders judgment on the injunction bond on a plea in reconvention for damages, the right of action thereon is exhausted even though the recovery is only for costs, and injunction defendant is precluded from subsequently maintaining an action at law on the bond for damages.—Bridges v. Wilson, 2 Tex.A.Civ.Cas. § 625.

In Wisconsin the statute providing that defendant may be required by plaintiff or his sureties to file a bill of particulars of the damages claimed by him and that either plaintiff or sureties may make an offer of the amount of damages to be adjudged contemplates that the sureties may appear in the proceeding if they wish; and where they do appear it is proper to incorporate an award against them in the judgment. —Schlitz Realty Corporation v. City of Milwaukee, 247 N.W. 459, 211 Wis. 62, followed in Alaska Land Co. v. City of Milwaukee, 247 N.W. 462, 211 Wis. 71, Uihlein v. City of Milwaukee, 247 N.W. 463 (two cases), 211 Wis. 72, Continental Realty Co. v. City of Milwaukee, 247 N.W. 463,

remedy is not exclusive of the usual remedy by suit on the injunction bond.[71]

Notice. In some jurisdictions the sureties are considered actual parties to the suit, and they are not entitled to notice of the judgment for damages before execution can be issued thereon.[72] In other jurisdictions notice to all obligors is necessary,[73] and it has been held that no judgment can be rendered in the injunction suit for damages on the bond without notice to the principal obligor,[74] but, where the principal obligor has due notice of the proceedings, a judgment may be given against the sureties without notice to them.[75]

Hearing. It has been held that any judgment entered against the sureties without a hearing will be void, and that the court can purge its records of such a judgment at any time.[76]

§ 290. Bond Having Force of Judgment

Under some statutes when an injunction to enjoin proceedings on a judgment for money is dissolved the decree has the force of a judgment against the obligors in the bond.

Under some statutes a bond to enjoin proceedings at law on a money judgment, on the dissolution of the injunction, if the bond conforms to the statutory requirements,[77] may have the force and effect of a judgment, and, on compliance with certain presented formalities, execution may issue against any or all of the obligors thereto for the amount of the judgment enjoined and the damages decreed.[78] Under such a statute a judgment follows without an order of the chancellor,[79] and the resulting judgment is a judgment against the surety as well as the principal.[80] The actual issuance of an injunction is necessary to make the statute applicable.[81]

§ 291. Action on Bond

Damages for the wrongful issuance of an injunction may be assessed in an independent action at law on the bond.

The assessment of damages for wrongful issuance of an injunction may be made in an action on the bond if the bond is so conditioned as to permit it.[82] Such an action is ex contractu,[83] not a proceeding in equity;[84] it is an action of debt or covenant.[85] However, as shown infra § 295, such an action may be brought in the chancery court under statutes so providing.

Inasmuch as the decision of the court dissolving an injunction is conclusive that the injunction was improperly granted, as discussed infra § 293 a, the inquiry in an action on the injunction bond is ordinarily limited to the amount of damages, if any, sustained by the wrongful issuance of the injunction.[86]

§ 292. —— Accrual of Right and Conditions Precedent to Action

a. In general
b. Final determination of injunction suit
c. Prior assessment of damages

a. In General

Liability on an injunction bond accrues only on a breach of the conditions of the bond; but, after such breach, a demand on, or prior proceedings against, the principal or surety are generally not a condition precedent to suit on the bond. Leave to sue is sometimes required by statute.

No liability accrues on an injunction bond for damages caused by an injunction unless, and until, there has been a breach of the conditions of the bond.[87] Liability on the bond is not incurred if

211 Wis. 73, New Jersey Theatre Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 75, Werdehoff Realty Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 76, Majestic Realty Corporation v. City of Milwaukee, 247 N.W. 464, 211 Wis. 77, and Glenogle Co. v. City of Milwaukee, 247 N.W. 465, 211 Wis. 78.

71. Tex.—Avery v. Stewart, 60 Tex. 154—Foster v. Shephard, 33 Tex. 687.

72. La.—Friedman v. Adler, 36 La. Ann. 384—Union Bank v. Smith, 3 La.Ann. 147.

In Texas defendant may receive his damages for the wrongful issue of the writ of injunction on proper pleadings and proof, without serving citation on the sureties.—Coates v. Caldwell, 8 S.W. 922, 71 Tex. 19, 10 Am.R. 725—32 C.J. p 446 note 65 [d].

73. S.C.—Hill v. Thomas, 19 S.C. 230.

74. Mo.—Konta v. St. Louis Stock Exchange, 131 S.W. 380, 150 Mo. App. 617.

75. Mo.—Konta v. St. Louis Stock Exchange, supra.

76. Or.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.

77. Ala.—Wiswell v. Munroe, 4 Ala. 9.
32 C.J. p 447 note 67 [h].

78. Tex.—Hanks v. Horton, 5 Tex. 103—Janes v. Reynolds, 2 Tex. 250—Western v. Woods, 1 Tex. 1.
32 C.J. p 447 notes 67–69.

79. Ala.—Newsom v. Thornton, 61 Ala. 95—Wiswell v. Munroe, 4 Ala. 9.

80. Ala.—Dubberly v. Black, 38 Ala. 193.

81. Ala.—Shorter v. Mims, 18 Ala. 655.

82. Mont.—Foster v. Royal Indemnity Co., 271 P. 609, 611, 83 Mont. 170, citing **Corpus Juris.**
32 C.J. p 440 note 69.

83. Tenn.—DaFoe v. Starek, 9 Tenn. App. 668.
Wis.—Prest v. Stein, 265 N.W. 85, 220 Wis. 354.

84. Wis.—Prest v. Stein, supra.

85. Tenn.—DaFoe v. Starek, 9 Tenn. App. 668.

86. Ga.—Jones v. Rountree, 74 S.E. 1096, 11 Ga.App. 181.
Ohio.—Berkey Farmers' Mut. Tel. Co. v. Sylvania Home Tel. Co., 119 N.E. 140, 97 Ohio St. 67.

87. Okl.—Wilson v. Tillman County, 167 P. 754, 64 Okl. 266.
32 C.J. p 447 note 71.

the cause in which the bond was issued terminated adversely to plaintiff therein and a final decision was rendered that the injunction was rightfully issued,[88] and this is so, although the temporary injunction was vacated.[89] However, if the final determination of the injunction suit was adverse to plaintiff, it is immaterial in an action on the bond that a motion to dissolve the preliminary injunction or temporary restraining order was denied.[90]

Demand on, or prior proceedings against, principal or surety. In the absence of statute providing otherwise,[91] neither a suit against the principal obligor,[92] nor a demand for payment made on the principal debtor[93] or his sureties,[94] is a condition precedent to an action on the bond; nor is the issuance of execution necessary as a condition precedent to an action on the bond.[95] The obligee on the injunction bond, in order to hold the sureties thereon, is not required to pursue any of his remedies against the principal even if the surety requests him to do so.[96]

Leave to sue. Under some statutes an action on the bond may be brought without an order granting leave to sue,[97] but under other statutes leave to sue may be necessary.[98]

b. Final Determination of Injunction Suit

(1) In general
(2) Dismissal, discontinuance, or final dissolution
(3) Modification or partial dissolution of injunction

(1) In General

Unless the terms of the bond or the governing statutes otherwise provide, action on the injunction bond ordinarily cannot be maintained until there has been a final determination of the injunction suit. Some authorities hold that there is no such final determination where an appeal is pending from a judgment dissolving the injunction, but there is also authority to the contrary.

The general rule is that no right of action accrues on an injunction bond containing the ordinary conditions until there has been a final determination of the action in which the injunction was issued,[99] or until something occurs equivalent to such a decision,[1] and this is so notwithstanding the

88. Ky.—Vicars v. Frazier, 295 S.W. 169, 172, 220 Ky. 356, citing **Corpus Juris.**
Wash.—Clem v. Hunz, 231 P. 7, 132 Wash. 14, 40 A.L.R. 987.
32 C.J. p 447 note 72.

89. N.Y.—New York Security & Trust Co. v. Lipman, 32 N.Y.S. 65, 83 Hun 569.

90. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
La.—McMillen v. Gibson, 10 La. 517.
Statutory reference to final decision
The text rule has been held applicable under a statute providing that liability attaches on the bond if the court finally decides that plaintiff was not entitled to the injunction or restraining order.—Beech v. U. S. Fidelity & Guaranty Co., supra.

91. Mo.—Konta v. St. Louis Stock Exch., 131 S.W. 380, 150 Mo.App. 617.
32 C.J. p 452 note 12.

92. Idaho.—Dangel v. Levy, 1 Idaho 722.
La.—Block v. Myers, 35 La.Ann. 220.

93. Cal.—Browner v. Davis, 15 Cal. 9.
Claim in bankruptcy unnecessary
N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.

94. La.—Vicksburg, S. & T. R. Co. v. Barksdale, 15 La.Ann. 465.
Nev.—Rosendorf v. Mandel, 1 P. 672, 18 Nev. 129.

95. Ark.—Sizer v. Anthony, 22 Ark. 465.
32 C.J. p 452 note 16.
Impairment of value of security
Where the injunction restrained the obligee on the injunction bond from selling certain property under a trust deed which secured a debt, and the delay caused by the injunction has reduced the security for the debt below its power to satisfy the debt, the obligee suffers immediate damage which the surety must make good, and such obligee need not secure a deficiency judgment and have execution returned unsatisfied before recovering damages.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal.App. 434.

96. N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.

97. Ala.—Zeigler v. David, 23 Ala. 127.
Mich.—Lothrop v. Southworth, 5 Mich. 436.

98. N.Y.—Higgins v. Allen, 6 How. Pr. 30.
Formal matter
"Leave of court," within the meaning of a statute providing that, where the damages have been ascertained by the decision of the court or the confirmation of a referee's report, an action may be brought on the injunction bond without further leave of the court, is formal, and may be supplied nunc pro tunc, or assumed as given until withdrawn, as by motion to dismiss the action.—Bolton v. Thacher, 214 N.Y.S. 290, 126 Misc. 675.

99. Cal.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 97.
Ky.—Vicars v. Frazier, 295 S.W. 169, 172, 220 Ky. 356, citing **Corpus Juris.**
Mont.—Bunston v. Labbitt, 277 P. 419, 420, 84 Mont. 585, citing **Corpus Juris.**
Okl.—Sloan v. Kohler, 88 P.2d 644, 646, 184 Okl. 511, citing **Corpus Juris.**
Tex.—Johnson v. McMahan, Civ. App., 40 S.W.2d 920, error refused.
32 C.J. p 448 note 76.
Filing of remittitur
Where an appeal has been taken in the suit in which the injunction was granted, there is no final determination, under some statutory provisions, until the remittitur from the reviewing court is filed in the original action by the clerk in the court where the judgment roll is filed, or the order appealed from is entered.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 97.

1. U.S.—Redlich Mfg. Co. v. Rice, D.C.Pa., 203 F. 722.
32 C.J. p 449 note 77.
Writ of prohibition
Where a writ of prohibition restrained the lower court from punishing defendants for contempt for not complying with the injunction, and the writ was made permanent on the ground that the injunction should not have issued, there was in effect a final determination that the injunction was illegal, thereby immediately fixing liability under the injunction bond and permitting commencement of an action thereon.—

injunction is dissolved before final determination of the action.[2] Conversely, where a final judgment is rendered dissolving the injunction, the condition of the bond is broken and an action may be brought thereon to recover the damages sustained,[3] unless the judgment is superseded,[4] and that too, whether or not a formal order of dissolution has been entered,[5] or a formal decree signed and filed.[6] In other words, the rights and liabilities of the parties to the injunction bond generally are fixed when it is finally determined that the injunction ought not to have been granted.[7] The final determination within the rule relates to the suit in which the injunction was procured, and not to another suit or action.[8]

The necessity for a final determination of the suit in which the injunction was granted may be obviated by the conditions of the particular bond on which the action is brought,[9] or by the terms of some special statutory provision in the particular jurisdiction.[10]

Effect of appeal from final judgment dissolving injunction. While, under some decisions, on a final judgment dissolving an injunction, a right of action on such bond immediately follows, notwithstanding an appeal from the judgment,[11] unless the judgment is superseded,[12] according to other decisions an action on the bond is premature, where an appeal taken with or without supersedeas from the order dismissing the bill is pending and undetermined.[13]

(2) Dismissal, Discontinuance, or Final Dissolution

An action generally may be maintained on the bond where the injunction has been finally dissolved or the injunction suit dismissed, whether voluntarily, for want of prosecution, or on the merits. However, where issuance of the injunction is determined to have been proper, its subsequent dissolution, because it is no longer necessary, does not permit action on the bond. Dismissal of the injunction suit by agreement of the parties does not constitute a determination of the wrongful issuance of the injunction so as to give rise to a cause of action on the bond.

Dismissal of the suit in which the injunction or temporary restraining order was issued,[14] or final

Pattee v. Mahaffey, 280 P. 1038, 48 Idaho 200.

Concession of impropriety of injunction

An action on the bond cannot be maintained until a final determination showing that the injunction was wrongfully issued or until the party obtaining the injunction has conceded, by dismissing his action, that he was not entitled to the injunction. —Wilshire Mortg. Corporation v. O. A. Graybeal Co., 105 P.2d 996, 41 Cal.App.2d 1.

Absence of pending action

A claim that the action in which the restraining order was issued is still undetermined cannot be successfully urged where it appears that the restraining order was dissolved for the reason that it was issued in no action then pending.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

2. U.S.—Nashville, C. & St. L. R. v. Railroad Commission of Alabama, C.C.Ala., 171 F. 223.
32 C.J. p 448 note 76.

Injunction sought as sole relief

Final determination is necessary, although the only relief sought by the bill was an injunction, and the court denied that relief, and dissolved the injunction after full proof, if there was no dismissal of the bill.—Vicksburg Water Works Co. v. Vicksburg, 54 So. 852, 99 Miss. 132, 33 L.R.A.,N.S., 844, Ann.Cas.1913D 917.

3. Ala.—Irwin v. Morrow, 95 So. 496, 19 Ala.App. 115, certiorari denied Ex parte Irwin, 95 So. 498, 209 Ala. 164.
32 C.J. p 449 note 79.

"Final judgment" defined

"Final judgment" is one which finally disposes of whole merits of case and reserves no further question for future determination.—Gibson Oil Co. v. Kelley, 36 P.2d 1111, 169 Okl. 218.

Adverse judgment notwithstanding "permanent" injunction

The injunctive relief granted under Comp.St.1921 § 7645 in a suit to enjoin a mortgagee from selling pledged property is a provisional remedy, and, although a permanent injunction may be issued, a judgment adverse to plaintiff on the merits of the action is a final decision that the injunction ought not to have been granted; and whether or not a final order is made as to the injunction, the right of action accrues on the bond.—First Nat. Bank v. Duncan, 285 P. 957, 142 Okl. 121.

4. Ky.—Alexander v. Gish, 9 S.W. 801, 88 Ky. 13.

5. Iowa.—Western Fruit & Candy Co. v. McFarland, 174 N.W. 57, 188 Iowa 204.
Kan.—Fox v. Hudson, 20 Kan. 246.

6. Me.—Thurston v. Haskell, 17 A. 73, 81 Me. 303.

7. Ohio.—Berkey Farmers' Mut. Tel. Co. v. Sylvania Home Tel. Co., 119 N.E. 140, 97 Ohio St. 67.
Okl.—Poarch v. Finkelstein, 99 P.2d 871, 874, 186 Okl. 523, citing **Corpus Juris.**

8. Kan.—Harlow v. Mason, 157 P. 1175, 98 Kan. 353.
32 C.J. p 449 note 84.

9. U.S.—Redlich Mfg. Co. v. Rice, D.C.Pa., 203 F. 722.
32 C.J. p 447 note 74.

10. Ill.—Shackleford v. Bennett, 86 N.E. 1073, 237 Ill. 523, 15 Ann.Cas. 719.
32 C.J. p 447 note 75.

11. Ky.—Alexander v. Gish, 9 S.W. 801, 88 Ky. 13, 10 Ky.L. 989.
32 C.J. p 451 note 1.

12. Ky.—Saddler v. Glover, 1 B.Mon. 50.
32 C.J. p 451 note 2.

13. Miss.—Yazoo & M. V. R. Co. v. Adams, 30 So. 44, 18 Miss. 977.
32 C.J. p 451 note 3.

14. U.S.—Renaud Sales Co. v. Davis, C.C.A.Mass., 104 F.2d 683, modifying, D.C., 22 F.Supp. 703.
Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
Fla.—National Surety Co. v. Willys-Overland, 138 So. 24, 25, 103 Fla. 738, citing **Corpus Juris.**
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 1083, 54 Idaho 255, 92 A.L.R. 264, quoting **Corpus Juris**—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P.2d 75, 52 Idaho 795.
Kan.—Kennedy v. Liggett, 295 P. 675, 132 Kan. 413.
Miss.—Campbell v. Stauffer, 146 So. 872, 166 Miss. 304—Johnson v. Howard, 141 So. 573, 167 Miss. 475.
Okl.—Callaway v. Sparks, 89 P.2d 275, 276, 184 Okl. 569, citing **Corpus Juris.**
32 C.J. p 449 note 85.

Dismissal for want of prosecution

The rule applies where the judg-

dissolution of the injunction,[15] ordinarily amounts to a determination that the injunction or order was improperly granted, and a right of action immediately accrues to the party enjoined.[16] It is not necessary in such case that there be a specific determination that the injunction or restraining order was improperly issued, as, for example, on a motion to dissolve the injunction or restraining order,[17] at least where the action in which the injunction or restraining order was issued was brought solely to obtain injunctive relief.[18] On the other hand, dissolution of an injunction does not amount to a determination that the injunction was improperly granted where the decree of dissolution specifically finds against all the defendants, imposes costs on them, and finds that the temporary injunction was properly and providently issued but because of the action of defendants since the issuance of the injunction the necessity for its continuance has been removed.[19]

Voluntary dismissal. The voluntary dismissal or discontinuance by plaintiff of the action in which the injunction was issued will generally have the same effect as a decision of the court that he was not entitled to the injunction, and gives rise to a cause of action on the bond.[20] The rule applies, although the action is dismissed without prejudice to a future action,[21] in which case it has been held that at least nominal damages are recoverable.[22] However, plaintiff's voluntary dismissal or discontinuance of the injunction suit does not give rise to an action against him on the bond where there is some special statutory provision to the contrary,[23] where the wording of the bond is such as to take the case outside the operation of the general rule,[24] where the discontinuance was corruptly induced,[25] or where the dismissal was based only on the ground that the necessity for injunctive relief has ceased.[26]

Dismissal by agreement. A cause of action does not ordinarily arise on the bond where the dismissal was the result of a voluntary agreement of the parties.[27] At least such a cause of action does not arise as against the sureties on the bond where the surety was a party neither to the litigation nor to the agreement or stipulation for dismissal.[28] The

ment of dismissal is entered for want of prosecution.
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Miss.—Campbell v. Stauffer, 146 So. 872, 166 Miss. 304.
32 C.J. p 449 note 85 [a], [b], p 448 note 76 [f].

15. Fla.—National Surety Co. v. Willys-Overland, 138 So. 24, 103 Fla. 738.
Mo.—Pierce v. Campbell, 274 S.W. 875, 217 Mo.App. 179.
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.
Okl.—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569.

16. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 1083, 54 Idaho 255, 92 A.L.R. 264, quoting **Corpus Juris.**
Mo.—Pierce v. Campbell, 274 S.W. 875, 217 Mo.App. 179.
Okl.—Gibson Oil Co. v. Kelley, 36 P.2d 1111, 169 Okl. 218.
32 C.J. p 449 note 85.

17. Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P.2d 75, 52 Idaho 795.
La.—Bowers v. Orleans Producing & Refining Corporation, 1 La.App. 784.

18. Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Okl.—Gibson Oil Co. v. Kelley, 36 P. 2d 1111, 169 Okl. 218.

19. Mo.—Pierce v. Campbell, 274 S. W. 875, 217 Mo.App. 179.

20. Cal.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App.2d 905—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal. App. 658.
Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Kan.—Kennedy v. Liggett, 295 P. 675, 132 Kan. 413.
Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 109, 105 Mont. 245, quoting **Corpus Juris.**
Neb.—Beatty v. Casselman, 211 N.W. 617, 618, 115 Neb. 104, citing **Corpus Juris.**
N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.
Okl.—Callaway v. Sparks, 89 P.2d 275, 276, 184 Okl. 569, citing **Corpus Juris**—Sloan v. Kohler, 88 P. 2d 644, 646, 184 Okl. 511, citing **Corpus Juris.**
32 C.J. p 450 note 87.
"It is well settled . . . that sureties on an injunction bond assume the hazard of a voluntary dismissal of the action by their principal, the plaintiff in the case. If he, acting independently and without the connivance or consent of the defendant, voluntarily dismisses his suit, his action is binding on the sureties, and conclusively establishes as against them the wrongfulness of the injunction."—Janssen v. Shown, C.C.A.Or., 53 F.2d 608, 610.

21. Tenn.—Southland Portland Cement Co. v. Melvin, 5 Tenn.App. 459.
32 C.J. p 451 note 94.

22. Ala.—National Surety Co. v. Citizens' Light, Heat & Power Co., 78 So. 834, 201 Ala. 456.

23. Iowa.—Ft. Madison St. R. Co. v. Hughes, 114 N.W. 10, 137 Iowa 122, 14 L.R.A.,N.S., 448.
32 C.J. p 450 note 88.

24. Colo.—Sweet v. Ford, 161 P. 144, 63 Colo. 175.
32 C.J. p 450 note 89.

25. Ill.—Boynton v. Robb, 22 Ill. 525.

26. Wash.—Mann v. Becker, 156 P. 396, 90 Wash. 534.

27. Cal.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App.2d 905.
N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.
32 C.J. p 450 note 92.
Waiver of rights
Defendants in the injunction suit may insist that plaintiff either voluntarily dismiss the suit or else proceed to trial and thereby permit the court to determine the propriety of the injunction, to the end that an action might be brought on the bond, and by failing so to insist, and instead stipulating for a dismissal, they waive any rights under the bond.—Wilshire Mortg. Corporation v. O. A. Graybeal Co., 105 P.2d 996, 41 Cal.App.2d 1.

28. U.S.—Janssen v. Shown, C.C.A. Or., 53 F.2d 608.

agreement between the parties does not amount to an admission by plaintiff in the injunction suit that he is not entitled to the injunction;[29] nor does the dismissal pursuant to mutual agreement operate as a judgment that plaintiff had no right to the injunction.[30] The fact that the stipulation of the parties, as a result of which the dismissal was decreed, was not filed in the case is unimportant where it sufficiently appears that the case was in fact dismissed pursuant to the stipulation.[31]

The terms of a particular stipulation between the parties to an injunction suit may be such that dismissal of the suit pursuant thereto will not bar an action on the bond,[32] as, for example, where the stipulation expressly reserves to the obligee any remedies or rights of action for damages caused by the injunction;[33] but a dissolution on consideration of the payment of a sum of money by defendant to complainant has been held to release the surety, although there was an express agreement to retain the surety's liability on the bond, where the agreement would in effect have operated as a fraud on the surety.[34]

(3) Modification or Partial Dissolution of Injunction

While the authorities are not unanimous, it is generally considered that modification or partial dissolution of an injunction gives rise to a cause of action on the bond, at least if the modification amounts to a decision that the injunction as granted was substantially improper.

While it has been held that no damages can be recovered in case the injunction has been sustained in part and there was no abuse of the remedy,[35] the weight of authority holds that modification or partial dissolution of an injunction by a final decree is such a breach of the obligation of the bond as to give to the obligee a right of action thereon.[36] The fact that, on the final hearing of the injunction suit, the temporary injunction was made permanent as to some defendants and the action dismissed as to others does not necessarily determine, with respect to those defendants against whom the action was dismissed, that the injunction was not wrongful in its inception.[37] Where an injunction restraining the prosecution by defendant of two actions at law was, on final hearing, dissolved as to the principal one of such actions, but not as to the other, and subsequently there was a substantial recovery by defendant on the merits, the fact that the injunction was not entirely dissolved does not discharge the surety on the bond from liability.[38]

A modification of the injunction, if not such as to amount to a decision that plaintiff was not entitled to the injunction substantially as granted, does not entitle defendant to bring an action on a bond conditioned to pay damages if the court shall finally decide that plaintiff was not entitled to the injunction.[39] Where the parties stipulate that the injunction shall be modified, and thereafter the injunction as modified is dissolved, a right of action accrues on the bond, and the modification of the injunction by stipulation does not have the effect of relieving the sureties from their liability.[40]

c. Prior Assessment of Damages

According to the weight of authority, assessment of damages is not a condition precedent to an action on the injunction bond unless the bond or the governing statutes so provide; but there is some authority to the contrary.

The general rule is that in the absence of some

Cal.—Wilshire Mortg. Corporation v. O. A. Graybeal Co., 105 P.2d 996, 41 Cal.App.2d 1.

"Where an action involving an injunction is dismissed as the result of the voluntary and amicable agreement of the parties, the defendant in the cause may not thereafter maintain an action against the sureties on the injunction bond, even though the bond, by its terms, does not require that the wrongfulness of the injunction shall be determined in the suit in which it was given."—Janssen v. Shown, C.C.A.Or., 53 F.2d 608, 612.

29. Cal.—Wilshire Mortg. Corporation v. O. A. Graybeal Co., 105 P.2d 996, 41 Cal.App.2d 1.

30. Cal.—Wilshire Mortg. Corporation v. O. A. Graybeal Co., supra.

31. U.S.—Janssen v. Shown, C.C.A. Or., 53 F.2d 608.

32. Ill.—Boynton v. Phelps, 53 Ill. 210—Patterson v. Rinard, 81 Ill. App. 80.

N.Y.—Dickerson v. Herman, 9 Daly 298.

33. N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.
32 C.J. p 451 note 93.

34. Ill.—Cassem v. Ernst, 84 Ill.App. 70, affirmed 55 N.E. 646, 183 Ill. 137.

35. La.—Vicksburg, S. & P. R. Co. v. Traylor, 30 So. 117, 105 La. 748.
32 C.J. p 451 note 96.

36. N.Y.—Tecla Corporation v. Salon Tecla, 234 N.Y.S. 544, 548, 226 App. Div. 168, quoting **Corpus Juris**—Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., 41 N.Y.S.2d 375, 377, 180 Misc. 643, citing **Corpus Juris.**
Wash.—Clem v. Hunz, 231 P. 7, 132 Wash. 14, 40 A.L.R. 987.
32 C.J. p 451 note 97.

Taking of water

Where temporary injunction forbidding defendants from taking any water from irrigation ditch or interfering with ditch was modified by decree entitled defendants to certain portion of water and certain rights in ditch, defendants had cause of action on injunction bond if they could prove damages.—Clem v. Hunz, supra.

37. Kan.—Kennedy v. Liggett, 295 P. 675, 132 Kan. 413.

38. U.S.—Woolfolk v. Jones, D.C.Va., 216 F. 807, reversed on other grounds 224 F. 673, 140 C.C.A. 183.

39. N.Y.—Palmer v. Foley, 71 N.Y. 106—Tecla Corporation v. Salon Tecla, 234 N.Y.S. 544, 549, 226 App. Div. 168, quoting **Corpus Juris.**

40. Ill.—Brackebush v. Dorsett, 37 Ill.App. 581, affirmed 27 N.E. 934, 138 Ill. 167.

special statutory requirement,[41] the assessment of damages caused by the wrongful suing out of an injunction is not a condition precedent to a right of action to recover such damages on the bond.[42] Nevertheless, where the obligation of the bond is to pay such damages as the court shall on dissolution of the injunction assess or award against plaintiff, it has been held a condition precedent to the right to maintain an action for damages on the bond that such damages should have been assessed or awarded against plaintiff,[43] and that he failed to pay such amount;[44] but there is authority to the contrary,[45] and it has been held that, where the condition of the bond to pay the damages awarded exceeds the requirements of the statute which does not authorize the award of damages on dissolution of the injunction, it is not a condition precedent to the right to sue on the bond that the court dissolving the injunction should have awarded damages.[46] An action on the case to determine damages need not be brought before bringing an action of debt on the bond.[47]

§ 293. —— Defenses

a. Validity or propriety of injunction
b. Defects in bond
c. Defenses precluded by recitals of bond
d. Miscellaneous defenses

a. Validity or Propriety of Injunction

After termination of the injunction suit adversely to plaintiff therein, defendants in the action on the bond cannot urge that the injunction should have been sustained, or that the party enjoined should not have obeyed the injunction because it was defective or granted without jurisdiction; and the sureties have been held estopped to deny the issuance or service of the injunction. However, where the injunction was dissolved on grounds not involving the legality of the acts enjoined, it may be shown that such acts were illegal and that therefore no damage was suffered by their prohibition.

In an action on an injunction bond to recover the damages provided for thereby, the decision of the court dissolving the injunction that it was improperly granted is conclusive of that fact,[48] in the absence of fraud and collusion,[49] and defendant in the action on the bond is not at liberty to go behind the judgment and litigate the question of the right to the injunction.[50] Thus, after termination of the injunction suit adversely to plaintiff therein, it cannot be urged as a defense to an action on the bond that no right of defendant in the injunction suit was invaded by the issuance of the injunction;[51] that the acts enjoined were unlawful,[52] and the injunction dissolved only on the ground of the court's lack of jurisdiction to grant the injunction[53] or on the ground of the laches of plaintiffs in the injunction suit;[54] that an agreement on which the injunction was founded was illegal;[55] that the business which was enjoined was a nuisance;[56] that the party enjoined from the sale of property held title thereto in fraud of the creditors of the true owner;[57] that no order of court had been obtained for the sale of a minor's property, the sale of which

41. N.C.—Crawford v. Pearson, 21 S.E. 561, 116 N.C. 718.
32 C.J. p 451 note 4.

42. Mont.—Foster v. Royal Indemnity Co., 271 P. 609, 83 Mont. 170.
N.Y.—Bolton v. Thacher, 214 N.Y.S. 290, 291, 126 Misc. 675, citing **Corpus Juris.**
32 C.J. p 451 note 6.

43. N.M.—Monte Rico Mill. & Min. Co. v. U. S. Fidelity & Guaranty Co., 5 P.2d 195, 35 N.M. 616, certiorari denied 52 S.Ct. 496, 286 U. S. 544, 76 L.Ed. 1281.
32 C.J. p 452 note 7.
Assessment of damages in injunction suit see supra §§ 283–287.

44. N.M.—Monte Rico Mill. & Min. Co. v. U. S. Fidelity & Guaranty Co., supra.
32 C.J. p 452 note 8.

45. Va.—Claytor v. Anthony, 15 Gratt. 518, 56 Va. 518.
32 C.J. p 452 note 9.

46. Me.—Union Wharf Proprietors v. Mussey, 48 Me. 307.

47. N.C.—Falls v. McAffee, 23 N.C. 139.
32 C.J. p 452 note 11.

48. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N. W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 195.
Miss.—Campbell v. Stauffer, 146 So. 872, 166 Miss. 304—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, quoting **Corpus Juris.**
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585—Foster v. Royal Indemnity Co., 271 P. 609, 612, 83 Mont. 170, citing **Corpus Juris.**
Tenn.—DaFoe v. Starek, 9 Tenn.App. 668.
32 C.J. p 452 note 25.

Findings on separate issues
Where two separate issues of fact are pleaded as defense in suit for injunction, and findings made as to each, both must be given effect in action on injunction bond.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 15.

49. Miss.—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, quoting **Corpus Juris.**
Ohio.—Berkey Farmers' Mut. Tel. Co. v. Sylvania Home Tel. Co., 119 N. E. 140, 97 Ohio St. 67.

50. U.S.—Janssen v. Shown, C.C.A. Or., 53 F.2d 608.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 195.
Miss.—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, quoting **Corpus Juris.**
32 C.J. p 453 note 27.

51. Miss.—Johnson v. Howard, 141 So. 573, 167 Miss. 475.

52. Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.

53. Miss.—Johnson v. Howard, 141 So. 573, 167 Miss. 475.

54. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N. W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 15.

55. U.S.—Oelrichs v. Spain, D.C., 15 Wall. 211, 21 L.Ed. 43.
Wash.—White v. Brooke, 39 P. 237, 11 Wash. 99.

56. Cal.—Cunningham v. Breed, 4 Cal. 384.

57. Colo.—Slack v. Stephens, 76 P. 741, 18 Colo.App. 538.
32 C.J. p 455 note 69.

by the minor was enjoined;[58] or that, until after the dissolution of the injunction, no permit had been obtained to erect the building whose erection was enjoined.[59] However, where the decision in the injunction suit adjudicated nothing more than that the injunction was not rightfully issued, and did not adjudicate the right of defendant therein to do the acts enjoined, it has been held that the obligors on the injunction bond may, in an action on the bond, show that the party enjoined did not have the right to do the acts enjoined and hence was not damaged by being forbidden to do them;[60] and it has also been held that, if on a final hearing on the merits, the trial court finds that plaintiff was entitled to an injunction at the time action was brought, this finding constitutes a defense in an action on the injunction bond for attorney's fees, notwithstanding the dissolution of the temporary injunction.[61]

Defects in injunction; jurisdiction. After plaintiff has obtained an injunction or restraining order and has stayed his adversary's proceedings, and thereby caused him to suffer damages, it is too late for the obligors on the injunction bond to set up as a defense in an action on the bond that the injunction or order should have been disregarded because it was irregular or defective,[62] or because the court had no jurisdiction to grant it.[63] Such an obligor,[64] whether a corporate bondsman or plaintiff in the injunction suit,[65] is estopped to challenge the validity of the injunction or restraining order and to say that the court granted it without jurisdiction. The obligors cannot escape liability on the ground that the injunction was ambiguous and should not have been obeyed,[66] or that it was broader in its commands than the order of the court would authorize.[67]

Issuance or service of injunction. The sureties on an injunction bond have been held estopped to deny the issuance[68] or the service[69] of the injunction.

b. Defects in Bond

After an injunction has been obtained on the strength of the bond, the obligors cannot defend an action thereon on the ground of irregularities or defects in the form of the bond; nor can the surety defend on the ground of fraud without showing participation of the obligee therein; but want of consideration may constitute a defense.

The obligors cannot question the mere form of the bond after obtaining an injunction on the strength of it.[70] Hence the injunction defendant can recover thereon notwithstanding irregularities in the form of the undertaking,[71] even where the injunction is dissolved on the ground of insufficient security,[72] and notwithstanding it is unusual in its

58. Colo.—Slack v. Stephens, supra.

59. Md.—Le Strange v. State, 58 Md. 26.

60. Neb.—Beatty v. Casselman, 211 N.W. 617, 115 Neb. 104.
32 C.J. p 453 note 31 [a] (3).

61. Iowa.—Jewel Tea Co. v. Stewart, 120 N.W. 962, 142 Iowa 353.
32 C.J. p 453 note 29.

62. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal. App.2d 587.
Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.

Duration of restraining order

Liability cannot be avoided on the ground that the temporary restraining order was void because it provided that it was to remain in effect for a period of time exceeding that prescribed by a statute limiting the time for which an ex parte order may be effective.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.

Reasonableness of engaging counsel

The obligor on the bond cannot avoid liability for counsel fees incurred by defendant in the injunction suit in connection with a motion to dissolve the restraining order on the ground that, since the restraining order was defective, defendant should have merely disregarded it, and, therefore, acted unreasonably in having counsel move to dissolve the restraining order.—Mason v. U. S. Fidelity & Guaranty Co., supra.

63. Kan.—Harvey v. Majors, 283 P. 663, 664, 129 Kan. 556, quoting **Corpus Juris.**
Miss.—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, citing **Corpus Juris.**
N.M.—Tatavich v. Pettine, 247 P. 840, 842, 31 N.M. 479, citing **Corpus Juris.**
32 C.J. p 453 note 30.

64. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 478, 60 Cal.App.2d 587, citing **Corpus Juris.**
Miss.—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, citing **Corpus Juris.**
Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.
32 C.J. p 453 note 30 [a].

Reason for rule

It does not lie in the mouth of one who has affirmed the jurisdiction of a court to grant an injunction, where he has accomplished his purpose by the injunction, afterward to deny such jurisdiction.—Johnson v. Howard, 141 So. 573, 575, 167 Miss. 475, citing **Corpus Juris**—32 C.J. p 453 note 30 [a].

65. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.

66. Cal.—Asevado v. Orr, 34 P. 777, 100 Cal. 293.
32 C.J. p 454 note 38.

Corpus Juris cited in upholding liability on bond for damages suffered in refraining from acts which could be construed as prohibited by fair construction of ambiguous restraining order.—Hatch v. National Surety Corporation, 72 P.2d 107, 111, 105 Mont. 245.

67. Ill.—Sturges v. Hart, 45 Ill. 103.
Neb.—Gibson v. Reed, 75 N.W. 1085, 54 Neb. 309.

68. Md.—Le Strange v. State, 58 Md. 26.
32 C.J. p 454 note 42.

69. Ala.—Salmon v. Salmon, 69 So. 304, 13 Ala.App. 510.

70. Va.—Columbia Amusement Co. v. Pine Beach Inv. Corp., 63 S.E. 1002, 109 Va. 325, 16 Ann.Cas. 1120.
32 C.J. p 454 note 46.

71. Kan.—Kennedy v. Liggett, 295 P. 675, 132 Kan. 413.
32 C.J. p 454 note 49.

72. La.—Betts v. Mougin, 15 La. Ann. 52.

terms,[73] or is more[74] or less[75] extensive in its terms than the statute or order for the injunction requires. No recovery can be had, however, for breach of such part of the condition as is not provided for by the statute or order,[76] and a condition inserted in a bond by a clerk, but not authorized by law or by the order of the court, is not binding on the sureties.[77]

Want of consideration. It may be a good defense to an action on a bond that it was void for want of consideration.[78] However, a bonding company which has been paid a premium for issuance of the bond cannot predicate want of consideration for the bond on the ground that the bond was issued pursuant to a recital that plaintiff in the injunction suit desired the undertaking for a restraining order as provided in a particular statute and that the order did not comply with the statute.[79]

Fraud. It is not a defense to the surety that the bond was procured by fraud, where it does not appear that the obligee participated in or knew of the fraud.[80]

c. Defenses Precluded by Recitals of Bond

The obligors on the bond are generally estopped to deny the recitals of the bond, as, for example, that a particular suit was pending or that the order granting the injunction required a bond.

The sureties on an injunction bond are generally estopped to deny the recitals of the bond to the terms of which they have agreed,[81] even though the recitals are in conflict with the records.[82] Thus, in an action on a bond given to restrain the further prosecution of a suit at law, defendant is estopped from denying that there was pending such a suit as that described in the bond;[83] and, when the bond recites that the issuance of the injunction was ordered "on the complainant's filing, etc., a bond executed by himself and a surety or sureties," etc., the surety, in an action against himself on the bond, is estopped from denying that the order granting the injunction required a bond.[84] However, where an injunction bond is required before the injunction is granted, the obligors on such a bond may show that no injunction issued, although it recites that an injunction was prayed for and obtained.[85]

d. Miscellaneous Defenses

In addition to the defenses already considered, there have been adjudications with respect to the sufficiency, as a defense to an action on an injunction bond, of various miscellaneous facts or circumstances including, among others, good faith in seeking the injunction, absence of injury, issuance of another injunction, and violation of the injunction by the party seeking damages for its issuance.

Good faith. It is generally considered no defense so far as concerns actual damages sustained by reason of the injunction that the injunction suit was brought in good faith by one who believed that he had reasonable grounds for injunction.[86] However, if the bond is conditioned to pay damages in the event the court finally decides that complainant in the injunction suit was not equitably entitled to the injunction, complainant's good faith may be considered on the question of whether he was equitably entitled to the injunction;[87] and it has been held that the fact that the injunction suit was brought in good faith may be shown in mitigation of damages.[88]

Absence of injury. Where defendant in the injunction suit was not, or could not possibly have been, injured, he is precluded from recovering damages on the bond.[89]

73. N.Y.—Candee v. Wilcox, 26 Hun 666.
Tenn.—Black v. Caruthers, 6 Humphr. 87.

74. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.
32 C.J. p 455 note 52.

75. W.Va.—Holliday v. Myers, 11 W. Va. 276.

76. U.S.—Hays v. Fidelity & Deposit Co. of Maryland, La., 112 F. 872, 50 C.C.A. 569.
32 C.J. p 455 note 54.

77. Tenn.—Baxter v. Washburn, 8 Lea 1.
32 C.J. p 455 note 57.

78. Cal.—Alaska Impr. Co. v. Hirsch, 47 P. 124, 119 Cal. 249, reheard 51 P. 340, 119 Cal. 249.
32 C.J. p 455 note 58.

79. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.

80. Ala.—Guild v. Thomas, 54 Ala. 414, 25 Am.R. 703.
32 C.J. p 455 note 60.
Fraud as affecting liability of sureties generally see the C.J.S. title Principal and Surety §§ 75–77, also 50 C.J. p 52 note 24–p 62 note 98.

81. Va.—Columbia Amusement Co. v. Pine Beach Inv. Corp., 63 S.E. 1002, 109 Va. 325, 16 Ann.Cas. 1120.
32 C.J. p 454 note 44.

82. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.

83. Ala.—Person v. Thornton, 5 So. 470, 86 Ala. 308.
32 C.J. p 454 note 41.

84. Md.—Hamilton v. State, 32 Md. 348—Lloyd v. Burgess, 4 Gill 187.

85. Ala.—Adams v. Olive, 57 Ala. 249.

86. Tenn.—Winslow v. Mulchey, Ch. A., 35 S.W. 762.
32 C.J. p 452 note 22.
In North Carolina
(1) At one time there could be no recovery on the bond without a showing of malice and want of probable cause on the part of plaintiff in the injunction suit.—Falls v. McAfee, 24 N.C. 236.
(2) By statute, however, it is no longer necessary to allege want of probable cause in proceedings to recover damages against plaintiff in injunction suits.—Crawford v. Pearson, 21 S.E. 561, 116 N.C. 718.

87. N.J.—Smith v. Kuhl, 26 N.J.Eq. 97.

88. Mont.—Stewart v. Miller, 1 Mont. 301.

89. Iowa.—Chicago, A. & N. R. Co.

Issuance of another injunction. It cannot be shown either in bar,[90] or in mitigation of damages,[91] that another injunction, which is still in force and undissolved, has been issued in respect of the same subject matter. Where the injunction for which the bond was given has been dissolved, it is not a defense to an action on the bond that an appeal is pending from a decree dissolving a subsequent injunction which was issued after amendment of the bill in the injunction suit.[92]

Violation of injunction. Although by disobedience to a writ of injunction the party enjoined becomes amenable to the action of the court as for contempt, as discussed supra § 257, as a general rule, such disobedience does not deprive him of his right of action for a breach of the conditions of the injunction bond, and is no defense to such an action.[93] Nevertheless, doing acts which the writ commands not to be done may prevent damages accruing which would have resulted if the writ had been obeyed, and a party enjoined of course would be unable to show damages in that respect as a consequence of the injunction.[94]

Payment from other sources. It is not a defense to an action on the bond against the sureties therein that the principal is solvent and able to pay his own debts, where the bond is not so conditioned;[95] nor is it a defense that defendant paid the costs of the original bill for injunction;[96] that execution issued on the judgment enjoined and a forthcoming bond was executed and forfeited;[97] or that plaintiff's damages had been paid by the county, which was bound to indemnify him against loss.[98]

Other defenses. In addition to the matters already considered, the sufficiency of other facts to constitute a defense to an action on an injunction bond has been adjudicated,[99] and it has been held not to constitute a defense that injunction plaintiff was misled by defendant's statements into bringing suit, unless it can be shown that defendant instigated or desired the institution of the suit;[1] that the injunction was allowed by consent of the parties, where the entry of such consent was conditional on the execution of the injunction bond;[2] that plaintiff did not file a memorandum of costs and disbursements in the injunction proceeding;[3] that plaintiffs had offered to give up all claim to the money whose payment to them had been enjoined, the offer having been made by way of compromise;[4] that an attorney for defendants in the injunction suit allegedly expressed an opinion on the trial that certain facts would constitute a defense to an action on the bond;[5] or that the suit in which the writ of injunction was issued was not brought against the proper party.[6] It is no defense to an action on the injunction bond that the main issues to be litigated in the injunction suit had become moot at the time of the decision dismissing such suit, where liability on the bond for costs and damages was still a live issue.[7] Suit on the injunction bond cannot be defended on the ground that the question of damages was litigated in the injunction suit, where it does not appear that the court in the in-

v. Whitney, 132 N.W. 840, 152 Iowa 520.

32 C.J. p 453 note 31.

90. Ill.—Weaver v. Poyer, 73 Ill. 489.

32 C.J. p 453 note 32, p 461 note 86 [a].

91. Ind.—Swan v. Timmons, 81 Ind. 243.

92. Ala.—Irwin v. Morrow, 95 So. 496, 19 Ala.App. 115, certiorari denied Ex parte Irwin, 95 So. 498, 209 Ala. 164.

93. Wis.—Prest v. Stein, 265 N.W. 85, 87, 220 Wis. 354, citing **Corpus Juris.**

32 C.J. p 454 note 35.

Recovery not conditioned on obedience

Obedience to the writ is not a condition to a recovery on the bond.—Colcord v. Sylvester, 66 Ill. 540—32 C.J. p 454 note 36.

94. Wash.—Steel v. Gordon, 45 P. 151, 14 Wash. 521.

32 C.J. p 454 note 37.

95. Ark.—Hunt v. Burton, 18 Ark. 188.

96. Ohio.—Kent v. Bierce, 6 Ohio 336.

97. Miss.—Harrison v. Balfour, 13 Miss. 301.

98. Colo.—Haley v. Breeze, 59 P. 212, 13 Colo.App. 435.

99. Superiority of equities

Where injunction suit to restrain the carrying out of contracts for the erection of school buildings was not brought until the work was nearly completed, the taxpayers who brought the suit did not have any equities superior to those of the contractors so as to defeat an action by the contracts on the injunction bond. —Independent School Dist. No. 35 v. Oliver Mining Co., 210 N.W. 856, 169 Minn. 15, adhering to opinion 208 N. W. 952, 169 Minn. 15.

Adoption of statutory remedy

Where an injunction prohibiting proceedings under a distress warrant is sought on the ground that the relation of landlord and tenant does not exist, and the injunction is dissolved, the sureties cannot escape liability on the bond on the ground that a statutory remedy providing for resisting an improper exercise of the right of distress was not adopted, the remedy being limited to a tenant, his assignee, or undertenant.—Hornback v. Swope, 8 Ky. L. 533.

1. Mo.—Schuyler County v. Donaldson, 9 Mo.App. 385.

2. Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W. 2d 431, 434, citing **Corpus Juris.**

Ohio.—Bishop v. Bascoe, 8 Ohio Dec., Reprint, 423, 7 Cinc.L.Bul. 342.

3. Mont.—Foster v. Royal Indemnity Co., 271 P. 609, 83 Mont. 170.

4. Colo.—Smith v. Atkinson, 32 P. 425, 78 Colo. 255.

5. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 15.

6. Idaho.—Boise City v. Randall, 66 P. 938, 8 Idaho 119.

7. Miss.—Campbell v. Stauffer, 146 So. 872, 166 Miss. 304.

junction suit determined any of the matters alleged in the action on the bond regarding damages.[8] Where an answer sets up a settlement, but the evidence fails to show that the matter in litigation was included therein, or that more than one of several plaintiffs participated or consented, or that anyone who acted was empowered to bind them, a verdict for defendants cannot stand.[9] Where, by means of an injunction, plaintiff was restrained from disposing of corporate stock, recovery on the injunction bond will not be defeated because during that period an attachment against the stock was in existence.[10] In an action on a bond given to secure an injunction against an execution it is immaterial whether the property released was subject to execution or whether plaintiff had lost his debt by reason of the injunction.[11]

§ 294. —— Release or Discharge of Liability

The surety is released by a material alteration in the bond or an extension of time granted the principal without his consent. A modification which does not increase his liability will not, however, discharge him. A bond may be discharged by the giving of a new bond which supersedes the old.

The surety is discharged by a material alteration in the bond made without the surety's consent.[12] Extension of time for a definite period granted the principal after judgment for a valuable consideration and without the consent of the sureties operates as a release of their liability on the bond.[13] A surety on an injunction bond is discharged by an agreement entered into, without his consent, by plaintiff and defendant, to have the case tried at chambers and decided after court term.[14] An order, entered by consent, modifying an injunction so as to make it less comprehensive than before, does not release the surety on the injunction bond from liability on dissolution of the injunction as modified, since the modification does not increase his liability.[15] Where the bill for injunction was at the same time a creditors' bill, the obligation of the surety on the injunction bond on which suit is brought is not discharged by the fact that other parties were added as complainants to prosecute the cause in which the injunction was issued.[16] A dismissal of the action as to one of the defendants has been held not to be such a change in the action as to relieve the parties to the bond from liability thereunder.[17]

A court should not release the surety from liability unless he, or someone for him, asks to be released.[18] A surety may have the bond canceled in a proper case;[19] but a motion to cancel the bond is premature where an appeal has been taken from a judgment granting a permanent injunction.[20]

New bond. If the injunction is continued on complainant's application, on the giving of a new bond with security, the first bond is discharged.[21] An injunction bond may be superseded by a new bond given in connection with a subsequent bill for injunctive relief, where the intent and understanding of all the parties is that the new bond shall have that effect.[22] On the other hand, where the court orders a second injunction bond to be given, which order is not substantially complied with, the first bond is not discharged.[23] An appeal bond given on the appeal from the order of dissolution does not supersede the injunction bond.[24]

Other grounds for release or discharge of liability on an injunction bond have been urged in particular cases and the sufficiency thereof adjudicated.[25] A release of the surety by part of the obligees does not release him from all liability.[26] Removal from the state of some of the obligors in the bond does not relieve the others therein from liability for the

8. Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410.

9. Cal.—Silcox v. Lang, 20 P. 297, 78 Cal. 118.

10. Ariz.—American Surety Co. v. Duvall, 196 P. 457, 22 Ariz. 261.
32 C.J. p 456 note 76.

11. Ky.—Riggan v. Crain, 5 S.W. 561, 86 Ky. 249, 9 Ky.L. 528.
32 C.J. p 756 note 75.

12. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal. App.2d 537.

Material alteration not shown

The obligation of a bond to pay damages suffered by those restrained if restraining order was improperly issued was not materially altered by issuance of restraining order for a period greater than that permitted by statute.—Mason v. U. S. Fidelity & Guaranty Co., supra.

13. Miss.—Miller v. Lewis, 60 So. 654, 103 Miss. 598.

14. La.—Baker v. Frellsen, 32 La. Ann. 822.

15. Ill.—Brackebush v. Dorsett, 27 N.E. 934, 138 Ill. 167, affirming 37 Ill.App. 581.

16. Md.—Levy v. Taylor, 24 Md. 282.

17. Wash.—Kleeb v. Bard, 40 P. 783, 12 Wash. 140.

18. Wis.—Sobey v. Thomas, 37 Wis. 568.

19. La.—Leake v. Breedlove, 1 Mart., N.S., 259.
32 C.J. p 457 note 4.

20. N.Y.—Vitagraph Co. of America v. Stewart, 170 N.Y.S. 527.

21. Ohio.—Kent v. Bierce, 6 Ohio 336.

22. N.H.—Crossman v. Quimby, 193 A. 213, 89 N.H. 91.

23. Ohio.—Kent v. Bierce, 7 Ohio Pt. II, 209.

24. Mich.—Rynearson v. Fredenburg, 4 N.W. 187, 42 Mich. 412.

25. **Compliance with condition for dissolution of injunction**

A surety is not exonerated or released from his liability on an injunction bond by the compliance of defendant in equity with the condition on which the injunction is to be dissolved.—Gray v. Campbell, 3 Munf. 251, 17 Va. 251.

26. Mo.—C. H. Albers Commn. Co. v. Spencer, 139 S.W. 321, 236 Mo. 608, Ann.Cas.1912D 705.
32 C.J. p 456 note 99.

whole amount of damages sustained.[27] The arrest of a judgment debtor under a capias is not a satisfaction of the judgment and does not discharge an injunction bond entered into on a bill being filed to enjoin the judgment.[28] A surety is not released from his liability on the bond merely by reason of a misnomer in the bond, and the obligee may plead and prove mistake and show the real intent of the parties; but, in the absence of such pleading and proof, there can be no recovery against the surety.[29] Although the judgment enjoined has been reversed since the decree against injunction plaintiff, the sureties on the bond are not entitled to relief so long as the decree stands.[30] Where the bond was given to prevent the sale of land under a deed of trust, the cestui que trust is the only person who can execute a sufficient release for damages, and a release by a trustee of a naked trust is no defense.[31]

§ 295. —— Jurisdiction and Venue

The statutes of the particular jurisdiction determine the jurisdiction and venue of actions on injunction bonds. A bond given in a federal court may be sued on in a state court.

The jurisdiction and venue of actions on injunction bonds depend to some extent on the statutes of the particular jurisdiction.[32] An action on an injunction bond is properly brought in the chancery court under statutes giving such court jurisdiction of suits for unliquidated damages for injuries to property growing out of the breach of an oral or written contract.[33] An injunction bond given in a federal court may be sued on in a state court.[34] An injunction bond given in a state court in one county may be sued on in another county where some of defendants reside.[35]

§ 296. —— Time to Sue and Limitations

The time to sue in actions on bonds generally is considered in Bonds § 103. Statutory limitations applicable to actions on bonds are treated in the C.J.S. title Limitations of Actions § 55, also 37 C.J. p 753 note 81–p 754 note 2, and 28 C.J. p 1308 note 70–p 1310 note 18.

Examine Pocket Parts for later cases.

§ 297. —— Parties

a. Plaintiffs
b. Defendants

a. Plaintiffs

(1) In general
(2) Joinder

(1) In General

An action on an injunction bond may be brought in the name of the real party in interest, including an assignee, where the statutes so provide, even though he was not a party to the bond or to the injunction suit. In the absence of statute, the suit should be brought in the name of the obligees for the benefit of those beneficially interested.

In accordance with the general rules governing parties plaintiff in actions on bonds, as discussed in Bonds § 106, and, in the absence of statute providing otherwise, suit on the bond may[36] and should[37] be prosecuted in the name of the obligee in the bond for the use of those beneficially interested. However, in many jurisdictions, by force of statutory provisions, suit may or should be brought, not in the name of the obligee in the bond, but in the name of the real party in interest,[38] even though, it has been held, he is not named as an obligee in the bond and was not a party to the proceeding in which the injunction was issued.[39]

27. Ky.—Landram v. Cambers, 3 Ky. Op. 548.

28. S.C.—Conner v. Winn, 3 S.C.L. 185.
32 C.J. p 457 note 9.

29. Tex.—Ables v. Waggner, Civ. App., 208 S.W. 693.
32 C.J. p 456 note 95.
Defects in bond as defense generally see supra § 293 b.

30. Tenn.—Blythe v. Peters, 3 Yerg. 378.

31. Mo.—O'Reilly v. Miller, 52 Mo. 210.

32. In Louisiana
(1) The surety may be sued in the same jurisdiction as that in which the principal may be sued.—Bowers v. Orleans Producing & Refining Corporation, 1 La.App. 784.
(2) Where the bond was given in the parish in which the surety resided, the principals residing in another parish, it was held that the surety might be sued in the parish in which he resided, but that the principals must be sued at their domicile.—Kimbrough v. Walker, 27 La. Ann. 566.

33. Tenn.—DaFoe v. Starek, 9 Tenn. App. 668.

34. Mont.—Montana Mining Co. v. St. Louis Mining & Milling Co., 48 P. 305, 19 Mont. 313.

35. Tex.—Wood v. Hollander, 19 S. W. 551, 84 Tex. 394.
32 C.J. p 452 note 20.

36. Ala.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.
32 C.J. p 457 note 11.
Suit for use of party injured
Where the bond is conditioned for the payment "of all such damages and costs which any person may sustain," an action may be brought by all the obligees for the use of one of the parties who had been injured by the injunction suit.—Babcock v. Reeves, 43 So. 21, 149 Ala. 665.
Suit for use of attorneys
Suit to recover damages on the bond may be brought in the names of the obligees for the use of their attorneys.—Patterson v. Rinard, 81 Ill.App. 80.

37. Ala.—National Surety Co. v. Citizens' Light, Heat & Power Co., 78 So. 834, 201 Ala. 456.
32 C.J. p 457 note 12.

38. Or.—Moore v. Lachmund, 117 P. 1123, 59 Or. 565, Ann.Cas.1913C 1273.
32 C.J. p 457 note 15.

39. Ala.—Marengo County v. Matkin, 42 So. 33, 144 Ala. 574, 6 Ann. Cas. 902.

A defendant whose title to land, the enjoyment of which has been enjoined, is merely possessory, has a sufficient interest to enable him to maintain an action on the bond.[40] A wife, after her husband's death, has been held entitled to prosecute an action against the surety in her own name, notwithstanding both she and her husband were beneficiaries of the injunction bond, where title to the land involved in the injunction suit was in the wife, and the husband, if living, would have been entitled only to statutory curtesy in the land.[41] Trustees appointed by the court simply to sell property have no title or interest in the property, and cannot sue on an injunction bond for damages to the property caused by the injunction restraining the sale.[42]

Assignees. It has been held, in accordance with the common-law rule that an assignee of a bond could not sue thereon in his own name, as discussed in Bonds § 106 b, that, in the absence of statute providing otherwise, one to whom an injunction bond has been assigned cannot maintain an action thereon;[43] but it has also been held that the assignee of an injunction bond may maintain a suit thereon.[44] In jurisdictions where by statute the real party in interest may bring suit on an injunction bond the suit may, of course, be brought thereon by the assignee.[45] Where the injunction defendant has assigned part of his interest in the subject matter of that suit, but has not assigned the undertaking, the assignee is not considered a necessary party plaintiff to an action on the bond.[46]

Persons representing a large class. If a bond is payable to defendants in the injunction suit and to a class of persons too numerous to be joined, one or more of the persons belonging to the class named may maintain an action on the bond in behalf of all, where a statute provides that, if the parties are numerous and cannot be brought before the court in a reasonable time, one or more may sue for the benefit of all;[47] but one who was not a defendant in the injunction suit, who was not named in the undertaking, and does not belong to a class who ought to have been made defendants, cannot maintain an action on the bond.[48]

Official or individual capacity. Where bond runs to certain persons as officials, it has been held that they cannot maintain an action thereon as individuals;[49] but an official has been held entitled to sue individually on an injunction bond where the bond runs to him as an individual,[50] or where his official description in the bond is mere descriptio personæ,[51] or where the action is brought after the expiration of his term of office.[52] It has been held that, where the bond runs to certain persons as individuals they may sue on it as officials if the injunction suit was brought against them in their official capacity.[53] An action on the bond is maintainable by parties in their individual capacities where the injunction operated on them only as individuals and the damage suffered because of the issuance of the injunction was suffered by them personally and not in their official capacities.[54]

(2) Joinder

Suit may be brought in the name of the obligee without joinder of the party beneficially interested, but all defendants in the injunction suit generally may unite in an action on the bond. The joinder of parties may be affected by the character of the bond as joint or several.

Suit may be brought in the name of the obligee without joining the person or persons for whose benefit the suit is prosecuted.[55] It has been held that all the defendants in the injunction suit may unite in an action on the bond, although the bond is in terms executed to but one of them,[56] and that, where one suing for injunction joined several defendants and prayed for relief against all of them, he cannot, when sued on the injunction bond, object that they join as plaintiffs;[57] but a joint action cannot be maintained by the obligees, unless the damages are joint.[58]

40. Ind.—Winship v. Clendenning, 24 Ind. 439.
41. Ky.—Brewer v. Kirk, 77 S.W.2d 34, 256 Ky. 822.
42. Md.—State v. Albert, 88 A. 119, 121 Md. 222.
43. Ill.—Safford v. Muller, 59 Ill. 205.
44. La.—Pottier v. Grant, 26 La. Ann. 283.
S.C.—Cay v. Galliott, 35 S.C.L. 282.
45. Kan.—Nimocks v. Welles, 21 P. 787, 42 Kan. 39.
46. Colo.—Smith v. Atkinson, 32 P. 425, 18 Colo. 255.
47. Ky.—Alexander v. Gish, 9 S.W. 801, 88 Ky. 13, 10 Ky.L. 989.
48. Ind.—Dunham v. Seiberling, 39 N.E. 1044, 12 Ind.App. 210.
49. Nev.—Kinkead v. Benton, 14 P. 294, 19 Nev. 437.
32 C.J. p 457 note 26.
50. Wash.—Sampson v. Woldenberg, 114 P. 162, 62 Wash. 483.
32 C.J. p 457 note 27 [c].
51. Ind.—Crawford v. Spindler, 103 N.E. 388, 55 Ind.App. 1.
32 C.J. p 457 note 27 [a].
52. Colo.—Breeze v. Haley, 59 P. 333, 13 Colo.App. 438.
32 C.J. p 457 note 27 [b].
53. Ky.—Wilder v. Miller, 206 S.W. 293, 182 Ky. 210.
54. Miss.—Johnson v. Howard, 141 So. 573, 167 Miss. 475.
55. Colo.—Breeze v. Haley, 59 P. 333, 13 Colo.App. 438.
Neb.—Gyger v. Courtney, 81 N.W. 437, 59 Neb. 555.
56. Ind.—Boden v. Dill, 58 Ind. 273.
57. Iowa.—Dennis v. Mantle, 155 N. W. 830, 173 Iowa 450.
58. Cal.—Fowler v. Frisbie, 37 Cal. 34.
32 C.J. p 458 note 35.

Character of bond as joint or several. It is not necessary that all the obligees on the bond join as parties plaintiff where the liability of the obligors to them is several and not joint,[59] and in this connection the mere fact that a number of obligees are named in the bond does not determine that all have a joint interest in the performance of the obligors' promises, the interest of each being determined by the intention of the parties.[60] Where an injunction bond is joint, all the obligees may join in an action thereon,[61] although the claim due the obligees may be of different amounts and bear interest from different dates,[62] or although only one of them has sustained injury,[63] and it is generally considered that all of the obligees in a joint bond must join in an action thereon;[64] but there is some authority to the effect that notwithstanding the joint character of the bond the obligees may sue separately or jointly.[65]

Bond payable to state. Where the bond is made payable to the state as authorized by statute, one of the parties entitled to the benefit of its penalty may, after dissolution of the injunction, prosecute a suit on such bond in the name of the state, for his own use, without joining the other beneficiaries.[66]

b. Defendants

The usual rules governing parties defendant in an action on a bond apply in actions on injunction bonds.

The general rules governing parties defendant in actions on bonds, as discussed in Bonds § 107, have been applied in actions on injunction bonds.[67] Ordinarily all the obligors on the bond should be joined as defendants;[68] but where, although the injunction proceedings are begun in the name of the state as plaintiff, the relator is the real complainant, suit may be maintained against him and the sureties on the bond, without making the state a codefendant.[69] Under some statutory provisions it is optional with plaintiff whether to make both the principal and surety on the bond parties to the action,[70] and plaintiff may, for example, sue the surety without joining the principal.[71]

There has been held to be a misjoinder of parties defendant where the action was brought ex contractu on the bond against the principal and the surety and ex delicto for additional damages against the principal;[72] but it has also been held proper to join as defendants the sureties on the bond, plaintiffs in injunction, and an alleged instigator or fomenter of the proceeding, although some were sued ex contractu and others ex delicto.[73]

§ 298. —— Process and Appearance

The general rules as to appearance considered in the title Appearance and those relating to process considered in the title Process control in the absence of express statutory provisions.

Examine Pocket Parts for later cases.

§ 299. —— Pleading

a. In general
b. Complaint or declaration
c. Answer or plea
d. Replication or reply
e. Issues, proof, and variance

a. In General

Matters pertaining to the construction or amendment of pleadings in actions on injunction bonds are gov-

59. Pa.—Miller v. South Hills Trust Co., 96 Pa.Super. 273.

Several liability created

Where an injunction bond recites that "plaintiffs undertake and promise to pay all costs and disbursements that may be decreed to defendants, and such damages as they may sustain by reason of the injunction, if it be wrongful," the undertaking creates a liability running in favor of any one of defendants.—Moore v. Lachmund, 117 P. 1123, 59 Or. 565, Ann.Cas.1912C 1273.

60. Pa.—Miller v. South Hills Trust Co., 96 Pa.Super. 273.

61. Vt.—Lillie v. Lillie, 55 Vt. 470. 32 C.J. p 458 note 32.

62. W.Va.—Peerce v. Athey, 4 W.Va. 22.

63. Ky.—Watts v. Sanders, 10 B. Mon. 372.

64. Mont.—Montana Mining Co. v. St. Louis Mining & Milling Co., 48 P. 305, 19 Mont. 313. 32 C.J. p 458 note 36.

Vendor and vendee

Where the injunction, in connection with which the bond was given, restrained both a prospective vendor and vendee of land from making the sale, and the bond ran in favor of both the vendor and vendee, it has been held that the action should be brought in the names of both obligees, and that there is a nonjoinder of parties plaintiff if the action is brought in the name of the vendor only, the other obligee being a necessary nominal party at least. —Spires v. Spires, 117 S.E. 255, 30 Ga.App. 228.

65. Or.—Ruble v. Coyote Gold & Silver Mining Co., 10 Or. 39.

66. U.S.—State v. U. S. Fidelity & Guaranty Co., 108 S.E. 271, 88 W. Va. 665.

67. **Parties liable for deficiency**

After dissolution of a temporary injunction restraining the sale of property under a mortgage, a suit on the bond to recover any deficiency occasioned by the injunction should join all parties liable for the deficiency.—Epstein v. Graff, 203 N. W. 836, 231 Mich. 232.

68. Md.—Wallis v. Dilley, 7 Md. 237. 32 C.J. p 458 note 46.

69. Colo.—Wason v. Frank, 44 P. 378, 7 Colo.App. 541.

70. Mont.—Foster v. Royal Indemnity Co., 271 P. 609, 83 Mont. 170.

71. Mont.—Foster v. Royal Indemnity Co., supra.

72. Ga.—Spires v. Spires, 117 S.E. 255, 30 Ga.App. 228.

73. La.—Riggs v. Bell, 3 So. 183, 39 La.Ann. 1030.

Severance

The sureties have a right to sever, but they are not bound so to do.—Riggs v. Bell, supra.

erned by the usual rules of pleading. Objections to the pleadings must be made in the mode required by the practice of the particular jurisdiction.

The general rules pertaining to the construction of pleadings in other actions, as discussed in the C.J.S. title Pleading §§ 53–58, also 49 C.J. p 105 note 10–p 122 note 52, apply to actions on injunction bonds.[74] Amendment of the pleadings should be allowed in a proper case.[75]

The availability of a given defect in a pleading depends on whether or not the proper course is pursued to bring the defect to the attention of the court according to the practice in the particular jurisdiction.[76] Under the practice in at least one jurisdiction, objection that the action is prematurely brought may be raised by demurrer or plea, depending on whether or not the fact appears on the face of the complaint.[77]

b. Complaint or Declaration

(1) In general
(2) Issuance, service, and propriety of injunction
(3) Damages

(1) In General

The complaint or declaration in an action on an injunction bond must be sufficient to justify the relief sought, and must clearly describe the bond and the claimed breach thereof. In the absence of provision in the bond or the statutes requiring a prior attempt to collect the damages from the principal, an allegation to that effect is unnecessary. There is some conflict as to the necessity of setting out the record in the injunction suit.

In an action on an injunction bond, plaintiff must set forth in his declaration or complaint all the facts which are essential to show a cause of action in him;[78] but, if this is done, it is not a fatal defect that the facts may have been awkwardly expressed.[79] The bond declared on must be described with such precision, certainty, and clearness as fully to apprise defendants of the cause of action which they are required to answer;[80] and, when the action is brought against plaintiff in the injunction suit, it must be alleged that he was a party to the bond.[81]

Plaintiff must clearly assign a breach of the conditions of the bond or undertaking,[82] although it is sufficient to set forth such facts as constitute a breach.[83] Plaintiff need not allege the existence of an order of the court of equity authorizing a withdrawal of the bond and permitting suit to be brought on it, in the absence of statute making it necessary to obtain leave to sue on the bond.[84] The validity of judgments whose collection was enjoined need not be alleged.[85]

Nonpayment by, or insolvency of, principal. Ordinarily the complaint need not aver a demand on the principal and a refusal by him to pay.[86] However, where the undertaking of the sureties is to pay the damages if plaintiff in the injunction suit does not pay, the petition in an action on the bond against the sureties must allege the failure of injunction plaintiff to pay the damages,[87] although such an allegation need not be made expressly, and a petition which contains allegations from which nonpayment may be implied is sufficient to withstand attack by a general demurrer based on the ground of insufficiency to state a cause of action.[88] If a statute makes it a condition precedent to the right to sue on an injunction bond that execution against the principal debtor shall have been returned unsatisfied, the fulfillment of this condition must be al-

74. Nonpayment of note
In construing a particular complaint, answer, and reply, it was held that they constituted a mutual admission that there was no actual payment of a note given by plaintiff to defendants so that the amount of the note was deductible from any recovery by plaintiff against defendants in the action on the injunction bond.—Mead v. Kalberg, 127 P. 185, 70 Wash. 517.

75. Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522.

76. Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

General or special demurrer
A petition which is good as against general demurrer may nevertheless be subject to special demurrer where it fails to set forth the pleadings or record in the former cause, or their substance, and also improperly joins causes of action.—Spires v. Spires, 117 S.E. 255, 30 Ga.App. 228.

77. Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

78. Okl.—Hart v. Hamra, 216 P. 649, 91 Okl. 141.
32 C.J. p 458 notes 49, 51.

Allegations held sufficient
Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245.
Pa.—Bratton v. Fidelity & Deposit Co. of Maryland, Com.Pl., 49 Dauph.Co. 112.
Wash.—Clem v. Hunz, 231 P. 7, 132 Wash. 14, 40 A.L.R. 987.

79. W.Va.—State v. Pingley, 100 S.E. 216, 84 W.Va. 433.

80. Fla.—Tallahassee R. Co. v. Hayward, 4 Fla. 411.
32 C.J. p 459 note 66.

81. Cal.—Asevado v. Orr, 34 P. 777, 100 Cal. 293.

82. Ariz.—Buggeln v. Cameron, 90 P. 324, 11 Ariz. 200.
32 C.J. p 460 note 68.

83. Fla.—Tallahassee R. Co. v. Hayward, 4 Fla. 411.
32 C.J. p 460 note 69.

84. N.C.—Falls v. McAffee, 23 N.C. 139.

85. Ind.—Midland R. Co. v. Stevenson, 33 N.E. 254, 6 Ind.App. 207, followed in 33 N.E. 256, 6 Ind.App. 702.
32 C.J. p 460 note 74.

86. Mont.—Montana Mining Co. v. St. Louis Mining & Milling Co., 43 P. 305, 19 Mont. 313.

87. Okl.—Hart v. Hamra, 216 P. 649, 91 Okl. 141.

88. Okl.—First Nat. Bank v. Duncan, 285 P. 957, 142 Okl. 121—Wyatt v. Marinoff, 268 P. 324, 131 Okl. 134.

leged;[89] but in the absence of such a statute it is not necessary to allege the insolvency of the principal.[90]

Record in injunction suit. It has been held that plaintiff need not file with the complaint,[91] or specifically set out therein,[92] any part of the record of the suit in which the injunction on which the bond is given was granted; but it has also been held that a petition which fails to set forth the pleadings or record in the former cause, or their substance, is subject to special demurrer.[93]

(2) Issuance, Service, and Propriety of Injunction

The complaint should allege, either expressly or impliedly, the issuance and service of the injunction, and final determination of the injunction suit adversely to plaintiff therein; but procedural matters connected with the granting of the injunction need not be alleged.

It should appear that an injunction was issued and was served;[94] and for this purpose it is sufficient to allege that the injunction was served on defendants personally without specifying the manner of service.[95] An express allegation of issuance and service is unnecessary where facts are alleged which of necessity imply such issuance and service.[96] It is unnecessary to allege expressly that the judge had authority to grant the injunction; that application for the injunction was presented to the judge by the injunction plaintiffs in the suit in which such injunction is alleged to have been granted; that cause was shown for granting such injunction; or that the injunction was granted in vacation, where the date on which it was granted is stated.[97]

Plaintiff should allege a final determination of the injunction suit,[98] and should show that the injunction was wrongfully issued,[99] although an express averment to that effect is unnecessary if the fact otherwise appears from the allegations pleaded.[1]

(3) Damages

Unless damages have already been awarded, plaintiff must specify the injuries sustained by the wrongful issuance of the injunction and, if he was not an obligee in the bond, how he is entitled to recover therefor. Special damages must be pleaded.

Unless damages have already been awarded, as by the decree dissolving the injunction,[2] plaintiff must specify the particular injuries sustained with such clearness that they may be understood by defendants,[3] and must allege facts showing how the issuance of the injunction caused the particular damages set out;[4] his recovery will be limited to such damages as are specifically alleged, and no damages other than those claimed will be allowed.[5] If plaintiff was not named as an obligee in the bond he must allege a state of facts showing that he was damaged from the direct effects of the injunction,[6] and as to such a plaintiff averments showing a breach of the bond coupled with the fact that the injunction was dissolved do not entitle him even

89. Ohio.—Hillyer v. Richards, 13 Ohio 135.

90. Idaho.—Dangel v. Levy, 1 Idaho 722.

91. Ind.—Winship v. Clendenning, 24 Ind. 439.
32 C.J. p 461 note 11 [b].

92. Ind.—Merrifield v. Weston, 68 Ind. 70.
32 C.J. p 459 note 60.

93. Ga.—Spires v. Spires, 117 S.E. 255, 30 Ga.App. 228.

94. Ind.—Merrifield v. Weston, 68 Ind. 70.

95. N.Y.—Loomis v. Brown, 16 Barb. 325.

96. Ala.—Dubberly v. Black, 38 Ala. 193.
32 C.J. p 459 note 55.

97. Ind.—Merrifield v. Weston, 68 Ind. 70.
32 C.J. p 459 note 58.

98. Iowa.—Lacey v. Davis, 102 N. W. 535, 126 Iowa 675, withdrawing 98 N.W. 366.
Okl.—Sloan v. Kohler, 88 P.2d 644, 184 Okl. 511.
32 C.J. p 459 note 62.

99. Okl.—Sloan v. Kohler, supra.
32 C.J. p 459 note 63.

1. Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.
32 C.J. p 459 note 64.

2. W.Va.—State v. Purcell, 5 S.E. 301, 31 W.Va. 44.
Assessment of damages in injunction suit see supra §§ 283–287.

3. W.Va.—State v. Purcell, 5 S.E. 301, 31 W.Va. 44.
32 C.J. p 460 note 77.

4. Ill.—Shreffler v. Nadelhoffer, 25 N.E. 630, 133 Ill. 536, 23 Am.S.R. 626.
32 C.J. p 460 note 78.

Loss of profits

A claim for loss of estimated profits from the conduct of a business because of the wrongful issuance of an injunction is not allowable in the absence of an allegation that the party enjoined had any previous experience in such business on which to base a reasonable hope of making such profits.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.

Payment for failure to convey land

Allegations that plaintiff had contracted to sell certain land, and was obligated to make a deed conveying such land to purchaser within a certain time, and was prevented from so doing because of the injunction, and paid a specified amount as damages because of not being able to perform contract, were sufficient to show that alleged damages were due to issuance and continuance of injunction.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.

Different amounts sought from principal and surety

The fact that plaintiff prays for judgment against the surety in the full amount of the bond, while the prayer against the principals on the bond is for a lesser amount, does not affect the sufficiency of the pleading in so far as concerns the allegations necessary to constitute a cause of action against the surety.—Buras v. Machella, 134 So. 751, 172 La. 580.

5. Ky.—Wilder v. Miller, 206 S.W. 293, 182 Ky. 210.
32 C.J. p 460 note 79.

6. Ala.—Irwin v. Morrow, 95 So. 496, 19 Ala.App. 115, certiorari denied Ex parte Irwin, 95 So. 498, 209 Ala. 164.
32 C.J. p 458 note 51 [a].

to nominal damages.[7]

In order to recover special damages, they must be alleged,[8] or at least facts stated from which it must necessarily be inferred that such damages were sustained.[9] Actual payment of counsel fees need not be alleged, in order to recover therefor, if a legal obligation to make such payment is sufficiently alleged.[10]

c. Answer or Plea

The answer or plea in an action on an injunction bond must comply with the general rules of pleading. Denials should not be made of matters established by the recitals of the bond or the judgment in the injunction suit, and only matters which properly constitute a defense should be affirmatively set forth.

The general rules applicable to pleas or answers in actions on bonds generally, as discussed in Bonds § 110, apply in actions on injunction bonds.[11] The plea should be distinctly responsive, not evasive and argumentative.[12] Defendant cannot properly deny that the injunction was granted, or allege that there was no injunction in existence when the bond was acknowledged[13] or that the court granting the injunction was without jurisdiction;[14] and a plea that, if the injunction defendant was damaged, it was by reason of his own wrong is bad.[15] A plea or answer is bad which sets up a contract different from the recitals of the bond,[16] or which alleges merely that defendant did not cause the bond to be filed.[17] The motive in suing out the injunction cannot be pleaded in bar.[18]

As a bar defendant may deny the dissolution of the injunction.[19] A plea that defendant has performed the conditions of a bond payable on dissolution of the injunction amounts to an admission that the injunction has been dissolved, since until that time there can be no conditions to perform.[20]

Misrepresentation in the procurement of the signatures of defendants to the bond in suit must be specially pleaded.[21]

Want of consideration. Where want of consideration can be set up as a defense to an action on the bond, as discussed supra § 293 b, it must be taken advantage of by a special plea, or otherwise in conformity to the practice in the particular jurisdiction.[22] Where want of consideration cannot be set up as a defense to an action on the bond, a plea alleging merely the want of consideration is bad.[23]

Settlement. A special or affirmative answer is bad which alleges a settlement of all matters in controversy in the injunction suit, but shows that the settlement was limited by its terms to such controversies as then existed and did not include controversies, such as that in the action on the bond, which might arise in the future.[24]

Pleas affecting question of damages. An allegation in the answer that the injunction was issued too late to have any operative effect is pertinent, at least on the question of damages.[25] Where plaintiff alleges damage in that he was unable to collect a debt by reason of the injunction, a plea that the debtor was insolvent at the time is a good answer.[26] A plea to an action on an injunction bond for breach of condition, which merely avers certain elements of expense and charges to which plaintiff alleges he was subjected by issuance of the injunction, is not a plea in bar and goes only to the reduction of damages.[27]

7. Ala.—Marengo County v. Matkin, 42 So. 33, 144 Ala. 574, 6 Ann.Cas. 902.
32 C.J. p 458 note 51 [a].

8. Iowa.—Hibbs v. Western Land Co., 46 N.W. 1119, 81 Iowa 285.
32 C.J. p 460 note 80.

9. Iowa.—Williams v. Ballinger, 101 N.W. 139, 125 Iowa 410.
32 C.J. p 460 note 81.

10. Neb.—Meeske v. Baumann, 241 N.W. 550, 122 Neb. 786, 83 A.L.R. 131.

11. **Cross complaint held insufficient**
A cross complaint alleging merely that the attorneys for defendant in the injunction suit had offered to deed certain property to plaintiff therein is demurrable where, by statute, an attorney may bind his client in an action or proceeding only if the agreement is filed with the clerk or entered on the minutes of the court.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.

12. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.
32 C.J. p 461 note 84.

13. Ky.—Allen v. Luckett, 3 J.J. Marsh. 164.

14. Ky.—Hanna v. McKenzie, 5 B. Mon. 314, 43 Am.D. 122.
Estoppel to challenge validity of injunction see supra § 293 a.

15. W.Va.—State v. Corvin, 41 S.E. 211, 51 W.Va. 19.
32 C.J. p 461 note 94.
Illegality of enjoined acts as defense to action on bond see supra § 293 a.

16. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.

17. Cal.—Lambert v. Haskell, 22 P. 327, 80 Cal. 611.
32 C.J. p 461 note 92.

18. Ill.—Sturges v. Hart, 45 Ill. 103.
Good faith as defense see supra § 293 d.

19. N.Y.—De Forest v. Baker, 1 Abb.Pr.,N.S., 34.
32 C.J. p 461 note 86.
Necessity of final determination of injunction suit see supra § 292 b.

20. Ky.—Harrison v. Park, 1 J.J. Marsh. 170.

21. N.Y.—Foley v. Schiedemantel, 17 N.Y.S. 663.

22. Cal.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.

23. Ky.—Mahan v. Tydings, 10 B. Mon. 351.

24. Cal.—Silcox v. Lang, 20 P. 297, 78 Cal. 118.

25. U.S.—U. S. v. Fisher Flouring Mills Co., D.C.Wash., 295 F. 691.

26. Ky.—Keel v. Ogden, 3 Dana 102.

27. Fla.—Sewell v. Huffstetler, 93 So. 162, 83 Fla. 629.

d. Replication or Reply

The reply must be responsive to the plea and must not depart from the complaint.

The replication or reply, when a proper pleading, must be responsive to the plea,[28] and must not depart from the material allegations of the complaint.[29]

e. Issues, Proof, and Variance

The allegations and proof must correspond, although an immaterial variance will not be fatal.

A verified answer denying execution of the bond requires plaintiff to prove its execution.[30] The allegations and proof must correspond, and no evidence is admissible which is not authorized by the allegations of the complaint.[31] However, a merely immaterial variance between pleading and proof is not fatal to a recovery.[32]

§ 300. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

The usual rules as to presumptions and burden of proof in civil actions obtain in an action on an injunction bond. The burden is on plaintiff to show a right to recover and the damages suffered. After plaintiff establishes a prima facie case, the burden is on defendant to show that the injunction was rightfully issued, or that the conditions of the bond have been performed.

In an action on an injunction bond the burden is on plaintiff to show a right of recovery[33] and the respects in which he suffered damage by reason of the injunction.[34] A plea of non est factum casts on plaintiff the onus probandi as in other cases.[35] The party seeking damages has the burden of showing that the injunction was wrongful in its inception, or at least that it was continued because of some wrong on the part of the one who obtained it.[36] The burden is on the party asking an allowance of counsel fees to prove that the amount asked is reasonable.[37] Also it is necessary that there should be proof of the actual rendition of services by counsel,[38] and of the value of such services.[39]

After plaintiff makes out a prima facie case by establishing the dissolution of the temporary injunction and the dismissal of the original suit, the burden is then on defendant to show that the injunction was rightfully issued.[40] Defendant has the burden of proving the performance of the conditions of the bond.[41] A defendant claiming that the bond was given without consideration, because the acts sought to be enjoined by the injunction suit had already taken place before issuance of the restraining order and injunction, has the burden of so showing.[42]

Presumptions. The general presumptions applicable in other civil actions apply in actions on injunction bonds.[43] In the absence of evidence to the contrary, it will be presumed that delivery of the bond was unconditional;[44] and, where the law authorizes an injunction only on bond for debt and costs, it will be presumed that the bond was executed for the debt and costs.[45] It will be presumed that the petition for injunction contained the necessary allegations to entitle the injunction plaintiff to the writ,[46] and that delay in the prosecution of the equity cause arose because all the parties were willing that

28. Ark.—Scott v. Fowler, 14 Ark. 427.
32 C.J. p 461 note 5.

29. Miss.—Gildart v. Howell, 2 Miss. 198.

30. Kan.—Jones v. Ross, 29 P. 680, 48 Kan. 474.

31. Okl.—Felkner v. Winningham, 155 P. 248, 55 Okl. 743.
32 C.J. p 461 note 10, p 459 note 55 [b].
Evidence held improperly excluded
Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522.

32. U.S.—Jones v. Allen, Ark., 85 F. 523, 29 C.C.A. 318, certiorari denied 18 S.Ct. 943, 171 U.S. 687.
32 C.J. p 461 note 11.

33. Iowa.—Ft. Madison St. R. Co. v. Hughes, 114 N.W. 10, 137 Iowa 122, 14 L.R.A.,N.S., 448.
32 C.J. p 462 note 13.

34. Pa.—Smyth v. Fidelity & Deposit Co. of Maryland, 192 A. 640, 326 Pa. 391, 111 A.L.R. 481.
32 C.J. p 462 note 13 [a].

35. Ky.—Robards v. Wolfe, 1 Dana 155.
32 C.J. p 462 note 16.

36. Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.

37. Ala.—McGraw v. Little, 73 So. 915, 198 Ala. 553.
Okl.—Prager's Paris Fashion v. Seidenbach, 242 P. 260, 263, 113 Okl. 271, quoting **Corpus Juris.**

38. Ill.—Delahanty v. Warner, 75 Ill. 185, 20 Am.R. 237.
Iowa.—Ady v. Freeman, 57 N.W. 879, 90 Iowa 402.
32 C.J. p 478 note 29.

39. Ill.—Delahanty v. Warner, 75 Ill. 185, 20 Am.R. 237—Rees v. Peltzer, 1 Ill.App. 315.
La.—Alfano v. Franek, 105 So. 598, 159 La. 498—Timkan v. Wisner Estates, 95 So. 711, 153 La. 262.

40. Cal.—Draffen v. U. S. Fidelity & Guaranty Co., 17 P.2d 121, 217 Cal. 43.
32 C.J. p 462 note 14.

41. Md.—Burgess v. Lloyd, 7 Md. 178.

42. Cal.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.

43. **Verity of record; alterations**
A presumption of verity will be accorded a record, and apparent alterations and interlineations will be assumed to constitute mistakes corrected when made, rather than an unlawful tampering with the record. —Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., supra.

44. Neb.—Gyger v. Courtney, 81 N. W. 437, 59 Neb. 555.

45. Tenn.—Hicks v. Haywood, 4 Heisk. 598.

46. Iowa.—Monroe Bank v. Gifford, 31 N.W. 881, 70 Iowa 580.

the hearing should be postponed.[47]

b. Admissibility

(1) In general
(2) Damages

(1) In General

As in other civil actions, the evidence in actions on injunction bonds must be competent, relevant, and material. Evidence is not admissible to contradict matters concluded by the injunction suit. The bond may be admitted, although defective in form.

The rules applicable generally in civil cases with respect to competency, relevancy, and materiality of evidence apply in actions brought on injunction bonds.[48] Evidence in contradiction of matters concluded by the injunction suit is not admissible.[49] However, the record of the suit in which the injunction was issued is admissible[50] to aid the court in ascertaining precisely what was determined therein.[51]

Bond. Where the execution of the bond is admitted by the pleadings, it is properly admitted in evidence, although slightly defective in form,[52] and a surety cannot object to its admission on the ground that it does not appear that the order for the injunction required a bond to be given, since he is estopped by the recitals of the bond.[53]

A recital in the bond that plaintiff had obtained an order for an injunction is not evidence of the issuing of the injunction.[54] In an action on a bond given in conjunction with an injunction restraining the prosecution of a particular suit, it may be shown aliunde that the bond erroneously recites the name of the defendant in the suit restrained, and that there was a suit pending in which the person so recited as defendant was the real party in interest, although others were the nominal defendants.[55]

(2) Damages

Competent evidence is admissible to show the amount of damages, that they resulted from the injunction, efforts to minimize them, the value of the property involved in the injunction suit, and attorney's fees incurred and the reasonableness thereof; but evidence of speculative damages or other improper items is inadmissible.

The admissibility of evidence on the issue of damages in an action on an injunction bond is governed by the usual rules as to the admissibility of evidence in civil actions generally.[56] Evidence that the damages claimed did not result from the injunction,[57] or were excessive,[58] or that their assessment was procured by fraud,[59] is admissible. Evidence is admissible, in reduction of damages, to show defendant's ownership of property, the sale of which was enjoined, the injunction having been dissolved on the ground that there was an adequate remedy at law, without any decision on the question of

47. U.S.—Jones v. Allen, Ark., 85 F. 523, 29 C.C.A. 318, certiorari denied 18 S.Ct. 943, 171 U.S. 687.

48. Iowa.—Chicago, A. & N. R. Co. v. Whitney, 132 N.W. 840, 152 Iowa 520.
32 C.J. p 462 note 22.

49. Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Okl.—Poarch v. Finkelstein, 99 P.2d 871, 186 Okl. 523.
32 C.J. p 462 note 24.

50. Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
32 C.J. p 462 note 25.

51. Iowa.—Chrisman v. Schmickle, supra.

52. Ind.—Winship v. Clendenning, 24 Ind. 439.
32 C.J. p 462 note 27.

53. Md.—Hamilton v. State, 32 Md. 348.

54. Ala.—Dubberly v. Black, 38 Ala. 193.

55. Ala.—Person v. Thornton, 5 So. 470, 86 Ala. 308.

56. **Evidence held admissible**
(1) Generally.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.

(2) A certified bill of costs in an injunction suit which was assigned to respondent therein, against whom they were taxed, by the parties in whose favor they were taxed, is admissible in estimating damages against the sureties on the injunction bond, if no objection was made on the trial that such costs were not regularly taxed.—Nolan v. Johns, 28 S.W. 492, 126 Mo. 159.

(3) In a suit on an injunction bond for the benefit of the real obligees, evidence of payment made by the nominal obligees for the real obligees' use is competent in ascertaining the relative damages sustained by the real obligees in defense and dissolution of the injunction.—Alabama Power Co. v. Hamilton, 77 So. 356, 201 Ala. 62.

(4) Where, in an action on an injunction bond, brought by lessees against the lessors for enjoining mining operations, the lessors proved failure of the lessees to mine and transport the ore in accordance with the directions of their engineers as required by the lease, it was competent for them also to prove the damages resulting to them from such failure.—Webb v. McFarlin, 58 So. 453, 177 Ala. 531.

(5) Where the injunction restrained the mining of coal, work done preparatory to getting out the coal, the work being done before the restraining order came into force, may be shown to help illustrate what had to be done thereafter in order to get out coal; but how much plaintiff spent on this work is immaterial.—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.

Evidence held inadmissible
(1) Evidence of damages from inability to transport coal from adjoining lands is inadmissible where plaintiff fails to show a right to such coal.—Strong v. Duff, 15 S.W. 2d 517, 228 Ky. 615, 70 A.L.R. 56.

(2) In an action on a bond given in connection with an injunction restraining the operation of a mine, evidence to prove what price plaintiff received for coal at a certain time is inadmissible where it is clear from the evidence that he could not have got any coal out of the mine for some weeks after that time even if no injunction had been granted.—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.

57. Mont.—Creek v. McManus, 43 P. 497, 17 Mont. 445.

58. Miss.—Cage v. Iler, 13 Miss. 410, 43 Am.D. 521.

59. N.Y.—Jordan v. Volkenning, 72 N.Y. 300.

ownership.[60] Defendants may show statements by plaintiff that he was making no profit from the transaction enjoined,[61] although, if such evidence is introduced, plaintiff may show what he was in fact making, as a circumstance confirming his denial that he made such a statement.[62] Evidence of efforts made by plaintiff to minimize the damages is admissible.[63] Competent evidence may be received as to the value of property involved in the injunction suit,[64] and any increase or decrease in the value of the property during the existence of the injunction.[65] Evidence as to purely speculative damages is not admissible.[66]

Attorney's fees. Evidence is admissible to show the work done by an attorney in obtaining a dissolution of the injunction or restraining order,[67] and what constitutes a reasonable fee therefor.[68] Where the circumstances are such that counsel fees are recoverable for the defense of the entire suit in which the bond was given, as discussed infra § 315, evidence is admissible to prove the payment of fees to counsel for defense of the suit;[69] but, where the facts of the case are such that no recovery is permissible except for services rendered in securing dissolution of the injunction, as discussed infra § 315, evidence as to other services[70] and as to what was a reasonable attorney's fee for such other services[71] is not admissible. Testimony as to what questions of law were briefed in the course of the performance of legal services in the injunction suit has been held immaterial in an action on the bond.[72]

c. Weight and Sufficiency

The general rules governing the weight and sufficiency of evidence in civil actions apply in actions on injunction bonds. Damages must be shown with reasonable certainty, but expert testimony is not indispensable.

The general rules as to the weight and sufficiency of evidence apply in actions on injunction bonds to recover damages resulting from the wrongful issuance of injunctions.[73] Plaintiff makes out a prima facie case by establishing the dissolution of the temporary injunction or restraining order and the dismissal of the injunction suit.[74]

60. Okl.—Mundell v. Colony Mercantile Co., 4 P.2d 1059, 153 Okl. 79.

61. Ky.—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.

62. Ky.—Brandenberg v. Addison, supra.

63. Ala.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.

64. Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

Appraised value

Where an execution was enjoined, the creditor may show, in an action against the surety on the injunction bond, that the property was appraised below its real value.—Elliot v. Cox, 5 Mart.N.S., La., 285.

Price at foreclosure sale

"Ordinarily the price obtained at a foreclosure sale is not evidence of the true value of the property."—DaFoe v. Starek, 9 Tenn.App. 668, 676.

Contract to sell

Where the injunction restrained the disposition of certain property, evidence of a contract for the sale of the property is admissible in an action on the bond to establish the market value of the property at the time the injunction bond was given and served and at the time the injunction issued; and the fact that the contract for sale was not binding, on the ground, for example, that it was not in writing does not affect the admissibility of such evidence.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

65. W.Va.—State v. Friedman, 81 S. E. 830, 74 W.Va. 11.
32 C.J. p 462 note 35.

66. Ala.—Lewis v. Collier, 47 So. 790, 157 Ala. 533.
32 C.J. p 463 note 39.

Offers for, or sales of, other property

Where the injunction restrained the sale of particular land, testimony respecting the condition of the real estate market and relating to unidentified verbal offers for lots, and other sales of lots, in the vicinity at the time during which the injunction was in force, is properly excluded where it is too speculative and contingent to furnish a basis for the allowance of damages.—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188.

67. Ariz.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58.
Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P. 2d 75, 52 Idaho 795.

68. Ariz.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58.
Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P. 2d 75, 52 Idaho 795.

69. Miss.—Baggett v. Beard, 43 Miss. 120.
32 C.J. p 462 note 32.

70. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.

71. Idaho.—Ferrell v. Cœur d'Alene & St. Joe Transp. Co., 157 P. 946, 29 Idaho 118.

72. Idaho.—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P.2d 75, 52 Idaho 795.

73. **Evidence held sufficient**

(1) Generally.—Bowman v. Hopper, 265 P. 743, 125 Kan. 680—32 C. J. p 463 note 46 [a].

(2) To support finding that dismissal of injunction suit was voluntary and that right to sue on bond was not waived.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App.2d 905.

(3) To show intention to sell stock, on the part of the party enjoined, and that he was prevented from so doing by the party who obtained the injunction.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 848.

(4) To support finding that warrant, assessment, and diagram were not recorded before issuance of restraining order.—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.

Evidence held insufficient

(1) To show that plaintiff in the action on the bond instigated the bringing of the injunction proceeding.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58.

(2) To show that plaintiff was not acting within his rights at the time during which he was restrained.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

(3) To establish other matters see 32 C.J. p 463 note 46 [b].

74. Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
32 C.J. p 462 note 14.

The damages claimed as the proximate result of the injunction must be shown with reasonable certainty,[75] or at least with sufficient certainty to authorize the judgment.[76] Evidence of what might have been gross profits, without a showing of the costs or expenses which would have been incurred, is insufficient on which to base a recovery.[77] Where the only evidence as to counsel fees has been stricken from the record, and such action is not assigned as error, damages in this particular cannot be awarded.[78] To authorize a recovery for loss caused by the injunction, it is not necessary to prove such loss from records of expense kept at the time expenditures were made, but a recovery may be had on proof of facts from which the damage suffered may be logically deduced.[79]

Market value. The weight to be given evidence of a contract for the sale of property, evidence of which has been introduced to establish the market value of the property, may be affected by the fact that the contract was not binding.[80] Evidence that plaintiff was offered a certain amount for property, the disposition of which was enjoined, is insufficient on which to predicate a recovery of damages where there is no proof that the offer was made in good faith, with the intention that it be accepted, by one who was ready to buy.[81] In the absence of evidence to the contrary, the price which a crop of the same variety as that involved in the injunction suit actually brought in the market furnishes ample proof of the reasonable market value thereof.[82]

Absence of expert testimony. The absence of expert testimony does not necessarily render the evidence insufficient to warrant a recovery.[83] Thus expert testimony of the reasonable value of the services rendered by attorneys is unnecessary where testimony as to the extent, duration, and nature of the services furnishes the court with ample evidence on which to determine the value of the services.[84]

Execution of bond as escrow. A surety cannot be relieved from his obligation on the bond by showing that his signature was affixed thereto as an escrow, unless his proof on petition is as clear, satisfactory, and demonstrative as that required to set aside a decree or judgment of a court of record on the ground of fraud.[85]

§ 301. —— Trial

The propriety of instructions in actions on injunction bonds is governed by the usual rules. Questions of fact are to be determined by the jury, and questions of law by the court.

The general rules as to instructions applicable in civil actions apply in actions on injunction bonds.[86] As in other cases, it is for the jury to decide questions of fact[87] and the weight to be given particu-

75. Ky.—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188.

76. Tex.—Southland Life Ins. Co. v. Stone, Civ.App., 112 S.W.2d 336.

Evidence held sufficient

(1) To sustain finding or verdict as to amount of damages generally.

Cal.—Adams v. National Automobile Ins. Co., 133 P.2d 657, 56 Cal.App. 2d 905—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.

D.C.—Knapp v. Dugan, 39 F.2d 285, 59 App.D.C. 240.

Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245.

Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 435.

32 C.J. p 463 note 46 [a] (5).

(2) To permit recovery for attorney's fees.—Francis v. Fidelity & Deposit Co. of Maryland, 269 P. 571, 93 Cal.App. 317.

(3) To establish claim for wages lost as a result of the injunction.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

(4) To establish other matters as to damages see 32 C.J. p 463 note 46 [a].

Evidence held insufficient

(1) To justify award of substantial actual damages.—Marks v. Jordan, Iowa, 208 N.W. 296.

(2) To establish loss of profits on prospective transactions.—Magnolia Petroleum Co. v. Holz, Tex.Civ.App., 299 S.W. 664.

(3) To separate charges for attorney's services necessary to procure dissolution from services rendered in other matters.—Housley v. Tobin, 286 P. 383, 41 Wyo. 419.

(4) To establish loss from deprivation of right to rent lots during injunctive period.—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188.

(5) To establish other matters as to damages see 32 C.J. p 463 note 46 [b] (2).

77. Tex.—Ellis v. City of West University Place, Civ.App., 171 S.W. 2d 178, affirmed 175 S.W.2d 396, 141 Tex. 608.

78. Idaho.—Pattee v. Mahaffey, 280 P. 1038, 48 Idaho 200.

79. Md.—Phœnix Pad Co. v. U. S., 75 A. 394, 111 Md. 549, 19 Ann.Cas. 667.

80. Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

81. Ind.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.

82. Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.

83. **Use value of light plant**

Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.

84. Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.

85. Tenn.—Ward v. Cullom, 2 Coldw. 353.

86. **Instructions held erroneous or properly refused**

Ala.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.

Okl.—Prager's Paris Fashion v. Seidenbach, 242 P. 260, 113 Okl. 271.

Instructions held proper

Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 133 P.2d 1017.

Ky.—Strong v. Duff, 48 S.W.2d 1074, 243 Ky. 469.

Mo.—Linneman v. Hawkins, App., 27 S.W.2d 1046.

87. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 133 P.2d 1017.

Or.—Blanchard v. Makinster, 1 P.2d 583, 137 Or. 58.

Wash.—Blakiston v. Osgood Panel &

lar testimony;[88] but it has been held unnecessary to submit an issue to the jury where the evidence thereon was uncontradicted.[89] Where the restraining order in conjunction with which the bond was given is a matter of record, and its effect involves but a question of its construction, the question of its effect is for the trial court, not the jury, to determine in an action on the bond.[90]

§ 302. —— Judgment

Matters concerning the judgment in an action on an injunction bond, such as the recital of jurisdictional facts, modification of the judgment, and the immunity of the judgment from collateral attack, are governed by the usual rules pertaining to judgments in civil actions.

The general rules governing judgments apply to judgments in actions on injunction bonds.[91] Accordingly it may be necessary to recite in the judgment the facts giving jurisdiction,[92] and the judgment is immune from collateral attack.[93] Under some statutory provisions the court may, for good cause, modify the judgment within a specified time from the date of its entry.[94]

Where the action on the bond is brought in the form of the old common-law action of debt, the judgment may be for the full penalty of the bond, although in excess of the amount of damages demanded in the complaint, and is dischargeable on payment of the amount of damages found.[95]

§ 303. —— Appeal and Error

The general rules of appeal and error in civil actions, including those pertaining to parties, and the right, scope, and extent of review, apply to appeals in actions on injunction bonds.

General rules governing the review of civil actions apply to appeals in actions on injunction bonds.[96] If a proceeding is had on the injunction bond by motion or otherwise against the sureties for the assessment of damages, they then become parties to the record and may appeal from the judgment;[97] but, in the absence of some statute providing otherwise, until this occurs, they have no such interest as to authorize them to carry on the suit by appeal or otherwise.[98] In a jurisdiction where by statute the surety is considered constructively in court, if he has neither appeared nor answered, nor been notified of the judgment, his right to appeal is not affected by defects occurring in the transcript, through the fault of the other appellant;[99] but the fact that the judgment includes the surety, although the principal alone is named in the verdict, does not authorize a reversal in favor of the surety who appeals.[1]

Scope and extent of review. A finding as to the aggregate damages sustained by breach of an injunction bond will not be disturbed on the ground that the damages were not itemized, in the absence of a request for a finding on each item.[2] It has been held that, in the absence of a trial on the merits and proper findings, the appellate court would not determine the sufficiency of a particular equitable defense.[3] Error in the taxation of costs in the

Veneer Co., 23 P.2d 397, 173 Wash. 253.

Damages as jury question see infra § 305.

Proximate consequence of injunction

Whether particular losses were the proximate and natural consequence of the wrongful issuance of the injunction was held, under the evidence, a question for the jury.—Jacobson v. Laurel Canyon Mining Co., 234 P. 823, 27 Ariz. 546.

Minimizing damages

In view of the record before the court it was held to be a question of fact, on the issue of minimizing damages, whether it was the duty of the party enjoined, under all the circumstances, to have moved to dissolve the injunction and prosecute an appeal, and whether an appeal would have been effective.—Johnson v. McMahan, Tex.Civ.App., 40 S.W. 2d 920, error refused.

88. Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 253.

89. Tex.—Sanitary Appliance Co. v. French, Civ.App., 58 S.W.2d 159, error dismissed.

90. Wash.—Blakiston v. Osgood Panel & Veneer Co., 23 P.2d 397, 173 Wash. 253.

91. **Motion for judgment**

Recovery in an action on the bond may be had by motion for judgment under a statute providing that "any person entitled to recover money by action on any contract" may, on motion, obtain judgment therefor.—State v. Carden, 163 S.E. 54, 111 W. Va. 631.

92. Tenn.—Coltart v. Ham, 2 Tenn. Ch. 356.

93. Ind.—Boos v. Morgan, 39 N.E. 919, 140 Ind. 206.
32 C.J. p 463 note 55.

94. Ariz.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58.

Showing as to good cause

Where the proper amount to be allowed as counsel fees is wholly within the discretion of the court and dependent to a great extent on its own knowledge, the mere fact that the court does modify the judgment with respect to counsel fees is sufficient to establish that it had good cause to believe the modification to be correct.—Hammond v. A. J. Bayless Markets, supra.

95. Ky.—Harrison v. Park, 1 J.J. Marsh., Ky., 170.

96. **Remission of excess recovery**

Where the trial court has found for plaintiff in an excessive amount, plaintiff has the right to remit the excess on the record without procuring a supplemental order to make the correction.—Bell v. Brinkley, 156 S.E. 348, 159 N.C. 171.

97. Mo.—St. Louis Zinc Co. v. Hesselmeyer, 50 Mo. 180.
32 C.J. p 463 note 60.

98. Mo.—St. Louis Zinc Co. v. Hesselmeyer, supra.

99. La.—Verges v. Gonzales, 33 La. Ann. 410.

1. La.—Mason v. Poulallier, 10 La. Ann. 418.

2. Cal.—Alaska Impr. Co. v. Hirsch, 47 P. 124, 119 Cal. 249, reheard 51 P. 340, 119 Cal. 249.

3. Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, opinion adhered to 210 N.W. 856, 169 Minn. 15.

injunction suit cannot be corrected on an appeal from a judgment in a suit on the bond, but should be corrected on appeal from the clerk's taxation.[4] A judgment in an action on an injunction bond will not be reversed because it is entered up in the old form as a judgment for the penalty of the bond to be discharged by the payment of the damages assessed by the jury, instead of a judgment for the amount of the damages ascertained by the jury, which a statute authorizes to be entered in such case.[5]

§ 304. —— Costs

Costs in an action on an injunction bond are governed by the general principles of costs in civil actions.

The costs in the action on the injunction bond itself are determined by the rules governing costs in civil actions generally.[6]

The recoverability in an action on the injunction bond of the expenses and costs of procuring dissolution of the injunction is considered infra § 315.

§ 305. —— Assessment of Damages

Questions as to the amount of damages in an action on an injunction bond are for the jury; but the recoverability of particular items is for the court.

In some jurisdictions, damages suffered by virtue of the wrongful issuance of an injunction may be assessed in the injunction suit itself, as discussed supra § 284, and such assessment is sometimes a condition precedent to an action on the bond, as discussed supra § 292 c. In cases in which such prior assessment is not required and an action is brought on the bond for damages resulting from the issuance of an injunction, the question of damages is one for the determination of the jury,[7] and the court has no power to discharge the jury and assess the damages itself.[8] This applies to counsel fees as well as to any other kind of damages.[9] While it is the province of the jury to fix the amount of extraordinary costs in a proper case, it is for the court to determine whether such costs are permissible.[10] The allowance of an item of damage should not be submitted to the jury where the item is too speculative and contingent to permit recovery therefor.[11]

§ 306. Rights and Remedies of Sureties

Principles governing the rights and remedies of sureties generally are considered in the C.J.S. title Principal and Surety §§ 286–342, also 50 C.J. p 230 note 74–p 278 note 73.

Examine Pocket Parts for later cases.

§ 307. Actions for Damages Independently of Bond

The granting of an injunction is conclusive of probable cause so as to prevent recovery for malicious prosecution of the injunction suit; and final determination of the injunction suit is a condition precedent to an action for damages brought independently of the injunction bond.

As heretofore stated, a common-law action may be brought, independently of an injunction bond, to recover damages resulting from the suing out of an injunction maliciously and without probable cause, as discussed supra § 281. The granting of an injunction after the court is fully informed by proof taken and argument on both sides is conclusive of probable cause preventing a recovery for malicious prosecution;[12] and this is so, although the judgment so rendered is afterward reversed on appeal.[13]

Conditions precedent. As in the case of suits on bonds, as discussed supra § 292 b, it is a condition precedent to the action that the suit in which the injunction was sued out should have been finally disposed of;[14] and an action for maliciously procuring the injunction prior to that time is premature.[15]

§ 308. —— Procedure

A suit for the wrongful issuance of an injunction, brought independently of the injunction bond, is governed by the general rules of pleading and practice.

Where an injunction was wrongfully sued out

4. S.C.—Hill v. Thomas, 19 S.C. 230.

5. W.Va.—Northwestern Bank v. Fleshman, 22 W.Va. 317.

6. No costs are allowable, in at least one jurisdiction, if the amount of the recovery is less than a prescribed amount.—Handy v. Samaha, 3 P.2d 602, 117 Cal.App. 286.

7. Minn.—Detroit Lakes Realty Co. v. McKenzie, 284 N.W. 60, 204 Minn. 490.
Pa.—Miller v. South Hills Trust Co., 96 Pa.Super. 272.
Wash.—Clem v. Hunz, 231 P. 7, 132 Wash. 14, 40 A.L.R. 987.
32 C.J. p 463 note 49.

8. Iowa.—Parker v. Slaughter, 24 Iowa 252.

9. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 133 P.2d 1017.
32 C.J. p 463 note 51.

10. Ky.—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.

11. Ky.—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.

12. U.S.—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F.Supp. 419, 422, quoting Corpus Juris.
32 C.J. p 464 note 71.

13. U.S.—Duke Power Co. v. Greenwood County, supra, quoting Corpus Juris.
32 C.J. p 464 note 72.

14. Ala.—Tutwiler v. Burns, 49 So. 455, 160 Ala. 386.
32 C.J. p 464 note 74.

15. Ala.—Tatum v. Morris, 19 Ala. 302.

against a judgment creditor and a sheriff, to restrain the sale of real estate on execution, an action for damages is maintainable by the judgment creditor alone, without the necessity of joining the sheriff as a party plaintiff.[16]

Pleadings. The pleadings in an action to recover damages independently of the bond must allege facts sufficient to justify the relief sought.[17] Malice and want of probable cause in the suing out of the injunction, where an essential element of the cause of action, as discussed supra § 281, must be pleaded;[18] but under some statutory provisions it is unnecessary to allege want of probable cause.[19]

§ 309. What Damages Allowed or Recoverable

The damages that may be allowed or recovered are such damages as were actually sustained as the necessary and proximate result of the injunction during the time it was operative.

The allowance of damages should rest on equitable principles, and, as a general rule, should be such damages only as were actually sustained by reason of the injunction,[20] that is, such damages as are the actual, necessary, and proximate result of the injunction during the time it was operative;[21] and has been held to include damages which continue beyond the date of dissolution, if they flow directly from the injunction.[22] The damages allowed should

16. Wash.—Anderson v. Philadelphia Provident Life & Trust Co., 66 P. 415, 26 Wash. 192.
32 C.J. p 464 note 77.

17. Petition held sufficient
La.—Davis v. Poitevant & Fayre Lumber Co., 132 So. 790, 15 La. App. 657.

18. Md.—Rieger v. Knight, 97 A. 358, 128 Md. 189, L.R.A.1916E 1277.
32 C.J. p 464 note 79.

19. N.C.—Crawford v. Pearson, 21 S. E. 561, 116 N.C. 718.

20. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F. 2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 603, 309 U.S. 667, 84 L.Ed. 1014—Cinderella Theatre Co. v. Sign Writers' Local Union No. 591, D.C. Mich., 6 F.Supp. 630.
Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.
Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
Colo.—Reagan v. Dick, 240 P. 337, 78 Colo. 148.
Ky.—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.
Miss.—Riley v. Hardy, 189 So. 514, 185 Miss. 765.
N.Y.—Brace Co. v. Kraft, 89 N.E. 1093, 196 N.Y. 468, affirming 111 N.Y.S. 1110, 126 App.Div. 924.
Ohio.—Cahill v. Fidelity & Casualty Co., 175 N.E. 39, 37 Ohio App. 444.
Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, reheard 7 P.2d 805, 138 Or. 467.
S.C.—Chambers v. Long, 128 S.E. 853, 132 S.C. 179.
S.D.—Edmison v. Sioux Falls Water Co., 73 N.W. 910, 10 S.D. 440.
Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.
Tex.—Southland Life Ins. Co. v. Stone, Civ.App., 112 S.W.2d 336.
W.Va.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217.
32 C.J. p 464 note 80.
Exemplary damages see infra § 313.

21. U.S.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 848.
Ala.—Fidelity & Deposit Co. of Maryland v. West Blocton Sav. Bank, 113 So. 486, 22 Ala.App. 12, reversed on other grounds 113 So. 489, 216 Ala. 465—McCord v. Bridges, 100 So. 469, 211 Ala. 295.
Ark.—Citizens' Pipe Line Co. v. Twin City Pipe Line Co., 39 S.W.2d 1017, 183 Ark. 1006.
Cal.—Draffen v. U. S. Fidelity & Guaranty Co., 17 P.2d 121, 217 Cal. 43—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal. App.2d 241—Moore v. Maryland Casualty Co., 280 P. 1008, 1010, 100 Cal.App. 658, citing **Corpus Juris.**
Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522.
Hawaii.—Wong Kwai Tong v. Fong Koon Chan, 28 Hawaii 399.
Ill.—Leonard v. Pearce, 271 Ill.App. 428.
Ind.—U. S. Fidelity & Guaranty Co. v. State ex rel. Ogden, 5 N.E.2d 115, 104 Ind.App. 21.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.
Ky.—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.
La.—Buras v. Machella, 134 So. 751, 172 La. 580.
Mo.—State ex rel. Blythe v. Trimble, 258 S.W. 1013, 302 Mo. 699.
Okl.—Wyatt v. Marinoff, Okl., 268 P. 224, 226, 131 Okl. 134, citing **Corpus Juris.**
Pa.—Smyth v. Fidelity & Deposit Co. of Maryland, 192 A. 640, 326 Pa. 391, 111 A.L.R. 481.
Tex.—Womack v. McMillan, Civ.App., 47 S.W.2d 437, 439, quoting **Corpus Juris**—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372.
W.Va.—State v. Carden, 163 S.E. 54, 55, 111 W.Va. 631, citing **Corpus Juris.**
32 C.J. p 464 notes 87, 88.

Damages held recoverable
(1) Expenses of advertising a sale which was enjoined.—Hicks v. Murphy, Tex.Civ.App., 172 S.W. 1135—32 C.J. p 481 note 69.

(2) Losses due to delay in commencement and completion of work under contract.
Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.
Minn.—Detroit Lakes Realty Co. v. McKenzie, 284 N.W. 60, 204 Minn. 490.
Pa.—Nether Providence Tp. School Dist. v. Mercur, 46 Pa.Super. 470.

(3) Other damages held recoverable see 32 C.J. p 481 notes 83 [b], 86, 88, 92–94, 96.

Not restricted to counsel fees and costs
La.—Rees v. Sheridan, 64 So. 923, 135 La. 7.
Costs as element of damages see infra § 315 e.
Counsel fees as element of damages see infra § 315 f.

Effect of appointment of receiver
Where receiver was appointed purely as ancillary to injunction restraining owners from disposing of property and for sole purpose of seeing that injunction was obeyed, and did not take actual possession of, or care for, the property, damages sustained as result of not being able to sell the property during pendency of injunction resulted wholly from issuance of injunction, and not as result of appointment of receiver, and hence were recoverable in action on injunction bond.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

22. Iowa.—City of Corning v. Iowa-

be such as will furnish just and reasonable compensation for the injury or loss sustained,[23] and should not be so inadequate as to show an abuse of discretion;[24] nor, on the other hand, should they be excessive.[25] The amount recoverable, however, is subject to the limitation that, if the amount of the damages is fixed by statute, the damages allowed should not exceed the statutory limitation,[26] unless, under some statutes, a greater amount is proved;[27] and also to the limitation that the court cannot award an amount in excess of its jurisdiction.[28]

Where an injunction was framed in ambiguous terms, defendant is entitled to such damages as he may have sustained by obeying it as he reasonably and in good faith understood it.[29]

Damages not recoverable in general. As a corollary to the general rule, the damages recoverable are confined to damages arising from the operation of the injunction itself, and do not include damages not proximately caused by the injunction,[30] such as damages occasioned by the suit itself, independent of the injunction,[31] damages occasioned by act of God,[32] or damages or expenses that would have been sustained if there had been no injunction;[33] and, if no loss is shown directly traceable to the injunction, no damages should be awarded other than the ordinary costs of suit.[34]

§ 310. —— Limited by Scope of Bond

In a suit on the bond, such damages only are recoverable as are clearly embraced within its terms.

Where suit is brought on the bond, the bond is controlling and only such damages are recoverable

Nebraska Light & Power Co., 282 N.W. 791, 225 Iowa 1380.
N.Y.—Bedell Co. v. Harris, 240 N.Y.S. 550, 228 App.Div. 529.

23. Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Pa.—Smyth v. Fidelity & Deposit Co. of Maryland, 192 A. 640, 326 Pa. 391, 111 A.L.R. 481.
Tex.—Brown v. Tyler, 34 Tex. 168.
The loss to the party enjoined, and not the benefit accruing to his adversary, furnishes the basis for the measure of damages.—Harbaugh v. Dwyer, C.C.A.Or., 289 F. 247.

24. Ky.—Preece v. Hardin, 69 S.W. 2d 361, 253 Ky. 226.

25. Ark.—McGill v. Grigsby, 168 S.W.2d 809, 205 Ark. 349.
Iowa.—Ryan Bros. v. Rate, 213 N.W. 218, 203 Iowa 1253.
La.—Monroe Grocer Co. v. Bynum, 149 So. 501, 177 La. 858.

26. Ill.—Nicoloff v. Schnipper, 233 Ill.App. 591.
La.—Schwann v. Sanders, 46 So. 573, 121 La. 461.
Miss.—Herron v. McLean, 191 So. 59.
32 C.J. p 464 note 82.
Statutory damages should be assessed on value of property involved if value is less than debt.—Coleman v. People's Bank of Lumberton, 112 So. 686, 146 Miss. 496.

27. La.—Schwann v. Sanders, 46 So. 573, 121 La. 461.

28. Ind.T.—Snyder v. Sherrell, 103 S.W. 756, 7 Ind.T. 35.

29. Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal. App. 658.
Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245.
Vt.—Webb v. Laird, 20 A. 599, 62 Vt. 448, 22 Am.S.R. 121.

30. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.
Ky.—Vicars v. Frazier, 295 S.W. 169, 220 Ky. 356.
N.Y.—Rochester Yacht Club Co. v. Rochester Boat Works, 230 N.Y.S. 731, 132 Misc. 887.
Damages held not recoverable
(1) Sum paid to draftsman to hurry plans after dissolution of injunction.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.
(2) Other damages held not recoverable see 32 C.J. p 481 notes 83 [k]–[m], 95.
Amount sued for
On the dissolution of an injunction restraining the prosecution of an action at law, the amount sued for in such action cannot be assessed as damages, although defendant in that action has become insolvent pending the injunction, since the rights of the parties should be determined in the law court.—Walker v. Pritchard, 25 N.E. 573, 135 Ill. 103, 11 L.R.A. 577.

31. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, 489, 131 A.L.R. 870, citing **Corpus Juris,** and affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F. Supp. 419, 423, citing **Corpus Juris.**
Tenn.—Russell v. Tennessee & Kentucky Tobacco Co., 89 S.W.2d 907, 19 Tenn.App. 474.
32 C.J. p 465 note 91.
On motion to dismiss counterclaim or set-off
Where, in action involving labor dispute, money damages and injunctive relief were demanded in complaint, and defendants interposed a counterclaim, it is error to award damages to defendants for opposing a motion to dismiss the counterclaim and affirmative defense, and in the preparation for, and attendance at, trial, since dissolution of injunction procured would not have dispensed with a trial.—Lewittes & Sons v. Perlow, 3 N.Y.S.2d 916, 254 App.Div. 94.

32. Ky.—Citizens' Trust & Guaranty Co. v. Ohio Valley Tie Co., 128 S.W. 317, 138 Ky. 421.
32 C.J. p 464 note 87 [e].

33. Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522—Reagan v. Dick, 240 P. 337, 338, 78 Colo. 148, citing **Corpus Juris.**
Miss.—Waldauer v. Parks, 106 So. 881, 141 Miss. 667.
Sums expended for materials which plaintiff had agreed to furnish.—Western Willite Co. v. Trinidad Asphalt Mfg. Co., C.C.A.Mo., 32 F.2d 487, certiorari denied Trinidad Asphalt Mfg. Co. v. Western Willite Co., 50 S.Ct. 19, 280 U.S. 562, 74 L. Ed. 616.

34. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, 131 A.L.R. 870, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F.Supp. 419.
Costs as damages see infra § 315e.

as are clearly embraced within its terms.[35] The amount recoverable on the bond has been limited to such damages as arise from the suspension or evasion of vested legal rights by the injunction,[36] and to such damages as may be reasonably anticipated and attributed to the injunction.[37]

§ 311. —— Affected by Penalty of Bond

Damages in excess of the penalty of the bond ordinarily cannot be recovered.

As a general rule no recovery of damages can be had in excess of the penalty of the bond,[38] even though the actual damages exceed that amount,[39] and the court has no power to make an allowance beyond that amount for disbursements,[40] unless, under some statutes, a motion has been made to have the amount of the penalty increased.[41] This limitation of damages has been held to apply to both the principal and the surety,[42] except that it does not apply as to the principal where the injunction was procured maliciously and without probable cause;[43] and, under some statutes, the principal is liable for all damages notwithstanding they exceed the penalty of the bond.[44]

§ 312. —— Remote or Speculative Damages

Remote or speculative damages cannot be recovered.

Such damages as are remote, conjectural, or speculative cannot be recovered.[45]

§ 313. —— Exemplary Damages

Exemplary damages are recoverable, ordinarily, only where the injunction has been sued out maliciously or through an abuse of process.

35. Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.
N.Y.—Bedell Co. v. Harris, 240 N. Y.S. 550, 228 App.Div. 529.
Or.—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 1 P.2d 1100, 138 Or. 467, reheard 7 P.2d 805, 138 Or. 467.
Tex.—Johnson v. McMahan, Civ.App., 40 S.W.2d 920, 922, citing **Corpus Juris**—Miller Surfacing Co. v. Bridgers, Civ.App., 269 S.W. 838, 840, quoting **Corpus Juris.**
32 C.J. p 465 note 92.

Bond conditioned to pay all damages held to cover

(1) All damages sustained by reason of wrongful injunction, except those resulting from malice and want of probable cause.—Baker v. Craig, 275 P. 216, 127 Kan. 811, modified on other grounds 280 P. 771, 128 Kan. 676.

(2) Damages which directly flow from the wrongful injunction, as well as damages accruing during the period of the injunctive relief.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N.W. 791, 225 Iowa 1380.

Under federal law

Liability on a bond given to obtain a restraining order under the authority of the federal statute, Rev.St. § 718, 28 U.S.C.A. § 381, terminates on the granting of a permanent injunction, although the decree is subsequently reversed and only such damages may be assessed against the sureties as accrued between the time of giving the undertaking and the rendition of the decree, granting a permanent injunction.—Houghton v. Cortelyou, 28 S.Ct. 234, 208 U.S. 149, 52 L.Ed. 432, modifying 27 App. D.C. 188—32 C.J. p 456 note 87.

36. Ind.—U. S. Fidelity & Guaranty Co. v. State ex rel. Ogden, 5 N.E.2d 115, 104 Ind.App. 31.
Pa.—Sensenig v. Parry, 5 A. 11, 113 Pa. 115—Miller v. South Hills Trust Co., 96 Pa.Super. 273.

37. Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
Ky.—Burley Tobacco Growers' Co-op. Ass'n v. Pennebaker Home for Girls, 299 S.W. 734, 221 Ky. 718.

38. U.S.—United Motors Service v. Tropic-Aire, C.C.A.Minn., 57 F.2d 479—Terry v. Robbins, C.C.N.C., 122 F. 725.
Cal.—Mason v. U. S. Fidelity & Guaranty Co., App., 141 P.2d 475—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.
Kan.—Baker v. Craig, 275 P. 216, 217, 127 Kan. 811, quoting **Corpus Juris,** and modified on other grounds 280 P. 771, 128 Kan. 676.
Ky.—Strong v. Duff, 15 S.W.2d 517, 521, 228 Ky. 615, 70 A.L.R. 56, citing **Corpus Juris**—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.
N.Y.—McColgan v. Dodds, 209 N.Y.S. 707, 125 Misc. 36.
N.C.—McAden v. Watkins, 131 S.E. 375, 191 N.C. 105.
32 C.J. p 466 note 96.

39. Idaho.—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 54 Idaho 255, 92 A.L.R. 264.
Kan.—Baker v. Craig, 275 P. 216, 127 Kan. 811, modified on other grounds 280 P. 771, 128 Kan. 676.
Ky.—Hughes v. Wickliffe, 11 B.Mon. 202.
N.C.—Schute v. Schute, 104 S.E. 764, 180 N.C. 386.
S.C.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

40. Kan.—Baker v. Craig, 275 P. 216, 127 Kan. 811, modified on other grounds 280 P. 771, 128 Kan. 676.
N.Y.—Lawton v. Green, 64 N.Y. 326.

41. N.Y.—McColgan v. Dodds, 209 N. Y.S. 707, 125 Misc. 36.

42. Ky.—Strong v. Duff, 15 S.W.2d 517, 228 Ky. 615, 70 A.L.R. 56.
Limitation of liability of surety generally see supra § 282.

43. Ky.—Strong v. Duff, 15 S.W.2d 517, 228 Ky. 615, 70 A.L.R. 56.

44. U.S.—Corpus Christi Gas Co. v. City of Corpus Christi, C.C.A.Tex., 46 F.2d 962, reversing, D.C., 36 F. 2d 972, and certiorari denied City of Corpus Christi, Texas, v. Corpus Christi Gas Co., 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541.
Tex.—Johnson v. McMahan, Civ.App., 40 S.W.2d 920, error refused.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
32 C.J. p 466 note 95.

45. Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Ill.—Leonard v. Pearce, 271 Ill.App. 428.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.
Ky.—Holliday v. Sphar, 119 S.W. 2d 656, 659, 274 Ky. 556, citing **Corpus Juris**—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.
N.Y.—Bedell Co. v. Harris, 240 N.Y. S. 550, 228 App.Div. 529.
32 C.J. p 466 note 99.

Theft of property which plaintiffs were enjoined from selling is a remote and not natural and proximate result of restraining order within terms of injunction bond.—Burley Tobacco Growers Co-op. Ass'n v. Pennebaker Home for Girls, 299 S.W. 734, 221 Ky. 718.
Conjectural or speculative profits see infra § 315.

According to some decisions, exemplary or punitive damages are not recoverable in any event, even though the injunction has been sued out maliciously.[46] According to other decisions such damages are recoverable where the suing out of the writ amounts to a palpable abuse of process,[47] or special damages are shown,[48] or where the writ was obtained maliciously;[49] and such damages will not be allowed in the absence of evidence that the injunction was sued out maliciously and without probable cause or that the remedy has been abused.[50]

§ 314. —— Nominal Damages

Nominal damages ordinarily may be awarded where complainant sustains only some trifling damage or no actual damage.

The award of a small or only a nominal sum may be made where complainant suffered some trifling damage,[51] or had some equity in his case.[52] According to some decisions, where no actual damages are shown, nominal damages are not recoverable;[53] but by other decisions nominal damages are recoverable without any showing of actual damages,[54] the view being taken that the dissolution of the injunction alone is sufficient to authorize the award;[55] and, if no actual damages are shown, the recovery must be limited to nominal damages.[56]

§ 315. —— Particular Items

a. Deprivation of use or occupation of property
b. Loss of profits
c. Injury to, or depreciation in value of, property
d. Loss of time or employment
e. Expenses and costs in procuring dissolution
f. Counsel fees
g. Interest
h. Damages pending appeal after dissolution
i. Damages resulting from plaintiff's acts or omissions

a. Deprivation of Use or Occupation of Property

Damages proximately accruing from restraint of the use or occupation of property, such as its use or rental value, are recoverable.

Where the effect of the injunction wrongfully issued has been to restrain defendant from the use or occupation of property, he is entitled to recover the damages necessarily and proximately resulting therefrom,[57] and, in determining the extent of such damages, the court proceeds on equitable princi-

46. Ill.—Chicago Title & Trust Co. v. Chicago, 110 Ill.App. 395, affirmed 70 N.E. 572, 209 Ill. 172.
Ohio.—Cahill v. Fidelity & Casualty Co., 175 N.E. 39, 37 Ohio App. 444.
Tex.—Womack v. McMillan, Civ.App., 47 S.W.2d 437—Lomax v. Trull, Civ.App., 232 S.W. 861.
32 C.J. p 466 note 1.

47. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489—Pendleton v. Eaton, 23 La.Ann. 435—Inter City Express Lines v. Guarisco, App., 165 So. 727.
Tenn.—South Penn Oil Co. v. Stone, Ch.App., 57 S.W. 374.

Statutory punitive damages
(1) Statutory damages, of a designated per cent of the judgment, costs, and attorney's fees, allowable on dissolution of injunction, are punitive in character and statute must be strictly construed.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489—Inter City Express Lines v. Guarisco, La.App., 165 So. 727—First Nat. Bank v. Coreil, La.App., 149 So. 826, amending 145 So. 395, rehearing denied 146 So. 479, and amended 149 So. 826.

(2) Such damages have been held to apply only to an injunction restraining the execution of a money judgment, and not to the dissolution of an injunction restraining specific performance of a contract.—Evasovich v. Cognevich, 106 So. 556, 159 La. 1035.

(3) Wife's action in claiming land seized as community property was her separate property and securing injunction to prohibit sale does not justify statutory, punitory damages where injunction was dissolved after trial on merits.—Montgomery v. Bouanchaud, 154 So. 8, 179 La. 312.

Fullest amount sustainable on reasonable basis when injunction is obtained contrary to plain rules of law and amounts to arbitrary and oppressive abuse of process.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.

48. La.—Burglass v. Villere, 129 So. 209, 170 La. 805, annulling 125 So. 144, 14 La.App. 314.

49. U.S.—Terry v. Robbins, C.C.N.C., 122 F. 725.
32 C.J. p 467 note 3.

50. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489.
32 C.J. p 467 note 4.

51. Minn.—Pelkey v. National Surety Co., 173 N.W. 435, 143 Minn. 176.
N.H.—Gowen v. Swain, 26 A.2d 682.

52. Ky.—Mallory v. Dauber, 83 Ky. 239, 7 Ky.L. 243.

53. U.S.—Coosaw Min. Co. v. Carolina Min. Co., C.C.S.C., 75 F. 860.
32 C.J. p 467 note 8.

54. Okl.—Whitehead v. Cook, 229 P. 254, 100 Okl. 282.
32 C.J. p 467 note 9.

55. Ala.—Salmon v. Salmon, 69 So. 304, 13 Ala.App. 510.

56. Tenn.—Hawkins v. Hubbell, 154 S.W. 1146, 127 Tenn. 312—Bradford v. Jellico, 1 Tenn.Ch.App. 700.

57. Ala.—McCord v. Bridges, 100 So. 469, 211 Ala. 295.
Cal.—Draffen v. U. S. Fidelity & Guaranty Co., 17 P.2d 121, 217 Cal. 43—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.
Ill.—Leonard v. Pearce, 271 Ill.App. 428.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 795, 225 Iowa 1380, citing **Corpus Juris.**
Okl.—Wyatt v. Marinoff, 268 P. 224, 131 Okl. 134.
32 C.J. p 467 note 12.

Damages held recoverable
(1) Cost of making inventories.—Sturgis v. Knapp, 33 Vt. 486.

(2) Cost of moving property for use elsewhere.
Tex.—French v. McCready, Civ.App., 57 S.W. 894.
Vt.—Sturgis v. Knapp, supra.

(3) Increased cost in building.—Roberts v. White, 73 N.Y. 375.

ples, and is not governed by arbitrary or technical rules.[58] However, defendant cannot recover damages for the deprivation of property to which he is not entitled.[59] The full value of the property cannot be allowed as damages,[60] unless there is a conversion, total deprivation, loss, or destruction thereof.[61]

Value of use or rental value in general. The injunction defendant is in general entitled to recover rental value of the property,[62] or the value of its use and occupation,[63] which was lost because of the injunction, from the time the injunction was in force; but he may not be entitled to recover rents, the collection[64] or interception[65] of which was not enjoined, or any sum which depends on contingencies which cannot be known;[66] nor can a recovery be had for rent or rental value which is not shown to have been lost because of the injunction.[67]

Loss of crops. If by reason of an injunction keeping him out of possession defendant loses his crops for the season, he is entitled to recover their value,[68] and is not restricted to proof of the value of the use of the land up to the time of the dissolution of the injunction.[69]

b. Loss of Profits

Loss of profits from an established business are recoverable as damages, if they can be ascertained with reasonable certainty.

Loss of profits from an established business[70] or injuries resulting to the business,[71] caused by wrongful injunction, are recoverable if they can be ascertained with reasonable certainty, as by estimating the probable profits that would have been made

58. Ill.—Alexander v. Colcord, 85 Ill. 323.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.
Okl.—Wyatt v. Marinoff, 268 P. 224, 131 Okl. 134.

59. Ohio.—Turnpike Co. v. Kelley, 41 Ohio St. 144.

60. Ky.—Hord v. Trimble, 1 Litt. 413.
Mo.—Bircher v. Parker, 40 Mo. 118.

61. Cal.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
32 C.J. p 467 note 15.

Unlawful conversion materially affects quantum of damages on dissolution of preliminary injunction.—McNevin v. Stoolman, 235 Ill.App. 449.

Bringing an injunction in good faith and on grounds supported by the evidence by a landlord to prevent his tenant from removing buildings erected on the land is not a conversion for which he can be held liable on his failure to establish his claim.—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.

62. Miss.—Waldauer v. Parks, supra.
N.Y.—Bedell v. Harris, 240 N.Y.S. 550, 228 App.Div. 529.
Tex.—Johnson v. McMahan, Civ.App., 40 S.W.2d 920.
W.Va.—State v. Carden, 163 S.E. 54, 56, 111 W.Va. 631, citing **Corpus Juris.**
Wis.—Nauman v. Central Shorewood Bldg. Corporation, 10 N.W.2d 151, 243 Wis. 362.
32 C.J. p 467 note 16.

Rental value of equipment of whose use defendants were deprived by improvidently issued temporary injunction, rather than interest on value of equipment, is measure of defendants' recovery.—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.

Where the erection or completion of a building is restrained, the rental value of the property of which the owner is deprived by reason thereof may be recovered as an element of damages.
Minn.—Detroit Lakes Realty Co. v. McKenzie, 284 N.W. 60, 204 Minn. 490.
W.Va.—State v. Carden, 163 S.E. 54, 111 W.Va. 631.
32 C.J. p 467 note 16 [c] (1) (4) (5).

63. U.S.—Hutchins v. Munn, App.D. C., 28 S.Ct. 504, 209 U.S. 246, 52 L.Ed. 776.
Iowa.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N. W. 791, 225 Iowa 1380.
32 C.J. p 467 note 16.

Use value of building, the erection or completion of which was restrained.—City of Corning v. Iowa-Nebraska Light & Power Co., supra —32 C.J. p 467 note 16 [c] (2), (3).

Deprivation of office
The measure of damages in favor of one deprived of his office, as property, by injunction is the value of its use during the time of deprivation.—Castleman v. Williams, Tex. Civ.App., 263 S.W. 638.

Use value as net profits
Where utility wrongfully enjoined construction of municipal light plant, as respects recovery of damages in suit on bonds, use value of property during time municipality was wrongfully deprived of use was net profits during period of such deprivation.—City of Corning v. Iowa-Nebraska Light & Power Co., 282 N.W. 791, 225 Iowa 1380.

64. S.D.—Edmison v. Sioux Falls Water Co., 85 N.W. 1016, 14 S.D. 486.
32 C.J. p 468 note 17.

65. Ala.—Curry v. American Freehold Land Mortg. Co., 27 So. 454, 124 Ala. 614.
32 C.J. p 468 note 18.

66. Iowa.—Johnson v. Moser, 34 N. W. 459, 72 Iowa 654.
Tex.—Southland Life Ins. Co. v. Stone, Civ.App., 112 S.W.2d 336.
32 C.J. p 468 note 19.

67. Ill.—Rosenthal v. Boas, 27 Ill. App. 430.
Wis.—Muscoda Bridge Co. v. Worden-Allen Co., 240 N.W. 802, 207 Wis. 22, denying rehearing 239 N. W. 649, 207 Wis. 22.

68. Tex.—Johnson v. McMahan, Civ. App., 40 S.W.2d 920, error refused.
32 C.J. p 468 note 21.

69. Ill.—Edwards v. Edwards, 31 Ill. 474.

70. Ky.—Holliday v. Sphar, 119 S. W.2d 656, 659, 274 Ky. 556, quoting **Corpus Juris**—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.
Okl.—Wyatt v. Marinoff, 268 P. 224, 131 Okl. 134.
Tex.—Magnolia Petroleum Co. v. Holz, Civ.App., 299 S.W. 664.
32 C.J. p 468 note 24.

One restrained from acting as justice of the peace is entitled to recover as damages such sum as he would have earned as fees with reasonable certainty, notwithstanding he earned money from other sources during such time.—Castleman v. Williams, Tex.Civ.App., 263 S.W. 638.

71. Or.—Reed v. Brandenburg, 143 P. 989, 72 Or. 435.
32 C.J. p 481 note 90.

but for the interruption of the business;[72] and this rule ordinarily applies whether or not the enjoining party was engaged in a competing business, and, if he was engaged in the same business, whether or not it was conducted at a profit or a loss.[73] Profits, however, cannot be recovered for a period of time during which the injunction was not obeyed;[74] and, if plaintiff had disposed of his business so that he did not own or run it while an injunction restraining its operation was in force, he is not entitled to recover the profits of the business during that time.[75]

Profits which are merely speculative or conjectural will not be allowed,[76] such as profits from a proposed business, not yet established.[77]

c. Injury to, or Depreciation in Value of, Property

Damages for injury to, or depreciation in the value of, property, directly caused by the injunction, are recoverable.

Damages for injury to, or depreciation in the value of, property, caused by the injunction, may be recovered,[78] provided it is the direct result of the injunction.[79] In case of wrongful restraint of the sale of property, the measure of damages is the depreciation in the value of the property while the injunction is in force,[80] or, as otherwise stated, the difference between the market value of the property when it would have been sold and when the injunction no longer prevented a sale,[81] provided, in case of a loss of sale by reason of the injunction, there was a bona fide offer which would have been accepted.[82] It has been held that the loss in

72. U.S.—I. T. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479.

In estimating profits

(1) The discount between the sale price and the par value of stock sold by defendant to dealers should not be considered as an expense of conducting the business.—I. T. S. Rubber Co. v. Tee Pee Rubber Co., supra.

(2) The court may refuse to distribute the expense of promotion stock issued for services over a period of twenty years in ascertaining the expenses of the business during the period of the injunction.—I. T. S. Rubber Co. v. Tee Pee Rubber Co., supra.

73. U.S.—Harbaugh v. Dwyer, C.C. A.Or., 289 F. 247.

Seller of business enjoined from carrying on competing business under void restrictive covenant could recover damages on bond for loss sustained due to the injunction.—Southern Properties v. Carpenter, Tex.Civ.App., 21 S.W.2d 372, error dismissed.

74. N.Y.—Yonkers v. Federal Sugar Refining Co., 164 N.Y.S. 516, 177 App.Div. 728, reversed on other grounds 116 N.E. 998, 221 N.Y. 206.

75. Ala.—Lewis v. Collier, 47 So. 790, 157 Ala. 533.
32 C.J. p 469 note 28.

76. Ky.—Holliday v. Sphar, 119 S. W.2d 656, 659, 274 Ky. 556, citing **Corpus Juris.**
32 C.J. p 468 note 26.

Loss of premiums by inability to sell bonds

Ky.—Wilder v. Miller, 206 S.W. 293, 182 Ky. 210.
32 C.J. p 481 note 88 [j].

77. U.S.—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F.Supp. 419.

Ky.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.

Expected profits from unbuilt plant

Where public utilities companies obtained preliminary injunction against construction of local power plant by county to be operated in competition with the companies and injunction was subsequently vacated, county could not recover, on the theory of restitution, expected profits from operation of the plant, which companies realized while the injunction was in force.—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F. Supp. 419.

78. U.S.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 848.

Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

Miss.—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.

N.C.—Gruber v. Ewbanks, 154 S.E. 318, 199 N.C. 385.
32 C.J. p 469 note 29.

Preventing cutting and removing of timber

Damages for wrongful injunction against cutting and removing timber are confined to decline in market value of trees and logs, which plaintiffs were prevented from manufacturing.

Ky.—Standard Elkhorn Coal Co. v. Riggs, 292 S.W. 476, 219 Ky. 51.

S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278.

79. Ky.—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.

Mo.—Riddlesbarger v. McDaniel, 38 Mo. 138.

Vt.—Sturgis v. Knapp, 33 Vt. 486.
32 C.J. p 469 note 30.

Depreciation in value, caused by negligent use by landlord of buildings which tenant was wrongfully restrained from removing, is recoverable.—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.

80. U.S.—Osage Oil & Refining Co. v. Chandler, C.C.A.N.Y., 287 F. 848.

Iowa.—Schmidt v. Meredith, 228 N. W. 568, 209 Iowa 621.

Mo.—Meysenburg v. Schlieper, 48 Mo. 426.

Okl.—Oklahoma Cotton Growers' Ass'n v. Hooven, 272 P. 852, 134 Okl. 47.

Tenn.—DaFoe v. Starek, 9 Tenn.App. 668.

32 C.J. p 469 note 29 [e], [g].

In ascertaining damages the true value of the property must be ascertained and deducted from the amount which the property could have been sold for.—DaFoe v. Starek, 9 Tenn.App. 668.

81. Cal.—Yellen v. Fidelity & Casualty Co. of New York, 1 P.2d 1019, 115 Cal.App. 434.

Idaho.—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.

Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285.

Tenn.—DaFoe v. Starek, 9 Tenn.App. 668.

Delay in sale of hay crop

For a wrongful injunction causing delay in harvesting and sale of matured hay crop, the measure of damages is the difference between market value of crop at time it would have been sold, in absence of any restraining order, and market value when restraining order expired, plus a reasonable time for harvesting.—Callaway v. Sparks, 89 P.2d 275, 184 Okl. 569.

82. Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285.

value of the property during the time the injunction was in operation, not exceeding the penalty of the bond, and the interest thereon from the time of the institution of suit, is the proper measure of damages.[83] Where, however, there is no proof that property is less valuable after the injunction than before, there can be no recovery for the difference between the price it brought and the price which had been agreed on for it;[84] nor, as against the surety, can there be recovery for depreciation caused by wrongful acts of the enjoining party other than that of suing out the writ.[85]

d. Loss of Time or Employment

Damages for loss of time or employment caused by the injunction may be recovered.

Damages for loss of time from work or business, caused by the wrongful injunction, may be recovered;[86] and, although there is authority to the contrary,[87] it has been held that there may also be recovery for loss of time in defending against the injunction,[88] or in procuring a dissolution thereof.[89]

If by reason of the injunction the party is thrown out of employment, he is entitled to recover for the time he was out of employment at the usual rate of wages, if he used due diligence to secure other employment during such period,[90] but not otherwise.[91]

e. Expenses and Costs in Procuring Dissolution

Reasonable and necessary expenses and costs incurred in connection with the procuring of the dissolution of an injunction may be recovered as an element of damages.

Except where the injunction bond provides otherwise in accordance with special statutory provisions regulating the matter,[92] reasonable and necessary expenses to which a party is put in procuring the dissolution of an injunction constitute damages which may be recovered in a proceeding on the bond or undertaking;[93] but these are limited to such as have accrued from the time of issuing the injunction down to its dissolution or the determination of an appeal from the dissolution decree,[94] and must be confined to those actually proved,[95] and to such expenses as are shown to be reasonable and necessary,[96] and caused by, or incurred in, connection with the wrongful injunction,[97] and in the ex-

83. Md.—Levy v. Taylor, 24 Md. 282.
N.C.—Gruber v. Ewbanks, 154 S.E. 318, 321, 199 N.C. 335, quoting **Corpus Juris,**
32 C.J. p 470 note 33.
Interest as element of damages generally see infra subdivision g of this section.

84. Tex.—Womack v. McMillan, Civ. App., 47 S.W.2d 437.
Wash.—Donahue v. Johnson, 87 P. 322, 9 Wash. 187.

85. N.M.—Walters v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 288 P. 1044, 35 N.M. 4.

86. La.—Three Rivers Oil Co. v. Laurence, 95 So. 652, 153 La. 224.

87. Cal.—Handy v. Samaha, 8 P.2d 602, 117 Cal.App. 286.
Okl.—Prager's Paris Fashion v. Seidenbach, 242 P. 260, 113 Okl. 271.
32 C.J. p 470 note 35.

88. Mo.—Helmkampf v. Wood, 85 Mo.App. 227.
32 C.J. p 470 note 36.

89. Iowa.—Ryan Bros. v. Rate, 213 N.W. 218, 203 Iowa 1253.
Neb.—Behrens v. Smith Baking Co., 266 N.W. 61, 130 Neb. 651.

90. Iowa.—Muller v. Fern, 35 Iowa 420.
Ky.—Shepherd v. Gambill, 96 S.W. 1104, 29 Ky.L. 1168.
32 C.J. p 470 note 37.

91. N.C.—Nansemond Timber Co. v. Rountree, 29 S.E. 61, 122 N.C. 45.

92. Iowa.—Western Fruit & Candy Co. v. McFarland, 174 N.W. 57, 188 Iowa 204.
32 C.J. p 470 note 39.

93. Ala.—Fidelity & Deposit Co. of Maryland v. West Blocton Sav. Bank, 113 So. 486, 22 Ala.App. 12, reversed on other grounds 113 So. 489, 216 Ala. 465.
Iowa.—Chrisman v. Schmickle, 230 N. W. 550, 209 Iowa 1311.
Kan.—Messmer v. Kansas Wheat Growers' Ass'n, 282 P. 728, 129 Kan. 220—Garden Plain Farmers' Elevator Co. v. Kansas Wheat Growers' Ass'n, 276 P. 799, 128 Kan. 218.
La.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.
Neb.—Meeske v. Baumann, 241 N.W. 550, 122 Neb. 786, 83 A.L.R. 131.
N.Y.—Lockwood's Dollar Cleaners v. Lockwood, 244 N.Y.S. 281, 137 Misc. 446.
W.Va.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217.
32 C.J. p 470 note 40.

Damages sustained in procuring partial dissolution may be recovered. —Dinny & Robbins v. Retail Shoe Salesmen's Union, Local 1115-F, R.C. I.P.A., 41 N.Y.S.2d 375, 180 Misc. 643.

Expense of securing dissolution of injunction issued by a federal court is not recoverable as damages in a suit on an injunction bond given in the federal court litigation.—Local Union No. 66 of United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 5 S.W.2d 671, 222 Mo.App. 383.

94. Md.—Wallis v. Dilley, 7 Md. 237.

95. U.S.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Tex., 27 F.Supp. 262.
Mont.—Cook v. Greenough, 36 P. 357, 14 Mont. 352.
N.Y.—Hotchkiss v. Platt, 8 Hun 46.

96. Ala.—Irwin v. Morrow, 95 So. 496, 19 Ala.App. 115, certiorari denied Ex parte Irwin, 95 So. 498, 209 Ala. 164.
Iowa.—Chrisman v. Schmickle, 230 N. W. 550, 209 Iowa 1311.
32 C.J. p 470 note 44.

97. U.S.—Heiser v. Woodruff, C.C. A.Okl., 128 F.2d 178—Cinderella Theatre Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F. Supp. 830.
Ariz.—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7.
Colo.—Fidelity & Deposit Co. of Maryland v. Seamann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522—Reagan v. Dick, 240 P. 337, 78 Colo. 148.
32 C.J. p 470 note 45.

Expenses recoverable

(1) Expenses paid in taking of depositions in injunction action.
U.S.—Heiser v. Woodruff, C.C.A.Okl., 128 F.2d 178.
Ky.—Williams v. Allen, 54 S.W. 720, 21 Ky.L. 1191.

(2) Compensation of investigator, employed by plaintiff to locate witness to testify in injunction suit.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.

(3) Where order to show cause contained restraining order, expenditures incurred in opposing issuance

ercise of ordinary care.[98] If these expenses are incurred in the main action or suit, they are recoverable only where the injunction was the sole relief sought therein,[99] or where the main suit is so blended with the temporary injunction proceedings that it is impossible to separate the two;[1] and they are not recoverable where the injunctive relief was merely ancillary or incidental to the main action.[2]

Costs. Reasonable and necessary costs occasioned by the writ, and incurred in procuring the dissolution of the injunction may be recovered as an element of the damages,[3] and include the costs of a reference, when the damages are so ascertained,[4] unless no other damages for which the injunction plaintiff was liable are proved.[5] However, recovery is limited to such costs as may have accrued from the time of the issuing of the injunction down to the affirmance of the order for its dissolution,[6] and to such as were the result of the temporary injunction.[7] There can be no recovery of costs imposed

of temporary injunction.—Schlitz Realty Corporation v. City of Milwaukee, 247 N.W. 459, 211 Wis. 62, followed in Alaska Land Co. v. City of Milwaukee, 247 N.W. 462, 211 Wis. 71, Uihlein v. City of Milwaukee, 247 N.W. 463, two cases, 211 Wis. 72, Continental Realty Co. v. City of Milwaukee, 247 N.W. 463, 211 Wis. 73, New Jersey Theatre Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 75, Werdehoff Realty Co. v. City of Milwaukee, 247 N.W. 464, 211 Wis. 76, Majestic Realty Corporation v. City of Milwaukee, 247 N.W. 464, 211 Wis. 77, and Glenogle Co. v. City of Milwaukee, 247 N.W. 465, 211 Wis. 78.

Expenses not recoverable

(1) Compensation of witnesses, who are allowed compensation by law.—Handy v. Samaha, 3 P.2d 602, 117 Cal.App. 286.

(2) Expense of resisting preliminary writ.—State v. Marguerite Coal Co., 140 S.E. 49, 104 W.Va. 324, 55 A.L.R. 452.

(3) Expense in bringing nonresident witnesses to the trial.—Gruber v. Ewbanks, 154 S.E. 318, 199 N.C. 335.

(4) Other expenses held not recoverable see 32 C.J. p 481 note 83 [g] [h].

98. Ky.—Citizens' Trust & Guaranty Co. v. Ohio Valley Tie Co., 128 S.W. 317, 138 Ky. 421.

99. Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.
Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311—Schmidt v. Meredith, 228 N.W. 568, 209 Iowa 621.

The rule, as otherwise stated, is that personal expenses are recoverable as damages on injunction bond where either the injunction was the sole relief to which suit pertained, or the expenses were paid out solely for purpose of procuring dissolution of injunction as distinguished from expenses for hearing of principal issues involved in the case.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217—State ex rel. Tully v. Taylor, 68 S.E. 379, 67 W.Va. 585.

Action to maintain status quo of tenancy so that lessor might have lien for accruing rent had for its sole object injunctive relief as regards claim of damages against injunction bond.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.

1. Ala.—Fidelity & Deposit Co. of America v. West Blocton Sav. Bank, 113 So. 486, 22 Ala.App. 12, reversed on other grounds 113 So. 489, 216 Ala. 465.
Mo.—Linneman v. Hawkins, App., 27 S.W.2d 1046.
32 C.J. p 471 note 47.

Expenses in procuring favorable decree in main suit permanently to restrain foreclosure are recoverable under injunction bond given to procure temporary injunction, under record showing decree was necessary to dissolve injunction.—Linneman v. Hawkins, supra.

2. Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522—Reagan v. Dick, 240 P. 337, 78 Colo. 148.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Mo.—Linneman v. Hawkins, App., 27 S.W.2d 1046.
N.H.—Smith v. Smith, 142 A. 685, 83 N.H. 342.

To determine whether prayer for injunction was auxiliary to main issues, as regards recovery of expenses for wrongful injunction, prayer for injunction is stricken to ascertain whether cause of action remains.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.

3. Ariz.—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7.
Idaho.—Pattee v. Mahaffey, 280 P. 1038, 48 Idaho 200.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Kan.—Messmer v. Kansas Wheat Growers' Ass'n, 282 P. 728, 129 Kan. 220—Garden Plain Farmers' Elevator Co. v. Kansas Wheat Growers' Ass'n, 276 P. 799, 128 Kan. 218.
Ky.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.
Miss.—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.
32 C.J. p 471 note 48.

Court costs are damages within the purview of an injunction bond to pay damages, if the court finally decides that plaintiff is not entitled to the injunction.—McKelvy v. Broadwater, 285 P. 190, 87 Mont. 103.

Costs of deposition used in injunction case may be recovered in action on an injunction bond.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7.

Costs not recoverable

(1) Costs paid for convenient, but not absolutely necessary, brief, or carbon copy of transcript.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.

(2) Fees paid jurors, who neither attended nor served.—Gwin v. City of Greenwood, 131 So. 821, 159 Miss. 110.

(3) Sum paid for pictures taken of premises and used on trial of injunction suit.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.

(4) Traveling expenses.—Holliday v. Sphar, 119 S.W.2d 656, 274 Ky. 556.

Stenographer's fees are recoverable only in so far as attributable to defeating the injunction.—Strong v. Duff, 15 S.W.2d 517, 228 Ky. 615, 70 A.L.R. 56.

Prepayment as condition to recovery
Mo.—Corder v. Martin, 17 Mo. 41.
32 C.J. p 471 note 48 [d].

4. N.Y.—Holcomb v. Rice, 23 N.E. 1112, 119 N.Y. 598.
32 C.J. p 471 note 48 [a].

5. N.Y.—Randall v. Carpenter, 88 N.Y. 293—Whiteside v. Novac Corrage Assoc., 32 N.Y.S. 724, 84 Hun 555.

6. Md.—Wallis v. Dilley, 7 Md. 237.

7. Iowa.—Williams v. Ballinger, 101 N.W. 139, 125 Iowa 410.
32 C.J. p 471 note 50.

Cost not due to restraining order
Court costs not shown to have been expended strictly on account of restraining order, should not be allowed as damages on bond accompa-

on plaintiff, in an action on the bond, as the condition of a continuance,[8] or of costs incurred on an order to show cause why a restraint should not be continued,[9] or of the costs of an unsuccessful motion to dissolve,[10] and, according to some decisions, even though the action was eventually dismissed.[11] Costs incurred in the main action are recoverable, if the injunction was the sole relief sought therein;[12] but not if the injunction was a mere incident to such action,[13] at least not unless the injunction rendered the trial of the action more difficult and expensive than it would otherwise have been.[14]

The costs on an appeal from an order dissolving the injunction, are generally not recoverable in a suit on the injunction bond.[15] It has been held, however, that on the reversal of a judgment granting a temporary injunction and dissolution of the injunction, all costs in the lower court and on appeal will be adjudged against the appellee and sureties on his injunction bond.[16] It has also been held that costs on appeal from a final judgment granting a permanent injunction after denying a motion to dissolve a restraining order, are recoverable on the bond given in connection with such order, although no appeal was taken from the order denying a dissolution, where an injunction was the only relief sought in the original action.[17]

f. Counsel Fees

(1) Right to allowance
(2) For what services recoverable
(3) Necessity of payment or obligation to pay fees
(4) Amount of allowance

(1) Right to Allowance

Reasonable attorney's fees incurred in procuring the dissolution of an injunction, which was wrongfully issued, are generally recoverable as an element of damages.

Under federal law, attorney's fees for services in effecting the dissolution of the injunction are not recoverable as an element of damages on an injunction bond given in such court,[18] notwithstanding, under the law of the state where the bond was executed, such fees could be recovered in a state court,[19] but as to the latter proposition there is authority to the contrary.[20] The federal rule has been approved and followed in some states, to the effect that attorney's fees cannot be recovered as damages on the dissolution of an injunction.[21]

In most states, however, in an action on an injunction bond or in assessing damages in the orig-

nying restraining order.—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.

8. Ala.—Bulock v. Ferguson, 30 Ala. 227.

9. Cal.—Curtiss v. Bachman, 42 P. 910, 110 Cal. 433, 52 Am.S.R. 111.

10. Cal.—Curtiss v. Bachman, supra.
Neb.—Pollock v. Whipple, 77 N.W. 355, 57 Neb. 82.
32 C.J. p 471 note 53.

11. Cal.—Curtiss v. Bachman, 42 P. 910, 110 Cal. 433, 52 Am.S.R. 111.
N.Y.—Allen v. Brown, 5 Lans. 511.

12. Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311—Schmidt v. Meredith, 228 N.W. 568, 209 Iowa 621.

13. Ariz.—Ackel v. Mason Dry Goods Co., 255 P. 488, 32 Ariz. 33.
Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51—Charters v. Fidelity & Deposit Co. of Maryland, 186 P. 921, 32 Idaho 612.
32 C.J. p 471 note 56.

14. N.Y.—Allen v. Brown, 5 Lans. 511.

Extraordinary costs

The rule is stated in Kentucky that extraordinary costs may be recovered in an action on the bond, if such costs were incurred in the injunction proceeding independently of the main cause of action, but not where injunctive relief is the main cause of action, or the injunction is decided solely by the result on the merits of the case.—Holt's Adm'r v. Johnson, 56 S.W.2d 962, 247 Ky. 180—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188—Elkhorn Coal Co. v. Justice, 283 S.W. 399, 214 Ky. 451.

15. Md.—Hamilton v. State, 32 Md. 348.
N.Y.—Guilford v. Cornell, 4 Abb.Pr. 220.
Va.—Woodson v. Johns, 3 Munf. 230, 17 Va. 230.

Costs previously allowed by appellate court after adverse decree are not recoverable as damages for wrongful suing out of injunction.—Gwin v. City of Greenwood, 131 So. 821, 159 Miss. 110.

16. Tex.—Railroad Commission of Texas v. Fisher, Civ.App., 127 S.W.2d 925—Smith v. Keele, Civ.App., 127 S.W.2d 926—Smith v. Coleman, Civ.App., 127 S.W.2d 928—Railroad Commission of Texas v. A. E. McDonald Motor Freight Lines, Civ.App., 127 S.W.2d 932.

17. Mont.—McKelvy v. Broadwater, 285 P. 190, 87 Mont. 103.

18. U.S.—Heiser v. Woodruff, C.C.A. Okl., 128 F.2d 178—In re Farmers' Union Mercantile Co., D.C.S.C., 26 F.2d 102—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F. Supp. 419.
Mo.—National Bank of Commerce in St. Louis v. Maryland Casualty Co., 270 S.W. 691, 307 Mo. 417.
32 C.J. p 471 note 60.

"The theory on which this rule rests is that the defendant is entitled to be indemnified only for the damages caused to him by the restraint imposed, and not for the costs of the suit, or the expenses incurred in ridding himself of the restraint."—In re Farmers' Union Mercantile Co., D.C.S.C., 26 F.2d 102, 103.

19. U.S.—Tullock v. Mulvane, Kan., 22 S.Ct. 372, 184 U.S. 497, 46 L.Ed. 657—Heiser v. Woodruff, C.C.A. Okl., 128 F.2d 178—Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, C.C.A.N.Y., 104 F.2d 105, certiorari denied 60 S.Ct. 131, 308 U.S. 599, 84 L.Ed. 501—In re Farmers' Union Mercantile Co., D.C.S.C., 26 F.2d 102.
Mo.—Local Union No. 66 of United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 5 S.W.2d 671, 222 Mo.App. 383.

20. Kan.—Mulvane v. Tullock, 50 P. 897, 58 Kan. 622.
32 C.J. p 471 note 60 [b].

21. Ark.—Oliphint v. Mansfield, 36 Ark. 191.
Ga.—Jones v. Rountree, 74 S.E. 1096, 11 Ga.App. 181.
32 C.J. p 471 notes 61–63.

inal suit, as the case may be, after dissolution of the injunction a reasonable allowance for necessary attorney's fees may be recovered as damages for services rendered in procuring a dissolution of the injunction.[22] This rule applies only where the issuance of the injunction was wrongful in its inception,[23] and the injunction was dissolved because of its wrongful issuance,[24] and, as has been held, when the action was then dismissed by plaintiff, or otherwise terminated in favor of defendant.[25] An allowance of attorney's fees may be refused where under the facts of the case there was an apparent justification for the issuance of the injunction.[26]

Objections. It is no objection to an allowance for counsel fees for procuring the dissolution of an injunction, that other matters were heard at the same time;[27] that defendant has voluntarily abandoned, pending an appeal, the proceedings enjoined;[28] that defendant had his regularly retained counsel conduct the motion to dissolve;[29] that the injunction was dissolved by motion on the face of the bill,[30] or on demurrer to the bill;[31] that the services rendered in procuring the dissolution simplified the preparation of the defense on the merits;[32] that the

22. U.S.—Heiser v. Woodruff, C.C.A. Okl., 128 F.2d 178—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262.
Ala.—City of Birmingham v. Wilkinson, 194 So. 548, 239 Ala. 199—McCord v. Bridges, 100 So. 469, 211 Ala. 295—Fidelity & Deposit Co. of Maryland v. West Blocton Sav. Bank, 113 So. 486, 22 Ala.App. 12, reversed on other grounds 113 So. 489, 216 Ala. 465.
Ariz.—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7, overruling, in so far as to the contrary, Richards v. Green, 32 P. 266, 3 Ariz. 227—Jacobson v. Laurel Canyon Mining Co., 234 P. 823, 27 Ariz. 546.
D.C.—Local Union No. 368 of Brotherhood of Painters, Decorators and Paperhangers of America v. Barker Painting Co., 24 F.2d 879, 58 App.D.C. 51.
Fla.—National Surety Co. v. Willys-Overland, Inc., 138 So. 24, 26, 103 Fla. 738, citing **Corpus Juris.**
Hawaii.—Miura v. Nishimoto, 35 Hawaii 595—Manibog v. Low, 33 Hawaii 660.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P.2d 75, 52 Idaho 795.
Ill.—Babcock v. Chicago Rys. Co., 155 N.E. 773, 325 Ill. 16—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324—Leonard v. Pearce, 271 Ill.App. 428—Engstrom v. City of Rockford, 271 Ill.App. 235—Keefe v. Sondag, 258 Ill.App. 15.
Kan.—Harvey v. Majors, 283 P. 663, 129 Kan. 556—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.
La.—Buras v. Machella, 134 So. 751, 172 La. 580—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131—Burglass v. Villere, 139 So. 209, 170 La. 805, annulling 125 So. 144, 14 La.App. 314.
Miss.—McLeod v. Barnes, 156 So. 517, 170 Miss. 880—Renaldo v. Lamas, 117 So. 528, 151 Miss. 207—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.
Mo.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo.App. 1237—Hecht Bros. Clothing Co. v. Walker, App., 279 S.W. 1059—Laumeier v. Sammelmann, 279 S.W. 249, 218 Mo.App. 468.
Neb.—Behrens v. Smith Baking Co., 266 N.W. 61, 130 Neb. 651—Meeske v. Baumann, 241 N.W. 550, 122 Neb. 786, 83 A.L.R. 131—Beatty v. Casselman, 211 N.W. 617, 115 Neb. 104.
N.Y.—Huster v. Notarantonio, 239 N.Y.S. 89, 135 Misc. 569.
S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278—Chambers v. Long, 128 S.E. 853, 132 S.C. 179.
W.Va.—Humphrey Mfg. Co. v. City of Elkins, 115 S.E. 846, 93 W.Va. 16—State v. Nash, 79 S.E. 829, 72 W.Va. 812.
Wis.—Nauman v. Central Sherwood Bldg. Corporation, 10 N.W.2d 151, 243 Wis. 362—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22—Schulteis v. Trade Press Pub. Co., 210 N.W. 419, 191 Wis. 164.
Wyo.—Housley v. Tobin, 286 P. 383, 41 Wyo. 419.
32 C.J. p 472 note 64.

As costs

There is authority that such fees are costs incidental to litigation and not damages from the wrongful restraint, and that there may be discretion in allowing them.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.

Workmen's compensation statute inapplicable

A statute relating to attorney's fees for obtaining compensation for injured workmen is inapplicable to action on injunction bond given in a compensation case.—Harvey v. Majors, 283 P. 663, 129 Kan. 556.

23. Ala.—City of Birmingham v. Wilkinson, 194 So. 548, 239 Ala. 199.
Kan.—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.
La.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.
Mo.—Hecht Bros. Clothing Co. v. Walker, App., 279 S.W. 1059.
Pa.—In re Clarke's Estate, 18 Pa. Dist. & Co. 214.
Wash.—Puget Sound Harbor No. 16 v. Ætna Acc. & Liability Co., 166 P. 785, 97 Wash. 413.
Wis.—Nauman v. Central Sherwood Bldg. Corporation, 10 N.W.2d 151, 243 Wis. 362.

24. Wash.—Puget Sound Harbor No. 16 v. Ætna Acc. & Liability Co., 166 P. 785, 97 Wash. 413.
32 C.J. p 473 note 74.

25. Kan.—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.
W.Va.—Humphrey Mfg. Co. v. City of Elkins, 115 S.E. 846, 93 W.Va. 16.

26. La.—Freeland v. Carmouche, 148 So. 658, 177 La. 395—Chavis v. Trimble, App., 124 So. 703.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.

27. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.
Necessity of segregation of services for dissolution see infra subdivision f (2) of this section.

28. Ala.—Cooper v. Hames, 9 So. 341, 93 Ala. 280.

29. La.—Luchini v. Police Jury, 53 So. 68, 126 La. 972, 21 Ann.Cas. 59.

30. Ill.—Keith v. Henkleman, 50 N.E. 692, 173 Ill. 137.

31. Ala.—Kemp v. Donovan, 94 So. 168, 208 Ala. 289.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.
Miss.—Thomas v. Mississippi Power & Light Co., 152 So. 269, 170 Miss. 811, followed in Mississippi Power & Light Co. v. McCoglan Hotel, 152 So. 271.

32. Ill.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.

knowledge gained or evidence used on the hearing of the motion was or could be subsequently used on the trial of the case on the merits;[33] or that the solicitors procuring the dissolution were interested in the event of the suit.[34] It also has been held that, where fees have been incurred in preparing to move the dissolution of an injunction, they will be recoverable notwithstanding the fact that plaintiff dismissed the action and thereby dissolved the writ before the filing or hearing of the motion to dissolve;[35] or that the injunction suit was dismissed on the hearing;[36] or that the dissolution proceeding was voluntarily dismissed;[37] or that the attorney moved to dismiss the action after the injunction was dissolved.[38]

Counsel fees on appeal. It generally has been held that counsel fees are recoverable as part of the damages for the necessary services rendered on a successful appeal in getting rid of an injunction, as well as in the court below,[39] as where an appeal was taken from a decree or order dissolving the injunction, in respect of attorney's fees incurred in successfully resisting an effort to have the decree or order set aside,[40] although in some states such fees have been refused on the ground that the appeal did not have the effect of keeping the injunction in force, the view being taken that under such circumstances no services of counsel were necessary.[41] Counsel fees on appeal, however, are not recoverable where the principal issues presented on the appeal involve the merits of the case;[42] nor can recovery be had for counsel fees expended on an unsuccessful appeal from an injunction, although the party appealing subsequently prevailed in the main case;[43] or for fees incurred on appeal from a judgment dismissing a complaint, or by reason of the continuance thereof after the dismissal of the complaint, where such continuation was not objected to by defendants, and no motion was made by them to vacate the injunction;[44] or for fees for services rendered in the appellate court, where it appears from the record that the petition in the original suit was amended by consent of both parties to give the appellate court jurisdiction.[45]

Fees unnecessarily incurred to obtain dissolution of an injunction should not be allowed as damages,[46] as where the injunction has terminated by its own limitation.[47] It has been held that such fees are not recoverable for securing the dissolution of an ineffective injunction;[48] but that they may be recovered for securing the dissolution of a void injunction.[49]

33. Ill.—Marks v. Columbia Yacht Club, 76 N.E. 582, 219 Ill. 417, affirming 121 Ill.App. 308—H. A. Hilmer Co. v. Behr, 196 Ill.App. 363—District No. 181 School Directors v. Mathis, 168 Ill.App. 174.
Miss.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757.

34. Ill.—Dempster v. Lansingh, 128 Ill.App. 388, reversed on other grounds 84 N.E. 1032, 234 Ill. 381.
Mo.—Richardson Lubricating Co. v. Bedell, 237 S.W. 192, 209 Mo.App. 238.

35. Colo.—Lynch v. Metcalf, 32 P. 183, 3 Colo.App. 131—Quinn v. Baldwin Star Coal Co., 76 P. 552, 19 Colo.App. 497.

36. U.S.—Cinderella Theatre Co. v. Sign Writers' Local Union No. 591, D.C.Mich., 6 F.Supp. 830.

37. Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245.

38. Cal.—Handy v. Samaha, 3 P.2d 602, 117 Cal.App. 286.

39. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.
Mont.—McKelvy v. Broadwater, 285 P. 190, 87 Mont. 103.
Okl.—Oklahoma Cotton Growers' Ass'n v. Salyer, 272 P. 855, 134 Okl. 55.
32 C.J. p 473 note 67.

40. Ala.—Jesse French Piano & Organ Co. v. Porter, 32 So. 678, 134 Ala. 302, 92 Am.S.R. 31.
32 C.J. p 473 note 68.

Limitations of statute

This rule applies where the statute under which the bond is given does not limit the conditions of the bond to the action of the court granting the injunction.—State v. Nash, 79 S.E. 829, 72 W.Va. 812—32 C.J. p 473 note 66.

41. Mo.—C. H. Albers Commn. Co. v. Spencer, 139 S.W. 321, 236 Mo. 608, Ann.Cas.1912D 705.
32 C.J. p 473 note 69.

42. Miss.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757—Smith v. Perkins, 88 So. 531, 125 Miss. 203.

43. N.Y.—Maltz v. Westchester Brewing Co., 152 N.Y.S. 669, 167 App.Div. 95.

44. N.Y.—Phœnix Bridge Co. v. Keystone Bridge Co., 41 N.Y.S. 891, 10 App.Div. 176.

45. La.—Lemeunier v. McCearley, 6 So. 338, 41 La.Ann. 411.

46. Ill.—McNevin v. Stoolman, 235 Ill.App. 449.
32 C.J. p 474 note 88.

Motion for dissolution as not unnecessary

Where temporary restraining order provided for its continuance until return day and until there was a decision on order to show cause, restraining order was not one that terminated automatically on return day, hence motion to dissolve noticed for return day was not such an unnecessary act as to preclude parties restrained from recovering attorney fees in action on bond.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475.

Unnecessary number of counsel

The party claiming the allowance will not be permitted to lay the foundation for large damages against complainant by employing an unnecessary number of counsel.—Hotchkiss v. Platt, 8 Hun, N.Y., 46—32 C. J. p 478 note 38.

47. La.—Inter City Express Lines v. Guarisco, App., 165 So. 727.
Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W.2d 431.
32 C.J. p 474 note 88 [b].

Termination on hearing on show-cause order

Wash.—Chin On v. Culinary Workers and Soft Drink Dispensers Union, 81 P.2d 803, 195 Wash. 530.

48. Miss.—Galbreath v. Thayer, 113 So. 180, 147 Miss. 556, 52 A.L.R. 288.

49. Ill.—Jeslyn v. Dickerson, 71 Ill. 25.
Mont.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

Parties in pari delicto. When a suit for injunction is based on an illegal agreement, and the parties thereto are in pari delicto, attorney's fees should not be allowed to defendant on the dissolution of the injunction.[50]

Public or private attorney. Counsel fees will not be allowed in case counsel are acting ex officio for a public corporation;[51] but this rule does not apply where the attorney is acting in a private capacity;[52] or where an attorney other than the public attorney appears for such a defendant.[53]

(2) For What Services Recoverable

Attorney's fees are allowable as damages only for services rendered in procuring dissolution of the injunction. If injunction is the sole relief sought, fees may be allowed for defending the entire action; but, if other relief is also sought, they generally are not recoverable if the dissolution results merely from a trial on the merits. The services for procuring the dissolution ordinarily must be segregated from services rendered in the case generally, to warrant a recovery therefor.

Counsel fees ordinarily are allowable only for services rendered in procuring the dissolution of the injunction,[54] including services on a reference to ascertain damages.[55] There can be no recovery for other services rendered in the suit in which the injunction was sued out;[56] for services rendered before the giving of the bond and the issuance of the writ,[57] such as in resisting the application for the issuance of the injunction;[58] for services rendered after dissolution of the injunction,[59] or in successfully maintaining a cross bill;[60] or, generally, for services rendered in the main defense of the suit or directed to the merits of the main controversy,[61] except where it is impossible to dissolve the

50. Miss.—Lowenburg v. Klein, 87 So. 653, 125 Miss. 284.

51. Ill.—Wilson v. Weber, 3 Ill.App. 125.
Miss.—Nixon v. Biloxi, 25 So. 664, 76 Miss. 810.
Mo.—Uhrig v. St. Louis, 47 Mo. 528.

52. Miss.—Matheny v. Simmons, 139 So. 172, 165 Miss. 429.

As personal attorney for officer
Court properly allowed attorney's fee as damages for wrongfully suing out injunction against chief of police where it was not shown that attorney had duty as city attorney to defend suit, and agreed facts showed he expected remuneration from chief of police.—Matheny v. Simmons, supra.

53. Ill.—Howard v. Burke, 93 N.E. 775, 248 Ill. 224—Hayes v. Kellums, 224 Ill.App. 533—Fordham v. Thompson, 144 Ill.App. 342.

54. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal. App.2d 587—Handy v. Samaha, 3 P.2d 602, 117 Cal.App. 286—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
D.C.—Local Union No. 368 of Brotherhood of Painters, Decorators and Paperhangers of America v. Barker Painting Co., 24 F.2d 879, 58 App.D.C. 51.
Hawaii.—Wong Kwai Tong v. Fong Koon Chan, 28 Hawaii 399.
Ill.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.
Ind.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.
Kan.—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.
Ky.—Strong v. Duff, 15 S.W.2d 517, 228 Ky. 615, 70 A.L.R. 56.
La.—Ducros v. St. Bernard Parish Police Jury, 8 So.2d 684, 200 La. 766—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491—Lutcher & Moore Cypress Co. v. Schexnaydre, 122 So. 911, 11 La. App. 72—Titche v. Hiller, 5 La. App. 375.
Minn.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.
Mo.—Mancuso v. Western Automobile Co., App., 296 S.W. 181.
N.M.—Tatavich v. Pettine, 247 P. 840, 31 N.M. 479.
W.Va.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217—State v. Marguerite Coal Co., 140 S.E. 49, 104 W.Va. 324, 55 A.L.R. 452.
Wis.—Antigo Electric Co. v. Faust Lumber Co., 244 N.W. 604, 209 Wis. 139—Muscoda Bridge Co. v. Worden-Allen Co., 240 N.W. 802, 207 Wis. 22, denying rehearing 239 N.W. 649, 207 Wis. 22.
32 C.J. p 474 note 92.

This rule includes necessary legal services rendered from time of issuance of temporary injunction until final dissolution thereof.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo. App. 1237.

Where temporary writ is granted, and thereafter an application for a preliminary writ is dismissed, and no motion to dissolve the injunction has been made, no recovery of attorney's fees on account of the suing out of the temporary injunction and dissolution thereof can be allowed.—Edward E. Morgan Co. v. City of Natchez, 196 So. 251, 188 Miss. 781.

55. Wis.—Antigo Electric Co. v. Faust Lumber Co., 244 N.W. 604, 209 Wis. 139—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.

56. Ala.—Bolling v. Tate, 65 Ala. 417, 39 Am.R. 5.
32 C.J. p 475 note 93.

57. Cal.—Lambert v. Haskell, 22 P. 327, 80 Cal. 611.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.
32 C.J. p 475 note 94.

58. Miss.—Edward E. Morgan Co. v. City of Natchez, 196 So. 251, 188 Miss. 781.
N.Y.—Lewittes & Sons v. Perlow, 3 N.Y.S.2d 916, 254 App.Div. 94—Youngs v. McDonald, 67 N.Y.S. 475, 56 App.Div. 14, affirmed 60 N. E. 1123, 166 N.Y. 639.
W.Va.—State v. Marguerite Coal Co., 140 S.E. 49, 104 W.Va. 324, 55 A. L.R. 452.
32 C.J. p 475 note 94 [a] [b].

59. U.S.—Heiser v. Woodruff, C.C.A. Okl., 128 F.2d 178.
Ala.—Robertson v. Robertson, 58 Ala. 68.
Cal.—Porter v. Hopkins, 63 Cal. 53.
Miss.—Thornton-Claney Lumber Co. v. O'Quin, 76 So. 732, 115 Miss. 857.

60. Ill.—Wilson v. Haecker, 85 Ill. 349—Jevne v. Osgood, 57 Ill. 340.
Miss.—Mims v. Swindle, 87 So. 151, 124 Miss. 686—Valentine v. McGrath, 52 Miss. 112.

61. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal. App.2d 587—Handy v. Samaha, 3 P.2d 602, 117 Cal.App. 286—Moore v. Maryland Casualty Co., 280 P. 1008, 100 Cal.App. 658.
Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522.
Hawaii.—Wong Kwai Tong v. Fong Koon Chan, 28 Hawaii 399.
Ill.—2063 Lawrence Avenue Bldg. Corporation v. Van Heck, 45 N.E. 2d 687, 317 Ill.App. 59—Leonard v. Pearce, 271 Ill.App. 428.
Ind.—Clevenger v. Goltry, 145 N.E. 332, 82 Ind.App. 110.

injunction until trial of the case on the merits,[62] or except where the expense of the trial was increased by the injunction,[63] nor can recovery be had for services rendered in bringing the suit on the injunction bond.[64]

Dissolution at trial on merits. The rule has been laid down without qualification that, if the dissolution of an injunction results merely from the defense and trial on the merits and no effort to obtain such dissolution otherwise is shown to have been made, there can be no allowance for attorney's fees.[65]

However, according to the weight of authority, where injunction is the only relief sought and dissolution is procured on final hearing only, no separate motion having been made for that purpose, attorney's fees are allowable for defending the entire action, as being for the dissolution of the injunction;[66] but it has been held that no recovery of counsel fees can be had on dissolution of the injunction, in such a case.[67]

On the other hand, also, according to the weight of authority, where an injunction is not the sole relief sought but is only ancillary to the main object of the suit, attorney's fees are not recoverable where no formal motion to dissolve the injunction was made, and where the dissolution thereof results merely from the defense and trial on the merits;[68] but there is authority to the contrary[69] It

La.—In re Morgan & Co., 99 So. 696, 155 La. 915.
Wis.—Muscoda Bridge Co. v. Worden-Allen Co., 240 N.W. 802, 207 Wis. 22, denying rehearing 239 N. W. 649, 207 Wis. 22.
32 C.J. p 475 note 98.

62. D.C.—Local Union No. 368 of Brotherhood of Painters, Decorators and Paperhangers of America v. Barker Painting Co., 24 F.2d 879, 58 App.D.C. 51.
32 C.J. p 475 note 99.

63. N.Y.—Hotchkiss v. Platt, 8 Hun 46—Allen v. Brown, 5 Lans. 511.

64. N.M.—Tatavich v. Pettine, 247 P. 840, 31 N.M. 479.

65. Ill.—Leonard v. Pearce, 271 Ill. App. 428, 444, citing **Corpus Juris.**
La.—Ducros v. St. Bernard Parish Police Jury, 8 So.2d 694, 200 La. 766—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491—Edwards v. Wiseman, 3 So.2d 661, 198 La. 382, amending 3 So. 2d 655—Montgomery v. Bouanchaud, 154 So. 8, 179 La. 312—Evasovich v. Cognevich, 106 So. 556, 159 La. 1035—Witbeck v. Rea, 105 So. 43, 158 La. 1003—Fontenot v. Fontenot, 101 So. 218, 156 La. 844—In re Morgan & Co., 99 So. 696, 155 La. 915—Three Rivers Oil Co. v. Laurence, 95 So. 652, 153 La. 224—First Nat. Bank v. Corell, App., 149 So. 326, rehearing 145 So. 395, rehearing denied 146 So. 479—Barnett v. Sandford, 137 So. 566, 18 La.App. 262—Lutcher & Moore Cypress Co. v. Schexnaydre, 122 So. 911, 11 La.App. 72—Jackson v. Dixon, 8 La.App. 761.
32 C.J. p 476 note 2.

66. D.C.—Local Union No. 368 of Brotherhood of Painters, Decorators and Paperhangers of America v. Barker Painting Co., 24 F.2d 879, 58 App.D.C. 51.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Minn.—Pelkey v. National Surety Co., 173 N.W. 435, 143 Minn. 176.
Okl.—Oklahoma Cotton Growers' Ass'n v. Salyer, 272 P. 855, 134 Okl. 55—Prager's Paris Fashion v. Seidenbach, 242 P. 260, 113 Okl. 271.
S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278.
W.Va.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217—State v. Marguerite Coal Co., 140 S.E. 49, 104 W.Va. 324, 55 A.L.R. 452.
32 C.J. p 476 note 6.

67. Ky.—Holliday v. Sphar, 119 S. W.2d 656, 274 Ky. 556—Holt's Adm'r v. Johnson, 56 S.W.2d 962, 247 Ky. 180—Strong v. Duff, 48 S. W.2d 1074, 243 Ky. 469—Avondale Heights Co. v. Proctor, 5 S.W.2d 1054, 224 Ky. 188—Burley Tobacco Growers' Co-op. Ass'n v. Pennebaker Home for Girls, 299 S.W. 734, 221 Ky. 718.
32 C.J. p 476 note 7.

68. U.S.—Duke Power Co. v. Greenwood County, D.C.S.C., 25 F.Supp. 419.
D.C.—Stanfield v. Vollbehr, 60 F.2d 670, 61 App.D.C. 239.
Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51.
Ill.—Babcock v. Chicago Rys. Co., 155 N.E. 773, 325 Ill. 16—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.
Iowa.—Chrisman v. Schmickle, 230 N.W. 550, 209 Iowa 1311.
Miss.—Lundy v. Greenville Bank & Trust Co., 174 So. 802, 179 Miss. 282—Kendrick v. Robertson, 111 So. 99, 145 Miss. 585—Staple Cotton Co-op. Ass'n v. Buckley, 106 So. 747, 141 Miss. 483—Hunter v. Hankinson, 106 So. 514, 141 Miss. 279.
S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278—Livingston v. Exum, 19 S.C. 223.
W.Va.—State v. Carden, 163 S.E. 54, 111 W.Va. 631—Humphrey Mfg. Co. v. City of Elkins, 115 S.E. 846, 93 W.Va. 16.
32 C.J. p 476 note 9.

In suit for permanent injunction, where temporary injunction was issued but was not dissolved pending disposition on merits, and decree was entered on the merits dissolving a permanent injunction and dismissing the suit, defendants were not entitled to recover solicitor's fees for services rendered on attempt to dissolve the temporary injunction and in defending the main case before the chancellor and on appeal, since temporary injunction had not been "dissolved" within statute relating to assessment of damages caused by temporary injunction, but became merged in the permanent injunction. —Nestor Johnson Mfg. Co. v. Goldblatt, 21 N.E.2d 723, 371 Ill. 570, 123 A.L.R. 1230, affirming 17 N.E.2d 371, 297 Ill.App. 190.

69. Cal.—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.
Kan.—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.
Ky.—Strong v. Duff, 48 S.W.2d 1074, 243 Ky. 469.
Mo.—Brownlee v. Fenwick, 15 S.W. 611, 103 Mo. 420—Farasy v. Hindert, App., 110 S.W.2d 785, distinguishing earlier Missouri cases apparently to the contrary.
32 C.J. p 477 note 10.

The fact that part of relief sought is permanent injunction does not preclude a recovery of the reasonable and necessary fees and expenses incurred in dissolving a temporary injunction wrongfully granted.—Miner v. Kirksey, 216 P. 284, 113 Kan. 715.

Where discharge of receiver also asked

The fact that the motion to dissolve included also a demand for the discharge of a receiver appointed in the proceedings does not make the motion any the less one to dissolve an injunction, and the right to attorney's fees for the wrongful issuance of the injunction will not be affected merely because there was an equally wrongful receivership coupled with it which must prac-

has been held that the mere fact that there was a separate hearing on a motion to dissolve an ancillary injunction does not authorize an allowance of attorney's fees, where it is necessary that the cause proceed to trial on the merits,[70] unless such separate hearing was had by agreement, with all rights reserved.[71]

Unsuccessful motion to dissolve. According to some decisions, no allowance can be made for fees on an unsuccessful motion to dissolve an injunction, although injunction defendant is successful on the final trial of the action;[72] or where, instead of moving to dissolve, an appeal is taken from an order granting the injunction, which appeal is dismissed on the ground that the order is not appealable, although the injunction is dissolved on final hearing by virtue of the judgment on the main controversy.[73] However, whether counsel fees incurred for purpose of trial are recoverable as damages under an injunction bond, where defendant unsuccessfully resisted the temporary injunction, but was successful at the trial, has been held to depend on whether he tried the action to vacate the injunction or determine the issues;[74] and it has been held that, notwithstanding the unsuccessful motion to dissolve, attorney's fees are recoverable, where the allowance of injunction is eventually proved to have been wrongful,[75] or where the motion is denied not on the merits or for irregularity, but for the reason that the court in its discretion considers it advisable to defer the inquiry into the merits until the final hearing;[76] or where an injunction is the only relief sought,[77] but not where the injunction is merely ancillary.[78]

Modification of injunction. Where, on a motion to dissolve, the court merely modified the injunction instead of dissolving it, fees paid for services in relation to such motion are not recoverable;[79] but there is authority to the contrary.[80]

Separation of services as prerequisite to allowance. Except where attorney's fees for defending the entire action are regarded as recoverable, to authorize an allowance of counsel fees for services rendered in procuring the dissolution of an injunction the evidence ordinarily must discriminate between services rendered in the case generally and services which were strictly necessary to procure a dissolution of the injunction, as a recovery of fees for such services may be had only where they can be segregated from the services rendered in the general defense and trial of the action,[81] although the fact that it is impossible exactly to separate the value of services rendered in securing the dissolution from that of services rendered in examining the

tically fall if the injunction fell.—Dempster v. Lansingh, 128 Ill.App. 388, reversed on other grounds 84 N.E. 1032, 234 Ill. 381.

70. Miss.—Lundy v. Greenville Bank & Trust Co., 174 So. 802, 179 Miss. 282.

71. Miss.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757.

In absence of agreement preserving right to hearing of motion to dissolve injunction as interlocutory matter at regular term, separate from hearing on merits, and preserving all defendants' rights as if hearing had been in vacation, granting of attorney's fees for dissolution of injunction would be improper.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757.

72. Cal.—Curtiss v. Bachman, 42 P. 910, 110 Cal. 433, 52 Am.S.R. 111. 32 C.J. p 477 note 11.

73. S.C.—Garlington v. Copeland, 21 S.E. 317, 43 S.C. 389. 32 C.J. p 477 note 17.

74. N.Y.—Granulator Soap Co. v. Haddow, 144 N.Y.S. 610, 159 App. Div. 563.

75. Wis.—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22. 32 C.J. p 477 note 12.

76. N.Y.—Andrews v. Glenville Woolen Co., 50 N.Y. 282.

77. Minn.—Neilsen v. Lea, 91 N.W. 1113, 87 Minn. 285.

78. Minn.—Lamb v. Shaw, 45 N.W. 1134, 43 Minn. 507.

79. Miss.—Caston v. Hutson, 104 So. 698, 139 Miss. 890. 32 C.J. p 477 note 19.

80. **Modifying order as too broad** Where defendant's motion to quash a temporary restraining order was denied, but the lower court, deeming its terms too broad, modified the order slightly to the advantage of the bondsmen, and continued the restraining order in force without further provision concerning the bond, the original bond continued in force pending an appeal from the order refusing to dissolve, and attorney's fees were therefore recoverable in an action on the bond.—Bunston v. Labbitt, 277 P. 419, 84 Mont. 585.

81. U.S.—Houston & North Texas Motor Freight Lines v. Local No. 745, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, D.C.Tex., 27 F.Supp. 262.
Ala.—Smith v. Summers, 112 So. 344, 215 Ala. 690.
Ariz.—Hammond v. A. J. Bayless Markets, 117 P.2d 490, 58 Ariz. 58—Jacobson v. Laurel Canyon Mining Co., 234 P. 823, 27 Ariz. 546—Lambert v. Haskell, 22 P. 327, 80 Cal. 611.
Colo.—Fidelity & Deposit Co. of Maryland v. Seemann Investment & Fidelity Co., 247 P. 182, 79 Colo. 522—Reagan v. Dick, 240 P. 337, 78 Colo. 148.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 691, 60 Idaho 127, quoting **Corpus Juris**—Beech v. American Surety Co. of New York, 51 P.2d 213, 56 Idaho 159.
Ill.—2063 Lawrence Avenue Bldg. Corporation v. Van Heck, 45 N.E. 2d 687, 317 Ill.App. 59—Leonard v. Pearce, 271 Ill.App. 428, 443, citing **Corpus Juris**—McNevin v. Stoolman, 235 Ill.App. 449.
Miss.—Johnson v. Howard, 141 So. 573, 167 Miss. 475.
Neb.—Beatty v. Casselman, 211 N.W. 617, 115 Neb. 104—Darling v. McBride, 125 N.W. 1088, 86 Neb. 481.
Okl.—Leach v. Kincaid, 244 P. 191, 116 Okl. 245.
W.Va.—State ex rel. Perry v. Adkins, 179 S.E. 816, 116 W.Va. 217.
Wyo.—Housley v. Tobin, 286 P. 383, 41 Wyo. 419.
32 C.J. p 477 note 21.

case on its merits will not preclude recovery for services in connection with the dissolution, where the best possible estimate is made.[82]

(3) Necessity of Payment or Obligation to Pay Fees

Attorney's fees are generally recoverable as damages only where they have been paid, or a legal obligation has been incurred therefor.

In order to recover attorney's fees as damages, it is essential either that they have been paid,[83] or that the person claiming the allowance has incurred a legal contractual obligation for the fees,[84] which obligation may be inferred from the facts of the case,[85] and need not be an express agreement.[86] There is authority to the effect that the fees are not recoverable unless they have been actually paid;[87] but such payment generally is not necessary if there is a legal liability for the fees.[88] There can be no recovery of attorney's fees where the services were rendered gratuitously,[89] or where defendant has acted as his own counsel.[90]

A contract for a contingent fee, ordinarily, cannot be used as a basis for recovering attorney's fees as damages.[91]

(4) Amount of Allowance

Attorney's fees for services rendered in procuring the dissolution of the injunction allowed as damages must be reasonable in amount.

The question as to the amount which shall be allowed as counsel fees is addressed largely to the discretion of the court,[92] who may consider his own knowledge in connection with testimony as to the value of the services,[93] and may allow less than the amount fixed as reasonable by witnesses.[94] As a

82. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 690, 60 Idaho 127—Davidson Grocery Co. v. U. S. Fidelity & Guaranty Co., 21 P. 2d 75, 52 Idaho 795.
Mo.—Akin v. Rice, 117 S.W. 655, 137 Mo.App. 147.

Proportionate part
When a motion to dissolve a temporary injunction is heard with the case on its merits, damages may be awarded on the injunction bond for the proportionate part of the attorney's fees incurred in securing its dissolution where the injunction is not merely ancillary to the main object of the suit.—Farasy v. Hindert, Mo.App., 110 S.W.2d 785.

83. La.—Timkan v. Wisner Estates, 95 So. 711, 153 La. 262.
Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285—Oklahoma Cotton Growers' Ass'n v. Hooven, 272 P. 852, 134 Okl. 47.

84. Kan.—Garden Plain Farmers' Elevator Co. v. Kansas Wheat Growers' Ass'n, 276 P. 799, 128 Kan. 218.
La.—Burglass v. Villere, 129 So. 209, 170 La. 805, annulling 125 So. 144, 14 La.App. 314—Alfano v. Franek, 105 So. 598, 159 La. 498—Timkan v. Wisner Estates, 95 So. 711, 153 La. 262.
Miss.—McLeod v. Barnes, 156 So. 517, 170 Miss. 880.
N.H.—Guay v. Brotherhood Bldg. Ass'n, 177 A. 409, 87 N.H. 216, 97 A.L.R. 1053.
Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285—Oklahoma Cotton Growers' Ass'n v. Hooven, 272 P. 852, 134 Okl. 47.
32 C.J. p 478 note 25.

It is erroneous to make allowance in the absence of any evidence that the person claiming the allowance had become liable to pay for services of counsel in and about the dissolution of the injunction.—Reed v. New York Nat. Exch. Bank, 82 N.E. 341, 230 Ill. 50.

If amount awarded does not exceed statutory limit, reasonable fees may be allowed without proof that they have been paid or that an obligation therefor has been incurred.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.

"Fixed liability" for attorney's fee in procuring dissolution of injunction means definitely ascertained and prescribed as to amount.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285.

Election commissioners may defend suit to enjoin placing of candidate's name on election ticket, and make contract with attorneys to defend suit, with payment of fees conditioned on obtaining of dissolution of injunction, and fees in such event to be assessed against them by court.—McLeod v. Barnes, 156 So. 517, 170 Miss. 880.

85. Ill.—School Directors v. School Trustees, 66 Ill. 247.
Mont.—Cook v. Greenough, 36 P. 357, 14 Mont. 352.

86. Ill.—Broken Bow Nat. Bank v. Freeman, 87 Ill.App. 622.
Wash.—Berne v. Maxham, 144 P. 23, 82 Wash. 235.

87. Cal.—Prader v. Grimm, 28 Cal. 11—Wilson v. McEvoy, 25 Cal. 169—Hooper v. Patterson, 32 P. 514, 3 Cal.Unrep. 811—Mason v. U. S. Fidelity & Guaranty Co., 141 P.2d 475, 60 Cal.App.2d 587.

Time of payment as affecting right
Counsel fees incurred for dissolving a restraining order are recoverable, although paid after the day first fixed, provided a retainer was paid before.—Prader v. Grim, 13 Cal. 585.

88. Minn.—Detroit Lakes Realty Co. v. McKenzie, 284 N.W. 60, 204 Minn. 490.
32 C.J. p 477 note 24.

89. Ill.—Reed v. New York Nat. Exch. Bank, 82 N.E. 341, 230 Ill. 50.

90. Ill.—Jevne v. Osgood, 57 Ill. 340—Stinnett v. Wilson, 19 Ill.App. 88.

91. Miss.—Riley v. Hardy, 189 So. 514, 515, 185 Miss. 765, citing **Corpus Juris.**
32 C.J. p 478 note 25 [d].

Where defendants' solicitors were to get contingent fee and were to be paid nothing unless chancellor allowed fee as damages, allowance to defendants, on injunction bond, of a solicitor's fee, was unauthorized.—Riley v. Hardy, 189 So. 514, 185 Miss. 765.

92. Miss.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204—New Orleans, M. & C. R. Co. v. Martin, 62 So. 228, 105 Miss. 230.

93. Ill.—Chicago Wire Chair Co. v. Kennedy & Wright Co., 141 Ill.App. 196.
32 C.J. p 478 note 33.

Court, itself, is expert on question of value of attorney's services in obtaining dissolution of temporary injunction.—Weil v. Richardson, 35 S. W.2d 369, 225 Mo.App. 1237.

94. Ill.—Hunt v. Pronger, 126 Ill. App. 403—Lichtenstadt v. Fleisher, 24 Ill.App. 92.

general rule, a reasonable amount may be allowed as attorney's fees for services rendered in procuring the dissolution of an injunction,[95] and nothing beyond an amount which is reasonable,[96] and according to some decisions customary,[97] will be allowed.

In determining reasonable attorney's fees, consideration should be given to the fact that the fees allowed should bear a reasonable relation to the value of the subject matter involved in the suit,[98] as well as to proof of the reasonable value of the services, taking into consideration the character of the services rendered, the time during which the attorney was engaged therein, and the magnitude of the interests involved;[99] and the amount of the fees is not controlled by the mere fact that the attorney has charged and that the party claiming the allowance has paid or agreed to pay a certain amount as fees,[1] or that the attorney to whom the fee was paid considered it reasonable.[2] In no event, how-

95. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.
Ill.—Warner v. Wende, 228 Ill.App. 153.
La.—Vidal v. Sterlington Gas Corporation, 161 So. 6, 182 La. 19—Valley Camp, W. O. W. v. Bethany Lodge, F. & A. M., App., 190 So. 833—Minden Syrup Co. v. Applegate, App., 150 So. 421—O'Keefe & Simpson v. Main St. Pharmacy, 8 La.App. 443—Lewis v. Ralph, 8 La.App. 48—State ex rel. Baptist Hospital v. Williams, 1 La.App. 341.
Mo.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo.App. 1237.
Wis.—Nauman v. Central Shorewood Bldg. Corporation, 10 N.W.2d 151, 243 Wis. 362—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.
32 C.J. p 478 note 35.

Fees held reasonable

(1) $100 for procuring dissolution of preliminary injunction restraining officers from disposing of assets pending receivership.—Epstein v. Longshoremen's Realty Ass'n, 104 So. 612, 158 La. 672.

(2) $250 for dissolution of injunction restraining passenger from prosecuting suit for injuries in another state.—Missouri Pac. Ry. Co. v. Harden, 105 So. 2, 158 La. 889.

(3) $300 to lessor for dissolving lessee's temporary injunction.—Nauman v. Central Shorewood Bldg. Corporation, 10 N.W.2d 151, 243 Wis. 362.

(4) $400 where dissolution involved trial of entire case.—Mancuso v. Western Automobile Co., Mo.App., 296 S.W. 181.

(5) $400 where the number of hours necessarily employed was 50½.—Wagner v. Okner, 41 N.E.2d 218, 314 Ill.App. 387.

(6) $600 where injunction suit was tried twice and once appealed.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278.

(7) $650 for obtaining dissolution of temporary injunction.—Weil v. Richardson, 35 S.W.2d 369, 225 Mo. App. 1237.

96. D.C.—Maiatico v. Mortgage Sec. Corporation of America, 60 F.2d 1081, 61 App.D.C. 245.
Ill.—Leonard v. Pearce, 271 Ill.App. 428.
Okl.—Oklahoma Cotton Growers' Ass'n v. Hooven, 272 P. 852, 134 Okl. 47.
32 C.J. p 478 note 36.

Fees held excessive

(1) $300 reduced to $190.—Ryan Bros. v. Rate, 213 N.W. 218, 203 Iowa 1253.

(2) $500 for dissolving restraining order, where rule to show cause was taken up, argued, and submitted on pleadings, reduced to $250.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.

(3) $1,200 for procuring dissolution of injunction restraining distribution of alleged excessive portion of taxes paid into court, reduced to $500.—Silver Creek Co. v. Hutchens, 151 So. 559, 168 Miss. 757.

(4) $5,000 for resisting motion for injunction against appeal from tax assessment by attorney general, reduced to $1,000.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.

(5) $7,500 for procuring dissolution of injunction restraining holding of primary elections and conventions by political party, reduced to $3,750.—Johnson v. Howard, 141 So. 573, 167 Miss. 475.

97. Ill.—Delahanty v. Warner, 75 Ill. 185, 20 Am.R. 237—Jevne v. Osgood, 57 Ill. 340—Iliff v. School Directors, 45 Ill.App. 419.

98. Ill.—Alexander v. Colcord, 85 Ill. 323.
N.Y.—Matthews v. Murchison, 14 Abb.N.Cas. 512 note.
32 C.J. p 478 note 40.

99. Ill.—Wagner v. Okner, 41 N.E.2d 218, 314 Ill.App. 387—Leonard v. Pearce, 271 Ill.App. 428.
Miss.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.
N.Y.—Matthews v. Murchison, 14 Abb.N.Cas. 512 note.
S.C.—Walker v. Oswald, 186 S.E. 916, 181 S.C. 278.
Wis.—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.

Quantum meruit

In absence of contract, value of attorney's services is fixed on quantum meruit.—Albert Pick & Co. v. Stringer, 129 So. 731, 171 La. 131.

Opinion evidence of value of attorney's services in dissolving injunction, although competent, is not indispensable.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.

Place of litigation is to be considered, but should not control.—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.

If there is no showing of value of attorney's services, a claim for fees for such services may be disallowed.
La.—Simms v. Liuzza, 123 So. 301, 168 La. 714.
Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W. 2d 431.

Where fees are allowed for defending an appeal from a decree dissolving an injunction, an allowance of half the amount awarded in the court below for counsel fees for procuring a dissolution of the injunction is a fair and adequate allowance.—Brooks-Scanlon Co. v. Stogner, 75 So. 596, 114 Miss. 736—Curphy v. Terrell, 42 So. 235, 89 Miss. 624.

1. Ill.—Dempster v. Lansingh, 128 Ill.App. 388, reversed on other grounds 84 N.E. 1032, 234 Ill. 381.
La.—Vidal v. Sterlington Gas Corporation, 161 So. 6, 182 La. 19.

Attorney's bill is not evidence of services or their value.—Scherzer v. Keller, 151 N.E. 915, 321 Ill. 324.

2. Ill.—Lomax v. Ragor, 85 Ill.App.

ever, can defendant recover more than he has paid or has become bound to pay,[3] or than he himself claims,[4] or beyond the penalty of the injunction bond.[5]

g. Interest

If the damages sustained are liquidated or clearly ascertainable as to amount, interest thereon may also be allowed as damages.

Interest on the damages sustained by reason of the wrongful injunction may be allowed if the amount of the damages is certain or capable of being made certain.[6] Interest may be recovered as damages where the direct and proximate result of the injunction was to deprive the owner, or one entitled to its use, of the use of money, liquidated or clearly ascertainable as to amount,[7] but not where the amount is not liquidated or clearly ascertainable.[8] Where suit on a note is enjoined interest on the note cannot be recovered unless it is shown that the person liable thereon has become insolvent since the injunction, or that plaintiff, without his fault, has suffered some damage equal to such interest.[9]

Where recovery is had on an injunction bond for the face of the bond, interest thereon from the date of the commencement of the action is recoverable,[10] although this makes the recovery for a larger amount than the penalty of the bond.[11]

Computation and rate. Interest can be allowed only on amounts, the payments of which have been deferred or delayed by the injunction, and not on amounts or installments that become due after the dissolution of the injunction.[12] The interest is ordinarily computed at the legal rate,[13] for and during the actual period of the delay caused by the injunction,[14] as, from the date of the injunction order,[15] or the date when the money was impounded,[16] up to the time of the dissolution of the injunction,[17] or until the money is paid into court,[18] and not from the date of filing the suit until the dissolution of the injunction.[19]

h. Damages pending Appeal after Dissolution

Damages arising from the continuance of the injunction pending an appeal after dissolution are generally recoverable.

The injunction bond is generally liable for the damages accruing to defendant in the injunction proceedings by reason of the delay and obstruction of his rights arising from the continuance of the injunction during the pendency of an appeal.[20] It has

679—Rosenthal v. Boas, 27 Ill.App. 430.

3. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.
Ill.—Jevne v. Osgood, 57 Ill. 340—Cors v. Tompkins, 51 Ill.App. 315—Stinnett v. Wilson, 19 Ill.App. 38.
Miss.—Riley v. Hardy, 189 So. 514, 515, 185 Miss. 765, quoting **Corpus Juris.**

4. La.—Woodward v. Lurty, 11 La. Ann. 280.

5. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401, 62 Idaho 683.
Miss.—Staple Cotton Co-op. Ass'n v. Borodofsky, 108 So. 807, 143 Miss. 585.
If costs in excess of liability on bond have already been paid, attorney's fees cannot be recovered.—Morris v. Bowen, 153 So. 779, 26 Ala. App. 22, certiorari denied 153 So. 780, 228 Ala. 402.
Penalty of bond as limitation of damages generally see supra § 311.

6. Cal.—Panter v. National Surety Co., 171 P. 803, 36 Cal.App. 44.
Md.—Levy v. Taylor, 24 Md. 282.

7. Mont.—McDermott v. American Bonding Co., 179 P. 828, 56 Mont. 1.
32 C.J. p 479 note 53.
On money invested in materials and supplies
On dissolution of temporary injunction against erection of structure, defendants are entitled to interest on moneys invested in materials and supplies, although first payment due on estimate was not delayed and materials were not incorporated until subsequent time.—Muscoda Bridge Co. v. Worden-Allen Co., 239 N.W. 649, 207 Wis. 22, rehearing denied 240 N.W. 802, 207 Wis. 22.

8. Iowa.—Colby v. Meservey, 52 N. W. 499, 85 Iowa 555.
32 C.J. p 479 note 55.

9. N.H.—Derry Bank v. Heath, 45 N.H. 524.

10. Ariz.—American Surety Co. v. Duvall, 196 P. 457, 22 Ariz. 261.
Md.—Levy v. Taylor, 24 Md. 282.
Wash.—Tacoma v. Sperry, 144 P. 544, 82 Wash. 393.
Interest from date of bond is not recoverable.—American Surety Co. v. Duvall, 196 P. 457, 22 Ariz. 261.

11. Wash.—Tacoma v. Sperry, 144 P. 544, 82 Wash. 393.

12. La.—Cannon v. Labarre, 13 La. 399.

13. U.S.—Oelrichs v. Spain, D.C., 15 Wall. 211, 21 L.Ed. 43.
Mo.—St. Louis, Iron Mt. R. Co. v. Schneider, 30 Mo.App. 620.
Mont.—McDermott v. American Bonding Co., 179 P. 828, 56 Mont. 1.

14. N.Y.—Hosack v. Rogers, 9 Paige 461.
32 C.J. p 480 note 64.

15. Iowa.—Chicago, A. & N. R. Co. v. Whitney, 121 N.W. 1043, 143 Iowa 506.
32 C.J. p 480 note 65.

16. Mont.—McDermott v. American Bonding Co., 179 P. 828, 56 Mont. 1.

17. Iowa.—Chicago, A. & N. Ry. Co. v. Whitney, 121 N.W. 1043, 143 Iowa 506.
32 C.J. p 480 note 67.

18. Md.—Wallis v. Dilley, 7 Md. 237.
32 C.J. p 480 note 68.

19. Mo.—Houston v. Welch, 241 S. W. 991, 211 Mo.App. 300.

20. Md.—Hamilton v. State, 32 Md. 348.
N.Y.—Fuller v. American Surety Co., 275 N.Y.S. 113, 153 Misc. 432.
Tex.—Johnson v. McMahan, Civ.App., 40 S.W.2d 920, error refused—Bass v. City of Clifton, Civ.App., 297 S. W. 872.
32 C.J. p 480 note 72, p 435 note 91.
The appeal bond is only cumulative security, except as to the costs on the appeal, for which it alone is answerable.—Hamilton v. State, 32 Md. 353.
Right to counsel fees on appeal see supra subdivision f of this section.

been held, however, that a bond conditioned to pay damages accruing by reason of the wrongful suing out of the injunction can be held to cover the damages only up to the dissolution of the injunction, and cannot be held to cover any damages which accrue by reason of wrongfully continuing the injunction in force by means of an appeal bond;[21] and that in case of such an appeal and continuance of the injunction, resort must be had to the appeal bond for the recovery of such damages.[22] A bond given for a temporary injunction does not cover damages on appeal from an order making the injunction permanent.[23]

i. Damages Resulting from Plaintiff's Acts or Omissions

Damages caused by plaintiff's voluntary acts or omissions ordinarily are not recoverable.

The party against whom the injunction was wrongfully issued cannot recover for damages caused by his voluntary act or his omission to act when he should do so.[24] Not only should an injunction defendant do nothing to enhance the damages,[25] but it is his duty to do what he reasonably can to diminish them,[26] or at least to use ordinary care to avoid injury.[27] However, he is not bound to incur any hazard or assume unusual risks, and if he adopts such a course as experienced and prudent persons under similar circumstances would regard proper, he is not responsible if another course might have been adopted which would have been equally safe and proper, and which would have reduced the damages.[28]

§ 316. —— Set-Offs and Deductions

The amount of damages recoverable by defendant in the injunction suit is subject to reduction by any receipts or benefits that have accrued to him, and to a counterclaim for damages which grew out of the transaction which gave rise to the injunction.

The amount recoverable by defendant in the injunction suit as damages on dissolution of the injunction must be reduced by any receipts, benefits, and improvements that accrue to him pending the injunction,[29] and is subject to a counterclaim for damages sustained in, and growing out of, the transaction which gave rise to the injunction.[30] However, the general costs of an injunction are not part of the damages awarded on the undertaking and, where they have been paid, cannot be deducted from the damages allowed;[31] nor are sureties entitled to credit for what has been paid on a judgment in an action enjoined where it appears that the unpaid balance exceeds the penalty of the bond.[32]

21. Ill.—Rees v. Peltzer, 1 Ill.App. 315.
32 C.J. p 480 note 73.

22. Ill.—Rees v. Peltzer, supra.

23. Tex.—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372.

24. Ill.—McNevin v. Stoolman, 235 Ill.App. 449.
Ind.—U. S. Fidelity & Guaranty Co. v. State ex rel. Ogden, 5 N.E.2d 115, 104 Ind.App. 21.
Okl.—Wyatt v. Marinoff, 268 P. 224, 131 Okl. 134.
32 C.J. p 480 note 75.

25. N.Y.—Roberts v. White, 73 N. Y. 375.

26. U.S.—I. R. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479.
N.Y.—Roberts v. White, 73 N.Y. 375.

Keeping employed

Defendant during the period of the injunction had the right to keep its business organization intact so as to resume business in the event the injunction was dissolved, but was required to reduce the damages from the suspension of its business by keeping profitably employed.—I. R. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479.

27. Okl.—Wyatt v. Marinoff, 268 P. 224, 131 Okl. 134.
32 C.J. p 480 note 79.

28. N.Y.—Roberts v. White, 73 N.Y. 375.
Vt.—Webb v. Laird, 20 A. 599, 62 Vt. 448, 22 Am.S.R. 121.

29. Ky.—Holliday v. Sphar, 119 S. W.2d 656, 274 Ky. 556—Brandenberg v. Addison, 298 S.W. 1091, 221 Ky. 442.
Tenn.—DaFoe v. Starek, 9 Tenn.App. 668.
32 C.J. p 481 note 98.

Rents received

Where plaintiff was restrained by temporary injunction from fulfilling contract for sale of land, in action on injunction bond, she was not entitled to recover for payments of interest on mortgage on land which prospective purchaser had agreed to assume since plaintiff retained possession and received rents exceeding amount of interest.—Clevenger v. Goltry, 145 N.E. 632, 82 Ind.App. 110.

30. Neb.—Beatty v. Casselman, 211 N.W. 617, 115 Neb. 104.

Damages caused by entry of one who had been enjoined from taking possession of land, as a result of his entry and removal of growing crops, may be counterclaimed.—Tinsley v. Tinsley, 15 B.Mon., Ky., 454.

Where lessee enjoined from erecting engine has obtained an order allowing him to do so under certain restrictions, damages caused by preventing such erection cannot be counterclaimed without showing that the order permitting it has been violated.—Omaha Lith., Etc., Co. v. Simpson, 45 N.W. 261, 29 Neb. 96.

31. N.Y.—Troxell v. Haynes, 16 Abb.Pr.,N.S., 1, 49 How.Pr. 517.
32 C.J. p 481 note 99.

32. U.S.—Jones v. Allen, Ark., 85 F. 523, 29 C.C.A. 318, affirming, C. C., 79 F. 698.
32 C.J. p 482 note 1.

INJURE.

In General

The word "injure" is not a technical term, but it has a popular and well understood meaning[1] and a very wide application.[2]

Ordinary Sense

It has been variously defined as meaning to cause loss or detriment to, to damage and lessen the value of;[3] to damage, to do harm to, or to hurt;[4] to harm;[5] specifically to hurt or wound the person;[6] also to impair or deteriorate in any way;[7] to impair or to impair the soundness of, as health;[8] to make worse[9] or less valuable;[10] to subject to any deleterious or nauseous action or influence;[11] to vex.[12] "Injure" is not referable to, nor is it used in describing, fatal injuries, but it is customarily confined to injuries that are not fatal.[13]

Injured. The participial adjective, or past tense, has been defined as meaning damaged; and always implies a result, rather than a cause.[14]

Technical Sense

While, as indicated in the preceding subdivision the word, "injure" has a popular and less precise signification, the term has an accurate meaning, well known to the law,[15] gathered, no doubt, from its derivation.[16] In its accurate and technical legal sense, it means to deprive of a legal right or rights;[17] to inflict an actionable wrong,[18] or to inflict a damage or detriment upon;[19] to violate or to injure rights;[20] to violate the legal right of another.[21]

Other Terms Compared

It has been said that "injure" is of similar import to, although strictly not interchangeable with, "cheat" see 14 C.J.S. p 1101 in Pocket Parts; and may be synonymous with, and also distinguished from, "defraud" see 26 C.J.S. p 683 notes 12, 15. It has been compared with, or distinguished from, "damage,"[22] "destroy" see 26 C.J.S. p 1246 note 24, "harass" see 39 C.J.S. p 774 note 43, "kill,"[23] and "maim."[24]

"Injured" has been held synonymous with "damaged" see 25 C.J.S. p 444 note 50; and has been compared with, or distinguished from, "destroyed" see 26 C.J.S. p 1247 note 36, "killed,"[25] and "taken" see Eminent Domain § 111.

1. Ky.—Interstate Business Men's Acc. Assoc. v. Dunn, 198 S.W. 727, 728, 178 Ky. 193, 6 A.L.R. 1333.
2. Mo.—State v. Harroun, 98 S.W. 467, 470, 199 Mo. 519.
N.Y.—Christian v. State Conservation Commn., 182 N.Y.S. 347, 348, 191 App.Div. 635.
Has numerous and comprehensive popular meanings
Tex.—Moody v. Levy, 58 Tex. 532, 533.
3. Ohio.—Job v. Harlan, 13 Ohio St. 485, 494.
4. Ill.—Ziolkowski v. Continental Casualty Co., 1 N.E.2d 410, 412, 284 Ill.App. 505—Porter v. Continental Casualty Co., 277 Ill.App. 492, 501.
32 C.J. p 512 notes 6, 8, 10.
5. N.Y.—Christian v. State Conservation Commn., 182 N.Y.S. 347, 348, 191 App.Div. 635.
6. Ill.—Ziolkowski v. Continental Casualty Co., 1 N.E.2d 410, 412, 284 Ill.App. 505—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.
Ohio.—Williamson v. State, 2 Ohio Cir.Ct. 292, 297, 1 Ohio Cir.Dec. 492.
7. Mo.—State v. Associated Press, 60 S.W. 91, 100, 159 Mo. 410, 81 Am.S.R. 368, 51 L.R.A. 151.
32 C.J. p 512 note 13.
8. Ill.—Ziolkowski v. Continental Casualty Co., 1 N.E.2d 410, 412, 284 Ill.App. 505—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.
32 C.J. p 512 note 12.
9. Ohio.—Job v. Harlan, 13 Ohio St. 485, 494.
10. U.S.—The Ferax, D.C.Mass., 8 F. Cas.No.4,737, 1 Sprague 180, 181.
11. Mo.—State v. Harroun, 98 S.W. 467, 470, 199 Mo. 519.
N.Y.—Christian v. State Conservation Commission, 182 N.Y.S. 347, 348, 191 App.Div. 635.
12. Tex.—Biesenbach v. Key, 63 Tex. 79, 81.
13. Ill.—Ziolkowski v. Continental Casualty Co., 1 N.E.2d 410, 412, 284 Ill.App. 505—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.
Ky.—Interstate Business Men's Acc. Assoc. v. Dunn, 198 S.W. 727, 728, 178 Ky. 193.
14. Ariz.—Pierce v. Phelps Dodge Corporation, 26 P.2d 1017, 1020, 42 Ariz. 436.
15. Eng.—Mogul S. S. Co., Ltd. v. McGregor, 23 Q.B.D. 598, 612—Allen v. Flood, 1898, A. C. 1, 93, 17 E.R.C. 285.
16. **Derivation**
"The word comes from the Latin words 'in,' meaning against, and 'jus,' meaning a right, and signifies something done 'against the right' of another person, producing either nominal or substantial damage."—Krom v. Antigo Gas Co., 143 N.W. 163, 164, 154 Wis. 528.
17. **"Unlawfully to deprive a citizen** of the United States of his right to vote at a congressional election is to injure him in any ordinary use of the word 'injure.' "—U. S. v. Stone, D.C.Md., 188 F. 836, 840.
18. Wis.—Krom v. Antigo Gas Co., 143 N.W. 163, 164, 154 Wis. 528.
32 C.J. p 512 note 23.
19. Mo.—State v. Associated Press, 60 S.W. 91, 100, 159 Mo. 410, 81 Am.S.R. 368, 51 L.R.A. 151.
32 C.J. p 512 note 14.
20. Mo.—State v. Harroun, 98 S.W. 467, 470, 199 Mo. 519.
21. Ind.—Trustees of Jennie Depauw Memorial M. E. Church v. New Albany Waterworks, App., 130 N.E. 827, 830.
Wis.—Krom v. Antigo Gas Co., 143 N.W. 163, 164, 154 Wis. 528.
As importing trespass
The term "injure" has been held to be one of several words, all of which contemplate acts of trespass.—State v. Porter, 25 W.Va. 685, 689.
22. Wis.—Krom v. Antigo Gas Co., 143 N.W. 163, 164, 154 Wis. 528.
23. Ohio.—Williamson v. State, 2 Ohio Cir.Ct. 292, 297, 1 Ohio Cir. Dec. 492.
24. **"Maim" compared**
Ala.—Richmond v. State, 58 So. 973, 974, 4 Ala.App. 139.
25. Ky.—Interstate Business Men's Acc. Ass'n v. Dunn, 198 S.W. 727, 728, 178 Ky. 193.
Ohio.—Williamson v. State, 2 Ohio Cir.Ct. 292, 297, 1 Ohio Cir.Dec. 492.

In Phrases

Phrases employing the word are listed in the note.[26] For other phrases as to which more recent adjudications have not been found see 32 C.J. p 512 note 24–p 513 note 50.

IN JURE or IN JUS. See 42 C.J.S. p 489 notes 8, 9.

IN JURE NON REMOTA CAUSA, SED PROXIMA SPECTATUR.[27]

INJURES GRAVES. In French law, grievous insults or injuries.[28]

INJURIA. The Latin word, "injuria," is said to be a technical word,[29] which comes from "in," against, and "jus, juris," right.[30] It means an actionable wrong;[31] injury, wrong, the privation or violation of right;[32] a tortious act, not necessarily willful and malicious,[33] but importing wrong intent;[34] something done against the right of the person, producing damage, and without reference to the fact or amount of damages.[35]

26. Phrases construed

(1) "Injured . . . by accident" see 1 C.J.S. p 446 note 97.

(2) "Injured party" in suits for divorce see Divorce §§ 12, 49 note 79.

(3) "Injure or defraud," as equivalent to "defraud" see 26 C.J.S. p 683 note 12.

(4) "Intent to injure," as meaning intent to do wrongful harm, more than mere intent to harm.—State v. Van Pelt, 49 S.E. 177, 187, 136 N.C. 633, 68 L.R.A. 760, 1 Ann.Cas. 495—32 C.J. p 512 note 9 [a].

(5) "'Of kin' to the 'injured party,'" within a statute relating to the competency of jurors in criminal prosecution, held to refer to a relative of the prosecutrix who signed complaint for assault with intent to rape, since she was the "injured party."—State v. Thomas, Mo., 174 S.W.2d 337, 338. Juror's personal relations generally as affecting his competency see the C.J.S. title Juries § 228, also 35 C.J. p 331 note 96–p 332 note 21.

(6) "Party injured," has been held equivalent to "party so damaged" see 25 C.J.S. p 444 note 61, and has been said to mean the party "wronged by the action of the other."—Byers v. Byers, 25 S.E.2d 466, 469, 223 N.C. 85—Lee v. Lee, 108 S.E. 352, 182 N.C. 61.

(7) "Person injured."

Colo.—Lee v. City of Ft. Morgan, 235 P. 348, 349, 77 Colo. 348.

Iowa.—State v. Ousley, 147 N.W. 849, 850, 166 Iowa 607.

Or.—Cash v. Portland Ry., Light & Power Co., 179 P. 909, 911, 92 Or. 31.

Tex.—City of Dallas v. Shows, Com. App., 212 S.W. 633, 634.

Vt.—Eames v. Brattleboro, 54 Vt. 471, 475.

32 C.J. p 513 note 45.

(8) "Person so injured," as applied to one injured in his property.—Dohring v. Kansas City, 71 S.W.2d 170, 173, 228 Mo.App. 519.

(9) "With intent to injure or endanger the safety of the vessel, or of her cargo, or of persons on board" construed as having the natural meaning, fully expressed, of "with intent to injure the vessel, her cargo, or persons on board, or to endanger the safety of the vessel, or her cargo, or of persons on board," for while "endanger the safety" is a common expression, "injure the safety" is a most unusual expression, since injury is commonly affirmed as done to a person or a concrete thing rather than to an abstract idea like "safety."—Marchese v. U. S., C.C.A. Fla., Ga., La., Tex., 126 F.2d 671, 674.

27. A maxim meaning "In law, the proximate and not the remote cause is regarded."—Black L.D.

See also Causa Proxima Non Remota Spectatur 14 C.J.S. p 41 note 86.

Applied or explained in

Kan.—Rodgers v. Missouri Pac. R. Co., 88 P. 885, 75 Kan. 222, 223, 121 Am.S.R. 416, 10 L.R.A.,N.S., 658, 12 Ann.Cas. 441.

Mass.—Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 33 N.E. 691, 692, 158 Mass. 570, 35 Am.S.R. 540, 20 L.R.A. 297.

32 C.J. p 513 note 51 [a].

Slightly different wording of maxim

"In jure non remota causa, sed proxima specta."—Houston & T. C. R. Co. v. Maxwell, 128 S.W. 160, 163, 61 Tex.Civ.App. 80.

Similarly rendered

(1) "In law the immediate not the remote cause of any event is regarded."—Carlston v. Municipal Council, 7 Newfoundl. 509, 515.

(2) "In law, the proximate and not the remote cause is to be looked into."—Bouvier L.D.

"Proxima" in the maxim held not to mean necessarily the cause or agency nearest in point of time or place.

Mass.—Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 33 N.E. 691, 692, 158 Mass. 570, 35 Am.S.R. 540, 20 L.R.A. 297.

N.Y.—Bird v. St. Paul F. & M. Ins. Co., 167 N.Y.S. 707, 708, 180 App. Div. 470.

Tex.—Houston & T. C. R. Co. v. Maxwell, 128 S.W. 160, 163, 61 Tex.Civ. App. 80.

28. Black L.D.

Personal insults and reproachful language are included in the "injures graves"—grievous insults—which are by the Code Napoleon made a just cause of divorce, but are not, either in terms or by implication, made under our law the cause for the dissolution of the marriage bond.—Butler v. Butler, 1 Pars. Eq. Cas.,Pa., 329, 346. See generally Divorce § 24 et seq.

29. N.Y.—Addington v. Allen, 11 Wend. 374, 408.

30. U.S.—King v. Lamborn, Idaho, 186 F. 21, 28, 108 C.C.A. 123.

W.Va.—West Virginia Transp. Co. v. Standard Oil Co., 40 S.E. 591, 592, 50 W.Va. 611, 88 Am.S.R. 895, 56 L.R.A. 804.

31. N.C.—Bennett v. Winston-Salem Southbound R. Co., 87 S.E. 133, 135, 170 N.C. 389, L.R.A.1916D 1074.

32. Black L.D.

33. N.Y.—Barnes v. Allen, 1 Abb. Dec. 111, 117, 1 Keyes 390.

32 C.J. p 513 note 57.

34. More than wrong act

"The technical word injuria means not simply a wrong act, but a wrong act with a wrong intent."—Addington v. Allen, 11 Wend.,N.Y., 374, 408.

35. U.S.—King v. Lamborn, Idaho, 186 F. 21, 28, 108 C.C.A. 123.

W.Va.—West Virginia Transp. Co. v. Standard Oil Co., 40 S.E. 591, 593, 50 W.Va. 611, 88 Am.S.R. 895, 56 L.R.A. 804.

"The injuria of the Roman law, sometimes translated injury and at other times outrage, and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of property which are enumerated in all of the commentaries on the common law, and which are so familiar to every one at this time. But it included more. An outrage was committed not only by striking with the fists, or with the club or lash, but also by shouting until a

In the civil law, "injuria" means generally injury, or injustice.[36]

"Injuria" has been distinguished from "damnum" see 25 C.J.S. p 996 note 19.

In Spanish, the word "injuria," besides the broad general meaning, above indicated, of anything against justice, reason, or right, has a peculiar, specific meaning restricted to whatever one does, says, or writes with the intent to disgrace or discredit another or hold him up to contempt, ridicule, or scorn,[37] the Spanish word being compared with, or distinguished from, "calumnia" see 12 C.J.S. p 887 note 78.

A brief discussion of "injuria" in Spanish criminal law, with citations of the applicable articles of the penal codes is contained in 32 C.J. p 514 notes 60–73. Analogous subject matter in American law is treated in the C.J.S. title Libel and Slander § 281 et seq, also 37 C.J. p 138 note 39 et seq.

INJURIA FIT EI CUI CONVICIUM DICTUM EST, VEL DE EO FACTUM CARMEN FAMOSUM.[38]

INJURIA ILLATA JUDICI, SEU LOCUM TENENTI REGIS VIDETUR IPSI REGI ILLATA MAXIME SI FIAT IN EXERCENTEM OFFICIUM.[39]

INJURIA NON EXCUSAT INJURIAM.[40]

INJURIA NON FIT VOLENTI.[41]

INJURIA NON PRÆSUMITUR.[42]

INJURIA PROPRIA NON CADET BENEFICIUM FACIENTIS.[43]

INJURIA SERVI DOMINUM PERTINGIT.[44]

INJURIOUS. That which is hurtful, disturbs happiness, impairs rights, or prevents their enjoyment.[45] The term implies a real, not a fanciful, disturbing cause,[46] and is the opposite of "first-class" see 36 C.J.S. p 824 note 39.

Phrases employing the word are set out in the note.[47]

INJURIOUSLY. In an injurious or hurtful manner; wrongfully; mischievously; abusively; maliciously.[48]

crowd gathered around one; and it was an outrage, or legal wrong, to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed 'by numberless other acts.'"—Pavesich v. New England L. Ins. Co., 50 S.E. 68, 71, 122 Ga. 190, 106 Am.S.R. 104, 69 L.R.A. 101, 2 Ann.Cas. 561.

36. Escriche Diccionario.
32 C.J. p 513 note 59.

"Injuria absque damno"

Injury or wrong without damage. A wrong done, but from which no loss or damage results, and which, therefore, will not sustain an action. —Black L.D. See also Damnum Absque Injuria, 25 C.J.S. p 996 notes 21–24.

"Injuria sine damno"

(1) A wrong without damage.—Purdy v. Manhattan El. R. Co., 13 N.Y.S. 295, 297.

(2) It has been contrasted with "wrong."—Western Union Tel. Co. v. Ferguson, 60 N.E. 674, 676, 157 Ind. 64, 54 L.R.A. 846.

37. Escriche Diccionario, citing Spanish Pen Code lib II tit X caps II, III.

38. A maxim meaning "An injury is done to him of whom a reproachful thing is said or concerning whom an infamous song is made."—Black L.D., citing Lamb's Case, 9 Coke 59b, 60a, 77 Reprint 822.

39. A maxim meaning "An injury offered to a judge or person representing the king, is considered as offered to the king himself, especially if it be done in the exercise of his office."—Black L.D.

40. A maxim meaning "A wrong does not excuse a wrong."—Trayner Leg.Max.

Applied in Mogul S. S. Co., Ltd. v. McGregor, 23 Q. B. D. 598, 604—Hilton v. Eckersley, 6 E. & B. 47, 76, 88 E.C.L. 47, 119 Reprint 781.

Similarly rendered

"One wrong does not justify another."—Black L.D.

41. A variant form of the maxim "Volenti Non Fit Injuria" meaning, "An injury is not done to him who wills it." See 67 C.J. p 270 note 4.

Applied in Johnson v. New York, 78 N.E. 715, 718, 186 N.Y. 139, 116 Am.S.R. 545, 9 Ann.Cas. 824.

42. A maxim meaning "Wrong is not presumed."—Traynor Leg.Max.

Applied in State v. Townley, 18 N.J.Law 311, 317.

Similarly rendered

"Injury is not presumed;" that is, "Cruel, oppressive, or tortious conduct will not be presumed."—Black L.D.

43. A maxim meaning "One's own wrong shall not fall to the advantage of him that does it."—Black L.D.

More freely rendered

(1) "No one shall profit by his own wrong."—Bouvier L.D.

(2) "A man will not be allowed to derive benefit from his own wrongful act."—Black L.D.

44. A maxim meaning "The master is liable for injury done by his servant."—Black L.D.

45. N.Y.—Rowland v. Miller, 15 N.Y.S. 701.

46. Something more than mere delicacy or fastidiousness; but it need not necessarily be apparent to the senses of sight, smell, or hearing, for it may be injurious without offending any of them.—Rowland v. Miller, supra.

47. Phrases construed

(1) "Injurious accident."—Pennsylvania R. Co. v. Raiordon, 13 A. 324, 119 Pa. 577, 583, 4 Am.S.R. 670.

(2) "Injurious or offensive to the neighboring inhabitants."—Rowland v. Miller, 15 N.Y.S. 701.

(3) "Injurious to health."—Lexington Mill & Elevator Co. v. U. S., Mo., 202 F. 615, 619, 121 C.C.A. 15.

(4) "Injurious words," in Louisiana, slander; libelous words.—Black L.D. See generally the C.J.S. title Libel and Slander, § 1, also 36 C.J. p 1146 notes 58–61; and §§ 14, 15, also 36 C.J. p 1165 note 34–p 1166 note 56.

(5) "What is injurious," contrasted with "benefit" see 10 C.J.S. p 339 note 85.

48. Century D.

Phrases construed

(1) "Injuriously affected," has

INJURY.

In General

A generic term,[49] which, in ordinary modern usage, is of very broad designation,[50] having more than one meaning,[51] for, as indicated in the following subdivisions, it may have a legal import as well as numerous and comprehensive popular meanings. The exact signification of the word "injury" has been considered and discussed by courts on numerous occasions, and their rulings are not always harmonious,[52] since it is often difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts.[53] In the broad sense, the term includes injury to person, property, reputation, and rights.[54]

References to particular applications or specific uses of the word are set out in the note.[55]

General and Popular Sense

The word "injury" has numerous and comprehensive popular meanings,[56] which, however, may be grouped under two general heads: It may indicate a hurt, as distinguished from the infliction of the hurt; or it may indicate the infliction of a hurt, as distinguished from the hurt inflicted.[57] In the latter sense, it has been defined as an act resulting in damage;[58] an act which damages, harms, or hurts;[59] detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing;[60] a source of harm;[61] a wrong;[62] every wrong, everything that is not done rightfully;[63] whatever reduces the utility or mars the integrity of the body;[64] and, in the former sense, as meaning damage, detriment, or harm;[65] damage or hurt done to, or suffered by, a person or thing;[66] detriment to property or interests, or to the value of a thing;[67]

been held synonymous with "damaged" see 25 C.J.S. p 444 note 51; and has been contrasted with "actually taken" in State v. Hoblitt, 288 P. 181, 185, 87 Mont. 403.

(2) "Injuriously and wrongfully," as including "unlawfully" see Indictments and Informations § 136.

49. U.S.—Standard Life & Accident Ins. Co. v. McNulty, Colo., 157 F. 224, 225, 85 C.C.A. 22.

50. Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.
32 C.J. p 515 note 92.

51. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 172, 228 Mo.App. 519.

52. Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 183 Cal. 273.

53. N.J.—Roessler & Hasslacher Chemical Co. v. Doyle, 64 A. 156, 159, 73 N.J.Law 521.

54. Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 809, 138 Wis. 133, 20 L.R.A.,N.S., 1175.

55. Cross references

(1) Admiralty jurisdiction over suits for injuries see Admiralty §§ 59–65.

(2) Bankrupt's right of action arising from injury to property as vesting in trustee see Bankruptcy § 194 a.

(3) Constitutional guaranty of a remedy for injuries to person or property see Constitutional Law § 709 c.

(4) Injuries by, or to, animals see Animals §§ 142–254.

(5) Injury as reversible error see Criminal Law § 1088 a.

(6) "Injury," or "injuries," within compensation acts see the C.J.S. title Workmen's Compensation Acts §§ 152–265, also 71 C.J. p 559 note 61–p 772 note 34.

(7) Injury to business see such C.J.S. titles as Attachment § 179 c (5), § 559 notes 34–37; Bridges § 43 b; Conspiracy §§ 10, 12, 20, § 24 note 33, § 33 notes 72–76, § 65; Damages §§ 42, 55, 80 note 81, § 90 notes 12–15, § 121 note 2, § 199 note 63; Eminent Domain § 111 note 67, §§ 162, 274 note 44, § 446 note 79; Libel and Slander §§ 32–52, also 36 C.J. p 1180 note 2–p 1192 note 22, § 164, also 37 C.J. p 30 notes 7–17, § 170, also 37 C.J. p 38 notes 40–45; Municipal Corporations § 1248, also 44 C.J. p 441 note 90–p 442 note 97; Nuisances § 19, also 46 C.J. p 680 notes 94–96; Sequestration § 21, also 57 C.J. p 269 notes 43, 44; Sheriffs and Constables § 74, also 57 C.J. p 841 notes 89–93; and Threats and Unlawful Communications § 3, also 62 C.J. p 934 notes 51–58.

(8) Injury to reputation see such C.J.S. titles as Actions § 92 b (2) (4); Arrest § 25 c notes 38–44; Attachment § 179 c notes 93–95, § 545 b note 18, § 559 notes 49, 50; Conspiracy § 16 note 28, §§ 59, 63; Libel and Slander § 1, also 36 C.J. p 1142 notes 21–33, §§ 13–31, also 36 C.J. p 1163 note 19–p 1180 note 1, § 283, also 37 C.J. p 139 note 54–p 140 note 89; and Sequestration § 21, also 57 C.J. p 269 notes 45–47.

56. Tex.—Moody v. Levy, 58 Tex. 532, 533.

57. U.S.—Spaunhorst v. Equitable Life Assur. Soc. of U. S., D.C.Mo., 14 F.Supp. 154, 155.

58. Wis.—Wells v. Wisconsin River Power Co., 167 N.W. 445, 446, 167 Wis. 345.

59. U.S.—Spaunhorst v. Equitable Life Assurance Society of U. S., D.C.Mo., 14 F.Supp. 154, 155.

Mo.—Myers v. Independence, 189 S. W. 816, 823.

N.Y.—Ritchie v. Standard Surety & Casualty Co. of New York, 13 N. Y.S.2d 1022, 1023, 257 App.Div. 545.

60. Ill.—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.

61. Cal.—San Francisco v. Industrial Acc. Commission, 191 P. 26, 183 Cal. 273, 275.

62. Ky.—Randolph v. Snyder, 129 S. W. 562, 564, 139 Ky. 159.
32 C.J. p 515 note 9.

63. Mo.—Hartridge v. St. Louis United R. Co., App., 196 S.W. 59, 61.

N.Y.—Ayers v. Lawrence, 59 N.Y. 192, 197.

64. Ill.—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.

65. Ill.—Gillman v. Chicago R. Co., 109 N.E. 181, 182, 268 Ill. 305.

Ohio.—Cincinnati St. Ry. Co. v. Clock, 197 N.E. 592, 593, 50 Ohio App. 139.

66. Ill.—Porter v. Continental Casualty Co., 277 Ill.App. 492, 500.

N.Y.—Ritchie v. Standard Surety & Casualty Co. of New York, 13 N. Y.S.2d 1022, 1023, 257 App.Div. 545.

Requires an object

Injury is commonly affirmed as done to a person or concrete thing.—Marchese v. U. S., C.C.A.Fla., Ga., La., Tex., 126 F.2d 671, 674.

67. U.S.—Tamm v. Ford Motor Co., C.C.A.Mo., 80 F.2d 723, 727.

Similarly expressed

Something affecting the capacity of the property for ordinary use, or causing a discomfort in the enjoyment of it that threatens the health or welfare of the occupant, with resultant injury to the property.—Essick v. Shillam, 32 A.2d 416, 418, 347 Pa. 373, 146 A.L.R. 1399.

hurt;[68] hurt or loss caused to, or sustained by, a person;[69] any wrong, damage, or mischief done or suffered;[70] a wrong or damage done to another,[71] either in his person, rights, reputation, or property;[72] any wrong or damage done to that which is good or valuable.[73] Examples illustrating the scope of the term, used in its popular sense, are set out in the note.[74]

Legal Sense

In harmony with the legal concept or principle that no cause of action arises from the doing of a lawful act or the exercise of a legal right if done or exercised in a lawful manner, discussed in Actions § 15 b, the word "injury" in a legal sense connotes "wrong,"[75] implies violation of a legal right,[76] and, as in the popular sense, supra note 57, it may sometimes be used to indicate either the invasion of a right or the damages resulting from such invasion, the word being frequently used indiscriminately in these two different senses.[77] So in common use, it is employed broadly enough to cover both the damnum and the injuria of the common law, and at this day its common and approved legal usage extends to and includes any hurtful or damaging effect which may be suffered by anyone,[78] and is often used even in statutes and other instruments, not in its technical legal sense, but in its popular and usual sense,[79] as meaning damage resulting from an unlawful act[80] or from a violation of a legal right.[81] In the strict sense of the law, however, especially the common law, its meaning corresponds to its etymology,[82] discussed in the definition of the word "injure" ante p 1109 note 16, and it has been said that the word has a legal import,[83] having acquired in law a well defined and well understood meaning,[84] so that its generally accepted legal definition is more restricted.[85] It means a wrongful invasion

68. Mont.—Ryan v. Ryan, 34 P. 494, 496, 33 Mont. 406.
32 C.J. p 515 note 17.

Physical hurt
As commonly used "injury" has been said to refer to a physical hurt rather than to include mental suffering caused by outrage to one's feelings and self-respect.—Hartridge v. St. Louis United R. Co., Mo.App., 196 S.W. 59, 61.

69. Ohio.—Cincinnati St. Ry. Co. v. Clock, 197 N.E. 592, 593, 50 Ohio App. 139.

70. Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 183 Cal. 273, 275.

71. Cal.—San Francisco v. Industrial Acc. Commn., supra.
Okl.—Andrews Mining & Milling Co. v. Atkinson, 135 P.2d 960, 962.
32 C.J. p 515 note 7.

72. N.C.—Hitch v. Edgecombe County, 44 S.E. 80, 132 N.C. 573, 575.
32 C.J. p 515 note 7.

73. N.Y.—Utica v. Blakeslee, 46 How.Pr. 165, 167.

74. Scope of term discussed
(1) In the usual meaning, that is, in the sense of hurt or damage it has been said that "injury" includes damages or injuries resulting to relative rights as well as direct injuries or injuries to absolute rights.—David v. City of St. Louis, 96 S.W. 2d 353, 356, 339 Mo. 241, 106 A.L.R. 849, citing **Corpus Juris.**

(2) In common speech, the word "injury," as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.
Ind.—Wasmuth-Endicott Co. v. Karst, 133 N.E. 609, 610, 77 Ind. App. 279.
Mass.—In re Burns, 105 N.E. 601, 603, 218 Mass. 8, Ann.Cas.1916A 787.
Va.—Burlington Mills Corporation v. Hagood, 13 S.E.2d 291, 293, 177 Va. 204.

(3) The word "injury" may be used in a sense to include all of the harm done to a person.—Hansen v. Dakota Transp. Co., 273 N.W. 261, 264, 65 S.D. 277.

(4) It may include an injury from strain or overexertion due to a physical condition which predisposes one to injury.—Herron Lumber Co. v. Neal, 172 S.W.2d 252, 254, 205 Ark. 1093, citing **Corpus Juris.**

(5) Under particular circumstances "injury" may be applicable to, or may include disease.
Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 28, 29, 183 Cal. 273—Bianco v. Industrial Accident Commission, App., 142 P.2d 73, 77—Bonner v. Industrial Accident Commission, App., 140 P.2d 1000, 1003.
Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.

(6) The term sometimes connotes a compensable injury and is correlated to an incapacity or disability justifying a compensatory award.—Bianco v. Industrial Accident Commission, supra.

(7) Hard work is not an "injury" although it may augment an injury, or accelerate the injurious results of an accident.—Bishop v. Morrison-Knudsen Co., Idaho, 137 P.2d 963, 967.

(8) Pregnancy, being a natural condition for a married woman, is not an "injury."—Carter v. Howard, 86 P.2d 451, 455, 160 Or. 507.

75. N.J.—State v. Rombolo, 103 A. 203, 204, 91 N.J.Law 560.

76. U.S.—Keogh v. Chicago & N. W. Ry. Co., Ill., 43 S.Ct. 47, 49, 260 U.S. 156, 67 L.Ed. 183—Maltz v. Sax, C.C.A.Ill., 134 F.2d 2, 4.

77. Ill.—Gillman v. Chicago R. Co., 109 N.E. 181, 182, 268 Ill. 305.

78. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 172, 228 Mo.App. 519, quoting **Corpus Juris.**
32 C.J. p 516 notes 30, 31.

As effect
Under particular circumstances, it has been defined as effect on the result.—State v. Reddington, 64 N.W. 170, 171, 7 S.D. 368.

79. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 172, 228 Mo.App. 519, quoting **Corpus Juris.**
32 C.J. p 516 note 32.

80. Minn.—Bohn Mfg. Co. v. Hollis, 55 N.W. 1119, 1121, 54 Minn. 223, 40 Am.S.R. 319, 21 L.R.A. 337.
32 C.J. p 515 note 12.

81. R.I.—Macauley v. Tierney, 33 A. 1, 2, 19 R.I. 255, 61 Am.S.R. 770, 37 L.R.A. 455.

82. Cal.—San Francisco v. Industrial Accident Commission, 191 P. 26, 27, 183 Cal. 273.
Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.

83. Tex.—Moody v. Levy, 58 Tex. 532, 533.

84. Mich.—Cooke v. Holland Furnace Co., 166 N.W. 1013, 1015, 200 Mich. 192, L.R.A.1918E 552.

85. Wis.—Wisconsin Tel. Co. v. Railroad Commn., 156 N.W. 614, 620, 162 Wis. 383, L.R.A.1916E 748.

of legal rights, and is not concerned with the hurt or damage resulting from such invasion,[86] being thus used in the familiar law phrase "damage without injury," or its Latin equivalent, "damnum absque injuria,"[87] and therefore, in its strict, technical, legal sense, "injury" has been defined to be a legal wrong as would be the subject of an action for damages at common law;[88] an actionable wrong;[89] an actionable wrong to property in the abstract, as distinguished from a physical hurt or damage to a specific article of property;[90] the deprivation of a legal right;[91] something for which an action will lie in behalf of the injured person;[92] a tort;[93] the unlawful infringement or privation of a right;[94] a wrong done to a person, or, in other words, a violation of his right;[95] a wrongful act or tort which causes loss or harm to another.[96]

In the civil law. A delict committed in contempt or outrage of anyone, whereby his body, his dignity, or his reputation is maliciously injured.[97]

Other Terms Compared

Synonyms or equivalents: "Accident" see 1 C.J.S. p 434 note 64, "damage" see Actions § 15 a notes 54, 55, "disability" see 26 C.J.S. p 1323 note 60, "legal injury,"[98] "loss,"[99] and "wrongful act or neglect."[1]

Compared with, or distinguished from: "Accident" see 1 C.J.S. p 429 note 38, p 434 note 65, "damage" see Actions § 15 a notes 56–58, "death,"[2] "destruction" see 26 C.J.S. p 1247 note 58, "disability" see 26 C.J.S. p 1323 note 65, "disease" see 27 C.J.S. p 143 note 87, "incapacity" see 42 C.J.S. p 500 note 86, "loss,"[3] "loss of life,"[4] "pecuniary loss,"[5] and "wound."[6]

"Wanton injury." Generally speaking, a "wanton injury" is one which is inflicted in disregard of another's rights;[7] more specifically, the conscious doing of some act or omission of some duty under knowledge of existing conditions and with the consciousness that from the doing of such act or omission of such duty injury will likely or probably re-

In judicial proceedings
It should be used intelligently and with due regard to its proper meaning.—Pennsylvania R. Co. v. Marchant, 13 A. 690, 696, 119 Pa. 541, 558, 4 Am.S.R. 659.

86. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 172, 228 Mo.App. 519, quoting **Corpus Juris.**
32 C.J. p 516 note 28.

87. Cal.—San Francisco v. Industrial Accident Commission, 191 P. 26, 27, 183 Cal. 273.
Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.
See also Actions § 15, and 25 C.J.S. p 996 notes 21–24.

88. Wash.—Smith v. St. Paul, M. & M. R. Co., 81 P. 840, 844, 39 Wash. 355, 109 Am.S.R. 889, 70 L.R.A. 1018.
32 C.J. p 516 note 33.

89. U.S.—Tamm v. Ford Motor Co., C.C.A.Mo., 80 F.2d 723, 727.
Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 172, 228 Mo.App. 519, quoting **Corpus Juris.**
32 C.J. p 516 note 34.

90. U.S.—Tamm v. Ford Motor Co., C.C.A.Mo., 80 F.2d 723, 727.

91. Colo.—Brittle Silver Co. v. Rust, 51 P. 526, 529, 10 Colo.App. 463.
32 C.J. p 516 note 37.

92. N.C.—Hitch v. Edgecombe County, 44 S.E. 80, 132 N.C. 573, 675.

93. Ky.—Randolph v. Snyder, 129 S.W. 562, 564, 139 Ky. 159.
32 C.J. p 516 note 35.

94. Pa.—Manning v. Klein, 1 Pa.Super. 210, 217.

95. Conn.—Sharkey v. Skilton, 77 A. 950, 952, 83 Conn. 503.
32 C.J. p 516 note 36.

Violation of right essential
"The term 'injury,' as used in the maxim [That to which a person assents is not esteemed in law an injury] is not synonymous with 'damage.' To constitute an injury in the sense there expressed, there must be a violation of some legal right; while damage is the harm, detriment or loss sustained by reason of the injury."—Carleton v. Fairbanks, 93 A. 462, 88 Vt. 537, 550.

96. Ind.—North Vernon v. Voegler, 2 N.E. 821, 824, 103 Ind. 314.

Injuries from judicial proceedings
N.Y.—McGune v. Palmer, 28 N.Y.Super. 607, 608—Wordsworth v. Lyon, 5 How.Pr. 463, 464.

Legal justification
"The word 'injury,' as generally used, includes any act or omission which harms or damages another, whether it be or be not justified by law."—Barry v. McCollom, 70 A. 1035, 81 Conn. 293, 297, 129 Am.S.R. 215.

Nonfeasance
Injury may arise "by nonfeasance or the not doing what was a legal obligation or duty."—Randolph v. Snyder, 129 S.W. 562, 564, 139 Ky. 159, 164.

97. Black L.D.

98. **"Injury" construed as "legal injury"**
Pa.—Jackman v. Rosenbaum Co., 106 A. 238, 241, 268 Pa. 158.

99. Iowa.—Geo. Birrell, Inc. v. Fidelity & Casualty Co. of New York, 188 N.W. 26, 29, 193 Iowa 860.
Ky.—Drury v. Franke, 57 S.W.2d 969, 982, 247 Ky. 758, 88 A.L.R. 917.
Tex.—United Service Automobile Ass'n v. Miles, Com.App., 161 S.W.2d 1048, 1050, citing **Corpus Juris**—Miles v. United Services Automobile Ass'n, Civ.App., 149 S.W.2d 233, 235.

1. N.H.—Yeaton v. Boston & M. R. Co., 61 A. 522, 524, 73 N.H. 285.

2. **"'Injury' and 'death' are by no means synonymous"**
Ga.—New v. Southern R. Co., 42 S.E. 391, 392, 116 Ga. 147, 59 L.R.A. 115—Seaboard Air-Line R. Co. v. Smith, 60 S.E. 353, 354, 3 Ga.App. 644.

3. Mont.—Nelson v. Great Northern Ry. Co., 72 P. 642, 648, 28 Mont. 297.

4. Ky.—Interstate Business Men's Assoc. v. Dunn, 198 S.W. 727, 729, 178 Ky. 193, 6 A.L.R. 1333.

5. Mont.—Stillwell v. Rankin, 174 P. 186, 187, 55 Mont. 130.

6. **Injury is a broader term than "wound"**
Mo.—State v. Henggeler, 278 S.W. 743, 746, 312 Mo. 15.

7. Pa.—Collins v. Rosenberg, 161 A. 580, 106 Pa.Super. 269.
Wash.—Hiatt v. Northern Pac. Ry. Co., 244 P. 994, 995, 138 Wash. 558.

sult,[8] an injury produced by conscious and intentional wrongful act, or omission of known duty with reckless indifference to consequences.[9]

"Wanton injury" has been said to be the moral equivalent of "intentional injury," although strictly differing therefrom, see infra note 52; similarly as to "willful or intentional injury;"[10] and it has been contrasted with an injury caused by breach of the duty to exercise ordinary care or by mere actionable negligence.[11]

In Phrases

The word "injury" or "injuries" occurs in numerous phrases as indicated in this subdivision.

"Absolute injuries." Absolute injuries are injuries to those rights which a person possesses as a member of society.[12] Among absolute injuries to the person are classed batteries, injuries to health, libel, malicious prosecutions, and slander.[13]

"Injury to the person" or *"Personal injury."* These words have been given in many connections a comprehensive definition.[14] They have been extensively applied and variously construed in such C.J.S. titles as Assault and Battery §§ 7, 12, 18, 19, 68, 72, 79, 92, 93, 123; Damages §§ 25, 31, 36, 47, 56–70, 81, 86, 87, 93, 94, 121 b, 135, 146–150, 185, 198; Homicide §§ 114–130; Master and Servant § 171 et seq, also 39 C.J. p 259 note 27 et seq; Motor Vehicles § 168 et seq, also 42 C.J. p 833 note 42 et seq; Negligence § 6, also 45 C.J. p 661 note 32–p 662 note 37, § 23 et seq, also 45 C.J. p 740 note 87 et seq; Workmen's Compensation Acts §§ 152–265, also 71 C.J. p 559 note 61–p 772 note 64; §§ 289–320, also 71 C.J. p 793 note 1–p 853 note 95; and others referred to in 32 C.J. p 520 note 97 and in the Descriptive-Word Index.

In general, a "personal injury" is an injury to the person of an individual;[15] but in its exact and legal significance is the equivalent of "personal wrong," and in a restrictive sense is the equivalent of "bodily injury."[16] Although authorities may be found which construe the phrase "injury to the person" to mean only such injury as would support an action for trespass vi et armis,[17] it is not confined to the instances where the wrong can be described technically as trespass to the person vi et armis,[18] for the phrase "personal injuries" is not necessarily limited to bodily or physical injuries,[19] but may include acts which do not involve physical contact with the person injured;[20] and the words "injuries to the person" have been judicially held to include injuries to the relative rights of persons[21] as well as injuries to their absolute rights.[22] Specifically, "personal injury" has been defined as including libel, slander, criminal conversation, seduction, and malicious prosecution; also assault, battery, false imprisonment, or other actionable injury to the person.[23]

8. Ala.—Duke v. Gaines, 140 So. 600, 601, 224 Ala. 519.

More than mere knowledge of danger

"When an act is done or omitted under circumstances and conditions, known to the person, that his conduct is likely to or probably will result in injury, and through reckless indifference to consequences, or consciously and intentionally, one does a wrongful act, or omits an act which he ought to have done, the injury inflicted may be said to be wanton. In such cases, it is, however, essential that the act done or omitted should be done or omitted with a knowledge and present consciousness that injury would probably result; and this consciousness is not to be implied from a mere knowledge of the dangerous situation."—Birmingham Railway, Light & Power Co. v. Drennen, 57 So. 876, 879, 175 Ala. 338, Ann.Cas.1914C 1037.

9. Ala.—Duke v. Gaines, 140 So. 600, 224 Ala. 519.

10. **The two phrases considered**

"While as to liability and the defenses which may be interposed, there is no difference between 'wanton injury' and 'willful or intentional injury,' there is a well-recognized distinction in the elements of these two classes of wrongs."—Central of Georgia Ry. Co. v. Corbitt, 118 So. 755, 756, 218 Ala. 410.

11. Wis.—Turtenwald v. Wisconsin Lakes Ice & Cartage Co., 98 N.W. 948, 949, 121 Wis. 65.

12. Black L.D.

13. Ga.—Johnson v. Bradstreet, 13 S.E. 250, 251, 87 Ga. 79.
N.C.—Tisdale v. Eubanks, 104 S.E. 339, 340, 180 N.C. 153.

14. Mass.—In re Hurle, 104 N.E. 336, 337, 217 Mass. 223, L.R.A. 1916A 279, Ann.Cas.1915C 919.

15. Ind.—Terre Haute Electric R. Co. v. Lauer, 52 N.E. 703, 706, 21 Ind.App. 466.

16. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 173, 228 Mo.App. 519.
32 C.J. p 520 notes 99, 1.

17. Mont.—McKenzie v. Doran, 104 P. 677, 678, 39 Mont. 593.

18. Mass.—In re Hurle, 104 N.E. 336, 337, 217 Mass. 223, L.R.A. 1916A 279, Ann.Cas.1915C 919.

19. Colo.—Williams v. Williams, 37 P. 614, 620, 20 Colo. 51.
Pa.—McCaffrey v. Jackson, 23 Pa. Dist. 173, 174.

20. Colo.—Williams v. Williams, 37 P. 614, 620, 20 Colo. 51.
N.Y.—Riddle v. MacFadden, 94 N.E. 644, 645, 201 N.Y. 215, dismissing appeal 115 N.Y.S. 1142, 130 App. Div. 898—Bennett v. Bennett, 23 N.E. 17, 116 N.Y. 584, 6 L.R.A. 553.
Pa.—McCaffrey v. Jackson, 23 Pa. Dist. 173, 174.

Mental or physical

Personal injuries may be either bodily or mental, but, whether one or the other, they infringe on the rights of the person, and not of property; and any mental injury is necessarily an injury to the person. —Morton v. Western Union Tel. Co., 41 S.E. 484, 485, 130 N.C. 299.

21. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 173, 228 Mo.App. 519, quoting **Corpus Juris.**
Pa.—McCaffrey v. Jackson, 23 Pa. Dist. 173, 174.

22. Mo.—Dohring v. Kansas City, 71 S.W.2d 170, 173, 228 Mo.App. 519, quoting **Corpus Juris.**
32 C.J. p 520 note 8.

23. Md.—New York, P. & N. R. Co. v. Waldron, 82 A. 709, 714, 116 Md. 441, 39 L.R.A.,N.S., 502.
N.Y.—Riddle v. MacFadden, 94 N.E. 644, 201 N.Y. 215—Keeler v. Dun-

When referring to physical or bodily injuries, there are two classes of personal injuries, those that are fatal, and those that are not fatal. Using "injuries" as a generic term, the phrase naturally includes injuries of both classes because one of either class is an injury, and the obvious and ordinary meaning of that word is all injuries, whether fatal or not.[24] The term, however, is known by its associates and by the sense in which it is used in other parts of the same contract or in similar agreements,[25] and consequently sometimes it may not include injuries resulting in death.[26] Considered from another point of view, and in a limited meaning, when "personal injuries" are spoken of there are apt to be meant only bodily injuries suffered through violence in some form or to some extent, that is, traumatic injuries.[27] On the other hand, when these phrases are used in the sense of "bodily injury," in its broad sense, they may mean not only bodily injury suffered by or resulting from violence, but may cover any harmful effect upon the body whether by violence or by disease;[28] and the terms are frequently used in both the broader and the more limited senses.[29] In the following notes examples are cited of what the phrases have been held to include[30] and not to include.[31]

"Personal injury" and "injury to the person" may be equivalent to "bodily harm" see 11 C.J.S. p 375 note 26, "bodily injury" see 11 C.J.S. p 377 notes 78, 79, "disturbance in body" see 27 C.J.S. p 493 note 34, and "private wrong."[32] The expression "injury to the person" is said to be more restrictive than the term "personal injuries" and is to be dis-

ham, 99 N.Y.S. 669, 671, 114 App. Div. 94, 97—Morse v. Press Pub. Co., 71 N.Y.S. 348, 349, 63 App.Div. 61—Wyatt v. Hall's Portrait Studio, 128 N.Y.Supp. 247, 248, 71 Misc. 199—Pitt v. Dunlap, 105 N. Y.Supp. 846, 847, 54 Misc. 115—Lasche v. Dearing, 53 N.Y.S. 58, 59, 23 Misc. 722—Kujek v. Goldman, 29 N.Y.S. 294, 296, 9 Misc. 34.

Test

If an injury to the person, either of the plaintiff or of another, be actionable, it is a personal injury.—Kujek v. Goldman, supra.

24. U.S.—Standard Life & Acc. Ins. Co. v. McNulty, Colo., 157 F. 224, 225, 85 C.C.A. 22.

Fatal injuries included

A claim to recover for death resulting from personal injury is as certainly "founded on injury to the person" as would be a claim to recover damages for a nonfatal injury resulting in a crippled body.—Bixby v. Sioux City, 164 N.W. 641, 643, 184 Iowa 89.

25. U.S.—Standard Life & Acc. Ins. Co. v. McNulty, Colo., 157 F. 224, 225, 85 C.C.A. 22.

26. Ohio.—Williamson v. State, 2 Ohio Cir.Ct. 292, 297, 1 Ohio Cir. Dec. 492.

Fatal injuries not included

An action for "personal injury," or for "personal injuries," held to mean an action for negligently causing bodily harm not resulting in death.—Fernwood Min. Co. v. Pluna, 213 S.W. 397, 398, 138 Ark. 459.

27. Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 183 Cal. 273.

Disease not included

"It never denotes an internal ailment which has gradually developed. In other words, it is an infliction not an affliction. If one should say that he suffered from an injury no one would entertain the thought that he might be afflicted with a malady, even with a malady to which accidental exposure might have given rise."—Christian v. State Conservation Commn., 182 N.Y.S. 347, 349, 191 App.Div. 635.

"Personal injury" distinguished from "disease" see 27 C.J.S. p 144 note 89.

28. Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 28, 183 Cal. 273.

Disease included

A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence.

Cal.—San Francisco v. Industrial Acc. Commn., supra.

Wis.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.

29. Cal.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 28, 183 Cal. 273.

30. Held to include

(1) False arrest and imprisonment.—New York, P. & N. R. Co. v. Waldron, 82 A. 709, 714, 116 Md. 441, 39 L.R.A.,N.S., 502.

(2) Influenza contracted by hospital employee.—San Francisco v. Industrial Acc. Commn., 191 P. 26, 28, 29, 183 Cal. 273.

(3) Injury to character, good name, or reputation.

Ga.—Johnson v. Bradstreet Co., 13 S.E. 250, 251, 87 Ga. 79.

N.C.—Tisdale v. Eubanks, 104 S.E. 339, 340, 180 N.C. 153.

Tex.—International & G. N. R. Co. v. Edmundson, Civ.App., 185 S.W. 402, 405.

(4) Loss of consortium.—Kujek v. Goldman, 29 N.Y.S. 294, 296, 9 Misc. 34—Maxson v. Delaware, L. & W. R. Co., 20 N.E. 544, 545, 112 N.Y. 559.

(5) Loss of sight due to an acute attack of optic neuritis induced by poisonous gases to which workman was constantly exposed.—In re Hurle, 104 N.E. 336, 337, 217 Mass. 223, L.R.A.1916A 279, Ann.Cas.1915C 919.

(6) Mental anguish caused by the nondelivery of a telegram.—Morton v. Western Union Tel. Co., 41 S.E. 484, 485, 130 N.C. 299.

(7) Pneumonia contracted by policeman due to exposure in line of duty.—State v. Policemen's Pension Fund, 119 N.W. 806, 807, 138 Wis. 133, 20 L.R.A.,N.S., 1175.

(8) Violation of right of privacy. —Wyatt v. Hall's Portrait Studio, 128 N.Y.S. 247, 249, 71 Misc. 199.

31. Held not to include

(1) Breach of contract generally. —Pitt v. Dunlap, 105 N.Y.S. 846, 847, 54 Misc. 115.

(2) Breach of marriage promise.— Pitt v. Dunlap, supra.

(3) Delay in delivering or failure to deliver, telegram constituting breach of contract.—Western Union Tel. Co. v. Witt, 110 S.W. 889, 891, 33 Ky.L. 685.

(4) Injury to property by fraud and deceit.—Guggisberg v. Boettger, 166 N.W. 177, 139 Minn. 226—Billson v. Linderburg, 68 N.W. 771, 772, 66 Minn. 66.

(5) "Libel" is not an "injury to the person," under particular circumstances.—Graham v. Mixon, 169 P. 1003, 1004, 177 Cal. 88, L.R.A. 1918F 1023.

(6) Malicious attachment.—Guggisberg v. Boettger, supra—Hansen Mercantile Co. v. Wyman, 117 N.W. 926, 927, 105 Minn. 491, 21 L.R.A.,N. S., 727.

32. N.J.—Tomlin v. Hildreth, 47 A. 649, 651, 65 N.J.Law 438.

tinguished therefrom.[33] One or another of these phrases has been compared with, or distinguished from, "bodily injury" see 11 C.J.S. p 377 note 80, "death of the person,"[34] "disease" see 27 C.J.S. p 144 note 89, "injury to personal rights,"[35] "injury to property,"[36] "loss,"[37] and "private injury."[38]

"Injury to property." Ordinarily the term "injury" when applied to property means some physical damage, hurt, or injury to the property itself by virtue of which its value has become diminished or destroyed,[39] and not to the mere personal right or rights of property.[40] Injury to property, however, need not be limited to a direct corporeal damage or wrong done to the specific property, as distinguished from an infringement of the rights of property;[41] but is sometimes to be given a broad and unrestricted meaning,[42] so as to include every invasion of one's property rights by actionable wrong;[43] and it has been specifically defined as an actionable act whereby the estate of another is lessened, other than a personal injury or breach of a contract.[44] The following notes contain examples of what the phrase has been held to include[45] and examples of what

33. Pa.—McCaffrey v. Jackson, 28 Pa.Dist. 173, 174.

Gist of distinction

In the former, the noun "person" indicates a natural body, or perhaps a body corporate, and the injuries contemplated are injuries to that body. In the latter phrase the noun employed is "injury," and the word "personal" is merely adjective, and, therefore, of far less significance than when used substantively.—McCaffrey v. Jackson, supra.

34. Not synonymous

"'Injury to the person' and 'death of the person' are not synonymous terms. The one presumes a continuation of life, though in an impaired state; the other, the destruction or ending of life."—Northern Pac. R. Co. v. Adams, Wash., 116 F. 324, 327, 54 C.C.A. 196.

35. N.J.—Crane v. Ketcham, 84 A. 1052, 1053, 83 N.J.Law 327—Hodge v. Wetzler, 55 A. 49, 51, 69 N.J.L. 490.

36. Minn.—Guggisberg v. Boettger, 166 N.W. 177, 139 Minn. 226, 227—Hansen Mercantile Co. v. Wyman, 117 N.W. 926, 928, 105 Minn. 491, 21 L.R.A.,N.S., 727—Ware v. Linderbergh, 68 N.W. 771, 772, 66 Minn. 66.

Mont.—McKenzie v. Doran, 104 P. 677, 678, 39 Mont. 593.

37. Eng.—The Franconia, 2 P. D. 163—Haigh v. Royal Mail Steam Packet Co., 52 L.J.Q.B. 640, 643.

38. Distinction stated

The term "private injury" must not be confounded with "personal injury," for, although every injury to a person is, in one sense, a private injury, yet, the term is not always used in so general a sense, but sometimes it is limited and applicable only to injuries to private property, or such as are distinguishable from injuries to the person.—State v. Boylson, 3 Minn. 438, 443.

39. Ga.—Blocker v. Boswell, 34 S.E. 289, 290, 109 Ga. 230.

Destruction of value may be partial

The phrase "injury to property," in contradistinction to the loss thereof, means a partial loss or destruction; and in the case of injury a value may yet remain in the property equal to or exceeding the stipulated value.—Nelson v. Great Northern R. Co., 72 P. 642, 648, 28 Mont. 297.

Trover and conversion

"Conversion implies no such injury. An action of trover, therefore, has no reference to any injury or damage which the property itself may have sustained. Indeed, after its conversion, it may actually be enhanced in value by the wrongdoer."—Blocker v. Boswell, 34 S.E. 289, 290, 109 Ga. 230.

40. N.Y.—Cleveland v. Barrows, 59 Barb. 364, 369.

41. Ga.—Crawford v. Crawford, 67 S.E. 673, 676, 134 Ga. 114, 28 L.R.A.,N.S., 353, 19 Ann.Cas. 932.

Similarly expressed

"An injury to property" does not necessarily mean a physical injury to tangible property.—Jay Bee Apparel Stores v. 563–565 Main Street Realty Corporation, 223 N.Y.S. 537, 541, 130 Misc. 23.

42. N.Y.—Ghiglione v. Friedman, 100 N.Y.S. 1024, 115 App.Div. 606, 607.

32 C.J. p 517 note 61 [a] (2).

43. N.Y.—Jay Bee Apparel Stores v. 563–565 Main Street Realty Corporation, 223 N.Y.S. 537, 130 Misc. 23.

S.C.—Bemis v. Waters, 170 S.E. 475, 477, 170 S.C. 432, quoting **Corpus Juris.**

32 C.J. p 517 note 61.

Injury is to owner

The legal injury in the case of harm done to personal property, is to its owner, and not to it. It is his right which has been violated.—Sharkey v. Skilton, 77 A. 950, 952, 83 Conn. 503.

Malice not essential

Malicious trespass or injury to property has been defined to mean a wrongful, intentional and willful injury and is not confined to cases where the offender is actuated by an evil animus against the owner of the property or the property itself.—State v. McKee, 104 S.W. 486, 487, 126 Mo.App. 524.

44. N.Y.—Ghiglione v. Friedman, 100 N.Y.S. 1024, 115 App.Div. 606, 607.

S.C.—Bemis v. Waters, 170 S.E. 475, 477, 170 S.C. 432, quoting **Corpus Juris.**

32 C.J. p 517 note 61 [a] (1).

45. Held "injuries to property"

(1) An action to recover for delay of work on a building, and consequent loss of rent, by reason of the wrongful causing of a notice of mechanics' lien to be filed against the property, is one for "an injury to property."—Ghiglione v. Friedman, 100 N.Y.S. 1024, 1025, 115 App.Div. 606.

(2) A cause of action for fraud and deceit is one for an injury to the property.—Guggisberg v. Boettger, 166 N.W. 177, 139 Minn. 226, 227—Hansen Mercantile Co. v. Wyman, 117 N.W. 926, 927, 105 Minn. 491, 21 L.R.A.,N.S., 727—Ware v. Linderbergh, 68 N.W. 771, 772, 66 Minn. 66.

(3) Conversion is an injury to property.—Kavanaugh v. McIntyre, 133 N.Y.S. 679, 681, 74 Misc. 222.

(4) "The damage to the growing crops" as an injury to real estate see 25 C.J.S. p 443 note 33.

(5) Damages claimed for waste of land, and for deceit also in the sale of personalty, must in each instance be held to arise out of an injury to property with or without force.—Gilbert v. Loberg, 53 N.W. 500, 501, 83 Wis. 189.

(6) "To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words."—McIntyre v. Kavanaugh, N.Y., 37 S.Ct. 38, 40, 242 U.S. 138, 141, 61 L.Ed. 205—In re Keeler, D.C.N.Y., 243 F. 770, 771.

(7) Malicious attachment is an injury to property.—Guggisberg v. Boettger, 166 N.W. 177, 139 Minn. 226—Hansen Mercantile Co. v. Wyman, 117 N.W. 926, 928, 105 Minn. 491, 21 L.R.A.,N.S., 727.

the phrase has been held not to include.[46]

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damages affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interest.[47]

Injury to real property, using the word "injury" in a technical sense, has been held to mean every wrong which in legal contemplation is an injury to real property, embracing not only injuries committed directly and forcibly for which, at common law, the appropriate remedy was an action of trespass, but such also as nuisances, the obstruction of light or air, diverting watercourses and other similar wrongs for which the remedy at common law was an action on the case.[48]

"Injury to property" has been compared with, or distinguished from, "injury to the person" see supra note 36, "loss of property,"[49] and "taking of property."[50]

Actions for "injury [or injuries]" to property and the joinder and the survival thereof see Abatement and Revival §§ 139–142 and Actions § 1 a (1) (f) (4), (6), (15), (24), § 15 b (3), (6), §§ 66, 75, 86–94, 104. Numerous other references to particular applications, or specific uses of the phrase are listed in 32 C.J. p 517 note 57. Injury to property as within the jurisdiction of justice of the peace courts see the C.J.S. title Justices of the Peace § 29, also 35 C.J. p 498 note 39–p 499 note 47.

"Intentional injury." An injury which results from an act done for the purpose of causing the injury or with the knowledge that the injury is reasonably, or substantially, certain to follow.[51]

The phrase has been said to be the moral equivalent of "wanton injury" although their elements, strictly speaking, are different,[52] and it has been distinguished from "accident" see 1 C.J.S. p 438 note 74, and from "wanton and wilful negligence" see the C.J.S. title Negligence § 9.

"Internal injuries." The phrase is not a term of precision,[53] but its commonly accepted meaning indicates any injury to, or in, the abdomen,[54] and it means, or refers to, injuries sustained in the body or trunk,[55] injuries to the organs in the abdominal cavity such as liver, kidneys, spleen, stomach, intestines, etc.;[56] it does not include injuries to other or separate members or organs.[57]

"Irreparable injury." The phrase is most frequently found in the books in cases dealing with equity suits, irreparable injury being the basis on which most equity actions rest.[58] It has been said

(8) The negligent burning of timber on land is an injury to real property.—Perry v. Seaboard Air Line R. Co., 68 S.E. 1060, 1061, 153 N.C. 117.

46. Held not "injury to property"

(1) Loss to the owners of merchandise which loss resulted from a fall in the market price while the merchandise was being held by the owners.—Roome v. Jennings, 19 N.Y.S. 825, 826, 61 N.Y.Super. 361.

(2) The obstruction of a highway held not to be an "injury to any property" of a town.—Woodman v. Bohan, 64 N.W. 323, 91 Wis. 36, 38.

(3) Slander is an injury, but not an injury to property.—McKenzie v. Doran, 104 P. 677, 678, 39 Mont. 593.

47. N.Y.—Kavanaugh v. McIntyre, 133 N.Y.S. 679, 681, 74 Misc. 222—Northern R. Co. v. Carpentier, 13 How.Pr. 222, 223.

"An injury to personal estate" is damage done to some specific property of which the person is the owner. It is not damage arising incidentally or collaterally.—Wolf v. Wall, 40 Ohio St. 111.

48. Ark.—Cox v. Little Rock & M. R. Co., 18 S.W. 630, 631, 55 Ark. 454.

"Damage or injury to land, as an infringement of the owner's right to the use and possession of it" see 25 C.J.S. p 443 note 28.

Similar enumeration

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbances of right of way, and the like.—Bouvier L.D.

49. Mont.—Nelson v. Great Northern R. Co., 72 P. 642, 648, 28 Mont. 297.

50. Gist of distinction

An injury to, and a taking of property are distinct things. Every taking involves an injury of some kind, although every injury does not include a taking. Property may be taken by an entry upon and appropriation of it, as in the ordinary case of location; but it is injured by obstructing access or drainage.—Baltimore v. Bregenzer, 93 A. 425, 427, 125 Md. 78—Garrett v. Lake Roland El. Ry. Co., 29 A. 830, 832, 79 Md. 277, 24 L.R.A. 396.

51. Conn.—Rogers v. Doody, 178 A. 51, 53, 119 Conn. 532.

"Intentional injuries" discussed

U.S.—Travelers' Ins. Co. v. McConkey, Iowa, 8 S.Ct. 1360, 1362, 127 U.S. 661, 667, 32 L.Ed. 308—Jarnagin v. Travelers' Protective Assoc., of America, Tenn., 133 F. 892, 893, 66 C.C.A. 622, 68 L.R.A. 499.

32 C.J. p 522 note 60.

Intentional injuries as risks excepted from insurance see the C.J.S. title Insurance, also 1 C.J. p 442 note 9–p 444 note 32.

52. Ala.—Feore v. Trammel, 102 So. 529, 533, 212 Ala. 325—Alabama Great Southern R. Co. v. Ensley Transfer & Supply Co., 100 So. 342, 345, 211 Ala. 298.

53. Cal.—Hines v. Industrial Accident Commission, 8 P.2d 1021, 1026, 215 Cal. 177.

54. Tenn.—City of Maryville v. McConkey, 90 S.W.2d 951, 957, 19 Tenn.App. 520.

55. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Bennette, 119 S.W. 181, 182, 134 Ky. 19.

56. Cal.—Hines v. Industrial Accident Commission, 8 P.2d 1021, 1026, 215 Cal. 177.

Held included

Tubercular peritonitis claimed to be the result of a fall may constitute "internal injury."—City of Maryville v. McConkey, 90 S.W.2d 951, 957, 19 Tenn.App. 520.

57. Held not "internal injuries"

(1) Internal injuries will not include an injury to the spine or to the nerves affected by such injury.—Hines v. Industrial Accident Commission, 8 P.2d 1021, 1026, 215 Cal. 177.

(2) Injury to a testicle is not an internal injury.—Cincinnati, N. O. & T. P. R. Co. v. Bennette, 119 S.W. 181, 182, 134 Ky. 19.

58. Wis.—Wisconsin Tel. Co. v. Railroad Commn., 156 N.W. 614, 619, 162 Wis. 383, L.R.A.1916E 748.

to be a well marked and defined term,[59] but apt to mislead,[60] since it is impossible to define it inflexibly,[61] and difficult to lay down any precise rule as to what gives to an injury the quality of being irreparable,[62] especially in the sense in which it is used in conferring jurisdiction on courts of equity, as discussed in Equity § 39 and Injunctions § 23.

In the popular sense, where there is substantial loss or damage which is not recoverable, it is entirely correct to say that there is "irreparable injury;" and the word "injury" in the phrase "irreparable injury" has been used to denote substantial financial loss,[63] but it does not necessarily mean that the injury is physically irreparable,[64] for an injury may be irreparable either from its own nature,[65] as when the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or when it is shown that the party who must respond is insolvent, and, for that reason, incapable of responding in damages.[66] The phrase means generally that the injury must be a grievous one, a material one, and not adequately reparable in damages;[67] and includes wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurate standard.[68]

"Legal injury." Following the legal meaning of "injury" discussed supra p 1113 note 75—p 1114 note 96, this phrase has been defined as an actionable wrong, a wrongful act resulting in damages;[69] an invasion of a right;[70] also whatever invades a person's rightful dominion over his property, whether or not damage ensues.[71]

Under particular circumstances, the phrase has been construed as equivalent to "injury" see supra p 1114 note 98, and "private injury."[72]

"Malicious injury." An injury committed wantonly, willfully, or without cause;[73] an injury caused by design, since malice imports intent[74] and sometimes it conveys the idea of revenge.[75]

"Nonpecuniary injury" and *"Pecuniary injury."* In the sense of wrongful invasions of a right, injuries may be considered as of two kinds: Pecuni-

See generally the C.J.S. titles Equity § 19 et seq; Injunctions § 23; and Nuisances § 114, also 46 C.J. p 768 note 88–p 769 note 93.

32 C.J. p 518 note 66; and consult the Descriptive-Word Index sub verbo "Irreparable Injury."

59. Colo.—Insurance Co. of North America v. Bonner, 42 P. 681, 682, 7 Colo.App. 97.

60. N.C.—Tise v. Whitaker-Harvey Co., 57 S.E. 210, 211, 144 N.C. 507.

61. W.Va.—Bettman v. Harness, 26 S.E. 271, 272, 42 W.Va. 433, 36 L.R.A. 566.

62. La.—Barrow v. Duplantis, 86 So. 718, 723, 148 La. 149.

32 C.J. p 518 note 70.

63. Wis.—Wisconsin Tel. Co. v. Railroad Commn., 156 N.W. 614, 620, 162 Wis. 383, L.R.A.1916E 748.

64. Ark.—Ahrent v. Sprague, 214 S.W. 68, 69, 139 Ark. 416.

Mich.—Ainsworth v. Munoskong Hunting & Fishing Club, 116 N.W. 992, 994, 153 Mich. 185, 126 Am.S.R. 474, 17 L.R.A.,N.S., 1236, 15 Ann.Cas. 706.

65. Ill.—Cleveland v. Martin, 75 N.E. 772, 777, 218 Ill. 73, 3 L.R.A.,N.S., 629—Lloyd v. Catlin Coal Co., 71 N.E. 335, 337, 210 Ill. 460.

66. Ill.—Cleveland v. Martin, 75 N.E. 772, 777, 218 Ill. 73, 3 L.R.A., N.S., 629.

32 C.J. p 518 notes 75–77.

67. Mich.—Minnis v. Newbro-Gallogly Co., 140 N.W. 980, 983, 174 Mich. 635, 44 L.R.A.,N.S., 1110.

32 C.J. p 518 note 72.

Adequacy or inadequacy of remedy as affecting exercise of equitable jurisdiction see Equity § 19 et seq.

Appeal from decisions causing irreparable injury see Appeal and Error § 102.

Judicially defined

It means only a grievous or substantial injury, one not adequately compensable in damages.—Mullens Realty, etc., Co. v. Klein, 102 S.E. 677, 680, 85 W.Va. 712—32 C.J. p 518 note 72 [a].

68. Pa.—Commonwealth v. Pittsburgh & Connellsville R. Co., 24 Pa. 159, 160, 62 Am.D. 372.

32 C.J. p 518 note 73.

69. Ill.—Gillman v. Chicago R. Co., 109 N.E. 181, 182, 268 Ill. 305.

Ky.—Combs v. Hargis Bank & Trust Co., 27 S.W.2d 955, 956, 234 Ky. 202, quoting **Corpus Juris.**

Combination or contract in restraint of interstate commerce as a "legal injury" see the C.J.S. title Monopolies § 95, also 32 C.J. p 519 note 81 [a].

70. Ill.—Edwards v. Ely, 47 N.E.2d 344, 346, 317 Ill.App. 599.

71. Cal.—Allen v. Stowell, 79 P. 371, 372, 145 Cal. 666, 68 L.R.A. 223, 104 Am.S.R. 80.

72. **In characterizing torts**

"When it is said that a tort is a private injury a legal injury is meant which involves more than damages."—Gillman v. Chicago R. Co., 109 N.E. 181, 182, 268 Ill. 305.

73. N.Y.—Rounds v. Delaware, L. & W. R. Co., 3 Hun 329, 335, 5 Thomps. & C. 475.

Same meaning in statute and at common law

"The term 'malicious injury,' as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally."—State v. Huegin, 85 N.W. 1046, 1067, 110 Wis. 189, 62 L.R.A. 700.

Includes a willful injury without just reason.—MacLean v. Scripps, 17 N.W. 815, 817, 18 N.W. 209, 52 Mich. 214.

74. Conn.—Sharkey v. Skilton, 77 A. 950, 951, 83 Conn. 503.

"Malicious injury to person, health, or reputation"

Construed as indicating, by the addition of the words "health or reputation," together with the word "malicious," that "injury" to the person is used in the broad sense of the term.—Taylor v. Bliss, 57 A. 939, 940, 26 R.I. 16.

75. **With reference to property**

In discussing malicious injury to, or destruction of, property, the term may denote an act done for the purpose of avenging some real or imaginary wrong, and not merely an act done willfully.—State v. Tarlton, 118 N.W. 706, 708, 22 S.D. 496.

See generally the C.J.S. title Malicious Mischief § 1, also 38 C.J. p 357 note 1—p 359 note 33.

ary and nonpecuniary.[76] A "nonpecuniary injury" is one for the measurement of which no money standard is or can be applicable, such as bodily and mental pain and suffering.[77]

A "pecuniary injury," on the other hand, is one which can be, and usually is, without difficulty estimated by a money standard, such as loss of real or personal property or of its use, loss of time, and loss of services;[78] and injury directly causing financial loss.[79]

The phrase is sometimes construed in the sense of "necessary injury."[80]

"Permanent injury." The word "permanent," as applied to injuries, is apt to mislead, as it is used not only in cases in which the damage is all done at once, but also in those cases in which the damage is continuing and prospective.[81] A permanent injury, as distinguished from a temporary or continuing injury, is one of such character, and existing under such circumstances, that it would be presumed to continue indefinitely;[82] one that, according to every reasonable probability, will continue throughout the remainder of one's life;[83] one that is reasonably certain to be followed by permanent impairment of earning capacity, or one which produces lasting irremediable pain;[84] one where any physical function, or the usefulness of a member of the body is permanently impaired.[85] In the following notes some examples are cited of what the phrase has been held to include[86] and not to include.[87]

It has been said that alleging "permanent injuries" is not the equivalent of alleging loss of time or earnings;[88] and "personal injury" has been compared with, or distinguished from, "disability" see 26 C.J.S. p 1323 note 68, "future injury" see 37 C.J.S. p 1418 note 56 (6), "future pain and suffering,"[89] "injury to future health,"[90] and "permanent impairment of earning power."[91]

"Permanent injury" as referring to "continuing nuisance" see the C.J.S. title Nuisances § 4, also 46 C.J. p 650 notes 68, 69. "Permanent injury to person" see Damages §§ 31, 81, 135 notes 5–9; and "permanent injury to property" see the C.J.S. titles

76. Conn.—Broughel v. Southern New England Tel. Co., 48 A. 751, 754, 73 Conn. 614, 84 Am.S.R. 176.

77. Conn.—Broughel v. Southern New England Tel. Co., supra.

78. Conn.—Broughel v. Southern New England Tel. Co., supra.
32 C.J. p 519 note 89.

79. Idaho.—Kelly v. Lemhi Irr. & Orchard Co., 168 P. 1076, 1077, 30 Idaho 778.

80. Mo.—Hawkins v. Missouri Pac. R. Co., 170 S.W. 459, 464, 182 Mo. App. 323.
32 C.J. p 519 note 86.

81. N.C.—Beach v. Wilmington & W. R. Co., 26 S.E. 703, 704, 120 N. C. 498.
32 C.J. p 519 notes 94, 95.
See also Damages § 31 note 34.

82. Minn.—Worden v. Bielenberg, 138 N.W. 314, 315, 119 Minn. 330.
Neb.—Applegate v. Platte Valley Public Power & Irrigation Dist., 285 N.W. 585, 589, 136 Neb. 280.

Duration of injury discussed

(1) "It is . . . correct to say that an injury may be permanent . . . without continuing for ever. . . . The injury to be permanent, it is repeatedly stated, must be something more than a mere temporary inconvenience; it must be lasting. Many cases are put, showing a permanent injury, though not continuing for ever."—Bassett v. Johnson, 2 N.J.Eq. 154, 162.

(2) "Permanent," as used with reference to the damages recoverable for a permanent personal injury, means lasting, and in some cases lifelong, because, if the injured person will be cured, the injury could not be permanent.—Stokes v. Ralpho Tp., 40 A. 958, 962, 187 Pa. 333.

(3) "Permanent injury" relates to a condition lasting during all the after life of the person injured.—Du Cate v. Brighton, 114 N.W. 103, 133 Wis. 628, 632.

(4) "Permanent injury" does not necessarily mean eternal or everlasting, but merely that disability is lasting or continuous as distinguished from temporary, and that it will be long continued.—Meznarich v. Republic Coal Co., 53 P.2d 82, 86, 101 Mont. 78.

(5) There is a difference between "permanent injury" to land and one that is perpetual, for "permanent injury" may exist without being perpetual.—Williams v. Henderson County Levee Imp. Dist. No. 3, Tex. Com.App., 36 S.W.2d 204, 207—Texas Pacific Coal & Oil Co. v. Taylor, Tex. Civ.App., 47 S.W.2d 1110, 1111.

(6) "These injuries, though they may not, strictly speaking, be absolute perpetuities, and positively irremedial [irremediable] in the last possible degree, are, nevertheless, in a legal sense, permanent, as contradistinguished from temporary. Permanency, in the legal acceptation of the term, does not include the idea of absolute, but only of practical, irremediability."—Coleman v. Bennett, 69 S.W. 734, 737, 111 Tenn. 705.

83. Ala.—Alabama Great Southern R. Co. v. Taylor, 71 So. 676, 678, 196 Ala. 37.

84. Ky.—Herndon v. Waldon, 47 S. W.2d 1047, 1049, 243 Ky. 312.

85. N.J.—Hercules Powder Co. v. Morris County Court of Common Pleas, 107 A. 433, 93 N.J.Law 93, 94.
Pa.—Corniak v. Cohen, 27 A.2d 560, 563, 150 Pa.Super. 140.

86. Held to include

(1) Loss of both eyes.—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 483, 484, 149 Pa.Super. 535.

(2) Loss of one testicle.—Hercules Powder Co. v. Morris County Ct. C. P., 107 A. 433, 93 N.J.Law 93, 94.

(3) Loss of two fingers.—Bilakos v. Kelley, 166 N.W. 892, 893, 200 Mich. 125, 130.

(4) Permanent disfigurement constitutes "permanent injury."—Wilson v. Spicuzza, Mo.App., 165 S.W.2d 428, 430.

87. Held not to include

(1) Fractures of bones and sacroiliac sprains are not necessarily "permanent injuries."—State ex rel. Kansas City Public Service Co. v. Shain, Mo., 165 S.W.2d 428, 430.

(2) The term "permanent injury," as used in the ordinary sense, does not include injuries resulting in death.—Milwaukee v. Ritzow, 149 N. W. 480, 482, 158 Wis. 376.

88. Mo.—Scholl v. Grayson, App., 127 S.W. 415, 417.

89. Mo.—Colby v. Thompson, App., 207 S.W. 73, 74.
Wis.—Du Cate v. Brighton, 114 N.W. 103, 105, 133 Wis. 628.

90. Mo.—Wood v. Chicago, B. & Q. R. Co., 95 S.W. 946, 947, 119 Mo. App. 78.

91. Ky.—Porter v. Music, 67 S.W.2d 958, 252 Ky. 312.

Injunctions §§ 22, 23; and Limitations of Actions § 169, also 37 C.J. p 886 note 78–p 889 note 97.

"Private injuries." Infringements of the private or civil rights belonging to individuals, considered as individuals.[92] The term has been held synonymous with, or construed as equivalent to, "legal injury" supra p 1119 note 72, and "private wrong;"[93] and has been distinguished from "personal injury" see supra p 1117 note 38.

"Public injuries." Public injuries are breaches and violations of rights and duties which affect the whole community as a community.[94]

"Unlawful injury." An injury resulting from an act prohibited by law, whether common or statutory.[95] The phrase is particularly applicable to threatened injuries,[96] or threats of injury to persons or property for the purpose of extorting money, as discussed in the C.J.S. title Threats and Unlawful Communications § 3, also 62 C.J. p 934 notes 51–58; and in its broadest sense has been said to mean or refer to an actionable wrong, an injury for which an action can be maintained.[97]

"Willful injury." An injury caused by design;[98] it means intentionally doing the act which is calculated or adapted to cause the injury, with design to inflict injury or with disregard of the natural consequences of the act.[99] It imports a positive act;[1] implies an intentional act, and one evincing a reckless disregard for the safety of others, and a willingness to inflict the injury complained of,[2] including in that idea the intentional disregard of obviously likely injurious consequences;[3] it may involve conduct which is quasi-criminal,[4] and is in law malicious, although no malevolent purpose to cause it and no motive of spite are imputed.[5]

"Willful injury" has been distinguished from "gross negligence,"[6] "injury resulting from negligence,"[7] "poor judgment,"[8] and "willful act."[9]

Other phrases. In the following notes various other phrases employing the word are listed, the judicial construction of some of which is here given,[10]

92. N.J.—Tomlin v. Hildreth, 47 A. 649, 651, 65 N.J.Law 438.

93. N.H.—Rhobidas v. Concord, 47 A. 82, 87, 70 N.H. 90, 85 Am.S.R. 604, 51 L.R.A. 381.
N.J.—Tomlin v. Hildreth, 47 A. 649, 651, 65 N.J.Law 438.
"Private wrong" defined see the C.J.S. title Torts § 1, also 50 C.J. p 374 notes 34–37.

94. Black L.D.

Held to constitute

(1) The opening of an unnecessary highway is a public injury no less than a wrong to the individuals whose property is immediately affected, since it increases needlessly the public expenditure and the burden of taxation.—Montclair Military Academy v. North Jersey R. Co., 47 A. 890, 893, 65 N.J.Law 328.

(2) The unauthorized or illegal assertion of the right to the exclusive possession of public lands, as by fencing off strategically located portions, so that all whose live stock graze in that locality, are prevented from having their stock seek pasturage in such public land, held to be an injury to the public rather than to one of the individual live stock owners.—Wilkinson Live Stock Co. v. McIlquam, 83 P. 364, 370, 371, 14 Wyo. 209, 3 L.R.A.,N.S., 733.

95. N.Y.—People v. Loveless, 84 N.Y.S. 1114, 1115.

96. Cal.—People v. Sanders, 207 P. 380, 384, 188 Cal. 44.
N.Y.—People v. Barondess, 31 N.E. 240, 241, 133 N.Y. 649—People v. Sheridan, 174 N.Y.S. 327, 329, 186 App.Div. 211.

97. Cal.—People v. Schmitz, 94 P. 419, 420, 7 Cal.App. 330, 15 L.R.A., N.S., 717.

98. Conn.—Sharkey v. Skilton, 77 A. 950, 951, 83 Conn. 503.
32 C.J. p 521 note 29.

Held not willful injury

A technical conversion by one who acts in good faith and under color of title is not a willful injury.—Cohn v. Melancon, 151 N.Y.S. 39, 40, 88 Misc. 549.

99. N.Y.—Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 649, 228 N.Y. 106.

1. N.M.—Thayer v. Denver & R. G. R. Co., 154 P. 691, 695, 21 N.M. 330.

2. Ind.—Louisville, N. A. & C. R. Co. v. Bryan, 7 N.E. 807, 808, 107 Ind. 51, 53—Southern R. Co. v. McNeeley, 88 N.E. 710, 713, 44 Ind. App. 126.

3. N.J.—Harber v. Graham, 143 A. 340, 342, 105 N.J.Law 213, 61 A.L.R. 1232.

4. Ind.—Louisville, N. A. & C. R. Co. v. Bryan, 7 N.E. 807, 808, 107 Ind. 51.

5. N.Y.—Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 228 N.Y. 106.

6. N.J.—Harber v. Graham, 143 A. 340, 342, 105 N.J.Law 213, 61 A.L.R. 1232.

7. N.M.—Thayer v. Denver & R. G. R. Co., 154 P. 691, 695, 21 N.M. 330.

8. N.J.—Harber v. Graham, 143 A. 340, 342, 105 N.J.Law 213, 61 A.L.R. 1232.

9. Conn.—Sharkey v. Skilton, 77 A. 950, 951, 83 Conn. 503.

10. Phrases construed

(1) "Action for 'injury to property,'" held not to include a bankrupt's right of action for conspiracy to interfere with his position as national bank president.—Boudreau v. Chesley, C.C.A.Me., 135 F.2d 623, 624, affirming, D.C., In re Mulloney, 45 F. Supp. 768.

(2) "Consequential injury."
N.Y.—Sadlier v. New York, 81 N.Y.S. 308, 312, 40 Misc. 78.
Pa.—Pennsylvania R. Co. v. Marchant, 13 A. 690, 119 Pa. 541, 557, 4 Am.S.R. 659.
Va.—Jordan v. Wyatt, 4 Gratt. 151, 154, 45 Va. 151, 154, 47 Am.D. 720.
See specifically 15 C.J.S. p 983 note 96; and the C.J.S. title Justices of the Peace § 29, also 35 C.J. p 498 note 40–p 499 note 45, as coming within jurisdiction of justice's court.

(3) "Continuing injury" is an injury that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured person.—Worden v. Bielenberg, 136 N.W. 314, 315, 119 Minn. 330—13 C.J. p 204 note 45.

(4) "Date of the injury causing such death," held to refer to the time of the causal injury rather than to the result of the injury, without reference to whether it is compensable or not.—Otis v. Parrott, Iowa, 8 N.W.2d 708, 711.

(5) "Direct injury."
N.Y.—Sadlier v. New York, 81 N.Y.S. 308, 312, 40 Misc. 78.
Wash.—Farnandis v. Great Northern R. Co., 84 P. 18, 20, 41 Wash. 486,

while others are elsewhere discussed.[11] For still other phrases as to which more recent adjudications

111 Am.S.R. 1027, 6 L.R.A.,N.S., 1086.

See particularly the C.J.S. title Nuisances § 111, also 46 C.J. p 770 note 2, direct injury as requisite for granting equitable relief against nuisance.

(6) "Injury, fatal or non-fatal," as including death, since death is a "fatal injury," in the ordinary and usual meaning of the words, as distinguished from the result of a fatal injury.—Sulzbacher v. Travelers Ins. Co., C.C.A.Mo., 137 F.2d 386, 390.

(7) "Injury resulting from such failure," held to refer to a legal injury, the word "injury" not being intended to mean physical injury.—Edwards v. Ely, 47 N.E.2d 344, 346, 317 Ill.App. 599.

(8) "Injury to head," construed as not including impairment or loss of hearing.

Ky.—Cincinnati, N. O. & T. P. R. Co. v. Bennette, 119 S.W. 181, 182, 134 Ky. 19—Louisville Ry. Co. v. Gaugh, 118 S.W. 276, 277, 133 Ky. 467.

Tenn.—City of Maryville v. McConkey, 90 S.W.2d 951, 957, 19 Tenn. App. 520.

(9) "Injury to person and property," construed to mean causing damage to the subject matter of the rights, not depriving the owner of them.—In re Ennis, D.C.N.Y., 171 F. 755, 757.

(10) "Intentional self-inflicted injury."—In re Ayers, 118 N.E. 386, 387, 66 Ind.App. 458.

(11) "'Malicious and willful' injury," as an injury done out of cruelty, hostility or revenge, more than a willful and intentional injury.—Wing v. Wing, 66 Me. 62, 64, 22 Am. R. 548.

(12) "'Malicious injury' to property," as including or indicating damage to the property, not merely the conversion thereof.—In re Ennis, supra.

(13) "Necessary injury" sometimes equivalent to "pecuniary injury" see supra note 80; and often construed as broad enough to include any damages which may be estimated according to a pecuniary standard, whether present, prospective, or proximate.—Barth v. Kansas City El. R. Co., 44 S.W. 778, 785, 142 Mo. 535—McCullough v. W. H. Powell Lumber Co., 216 S.W. 803, 807, 205 Mo.App. 15.

(14) "Real injury," in the civil law, an injury inflicted by any act by which a person's honor or dignity is affected.—Black L.D.

(15) "Relative injuries," defined as injuries to those rights which a person possesses with relation to the person who is immediately affected by the wrongful act done.—Black L. D.

(16) "Reparable injury," generally an injury the damage from which is merely in the nature of pecuniary loss, and which can be exactly and fully repaired by compensation in money.—Barrow v. Duplantis, 86 So. 718, 723, 148 La. 149—Puckette v. Hicks, 2 So. 801, 39 La.Ann. 901, 4 Am.S.R. 242.

(17) "Serious injury."—Union Mut. Ins. Co. v. Wilkinson, Iowa, 13 Wall., U.S., 222, 230, 20 L.Ed. 617—32 C.J. p 523 note 64.

(18) "Serious personal injury."—Smarrs v. State, 61 S.E. 914, 916, 131 Ga. 21—32 C.J. p 520 note 98 [c].

(19) "Sudden injury," held to express a physical, not a mental condition, and hence not synonymous with "quick anger" in defining "heat of passion."—State v. Sloan, 56 P. 364, 368, 22 Mont. 293, 304.

(20) "Temporary injury" construed as an injury that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured person.—Worden v. Bielenberg, 138 N.W. 314, 315, 119 Minn. 330.

(21) "Verbal injury," in the civil law, a verbal injury, when directed against a private person, consists in the uttering of contumelious words, which tend to injure his reputation by making him little or ridiculous.—Black L.D.

(22) "Violent injury" has been held not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the act.—People v. Bradbury, 91 P. 497, 151 Cal. 675.

(23) "Willful and malicious injuries."—Tinker v. Colwell, N.Y., 24 S. Ct. 505, 506, 193 U.S. 473, 48 L.Ed. 754—32 C.J. p 521 note 29 [d]. See also Bankruptcy § 574, discharge in bankruptcy as not affecting bankrupt's liability for willful and malicious injury to property or person of another.

11. Phrases discussed elsewhere

(1) "Accidental injury" and "accidental personal injury" see 1 C.J.S. p 452 note 46, p 456 note 51.

(2) "Action for injuries done to the person," within meaning of limitation statutes, see the C.J.S. title Limitations of Actions § 74, also 37 C.J. p 775 note 62.

(3) "Actual injury" and "actual injury to his property" see 1 C.J.S. p 1442 notes 34, 35.

(4) "Actual notice of injury" and "actual pecuniary injury" see 1 C.J.S. p 1443 notes 57, 76.

(5) "Any injuries," "any injury, loss or damage," and "any injury to person or persons" see 3 C.J.S. p 1407 notes 42–44.

(6) "Bodily injury" defined generally see 11 C.J.S. p 376 note 53–p 377 note 82; and discussed specifically see such C.J.S. titles as Assault and Battery § 79; Homicide §§ 123–126; Robbery § 25, also 54 C.J. p 1031 notes 57, 58; and Workmen's Compensation Acts § 158, also 71 C.J. p 577 note 69–p 579 note 98.

(7) "Bodily injury to the person" and other similar phrases see 11 C.J.S. p 378 notes 3, 10–13, 15, 18, 23–27.

(8) "Civil injury" see 14 C.J.S. p 1155 notes 75–77.

(9) "Common injury" see the C.J.S. title Nuisances §§ 78, 79, also 12 C.J. p 156 notes 50, 51, 32 C.J. p 517 note 54, and 46 C.J. p 728 note 44 and p 732 note 52–p 734 note 65.

(10) "Compensable injury" see the C.J.S. title Workmen's Compensation Acts § 152 et seq, also 32 C.J. p 517 note 55, and 71 C.J. p 559 note 61 et seq.

(11) "Conditions and diseases which may result from bodily injuries" distinguished from "bodily injury" see 11 C.J.S. p 377 note 81.

(12) "Continuous injury" see 17 C.J.S. p 285 note 97.

(13) "Continuous or recurring injury" see the C.J.S. title Nuisances § 115, also 46 C.J. p 770 notes 94–1.

(14) "Day and hour of any accident causing the injury" see 14 C.J.S. p 53 note 24.

(15) "'Enormous' bodily injury" equivalent to "great bodily harm" see 11 C.J.S. p 377 note 88.

(16) "Fatal injury" distinguished from "disability" see 26 C.J.S. p 1323 note 62.

(17) "General injury" contrasted with "special injury" or "specific injury" see 38 C.J.S. p 763 note 16 (31).

(18) "Great bodily injury" and "serious bodily injury" see 11 C.J.S. p 377 note 91–p 378 note 99.

(19) "Great personal injury" equivalent to "great bodily harm" see 11 C.J.S. p 377 note 89.

(20) "Indirect injury" see 42 C.J.S. p 1364 note 29(8).

(21) "Injured . . . by accident," "injuries sustained by accident," "injury by accident," "injury caused by accident," and "injury resulting from accident" see 1 C.J.S. p 446 note 97–p 447 note 2.

(22) "Injury proximately caused by accident" see Cause 14 C.J.S. p 53 note 14.

have not been found see 32 C.J. p 522 note 30–p 523 note 77.

INJUSTICE. In general, the withholding or denial of justice, and in law, the term is almost invariably applied to the act, fault, or omission of a court, or some other agency of government, as distinguished from that of an individual.[12]

"Injustice" has been contrasted with, or distinguished from, "hardship" see 39 C.J.S. p 777 note 2, and "fraud" see Fraud § 1 note 25.

INJUSTUM EST, NISI TOTA LEGE INSPECTA, DE UNA ALIQUA EJUS PARTICULA PROPOSITA JUDICARE VEL RESPONDERE.[13]

INK. A colored fluid of slight viscosity used for writing or drawing, or a more viscous colored substance used in printing; the coloring matter is gallotannate of iron.[14] It is a matter of common knowledge that ink can be manufactured from a great variety of substances.[15]

In the lumber industry, ink, which causes stains in oak lumber, is iron tannate, formed by tannic acid in the lumber and iron in the dipping vat where the lumber is treated for stains.[16]

IN KIND. See In 42 C.J.S. p 477 notes 99, 1.

INLAGARE. In old English law, to restore to the protection of law; to restore a man from the condition of outlawry; opposed to "utlagare."[17]

INLAGATION. Restoration to the protection of law; restoration from a condition of outlawry.[18]

INLAGH. A person within the law's protection; the opposite of "utlagh," an outlaw.[19]

INLAID LINOLEUM. A type of linoleum floor covering which takes its name from varicolored inlays or figures variously applied to, or produced on, the conventional burlap backing or base.[20] It is of two principal kinds, namely, "molded inlaid linoleum" and "straight-line inlaid linoleum," classified on the basis of the different methods of manufacture described in the note.[21]

(23) "Injury to personal estate" see supra p 1118 note 47.

(24) "Injury to personal rights," compared with and distinguished from "injury to the person" see supra p 1117 note 35.

(25) "Mortal injury" equivalent to and compared with "serious bodily injury" see 11 C.J.S. p 378 notes 98, 99.

(26) "Physical injury," as a synonym of "bodily harm" or "bodily hurt" see 11 C.J.S. p 375 note 27, p 378 note 7.

(27) "Schedule injuries" see the C.J.S. title Workmen's Compensation Acts §§ 306–317, also 71 C.J. p 833 note 45–p 850 note 57.

(28) "Special injury" contrasted with "general injury" see 38 C.J.S. p 763 note 16 (31), and as construed or applied with reference to nuisances see the C.J.S. title Nuisances § 75, Sunday sales as not constituting "special injury" to other dealers so as to justify action by them under nuisance statute; and § 79, as essential to individual's right to relief against a public nuisance, also 46 C.J. p 725 note 54, p 732 note 51–p 736 note 88.

(29) "Specific injury" contrasted with "general injury" see 38 C.J.S. p 763 note 16 (31), and as used with reference to schedule injuries within compensation acts see the C.J.S. title Workmen's Compensation Acts §§ 306–310, also 71 C.J. p 833 note 45–p 889 note 12.

12. Black L.D.

Held to constitute "injustice"

(1) The overvaluation of the property of a taxpayer.—State v. Superior Lumber & Mill Co., 170 P. 58, 60, 23 N.M. 606—South Spring Ranch & Cattle Co. v. State Board of Equalization, 139 P. 159, 173, 18 N.M. 531.

(2) Where a party in interest, acting without fault or neglect, intends to litigate, or to have reviewed, important questions of law or fact which he has the right to litigate, and is denied, or deprived of, such right then an injustice is done. U.S.—Silvey's Case, 7 Ct.Cl. 305, 324. N.H.—Holton v. Olcott, 58 N.H. 598, 599—In re Moulton, 50 N.H. 532, 537.

Held not to constitute

In holding that a loss to stockholders resulting from a change in the corporation's charter which the legislature had reserved power to make, did not constitute an injustice, the court said: "The exercise of a perfect legal right cannot possibly operate, in the eye of the law, injustice to anybody."—Mississippi Building & Loan Association v. McElveen, 56 So. 187, 189, 100 Miss. 16.

Phrases construed

(1) "Any such injustice," as referring to errors, other than mere clerical errors, in the assessment book.—Bernalillio First State Bank v. State, 196 P. 743, 744, 27 N.M. 78.

(2) "Without injustice or undue delay to the creditors or to the debtor."—Ex parte Moon, 19 Q.B.D. 669, 677—Ex parte Charlton, 6 Ch.D. 45, 51.

13. A maxim meaning "It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law."—Cyclopedic L.D.

Applied in Bonham's Case, 8 Coke 114a, 117b, 77 Reprint 646.

Similarly rendered

"It is unjust to decide or respond as to any particular part of a law without examining the whole of the law."—Black L.D.

14. Century D.

"Ink pencil"

As distinguished from lead pencil, it is defined as a pencil in which a solid indelible pigment takes the place of the usual lead.—Thrailkill v. Smith, 138 N.E. 532, 533, 106 Ohio St. 1.

15. Ohio.—Thrailkill v. Smith, supra.

16. Tenn.—E. I. Du Pont De Nemours & Co. v. E. L. Bruce Co., 124 S.W.2d 243, 244, 174 Tenn. 148.

17. Black L.D.

18. Black L.D.

19. Black L.D.

20. U.S.—Armstrong Cork Co. v. W. & J. Sloane Mfg. Co., C.C.A.N.J., 27 F.2d 644, 645.

21. **Two processes described**

(1) "Molded inlaid linoleum," came into the art in 1880; it is manufactured by the stencil process. A stencil, provided with sections in the form of the different parts of a desired varicolored pattern, is placed on burlap, and each section is filled with a loose granular mixture o linseed and cork of the desired color.

"Inlaid linoleum" has become a trade-name referring to the "straight-line inlaid linoleum" and has been distinguished from "plain linoleum" and "painted linoleum."[22]

INLAND. Within a country, state or territory; within the same country.[23]

In old English law, inland was used for the demesne of a manor; that part which lay next or most convenient for the lord's mansion house, as within the view thereof, and which, therefore, he kept in his own hands for support of his family and for hospitality; in contradistinction to outland or utland, which was the portion let out to tenants.[24]

INLANTAL or INLANTALE. Demesne or inland, opposed to delantal, or land tenanted.[25]

INLAUGHE. Saxon, in old English law, under the law, in a frank-pledge, or decennary.[26]

INLAW. As a verb, to place under the protection of the law.[27]

IN LAW. See In 42 C.J.S. p 483 note 82 (24).

INLEASED. In old English law, entangled or ensnared.[28]

IN LEGE OMNIA SEMPER IN PRAESENTI STARE CONSENTUR.[29]

INLET. A term which is construed to mean the indentation in the shore at the mouth or outlet of a navigable stream.[30]

IN LIEU OF. See In 42 C.J.S. p 477 note 2–p 478 note 8.

INLIGARE. In old European law, to confederate; to join in a league.[31]

IN LIMINE. See In 42 C.J.S. p 489 note 10.

IN LOCO FACTI IMPRESTABILIS SUBEST DAMNUM ET INTERESSE.[32]

IN LOCO PARENTIS. See In 42 C.J.S. p 489 note 12–p 490 note 16.

IN MAJORE SUMMA CONTINETUR MINOR.[33]

IN MALEFICIIS VOLUNTAS SPECTATUR NON EXITUS.[34]

IN MALEFICIO RATIHABITIO MANDATO COMPARATUR.[35]

INMATE. An associated lodger or inhabitant, one who is a mate or associate in the occupancy of a place;[36] a fellow lodger, one who lives in the same house or apartment with another;[37] one who occu-

The stencil being withdrawn, the burlap, with the superimposed stenciled divisions now making the desired pattern, then passes beneath a powerful press which compresses the stenciled blocks and cements them to each other and to the burlap, producing, however, irregular edges at the junctures of the different parts of the pattern, due to the fact that, after the stencil pattern is removed, and the loose, granular, varicolored mixes are subjected to pressure, the particles move laterally, and the different colored pattern sections interlace and produce irregular lines between the different colored inlays.—Armstrong Cork Co. v. W. & J. Sloane Mfg. Co., C.C.A.N.J., 27 F.2d 644, 645, 647, 648.

(2) "Straight-line inlaid linoleum," has been made since 1895, and was introduced in an effort to meet the objection of the trade to the irregular, or ragged edge, lines of the molded linoleum. In this process, the inlays or figures are cut from rolled sheets and placed or inlaid on the burlap to form patterns, after which the burlap and the superimposed inlays are by heat and pressure cemented together, with the result that the juncture lines between the different color inlays are sharp and distinct, since the pattern sections are cut from solid, hardened sheets and have distinct, sharply defined edges. Until the advent of the embossed or indented molded linoleum, these "straight-line" linoleums largely supplanted the stenciled or molded linoleum.—Armstrong Cork Co. v. W. & J. Sloane Mfg. Co., supra.

22. U.S.—Armstrong Cork Co. v. W. & J. Sloane Mfg. Co., supra.

23. Black L.D.

Phrases construed

(1) "Inland bill of exchange," see Bills and Notes § 4 b.

(2) "Inland trade," defined as trade wholly carried on at home, as distinguished from commerce.—Black L.D.

(3) Other phrases as to which more recent adjudications have not been found see 32 C.J. p 523 notes 85–91.

24. Black L.D.

25. Black L.D.

26. Black L.D.

27. Black L.D.

28. Black L.D.

29. A maxim meaning "In law all things are always judged from their present status."—Morgan Leg.Max.

30. N.Y.—Tillotson v. Hudson River R. Co., 9 N.Y. 575, 580.

31. Black L.D.

32. A maxim meaning "Damages come in the place of an act which cannot be performed."—Trayner Leg. Max.

Applied in Audubon Hotel Co. v. Braunning, 46 So. 33, 35, 120 La. 1089, 124 Am.S.R. 456.

33. A maxim meaning "In the greater sum is contained the less."—Black L.D.

Applied in Foliamb's Case, 5 Coke 115b, 77 Reprint 235.

34. A maxim meaning "In evil deeds regard must be had to the intention and not to the result."—Black L.D.

35. A maxim meaning "In a tort, ratification is equivalent to authority."—Bouvier L.D.

Similarly rendered

"In a case of malfeasance, ratification is equivalent to command."—Black L.D.

36. U.S.—Ex parte Psimoules, D.C. Cal., 222 F. 118, 120—Farrell v. Security Mut. L. Ins. Co., Conn., 125 F. 684, 688, 60 C.C.A. 374.

37. U.S.—Farrell v. Security Mut. L. Ins. Co., supra.

Similar definitions

(1) A person who lodges or dwells in the same house with another, occupying different rooms, but using the same door for passing in and out of the house.—Black L.D.

pies or lodges in a place with others; also any occupant, even if alone,[38] hence an indweller, one who occupies or lodges in any place or dwelling, one of the occupants of an asylum, hospital, or prison.[39]

"Inmates" of particular institutions or places are discussed in such C.J.S. titles as Army and Navy § 62, soldiers' homes; Asylums § 7; Disorderly Houses §§ 7, 11 e, 14 b, d, 15 d; Hospitals §§ 7, 8; Paupers §§ 17, 77, 78, also 48 C.J. p 446 notes 85–93, p 543 note 67–p 547 note 23; Prisons §§ 18, 19, also 50 C.J. p 343 note 32–p 346 note 93; Prostitution § 4, also 32 C.J. p 524 note 7 [a]–[c], 50 C.J. p 803 notes 76–90; and Reformatories § 8 et seq, also 53 C.J. p 1060 note 35 et seq.

IN MAXIMA POTENTIA MINIMA LICENTIA.[40]

IN MERCIBUS ILLICITIS NON SIT COMMERCIUM.[41]

IN-MIGRANTS. A word used to designate transients, that is, people who are here today and gone tomorrow.[42]

INMUEBLES. In Spanish law, immovables; real property.[43]

INMUNE. In Spanish law, one who is free from any obligation or burden.[44]

INMUNIDAD. In Spanish law, exemption from obligation or burden.[45]

INN. As defined generally see Innkeepers § 1, post page 1128 note 1—page 1133 note 1.

Inns of chancery. The buildings known as Clifford's Inn, Clement's Inn, New Inn, Staple's Inn. They were formerly a sort of collegiate houses, in which law students learned the elements of law before being admitted into the inns of court, but they have long ceased to occupy that position.[46]

(2) One who dwells in a part of another's house, the latter dwelling at the same time in such house.—Rex v. Franey, 44 N.S. 163, 167.

38. Cal.—People v. Matsicura, 124 P. 882, 883, 19 Cal.App. 75.

39. U.S.—Farrell v. Security Mut. L. Ins. Co., Conn., 125 F. 684, 688, 60 C.C.A. 374.

Phrases construed

(1) Inmate of an asylum see Asylums § 7.

(2) "Inmate of a house of ill fame," or "inmate of a house of prostitution" see the C.J.S. titles Disorderly Houses § 7; and Prostitution § 4, also 32 C.J. p 524 note 7 [a]–[c], 50 C.J. p 803 notes 76–90.

(3) Other phrases as to which more recent adjudications have not been found see 32 C.J. p 524 notes 14–17.

40. A maxim meaning "In the greatest power there is the smallest license."—Wharton L.Lex.

Similarly rendered

"In the greatest power there is the least freedom."—Black L.D.

41. A maxim meaning "There should be no commerce in illicit or prohibited goods."—Black L.D.

42. U.S.—Brown v. Bayview Manor Homes, D.C.Va., 51 F.Supp. 557, 558.

43. Escriche Diccionario.

44. Escriche Diccionario.

45. Escriche Diccionario.

"Inmunidad eclesiástica"

Exemption conceded to churches as regards taxation on their property (inmunidad real), and from profane use or entry (inmunidad local), as well as to clergy (inmunidad personal ó clerical) corresponding to the English "benefit of clergy" so that they are not amenable to the ordinary tribunals.—Escriche Diccionario.

46. Black L.D.

History and purpose

(1) "When 'the fixing of the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot', brought the legal profession together, 'they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery). . . . Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled apprentices, . . .), who answered to our bachelors, as the state and degree of a serjeant . . . did to that of a doctor.' "—Ricker's Pet., 29 A. 559, 562, 66 N.H. 207, 24 L.R.A. 740.

(2) "Here in Term time the students of the law attend in great numbers, as it were to public schools, and are there instructed in all sorts of law learning and in the practice of the courts. There belong to it ten lesser Inns, and sometimes more, which are called the Inns of Chancery, in each of which there are an hundred students at the least, and in some of them a far greater number, though not constantly residing. The students are for the most part young men. Here they study the nature of original and judicial writs, which are the very first principles of the law. After they have made some progress here and are more advanced in years, they are admitted into the Inns of Court properly so called; of these there are four in number. In that which is the least frequented there are about 200 students . . . for the young student, which most commonly cometh from one of the Universities, for his entrance or beginning were first instituted and erected eight houses of Chancery, to learn there the elements of the law, that is to say (inter alia) 'Clifford's Inn, and each of these houses consists of forty or thereabouts.' . . . 'All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others quantum inter viburna cupressus. In which Houses of Court and Chancery, the readings and other exercises of the laws therein continually used are most excellent and behoofful for attaining to the knowledge of these laws.' "—Smith v. Kerr, [1900] 2 Ch. 511, 518.

(3) They were so called because they were anciently inhabited by such clerks as chiefly studied the framing of writs, which regularly belonged to the cursitors, who were officers of the court of chancery. There were nine of them, namely: Clement's, Clifford's, and Lyon's Inn; Furnival's, Thavies', and Symond's Inn; New Inn; and Barnard's and Staples' Inn. They consisted chiefly of solicitors, and possessed corporate property, hall, chambers, etc., but performed no public functions like the inns of court.—Black L.D.

Inns of court. Certain private unincorporated associations in the nature of collegiate houses, located in London, and invested with the exclusive privilege of calling to the bar, that is, conferring the rank or degree of barrister.[47]

INNAMIUM. In old English law, a pledge.[48]

INNAVIGABILITY and **INNAVIGABLE.** See the C.J.S. titles Insurance § 311, also 32 C.J. p 524 note 25, applied to vessels in the law of marine insurance; and Navigable Waters § 1, also 32 C.J. p 524 note 24, with reference to streams.

IN NECESSARIIS, UNITAS; IN NON NECESSARIIS, LIBERTAS; IN OMNIBUS, CARITAS.[49]

INNER. Farther in; interior; internal; as an inner chamber, the inner bark.[50]

INNINGS. In old records, lands recovered from the sea by draining and banking.[51]

47. Black L.D.

Classification and history

(1) The principal inns of court are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. The two former originally belonged to the Knights Templar; the two latter to the earls of Lincoln and Gray respectively. These bodies now have a "common council of legal education" for giving lectures and holding examinations.—Black L.D.

(2) "The original institution of the inns of court nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charter from the crown. They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar is delegated to them from the judges, and in every instance their conduct is subject to their control, as visitors."—Ricker's Pet., 29 A. 559, 562, 66 N.H. 207, 215, 24 L.R.A. 740.

48. Black L.D.

49. A maxim meaning "In those things which are essential let there be unity; in non-essentials, liberty; in all things, charity."—Morgan Leg. Max.

50. Webster New Int.D.

Phrases construed

(1) "Inner barrister" see Attorney and Client § 3 b, also 6 C.J. p 567 note 11 [a].

(2) "Inner courts" defined see Court 20 C.J.S. p 1305 note 33 and Pocket Parts.

(3) "Inner Temple" see Inn ante note 47.

51. Black L.D.

INNKEEPERS

This Title includes regulation of inns, hotels, boardinghouses, lodginghouses, and all houses furnishing for compensation accommodation as a temporary home; and mutual rights, duties, and liabilities of keepers of such houses and their guests, boarders, or lodgers.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITIONS, DISTINCTIONS, AND GENERAL CONSIDERATIONS

§ 1. In General

a. Definition and nature of "inn" or "hotel"
b. Other terms defined and compared

a. Definition and Nature of "Inn" or "Hotel"

An inn or hotel is essentially an establishment which provides lodging for transients; and a place which would otherwise be an inn or hotel does not lose its character as such because of its mode of construction, the appellation bestowed on it by the proprietor, or the fact that food and drink cannot be obtained therein or are available at the option of the guest.

An inn or hotel is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation;[1] a place where every well-behaved stranger or traveler, who is willing to pay reasonable rates for accommodation, is entitled to receive food, drink, and lodging;[2] a place for the regular accommodation of travelers or transients with lodging, food, or entertainment;[3] a house where a traveler is furnished with everything for which he has occasion while on his way;[4] a business institution held out to the public as a house where travelers, strangers, or other transient persons having means of payment, and of proper demeanor and fair repute, must be received and accommodated, to its capacity, without any previous agreement for accommodation or as to the duration of their stay.[5]

Distinctive features of a hotel or inn are that it receives transient guests[6] and furnishes them with lodging.[7] It is kept for the accommodation and entertainment of travelers and wayfaring men, and

1. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App.2d 62.
Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, citing **Corpus Juris**, and transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 527 note 1, p 528 note 7.

Other definitions

(1) A house where travelers or others are entertained and furnished with food and lodging, and sometimes other conveniences.—City of Birmingham v. Bollas, 96 So. 591, 592, 209 Ala. 512.

(2) A public house where guests are given fare and lodging or fare without lodging, at stipulated rates.—Murray v. Hagens, La.App., 148 So. 505, 506.

(3) A house for the entertainment of travelers and passengers in which lodging and necessaries are provided for them and for their horses and attendants.—Cromwell v. Stephens, 2 Daly, N.Y., 15, 21, 3 Abb.Pr.,N.S., 26—32 C.J. p 527 note 1 [a] (7).

(4) A house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home.—Ford v. Waldorf System, 188 A. 633, 57 R.I. 131.
32 C.J. p 527 note 1 [a].

2. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, citing **Corpus Juris**, and transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 528 notes 4 [a], 7 [a] (4).

3. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.
N.Y.—Waitt Const. Co. v. Chase, 188 N.Y.S. 589, 197 App.Div. 327, affirmed 135 N.E. 948, 233 N.Y. 633.
32 C.J. p 528 note 7 [a].

4. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, citing **Corpus Juris**, and transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 528 note 12.

5. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

6. Iowa.—Hubbell v. Higgins, 126 N.W. 914, 148 Iowa 36, Ann.Cas.1912B 822.
Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, citing **Corpus Juris** and transferred, see, Sup., 161 S.W.2d 408.

7. Mo.—Juengel v. City of Glendale, supra, citing **Corpus Juris**.

not for those residing in the same neighborhood who may visit, or others who may remain at the house for some special purpose not connected with passage or travel.[8] Formerly it was necessary, in order to constitute an inn, that there should be provision for furnishing not only lodging, but also food[9] and drink[10] for the guests, and accommodation for their horses;[11] but this early definition has been modified and narrowed by changes in the modes of travel and customs of the people,[12] and facilities for the supplying of guests with food[13] or drink,[14] and a stable for the care of their horses,[15] are no longer essential requisites of an inn or hotel. The character of a place as an inn or hotel is not lost because of the type of structure or the surrounding buildings or lands,[16] or because a different appellation is bestowed on it.[17]

Where the term "hotel" is defined by statute, the statutory definition will govern in applying such statute, but does not necessarily determine the meaning of the term as used in an unrelated statute.[18]

"Hotel" and "inn" compared. At one time an "inn" differed from a "hotel," in that the inn not only offered accommodations to persons, but stabling and feed for their horses, and safe-keeping for their baggage and impedimenta.[19] At present, however, "hotel" is a word which in common use has largely, if not entirely, displaced the term "inn;"[20] it is regarded as synonymous therewith,[21] especially an inn of the better class,[22] and is employed interchangeably therewith in statutes and decisions.[23] It has been said that the term "inn" is now usually restricted to small, old-fashioned establishments, and that "hotel" is properly distinguished from "inn" by the former's superior style and pretensions.[24]

A hotel on the European plan is one where the charge per day includes only lodging and service, and the guests take their meals at the attached restaurant, or wherever they please, and pay for them separately.[25] As otherwise expressed, such a hotel is one in which the renting of rooms is separate from the furnishing of meals and the maintenance of a restaurant for meals;[26] a hotel which furnishes rooms and lodging without board;[27] or a hotel where the keeper does not provide meals for the guests.[28] In such a hotel the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order.[29] The mere fact

N.Y.—Babb v. Elsinger, 147 N.Y.S. 98.

8. Mich.—Brams v. Briggs, 260 N. W. 785, 786, 272 Mich. 38—Carter v. Hobbs, 12 Mich. 52, 55, 83 Am. D. 762.

9. U.S.—Lewis v. Hitchcock, D.C.N. Y., 10 F. 4.
N.Y.—Kelly v. New York Excise Com'rs, 54 How.Pr. 327.
"The word inn at common law meant a place where a traveler is furnished with both lodging and entertainment, including food."—Dixon v. Robbins, 158 N.E. 63, 246 N.Y. 169, 53 A.L.R. 986, reversing 221 N. Y.S. 814, 220 App.Div. 746—Odom v. East Avenue Corporation, 34 N.Y.S. 2d 312, 316, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
Extent of duty to entertain and accommodate guest see infra § 9.

10. Minn.—Nelson v. Johnson, 116 N.W. 828, 104 Minn. 440, 17 L.R.A., N.S., 1259.
32 C.J. p 529 note 15.

11. Minn.—Nelson v. Johnson, supra.
32 C.J. p 529 note 16.

12. Wis.—Huntley v. Stanchfield, 169 N.W. 276, 168 Wis. 119, 19 A. L.R. 513.
32 C.J. p 529 note 17.

13. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, citing **Corpus Juris**, and transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 529 note 18.

14. Mo.—Juengel v. City of Glendale, supra, citing **Corpus Juris.**
32 C.J. p 529 note 19.

15. Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.
32 C.J. p 529 note 20.

16. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.
32 C.J. p 527 note 1 [b].

17. Cal.—Edwards v. City of Los Angeles, supra.
N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N. Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

18. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.

19. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

20. N.Y.—Dixon v. Robbins, 158 N. E. 63, 246 N.Y. 169, 53 A.L.R. 986, reversing 221 N.Y.S. 814, 220 App. Div. 746.
32 C.J. p 528 note 4.
"Hotel" is modern name for houses that were formerly called "inns" or "taverns."—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.

21. N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
32 C.J. p 528 note 5.
"All recognized lexicographers indicate that the words may be regarded as synonymous."—Dixon v. Robbins, 158 N.E. 63, 246 N.Y. 169, 53 A.L.R. 986, reversing 221 N.Y.S. 814, 220 App.Div. 746.

22. N.Y.—Dixon v. Robbins, supra —Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App. Div. 985.

23. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, transferred, see, Sup., 161 S.W.2d 408.
N.Y.—Meehan v. Board of Excise Com'rs of Jersey City, 70 A. 363, 75 N.J.Law 557, affirming 64 A. 689, 73 N.J.Law 382.
32 C.J. p 528 note 6.

24. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.

25. La.—Vonderbank v. Schmidt, 10 So. 616, 44 La.Ann. 264, 32 Am.S.R. 336, 15 L.R.A. 462.
32 C.J. p 528 note 8.

26. N.Y.—Bernstein v. Sweeny, 33 N.Y.Super. 271, 272.

27. La.—Vonderbank v. Schmidt, 10 So. 616, 44 La.Ann. 264, 32 Am.S.R. 336, 15 L.R.A. 462.

28. La.—Sieward v. Denechaud, 45 So. 561, 564, 120 La. 720.

29. Ky.—New Galt House Co. v.

that a hotel is conducted on the European plan does not alter its legal character as an inn.[30]

Public utility. Hotels are not public utilities,[31] and their internal affairs are not subject to the regulatory powers of a public service commission, as discussed infra § 4.

Questions of law and fact. The question whether a house of entertainment is a public inn, a boardinghouse, or a private house is a question of fact, to be determined, like any fact, on all the evidence.[32] However, whether a building is an inn is a question of law for the court where there are no facts as to this issue in dispute.[33] Where a dining room or restaurant is connected with, and operated in, a hotel, it cannot be stated as a matter of law that it is not part of the hotel.[34]

b. Other Terms Defined and Compared

The term "inn" or "hotel" has frequently been compared with, or distinguished from, many other terms, such as "apartment hotel" or "apartment building," "boardinghouse," "lodginghouse," "rooming house," "coffeehouse," "house of public entertainment," "ordinary," "public utility," "restaurant," "saloon," "tavern," "tenement house," and "tourist camp."

Apartment hotel or building. In legal contemplation an apartment hotel, as such, is not an inn;[35] but an apartment building may constitute a "hotel" as defined by a particular statute.[36]

A "family hotel," as distinguished from an ordinary public hotel, is a hotel designed primarily for the accommodation of permanent guests, in which rooms and suites are taken by families or individuals for some period; it is not designed, or at least is designed only incidentally, for the accommodation of transients.[37] As used in particular covenants or statutory provisions, the term "tenement house" may include[38] or exclude[39] "family hotels."

"Tavern" is sometimes broadly defined as a house where travelers or others are entertained and furnished with food and lodging, and sometimes with other conveniences;[40] a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation;[41] or a public house where entertainment and accommodation for travelers and other guests are provided.[42] Frequently the element of the sale of liquors is included in the definition of "tavern" and the term is variously defined as a house for the entertainment of travelers as well as for the sale of liquors;[43] a public place, where food and intoxicating liquors are furnished to guests, and usually where liquors are sold to be drunk on the premises;[44] a place where wine is sold and drinkers are entertained;[45] or a hotel usually licensed to sell liquors in small quantities.[46] The purpose of a tavern is primarily to accommodate the public with eating, drinking, and lodging.[47]

The word "tavern" frequently is used synonymously with "inn" or "hotel,"[48] and, as appears

Louisville, 111 S.W. 351, 129 Ky. 341, 17 L.R.A.,N.S., 566.

30. N.Y.—Bernstein v. Sweeny, 33 N.Y.Super. 271—Krohn v. Sweeney, 2 Daly 200.
Wis.—Huntley v. Stanchfield, 169 N. W. 276, 168 Wis. 119, 19 A.L.R. 513.
32 C.J. p 529 note 22.

31. N.Y.—People ex rel. Public Service Commission v. New York Telephone Co., 29 N.Y.S.2d 513, 262 App.Div. 440, affirming People ex rel. Public Service Commission of New York v. New York Telephone Co., 22 N.Y.S.2d 837, 175 Misc. 128, and affirmed 40 N.E.2d 1020, 287 N.Y. 803.

32. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.
32 C.J. p 530 note 33.

33. Pa.—Mathis v. Off, 8 Pa.Dist. & Co. 6.

34. N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.

35. Mass.—Davis v. Gay, 6 N.E. 549, 141 Mass. 531.
N.Y.—Alsberg v. Lucerne Hotel Co., 92 N.Y.S. 851, 46 Misc. 617.
32 C.J. p 529 note 25.
"Apartment hotel" defined see the C.J.S. definition 3 C.J.S. p 1422 notes 75–77.
"Tenement house" as including "apartment hotels" see infra note 7.

36. Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402.
"Apartment house" defined see the C.J.S. definition 3 C.J.S. p 1422 note 78–p 1423 note 92.

37. N.Y.—Kew Gardens Corporation v. Ciro's Plaza, 23 N.Y.S.2d 957, 175 Misc. 475.
32 C.J. p 529 note 25 [a].

38. Mass.—Bancroft v. Building Commissioner of City of Boston, 153 N.E. 319, 257 Mass. 82.
62 C.J. p 705 note 88 [a].

39. N.Y.—Apartment Hotel Owners' Ass'n v. City of New York, 233 N. Y.S. 553, 133 Misc. 881—Musgrave v. Sherwood, 54 How.Pr. 338, reversed on other grounds 23 Hun 669, 60 How.Pr. 339.
Contra Musgrave v. Sherwood, 53 How.Pr. 311.

40. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.

41. Tex.—Comer v. State, 10 S.W. 106, 26 Tex.Civ.App. 509.
Wis.—Jansen v. State, 19 N.W. 374, 60 Wis. 577.

42. Mo.—City of St. Louis v. Siegrist, 46 Mo. 593, 594.
Similar definitions
(1) A public house where food is provided for travelers and guests.—Murray v. Hagens, La.App., 143 So. 505, 506.
(2) A place for the entertainment of travelers, where all their wants can be supplied.—People v. Jones, 54 Barb., N.Y., 311, 316, 1 Cow.Cr. 381—32 C.J. p 527 note 3 [a].

43. N.Y.—People v. Jones, supra.

44. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

45. S.C.—State v. Chamblyss, 25 S. C.L. 220, 34 Am.D. 593.

46. Mo.—City of St. Louis v. Siegrist, 46 Mo. 593, 594.

47. Pa.—In re London & Polsky's License, 24 Pa.Dist. 985, 43 Pa. Co. 691.

48. U.S.—Werner v. Washington, C.

from a comparison of the definitions of the terms, is similarly defined. It has been said that the term "tavern" is growing obsolete[49] and is now usually restricted to small, old-fashioned establishments.[50]

A tavern is considered to be a "house of entertainment" or a "house of public entertainment."[51]

Boardinghouses, lodginghouses, or rooming houses. Formulating a definition of "rooming house" has been said to be a dangerous, if not impossible, task.[52] In general, a lodginghouse or rooming house may be defined as a house where lodgings are let;[53] a house where bedrooms as such are furnished;[54] a house where there are one or more bedrooms which the proprietor can spare for the purpose of giving lodgings to such persons as he chooses to receive;[55] or a house containing furnished apartments which are let out by the week or by the month, without meals, or with breakfast simply.[56] A "flat" or "apartment house" may be used as a lodginghouse and structures placed side by side, or one in the rear of another, or in a circle or semicircle, do not lose their identity as rooming houses merely by bestowing on them a different appellation, if in fact they are used to lodge the public.[57]

"Boardinghouse" is defined as a house kept principally for the residence of permanent boarders;[58] a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept;[59] a house for the accommodation of those who enter under contract for entertainment at a certain rate for a certain period of time, as for a week or month, at a rate of compensation agreed on.[60] A boardinghouse furnishes its patrons with both food and lodging, and a house in which rooms are let to roomers by the day, week, or month, but to whom the proprietor does not furnish or sell food or refreshments, is not a boardinghouse.[61]

Neither a boardinghouse[62] nor a lodginghouse or rooming house[63] constitutes, as such, an inn or a hotel, even though a register is kept and the word "hotel" appears on its stationery;[64] but by statute, the word "hotel" may be so defined as to include a rooming house.[65] The distinction between a hotel or inn and a boardinghouse or lodginghouse is that the former is for the accommodation of all persons who choose to come and who are in a condition fit to be received, without any prior or express agreement as to the duration of their stay, while the latter is for the accommodation of such persons as the proprietor chooses to receive under an express contract for a certain period of time and at a certain rate.[66] There is nothing incon-

C.D.C., F.Cas.No.17,416a, 2 Hayw. & H. 175.
N.Y.—Waitt Const. Co. v. Chase, 188 N.Y.S. 589, 592, 197 App.Div. 327, affirmed 135 N.E. 948, 233 N.Y. 633.
32 C.J. p 527 note 3.

No practical difference
In a decision in which doubt was expressed as to whether there is any legal distinction between an "inn or tavern" and a "hotel," it was held that there was no practical difference between them such as would render certain regulations applicable to "hotels" and not to "inns and taverns." —Meehan v. Board of Excise Com'rs of Jersey City, 70 A. 363, 365, 75 N. J.Law 557, affirming 64 A. 689, 73 N.J.Law 382.

49. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

50. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.

51. Ala.—City of Birmingham v. Bollas, supra.
N.Y.—Crown Point Overseers of Poor v. Warner, 3 Hill 150, 156.
30 C.J. p 475 note 62.

52. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
54 C.J. p 1103 note 3.

53. Mo.—Marden v. Radford, 84 S. W.2d 947, 955, 229 Mo.App. 789, citing **Corpus Juris.**
12 C.J. p 204 notes 52-54—38 C.J. p 137 note 74.

54. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.

55. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.
54 C.J. p 1103 note 4.

56. Mo.—Marden v. Radford, 84 S.W. 2d 947, 955, 229 Mo.App. 789, citing **Corpus Juris.**
38 C.J. p 137 note 75.

57. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.

58. N.J.—Singelakis v. Davidson, 188 A. 443, 444, 117 N.J.Law 332, quoting **Corpus Juris.**
8 C.J. p 1132 note 15.

59. N.J.—Singelakis v. Davidson, supra, quoting **Corpus Juris.**
32 C.J. p 539 note 87 [a]—8 C.J. p 1132 note 13.

Not a "'family' house"
A boardinghouse is not a "'family' house."—Baddour v. City of Long Beach, 18 N.E.2d 18, 22, 279 N.Y. 167.

Private dwelling distinguished
Me.—Robbins v. Bangor R. & Electric Co., 62 A. 136, 100 Me. 496, 1 L.R.A.,N.S., 963.
N.J.—Singelakis v. Davidson, 188 A. 443, 117 N.J.Law 332.
N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167.
8 C.J. p 1132 note 14 [a], [d].

60. N.J.—Singelakis v. Davidson, 188 A. 443, 444, 117 N.J.Law 332, quoting **Corpus Juris.**
8 C.J. p 1132 note 14.

61. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

62. Ark.—Pettit v. Thomas, 148 S. W. 501, 103 Ark. 593, 12 L.R.A.,N.S., 122, Ann.Cas.1914B 726.
32 C.J. p 529 note 27.

63. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.
N.Y.—Dixon v. Robbins, 158 N.E. 63, 246 N.Y. 169, reversing 221 N.Y.S. 814, 220 App.Div. 746.
32 C.J. p 529 note 26.

64. N.Y.—Roberts v. Case Hotel Co., 175 N.Y.S. 123, 106 Misc. 481.

65. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
54 C.J. p 1104 note 6.

66. Kan.—City of Independence v. Richardson, 232 P. 1044, 1046, 117 Kan. 656, quoting **Corpus Juris.**
N.Y.—People v. Gold, 6 N.Y.S.2d 264,

sistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boardinghouse and an inn; with respect to those who occupy rooms and are entertained on a special contract, it may be a boardinghouse, and in respect of transient persons, who without a stipulated contract remain from day to day, it may be an inn.[67] The fact that a house is not immediately on a highway, and that the grounds on which it stands are inclosed and the gates closed at night, does not render it any less an inn, or convert it into a boardinghouse.[68] A boardinghouse[69] or lodginghouse[70] is not the same as a tenement house.

"House of public entertainment." A house where travelers or others are entertained and furnished with food and lodging, and sometimes other conveniences, whether called an "inn" or a "hotel," is in common understanding a "house of public entertainment."[71]

Restaurant. The word "restaurant" has been said to have no defined meaning,[72] and is frequently applied broadly to all places where refreshments can be had,[73] from a mere eating house[74] or place where meals and refreshments are served[75] to common shops or stores where the furnishing of eatables to be consumed on the premises is subordinate to the chief business of vending articles of consumption and confectionery.[76]

The term "restaurant" has been said to be synonymous with the term "café."[77] A "restaurant" or a "café," as far as those terms are used to designate a mere eating house where no provision is made for lodging the patrons, is not a boardinghouse,[78] or an inn, or a hotel;[79] nor is it a "tavern"

267—Cady v. McDowell, 1 Lans. 484, 496.
32 C.J. p 529 note 80—8 C.J. p 1132 note 14 [c]—54 C.J. p 1103 note 4 [a].

Place held "inn," not boardinghouse
Pa.—Mathis v. Off, 8 Pa.Dist. & Co. 6.

67. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.
32 C.J. p 530 note 81—54 C.J. p 1103 note 4 [b].

68. Cal.—Fay v. Pacific Impr. Co., 26 P. 1099, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188, reheard 28 P. 943, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188.

69. N.Y.—People v. Shkilky, 194 N.Y.S. 101, 201 App.Div. 55.
62 C.J. p 705 note 86.

70. Ohio.—Linwood Park Co. v. Van Dusen, 58 N.E. 576, 63 Ohio St. 183.
62 C.J. p 705 note 93.

71. Ala.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.
N.Y.—Overseers of Poor of Crown Point v. Warner, 3 Hill 150.
"Tavern" as "house of public entertainment" see supra note 51.

72. N.C.—State v. Shoaf, 102 S.E. 705, 179 N.C. 744.
54 C.J. p 729 note 93.

73. Mich.—Richards v. Washington F. & M. Ins. Co., 27 N.W. 586, 60 Mich. 420.
54 C.J. p 729 notes 95, 5.

74. Mich.—Richards v. Washington F. & M. Ins. Co., supra.
N.C.—State v. Shoaf, 102 S.E. 705, 179 N.C. 744.
54 C.J. p 729 note 99.

Similar descriptions
(1) Public eating place or house.—San Francisco v. Larsen, 131 P. 366, 367, 165 Cal. 179—54 C.J. p 729 note 17.

(2) Cookshop.
Mich.—Richards v. Washington F. & M. Ins. Co., 27 N.W. 586, 60 Mich. 420, 426.
N.C.—State v. Shoaf, 102 S.E. 705, 179 N.C. 744.

(3) A place where eatables are furnished to be consumed on the premises.—State v. Shoaf, supra.

(4) A place where eatables can be obtained at all reasonable hours.—In re Liquor Licenses, Pa.Quart. Sess., 4 Montg.Co. 77, 79.

(5) A place where something to eat, already prepared, or which can readily be prepared, may be obtained.
N.H.—State v. Hogan, 30 N.H. 268, 272.
Vt.—Donahue v. Conant, 146 A. 417, 419, 102 Vt. 108.

75. Md.—Standard Brewing Co. v. Weil, 99 A. 661, 663, 129 Md. 487.
Vt.—Donahue v. Conant, 146 A. 417, 102 Vt. 108.
54 C.J. p 729 notes 12, 13.

Similar descriptions
(1) An establishment where refreshments or meals may be procured by the public.—Ft. Smith v. Gunter, 154 S.W. 181, 106 Ark. 371—54 C.J. p 729 note 3.

(2) An establishment for the sale of refreshments, both food and drink.—Page v. District of Columbia, 20 App.D.C. 469, 475—54 C.J. p 729 note 1.

(3) A place where refreshments, food, and drink are served.—State v. Shoaf, 102 S.E. 705, 179 N.C. 744—54 C.J. p 729 note 14.

(4) A place where meals are served.—Potson v. Chicago, 222 Ill. App. 50.

(5) A place to which a person resorts for the temporary purpose of obtaining a meal or something to eat.—State v. Shoaf, supra.

(6) A house where liquors and cooked food are sold.—Page v. District of Columbia, supra.

(7) A place where any person who conducts himself properly and is able and willing to pay for food has a right to demand that it be furnished him.—Debenham v. Short, Tex.Civ. App., 199 S.W. 1147, 1148.

76. Mich.—Richards v. Washington F. & M. Ins. Co., 27 N.W. 586, 60 Mich. 420.

77. N.C.—State v. Shoaf, 102 S.E. 705, 179 N.C. 744.
54 C.J. p 729 note 20.

78. Kan.—State v. Brown, 212 P. 663, 664, 112 Kan. 814, 31 A.L.R. 338.
54 C.J. p 730 note 26.

79. Tex.—Debenham v. Short, Civ. App., 199 S.W. 1147, 1148.
32 C.J. p 530 note 34—19 C.J. p 1008 note 20 [b]—54 C.J. p 730 note 29.
"There is a wide difference between supplying food to a guest at a place conducted as an inn, and supplying food to a customer of a restaurant as that business is carried on under present day conditions. In olden times, an inn was a temporary home for the guest, who was satisfied to accept whatever fare the innkeeper supplied him with; now, a customer goes to a restaurant only to satisfy his immediate need of food, and he, rather than the restaurant keeper, selects the particular food he wants at a price fixed by the restaurant keeper for that food."—Ford v. Waldorf System, 188 A. 633, 635, 57 R.I. 131.

Legislative recognition of distinction
"The common law distinction be-

where that term is used as synonymous with "inn" or "hotel."[80] A restaurant is a place where viands are sold, not where intoxicants are dispensed,[81] and thus a mere drinking house[82] or "concert saloon"[83] is not a restaurant; but a place which would otherwise be a restaurant does not lose its character as such by the mere fact that liquor is furnished therein,[84] and an establishment may be so conducted as to constitute not only a restaurant, but also, in addition, a "dramshop,"[85] a "saloon,"[86] or a "tippling house."[87] The term "restaurant" has been held not to include a drugstore selling soda water and ice cream;[88] a place merely for the sale of soft drinks, cigars, cigarettes, and ice cream;[89] an apartment where only soft drinks are sold, at a single stand and by the glass;[90] a place of amusement;[91] or a shop or store[92] particularly one used merely for the manufacture and sale of tobacco, snuff, and cigars.[93]

Saloon. A drinking saloon is not an inn.[94]

Coffeehouse. A mere coffeehouse, where no provision is made for lodging guests, is not an inn.[95] However, the term has been defined as a house of entertainment where guests are supplied with coffee and other refreshments, and sometimes with lodging,[96] and is sometimes used to denote a hotel or tavern.[97]

An "ordinary" has been defined as a tavern or eating house where regular meals are served[98] at settled prices.[99] The term was at one time used to designate a public house, open to whoever might apply for accommodation, where food and lodging were furnished to the traveler and his beast, at fixed rates, and where intoxicating liquor was sold at retail. It was a house of public entertainment and was commonly designated as a "tavern" or "hotel."[1]

Hospital. A statute including within its definition of a hotel "any structure where rooms or board are furnished, whether to permanent or transient occupants" has been held intended to be restricted in its meaning to businesses like hotels, rooming houses, and eating houses, and not to include a hospital.[2]

"Hotel garni" is a species of establishment once common in Paris in which furnished apartments were let by the day, week, or month.[3]

Hotelleries is a name used in France to signify inns of the better class.[4]

A sleeping car, as discussed in Carriers § 904, is not an inn.

A tenement house is distinguishable from a hotel,[5] for in a tenement house the occupants are tenants, whereas in a hotel they are merely guests.[6] As used in particular statutory provisions the term "tenement house" may include "apartment hotels."[7]

tween the business conducted by a hotel and that of a restaurant has been consistently recognized by the legislature of this state."—Appeal of Wellsboro Hotel Co., 7 A.2d 334, 335, 336 Pa. 171, 122 A.L.R. 1396.

80. N.Y.—People v. Jones, 54 Barb. 317, 1 Cow.Cr. 381.

81. Tex.—Savage v. State, 88 S.W. 351, 356, 50 Tex.Cr. 199.
54 C.J. p 729 note 16.

Sale of liquors excluded under ordinance

"Restaurant" has been defined by an ordinance as "every place where food or refreshments of any kind —not including spirituous, vinous or malt liquors—are prepared for casual visitors and sold for consumption therein."—New Galt House v. Louisville, 111 S.W. 351, 352, 129 Ky. 341, 33 Ky.L. 869, 17 L.R.A.,N.S., 566—54 C.J. p 730 note 24.

82. Pa.—In re Liquor Licenses, Quart.Sess., 4 Montg.Co. 77.

83. Pa.—Cleveland v. O'Neil, 4 Pa. C.Pl. 148, 149.

84. U.S.—Lewis v. Hitchcock, D.C. N.Y., 10 F. 4, 6.
N.Y.—Babb v. Elsinger, 147 N.Y.S. 98, 99.

85. Colo.—Scanlon v. Denver, 88 P. 156, 157, 38 Colo. 401.

86. Colo.—Lendholm v. People, 136 P. 70, 55 Colo. 467.
54 C.J. p 729 note 22.

87. Colo.—Scanlon v. Denver, 88 P. 156, 157, 38 Colo. 401.
54 C.J. p 729 note 23.

88. Iowa.—In re Henery, 100 N.W. 43, 44, 124 Iowa 358.

89. Vt.—Donahue v. Conant, 146 A. 417, 419, 102 Vt. 108.

90. Ill.—Cecil v. Green, 60 Ill.App. 61, 63.

91. Pa.—Cleveland v. O'Neil, 4 Pa.C. Pl. 148, 149.

92. Tex.—Debenham v. Short, Civ. App., 199 S.W. 1147, 1148.
54 C.J. p 730 note 34.

93. N.H.—State v. Hogan, 30 N.H. 268, 273.

94. N.Y.—People v. Jones, 54 Barb. 311, 1 Cow.Cr. 381.
32 C.J. p 530 note 37.

95. Ark.—Pettit v. Thomas, 148 S. W. 501, 103 Ark. 593, 12 L.R.A.,N S., 122, Ann.Cas.1914B 726.
32 C.J. p 530 note 36—11 C.J. p 947 note 15 [b].

96. Century D.
11 C.J. p 947 note 15.

97. Worcester D.
11 C.J. p 947 note 15.

98. Ill.—Potson v. Chicago, 222 Ill. App. 50, 52.

99. U.S.—Werner v. Washington, C. C.D.C., 29 F.Cas.No.17,416a, 2 Hayw. & H. 175, 180.
46 C.J. p 1135 note 49 [a], [b].

1. Va.—Talbott v. Southern Seminary, Inc., 109 S.E. 440, 131 Va. 576, 19 A.L.R. 534—Wortham v. Commonwealth, 5 Rand. 669, 26 Va. 669.
46 C.J. p 1135 note 49.

2. Iowa.—Hull Hospital v. Wheeler, 250 N.W. 637, 216 Iowa 1394.
"Hospital" distinguished from "hotel" see Hospitals § 1.

3. N.Y.—Cromwell v. Stephens, 2 Daly 15, 19, 3 Abb.Pr.,N.S., 26.

4. N.Y.—Cromwell v. Stephens, supra.
32 C.J. p 528 note 4 [b] (5).

5. N.Y.—Kitching v. Brown, 73 N.E. 241, 180 N.Y. 414.
62 C.J. p 705 note 92.

6. N.Y.—Musgrave v. Sherwood, 53 How.Pr. 311.

7. N.Y.—Apartment Hotel Owners' Ass'n v. City of New York, 233 N.Y.S. 553, 133 Misc. 881.

Tourist camp. The business or occupation of conducting a tourist camp in which cabins are rented to transients has been held to have all the essential characteristics of the business or occupation of keeping a hotel.[8]

A hotel bill is a bill for board and lodging, but not for billiards, cigars, and liquors.[9]

§ 2. Keeper of Inn, Hotel, or Tavern

a. Definition and characteristics
b. Other terms compared and distinguished

a. Definition and Characteristics

An innkeeper is one who engages as a regular business in receiving at an inn, and providing accommodations for, all transients who are in fit condition and willing to pay an adequate price. In the absence of prohibitory statutes, any corporation or natural person may engage in innkeeping.

An innkeeper is a person who publicly professes that he keeps an inn, and will receive therein all travelers who are willing to pay an adequate price and who come in a situation in which they are fit to be received.[10] An innkeeper has also been defined as a person who makes it his business to entertain travelers and passengers and provide lodging and necessaries for them and their horses and attendants;[11] but this type of definition has been altered and relaxed by changes in the customs of the people and modes of travel,[12] and whatever may have been the rule in early times, it is now well settled that a man may be an innkeeper although he has no provision for the accommodation of horses.[13] The common-law definition of an innkeeper is sometimes broadened by statutory enactment.[14]

The terms "hotel keeper"[15] and "tavern keeper"[16] have been considered as synonymous with "innkeeper," at least a hotelkeeper and an innkeeper occupy the same status in the law.[17]

It has been said that the business of "innkeeper" is largely obsolescent,[18] that "innkeepers" in the true meaning of that word are rare and fast disappearing,[19] and that the term itself is falling into disuse.[20]

Requisites. To constitute a person an innkeeper, hotelkeeper, or tavern keeper he must receive and entertain as guests all those who choose to visit his house,[21] the obligation to do so, as discussed infra § 9, being one of the distinguishing characteristics of the business of keeping an inn.[22] Another essential characteristic of keeping an inn is that it shall be the regular business of the person so engaged,[23] and a person is not an innkeeper who receives guests out of mere hospitality, or from motives among which gain is at most incidental,

8. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, 613, transferred, see, Sup., 161 S.W.2d 408.
"Tourist camp" defined see the C.J.S. definition 12 C.J.S. p 889 note 22.

Single building unnecessary
"A tourist camp is none the less a hotel because the business or occupation is conducted through the use of a group of buildings rather than through the use of one."—Juengel v. City of Glendale, supra.

9. Colo.—Patterson v. Gage, 16 P. 560, 561, 11 Colo. 50, 52.

10. Tenn.—Hill v. Memphis Hotel Co., 136 S.W. 997, 124 Tenn. 376, 34 L.R.A.,N.S., 420.
32 C.J. p 530 note 40.

11. Ky.—Audubon Country Club v. Commonwealth, 183 S.W. 911, 169 Ky. 399.
32 C.J. p 530 note 41.

12. Mo.—Horton v. Terminal Hotel & Arcade Co., 89 S.W. 363, 114 Mo. App. 357.
32 C.J. p 531 note 44.

13. Minn.—Johnson v. Chadbourn Finance Co., 94 N.W. 874, 89 Minn. 310, 99 Am.S.R. 571.
32 C.J. p 531 note 54.

14. Iowa.—Hull Hospital v. Wheeler, 250 N.W. 837, 216 Iowa 1394.

In California
The article in the civil code relative to innkeepers indicates a general classification as "innkeepers" of a "hotelkeeper," "furnished apartment house keeper," "furnished bungalow court keeper," "boarding house or lodging house keeper," and keepers of "furnished cottages."—Edwards v. City of Los Angeles, 119 P. 2d 370, 48 Cal.App.2d 62.

In Louisiana
(1) The term "innkeepers" includes, by statute, those who keep a tavern or hotel, and make a business of lodging travelers.—Murray v. Hagens, App., 143 So. 505, 506.

(2) The operator of a nine- or ten-room establishment which was operated like a hotel, with separate keys for each room, and which catered to transients and local guests who were required to register, was held to be an "innkeeper" within the meaning of the statute.—Babin v. Thormander, App., 167 So. 241, 242.

15. Tenn.—McClaugherty v. Cline, 163 S.W. 801, 128 Tenn. 605.
32 C.J. p 531 note 45.

"Hotel keeper" has been defined as "a person keeping a house for the entertainment of travelers, with board and lodging."—Patterson v. Gage, 16 P. 560, 561, 11 Colo. 50.

16. Ga.—Bonner v. Welborn, 7 Ga. 296.
N.Y.—Crown Point Overseers of Poor v. Warner, 3 Hill 150.

"Tavern keeper" defined
(1) One who obtains a license to keep a tavern and for whom it is kept.—Commonwealth v. Burns, 4 J. J.Marsh., Ky., 177.

(2) Other definitions see 32 C.J. p 531 note 46 [a] (2)-(5).

17. Pa.—Appeal of Wellsboro Hotel Co., 7 A.2d 334, 336 Pa. 171, 122 A. L.R. 1396.

18. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

19. R.I.—Ford v. Waldorf System, 188 A. 633, 57 R.I. 131.

20. Kan.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

21. N.Y.—People v. Jones, 54 Barb. 311, 1 Cow.Cr. 381.

22. U.S.—Civil Rights Cases, Tenn., 8 S.Ct. 18, 109 U.S. 3, 27 L.Ed. 835.
32 C.J. p 531 note 49.

23. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 531 note 50.

and not because he has regularly entered into the business of receiving guests;[24] but it is not necessary that innkeeping should be the exclusive occupation of the person engaged therein.[25] While a sign displayed on a building, indicating that it is a common inn, is evidence that the building is such in fact and that the proprietor is an innkeeper,[26] in order to constitute a person an innkeeper it is not necessary that he should exhibit a sign indicating his occupation as such,[27] and it is sufficient if he, by words, acts, or otherwise, holds himself out to the public as a common innkeeper.[28] The innkeeper is the person or corporation who really owns and carries on the business,[29] as distinguished from a mere employee;[30] but, where one has by advertisements held himself out as proprietor of an inn, a mere want of technical ownership of the plant, or his private and personal relations to some corporation having an investment therein, will not protect him from liability as an innkeeper.[31] A person may be an innkeeper, although he does not sell wine or liquor.[32] One may be a bona fide tavern keeper notwithstanding the receipts from the bar are larger than those from the tavern proper.[33]

The right to keep an inn is not a franchise,[34] and any natural person or corporation may engage in the business of innkeeping in the absence of statutory regulations to the contrary.[35]

b. Other Terms Compared and Distinguished

The duty of an innkeeper to accommodate the public generally, and the transient nature of the accommodations he provides, distinguish him from a boardinghouse or lodginghouse keeper. An innkeeper is also distinguished from a landlord, merchant, trader, publican, victualer, restaurant keeper, or steamboat proprietor.

Boardinghouse or lodginghouse keeper. A boardinghouse keeper is one who furnishes accommodations for a definite period, as by the week or month, at a rate of compensation agreed on.[36] Since a distinction obtains between a boardinghouse and a lodginghouse, as discussed supra § 1 b, a keeper of a lodginghouse is not, in a legal sense, a boardinghouse keeper.[37] Except as the terms may be otherwise used in particular statutory provisions,[38] one who keeps a mere boardinghouse[39] or a lodginghouse or rooming house[40] is not an innkeeper, the distinction lying in the transient nature of the entertainment provided by an innkeeper,[41] and the fact that the keeper of a boardinghouse or a lodginghouse, not having made a profession of willingness to serve the public, is at liberty to choose his guests, and to make special arrangements with them, while an innkeeper is pledged to entertain all travelers of good conduct and with means of payment.[42] Similarly, the keeper of a hotel at a summer resort or watering place, for the board, lodging, and entertainment of the visitors, is not an innkeeper, because there is wanting the essential characteristic that innkeepers entertain from day to day on an implied contract, while the keeper of a hotel of the sort mentioned above receives his guests under an express contract for a certain time and at a certain rate.[43] However, this rule applies only to a person who is conducting a house which is a boardinghouse proper, and it exists only by reason of the fact that the persons received are taken by express arrangement at a certain rate and usually for a protracted stay; it does not apply to a person who is conducting a general hotel business, even though the hotel is located at a summer resort or

24. Tex.—Howth v. Franklin, 20 Tex. 798, 73 Am.D. 218.
32 C.J. p 531 note 51.

25. N.H.—Amey v. Winchester, 39 A. 487, 68 N.H. 447, 73 Am.S.R. 614, 39 L.R.A. 760.
32 C.J. p 531 note 52.

26. Minn.—Johnson v. Chadbourn Finance Co., 94 N.W. 874, 89 Minn. 310, 99 Am.S.R. 571.
32 C.J. p 531 note 56.

27. Iowa.—Humburd v. Crawford, 105 N.W. 330, 128 Iowa 743.
32 C.J. p 531 note 57.

28. Cal.—Fay v. Pacific Impr. Co., 26 P. 1099, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188, reheard 28 P. 943, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188.
32 C.J. p 531 note 58.

29. Mass.—Nantasket Beach Steamboat Co. v. Shea, 65 N.E. 57, 182 Mass. 147.
32 C.J. p 532 notes 66, 68.

30. D.C.—Chanock v. U. S., 267 F. 612, 50 App.D.C. 54.

31. Ill.—Ross v. Daugherty, 127 Ill. App. 572.
32 C.J. p 532 note 70.

32. Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.
32 C.J. p 531 note 55.

33. Ky.—Schneider v. Commonwealth, 111 S.W. 303, 304, 33 Ky. L. 770, 20 L.R.A.,N.S., 107.

34. N.Y.—Crown Point Overseers of Poor v. Warner, 3 Hill 150.

35. Cal.—Magee v. Pacific Impr. Co., 33 P. 772, 98 Cal. 678, 35 Am.S.R. 199.
32 C.J. p 532 note 59.
Necessity of license see infra § 6.

36. N.Y.—Stewart v. McCready, 24 How.Pr. 62.

37. Ill.—Bailey v. People, 60 N.E. 98, 190 Ill. 28, 83 Am.S.R. 116, 54 L.R.A. 838.

38. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.

39. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
32 C.J. p 532 note 79.

40. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., supra.
N.C.—Wells v. West, 194 S.E. 813, 212 N.C. 656.
32 C.J. p 532 note 80.

41. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.

42. Wis.—Huntley v. Stanchfield, 169 N.W. 276, 168 Wis. 119, 19 A.L.R. 513.
32 C.J. p 532 note 81.
Distinction between "inn" and "boardinghouse" or "lodginghouse" see supra § 1 b.

43. U.S.—Blum v. Southern Pullman Palace Car Co., C.C.Tenn., 3 F.Cas. No.1,574, 1 Flipp. 500.
32 C.J. p 533 note 82.

watering place.[44]

Landlord. The term "landlord" is sometimes defined to include the master or proprietor of an inn or of a lodginghouse or boardinghouse.[45] It has been observed, however, that some of the decisions deprecate the use of the term "landlord" when the other party to the arrangement is a mere guest or lodger rather than a tenant, preferring the term "proprietor" or other expression of like import.[46]

Merchant or trader. The business or occupation of innkeeping is not a trading[47] or mercantile[48] pursuit. However, one who keeps a hotel may at the same time be a merchant in the legal sense where he buys and retails other articles, as an unrestricted business, in the establishment kept by him as a hotel.[49]

"Publican" and "victualer" are synonymous terms and mean one who serves food or drink prepared for consumption on the premises.[50] The English publican or victualer is the legal ancestor of the modern restaurant keeper.[51]

Keeper of restaurant, café, or coffeehouse. "Restaurant keeper" has been defined as a caterer who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons.[52] A person who keeps merely a restaurant or café[53] or a coffeehouse[54] is not an innkeeper. A restaurant keeper has been distinguished from a manufacturer,[55] merchant or tradesman,[56] and saloonkeeper.[57]

Steamboat proprietor. The proprietors of steamboats are not innkeepers;[58] but the relation which exists between them and their passengers differs in no essential respect from that which exists between innkeeper and guest, and, if not identical therewith, is closely analogous thereto.[59]

§ 3. Guests

a. Definitions and distinctions
b. Requisites and nature
c. Duration of relation
d. Questions of law and fact
e. Presumptions and burden of proof

a. Definitions and Distinctions

A guest is a transient who receives accommodations at an inn, his transient character being the essential distinguishing feature between him and a boarder or lodger. A tenant differs from a guest, boarder, or lodger in that the tenant acquires an interest in the realty and a right to the exclusive legal possession of the premises hired.

A "guest," within the meaning of the rules of law pertaining to the relation of innkeeper and guest, is a transient person who resorts to, and is received at, an inn for the purpose of obtaining the accommodations which it purports to afford.[60]

44. N.C.—Holstein v. Phillips, 59 S.E. 1037, 146 N.C. 366, 14 L.R.A.,N.S., 415, 14 Ann.Cas. 323.

45. La.—Murray v. Hagens, App., 143 So. 505.

46. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
"Tenant" distinguished from "boarder," "lodger," or "guest" see infra § 3.

47. U.S.—Toxaway Hotel Co. v. J. L. Smathers & Co., 30 S.Ct. 263, 216 U.S. 439, 54 L.Ed. 558.
32 C.J. p 532 note 74—63 C.J. p 603 note 95 [a] (3), (4).
"Restaurant keeper" distinguished from "merchant" or "tradesman" see infra this section note 56.

48. U.S.—Toxaway Hotel Co. v. J. L. Smathers & Co., supra.

49. Ky.—Campbell v. Finck, 2 Duv. 107.
32 C.J. p 532 note 73—40 C.J. p 646 note 78.

50. Mass.—Friend v. Childs Dining Hall Co., 120 N.E. 407, 409, 231 Mass. 65, 6 A.L.R. 1100.

51. R.I.—Ford v. Waldorf System, 188 A. 632, 57 R.I. 131.

52. U.S.—In re Ah Yow, D.C.Wash., 59 F. 561.

53. Pa.—Appeal of Wellsboro Hotel Co., 7 A.2d 334, 336 Pa. 171, 122 A.L.R. 1396.
54 C.J. p 730 note 44.
"Restaurant" distinguished from "inn" or "hotel" see supra § 1 b.

54. Ga.—Bonner v. Welborn, 7 Ga. 296.

55. Cal.—San Francisco v. Larsen, 131 P. 366, 165 Cal. 179.

56. U.S.—In re Ah Yow, D.C.Wash., 59 F. 561.
54 C.J. p 730 note 45.

57. Tex.—Savage v. State, 88 S.W. 351, 50 Tex.Cr. 199.

58. Mass.—Clark v. Burns, 118 Mass. 275, 19 Am.R. 456.
32 C.J. p 533 note 86.

59. N.Y.—Adams v. New Jersey Steamboat Co., 45 N.E. 369, 151 N.Y. 163, 56 Am.S.R. 616, 34 L.R.A. 682.

60. U.S.—Freudenheim v. Eppley, C. C.A.Pa., 88 F.2d 280, 283.
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76, 80, quoting Corpus Juris.
La.—Murray v. Hagens, App., 143 So. 505.
32 C.J. p 533 note 90.
Other definitions
(1) One who comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives.
Iowa.—Shoecraft v. Bailey, 25 Iowa 553, 555.
N.Y.—Metzger v. Schnabel, 52 N.Y.S. 105, 106, 23 Misc. 698.
(2) One who patronizes an inn.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 827, 134 Neb. 137, 115 A.L.R. 1078—32 C.J. p 538 note 90 [a] (1).
(3) A person entertained for pay at an inn, tavern, or hotel on the general undertaking of the keeper of the house.—Murray v. Hagens, La. App., 143 So. 505, 506—32 C.J. p 533 note 90 [a].
(4) "Guest" defined generally see 39 C.J.S. p 415 notes 13–25.
Hospital patient
(1) Under a statute defining "guest" to include "boarder and patron, or any legal occupant of any hotel as herein defined," it was held that the legislature in using the phrase, "or any legal occupant of any hotel as herein defined," attempted to classify the persons mentioned as guests, boarders, or patrons of hotels, rooming houses, and boarding-houses, and did not intend to include a patient in a hospital.—Hull Hospital v. Wheeler, 250 N.W. 687, 216 Iowa 1394.

A "boarder" is one who boards at a boarding-house;[61] one who has food and lodging in another's house or family for a reward or stipulated price.[62]

"Lodger" or "roomer." "Lodger" has been defined as one who has leave or the right to inhabit another man's house;[63] a person whose occupancy is a part of a house, and subordinate to, and in some degree under, the control of a landlord or his representative;[64] one who for the time being has his home at his lodging place.[65] According to the purpose for which it is used the meaning of the term may vary.[66]

"Roomer" has been considered synonymous with "lodger,"[67] and has been defined as one who rents a room or rooms in a house.[68]

"Guest" distinguished from "boarder" or "lodger." It has been said to be difficult, if not impossible, to lay down a set rule as to what circumstances make the distinction between a guest and a lodger.[69] In general, the essential difference between a mere boarder and a guest at an inn lies in the character in which the party comes and remains, that is, whether he is a transient person or not,[70] a guest being, as already shown, a transient or wayfarer, whereas a person enjoying accommodations under such conditions of permanency as to make the place his home or residence for the time being is not a guest but a boarder,[71] or a lodger if he simply has a room without meals.[72] It has also been said that there is a difference between a boarder and a guest in regard to the contract by which the relation is created in the respective instances, a boarder be-

(2) "Hospital" distinguished from "hotel" see Hospitals § 1.

Corpus Juris cited in holding that prospective hotel employee residing at the hotel before commencement of the employment was not a guest. —Powers v. Raymond, 239 P. 1069, 1071, 167 Cal. 126.

Relationship is distinct from that existing between the proprietor of an eating house and a patron thereof.—Appeal of Wellsboro Hotel Co., 7 A.2d 334, 336 Pa. 171, 122 A.L.R. 1396.

"Travelers," within statute respecting innkeepers' responsibility for travelers' effects, are "guests," while "customer" is buyer of fare at inn or one patronizing it for board and lodging.—Murray v. Hagens, La.App., 143 So. 505.

61. N.J.—Atlantic City v. Le Beck, 15 A.2d 653, 125 N.J.Law 373.

62. N.Y.—In re Doubleday, 159 N.Y.S. 947, 950, 173 App.Div. 739—Metzger v. Schnabel, 52 N.Y.S. 105, 106, 23 Misc. 698.
8 C.J. p 1131 note 9.

Similar definition

A boarder is "one who has food statedly at another's table, or meals and lodging in his house, for pay or compensation of any kind."—Patrick v. Crank, Mo.App., 110 S.W.2d 381, 384.

63. Mo.—Marden v. Radford, 84 S.W.2d 947, 954, 229 Mo.App. 789, citing **Corpus Juris.**
38 C.J. p 136 notes 62, 63.

Other definitions

(1) A tenant of part of another's house.—Marden v. Radford, supra, citing **Corpus Juris**—38 C.J. p 136 note 60.

(2) One who inhabits a portion of a house, of which another has the general possession and custody.—Marden v. Radford, supra, citing **Corpus Juris**—38 C.J. p 136 note 64.

(3) One who lives at board, or in a hired room, or who has a bed in another's house.—Marden v. Radford, supra, citing **Corpus Juris**—38 C.J. p 136 note 65.

(4) One who lives in a hired room or rooms in the house of another.
Minn.—Dewar v. Minneapolis Lodge No. 44 B. P. O. E., 192 N.W. 358, 359, 155 Minn. 98, 32 A.L.R. 1012.
Mo.—Marden v. Radford, 84 S.W.2d 947, 954, 229 Mo.App. 789, citing **Corpus Juris.**

(5) One who occupies hired apartments in another's house.—Marden v. Radford, supra, citing **Corpus Juris**—38 C.J. p 136 note 67.

(6) One who has no interest in the realty, but who occupies part of a house or tenement which is under the control of another.
Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App.2d 62.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

64. Mo.—Marden v. Radford, 84 S.W.2d 947, 954, 229 Mo.App. 789, citing **Corpus Juris.**
38 C.J. p 136 note 69.

65. Mo.—Marden v. Radford, supra, citing **Corpus Juris.**
Neb.—Pullman Palace Car Co. v. Lowe, 44 N.W. 226, 28 Neb. 239, 26 Am.S.R. 325, 6 L.R.A. 809.

66. Mo.—Marden v. Radford, 84 S.W.2d 947, 954, 229 Mo.App. 789, citing **Corpus Juris.**
38 C.J. p 136 note 71.

67. N.J.—Atlantic City v. Le Beck, 15 A.2d 653, 654, 125 N.J.Law 373.
54 C.J. p 1103 note 1.

68. N.J.—Atlantic City v. Le Beck, supra.

69. Wash.—Smith v. Dorchester Hotel Co., 259 P. 1085, 145 Wash. 344.

70. Ill.—Holman v. Indianapolis Life Ins. Co., 18 N.E.2d 112, 297 Ill.App. 649.
Mo.—Marden v. Radford, 84 S.W.2d 987, 229 Mo.App. 789.
N.C.—Holstein v. Phillips, 59 S.E. 1037, 146 N.C. 366, 14 L.R.A.,N.S., 475, 14 Ann.Cas. 323.
Wash.—Smith v. Dorchester Hotel Co., 259 P. 1085, 1086, 145 Wash. 344, citing **Corpus Juris.**

71. Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.
Tenn.—Meacham v. Galloway, 52 S.W. 859, 102 Tenn. 415, 420, 73 Am.S.R. 886, 46 L.R.A. 319.
32 C.J. p 537 note 64, p 538 note 72 [a], [b].

72. Mo.—Marden v. Radford, 84 S.W.2d 987, 229 Mo.App. 789.
N.Y.—Gibson v. Von Glahn Hotel Co., Inc., 185 N.Y.S. 154.

Individuals held lodgers not guests

(1) Generally.—Smith v. Dorchester Hotel Co., 259 P. 1085, 145 Wash. 344.

(2) One who obtained a room in a residence hotel by special arrangement with the proprietor at a fixed rate for a permanent stay, having merely the use of a room of which the hotel management retained the general control, furnishing maid service and the like, was held a "lodger."—Brams v. Briggs, 260 N.W. 785, 272 Mich. 38.

Individual held guest not roomer

One who lived in a hotel for about a year, under an arrangement whereby he was given a lower rate than that of transient guests, and paid his bills usually once each month, while transient guests paid each day, or at the end of each week, was held a "guest" rather than a "roomer."—Driskill Hotel Co. v. Anderson, Tex.Civ.App., 19 S.W.2d 316.

ing under an express contract at a certain rate, for a certain time,[73] while a guest at an inn is ordinarily entertained from day to day, according to his business, on an implied contract;[74] but this difference seems to rest more on the practice usually followed in the dealings between innkeepers and their guests, for it has frequently been held that, where a transient goes to an inn for entertainment as such, he may become a guest, in the legal sense of the word, notwithstanding an express contract between him and the innkeeper fixing the amount to be paid.[75] The length of stay,[76] the existence of a special contract for the room,[77] and the existence of a home elsewhere[78] are material circumstances in determining whether a person is a guest rather than a boarder or lodger, and may be considered as evidence in connection with other circumstances, even though, standing alone, they may not be decisive; but such circumstances individually are not controlling,[79] and the mere fact that he has stayed for a week or longer, and that he is paying the weekly rather than the daily rate, does not necessarily establish that he is a boarder and not a guest.[80] It has been held that some members of a family stopping at a hotel may be boarders, while others are guests.[81]

"Tenant" distinguished from "boarder," "lodger," or "guest." While it has been observed that the distinction between a tenant on the one hand and a guest, boarder, or lodger on the other is substantial,[82] well settled,[83] and fully recognized by the authorities,[84] it has also been pointed out that in some classes of establishments the tendency of these different classes of occupants is to shade into each other, and that attention must therefor be given to the detailed criteria that must be relied on to decide into which class given individuals fall.[85] A principal distinction between the relationship of landlord and tenant and that existing between innkeeper and guest, or between a keeper of a boardinghouse or lodginghouse and the boarder or lodger, exists in the fact that the tenant acquires an interest in the real estate, while the guest, boarder, or lodger does not.[86] Another distinction rests in the character of the possession,[87] the tenant having the exclusive legal possession, whereas the lodger has merely the use without the actual or exclusive legal possession;[88] and the ordinary agreement for

73. N.C.—Holstein v. Phillips, 59 S.E. 1037, 146 N.C. 366, 14 L.R.A.,N.S., 475, 14 Ann.Cas. 323.
32 C.J. p 537 note 66.

74. N.Y.—Willard v. Reinhardt, 2 E.D.Smith 148.
32 C.J. p 538 note 67.

75. Ark.—Pettit v. Thomas, 148 S.W. 501, 103 Ark. 593, 12 L.R.A.,N.S., 122, Ann.Cas.1914B 726.
32 C.J. p 534 note 95.

76. Wash.—Smith v. Dorchester Hotel Co., 259 P. 1085, 145 Wash. 344.
32 C.J. p 538 note 73.

77. Cal.—Magee v. Pacific Impr. Co., 33 P. 772, 98 Cal. 678, 35 Am.S.R. 199.
Mich.—Brams v. Briggs, 260 N.W. 785, 786, 272 Mich. 38—Carter v. Hobbs, 12 Mich. 52, 56, 83 Am.D. 762.
Wash.—Smith v. Dorchester Hotel Co., 259 P. 1085, 145 Wash. 344.

78. Wash.—Smith v. Dorchester Hotel Co., supra.
32 C.J. p 538 note 72.

79. Wash.—Smith v. Dorchester Hotel Co., supra.

80. Minn.—Knutson v. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., 279 N.W. 714, 202 Minn. 642.
Pa.—Mathis v. Aff, 8 Pa.Dist. & Co. 6.
32 C.J. p 538 note 70.

81. Minn.—Lusk v. Belote, 22 Minn. 468.
32 C.J. p 538 note 77.

82. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
35 C.J. p 955 note 69.

83. D.C.—Beall v. Everson, Mun.App., 34 A.2d 41.

84. Cal.—Roberts v. Casey, 93 P.2d 654, 657, 36 Cal.App.2d Supp. 767.
"A mere guest or lodger is no tenant."—Roberts v. Casey, supra.
"When the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants."—Edwards v. City of Los Angeles, 119 P.2d 370, 374, 48 Cal.App.2d 62.

85. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

86. U.S.—Coggins v. Gregorio, C.C.A.N.M., 97 F.2d 948—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.
Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App.2d 62—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 600, 116 Conn. 112, citing **Corpus Juris.**
D.C.—Beall v. Everson, Mun.App., 34 A.2d 41.
Mass.—White v. Maynard, 111 Mass. 250, 15 Am.R. 28.
Mo.—Marden v. Radford, 84 S.W.2d 947, 955, 229 Mo.App. 789.

Absence of contract as to realty
The relation of innkeeper and guest is not the relation of landlord and tenant, since there is no contract as to realty.
Cal.—Van Dorn v. Couch, 64 P.2d 1197, 1201, 21 Cal.App.2d 749, quoting **Corpus Juris,** concurring opinion per Schauer, J.
N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.

Guests as licensees
Guests, in a hotel, boarders in a boardinghouse, and roomers or lodgers, are generally mere "licensees" and not "tenants" as respects right of landlord summarily to remove them for nonpayment of rent.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

87. Iowa.—Brin v. Sidenstucker, 8 N.W.2d 423, 232 Iowa 1258, 145 A.L.R. 359.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

88. U.S.—Coggins v. Gregorio, C.C.A.N.M., 97 F.2d 948—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.
Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 600, 116 Conn. 112, citing **Corpus Juris.**
D.C.—Beall v. Everson, Mun.App., 34 A.2d 41.
Iowa.—Brin v. Sidenstucker, 8 N.W.2d 423, 145 A.L.R. 359.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.
35 C.J. p 955 note 68.

board and lodging in a house, by which the keeper retains the legal possession, custody, and care of the whole house and of every room therein, does not create the relationship of landlord and tenant.[89] The tenant may, while the lodger may not, maintain ejectment[90] and trespass.[91] The landlord may have a lien, for unpaid rent, on the goods of the lodger, although he may have no lien on those of a tenant.[92]

In determining the relation between the parties in a given case, the result does not depend on any one factor as being decisive, but rather on the direction which the general effect of the various tests that have been applied, after weighing opposing ones against each other, can be said to take,[93] and the relation established depends, in the final analysis, on the contract of hiring,[94] gathered from its terms and interpreted in the light of the surrounding circumstances,[95] having in view the ascertainment of the intention of the parties to the contract.[96] Resort may be had to all the extrinsic facts and circumstances that have a bearing on the character of the occupancy which the parties intended to and did create;[97] and whether the premises are hired by

Proprietor's retention of supervision or control

If the proprietor retains to himself any supervision or control of the premises hired, the occupant is a lodger, and the control or supervision by the owner is not required to be for any particular purpose or reason.—Marden v. Radford, supra.

No actual interference with possession

It is immaterial that hotel owner may never have interfered with occupant's possession and entered for purpose of repairing furniture and fixtures, or that he entered with occupant's consent at times and on occasions suitable to occupant, if owner reserved right to enter for any purpose.—Marden v. Radford, supra.

89. Cal.—Fox v. Windemere Hotel Apartment Co., 157 P. 820, 30 Cal. App. 162.
35 C.J. p 955 note 65.

90. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 600, 116 Conn. 112, citing **Corpus Juris**—Mathews v. Livingston, 85 A. 529, 86 Conn. 263, Ann.Cas.1914A 195.

91. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 600, 116 Conn. 112, citing **Corpus Juris**—Mathews v. Livingston, 85 A. 529, 86 Conn. 263, Ann.Cas.1914A 195.

92. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Mathews v. Livingston, 85 A. 529, 86 Conn. 263, Ann.Cas.1914A 195.

93. Cal.—Roberts v. Casey, 93 P.2d 654, 658, 36 Cal.App.2d Supp. 767.
"It is not a question of what the relation would be if considered in some isolated aspect, but rather what is its dominant character."—Roberts v. Casey, supra.

Mode of fixing rate; maid service

The mere fact that the charge for the occupancy may be based on a monthly rate, or reckoned for more persons than one, or that maid service is or is not furnished, is not conclusive one way or the other as to the character of the occupancy; such facts are only matters for consideration in connection with all other facts in the record.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

Status as tenant held shown

(1) Occupants of a hotel room, for which they were to pay "rent" by the month and to furnish everything in the way of furniture and household goods to make it habitable as living quarters, were held "lessees" or "tenants" and not "guests," "roomers," or "patrons" of the hotel. —Brin v. Sidenstucker, 8 N.W.2d 423, 232 Iowa 1258, 145 A.L.R. 359.

(2) Where a husband and wife had the exclusive right to the possession of an apartment under rental agreement, and agreed that they would do all work necessary to keep apartment and its furnishings in order, the relation between apartment house owner and them was that of "landlord and tenant" and not "lodginghouse keeper and lodger."—Coggins v. Greggorio, C.C.A.N.M., 97 F.2d 948.

(3) Husband and wife, renting two light housekeeping rooms, one of which was kitchenette, in hotel wing, were not "guests" within statute respecting innkeepers' responsibility for travelers' effects, but were "tenants."—Murray v. Hagens, La.App., 143 So. 505.

94. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Mo.—Marden v. Radford, 84 S.W.2d 947, 955, 229 Mo.App. 789, citing **Corpus Juris.**
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.
35 C.J. p 955 note 66.

95. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Mo.—Marden v. Radford, 84 S.W.2d 947, 955, 229 Mo.App. 789, citing **Corpus Juris.**
35 C.J. p 955 note 67.

Express provision as to relationship

A written contract between a hotel keeper and a guest for the rental on a room for a year, the contract containing a provision that the relation between the parties should at all times be that of innkeeper and guest and not landlord and tenant, creates the relationship of innkeeper and guest.—Baldwin Piano Co. v. Congress Hotel, 243 Ill.App. 118.

Rental of "furnished apartment"

One who rented a "furnished apartment" was held not to have thereby become a "roomer" or a "guest" within the meaning of a statute defining "guest" to include a "boarder" or "patron" of a hotel; and the relationship between the proprietor and the occupant of the apartment was therefor not that of hotel keeper and guest.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.

"Furnishing board and lodging" generally connotes the legal relation of innkeeper and guest, rather than landlord and tenant.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

96. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 116 Conn. 112, citing **Corpus Juris.**
Mo.—Marden v. Radford, 84 S.W.2d 947, 955, 229 Mo.App. 789, citing **Corpus Juris.**
35 C.J. p 955 note 68.

97. Mo.—Martin v. Shryock Realty Co., 163 S.W.2d 804, 236 Mo.App. 1265.

Facts indicating status as lodger

Evidence that owners of apartment building retained keys to all apartments, furnished linens and maid service, kept hallways and windows in apartments clean, attended to removal of garbage, and furnished water, heat, and telephone service, tended to show that relation between owners and occupants of apartments was that of proprietors and lodgers rather than landlords and tenants.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

Facts indicating status as tenant

The fact that there are no common kitchens, dining rooms, toilets, or bathrooms, that suites severally have these various facilities, that each

the week or month, are furnished or unfurnished, whether the owner of the house resides on the premises, and the extent to which he exercises supervision and care of the apartment occupied by the lodger or tenant, are all material in ascertaining the intention of the parties to the contract.[98] The mere fact that a building is operated, advertised, and known as a "hotel" is not conclusive of the character of any particular occupancy therein,[99] and a person who occupies rooms in a "hotel" may, under the circumstances of the case, be a tenant and not a guest;[1] but the appellation used to designate the establishment is to be considered in connection with all the other facts and circumstances to negative or support the existence of any particular character of occupancy.[2] Where the same building is operated as an inn or hotel, rooming house, and apartment house, as a single institution and under the same management, some of the occupants may be guests, others roomers, and still others tenants.[3]

b. Requisites and Nature

To establish the relationship of innkeeper and guest, the parties must intend so to do; the person accommodated must be received as a guest and must procure accommodations in that capacity, although it is not essential that he register.

When one becomes a guest of an inn he is on the innkeeper's premises at the latter's invitation and is an invitee.[4] A guest may be such actually or constructively.[5]

Transient character. To be a guest of an inn or hotel it is essential, at least at common law, that the person should be a transient, that is, that he should come to the inn for a more or less temporary stay,[6] for if he comes on a permanent basis he will be deemed a boarder or lodger rather than a guest, see supra subdivision a of this section. It is said in some cases that in order to constitute a person a guest he must be a traveler or wayfarer;[7] but it has been doubted whether the courts in such cases intended to lay any stress on the term "traveler,"[8] and other cases do not take such a restricted view but hold that a guest is a person who uses the inn either for a temporary or a more permanent stay, in order to take what the inn can give, regardless of whether he comes from a distance or lives in the immediate vicinity.[9]

Intention or purpose; illegal conduct. A real or presumed intention to become a guest of an innkeeper is a controlling factor in determining whether one is in fact a guest,[10] and a person admitted to an inn becomes a guest only if he is received to be treated as a guest.[11] Hence a person who is invited by the innkeeper as his friend,[12] or who goes to dine with a guest,[13] or who goes to an inn merely to attend a banquet or a ball held there, even if he buys liquor or stables his horse,[14] is not a guest. A discharged hotel employee who does not

suite is in some sort a distinct unit, and that the rent for a suite is the same without regard to the number of occupants, are circumstances tending to characterize the relation between the parties as that of landlord and tenant rather than proprietor and lodger.—Roberts v. Casey, supra.

98. Conn.—Carroll v. Cooney, 163 A. 599, 116 Conn. 112.

99. Mo.—Marden v. Radford, 84 S. W.2d 947, 229 Mo.App. 789.

1. N.Y.—Hackett v. Bell Operating Co., 169 N.Y.S. 114, 181 App.Div. 535.
32 C.J. p 538 note 79.

Landlord and tenant relation held shown

Notwithstanding the designation of a building as a "hotel," where occupant who had no other home or residence remained there for approximately twenty-two months, and had applied for and been given a monthly rate after being there a few weeks, and thereafter continued on the monthly basis, the relation was held to be that of landlord and tenant, not innkeeper and guest.—Mason v. Hotel Grand Union, 41 N.Y.S. 2d 309.

2. Mo.—Marden v. Radford, 84 S.W. 2d 947, 229 Mo.App. 789.

3. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

Status of one unaffected by that of others

The relation between the proprietor of a family hotel and one who took rooms therein for a definite term at a fixed monthly rent would not be affected by the fact that travelers were received as transient guests for no definite period and at no fixed price.—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64.

4. Mo.—Burnison v. Souders, 35 S. W.2d 619, 225 Mo.App. 1159.

5. N.Y.—Ticehurst v. Beinbrink, 129 N.Y.S. 838, 72 Misc. 365.

6. Mich.—Brams v. Briggs, 260 N. W. 785, 272 Mich. 38.
N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N. Y. 120, 76 A.L.R. 1103—Kaplan v. Stogop Realty Co., 233 N.Y.S. 113, 133 Misc. 611.
32 C.J. p 533 note 94.

7. Tenn.—Meacham v. Galloway, 52 S.W. 859, 102 Tenn. 415, 73 Am.S. R. 886, 46 L.R.A. 319.
32 C.J. p 533 note 91.

8. Conn.—Walling v. Potter, 35 Conn. 183.
32 C.J. p 533 note 92.

9. Wis.—Curtis v. Murphy, 22 N.W. 825, 63 Wis. 4, 53 Am.R. 242.
32 C.J. p 533 note 93.

10. N.Y.—Ticehurst v. Beinbrink, 129 N.Y.S. 838, 72 Misc. 365.
32 C.J. p 535 note 23.

Purpose to procure refreshments or lodging

To be a guest one must visit the hotel for the purpose of availing himself of the entertainment offered, that is, to obtain refreshments or lodging.—Cumming v. Allied Hotel Corporation, Mo.App., 144 S.W.2d 177.

11. Tenn.—Hill v. Memphis Hotel Co., 136 S.W. 997, 124 Tenn. 376, 34 L.R.A.,N.S., 420.
32 C.J. p 536 note 34.

12. Tenn.—Manning v. Wells, 9 Humphr. 746, 51 Am.D. 688.
32 C.J. p 536 note 35.

13. N.Y.—Gastenhofer v. Clair, 10 Daly 265.

14. N.H.—Amey v. Winchester, 39

hire a room, but owing to the lateness of the hour is allowed to occupy one for the remainder of the night, is not a guest.[15] The intent to become a guest must be communicated to the innkeeper or his agent,[16] although an application to the innkeeper for entertainment is sufficient notice of the traveler's intention to become a guest,[17] and, as shown infra this section, registration as a guest is not indispensable. A person is none the less a guest because he comes to the inn, not on his own business or pleasure, but in the company and at the expense of another, if he comes as a traveler or transient to receive entertainment in that character.[18]

A person does not become a guest by obtaining a room at an inn solely for the accomplishment of some unlawful or improper purpose,[19] but, on the other hand, where a person resorting to a hotel for an illegal purpose remains after his improper conduct ceases, the relationship of host and guest attaches.[20] The relationship of innkeeper and guest is not affected by the fact that the guest is acting illegally in a matter outside of the actual relationship.[21]

Necessity of procuring accommodations. A person cannot become the guest of a hotel unless he procures some accommodation;[22] but the accommodation necessary to be procured by a person in order to constitute him a guest may consist of any form of entertainment or refreshment which the innkeeper publicly professes to serve,[23] and it is sufficient if he takes lodgings only,[24] or food without lodgings.[25] While it has been held that one who visits an inn merely for the purpose of obtaining liquor thereby becomes a guest,[26] it is generally considered that such a person does not become a guest within the meaning of statutes allowing guests to be served with intoxicating liquor on Sunday, but providing that a person must obtain food or lodging in order to constitute him a guest.[27]

A person does not become a guest merely by availing himself, without expense, of the facilities and comforts of the hotel, such as the use of the lobby, lounging room, and hotel stationery, which the innkeeper furnishes gratuitously to the public at large;[28] and where the innkeeper is engaged in another kind of business, which he conducts in connection with his inn for the convenience or pleasure of his guests, the relationship of innkeeper and guest does not arise between him and those who merely patronize the other business.[29]

Sending or leaving chattels. The owner of inanimate chattels who does not receive any personal entertainment does not become a guest merely by sending the chattels to an inn, or leaving them there,[30] and a person who engages and pays for a room merely to secure a safe place for the deposit of his valuables, and without any intention of occupying it, is not a guest.[31] It has been held that one who leaves his horse at an inn to be cared for thereby becomes a guest as regards the property so committed to the innkeeper's care,[32] and the rule has been extended to a case where a mere bailee left a horse at an inn;[33] but it has also been held that one does not become a guest merely by leaving his horse at an inn to be cared for,[34] or, a fortiori, by

A. 487, 68 N.H. 447, 73 Am.S.R. 614, 39 L.R.A. 760.
32 C.J. p 536 note 37.

15. N.Y.—Morrison v. Hotel Rutledge Co., 193 N.Y.S. 428, 200 App. Div. 636.

16. N.Y.—Gastenhofer v. Clair, 10 Daly 265.
32 C.J. p 535 note 25.

17. Tenn.—Hill v. Memphis Hotel Co., 136 S.W. 997, 124 Tenn. 376, 34 L.R.A.,N.S., 420.

18. Vt.—Read v. Amidon, 41 Vt. 15, 98 Am.D. 560.
32 C.J. p 536 note 40.

19. Wis.—Curtis v. Murphy, 22 N. W. 825, 63 Wis. 4, 53 Am.R. 242.
32 C.J. p 535 note 27.

20. N.Y.—Lucia v. Omel, 41 N.Y.S. 659, 46 App.Div. 200.
32 C.J. p 535 note 28.

21. Mass.—Cox v. Cook, 14 Allen 165.
32 C.J. p 536 note 29.

22. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76, 80, quoting **Corpus Juris.**
32 C.J. p 535 note 14.

23. Ill.—Burton v. Drake Hotel Co., supra, quoting **Corpus Juris.**
Tenn.—Hill v. Memphis Hotel Co., 136 S.W. 997, 124 Tenn. 376, 34 L. R.A.,N.S., 420.

24. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76, 80, quoting **Corpus Juris.**
32 C.J. p 535 note 16.

25. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76, 80, quoting **Corpus Juris.**
32 C.J. p 535 note 17.

26. N.Y.—Donald v. Edgerton, 5 Barb. 560.
32 C.J. p 535 note 18.

27. Mass.—Commonwealth v. Regan, 64 N.E. 407, 182 Mass. 22.
32 C.J. p 535 note 20.

28. Ark.—Baker v. Bailey, 145 S.W. 532, 103 Ark. 12, 39 L.R.A.,N.S., 1085.
Minn.—Parker v. Dixon, 157 N.W. 583, 132 Minn. 367, L.R.A.1916E 534, Ann.Cas.1918A 540.

29. Ga.—Walpert v. Bohan, 55 S.E. 181, 126 Ga. 532, 115 Am.S.R. 114, 6 L.R.A.,N.S., 828, 8 Ann.Cas. 89.
32 C.J. p 531 note 53.

30. Minn.—Parker v. Dixon, 157 N. W. 583, 132 Minn. 367, L.R.A.1916E 534, Ann.Cas.1918A 540.
32 C.J. p 534 note 5, p 536 note 33 [a] (1).
Continuance of status as guest to remove effects see infra subdivision c of this section.

31. Mo.—Bunn v. Johnson, 77 Mo. App. 596.

32. Del.—Russell v. Fagan, 3 A. 258, 12 Del. 389.
32 C.J. p 534 note 8.

33. Mass.—Mason v. Thompson, 9 Pick. 280, 20 Am.D. 471.
32 C.J. p 534 note 9.

34. Me.—Healey v. Gray, 68 Me. 439, 28 Am.R. 80.
32 C.J. p 534 note 10.

leaving his horse at an inn without any agreement, express or implied, for the innkeeper's care of the horse.[35]

Where property in the possession of a third person, as bailee of the owner, is taken to an inn by such third person, the owner does not in consequence thereof occupy the relation of guest, because the law cannot imply, in such a case, that the property was in the owner's possession.[36]

Registration. It is not necessary to register in order to be a guest,[37] and a person may be accepted as a guest at a hotel, without registration, by the mere delivery to him of the key to a room by the clerk.[38] Where the registered occupant of a room, with the knowledge and consent of the hotel management, turns his room over to another person, and the hotel clerk delivers the key of the room to that person, such person, although he fails or is not required to register, becomes an accepted guest of the hotel, not a mere licensee. However, a mere guest of the registered occupant of a room at a hotel, who shares such room with its occupant without the knowledge or consent of the hotel management, is not a guest of the hotel as there is no contractual relation between such third person and the hotel proprietor.[39] Where an individual registers for himself and family, another member of the family may become a guest without personally registering.[40]

c. Duration of Relation

One remains a guest from the time he is received as such until he pays his bill and departs. Such status is terminated by abandonment of the transient character of the stay, but not by a mere temporary absence with intent to return.

When a person goes to an inn as a traveler or wayfarer, and the innkeeper receives him as such, the relation of host and guest attaches at once.[41]

A guest ordinarily may go when he pleases,[42] and ceases to be a guest when he pays his bill and departs.[43] Leaving the inn temporarily, the guest intending to return again, does not necessarily terminate the relation,[44] particularly if, by mutual understanding or agreement, the relation is continued during his absence.[45] However, in order that the relationship may continue during the absence of the guest, there must be an animus revertendi on the part of the guest,[46] the intent must be to return within a definite and reasonable time,[47] and the liability to compensate the innkeeper must continue during the absence;[48] and the mere fact that a guest intends to return will not operate of itself to continue the relation of host and guest.[49]

It has been held that an owner of chattels, whose entertainment at the inn has ceased, does not continue to be a guest by allowing the chattels to remain at the inn thereafter;[50] but it has also been held that when a guest departs without removing his effects, the relation will continue for such reasonable time as will afford him an opportunity of removing them.[51] Where, on the departure of the guest, the innkeeper or a servant acting within the

35. Ga.—Brewer v. Carswell, 64 S.E. 674, 132 Ga. 563, 131 Am.S.R. 216.

36. N.Y.—Coykendall v. Eaton, 55 Barb. 188, 37 How.Pr. 438.
32 C.J. p 535 note 12.

37. U.S.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.
32 C.J. p 535 note 24.

Reason for rule

The registration of guests at a hotel is no part of the contract between the hotel proprietor and the guest, the purpose of the register being to keep track of the number of people in the house and to keep the books straight; the register is kept solely for the benefit and convenience of the hotel proprietor. —Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.

38. La.—Moody v. Kenny, supra.

39. La.—Moody v. Kenny, supra.

Husband and wife

A husband who, without registering, and without the knowledge or acquiescence of the hotel and its responsible agents occupied, in company with his wife, a single room which had been assigned for her sole use and occupancy, was held not a guest.—Warren v. Penn-Harris Hotel Co., 91 Pa.Super. 195.

40. Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177.

Mother-in-law

Where a son-in-law registered for himself and family, and paid a substantial price for the use of the hotel room by himself and family, his mother-in-law, being a member of the family, became a guest.—Cumming v. Allied Hotel Corporation, supra.

41. U.S.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.
32 C.J. p 536 note 32.

42. Iowa.—Shoecraft v. Bailey, 25 Iowa 553.
Tex.—Keiffer v. Keough, Civ.App., 188 S.W. 44.

43. La.—Carol v. Monteleone, 71 So. 798, 139 La. 541, L.R.A.1916F 234.
32 C.J. p 536 note 46.

44. Ala.—Watkins v. Hotel Tutwiler Co., 76 So. 302, 200 Ala. 386, L.R.A.1917F 834.
32 C.J. p 537 note 53.

45. Colo.—Brown Hotel Co. v. Burckhardt, 56 P. 188, 13 Colo.App. 59.
32 C.J. p 536 note 48.

46. Ala.—Watkins v. Hotel Tutwiler Co., 76 So. 302, 200 Ala. 386, L.R.A.1917F 834.
32 C.J. p 536 note 49.

47. Ala.—Watkins v. Hotel Tutwiler Co., supra.
Tenn.—Whitemore v. Haroldson, 2 Lea 312.

48. Ala.—Watkins v. Hotel Tutwiler Co., 76 So. 302, 200 Ala. 386, L.R.A.1917F 834.
32 C.J. p 537 note 52.

49. Ala.—Watkins v. Hotel Tutwiler Co., supra.
Miss.—Miller v. Peeples, 60 Miss. 819, 45 Am.R. 423.
Mo.—McKeever v. Kramer, 218 S.W. 403, 203 Mo.App. 269.
32 C.J. p 536 note 47.

50. Colo.—Oxford Hotel Co. v. Lind, 107 P. 222, 47 Colo. 57, 28 L.R.A., N.S., 495, 18 Ann.Cas. 983.
32 C.J. p 534 note 5.

51. Ohio.—Hotels Statler Co., Inc.,

scope of his employment undertakes to deliver the guest's baggage at a railroad station or a steamboat wharf, the relation of innkeeper and guest continues until delivery at the designated place.[52]

Abandonment of transient character. A guest at an inn may terminate the existing relation by abandoning his transient character, and this may be effected merely by forming an intention to remain indefinitely or permanently, without any present purpose of going on to any other place.[53] However, a special contract with an innkeeper, such as one for a weekly rate, made by a person who has been received as a guest, does not operate to terminate the relation if the party retains his character as a transient.[54] Likewise, where the relation of innkeeper and guest is once established, it is not changed or terminated by the fact that the person received remains a considerable time provided he still retains his status as a transient or traveler.[55]

d. Questions of Law and Fact

If the facts are undisputed the question of whether an individual is a guest, boarder, lodger, or tenant is one of law; otherwise it is a question of fact, or a mixed question of law and fact.

Whether the relation of innkeeper and guest exists, or whether a given individual is a boarder, lodger, or tenant, is ordinarily a question of fact,[56] or a mixed question of law and fact.[57] However, if the facts are definitely ascertainable from the undisputed evidence, the question becomes one of law for the determination of the court.[58]

The time at which the relationship commenced and terminated is usually a question of fact.[59]

e. Presumptions and Burden of Proof

In the absence of a contrary showing, a person accommodated at a hotel is presumed to have become and remained a guest. As between the status of tenant and lodger, it is presumed, unless a contrary intention appears, that the parties intended to create a landlord-tenant relationship.

The presumption is that one who goes to a hotel goes as a guest, unless there is evidence showing that he goes as a boarder.[60] However, where he is staying at the inn under a contract by which he is to remain there a certain considerable time, and in return gets a special rate for board, he is presumably a boarder.[61] As between the relationship of landlord and tenant and that of lodginghouse keeper and lodger, it has been held that, in the absence of any provision in the contract or of proof of extrinsic circumstances indicating a contrary intention, it will be presumed that it was the intention of the parties to create the relationship of landlord and tenant.[62]

The presumption always is that one who comes as a guest remains in that capacity until a change of relation is shown;[63] and the burden is on the innkeeper to show that the relation has terminated.[64]

v. Safier, 134 N.E. 460, 103 Ohio St. 638.
32 C.J. p 534 note 6.

52. Ala.—Glenn v. Jackson, 9 So. 259, 93 Ala. 342, 12 L.R.A. 382.
Okl.—Huckins Hotel Co. v. Clampitt, 224 P. 945, 946, 101 Okl. 190, citing **Corpus Juris.**
32 C.J. p 537 note 54.

53. N.C.—Holstein v. Phillips, 59 S.E. 1037, 146 N.C. 366, 14 L.R.A.,N.S., 475, 14 Ann.Cas. 323.
32 C.J. p 537 note 55.

54. Mich.—Polk v. Melenbacker, 99 N.W. 867, 136 Mich. 611.
32 C.J. p 537 note 57.

55. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.Y.—Hancock v. Rand, 94 N.Y. 1, 46 Am.R. 112, affirming 17 Hun 279.
32 C.J. p 537 note 58.

56. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.
32 C.J. p 534 note 3, p 535 note 23 [a], p 538 note 71.

Evidence held sufficient for jury
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

Evidence held insufficient for jury
Mo.—Martin v. Shryock Realty Co., 163 S.W.2d 804, 236 Mo.App. 1265.
32 C.J. p 538 note 71 [a].

57. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.
32 C.J. p 534 note 4.

58. Ariz.—Haff v. Adams, 59 P. 111, 6 Ariz. 395.
Ohio.—Arcade Hotel Co. v. Wiatt, 4 N.E. 398, 44 Ohio St. 32, 58 Am.R. 785.

59. U.S.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.
32 C.J. p 536 note 31, p 534 note 3 [a].

60. Cal.—Fay v. Pacific Impr. Co., 26 P. 1099, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188, reheard 28 P. 943, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188.
Mass.—Hall v. Pike, 100 Mass. 495.

61. Tenn.—Meacham v. Galloway, 52 S.W. 859, 102 Tenn. 415, 73 Am.S.R. 886, 46 L.R.A. 319.
32 C.J. p 538 note 76.

62. Mo.—Marden v. Radford, 84 S.W.2d 947, 229 Mo.App. 789.

63. Minn.—Ross v. Mellin, 32 N.W. 172, 36 Minn. 421.
32 C.J. p 537 note 59.

64. Okl.—Huckins Hotel Co. v. Hooper, 144 P. 177, 44 Okl. 307.

II. STATUTORY AND MUNICIPAL REGULATION

§ 4. Power to Regulate in General

The regulation of inns, boardinghouses, and the like is within the police power of the state. Power to regulate is generally conferred on municipal corporations or other local governing bodies, and their regulations, if reasonable, must be complied with.

The regulation of inns and other houses of public entertainment, such as boarding and lodging houses, is a matter which is concerned with the health, morals, and welfare of the public, and is therefore within the police power of a state,[65] and where there are statutes providing for such regulation, one who conducts such an establishment accepts the duty of fulfilling the obligations imposed by the statutes.[66] The regulations, to be valid, must be reasonable and not calculated to discriminate arbitrarily against particular classes or individuals.[67]

The power to regulate is commonly[68] but not always,[69] committed to local bodies such as municipal corporations; and whether or not the power has been so committed in a particular case depends on the interpretation of the governing statute.[70] Delegation of the power to regulate does not confer the power to prohibit.[71] Hotels not being public utilities, see supra § 1 b, their internal affairs are not subject to the regulatory powers of a public service commission.[72]

§ 5. Particular Regulations

Particular regulations with which one conducting an inn, boardinghouse, or lodginghouse, or similar establishment must comply include regulations pertaining to the construction of the premises, the appliances to be maintained thereon, opening and closing hours, sanitary conditons, the number of persons accommodated, and the rates to be charged.

Inns, hotels, boardinghouses, and lodginghouses, restaurants, and similar establishments for the entertainment of the public must comply with statutes or ordinances pertaining to the construction or alteration of the building, and the appliances or structures to be maintained on the premises,[73] the opening and closing hours of the establishment,[74] its

65. Mont.—State v. City of Billings, 255 P. 11, 79 Mont. 25, 54 A.L.R. 1091.
32 C.J. p 538 note 80, p 539 note 89—12 C.J. p 919 note 37.
Validity of state regulations as regards due process of law see Constitutional Law § 672.

Public interest
The legislature may enact reasonable regulations for hotels and similar businesses on the theory that they are affected with a public interest.—McRae v. Robbins, 9 So.2d 284, 151 Fla. 109.

66. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

67. Mass.—In re Opinion of Justices, 94 N.E. 558, 207 Mass. 601, 34 L.R.A.,N.S., 604.

Regulations held not arbitrary or unreasonable
Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.
32 C.J. p 539 note 89 [a].

68. Mont.—State v. City of Billings, 255 P. 11, 79 Mont. 25, 54 A.L.R. 1091.
Utah.—Ogden City v. Leo, 182 P. 530, 54 Utah 556, 5 A.L.R. 960.

Tourist camps
A statute giving municipal authorities power to regulate restaurants, taverns, hotels, and public boardinghouses has been held to empower them to regulate tourist camps.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.

69. Ark.—Bragg v. Adams, 21 S.W. 2d 950, 180 Ark. 582.
32 C.J. p 538 note 82 [a].

70. N.J.—Smith v. Hightstown, 57 A. 901, 71 N.J.Law 276, affirmed 60 A. 393, 71 N.J.Law 536.
32 C.J. p 538 note 82.

71. Ill.—Chicago v. Drake Hotel Co., 113 N.E. 718, 274 Ill. 408, L.R.A.1917A 1170.
32 C.J. p 538 note 83.

72. N.Y.—People ex rel. Public Service Commission of New York v. New York Telephone Co., 22 N.Y.S.2d 837, 175 Misc. 128, affirmed People ex rel. Public Service Commission v. New York Telephone Co., 29 N.Y.S.2d 513, 262 App.Div. 440, affirmed 40 N.E.2d 1020, 287 N.Y. 803.

73. Mass.—Murdock v. Swasey, 67 N.E. 671, 183 Mass. 573.
32 C.J. p 539 notes 89 [a], 91.
Protection against fire see infra § 7.

Handrails
U.S.—MacLaughlin v. Hull, C.C.A. Wash., 87 F.2d 641.
Minn.—Judd v. Landin, 1 N.W.2d 861, 211 Minn. 465.

Cost of structure
The purpose of an ordinance requiring hotels erected within a designated zone to cost more than a named amount is to have a substantial building, and the ordinance includes not only new buildings, which must cost more than the named amount, but also old buildings, the value of which must exceed the named amount.—Benequit v. Borough of Monmouth Beach, 18 A.2d 847, 125 N.J.Law 65.

Certificate of occupancy
(1) A certificate of occupancy for a lodginghouse, issued by the superintendent of buildings of a city, is binding on all officers and agencies of the city until set aside or vacated.—Lyons v. Prince, 12 N.Y.S.2d 466, 257 App.Div. 202, affirmed 24 N.E.2d 466, 281 N.Y. 557.

(2) The certificate cannot be revoked by the board of standards and appeals of the city as against a purchaser of the premises, including one acquiring the leasehold, relying on the issuance of the certificate to his predecessor in interest.—Edwards v. Murdock, 29 N.E.2d 74, 283 N.Y. 529, reversing 15 N.Y.S.2d 131, 258 App.Div. 716, appeal denied 17 N.Y.S.2d 220, 258 App.Div. 877, motion denied 26 N.E.2d 814, 282 N.Y. 684, mandate conformed to 22 N.Y.S.2d 772, affirmed 26 N.Y.S.2d 311, 261 App.Div. 894, appeal denied 27 N.Y.S.2d 189, 261 App.Div. 954, and reargument and motion denied 29 N.E.2d 666, 284 N.Y. 592, reargument denied 35 N.E.2d 509, 285 N.Y. 848.

74. N.H.—State v. Freeman, 38 N.H. 426.
43 C.J. p 431 note 70.

maintenance in a clean and sanitary condition,[75] and the number of persons to be accommodated.[76] Compliance is necessary also with statutes which regulate the rates or charges,[77] or require a schedule of rates to be filed with a designated public official.[78] The use of a tenement house for a lodging-house is prohibited by some statutes.[79]

Under some statutes dealing with safety measures in hotels and lodginghouses, the owner of the ultimate title to the real property has obligations with respect to only those requirements pertaining to permanent fixtures, that is, articles which become a part of the realty according to the usual rules regarding real estate fixtures.[80]

Bond. In some jurisdictions a bond to secure compliance with the law is required of an innkeeper or tavern keeper.[81]

Official inspection of inns, hotels, and public lodginghouses may be had under statutes providing therefor.[82]

§ 6. —— Licenses

a. In general
b. Procedure to obtain; grant or refusal
c. Operation, transfer, suspension, or revocation

a. In General

A license is generally required to conduct a hotel, boardinghouse, lodginghouse, or similar establishment, and one who fails to obtain such license may thereby lose certain rights or remedies which he would otherwise have. A regulation requiring a license should be construed in accordance with the intent of its framers.

In the absence of any statute on the subject, any person may keep an inn or similar house without obtaining a license so to do.[83] The power to regulate such establishments, however, includes the power to license them,[84] and in many jurisdictions a license is required by statute to carry on the business of keeping an inn or hotel,[85] a lodginghouse or rooming house,[86] a boardinghouse,[87] a tourist camp,[88] or an apartment house in which rooms are rented to transients.[89] Statutes of this nature have

75. Iowa.—Hubbell v. Higgins, 126 N.W. 914, 148 Iowa 36, Ann.Cas. 1912B 822
Health regulations pertaining to restaurants see Health § 25.

76. N.Y.—Crown Point Overseers of Poor v. Warner, 3 Hill 150.
32 C.J. p 539 note 94.

77. Ky.—Banks v. Oden, 1 A.K. Marsh, 546.
N.J.—South v. Grant, 7 N.J.Law 26.

78. Ohio.—State v. Norval Hotel Co., 133 N.E. 75, 103 Ohio St. 361.
32 C.J. p 539 note 93.

79. N.Y.—Saportes v. Hayeck, 182 N.Y.S. 295, 111 Misc. 620.

80. Miss.—Rose v. Rather, 199 So. 299, 190 Miss. 105.
Nature and requisites of fixtures see Fixtures § 1.

81. Me.—Randall v. Tuell, 36 A. 910, 89 Me. 445, 38 L.R.A. 143.
32 C.J. p 540 note 32.

82. Iowa.—Hubbell v. Higgins, 126 N.W. 914, 148 Iowa 36, Ann.Cas. 1912B 822.
32 C.J. p 539 note 95.

83. Ala.—Foster v. State, 4 So. 833, 84 Ala. 451.
32 C.J. p 532 note 61.
Right to keep inn generally see supra § 2.

84. Ark.—Helena v. Miller, 114 S.W. 237, 88 Ark. 263.
32 C.J. p 539 note 5.

85. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.
32 C.J. p 539 note 99.
License to sell intoxicating liquors see the C.J.S. title Intoxicating liquors § 124, also 33 C.J. p 538 note 81.

Number of beds and rooms

Under a statute imposing a license tax on hotels having beds for ten or more persons, but containing no limitation that only one person shall sleep in a bed located in a separate room, a place accommodates and has beds for ten or more persons where, although it has less than ten rooms, some of the rooms have double beds and the total will provide sleeping accommodations for ten or more persons.—Farrior v. State ex rel. Compton, Fla., 13 So.2d 147.

86. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.
32 C.J. p 539 notes 1, 2.

Rooming house excluded from statute

A statute authorizing license taxes on hotels, taverns, boardinghouses, and innkeepers, among other businesses or establishments, has been held not to authorize imposition of a license tax on a rooming house.—City of Independence v. Richardson, 232 P. 1044, 117 Kan. 656.

87. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.

Renting, not boarding, held subject of tax

Under regulations evincing a purpose to impose a license tax on those engaged in the business of renting rooms for lodging accommodations, it was held that keeping a "boardinghouse" was included so that a boardinghouse keeper who also rented rooms might not, under the guise of a boardinghouse proprietor, defeat the purpose of the ordinance, and that it is the renting of rooms, and not the business of boarding, which is the subject of the tax.—Edwards v. City of Los Angeles, supra.

Boardinghouse excluded from statute

A statute providing for the payment of a privilege tax by hotelkeepers has been held to have no application to a person who keeps a boardinghouse and not a hotel.—McClaugherty v. Cline, 163 S.W. 801, 128 Tenn. 605—32 C.J. p 540 note 38.

88. Mo.—Juengel v. City of Glendale, App., 164 S.W.2d 610, transferred, see, Sup., 161 S.W.2d 408.

89. Fla.—State ex rel. Warren v. Lehman, 130 So. 716, 100 Fla. 970.

Occupation by owner

A statute imposing a license tax on apartment houses in which rooms are rented to transients, but excepting from its operation buildings in which the rooms are rented out by an owner who occupies the building as his actual home or residence, was held not intended to relieve from the payment of the tax an owner of an apartment house who happens to occupy an apartment or a unit in such apartment house as his residence, but rather to relieve from the tax a regular home owner who happens to rent rooms in his residence; and as so construed the statute is not discriminatory.—State ex rel. Warren v. Lehman, supra.

been held valid.[90]

The payment of a franchise tax imposed on all corporations doing business in the state does not relieve a corporation engaged in operating a hotel from paying the license tax imposed on hotelkeepers.[91] However, an institution which is engaged purely in public charity and which is exempt from taxation without limitation cannot be required to pay a license tax for operating a restaurant in furtherance of the purposes for which it was organized.[92]

The construction of regulations requiring a license should be in conformity with the intent of the framers thereof,[93] and in specifying the establishments requiring a license it is not necessary that the legislative body enumerate specifically by title or name every possible phase of the business involved.[94]

Amount of fee or tax. A statute or ordinance imposing a license fee on hotelkeepers will be upheld where the fee is reasonable in amount.[95] Regardless of whether his hotel is operated on the American or European plan,[96] a person who has paid a license fee or tax on the general business of conducting a hotel, inn, or tavern cannot be required to pay an additional tax for the privilege of maintaining and operating a restaurant, eating house,[97] or sleeping rooms,[98] in connection with, and as an incident of, the business of conducting the hotel.

Acting without license. Where a license is required for conducting an inn or similar public house, one cannot legally maintain such an establishment without a license, even though it has been wrongfully refused,[99] and one who operates such a house without a license cannot, it has been held, sue for damage to his business,[1] recover compensation for board and lodging furnished,[2] or establish a lien on property of the guest.[3] However, the failure of a person to obtain a license does not prevent him from being in the status of an innkeeper so far as concerns the responsibilities of his occupation.[4]

b. Procedure to Obtain; Grant or Refusal

The statutes of the particular jurisdiction govern the procedure for obtaining a license to keep a hotel or other public house, and the grant or refusal of the license ordinarily rests in the discretion of the licensing authorities.

The granting of licenses to keep a hotel or other public house is by statute generally intrusted to some administrative or quasi judicial body,[5] and the procedure by which the license is obtained is solely a matter of statutory regulation,[6] as are also the

90. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.
32 C.J. p 539 note 3.

91. N.C.—Cobb v. Durham County, 30 S.E. 338, 122 N.C. 307.

92. Ky.—Corbin Y. M. C. A. v. Commonwealth, 205 S.W. 388, 181 Ky. 384, 1 A.L.R. 264.

93. Cal.—Edwards v. City of Los Angeles, 119 P.2d 370, 48 Cal.App. 2d 62.

Penal nature of regulation

An ordinance requiring a license of every person engaged in the business of renting or letting any rooms in any hotel, rooming house, boardinghouse, apartment house or lodginghouse, and prescribing fees therefor proportionate to gross receipts, is not a regulatory penal statute, notwithstanding it carries a penalty clause for its violation, but imposes an occupational license tax for revenue.—Edwards v. City of Los Angeles, supra.

94. Cal.—Edwards v. City of Los Angeles, supra.

Name and type of structure immaterial

Under regulations designed to require a license of any one engaged in the business of renting lodging space to a guest or roomer, as distinguished from conferring a tenancy, and also designed to collect license taxes in proportion to gross receipts, it is immaterial whether the structure is called a hotel, apartment, rooming house, boardinghouse, lodginghouse, flat, bungalow court, duplex, or single dwelling; it is the business of renting rooms without a license which is prohibited, the type or form of structure in which the business is conducted being merely incident thereto.—Edwards v. City of Los Angeles, supra.

Reference to "rooms" held not indefinite

An ordinance requiring payment of occupational license tax by persons letting "rooms" in hotels, rooming houses, boardinghouses, apartment houses, or lodginghouses has been held not indefinite as to what is meant by term "rooms"; when an apartment is rented it is in fact a rental of the room or rooms contained therein, and the only rooms that come within purview of ordinance are rooms rented to guests or roomers for lodging purposes and not rooms used as stores or the like, nor rooms leased or let to tenants conferring on them an interest in realty.—Edwards v. City of Los Angeles, supra.

95. Ark.—Helena v. Miller, 114 S.W. 237, 88 Ark. 263.
32 C.J. p 540 note 33.

96. Ky.—New Galt House Co. v. Louisville, 111 S.W. 351, 129 Ky. 341, 33 Ky.L. 869, 17 L.R.A.,N.S., 566.
Pa.—McClure v. Krumbholz, 9 Pa. Dist. 544.

97. Ky.—New Galt House Co. v. Louisville, 111 S.W. 351, 129 Ky. 341, 33 Ky.L. 869, 17 L.R.A.,N.S., 566.
32 C.J. p 540 note 35.

98. N.J.—Atlantic City v. Hemsley, 70 A. 322, 76 N.J.Law 354.

99. Vt.—State v. Stone, 6 Vt. 295.

1. Ga.—Bonner v. Welborn, 7 Ga. 296.

2. Me.—Randall v. Tuell, 36 A. 910, 89 Me. 443, 38 L.R.A. 143.

3. Me.—Stanwood v. Woodward, 38 Me. 192.
Right of innkeeper to lien on goods of guests see infra § 26.

4. Me.—Atwater v. Sawyer, 76 Me. 539, 49 Am.R. 634.
32 C.J. p 532 note 63, p 541 note 45.
Offenses see infra § 27.

5. Utah.—Larsen v. Salt Lake City, 141 P. 98, 44 Utah 437.
32 C.J. p 539 note 7.

6. N.J.—Johnson v. Wentz, 79 A. 604, 81 N.J.Law 34.
32 C.J. p 539 note 8.

matters necessary to be shown to authorize the granting of the license.[7] Under a statute requiring the application for a license to be accompanied by the written consent of the owner of the premises for which application for the license is made, a verbal consent, particularly an uncertain verbal consent given through a third person, will not suffice.[8] More than one person may be licensed to keep a particular inn.[9]

Provision is generally made for keeping the business out of improper hands, by committing the matter to the discretion of the licensing authorities;[10] and this discretion will not be controlled by the courts,[11] unless it is exercised in an arbitrary manner.[12] The fact that different local boards may exercise discretion in granting licenses differently, and that the statute to that extent may operate unequally in different parts of the state, is not a legal objection to the validity of the statute.[13]

The power to license is not the power to prohibit, and where a board is given by statute power to license public houses, it cannot legally refuse to grant licenses enough to serve the requirements of public convenience, if proper persons apply.[14] The statutes may provide a remedy where a license is wrongly refused.[15]

c. Operation, Transfer, Suspension, or Revocation

A license to keep a hotel gives the right to maintain a restaurant in connection therewith. The license is personal, and valid only for the premises for which it is issued. It may be suspended or revoked for cause.

A license to keep an inn, hotel, or tavern includes the right to maintain and operate a restaurant or eating house in connection therewith,[16] without obtaining a special license[17] or paying a special tax, see supra subdivision a of this section. After a license has been issued, no restraints can be imposed on the persons licensed except such as are authorized by the governing statute.[18]

The license is valid only for the premises for which it is issued.[19] Although there is nothing illegal in an agreement to transfer a license to keep an inn,[20] nevertheless, the license is personal,[21] not transferable,[22] and of no avail to a person other than the one to whom it is granted.[23] It does not pass with a lease of the premises.[24]

Suspension or revocation. The license may be suspended[25] or revoked[26] for cause under regulations so providing; and after valid revocation continued operation of the establishment is without a license and in violation of regulations requiring a license.[27]

7. Ky.—Audubon Country Club v. Commonwealth, 183 S.W. 911, 169 Ky. 399.
32 C.J. p 539 note 9.

8. N.J.—Reid v. Borough of Deal, 134 A. 187, 4 N.J.Misc. 706.

Tenants in common; partners

Where the property is owned by tenants in common, written consent of one owner and verbal consent of the other is insufficient; and the fact that the tenants in common are to be partners in the proposed hotel business does not give one legal authority to bind the other in giving the required consent.—Reid v. Borough of Deal, supra.

9. N.J.—Amerman v. Hill, 19 A. 789, 52 N.J.Law 326.

10. Ky.—Pierce v. Com., 10 Bush 6.
32 C.J. p 540 note 10.

11. Ky.—Taylor v. Commonwealth, 142 S.W. 369, 146 Ky. 303.
32 C.J. p 540 note 11.

12. Ky.—Hogland v. Com., 8 Bush 147—Louisville v. Kean, 18 B.Mon. 9.

13. Vt.—Bancroft v. Dumas, 21 Vt. 456.

14. Ky.—Louisville v. Kean, 18 B. Mon. 9.
Vt.—State v. Stone, 6 Vt. 295.

15. Va.—Sights v. Yarnalls, 12 Gratt. 292, 53 Va. 292.
Mandamus to compel issuance of license see the C.J.S. title Mandamus § 156, also 38 C.J. p 741 note 16-p 743 note 38.

16. Del.—State v. Ainscow, 75 A. 372, 23 Del. 71.
Tenn.—Maxwell Operating Co. v. Nashville, 7 Tenn.Civ.A. 336.

17. Del.—State v. Ainscow, 75 A. 372, 23 Del. 71.
Tavern license as authorizing sale of liquor see the C.J.S. title Intoxicating Liquors § 130, also 33 C.J. p 539 notes 88, 89.

18. Me.—Crosby v. Snow, 16 Me. 121.

19. Ky.—Barnes v. Commonwealth, 2 Dana 388.

Adjoining room

A license to keep a tavern in the licensee's "brick house" may apply to a frame room adjoining it, which is used as the barroom.—Gray v. Commonwealth, 9 Dana, Ky., 300, 35 Am.D. 136.

20. N.J.—Hall v. Hoagland, 38 N.J. Law 350.

21. Mass.—Commonwealth v. Lavery, 73 N.E. 884, 188 Mass. 13.
32 C.J. p 540 note 23.

22. Ky.—Commonwealth v. Branamon, 8 B.Mon. 374.
32 C.J. p 540 note 24.

23. Mass.—Commonwealth v. Lavery, 73 N.E. 884, 188 Mass. 13.
N.J.—Hall v. Hoagland, 38 N.J.Law 350.

24. Ky.—Commonwealth v. Branamon, 8 B.Mon. 374—Commonwealth v. Bryan, 9 Dana 310.

25. Ky.—Plummer v. Commonwealth, 1 Bush 26.
32 C.J. p 540 note 29.

26. Va.—Sights v. Yarnalls, 12 Gratt. 292, 53 Va. 292.
32 C.J. p 540 note 30.

Alternative grounds for revocation

Under a statute permitting municipal authorities to revoke or cancel the license if the public safety, peace, good order, or decency so require, or if the person operating the establishment is convicted of violating ordinances regulating such business, it is of no consequence that the licensee was not convicted of violating any ordinance regulating the business, where the municipal authorities have concluded on investigation that the public safety, peace, good order, or decency require revocation of the license.—City of Birmingham v. Bollas, 96 So. 591, 209 Ala. 512.

27. Ala.—City of Birmingham v. Bollas, supra.

§ 7. —— Protection against Fire

The equipment of hotels and boardinghouses or lodginghouses with fire escapes or other safeguards in the event of fire, although not required at common law, is now generally required by statute, and the duty of complying with the statute may be imposed on all persons interested in the property, including the owner or lessee.

At common law there was no obligation to provide fire escapes for the safety of the guests or lodgers.[28] Under the statutes in many jurisdictions, however, establishments such as hotels, boardinghouses, or lodginghouses, over a certain size, must provide fire escapes or other designated safeguards for the protection of the life and property of the occupants in the event of fire,[29] and the duty to provide such safeguards is, by virtue of some provisions, an absolute one.[30] It is also required under some statutes that in case of fire an innkeeper shall give notice thereof at once to all guests or inmates, and do all in his power to save such guests and inmates.[31] Such enactments have been considered wise and salutary, in view of the great height of modern hotel buildings and the disasters which have frequently occurred, and their validity has been sustained.[32]

Persons charged with duty. Statutes making it the duty of the owner, proprietor, lessee, or keeper of a hotel or similar establishment to provide certain devices for protection in the event of fire have been construed to impose the duty on all persons interested in, or having control or dominion over, the property, including the owner, as well as the lessee, and to impose the duty on the persons designated severally and not jointly.[33]

Official notice or direction. A hotel owner is chargeable with knowledge of regulations requiring fire escapes or other means of egress, and hence notice from an inspector ordinarily is not necessary to charge the owner with the duty of providing such protection.[34] Under some statutes, however, the owner of a hotel is not required to furnish additional ways of egress or means of escape from fire until after an inspector of buildings has given him a written notice specifying what additional ways or means are necessary.[35] The charter and ordinances of some cities confer power on the fire commissioner to direct the installation of an interior electric fire alarm system.[36]

III. RIGHTS, DUTIES, AND LIABILITIES, AND ENFORCEMENT THEREOF

§ 8. In General

The occupation of an innkeeper is of a public or quasi-public character. The rights, duties, and responsibilities of innkeepers and guests have their origin in considerations of public policy.

The business or occupation of an innkeeper is of a public[37] or quasi-public[38] character, invested

28. Mo.—Yall v. Snow, 100 S.W. 1, 201 Mo. 511, 119 Am.S.R. 781, 10 L.R.A.,N.S., 177.
32 C.J. p 541 note 47.

Corpus Juris quoted in considering duty to provide college dormitory with fire escapes.—Commonwealth v. Madison, 108 S.W.2d 519, 524, 269 Ky. 571.

29. N.Y.—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997.
Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.
32 C.J. p 541 note 48.

Rope ladder fire escapes
The repeal and reënactment of a statute requiring three-story buildings to have iron or steel stair fire escapes was held not to have repealed, by implication, a statute permitting hotels of three stories or less to have rope ladder fire escapes.—Collins v. Twellman, 126 S.W.2d 231, 344 Mo. 330.

Compliance shown
Wash.—Evans v. Saran, 128 P.2d 763, 14 Wash.2d 533.

Compliance not shown
Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

30. N.Y.—Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

31. U.S.—Miller v. Strahl, 86 S.Ct. 147, 239 U.S. 426, 60 L.Ed. 364, affirming 151 N.W. 952, 97 Neb. 820, Ann.Cas.1917A 141.

32. U.S.—Miller v. Strahl, supra.
32 C.J. p 541 note 51.

33. Mo.—Johnson v. Snow, 100 S.W. 5, 201 Mo. 450.
32 C.J. p 541 note 54.

Primary duty of owner
An ordinance requiring lodginghouses to be equipped with fire escapes, and providing that persons violating the ordinance would be guilty of a misdemeanor, was held not ineffective as failing to designate the person on whom the duty to construct the fire escapes rested, where the fair intendment of the ordinance was that the duty rested primarily on the owner.—Roxas v. Gogna, 106 P.2d 227, 41 Cal.App.2d 234.

Duties limited to permanent fixtures
An alarm bell or gong is not a permanent fixture which the owner of title to a hotel or lodginghouse would be required to furnish under a statute imposing on such an owner certain duties with respect to permanent fixtures.—Rose v. Rather, 199 So. 299, 190 Miss. 105.

Joint and several obligation is not imposed.—Johnson v. Snow, 76 S.W. 675, 102 Mo.App. 233.

34. Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

35. Mass.—Perry v. Bangs, 36 N.E. 683, 161 Mass. 35.

36. N.Y.—U. S. Trust Co. v. Blake, 137 N.E. 327, 234 N.Y. 273, modifying 187 N.Y.S. 6, 196 App.Div. 289.

37. Iowa.—Bowlin v. Lyon, 25 N.W. 766, 67 Iowa 536, 56 Am.R. 355.
32 C.J. p 541 note 59.

38. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.
N.Y.—Odom v. East Avenue Corpo-

with many privileges[39] and burdened with correspondingly great responsibilities.[40] The rules regulating the respective rights, duties, and responsibilities of innkeeper and guest have their origin in considerations of public policy,[41] and were designed mainly for the protection and security of travelers and their property.[42]

The relation is a mutual one, involving mutual rights and obligations.[43] It involves obligations, on the part of the innkeeper, to furnish accommodation, discussed infra § 9, to keep the goods of the guest safe from loss or injury, discussed infra § 12 et seq, and to exercise, reasonable care for the safety of the guest discussed infra § 22, and, on the part of the guest, to pay for the entertainment received, discussed infra § 26, and to refrain from conduct offensive to other guests or which would bring the hotel into disrepute.[44]

§ 9. Reception and Entertainment of Guests

a. In general
b. Grounds for refusal
c. Exclusion after acceptance

a. In General

An innkeeper must receive and entertain all unobjectionable persons who offer themselves as guests as long as he has accommodations and they will pay the reasonable charges therefor.

An innkeeper is under a legal obligation to receive and entertain all unobjectionable persons who offer themselves as guests as long as he has accommodations for them and they pay or are able and willing to pay a reasonable consideration therefor.[45] This obligation to serve the public attaches to every one professing the trade of innkeeper,[46] even though he has neglected to obtain a license.[47] Although an innkeeper is bound to provide his guest with such facilities as the character of his inn afford,[48] it is only a reasonable accommodation, with respect to those things furnished at an inn, that the guest is entitled to demand,[49] and therefore he has no right to select any particular apartment.[50] However, while an innkeeper has the right to move a guest from one room or apartment to another,[51] he cannot put him out of the room assigned to him and then refuse him other proper accommodation.[52]

The innkeeper is bound to respect and give reasonable attention to the convenience,[53] comfort,[54]

ration, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
32 C.J. p 541 note 60.

39. N.Y.—Odom v. East Avenue Corporation, supra.
32 C.J. p 541 note 61.

40. N.Y.—Odom v. East Avenue Corporation, supra.
32 C.J. p 541 note 62.

41. Ala.—Beale v. Posey, 72 Ala. 323.
Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.

42. Ala.—Beale v. Posey, 72 Ala. 323.
Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.

43. Minn.—Parker v. Dixon, 157 N. W. 583, 132 Minn. 367, L.R.A.1916E 534, Ann.Cas.1918A 540.
Pa.—Hirsh v. Anderson Hotel Co., 58 Pa.Super. 387.

44. Kan.—Lehnen v. Hines, 127 P. 612, 88 Kan. 58, 42 L.R.A.,N.S., 830.
Mont.—Jones v. Shannon, 175 P. 882, 55 Mont. 225.

45. U.S.—Davies Warehouse Co. v. Brown, C.C.A.Tenn., 137 F.2d 201, 207, citing **Corpus Juris.**
N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
32 C.J. p 542 note 71.

Goods and luggage

Innkeeper is obliged to receive guests and their goods and luggage.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 332 Mo. 749, transferred, see, App., Lines Music Co. v. Holt, 48 S.W.2d 92, and dissenting opinion, 61 S.W.2d 326, 332 Mo. 749.

46. N.C.—State v. Wynne, 8 N.C. 451.
32 C.J. p 542 note 72.

47. Me.—Atwater v. Sawyer, 76 Me. 539, 49 Am.R. 634.
32 C.J. p 542 note 73.

48. N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.

49. Ark.—Lewis v. Roescher, 98 S. W.2d 956, 193 Ark. 161.
32 C.J. p 542 note 74.

Room telephone

Hotel was under no duty to furnish guest with telephone in room and was not liable because telephone furnished was defective, or because guest was unable to get communication with clerk, at least where hotel had no knowledge of fact that telephone was defective or that guest was either sick or likely to become sick and suffer.—Lewis v. Roescher, supra.

Business service or accommodation

An innkeeper is not bound to furnish accommodation for the carrying on of the business of a guest.—Mowers v. Fethers, 61 N.Y. 34, 19 Am.R. 244, reversing 6 Lans. 112, and distinguishing Washburn v. Jones, 14 Barb. 193—32 C.J. p 542 note 85.

50. N.Y.—De Wolf v. Ford, 86 N.E. 527, 192 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860.
32 C.J. p 542 note 75.

51. Ala.—Hervey v. Hart, 42 So. 1013, 149 Ala. 604, 123 Am.S.R. 67, 9 L.R.A.,N.S., 213, 13 Ann.Cas. 1049.
32 C.J. p 542 note 77.

52. Ala.—Hervey v. Hart, supra.

53. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.
N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
32 C.J. p 542 note 79.

Awakening guests

An innkeeper has no mandatory duty to awaken a guest at a requested hour.—Gumbart v. Waterbury Club Holding Corporation, D.C. Conn., 27 F.Supp. 228.

Entry at night

Neither common law nor statutes require innkeeper, unrequested, to supply every guest with a key to the inn, or to keep the entrance either unlocked or under attendance during the night.—Gumbart v. Waterbury Club Holding Corporation, supra.

Place of entry

A guest's implied invitation of entry may not be expanded to include invitation to enter window.—Gumbart v. Waterbury Club Holding Corporation, supra.

54. U.S.—Emmke v. De Silva, C.C.A. Mo., 293 F. 17.
N.Y.—Odom v. East Avenue Corpo-

and, as discussed infra § 25, the privacy of his guests, and must refrain from insulting or abusing his guests, or indulging in any conduct that may unnecessarily bring on them physical discomfort or distress of mind.[55]

Food. Formerly an innkeeper was required to be prepared to entertain the traveler with both food and lodging,[56] and to keep on hand sufficient food for a reasonable number of guests,[57] but, while it is a part of the time-honored business of a hotel or inn to provide those who seek lodging with food and refreshment,[58] facilities for supplying guests with food are no longer considered a requisite of an inn or hotel, as discussed supra § 1.

Termination of duty. An innkeeper may at any time put an end to his duty to receive travelers by definitely going out of the business.[59]

Rules of hotel. An innkeeper has the right to make and enforce such reasonable rules as may be designed to prevent immorality,[60] drunkenness,[61] or any form of misconduct that may be offensive to other guests,[62] or that may bring his inn into disrepute, or that may be radically inconsistent with the generally recognized proprieties of life.[63] A rule of a hotel that persons without baggage shall not be assigned to a room in the absence of proper identification is a reasonable one.[64]

b. Grounds for Refusal

Grounds for the refusal to receive a proposed guest are as a rule limited to the lack of accommodations or the unsuitability of the guest.

An innkeeper may properly refuse to receive and entertain a proposed guest when his accommodations are exhausted,[65] or where the guest is not able and willing to pay the price of the entertainment sought,[66] or is not in a fit condition to be received,[67] as where he is drunk or disorderly,[68] or otherwise obnoxious.[69] On the other hand, it is held to be no excuse for refusal to receive and entertain a person that he comes on Sunday,[70] or that he is an infant,[71] or that other members of a military company, to which he belongs, have previously misconducted themselves at the inn;[72] nor is the mere apprehension of an insult sufficient for a refusal.[73]

c. Exclusion after Acceptance

An innkeeper may remove a guest for a valid reason without incurring liability therefor if he does not employ excessive force or other unlawful means.

A person who has been received at an inn as a guest and who conducts himself in a proper and peaceful manner and pays the amount charged for his entertainment has a right to remain at the inn for a reasonable time.[74] On the other hand, a person may be properly excluded from a hotel or inn,

ration, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
Pa.—Kral v. Coloviras, Com.Pl., 47 Dauph.Co. 279.
32 C.J. p 542 note 80.

Not an insurer

An innkeeper is not an insurer of the convenience or comfort of his guests, but his obligation is to exercise reasonable care that neither he nor his servants shall destroy or minimize the comfort, convenience, and peace which the latter would ordinarily enjoy if the inn were properly conducted, due allowance being made for the grade of the inn and the character of the accommodation which it is designed to afford.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.

Arrest by officers

One conducting hotel owes no duty to prevent arrest of guest by officers seemingly acting within their authority.—Smith v. Jefferson Hotel Co., 173 S.E. 456, 48 Ga.App. 596.

55. N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.

Insulting words or conduct

An innkeeper has been held liable for a breach of duty to a guest by the manager's conduct in abusing the guest and threatening him with violence and ejection from the hotel.—Milner Hotels v. Dougherty, Miss., 15 So.2d 358.

56. Conn.—Walling v. Potter, 35 Conn. 183.
32 C.J. p 542 note 82.

57. Me.—Atwater v. Sawyer, 76 Me. 539, 49 Am.R. 634.

58. Pa.—Appeal of Wellsboro Hotel Co., 7 A.2d 334, 336 Pa. 171, 122 A.L.R. 1396.

59. N.Y.—Conklin v. Prospect Park Hotel Co., 1 N.Y.S. 406, affirmed 26 N.E. 755, 125 N.Y. 711.
32 C.J. p 542 note 87.

60. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.
32 C.J. p 543 note 90.

61. N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860.

62. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.

63. N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860—Boyce v. Greeley Square Hotel Co., 168 N.Y.S. 191, 181 App.Div. 61, affirmed 126 N.E. 647, 228 N.Y. 106.

64. Md.—Coquelet v. Union Hotel Co., 115 A. 813, 139 Md. 544.

65. U.S.—Jackson v. Virginia Hot Springs Co., D.C.Va., 209 F. 979.
32 C.J. p 543 note 96.

66. N.Y.—Morningstar v. Lafayette Hotel Co., 105 N.E. 656, 211 N.Y. 465, 52 L.R.A.,N.S., 740.
32 C.J. p 543 note 98.

67. Del.—Russell v. Fagan, 8 A. 253, 12 Del. 389—Hall v. State, 4 Del. 132.

68. U.S.—Nelson v. Boldt, C.C.Pa., 180 F. 779.
32 C.J. p 543 note 1.

69. N.C.—State v. Steele, 11 S.E. 478, 106 N.C. 766, 19 Am.S.R. 573, 8 L.R.A. 516.
32 C.J. p 543 note 2.

70. Pa.—Commonwealth v. Naylor, 34 Pa. 86.
32 C.J. p 543 note 3.

71. Ky.—Watson v. Cross, 2 Duv. 147.

72. Me.—Atwater v. Sawyer, 76 Me. 539, 49 Am.R. 634.

73. Me.—Atwater v. Sawyer, supra.

74. Del.—Vansant v. Kowalewski, 90 A. 421, 28 Del. 92—Le Fevre v. Crossan, 84 A. 128, 26 Del. 379.

after he has been accepted as a guest, where he refuses to pay his bill,[75] or where he becomes a resident and thereby loses his status as a traveler or transient.[76] Also a guest may be properly excluded because of his objectionable character,[77] as, for example, where he becomes obnoxious by his own fault,[78] as by becoming intoxicated,[79] or by soliciting business of the other guests,[80] or by improper, disorderly, annoying, or offensive conduct,[81] or even where he becomes obnoxious without fault on his part, as by reason of illness.[82] Where one or more of the grounds of exclusion exist, an innkeeper may remove a guest from the inn[83] without liability therefor, provided he does not employ excessive force or other unlawful means in accomplishing the removal.[84] Similar rules are applied in determining the liability, if any, for ejecting a person from a restaurant after he has ordered a meal.[85]

§ 10. —— Remedies

An innkeeper who improperly refuses to receive and entertain a guest, or who wrongfully excludes a guest once accepted, is liable to an action by the injured person for damages. An innkeeper may enforce his right to eject a guest by an action in the proper form.

An innkeeper who improperly refuses to receive and entertain a person coming to the inn as a guest or, after accepting him as a guest, wrongfully excludes him, is liable, in consequence of such unlawful act, to an action by the injured person for damages,[86] and it has been held that the guest's remedy, if evicted, is restricted to an action for damages.[87]

Pleading. The declaration, petition, or complaint must state a cause of action[88] and not consist of mere conclusions unsupported by allegations of fact.[89] However, plaintiff's pleading need not anticipate and avoid defenses,[90] such as a defense that the innkeeper's accommodations were exhausted at the time plaintiff applied,[91] or that plaintiff was suffering from a contagious disease or was otherwise not in a condition fit to be entertained.[92] Under some practice acts the latter defense must be specially pleaded by the innkeeper.[93]

Evidence and trial. After plaintiff has shown that he was admitted as a guest, the burden is on the innkeeper to justify his ejection.[94] Questions relating to the admissibility[95] and sufficiency[96] of evidence are determined by the rules applicable in

75. Ky.—Raider v. Dixie Inn, 248 S. W. 229, 198 Ky. 152.
32 C.J. p 543 note 11.

76. Ky.—Raider v. Dixie Inn, supra.
32 C.J. p 543 note 12.

77. Ky.—Raider v. Dixie Inn, supra.

78. Ky.—Raider v. Dixie Inn, supra.

79. Mass.—Holden v. Carraher, 81 N.E. 261, 195 Mass. 392, 11 Ann. Cas. 724.
Pa.—McHugh v. Schlosser, 28 A. 291, 159 Pa. 480, 39 Am.S.R. 699, 23 L. R.A. 574.

80. N.C.—State v. Steele, 11 S.E. 478, 106 N.C. 766, 19 Am.S.R. 573, 8 L.R.A. 516.

81. Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.
32 C.J. p 543 note 16.

82. N.Y.—Levy v. Corey, 1 N.Y.City Ct.Suppl. 57.
32 C.J. p 543 note 17.

83. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.
Boarding house keeper may dispossess boarders without resort to summary proceedings.—Jacob v. Jacob, 212 N.Y.S. 62, 125 Misc. 649.

84. Mass.—Holden v. Carraher, 81 N.E. 261, 195 Mass. 392, 11 Ann. Cas. 724.
32 C.J. p 543 notes 11-19.

85. Wash.—Chase v. Knabel, 90 P. 642, 46 Wash. 484, 12 L.R.A.,N.S., 1155.
32 C.J. p 544 note 20.

86. N.Y.—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N.Y.S.2d 491, 264 App.Div. 985.
32 C.J. p 544 note 22.
Criminal liability see infra § 27.
Effect of Civil Rights Law on common-law remedy
The statutory remedy given negro guests at hotel who were allegedly refused service in hotel corporation's restaurant by Civil Rights Law did not preclude guests from maintaining a cause of action against corporation predicated on liability of an innkeeper according to common-law principles.—Odom v. East Avenue Corporation, supra.
Application of Civil Rights Acts to inns, etc., see Civil Rights § 7.

87. N.C.—Hutchins v. Durham, 24 S.E. 723, 118 N.C. 457, 32 L.R.A. 706.

88. Ky.—Raider v. Dixie Inn, 248 S. W. 229, 198 Ky. 152.
Actionable words or breach of duty
Where a declaration stated a cause of action against hotel owner and manager for damages arising from innkeeper's breach of duty to guest by defendant manager's conduct in cursing and abusing plaintiff and threatening him with violence and ejection from hotel, rather than cause of action under actionable words statute, the prohibition in the statute against sustaining plea, exception, or demurrer in case stated thereunder, so as to preclude jury from passing on facts complained of, is inapplicable.—Milner Hotels v. Dougherty, Miss., 15 So.2d 358.
Declaration held sufficient
U.S.—Jackson v. Virginia Hot Springs Co., Va., 213 F. 969, 130 C. C.A. 375, reversing, D.C., 209 F. 979.
Ark.—Stevenson v. John J. Grier Hotel Co., 251 S.W. 355, 159 Ark. 44.
Declaration held insufficient
Ga.—Smith v. Jefferson Hotel Co., 173 S.E. 456, 48 Ga.App. 596.

89. Ky.—Raider v. Dixie Inn, 248 S.W. 229, 198 Ky. 152.

90. U.S.—Jackson v. Virginia Hot Springs Co., Va., 213 F. 969, 130 C.C.A. 375, reversing, D.C., 209 F. 979.

91. U.S.—Jackson v. Virginia Hot Springs Co., supra.
32 C.J. p 544 note 39.

92. U.S.—Jackson v. Virginia Hot Springs Co., supra.

93. N.J.—Watkins v. Cope, 86 A. 545, 84 N.J.Law 143.

94. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396—Florence Hotel Co. v. Bumpus, 69 So. 566, 194 Ala. 69, Ann. Cas.1918C 252.

95. Cal.—Willis v. McMahon, 26 P. 649, 89 Cal. 156.
32 C.J. p 544 note 43.

96. Ky.—Raider v. Dixie Inn, 248 S.W. 229, 198 Ky. 152.
32 C.J. p 544 note 44.

civil cases generally. Questions of fact are to be determined by the jury where there is a substantial conflict in the evidence.[97] Particular questions of fact to be determined by the jury include the question whether the hotel keeper's servants acted maliciously in ejecting plaintiff,[98] and whether a charge for services rendered a guest was excessive, so that the proprietor was not justified in refusing to further entertain the guest refusing to pay the charge.[99] Instructions must embody correct principles of law and be justified by the evidence in the case.[1]

Damages. Since the action sounds in tort,[2] it is governed by the general rule that the measure of damages is based on the theory of compensation for the wrong and injury.[3] Thus damages for injury to health by refusal to receive one as a guest may be recovered,[4] and some courts hold that a guest wrongfully ejected from a hotel may recover damages for injury to his feelings as a result of the humiliation,[5] but other courts hold that there can be no recovery for mental anguish resulting from the humiliation, or for loss of reputation and credit.[6] Exemplary damages may be allowed when there are aggravating circumstances,[7] but not where there is no actual damage.[8] Whether or not the damages awarded are excessive depends on the circumstances of each particular case.[9]

Actions by innkeeper. An innkeeper may enforce his right to eject a guest by an action in the proper form,[10] and, in the absence of statutory regulation, general rules apply in such proceedings.[11]

§ 11. Admission of Persons Not Guests

A person who is not a guest has in general no legal right to enter or remain in an inn against the will of the innkeeper, but an invitee of a guest ordinarily may remain in the inn in the absence of reasonable restrictions or regulations to the contrary.

A person who is not a guest has in general no legal right to enter or remain in an inn against the will of the innkeeper,[12] and it has been held that, where a person has entered a public inn and his presence is disagreeable to the proprietor or his guests, the proprietor may request him to depart, and if he refuses he may be lawfully ejected by the innkeeper with the use of as much force as is reasonably necessary.[13] However, in the absence of a regulation or agreement to the contrary, and un-

97. Mont.—Jones v. Shannon, 175 P. 882, 55 Mont. 225.
Pa.—Warren v. Penn-Harris Hotel Co., 91 Pa.Super. 195.

98. Mo.—Dalzell v. Dean Hotel Co., 186 S.W. 41, 193 Mo.App. 379.

99. N.Y.—Morningstar v. Lafayette Hotel Co., 105 N.E. 656, 211 N.Y. 465, 52 L.R.A.,N.S., 740.

1. Mass.—Holden v. Carraher, 81 N. E. 261, 195 Mass. 392, 11 Ann.Cas. 724.

Instructions held erroneous or properly refused

Mo.—Livesay v. Ambassador Operating Co., App., 92 S.W.2d 961.

2. Minn.—McCarthy v. Niskern, 22 Minn. 90.

3. Del.—Le Fevre v. Crossan, 84 A. 128, 26 Del. 379.
Mont.—Jones v. Shannon, 175 P. 882, 55 Mont. 225.

4. Cal.—Willis v. McMahon, 26 P. 649, 89 Cal. 156.

5. Ark.—Stevenson v. John J. Grier Hotel Co., 251 S.W. 355, 159 Ark. 44.
N.Y.—Morningstar v. Lafayette Hotel Co., 105 N.E. 656, 211 N.Y. 465, 52 L.R.A.,N.S., 740—Odom v. East Avenue Corporation, 34 N.Y.S.2d 312, 178 Misc. 363, affirmed 37 N. Y.S.2d 491, 264 App.Div. 985.
Pa.—Kral v. Coloviras, Com.Pl., 47 Dauph.Co. 279.

6. Tex.—Malin v. McCutcheon, 76 S. W. 586, 33 Tex.Civ.App. 387.

7. Minn.—McCarthy v. Niskern, 22 Minn. 90.
32 C.J. p 544 note 33.

8. Tex.—Malin v. McCutcheon, 76 S.W. 586, 33 Tex.Civ.App. 387.

9. Kan.—Lehnen v. Hines, 127 P. 612, 88 Kan. 58, 42 L.R.A.,N.S., 830.
32 C.J. p 544 note 35.

10. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

Forcible detainer

Where occupants of apartment were in arrears in rent and hired a police officer to prevent removal of their property from apartment, an action for forcible detainer by owner of apartment building would not lie to secure possession of the apartment, since an action for forcible detainer may not be maintained when defendants originally entered pursuant to a contract with plaintiff.—Roberts v. Casey, supra.

11. Notice

Occupants of an apartment in an apartment building who were mere lodgers and not tenants on default in making rent payments could by appropriate proceedings in unlawful detainer be ousted from premises without requirement of any advance notice.—Roberts v. Casey, supra.

Complaint

Although complaint in action by owner of apartment building to secure possession of apartment occupied by persons in arrears in rent purported to state an action under forcible detainer statute, which action did not lie against defendant, a judgment for plaintiff would be sustained if complaint stated a good cause of action in unlawful detainer. —Roberts v. Casey, supra.

12. Del.—State v. Whitby, 5 Del. 494.

Unregistered spouse of guest

Husband not registering at hotel, but occupying wife's room, cannot recover for employee's discourtesy in requesting that he register or leave.—Warren v. Penn-Harris Hotel Co., 91 Pa.Super. 195.

13. Del.—Le Fevre v. Crossan, 89 A. 128, 26 Del. 379.
Pa.—Commonwealth v. Mitchel, Com. Pl., 2 Pars.Eq.Cas. 431.
32 C.J. p 545 note 52.
Liability of innkeeper to persons other than guests:
Loss of goods see infra § 18.
Personal injury see infra § 22.

Assault

Insulting language of house detective in ordering woman who was waiting for relatives in hotel lobby to leave hotel was not "assault" for which hotel would be liable in absence of language from which reasonable person might have anticipated exercise of unlawful force.—Jenkins v. Kentucky Hotel, 87 S.W. 2d 951, 261 Ky. 419.

Personal malice of agent

Hotel proprietors were not liable to licensee for humiliation, malicious prosecution, and false imprisonment

der such reasonable restrictions and regulations as the management may impose, a guest of a hotel may, as a matter of right, invite unobjectionable persons to visit him at the hotel for lawful purposes and at lawful times and they have a right to remain in the hotel.[14] Hence, under proper limitations, an innkeeper has been held bound to admit a person who actually has business with, and has been sent for by, a guest,[15] although it has also been held that an innkeeper may deny to a business rival the use of the facilities of his inn for purposes of competition even though the competitor's presence is requested by guests;[16] and one who comes merely to make a social call on a guest has no right to enter the inn and may be excluded.[17] A fortiori one who comes merely on his own business may be excluded, even though a business rival is admitted by the innkeeper,[18] but where to exclude such a person would subject the guest to a monopoly in a necessary service, the innkeeper, it seems, has no right to deprive the guest of the benefit of competition by the admission of one person and the exclusion of his rivals.[19]

§ 12. Loss of or Injury to Property

An innkeeper's liability for loss or injury to personal property is treated infra §§ 13–21.

Examine Pocket Parts for later cases.

§ 13. —— Liability of Innkeepers in General

a. General rule
b. Property of third persons
c. Exceptions to rule

a. General Rule

An innkeeper is liable for any loss or injury to the property of his guests caused by his own default or that of his servants or by others for whose presence in the inn he is responsible.

It is the duty of an innkeeper to keep the goods of his guests safely night and day, so that no loss shall happen through his default or that of his servants, or others for whose presence in the inn the innkeeper is responsible, and if he is guilty of any breach of this duty he is liable to the party injured for the loss sustained.[20] The criterion of liability is the right of the innkeeper to charge the guest for his entertainment,[21] and the absence or sickness of the innkeeper is no excuse for a loss.[22]

What law governs. The liability of an innkeeper for the loss of the goods of a guest is determined by the law of the country where the inn is kept.[23]

Origin and basis of rule. The rule making innkeepers liable for the loss of their guests' goods is founded on considerations of public policy for the protection of travelers against the negligence and dishonest practices of innkeepers and their servants.[24] It had its origin at an early period when highways were infested with thieves and highwaymen, with whom the innkeepers frequently colluded, and was the only means under such conditions by which protection could be afforded to travelers who had no means of knowing the neighborhood or the character of those whom they might meet at an inn.[25]

suffered by licensee as result of ejection from hotel lobby by house detective who acted from personal malice and not in furtherance of hotel business.—Comfort v. Monteleone, La.App., 163 So. 670.

14. Mo.—Livesay v. Ambassador Operating Co., App., 92 S.W.2d 961.
32 C.J. p 545 note 55.

15. N.H.—Markham v. Brown, 8 N. H. 523, 31 Am.D. 209.
32 C.J. p 545 note 56.

16. Ariz.—Champie v. Castle Hot Springs Co., 233 P. 1107, 27 Ariz. 463.

17. Pa.—Commonwealth v. Mitchel, Com.Pl., 2 Pars.Eq.Cas. 431.

18. N.C.—State v. Steele, 11 S.E. 478, 106 N.C. 766, 19 Am.S.R. 573, 8 L.R.A. 516.
32 C.J. p 545 note 58.

19. N.H.—Markham v. Brown, 8 N. H. 523, 31 Am.D. 209.
32 C.J. p 545 note 60.

20. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Ky.—Cumberland Hotel Operating Co. v. Hartman, 94 S.W.2d 637, 264 Ky. 300—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 556, 206 Ky. 494, citing **Corpus Juris.**
La.—Babin v. Thormander, 167 So. 241.
Miss.—Todd v. Natchez-Eola Hotels Co., 157 So. 703, 171 Miss. 577.
Pa.—Mathis v. Off, 8 Pa.Dist. & Co. 6.
32 C.J. p 545 note 62.

That hotels cater to common man, supplying simple accommodations, at price conceived to be within his means, has been held not to increase risk of guest or diminish proprietor's responsibility.—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121.

Guards

Hotelkeepers have a right to employ detectives and night watchmen to protect their guests against thefts.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.

21. Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.
32 C.J. p 545 note 63.

22. Pa.—Houser v. Tully, 62 Pa. 92, 1 Am.R. 390.
32 C.J. p 545 note 64.

23. Mo.—Treichlinger v. French, Lick Springs Hotel Co., 192 S.W. 101, 196 Mo.App. 686.
Tenn.—Holland v. Pack, Peck 151.

24. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
N.Y.—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121.
32 C.J. p 545 note 66.

25. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.
32 C.J. p 545 note 67.

A hotel manager is not personally liable for the loss of property from a guest's room in the absence of a showing of individual responsibility.[26]

b. Property of Third Persons

An innkeeper is not liable for the loss of, or injury to, the property of third persons in the absence of negligence.

An innkeeper is not liable for loss of, or injury to, the property of third persons in the absence of negligence.[27]

c. Exceptions to Rule

The innkeeper is not liable for losses due to acts of God or the public enemy, or the companions or servants of the guest, or for losses from inherent causes.

Losses arising from the negligence of the guest, as considered infra § 14, or from an act of God[28] or of a public enemy[29] are recognized as exceptions to the rule holding an innkeeper liable for loss of goods of a guest. However, even if the goods are injured by an excepted cause, an act of God, the innkeeper is liable if he negligently failed to provide against the loss from this cause,[30] as it has been held that the act of God must be the sole proximate cause of the damage to excuse the innkeeper.[31]

Acts of companions or servants of guest. An exception to the rule that an innkeeper is liable for the loss of property of a guest exists where the loss was caused by the acts of the servants or companions of the guest.[32]

Losses from inherent causes. An innkeeper is not liable where the loss was due to causes inherent in the property itself; as where a horse dies of disease or in consequence of its own viciousness,[33] or where perishable property becomes worthless in the natural order of things.[34]

§ 14. —— Negligence of Guest

a. In general

26. Okl.—Ketchum v. Gordon, 298 P. 605, 151 Okl. 240.

27. Tex.—Washington v. Ravel, Civ. App., 14 S.W.2d 367.

28. Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.

Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**

Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.

Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 556, 206 Ky. 494, citing **Corpus Juris.**

La.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.

N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559—Norris v. Mischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329—Shaine v. S. Jacobson, 201 N.Y.S. 781, 121 Misc. 590.

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242 and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

32 C.J. p 546 note 68.

Accidental fire see infra § 15.

The words "irresistible superhuman cause," used in a statute, are equivalent in meaning to the phrase "act of God," and refer to those natural causes the effect of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ.—Fay v. Pacific Impr. Co., 26 P. 1099, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188, reheard 28 P. 943, 93 Cal. 253, 27 Am.S.R. 198, 16 L.R.A. 188—32 C.J. p 546 note 68 [a].

29. Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.

Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**

Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.

Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 556, 206 Ky. 494, citing **Corpus Juris.**

La.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.

N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559—Norris v. Manischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329—Shaine v. S. Jacobson, 201 N.Y.S. 781, 121 Misc. 590.

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242 and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

32 C.J. p 546 note 69.

Robbers

The phrase "public enemy" does not include robbers.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala. App. 145, certiorari denied 167 So. 596, 232 Ala. 175.

30. S.D.—Scheffer v. Corson, 58 N.W. 555, 5 S.D. 233.

Unusual rainfall was held not to excuse hotelkeeper's failure to use devices to prevent damage to guest's goods by flooding of basement where exercise of reasonable care would call for the use of such devices.—Wolf Hotel Co. v. Parker, 158 N.E. 294, 87 Ind.App. 333.

31. Ind.—Wolf Hotel Co. v. Parker, 158 N.E. 294, 87 Ind.App. 333.

32. Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242 and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

32 C.J. p 547 note 2.

Agent of guest

Hotel directing guest to garage for storage of automobile and receiving fee therefor is not liable for damage to guest's automobile while it was being returned by employee of garage from place to which it had been taken for repairs requested by owner in telephone conversation with garage proprietor.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

33. Ill.—Metcalf v. Hess, 14 Ill. 129.

34. Vt.—Howe Mach. Co. v. Pease, 49 Vt. 477.

b. What constitutes
c. Degree of negligence

a. In General

An innkeeper is not liable for the loss of, or injury to, the property of a guest or third person resulting from the negligence of the guest.

Regardless of whether or not in the particular jurisdiction an innkeeper is regarded as an insurer, considered infra § 15, it is well settled that he is not liable for any loss of, or injury to, the property of a guest which was caused by the negligence of the guest himself.[35] On this general principle, where an innkeeper acts in accordance with the definite instructions of the owner, and the goods are thereby lost without negligence of the innkeeper, he is not liable.[36] However, if, subsequently to the guest's negligence, the innkeeper could have avoided the effect thereof but failed to do so, he will be responsible for the loss.[37]

Property of third persons. An innkeeper is not liable for injury to the property of third persons where it was caused by the negligence of a guest.[38]

b. What Constitutes

What constitutes negligence of a guest is a question of fact to be determined from a consideration of the circumstances of the particular case.

What constitutes negligence of the guest in any case is a question of fact, to be determined on a consideration of all the circumstances of the particular case, and an act or omission which is negligence in one case may not be so regarded in another.[39] Carelessness on the part of the guest may not be negligence in law,[40] as where it was not the cause of the loss.[41] It has been held that it is not negligence on the part of a guest to keep his money and valuables about his person, instead of depositing them with the innkeeper, in the absence of any statutory regulation or other limitation of liability binding on him;[42] to place rings in a pillow slip for the night;[43] to fail to conceal valuables from hotel employees;[44] to fail to inform the innkeeper that a package intrusted to him or his servants contains valuables;[45] to fail to give innkeeper's employees instructions as to baggage;[46] to deliver goods to a servant employed by the innkeeper to receive and keep the property of guests, instead of placing them in a checkroom provided by the innkeeper;[47] to remain out of his room all night;[48] to allow several days to pass after the innkeeper received the baggage without inquiring as to its safety;[49] to fail to request a search of a place where the missing goods might be;[50] to permit the innkeeper to place in the room with him another guest, by whom a theft is committed;[51] and a fortiori, it is not negligence where the innkeeper places another in a guest's room without the guest's permission.[52]

35. Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.
Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 483, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
La.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.
N.Y.—Millhiser v. Beau Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millhiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855—Gardner v. Roosevelt Hotel, 24 N.Y.S.2d 261, 175 Misc. 610, reversed on other grounds 28 N.Y.S. 2d 78, 176 Misc. 546, reversed on other grounds 32 N.Y.S.2d 208, 263 App.Div. 268, appeal denied 34 N.Y. S.2d 133, 263 App.Div. 953—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559—Udell v. Hamburg-American Line, 253 N.Y.S. 209, 141 Misc. 754, affirmed 255 N.Y.S. 1011—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N. Y. 120, 76 A.L.R. 1103.
Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242 and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.
Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.
Tex.—Driskill Hotel Co. v. Anderson, Civ.App., 19 S.W.2d 216.
32 C.J. p 546 note 72.

36. Mo.—Owens v. Geiger, 2 Mo. 39, 22 Am.D. 435.

37. Ga.—Watson v. Loughran, 38 S.E. 82, 112 Ga. 837.
32 C.J. p 546 note 74.

38. Tex.—Washington v. Ravel, Civ. App., 14 S.W.2d 367.

39. Mass.—Robinson v. Weber Duck Inn Co., 1 N.E.2d 27, 294 Mass. 75.
Tex.—Driskill Hotel Co. v. Anderson, Civ.App., 19 S.W.2d 216.
32 C.J. p 546 note 75.
Questions for jury see infra § 21.

40. N.M.—Landrum v. Harvey, 210 P. 104, 28 N.M. 243.

41. N.M.—Landrum v. Harvey, supra.
32 C.J. p 547 note 1.

42. Minn.—Smith v. Wilson, 31 N. W. 176, 36 Minn. 334, 1 Am.S.R. 669.
32 C.J. p 546 note 76.

43. N.M.—Landrum v. Harvey, 210 P. 104, 28 N.M. 243.

44. Wash.—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 546 note 78.

45. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Ind.—Wolf Hotel Co. v. Parker, 158 N.E. 294, 87 Ind.App. 333.
32 C.J. p 547 note 79.

46. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.

47. Ill.—Burton v. Drake Hotel Co., supra.
32 C.J. p 547 note 80.

48. Pa.—Turner v. Whitaker, 9 Pa. Super. 83.

49. Ill.—Eden v. Drey, 75 Ill.App. 102.

50. Neb.—Dunbier v. Day, 12 N.W. 109, 12 Neb. 596, 41 Am.R. 772.

51. Minn.—Olson v. Crossman, 17 N.W. 375, 31 Minn. 222.

52. Ind.—Dessauer v. Baker, Wils. 429.

On the other hand, it has been held that it is such negligence as will defeat the remedy of the guest against the innkeeper if he permits a third person to exercise acts of ownership over his baggage without informing the innkeeper that he, the guest, is the owner,[53] or if he fails to comply with a notice to place valuables in the hands of the innkeeper,[54] or with reasonable regulations designed to secure the safety of his property and brought to his knowledge.[55]

Failure to lock door. The failure of the guest to lock or fasten the door of his room will not, as a matter of law, discharge the innkeeper from his liability to answer for the goods of the guest stolen from such room.[56] However, the failure of a guest to lock his door may be considered in connection with other facts and circumstances in the case in determining whether or not he was negligent.[57] It is not a duty of a guest to notify the innkeeper that the lock is out of repair,[58] and it has been held that failure to look for a bolt, after locking the door, is not negligence.[59]

Intoxication of guest. It has been held that the intoxication of a guest whose goods are stolen from the inn while he is in such condition does not relieve the innkeeper from liability for the loss so sustained,[60] but if the intoxication of the guest contributed to the loss, he is chargeable with negligence and the innkeeper is not liable.[61]

c. Degree of Negligence

Want of ordinary care on the part of the guest which proximately contributed to the loss is usually sufficient to defeat a recovery against the innkeeper.

The rule laid down by the authorities is that the want of ordinary care on the part of the guest, that is, such care as a prudent man may reasonably be expected to exercise under like circumstances, is sufficient to defeat a recovery against the innkeeper, where it appears that the guest's negligence proximately contributed to the loss, and that the loss would not otherwise have happened;[62] but the care required of the guest is not such care as will cause him personal inconvenience.[63]

§ 15. —— Nature and Extent of Liability in General

The prevailing common-law view is that an innkeeper is liable as an insurer for all the goods of a guest lost in the inn.

Different theories have been advanced as to the law governing the innkeeper's liability for the goods of his guest.[64] It has been observed as somewhat singular that on a practical question which must be as old as the rudiments of the law there should be found at the present day such diversity of opinion and decision as obtains in regard to the question under consideration,[65] and it is even more singular that the same early case should be cited as authority for both of the conflicting rules.[66]

Although modified by statutes in some jurisdictions, as considered infra § 17, the prevailing view at common law is that, like a common carrier, an innkeeper is liable absolutely, or as an insurer, for all goods of a guest lost in the inn,[67] unless the loss

53. Ill.—Kelsey v. Berry, 42 Ill. 469.
32 C.J. p 547 note 87.

54. Mass.—Widen v. Warren Hotel Co., 159 N.E. 456, 262 Mass. 41, 50 A.L.R. 313.
32 C.J. p 547 note 88.
Effect of notice generally see infra § 17.

55. Mass.—Widen v. Warren Hotel Co., 159 N.E. 456, 262 Mass. 41, 50 A.L.R. 313.
Ohio.—Fuller v. Coats, 18 Ohio St. 343.

56. W.Va.—Cunningham v. Bucky, 26 S.E. 442, 42 W.Va. 671, 57 Am.S.R. 878, 35 L.R.A. 850.
32 C.J. p 547 note 92.

57. N.Y.—Becker v. Warner, 35 N.Y.S. 739, 90 Hun 187.
32 C.J. p 547 note 93.

58. Ala.—Lanier v. Youngblood, 73 Ala. 587.

59. Mass.—Spring v. Hager, 13 N.E. 479, 145 Mass. 186, 1 Am.S.R. 451.

60. Mich.—Rubenstein v. Cruikshanks, 19 N.W. 954, 54 Mich. 199, 52 Am.R. 806.
W.Va.—Cunningham v. Bucky, 26 S.E. 442, 42 W.Va. 671, 57 Am.S.R. 878, 35 L.R.A. 850.

61. Pa.—Shultz v. Wall, 19 A. 742, 134 Pa. 262, 19 Am.S.R. 686, 8 L.R.A. 97.
32 C.J. p 547 note 91.

62. Pa.—Benjamin v. Colonial Hotel Co., 112 A. 54, 268 Pa. 459.
32 C.J. p 547 note 97.

63. Md.—Maltby v. Chapman, 25 Md. 310.

64. Md.—Roueche v. Hotel Braddock, 165 A. 891, 164 Md. 620.
32 C.J. p 548 note 7.
Liability as bailee to person not guest see infra § 18.

65. N.H.—Sibley v. Aldrich, 33 N.H. 553, 66 Am.D. 745.

66. Md.—Roueche v. Hotel Braddock, 165 A. 891, 164 Md. 620.
32 C.J. p 548 note 10.

67. Ala.—Ridgely Operating Co. v. White, 150 So. 693, 227 Ala. 459—Johnston v. Mobile Hotel Co., 167 So. 595, 596, 27 Ala.App. 145, quoting **Corpus Juris**, and certiorari denied 167 So. 596, 232 Ala. 175.
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
Mo.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 332 Mo. 749, transferred, see Lines Music Co. v. Holt, App., 48 S.W.2d 92, dissenting opinion 61 S.W.2d 326, 332 Mo. 749.
N.Y.—Millhiser v. Beau Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millhiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Gardner v. Roosevelt Hotel, 24 N.Y.S.2d 261, 175 Misc. 610, reversed on other grounds 28 N.Y.S.2d 78, 176 Misc. 546, reversed on other grounds 32 N.Y.S.2d 208, 263 App.Div. 268, appeal denied 34 N.Y.S.2d 133, 263 App.Div. 953—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559—Udell v. Hamburg-American Line, 253 N.Y.S. 209, 141 Misc. 754, affirmed 255 N.Y.S. 1011—Kaplan v. Stogop Realty Co., 233 N.Y.S.

happens by an act of God or a public enemy, considered supra § 13, or by the fault or negligence of the guest himself, considered supra § 14. The logical consequence of the rule holding innkeepers absolutely liable as insurers is that no distinction is to be made between losses happening from internal causes, such as thefts by other guests or by servants, and those which result from external causes, such as burglary and robbery,[68] or accidental fire.[69] However, in some jurisdictions, sometimes by virtue of statutory provisions, the rule as to the liability of the innkeeper for losses arising from an accidental fire has been changed so that the innkeeper is no longer liable for property lost by a fire occasioned by unavoidable casualty or superior force and without any fault or negligence on the part of the innkeeper or his servants.[70]

The minority view is that an innkeeper is responsible only if he is negligent. He owes the highest possible degree of care to his guest, but if he has been as careful as possible, and the goods have been lost or injured without his fault, he is not liable.[71]

§ 16. —— Property Covered

As a general rule, the innkeeper's liability extends to all personal property brought by the guest to the inn.

The general rule is that the innkeeper's liability is not confined to goods of any particular kind, but extends to all personal property brought by the guest to the inn.[72] An innkeeper's liability has been held not limited, like that of a carrier of passengers, to that species of property which comes under the denomination of baggage;[73] and where the guest seeks to recover for the loss of "baggage," the term is construed as not necessarily confined to articles of clothing[74] or such articles as are ordinarily used by travelers stopping at hotels as guests.[75] Thus the liability of the innkeeper extends to horses,[76] automobiles,[77] a peddler's stock of goods,[78] and to merchandise carried to an inn by a guest,[79] but not

113, 133 Misc. 611—Norris v. Manischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329—Shaine v. S. Jacobson, 201 N.Y.S. 781, 121 Misc. 590.

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239—Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242—Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

Wash.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264.

32 C.J. p 548 note 12.

This prevailing rule has been stated in cases from jurisdictions not adhering thereto.

La.—Robbins v. Pontchartrain Apartments, 142 So. 263, 175 La. 278.

Md.—Roueche v. Hotel Braddock, 165 A. 891, 893, 164 Md. 620, quoting **Corpus Juris.**

Safety of premises

The innkeeper is bound to provide safe premises and is absolutely liable if the goods of a guest are injured by a defect in the premises.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360—32 C. J. p 549 note 21.

68. Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 596, 27 Ala.App. 145, citing **Corpus Juris,** and certiorari denied 167 So. 596, 232 Ala. 175.

32 C.J. p 549 note 16.

69. Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242 and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

32 C.J. p 549 note 17.

Accidental fire not act of God

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242, and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

32 C.J. p 549 note 17 [a].

70. Mass.—Weiser v. Lane, 138 N.E. 391, 244 Mass. 340.

32 C.J. p 549 notes 18, 19.

Limitation of liability by statute generally see infra § 17 c.

71. Md.—Roueche v. Hotel Braddock, 165 A. 891, 893, 164 Md. 620, quoting **Corpus Juris.**

Tex.—Dallas Hotel Co. v. Davison, Com.App., 23 S.W.2d 708, 712, citing **Corpus Juris,** and reversing Dallas Hotel Co. v. Davidson, Civ. App., 12 S.W.2d 633.

32 C.J. p 549 note 20.

Care of ordinarily prudent person

Although hotelkeeper must exercise high degree of care and diligence in protecting guests' property, exercise thereof is merely "ordinary care," and hotelkeeper is liable for loss of guest's property only if guilty of "negligence" consisting in omission to exercise care which an ordinarily prudent person would use. —Dallas Hotel Co. v. Raitman, Tex. Civ.App., 59 S.W.2d 943.

72. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 482, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre Co. v. Hardin, 257 P. 317, 125 Okl. 242, and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.

Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

32 C.J. p 550 note 23.

Property covered by statutory limitation of liability see infra § 17.

73. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.

N.Y.—Van Wyck v. Howard, 12 How. Pr. 147.

74. Tex.—Zeiger v. Woodson, Civ. App., 202 S.W. 164.

75. Tex.—Zeiger v. Woodson, supra.

76. Tenn.—Dickerson v. Rogers, 4 Humphr. 179, 40 Am.D. 642.

77. Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

Hotel furnishing parking space for guests' convenience was bound to use ordinary care for safety of guest's automobile, and such duty extended to attendant in charge of parking lot.—Todd v. Natchez-Eola Hotels Co., 157 So. 703, 171 Miss. 577.

78. Me.—Cohen v. Manuel, 39 A. 1030, 91 Me. 274, 64 Am.S.R. 225, 40 L.R.A. 491.

Mich.—Rubenstein v. Cruikshanks, 19 N.W. 954, 54 Mich. 199, 52 Am.R. 806.

79. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.

Okl.—Busby Hotel & Theatre Co. v. Thom, 257 P. 314, 125 Okl. 239, followed in Busby Hotel & Theatre

to merchandise exhibited for sale at an inn, in a room under the exclusive control of the guest, as considered infra § 19. Also, it has been held that the liability of the innkeeper includes money,[80] and is not limited to an amount necessary for traveling expenses.[81] However, it has been held that the liability of an innkeeper in the respect under consideration, extends only to the baggage of his guests, and that the term "baggage" includes only articles for the personal convenience and use of the traveler.[82]

§ 17. —— Limitation of Liability

a. By rules and notices generally
b. By contract
c. By statute

a. By Rules and Notices Generally

An innkeeper may limit his liability for the goods of his guest by promulgating just and reasonable rules which, when actually brought to the notice of the guest, will debar a recovery in the event the guest has not complied with them.

An innkeeper has a right to make such just and reasonable rules and regulations in the management of his inn as will more effectually secure the property of his guests and operate as a protection to himself,[83] and, by giving notice of such rules to the guests, may require the latter to conform thereto.[84] Actual notice to a guest, given by an innkeeper, to the effect that he will be liable for the guest's effects only to a certain extent, or on certain conditions, is binding on the guest;[85] but, in the absence of statutory authority, an innkeeper cannot limit his liability by a general, public, or constructive notice,[86] not brought to the guest's knowledge,[87] such as a notice posted in the room of the guest,[88] or on the wall of the hotel,[89] or printed on the hotel register.[90]

The commonest rule enforced is that valuable packages must be left at the office to be placed in the safe. So far as this may reasonably be required of a guest, failure by the guest to observe it will exonerate the innkeeper from liability for the goods.[91] However, the notice is effective only as to property which can conveniently be left in the safe and not as to property which the guest needs to keep by him; if applied to such property, it would be unreasonable.[92] Thus, clothing and articles of daily use are not covered by the notice.[93] Reasonable notice of the rule must be given to the guest;[94] and the terms of the notice must be construed strictly,[95] it being necessary that the notice or request, whether made orally or in the form of a printed notice brought to the attention of the guest, should be so clear and unmistakable in its terms as to leave room for no reasonable doubt as to what is intended.[96] Thus a notice that "valuables" must be put in the safe has been held not to extend to money,[97] or to certain other property.[98]

Effect of compliance. If the guest complies with the notice, the common-law liability of the innkeeper is unaffected.[99]

b. By Contract

An innkeeper may specially contract with his guests for a limited liability with regard to their effects.

An innkeeper may specially contract with his guests for a limited liability with regard to the guests' effects,[1] as by stipulating to receive goods,

Co. v. Hardin, 257 P. 317, 125 Okl. 242, and Busby Hotel & Theatre Co. v. Hall, 257 P. 317, 125 Okl. 242.
32 C.J. p 550 note 30.

80. Ala.—Watkins v. Hotel Tutwiler Co., 76 So. 302, 200 Ala. 386, L.R.A. 1917F 834.
32 C.J. p 550 note 32.

81. Minn.—Smith v. Wilson, 31 N.W. 176, 36 Minn. 334, 1 Am.S.R. 669.
32 C.J. p 550 note 33.

82. Md.—Roueche v. Hotel Braddock, 165 A. 891, 164 Md. 620.
32 C.J. p 550 note 35.
Rule analogous to carrier's liability with respect to the baggage of passengers applied.—Pettigrew v. Barnum, 11 Md. 434, 69 Am.D. 212.

83. Mass.—Widen v. Warren Hotel Co., 159 N.E. 456, 262 Mass. 41, 50 A.L.R. 313.
N.Y.—Van Wyck v. Howard, 12 How. Pr. 147.

84. Ill.—Palas v. Harvey Room Co., 211 Ill.App. 580.

85. W.Va.—Nesben v. Jackson, 109 S.E. 489, 89 W.Va. 470.
32 C.J. p 551 note 43.
Statutory notices see infra subdivision c (2) of this section.

86. N.Y.—Stanton v. Leland, 4 E.D. Smith 88.

87. Ill.—Palas v. Harvey Room Co., 211 Ill.App. 580.

88. Iowa.—Bodwell v. Bragg, 29 Iowa 232.
32 C.J. p 551 note 47.

89. Ill.—Palas v. Harvey Room Co., 211 Ill.App. 580.

90. N.Y.—Bernstein v. Sweeny, 33 N.Y.Super. 271.

91. N.Y.—Stanton v. Leland, 4 E.D.Smith 88.
Ohio.—Fuller v. Coats, 18 Ohio St. 343.

92. Tenn.—Maxwell Operating Co. v. Harper, 200 S.W. 515, 138 Tenn. 640, L.R.A.1918C 672.
32 C.J. p 551 note 54.

93. Tenn.—Maxwell Operating Co. v. Harper, supra.
32 C.J. p 551 note 54.

94. Ala.—Lanier v. Youngblood, 73 Ala. 587.
32 C.J. p 551 note 55.

95. Ky.—Packard v. Northcraft, 2 Metc. 439.
32 C.J. p 551 note 56.

96. N.Y.—Van Wyck v. Howard, 12 How.Pr. 147.

97. N.Y.—Stanton v. Leland, 4 E.D. Smith 88.

98. Mineral specimens
Colo.—Brown Hotel Co. v. Burckhardt, 56 P. 188, 13 Colo.App. 59.

99. Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.
32 C.J. p 551 note 60.

1. Ala.—Ridgely Operating Co. v. White, 150 So. 693, 698, 227 Ala. 459, citing Corpus Juris.
Vt.—McDaniels v. Robinson, 26 Vt. 316, 62 Am.D. 574.

to keep with or without reward, as a common bailee.[2] However, a stipulation which is unreasonable and unsupported by a consideration,[3] or one that is contrary to public policy,[4] has been held void.

c. By Statute

(1) In general
(2) Mode of effecting limitation
(3) Extent of limitation and application of statutes

(1) In General

In many jurisdictions statutes have been enacted with respect to the liability of innkeepers for the effects of their guests, some of them merely declaratory of the common law and others modifying it by limiting or prescribing a mode of limiting the innkeeper's liability.

While, in the absence of statutory regulation, an innkeeper's liability depends on common-law principles,[5] in many jurisdictions statutes have been enacted with respect to the liability of innkeepers for the effects of their guests.[6] It has been said generally that they impose no new burden on the innkeeper and were enacted for his benefit.[7] Some of these statutes, or at least certain provisions thereof, are merely declaratory of the common law,[8] while others modify the common-law rule by limiting, or by prescribing a mode of limiting, the liability of an innkeeper.[9] A provision that is very common permits innkeepers to provide a place of safe deposit, and to require guests to place there money and other articles of a nature calculated to tempt dishonest persons, and easy to remove without detection, thus giving innkeepers the right to make their liability as insurers conditional on actual custody in certain cases.[10]

Strict construction. In so far as statutes of this nature are in derogation of the common law, they are to be strictly construed.[11]

2. Vt.—McDaniels v. Robinson, supra.

3. Tenn.—Maxwell Operating Co. v. Harper, 200 S.W. 515, 138 Tenn. 640, L.R.A.1918C 672.
32 C.J. p 551 note 63.

4. Okl.—Oklahoma City Hotel Co. v. Levine, 116 P.2d 997, 189 Okl. 331.

Owner's risk

A stipulation on a baggage check that the property is left at the owner's risk cannot relieve an innkeeper against his own negligence or that of his agents and servants.—Dallas Hotel Co. v. Richardson, Tex.Civ. App., 276 S.W. 765.

5. Ind.—Bowell v. De Wald, 28 N.E. 430, 2 Ind.App. 303, 50 Am.S.R. 240.
N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103.

6. U.S.—Fisher v. Kelsey, Mo., 7 S. Ct. 929, 121 U.S. 383, 30 L.Ed. 930.
N.M.—Landrum v. Harvey, 210 P. 104, 28 N.M. 243.
32 C.J. p 551 note 64.

7. La.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.
Tex.—Dallas Hotel Co. v. Davison, Com.App., 23 S.W.2d 708, reversing Dallas Hotel Co. v. Davidson, Civ. App., 12 S.W.2d 633—Dallas Hotel Co. v. Raitman, Civ.App., 59 S.W. 2d 943.

Purpose of statute

(1) Purpose of statutes relating to liability of innkeepers for property of guests was to relieve innkeepers of burden of common-law liability, to limit liability in absence of special contract, and to provide a method by which innkeeper may relieve himself from liability as a depositary for hire for guest's articles of unusual value.—Providence Washington Ins. Co. v. Hotel Marysville, Cal.App., 140 P.2d 698.

(2) The statute was intended to create mutual and reciprocal duties and rights between hotelkeeper and his guests and to maintain a fair and reasonable balance of protection to both.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

8. Okl.—Abercrombie v. Edwards, 161 P. 1084, 62 Okl. 54.
32 C.J. p 551 note 66.

9. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338.
32 C.J. p 551 note 67.

Robbery and violence

Under some statutes an innkeeper is not responsible for theft by force and arms or with exterior breaking open of doors or by any extraordinary violence.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.

Depositary for hire

(1) In some jurisdictions the liability of an innkeeper has been changed from that of insurer to that of a depositary for hire.
Ark.—Andrews v. Southwestern Hotel Co., 44 S.W.2d 675, 184 Ark. 982.
Cal.—Providence Washington Ins. Co. v. Hotel Marysville, App., 140 P.2d 698—Muehlebach v. Paso Robles Springs Hotel, 225 P. 19, 65 Cal.App. 634—Hummingbird v. Schurich, 68 P.2d 319, 24 Cal.App. 2d Supp. 757.
Miss.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.

(2) Where defendant hotel company was not guilty of negligence with regard to loss of jewelry by guests, defendant as bailee for hire of personal property could not be charged with loss of the jewelry, but as to loss of money stolen from room of guests, hotel company was held subject to common-law liability as insurer, notwithstanding its freedom from negligence, where the statute limiting innkeeper's liability to that of depositary or bailee for hire as to personal property expressly excluded money.—Baxter v. Shanley-Furness Co., 226 P. 391, 193 Cal. 558.

10. N.Y.—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
32 C.J. p 551 note 68.

Formal demand for return

Innkeeper waived formal demand for return of guest's property deposited in hotel safe by stating, in response to inquiry, that he could not comply with demand because of robbery.—Davis v. Cohen, 235 N.W. 173, 253 Mich. 330.

11. Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.
Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 481, 106 Conn. 551, 53 A.L.R. 1042, citing **Corpus Juris.**
Mich.—Davis v. Cohen, 235 N.W. 173, 253 Mich. 330.
Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384,

(2) Mode of Effecting Limitation

Some statutes create a limitation of liability without requiring any act to be done by the innkeeper, others stipulate certain requirements with which he must strictly comply before he may invoke the limitation.

In some jurisdictions the statutes, or statutes which were formerly in force, create a limitation of liability, at least as to certain property, without requiring any act to be done by the innkeepers,[12] as by providing that they shall not be liable for losses sustained by the guests, unless the guests deliver or offer to deliver such property to them for safe custody,[13] or unless the guests give written notice of the property in their possession.[14]

In other jurisdictions, or in the same jurisdictions with respect to other property, it is provided that, in order to effect a limitation of liability, the innkeeper shall provide a secure place of deposit for valuables, and post notices to the guests to leave their effects with him for safe-keeping.[15] In order to be relieved of his common-law liability a literal compliance by the innkeeper with the statutes is generally held necessary.[16] This is true not only as to providing the iron safe required,[17] or suitable locks and bolts on the doors of the rooms,[18] but also as to giving all notices required by the statute exactly as provided.[19] Thus, when the notice is required to be printed "in ordinary sized plain English type," printing it in very small type is not enough,[20] even if the guest could just as easily have read it.[21] Also, the omission of a material portion of the statute will render the notice ineffectual to protect the innkeeper.[22]

171 Misc. 338—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
32 C.J. p 552 note 70.

12. U.S.—Ely v. Charellen Corporation, C.C.A.Fla., 120 F.2d 984.
32 C.J. p 552 notes 72, 73.

13. U.S.—Ely v. Charellen Corporation, supra
Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.
32 C.J. p 552 note 72.

14. U.S.—Hagerstrom v. Brainard Hotel Corporation, C.C.A.N.Y., 45 F.2d 130.
32 C.J. p 552 note 73.

15. Mass.—Widen v. Warren Hotel Co., 159 N.E. 456, 262 Mass. 41, 50 A.L.R. 313.
N.Y.—Millhiser v. Beau Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 552 note 74.

Extension of common-law principle

These statutes, by providing for constructive notice, extend the common-law principle whereby the guest is bound by actual notice of a requirement of the deposit of valuables in the office or safe of the hotel.—Nesben v. Jackson, 109 S.E. 489, 89 W.Va. 470.

16. U.S.—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829.
Ala.—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.
Cal.—Baxter v. Shanley-Furness Co., 226 P. 391, 193 Cal. 558—Cline v. Dimmick, 255 P. 213, 214, 82 Cal. App. 155, quoting **Corpus Juris.**
N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 552 note 76.

17. Cal.—Cline v. Dimmick, 255 P. 213, 214, 82 Cal.App. 155, quoting **Corpus Juris.**
Neb.—Dunbier v. Day, 12 N.W. 109, 12 Neb. 596, 41 Am.R. 772.

Type of safe

It has been held that an innkeeper is not obliged to furnish individual lock boxes for his guests, nor is it necessary that the "iron chest or other safe deposit" be burglar proof.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.

18. Tex.—Dallas Hotel Co. v. Davison, Com.App., 23 S.W.2d 708, reversing Dallas Hotel Co. v. Davidson, Civ.App., 12 S.W.2d 633.

Suitability of both

The law leaves to the hotelkeeper the choice of selecting either a suitable lock or bolt for the doors of the sleeping rooms; and if he elects to place a lock and a bolt on the door, they should both be suitable for that purpose.—Dallas Hotel Co. v. Davison, supra.

19. N.Y.—Gardner v. Roosevelt Hotel, 32 N.Y.S.2d 208, 263 App.Div. 268, reversing 28 N.Y.S.2d 78, 176 Misc. 546, reversing 24 N.Y.S.2d 261, 175 Misc. 610, and appeal denied 34 N.Y.S.2d 133, 263 App.Div. 953—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103.
Wash.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 552 note 78.

Contra under particular statute

Under a statute providing that in no event shall liability attach to the innkeeper for the loss of jewelry unless deposit thereof is made with the hotel and a receipt taken, it was held that the innkeeper was not liable for loss of a guest's jewelry, not so deposited, even though the innkeeper was negligent, and this notwithstanding another provision of the statute requiring the innkeeper to post in each room reasonable rules and regulations for the management of the hotel, and a copy of the first-mentioned provision.—Ely v. Charellen Corporation, C.C.A.Fla., 120 F.2d 984.

Sufficiency of notice

(1) Hotel company's posted notice, "Positively not responsible for any valuables unless left at hotel office," was held not in compliance with a statute requiring innkeeper to post notice that he will not be liable for property unless placed in fireproof safe.—Baxter v. Shanley-Furness Co., 226 P. 391, 193 Cal. 558.

(2) Hotelkeeper's notice of nonliability, which did not specify furs, was held not to relieve him of liability for fur cape.—Cline v. Dimmick, 255 P. 213, 82 Cal.App. 155.

20. Mo.—Porter v. Gilkey, 57 Mo. 235.

21. Mo.—Porter v. Gilkey, supra.

22. N.Y.—Millhiser v. Beau Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855—Epp v. Bowman-Bilt-

There must be strict compliance with the statute with regard to the place of posting such notice,[23] and where the statute requires the notice to be posted in the rooms or in the office, printing it on the hotel register has been held insufficient.[24]

Actual notice to a guest, that a safe has been provided for keeping the effects of guests and that the innkeeper will not be responsible for their loss unless deposited therein, is usually considered equivalent to the statutory notice by posting,[25] but there is authority to the contrary.[26]

(3) Extent of Limitation and Application of Statutes

(a) In general

(b) Property covered

(c) Amount of liability

(a) In General

Notwithstanding the innkeeper's compliance with statutes relating to limitation of liability, he remains liable as at common law where the guest complies with the statutory requirements; and even though a guest fails to comply therewith, the innkeeper is ordinarily liable for a loss caused by the default or negligence of himself or his servants.

Notwithstanding the existence of a statute providing for limitation of liability, and compliance by the innkeeper therewith, he remains liable as at common law, unless the statute provides otherwise, where the guest placed the property in question in the custody of the innkeeper as required by the statute and notice given in pursuance thereof,[27] or where, although the guest failed to deposit the property with the innkeeper, the failure was not the cause of the loss,[28] or where the innkeeper waived the requirement of the statute,[29] unless the waiver was made in ignorance of the contents of the package offered for deposit.[30] Also the innkeeper remains under his common-law liability until a reasonable time has elapsed for depositing the goods.[31]

Although the exemption ceases when the goods are packed for departure and the innkeeper is so informed,[32] it has been held that the statute does not exempt the innkeeper from liability when the guest places jewelry in a trunk in his room preparatory to his departure on the following morning,[33] and previous neglect to place the jewelry in the hotel safe does not affect the right of recovery.[34]

Negligence of innkeeper. Although, under some statutes, an innkeeper has been held relieved from liability, at least as to certain property, even where

more Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338.
32 C.J. p 552 note 83.

23. N.Y.—Epp v. Bowman-Biltmore Hotels Corporation, supra.
Wash.—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.

Door of each room

Where the notice is to be posted on the doors, it must be posted on the door of every room occupied by a guest.—Lanier v. Youngblood, 73 Ala. 587—32 C.J. p 552 note 79.

Public place

(1) A hotel office which was not wholly separate and apart from the lobby and the interior of which was open to public view was a "public place" within a statute requiring innkeepers who provide a safe for safekeeping of guests' valuables to post a notice thereof in three or more public places.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

(2) Posting of statute, exempting hotel from liability for loss of valuables if hotel posted notices in three or more public rooms that valuables might be left in safe, in back of hotel office where it could not be read by guests, did not comply with statute.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264.

24. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.
Wash.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 552 note 80.

To post, within the statute, means to nail, attach, affix, or otherwise fasten up physically and to display in a conspicuous manner and not theoretically, and a posting is not made by printing or recording a notice in a book or on a card and keeping it on a desk.—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 171 Misc. 338.

25. Pa.—Shultz v. Wall, 19 A. 742, 134 Pa. 262, 19 Am.S.R. 686, 8 L.R.A. 97.
32 C.J. p 552 note 84.

26. Ala.—Lanier v. Youngblood, 73 Ala. 587—Johnston v. Mobile Hotel Co., 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175.
Wash.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264.

27. Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.
32 C.J. p 552 note 85.

Ordinary negligence

Under statute restricting liability of hotelkeeper as bailee of guests' valuables, for safekeeping, to cases where loss or destruction of the guests' articles is caused by theft or gross negligence of the hotelkeeper, or his employees, the rule of ordinary negligence does not apply.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

28. Mass.—Burbank v. Chapin, 2 N.E. 934, 140 Mass. 123.
32 C.J. p 552 note 86.

29. N.Y.—Friedman v. Breslin, 65 N.Y.S. 5, 51 App.Div. 268, affirmed 61 N.E. 1129, 169 N.Y. 574.

Authority of clerk

Hotel clerk acting within employment binds proprietor, but he has been held not authorized to waive a regulation regarding disposition of baggage to as a guest familiar with the regulation.—Widen v. Warren Hotel Co., 159 N.E. 456, 262 Mass. 41, 50 A.L.R. 313.

30. N.Y.—Bendetson v. French, 46 N.Y. 266, reversing 44 Barb. 31.

31. U.S.—Becker v. Haynes, C.C. Mass., 29 F. 441.
N.Y.—Rosenplaenter v. Roessle, 54 N.Y. 262.

32. Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 814, 143 Neb. 404, quoting **Corpus Juris.**
N.Y.—Bendetson v. French, 46 N.Y. 266, reversing 44 Barb. 31.

33. U.S.—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829.

34. U.S.—Heinz v. Leeds & Lippincott Co., supra.

he has been negligent,[35] ordinarily an innkeeper by complying with the statute on the subject does not relieve himself from all liability for the safety of the goods of his guests, if they fail to place them in his actual custody, but only from his liability as an insurer;[36] he is still liable for a loss caused by the default or negligence of himself or his servants.[37] Indeed, a statute regulating or limiting the liability of an innkeeper is not applicable where the guest bases his cause of action solely on the negligence of the innkeeper in keeping property deposited with him and not on his common-law liability as an insurer.[38]

Compliance by guest. In order to hold the innkeeper liable under common-law principles, a guest must comply with the provisions of the statute.[39] It has been held that a guest does not comply with the statutes, even though he hands property to the innkeeper, unless he expressly makes the delivery for the purpose of deposit in the safe.[40] It has also been held that the innkeeper should be given such notice of the character of the property that he may know that it is valuable;[41] and that the mere appearance of the baggage deposited is not sufficient to put the innkeeper on notice as to its valuable nature.[42] While, in the absence of a request, it has been held that there is no obligation on the guest to state the monetary value of the goods deposited,[43] where money was deposited without disclosure of the amount by a guest in a box in a hotel safe removable by the use of two keys, one held by the guest and the other by the hotel, it was held that the liability of the innkeeper could not exceed the statutory limit.[44]

Particular innkeepers. The statutes are usually made applicable to all innkeepers,[45] but in some instances they are not so comprehensive.[46]

(b) Property Covered

The statutes providing for limitation of liability usually specify property of such a kind as to be especially liable to theft while preserving the common-law rule with reference to ordinary baggage and wearing apparel.

The statutes providing for a limitation of liability usually specify property of such a kind or character as to be peculiarly subject to loss by theft or otherwise, such as money, jewelry, ornaments, precious stones, articles of gold or silver manufacture, or other valuable articles,[47] although sometimes property of all kinds, with certain exceptions, is declared to be within the statute;[48] and when the statute specifically names the kinds of property with respect to which the innkeeper may limit his liability, the court cannot, in any case, extend it to other articles,[49] because the statutes, being in derogation of

35. U.S.—Ely v. Charellen Corporation, C.C.A.Fla., 120 F.2d 984.
32 C.J. p 552 note 91.

36. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76—Hall v. Hotel Sherman Co., 236 Ill.App. 386.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 814, 143 Neb. 404, quoting **Corpus Juris.**
32 C.J. p 552 note 92.

37. Cal.—Muehlebach v. Paso Robles Springs Hotel, 225 P. 19, 65 Cal. App. 634.
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 814, 143 Neb. 404, quoting **Corpus Juris.**
N.Y.—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
32 C.J. p 552 note 93.

38. La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 814, 143 Neb. 404, quoting **Corpus Juris.**
N.Y.—Shaine v. S. Jacobson, Inc., 201 N.Y.S. 781, 121 Misc. 590.
32 C.J. p 553 note 94.

39. **Delivery within statute**
Delivery of locked case of jewelry was sufficient delivery of jewelry to render innkeeper liable for loss. —Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.

40. Cal.—Providence Washington Ins. Co. v. Hotel Marysville, App., 140 P.2d 698.
Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.
Mo.—Horton v. Terminal Hotel & Arcade Co., 89 S.W. 363, 114 Mo. App. 357.

41. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.

42. Cal.—Providence Washington Ins. Co. v. Hotel Marysville, App., 140 P.2d 698.

43. Conn.—Stoll v. Almon C. Judd Co., 138 A. 479, 106 Conn. 551, 53 A.L.R. 1042.

44. N.Y.—Norris v. Manischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329.

45. La.—Murray v. Hagens, App., 143 So. 505.

46. Ala.—Lanier v. Youngblood, 73 Ala. 587.
32 C.J. p 553 note 98.

47. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.Y.—Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855, modified on other grounds Millhiser v. Beau-Site Co., 231 N.Y.S. 549, 224 App. Div. 594, affirmed 167 N.E. 447, 251 N.Y. 290.
32 C.J. p 553 note 99.

Camera
Whether an expensive camera was a valuable article required to be left by guest for deposit in safe in order to render hotel liable for loss depends on peculiar facts of each case. —Ketchum v. Gordon, 298 P. 605, 151 Okl. 240.

48. U.S.—Becker v. Haynes, C.C. Mass., 29 F. 441.
Mass.—Weiser v. Lane, 138 N.E. 391.
32 C.J. p 553 note 1.

49. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.Y.—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121.
32 C.J. p 553 note 2.

Automobiles
The statute limiting an innkeeper's liability for guests' jewelry and other small and valuable articles to be kept in a safe or in the guest's room has no relation whatever to the safe care of automobiles, and hence the failure to post a copy of the statute as prescribed therein cannot be availed of by a guest to fasten liability on defendant.—Andrews v.

the common law, are to be construed strictly, as shown supra subdivision c (1) of this section.

With few exceptions, statutes regulating the liability of innkeepers for the property of their guests have practically preserved the common-law rule with reference to ordinary baggage and wearing apparel.[50] In some instances the statutes providing for a limitation of liability expressly except personal baggage, money necessary for immediate or traveling expenses, and articles of personal use,[51] and it is held that a reasonable amount of money for traveling expenses, and articles of personal use and convenience, although within the terms of the statute, are not within its spirit, and that a guest by retaining such articles in his own possession, instead of depositing them with the innkeeper, does not absolve the innkeeper from his common-law liability.[52] On the other hand it is held that the statutes apply to all the property of the kind designated, without exception of such amounts or articles as a guest may require for his traveling expenses or personal convenience.[53] If a guest sees fit to retain his money on his person or in his room he does so at his own risk in the absence of actual negligence on the part of the hotel.[54]

Watch. There is a conflict of authority on the question whether a watch comes within the statutes limiting the liability of an innkeeper and not specifically mentioning or excepting a watch. It has been held not within the statutes specifying valuable articles,[55] nor, except in a few jurisdictions,[56] is it within a statute specifying jewels and ornaments.[57] It has been held to be within a statute specifying articles of gold and silver manufacture;[58] but there is authority to the contrary.[59]

(c) Amount of Liability

In some jurisdictions the statutes limit the amount for which an innkeeper may be held liable.

In many jurisdictions the statutes limit the amount for which an innkeeper may be held liable, and this is true notwithstanding the property has been delivered to the innkeeper for safe-keeping.[60] Although, sometimes by virtue of express statutory exception, where the goods of a guest are lost through the negligence of the innkeeper, the limitation as to amount does not apply and the guest may recover the full amount of his loss,[61] under other statutes it has been held that the limitation as to the amount applies even to losses caused by the negligence of the innkeeper or his employees[62] and to a theft by an employee,[63] but does not apply to a theft by the innkeeper.[64] Although an innkeeper

Southwestern Hotel Co., 44 S.W.2d 675, 184 Ark. 982.

50. Ohio.—Palace Hotel Co. v. Medart, 100 N.E. 317, 87 Ohio St. 130, Ann.Cas.1913E 860.

51. U.S.—Becker v. Haynes, C.C. Mass., 29 F. 441.
32 C.J. p 553 note 5.

52. Md.—Roueche v. Hotel Braddock, 165 A. 891, 164 Md. 620.
32 C.J. p 553 note 6.

Wearing apparel
Pa.—Franchinia v. Palumbo, 79 Pa. Super. 234—Mathis v. Off, 8 Pa. Dist. & Co. 6.

53. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
32 C.J. p 553 note 7.

54. Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 143 Neb. 404—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.

55. Ga.—Murchison v. Sergent, 69 Ga. 206, 47 Am.R. 754.

56. Tenn.—Rains v. Maxwell House Co., 79 S.W. 114, 112 Tenn. 219, 64 L.R.A. 470, 2 Ann.Cas. 488.

57. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
32 C.J. p 553 note 10.

Diamond studded watch
Watch ornamented with diamonds but primarily article of daily use was held not a "jewel" or "ornament" within statute relieving innkeeper from liability for loss of money, jewels, or ornaments where guest neglects to deposit such valuables in innkeeper's safe, notwithstanding the watch could not be safely worn on day of loss because of broken clasp. —Kennedy v. Bowman Biltmore Hotel Corporation, 283 N.Y.S. 900, 157 Misc. 416.

58. Ohio.—Lang v. Arcade Hotel Co., 9 Ohio Dec., Reprint, 372, 12 Cinc. L.Bul. 253.
Wis.—Steward v. Parsons, 24 Wis. 241.

59. Mich.—Weadock v. Swart, 128 N.W. 734, 163 Mich. 602, Ann.Cas. 1912A 959.

60. La.—Connecticut Fire Ins. Co. v. Hotel Grunewald Caterers, Inc., 8 La.App. 479.
Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
N.Y.—Norris v. Manischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 553 note 13.

Amount for each container
Statute limiting innkeeper's liability to certain amounts for each container refers to container as a single piece of baggage at time of loss.—Cline v. Dimmick, 255 P. 213, 82 Cal. App. 155.

61. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76—Hall v. Hotel Sherman Co., 236 Ill.App. 386.
32 C.J. p 553 note 14.

62. Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

63. N.Y.—Millhiser v. Beau-Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

64. N.Y.—Millhiser v. Beau-Site Co., 167 N.E. 447, 251 N.Y. 290, affirming 231 N.Y.S. 549, 224 App.Div. 594, which modified Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

Proceeds of theft by employee
The statute limiting liability was not intended to allow a hotel to keep money of a guest in excess of the statutory limitation stolen by an employee and used by him to repay the hotel for his defalcations.—In re

may not be obliged to accept for deposit from a guest property whose value exceeds the statutory limitation,[65] he may, under some statutes, specially contract for a liability greater than the statutory one.[66] An innkeeper receiving a package without a notice of value and without a request for a special agreement may assume that he is only undertaking the statutory liability.[67]

§ 18. —— Relationship of Innkeeper and Guest

a. In general
b. Liability as bailee

a. In General

The liability of an innkeeper, as such, for the loss of, or injury to, property ordinarily depends on the existence of the relation of innkeeper and guest at the time the loss or injury occurred.

Unless an innkeeper has by a special contract with a person who is not strictly a guest consented to assume the responsibility of an innkeeper for property deposited with him,[68] the extraordinary liability of an innkeeper, as such, for the loss of, or injury to, property depends on the existence of the relation of innkeeper and guest at the time the loss or injury occurred; it cannot be imposed in any case where the relation of innkeeper and guest never existed,[69] or where, at the time of loss, the owner of the goods did not intend to become a guest and did not in fact become one until after the loss,[70] or where the relation had been terminated before the loss occurred,[71] unless the loss occurred before the expiration of such a period of time as was reasonable under the circumstances for the removal of the goods.[72]

However, the requirement that the relation of innkeeper and guest must have existed at the time of the loss, in order to render the innkeeper subject to the extraordinary liability, does not mean that the actual owner of the property lost must have been a guest. If it is taken to the inn by the agent or servant of the owner, and such agent or servant is the guest of the innkeeper, the owner may enforce the innkeeper's liability, as considered infra § 21. Neither is it implied that the guest must have actually been in the inn at the time of the loss or injury. If he was a guest at the time, although temporarily absent, the innkeeper is liable,[73] and as long as the guest is actually on the premises the liability of the innkeeper continues, although the guest has paid his bill and is in the act of departing.[74]

b. Liability as Bailee

Where the relation of innkeeper and guest does not exist, the responsibility of an innkeeper for the safekeeping of the property of another is that of a bailee and his liability is governed by the rules applicable to bailments generally.

Where the relation of innkeeper and guest does not exist at the time, the responsibility of an innkeeper for the safekeeping of the property of another in his possession is that of a bailee[75] either

Brainard Hotel Co., C.C.A.N.Y., 75 F.2d 481.

65. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.

66. **Consent or agreement in writing**
(1) A brass baggage check given by bellboy to a hotel guest for luggage containing valuable jewelry was not a "consent in writing" by hotelkeeper to assume greater than statutory liability for loss of luggage, within the statute limiting liability unless the hotelkeeper consents in writing to a greater liability.—Providence Washington Ins. Co. v. Hotel Marysville, 140 P.2d 698, 60 Cal.App.2d 338.
(2) Hotel clerk's statement that key to box constituted receipt for guest's money was held not a "special agreement in writing" within the statute.—Norris v. Manischewitz Broadway Central Hotel, 221 N.Y.S. 363, 129 Misc. 329.

67. N.Y.—Millheiser v. Beau-Site Co., 223 N.Y.S. 733, 129 Misc. 855, modified on other grounds Millhiser v. Beau-Site Co., 231 N.Y.S. 549, 224 App.Div. 594, affirmed 167 N.E. 447, 251 N.Y. 290.

68. Vt.—McDaniels v. Robinson, 26 Vt. 316, 62 Am.D. 574.

69. Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
La.—Murray v. Hagens, App., 143 So. 505—Sherburne v. Hotel Grunewald Caterers Co., 120 So. 269, 9 La.App. 748.
Miss.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.
N.Y.—Kaplan v. Stogop Realty Co., 233 N.Y.S. 113, 133 Misc. 611—Mason v. Hotel Grand Union, 41 N.Y.S.2d 309.
Wash.—Smith v. Dorchester Hotel Co., 259 P. 1085, 145 Wash. 344.
32 C.J. p 554 notes 16, 17.
What constitutes, and duration of, relation of innkeeper and guest see supra § 3.

When liability arises
The liability of the innkeeper as such begins at the moment when the relation of guest and host arises.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.

70. Minn.—Parker v. Dixon, 157 N.W. 583, 132 Minn. 367, L.R.A.1916E 534, Ann.Cas.1918A 540.

71. La.—Alex W. Rothschild & Co. v. Lynch, 103 So. 188, 157 La. 849.
N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.
Okl.—Keisel v. Reynolds, 244 P. 1104, 125 Okl. 295.
32 C.J. p 554 note 19.

Departure without paying bill
La.—Bichard v. Lidel, 119 So. 444, 10 La.App. 6.
32 C.J. p 554 note 19 [b].

72. Cal.—Pawn v. Wall, 264 P. 268, 88 Cal.App. 597.
32 C.J. p 554 note 20.

73. N.Y.—McDonald v. Edgerton, 5 Barb. 560.

74. N.Y.—Seymour v. Cook, 53 Barb. 451, 35 How.Pr. 180.

75. La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114—Alex W. Rothschild & Co. v. Lynch, 103 So. 188, 157 La. 849.—

with[76] or without[77] reward. This is true where goods are received by the innkeeper for the guest after the relation has terminated and the guest has departed,[78] even though the innkeeper may have agreed while the guest was at the inn to receive and forward the goods.[79] As bailee, the innkeeper is liable if the goods are lost by neglect of due care on his part,[80] or by misdelivery.[81]

In accordance with the rules governing bailments generally, an innkeeper who is deemed to be a gratuitous bailee is liable only for a loss occasioned by gross negligence[82] or fraud[83] on his part; but a higher degree of responsibility rests on him where he is deemed to be a bailee for hire,[84] whether compensation is paid directly[85] or whether the bailment is a mutual one arising as a necessary incident of a business conducted by the bailee for profit;[86] in such case he is liable for a loss arising from his failure to exercise ordinary care.[87] A contract of bailment between an innkeeper and another person not a guest with regard to a stored trunk does not cover articles not ordinarily contained in stored trunks in the absence of actual notice to the innkeeper of the contents of the trunk in question.[88]

In order to hold an innkeeper bound by a contract of bailment entered into between a mere clerk employed by him and a person not a guest, it must appear that the clerk had actual authority to make the contract;[89] entering into contracts of bailment with persons not guests is not within the apparent authority or course of employment of a clerk of a hotel.[90] However, the innkeeper may be estopped

Sherburne v. Hotel Grunewald Caterers Co., 120 So. 269, 9 La.App. 748.
Minn.—Peet v. Roth Hotel Co., 253 N.W. 546, 191 Minn. 151.
N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.
Okl.—Keisel v. Reynolds, 244 P. 1104, 125 Okl. 295.
Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
32 C.J. p 555 note 24.

Guest at banquet

Invited guest of companies engaged in staging for employees an annual banquet and dance at hotel, by leaving automobile on hotel's free parking lot knowing it to be neither customary nor required that hotel give identification checks for automobiles, assumed risk that automobile might be stolen without fault or negligence of hotel, and the responsibility of the hotel is merely that of a bailee.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.

76. Miss.—Edwards Hotel Co. v. Terry, supra.
Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
32 C.J. p 555 note 25.

77. La.—Alex v. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114—Alex W. Rothschild & Co. v. Lynch, 103 So. 188, 157 La. 849—Sherburne v. Hotel Grunewald Caterers Co., 120 So. 269, 9 La.App. 748.
Miss.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.
N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.
Okl.—Keisel v. Reynolds, 244 P. 1104, 125 Okl. 295.
32 C.J. p 555 note 26.

78. La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114—Alex W. Rothschild & Co. v. Lynch, 103 So. 188, 157 La. 849.
32 C.J. p 555 note 27.

79. La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114.
32 C.J. p 555 note 28.

80. Ind.—Wolf Hotel Co. v. Parker, 158 N.E. 294, 87 Ind.App. 333.
La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114—Sherburne v. Hotel Grunewald Caterers Co., 120 So. 269, 9 La.App. 748.
Miss.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.
32 C.J. p 555 note 29.
Care required of innkeeper holding property under lien see infra § 26.

Lodger leaving without notice or paying for room cannot hold innkeeper liable for more than ordinary care in preservation of personal belongings.—Bichard v. Lidel, 119 So. 444, 10 La.App. 6.

81. Ark.—Wear v. Gleason, 12 S.W. 756, 52 Ark. 364, 20 Am.S.R. 186.
32 C.J. p 555 note 30.

Theft as misdelivery

It has been held that a theft of the bailed property will not support an action for damages therefor on the theory that there was a misdelivery.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.

82. Miss.—Edwards Hotel Co. v. Terry, supra.
N.Y.—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559.
Okl.—Keisel v. Reynolds, 244 P. 1104, 125 Okl. 295.
32 C.J. p 555 note 32.

What constitutes gross negligence

(1) Hotels which destroyed addresses of departed guests and sent notice of proposed sale of unclaimed trunks and contents to former guest, at address found on old letter in a trunk, were guilty of actionable gross negligence in destroying registration card and selling the trunks.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.

(2) Other illustrations see 32 C.J. p 555 note 32 [a].

83. La.—Carol v. Monteleone, 71 So. 798, 139 La. 541, L.R.A.1916F 284.

84. U.S.—Adelphia Hotel Co. v. Providence Stock Co., C.C.A.Pa., 277 F. 905, affirming, D.C., 274 F. 485.
N.Y.—Loder v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559.

85. U.S.—Adelphia Hotel Co. v. Providence Stock Co., C.C.A.Pa., 277 F. 905, affirming, D.C., 274 F. 485.

86. Cal.—Hummingbird v. Schurich, 68 P.2d 319, 24 Cal.App.2d Supp. 757.
Minn.—Peet v. Roth Hotel Co., 253 N.W. 546, 191 Minn. 151.
Okl.—Oklahoma City Hotel Co. v. Levine, 116 P.2d 997, 189 Okl. 331.
Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
Tex.—Baird v. Williams, Civ.App., 56 S.W.2d 893—Dallas Hotel Co. v. Richardson, Civ.App., 276 S.W. 765.
32 C.J. p 555 note 36.

87. Cal.—Hummingbird v. Schurich, 68 P.2d 319, 24 Cal.App.2d Supp. 757.
Minn.—Peet v. Roth Hotel Co., 253 N.W. 546, 191 Minn. 151.
Tex.—Baird v. Williams, Civ.App., 56 S.W.2d 893.
32 C.J. p 555 note 37.

88. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 17 N.Y.S.2d 498, 173 Misc. 604, modifying 20 N.Y.S.2d 227, 173 Misc. 595.
32 C.J. p 555 note 38.

89. N.Y.—Booth v. Litchfield, 94 N.E. 1078, 201 N.Y. 466, 35 L.R.A.,N.S., 710.

90. Ohio.—Arcade Hotel Co. v.

from disclaiming the relation of master to a person whom he has held out as his servant and whose negligence is responsible for the loss.[91]

Sale of unclaimed chattels. An innkeeper holding goods of a former guest under a gratuitous bailment may sell them at auction pursuant to a statute permitting innkeepers to sell unclaimed chattels.[92] He must, however, comply with the statutory requirements.[93]

§ 19. —— Custody of Property by Innkeeper

a. In general
b. Actual delivery to innkeeper or his servants
c. Constructive custody

a. In General

It is a requisite of the extraordinary liability of an innkeeper for the effects of his guest that they must have been in the custody of the innkeeper as such at the time of the loss or injury.

It is a requisite of the extraordinary liability of an innkeeper for the effects of his guest that the effects, at the time of the loss or injury, must have been in the custody of the innkeeper as such.[94] No such liability is incurred where the guest assumes the entire and exclusive care, control, and possession of his goods,[95] as where the guest, by arrangement with the innkeeper, displays merchandise in a room of the inn and invites customers there, the control of the room and the goods for this purpose being in the guest.[96] However, some statutes have extended the liability of the innkeeper to cover the latter case;[97] and in the absence of statute, the innkeeper is responsible if the goods are lost or injured through his negligence.[98] Moreover, where the room is also used as a sleeping room, the innkeeper is responsible as such for the personal baggage of the guest placed in the room.[99]

Custody as bailee. An innkeeper is not responsible as such for the safe-keeping of goods of a guest delivered to his servant as an individual and not as representative of the innkeeper.[1]

b. Actual Delivery to Innkeeper or His Servants

The responsibility of the innkeeper is the same whether the goods are delivered at the time of the guest's arrival or thereafter while the relation still continues and under some circumstances the liability may even antedate the guest's arrival.

The responsibility of an innkeeper for goods delivered to, or deposited with, him or his servant by or for a guest is the same whether the delivery or deposit is made when the guest arrives at the inn and the relation of innkeeper and guest is established[2] or thereafter while the relation still continues,[3] and under some circumstances the responsibility of an innkeeper as such for the goods of a guest may commence at the time the goods are delivered to him or his servant before the prospective guest arrives at the inn, engages accommodations, and actually becomes a guest, as where the goods are previously sent to the inn and received by the innkeeper,[4] or where they are delivered to a porter or other

Waitt, 4 N.E. 398, 44 Ohio St. 32, 58 Am.S.R. 785.
32 C.J. p 555 note 40.

91. U.S.—Adelphia Hotel Co. v. Providence Stock Co., C.C.A.Pa., 277 F. 905, affirming, D.C., 274 F. 485.

92. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.

93. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., supra.

Notice

The statutory requirement of publication of one notice of innkeeper's sale of unclaimed chattels is for the purpose of attracting attention of prospective buyers, not of bringing home to the guest knowledge of the sale, and while the statute does not require notice of the sale to be sent to the owner of the unclaimed baggage whose address is no longer available, nor the address to be retained for an indefinite period, the innkeeper is required, in the absence of statutory direction, to exercise ordinary good faith and reasonable care in preserving the name and address of the owner.—Crosby v. 20 Fifth Ave. Hotel Co., supra.

94. N.Y.—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559.
32 C.J. p 556 note 42.

Parked car in vacant lot

Where hotel guest parked his automobile in vacant lot provided gratis by hotel, and sample case and other personalty were stolen therefrom, hotelkeeper would be liable for loss only under rules governing negligence as bailee, not as innkeeper.—Lader v. Warsher, supra.

95. Mass.—Weiser v. Lane, 138 N.E. 391, 244 Mass. 340.
32 C.J. p 556 note 43.

Relinquishment of custody by innkeeper

Where a hotel proprietor undertook for a consideration to transport sample case to hotel, where it was delivered and identified by the guest and no arrangement made for safekeeping for hire, the hotelkeeper thereafter was at the most a gratuitous bailee, liable only for want of ordinary care.—Weiser v. Lane, supra.

96. U.S.—Fisher v. Kelsey, Mo., 7 S. Ct. 929, 121 U.S. 383, 30 L.Ed. 930, affirming, C.C., 16 F. 71, 5 McCrary 135.
32 C.J. p 556 note 44.

97. Okl.—Abercrombie v. Edwards, 161 P. 1084, 62 Okl. 54.

98. Okl.—Williams v. Norvell Shapleigh Hardware Co., 116 P. 786, 29 Okl. 331, 35 L.R.A.,N.S., 350, Ann. Cas.1913A 448.
32 C.J. p 556 note 46.

99. U.S.—Myers v. Cottrill, C.C. Wis., 17 F.Cas.No.9,985, 5 Biss. 465.

1. Pa.—Sneider v. Geiss, 1 Yeates 34.

2. Cal.—Pinkerton v. Woodward, 33 Cal. 557, 91 Am.D. 657.
32 C.J. p 556 note 51.

3. Cal.—Pinkerton v. Woodward, supra.
32 C.J. p 556 note 52.

4. Ill.—Flint v. Illinois Hotel Co., 149 Ill.App. 404.
32 C.J. p 556 note 53.

person authorized by the innkeeper to receive them,[5] for instance, at the railroad station.[6] In these cases, however, the innkeeper's responsibility as such is conditioned on the owner becoming a guest within a reasonable time;[7] where he fails to fulfill this condition, the responsibility of the innkeeper becomes ab initio that of a mere bailee.[8]

c. Constructive Custody

Unless so required by statute it is not requisite to the innkeeper's extraordinary liability that the guest's property should be placed in his special keeping or that he should have exclusive possession of it, so long as it is within the precincts of the inn or even, under certain circumstances, when it is outside them.

Unless so required by statute, it is not requisite to the extraordinary liability of an innkeeper that property of the guest should be placed in the special keeping of the innkeeper[9] or that he be given exclusive possession or complete domination over it;[10] it is generally sufficient if the property is in the inn under the general and implied care and control of the innkeeper.[11] Thus, unless the guest assumes the exclusive control and possession of the property, as considered supra subdivision a of this section, it is deemed to be within the custody of the innkeeper so as to render him responsible therefor where it is in the room of the guest,[12] or where it is in a room or place in the inn provided or customarily used for the reception or keeping of articles of the class to which it belongs,[13] or even where it is in a public room or part of the inn,[14] such as the lobby.[15] Even a request by the guest that his goods be placed or remain in some particular room or place in the inn does not relieve the innkeeper from responsibility where the room or place is under his general control and supervision and is not in the exclusive possession of the guest.[16]

The custody of the innkeeper and his responsibility for safe-keeping commences as soon as the goods are brought into the inn,[17] or a place appurtenant thereto,[18] or, as sometimes stated, as soon as they are brought within the precincts of the inn;[19] and this is true, although there is no actual delivery of the goods[20] nor any notice given[21] to the innkeeper personally.

The goods need not necessarily be within the building strictly denominated the inn.[22] A place outside the inn premises may be adopted as a part thereof by the innkeeper, as where an inclosure for keeping the horses or vehicles of guests is not physically connected with the inn,[23] and it has even been held that a parking lot adjacent to the hotel and maintained for the convenience of its guests is a part of the inn.[24] However, an innkeeper is not liable as such for property stolen from a building

5. Ga.—Coskery v. Nagle, 10 S.E. 491, 83 Ga. 696, 20 Am.S.R. 333, 6 L.R.A. 483.
32 C.J. p 556 note 54.

6. Mass.—Dickinson v. Winchester, 58 Mass. 114, 50 Am.D. 760.

7. Ill.—Flint v. Illinois Hotel Co., 149 Ill.App. 404.
32 C.J. p 556 note 56.

8. Miss.—Edwards House v. Davis, 86 So. 849, 124 Miss. 485.
32 C.J. p 557 note 57.

9. Ala.—Ridgely Operating Co. v. White, 150 So. 693, 697, 227 Ala. 459, citing **Corpus Juris.**
32 C.J. p 557 note 59.

10. Ala.—Ridgely Operating Co. v. White, supra, citing **Corpus Juris.**
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
32 C.J. p 557 note 60.

Employment of independent contractor

An innkeeper, who undertakes to transport the baggage of a guest from the hotel to the railway station, is liable for the loss of such property, although he employs an independent contractor for the purpose.—Huckins Hotel Co. v. Clampitt, 224 P. 945, 101 Okl. 190.

11. Pa.—Franchinia v. Palumbo, 79 Pa.Super. 234.
32 C.J. p 557 note 61.

12. Ala.—Ridgely Operating Co. v. White, 150 So. 693, 697, 227 Ala. 459, citing **Corpus Juris.**
Pa.—Franchinia v. Palumbo, 79 Pa. Super. 234.
32 C.J. p 557 note 63.

13. Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
32 C.J. p 557 note 64.

14. Ala.—Ridgely Operating Co. v. White, 150 So. 693, 697, 227 Ala. 459, citing **Corpus Juris.**
32 C.J. p 557 note 65.

15. Mo.—Swanner v. Conner Hotel Co., 224 S.W. 123, 205 Mo.App. 329.
32 C.J. p 557 note 66.

16. Ky.—Packard v. Northcraft, 2 Metc. 439.

17. U.S.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.
Okl.—Abercrombie v. Edwards, 161 P. 1084, 62 Okl. 54.

18. Okl.—Abercrombie v. Edwards, supra.
32 C.J. p 557 note 69.

19. N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App. Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103.
32 C.J. p 557 note 70.

20. Ga.—Rockwell v. Proctor, 39 Ga. 105.
32 C.J. p 557 note 71.

21. Mo.—Maloney v. Bacon, 33 Mo. App. 501.
32 C.J. p 557 note 72.

22. Mo.—Maloney v. Bacon, supra.
32 C.J. p 557 note 73.

23. Me.—Cohen v. Manuel, 39 A. 1030, 91 Me. 274, 64 Am.S.R. 225, 40 L.R.A. 491—Hilton v. Adams, 71 Me. 19.

Garage proprietor as agent of inn

Proprietor of garage to which hotel company directed guests for storage of automobiles and received fee therefor was held agent of hotel company in furnishing place for storage and care of guests' automobiles.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.

24. Miss.—Todd v. Natchez-Eola Hotels Co., 157 So. 703, 171 Miss. 577.

Servant; scope of employment

Parking lot attendant was held "servant" where parking lot was part of hotel, it being immaterial that attendant received no salary but depended entirely on tips; and where attendant took guest's automobile to carry a passenger for hire and on return trip engaged in a joy ride, he was held to be acting within the scope of his employment so as to render hotel liable to guest

separate from the inn and kept by him in a capacity other than innkeeper.[25]

The innkeeper is responsible for the goods of a guest placed outside the inn on the direction of the innkeeper,[26] without the knowledge or consent of the guest;[27] but not where they are placed or left outside the inn at the request, or by the act, of the guest.[28]

The delivery of a baggage check by a guest or a person who subsequently becomes a guest, either on his arrival at the railroad station or on or after his arrival at the hotel, to the innkeeper or his representative places the goods the check represents in the custody of the innkeeper[29] even though the baggage is never brought within the walls of the hotel,[30] unless the innkeeper can show that the property was never delivered by the railroad company.[31] The rationale of this rule, however, has been severely criticized and the rule itself disapproved, although recovery was allowed on the ground of a breach of contract.[32]

§ 20. —— Liability of Keepers of Other Public Houses

a. Boardinghouse and lodginghouse keepers

b. Restaurant keepers

a. Boardinghouse and Lodginghouse Keepers

In the absence of statute boardinghouse and lodginghouse keepers are not insurers of the goods of their roomers and their liability is controlled by the ordinary rules of law.

In the absence of statutes changing the rule,[33] the liability of a boardinghouse or lodginghouse keeper or of an innkeeper for the loss of a boarder's or lodger's goods is regulated by the ordinary rules of law, and he is liable only for a loss occasioned by his own act or negligence or that of his servants.[34] He is not an insurer,[35] and it has been held that he is not a bailee of a roomer's property[36] and owes the roomer only the duty of ordinary care of his property.[37]

Also, it has been held that if a boarder deposits goods for safe-keeping with the person with whom he boards, there is a naked deposit without reward, and hence the bailee is bound to exercise slight diligence only,[38] but other courts, taking the view that the bailment is not a depositum, or naked deposit without reward, hold that the boardinghouse keeper is under the obligation of using reasonable care in protecting the property deposited.[39]

A lodginghouse keeper has the right to make reasonable regulations governing his liability for the effects of his lodgers,[40] and a lodger, after notice, is

for damage to automobile.—Todd v. Natchez-Eola Hotels Co., supra.

25. Me.—Minor v. Staples, 71 Me. 316, 36 Am.R. 318.
32 C.J. p 557 note 75.

26. Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 182, 19 Tenn. App. 360, citing **Corpus Juris.**
32 C.J. p 557 note 76.

27. Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 19 Tenn.App. 360.
32 C.J. p 557 note 77.

28. N.Y.—Lader v. Warsher, 1 N.Y.S.2d 160, 165 Misc. 559.
Tenn.—Andrew Jackson Hotel v. Platt, 89 S.W.2d 179, 182, 19 Tenn. App. 360, citing **Corpus Juris.**
32 C.J. p 557 note 78.

29. U.S.—Hagerstrom v. Brainard Hotel Corporation, C.C.A.N.Y., 45 F.2d 130.
32 C.J. p 557 note 79.

30. Colo.—Keith v. Atkinson, 111 P. 55, 48 Colo. 480, 139 Am.S.R. 284.

31. Ga.—Carhart v. Wainman, 40 S.E. 781, 114 Ga. 632, 88 Am.S.R. 45.

32. N.Y.—Davidson v. Madison Corporation, 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103, affirming 247 N.Y.S. 789, 231 App.Div. 421.

Not a symbolical delivery

"Clearly the delivery of a railroad check to an innkeeper is not a symbolical delivery of the baggage which it represents."—Davidson v. Madison Corporation, supra.

33. Okl.—Abercrombie v. Edwards, 161 P. 1084, 62 Okl. 54.

Receipt under statute

Detached portion of envelope in which club member deposited valuables was a "receipt" within the statute limiting liability of lodginghouse keeper unless he shall have given a receipt in writing therefor.—Greer v. Los Angeles Athletic Club, 258 P. 155, 87 Cal.App. 272.

34. Ill.—Gray v. Drexel Arms Hotel, 146 Ill.App. 604.
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 556, 206 Ky. 494, citing **Corpus Juris.**
N.Y.—Hayes v. Wulff, 200 N.Y.S. 361.
Okl.—Kee v. Bethurum, 293 P. 1084, 146 Okl. 237.
32 C.J. p 558 note 85.

Early cases contra

In a few early cases, it was held that a boarding or lodginghouse keeper was under no obligation to take care of the goods of his patrons.—Clifford v. Stafford, 145 Ill. App. 247—32 C.J. p 558 note 86.

35. N.C.—Wells v. West, 194 S.E. 313, 212 N.C. 656.
Okl.—Kee v. Bethurum, 293 P. 1084, 146 Okl. 237.
32 C.J. p 558 note 84.

36. N.C.—Wells v. West, 194 S.E. 313, 212 N.C. 656.
Okl.—Kee v. Bethurum, 293 P. 1084, 146 Okl. 237.

No contractual obligation

Where lodger asked owner of lodginghouse not to let anyone have his accordion, and she agreed, but permitted third person to remove it, there was no contractual obligation on part of owner of lodginghouse for breach of which an action could be maintained by lodger.—Wells v. West, 194 S.E. 313, 212 N.C. 656.

Access to room

The text rule is applicable even though the boardinghouse keeper has access to the room for maid service. —Wells v. West, supra.

37. Okl.—Kee v. Bethurum, 293 P. 1084, 146 Okl. 237.

38. Kan.—Johnson v. Reynolds, 3 Kan. 251.

39. Cal.—Greer v. Los Angeles Athletic Club, 258 P. 155, 87 Cal.App. 272.
Mass.—Coe v. Ricker, 101 N.E. 76, 214 Mass. 212, 45 L.R.A.,N.S., 30, Ann.Cas.1914B 1178.

What is reasonable care depends on the circumstances.—Coe v. Ricker, supra—32 C.J. p 558 note 92.

40. N.Y.—Herter v. Dwyer, 139 N.Y.S. 505.
32 C.J. p 558 note 93.

bound to comply therewith.[41] It will be presumed that a notice that baggage or wearing apparel left for storage is at the risk of the owner entered into any implied contract arising on the reception of a trunk for storage.[42]

The clerk of a lodginghouse keeper has no implied authority to accept, for deposit, the money of one not a lodger.[43]

b. Restaurant Keepers

Since a restaurant keeper is not an insurer of the apparel of his patrons his liability is usually dependent on the establishment of a bailment.

The keeper of a restaurant or eating house is not an insurer of the property of his patrons,[44] and his liability for the loss of such property depends on whether or not a bailment is established.[45] Where a patron's coat is taken by a waiter or other servant to hang up, the restaurant keeper is a bailee and is responsible for its misdelivery or loss, through negligence,[46] and this is true, even though the words "not responsible for hats and coats" were printed on the bill of fare, and the waiters were forbidden to take hats and coats from the patrons.[47] However, where the customer himself hangs up his coat without notice to the restaurant keeper or his servants, there is no bailment, and the restaurant keeper cannot be held responsible for its loss unless it is shown that he was remiss in his general supervision of the restaurant,[48] and the fact that the customer hung his coat at a place indicated by the manager has been held not to impose liability on the restaurant keeper for his loss.[49] This is especially true where the proprietor has given notice that he will not be responsible for personal property unless checked.[50] Where an overcoat is checked at a restaurant, the restaurant keeper is not liable as bailee for the loss of a purse and contents in the pocket thereof, unless he has actual notice of their presence therein.[51]

Limitation of liability. In some jurisdictions statutes limit the amount of a restaurant keeper's liability for the loss of property deposited with him without valuation.[52]

Injury to property. A restaurant keeper is responsible for damages to the wearing apparel of a patron caused by the negligence of his servants in the conduct of the business for which they are employed.[53]

Safety of premises. A restaurant keeper must use reasonable care to see that the portions of his premises where patrons are expressly or impliedly invited to go are reasonably safe for their use,[54] and he has a duty to warn them of any danger of damage to their apparel, reasonably within his knowledge and of such a character as not to be within theirs.[55]

§ 21. —— Actions

a. In general
b. Form of action
c. Pleading
d. Evidence
e. Trial and judgment

a. In General

While ordinarily the innkeeper's peculiar liability for the loss of goods of a guest may be enforced only by the guest, if the latter is a member of the owner's family or his servant, the owner may sue.

If one lends his property to another and the bailee comes with it to an inn and it is there lost, the guest may sue by virtue of his qualified property in the goods as bailee,[56] and ordinarily he alone may enforce the innkeeper's peculiar liability.[57] If, however, the guest is a member of the owner's family the owner may sue,[58] and a master may sue for

41. N.Y.—Herter v. Dwyer, supra.
42. Ill.—Vigeant v. Nelson, 140 Ill. App. 644.
32 C.J. p 558 note 95.
43. N.Y.—Mulhauser v. Dwyer, 184 N.Y.S. 635.
44. Pa.—Maher v. Chapin's Lunch Co., 180 A. 739, 740, 119 Pa.Super. 213, quoting **Corpus Juris.**
32 C.J. p 558 note 97.
45. Pa.—Maher v. Chapin's Lunch Co., 180 A. 739, 740, 119 Pa.Super. 213, quoting **Corpus Juris.**
32 C.J. p 558 notes 99, 2.
46. Ill.—Vogelsang v. Fredkyn, 133 Ill.App. 356.
32 C.J. p 558 note 99.
47. Ill.—La Salle Restaurant & Oyster House v. McMasters, 35 Ill. App. 677.
48. N.Y.—Schleef v. Foodcraft Co., Inc., 165 N.Y.S. 209.
32 C.J. p 558 note 2.
49. Pa.—Maher v. Chapin's Lunch Co., 180 A. 739, 119 Pa.Super. 213.
50. N.Y.—Duckworth v. Codington Co., 136 N.Y.S. 68.
32 C.J. p 558 note 3.
51. N.Y.—Robin v. Colaizzi, 166 N.Y.S. 978, 101 Misc. 298.
52. N.Y.—Honig v. Riley, 155 N.E. 65, 244 N.Y. 105, reversing 216 N.Y.S. 158, 217 App.Div. 570, which affirmed 213 N.Y.S. 380, 126 Misc. 320 and modifying 209 N.Y.S. 233, 124 Misc. 809.
53. Mass.—Robinson v. Weber Duck Inn Co., 1 N.E.2d 27, 294 Mass. 75.
32 C.J. p 559 note 5.
54. Mass.—Robinson v. Weber Duck Inn Co., supra.
55. Mass.—Robinson v. Weber Duck Inn Co., supra.
56. Minn.—Chamberlain v. West, 33 N.W. 114, 37 Minn. 54.
32 C.J. p 559 note 7.
57. N.Y.—Coykendall v. Eaton, 55 Barb. 188, 37 How.Pr. 438.
32 C.J. p 559 note 8.
58. Mass.—Dickinson v. Winchester, 4 Cush. 114, 50 Am.D. 760.
32 C.J. p 559 note 10.
A father may sue the innkeeper for the loss of his goods taken to an inn by his minor son.—Epps v. Hinds, 27 Miss. 657, 61 Am.D. 528—32 C.J. p 559 note 10.

his goods lost at an inn by his servant.[59] So it has been held that both partners may sue for goods of the firm taken to an inn by one partner and lost there.[60]

Limitation of action. An action against an innkeeper for the loss of the goods of a guest must be brought within the time limited by statutes specially applicable thereto.[61] The application of general statutes of limitations to tort actions is considered in the C.J.S. title Limitations of Actions §§ 73–81, also 37 C.J. p 771 note 8–p 782 note 85.

b. Form of Action

The usual common-law form of action by a guest against an innkeeper for goods lost at an inn is an action on the case, but sometimes it is brought for breach of implied contract, or for conversion.

The most usual common-law form of action to recover of an innkeeper the value of goods of a guest, alleged to have been lost at his inn, is an action on the case for the wrong done.[62] However, the action is sometimes brought on the implied contract of the innkeeper safely to keep the goods,[63] and it has been held that the innkeeper may be sued in conversion for loss of the property;[64] but it has also been held that trover is not maintainable, unless an actual conversion is shown.[65]

c. Pleading

A declaration which shows the relation of innkeeper and guest and alleges delivery of the property to the innkeeper and a failure or refusal of the innkeeper to return it is sufficient.

It is generally necessary to show by the pleadings that defendant was an innkeeper and plaintiff his guest,[66] but, where the petition, declaration, or complaint contains such an allegation, together with an allegation of a delivery of the property or a baggage check therefor to the innkeeper coupled with the failure or refusal of the latter to return it, it states a cause of action.[67] The declaration need not set out the customary liability of innkeepers, since the custom is part of the law of the land;[68] nor is it ordinarily necessary for the petition, declaration, or complaint to negative defenses, such as contributory negligence on the part of plaintiff[69] or failure of the railroad company to deliver the property to the innkeeper,[70] it being incumbent on defendant to set up defenses in his answer.[71]

The issues, proof, and variance in actions against an innkeeper by a guest for property loss or damage are governed by the rules applicable to other civil actions.[72] Although defendants, in an action against them for the conversion of certain trunks, did not plead a special contract, they may take advantage of it as a defense when plaintiffs have introduced in evidence the baggage checks containing the alleged contract.[73]

d. Evidence

(1) Presumptions and burden of proof
(2) Admissibility, weight, and sufficiency

(1) Presumptions and Burden of Proof

Generally proof that goods of a guest have been lost or injured makes out a prima facie case of liability and

59. Mass.—Berkshire Woollen Co. v. Proctor, 7 Cush. 417.
32 C.J. p 559 note 11, p 535 note 11 [a].

Bailee as servant
In some early cases it was said that a bailee stands in the same position as a servant, and the bailor may sue the innkeeper for loss of goods.—Mason v. Thompson, 9 Pick., Mass., 280, 20 Am.D. 471—32 C.J. p 559 note 13.

60. N.Y.—Needles v. Howard, 1 E.D. Smith 54.

61. Cal.—Pawn v. Wall, 264 P. 268, 88 Cal.App. 597.

62. Pa.—Mathis v. Off, 8 Pa.Dist. & Co. 6.
32 C.J. p 559 note 15.

63. Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
32 C.J. p 559 note 16.

64. Mo.—Heiser v. Berger Catering Co., 106 S.W. 579, 128 Mo.App. 210.

65. N.Y.—Hallenbake v. Fish, 8 Wend. 547, 24 Am.D. 88.

66. Ga.—Walpert v. Bohan, 55 S.E. 181, 126 Ga. 532, 115 Am.S.R. 114, 6 L.R.A.,N.S., 828, 8 Ann.Cas. 89.
Md.—Towson v. Havre-de-Grace Bank, 6 Harr. & J. 47, 14 Am.D. 254.

Bailment contract
Where the declaration states a cause of action on a contract of bailment for hire, it is not demurrable as showing that plaintiff was a boarder and not a guest.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.

67. Tenn.—Smith v. Noe, supra.
32 C.J. p 559 note 21.

Pleading cause of loss unnecessary
Tenn.—Smith v. Noe, supra.

Bank notes
The term "money," as used in a declaration against an innkeeper charging him with liability for a loss of money of a guest, includes bank notes.—Towson v. Havre-de-Grace Bank, 6 Harr. & J., Md., 47, 14 Am. D. 254.

68. Ky.—Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am.D. 416.

69. Ind.—Bowell v. De Wald, 28 N. E. 430, 2 Ind.App. 303, 50 Am.S.R. 240.

70. Ga.—Carhart v. Wainman, 40 S. E. 781, 114 Ga. 632, 88 Am.S.R. 45.

71. N.Y.—Gile v. Libby, 36 Barb. 70.
Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
32 C.J. p 559 note 25.

72. **Issue not altered by answer**
In action against innkeeper for loss of automobile, answer denying allegations that it operated a garage and for an additional consideration agreed to store the automobile, and alleging instead that it had only a shed in which it permitted guests to house their automobiles, did not materially alter the issue presented by plaintiff.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.

Variance held immaterial
Fla.—Kloeppel v. Bradford, 182 So. 839, 133 Fla. 695.

73. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.

casts on the innkeeper the burden of exonerating himself.

General rules as to presumptions and burden of proof apply in actions against innkeepers for loss or damage to goods of a guest.[74] However, whether innkeepers are held liable as insurers of goods of their guests, or only for negligence, proof that goods of a guest have been lost or injured makes out a prima facie case of liability[75] and casts on the innkeeper the burden of establishing such facts as will exonerate him.[76] Ordinarily, the burden of proving plaintiff's contributory negligence is on the innkeeper.[77] Also, where an innkeeper claims the benefit of a statute, altering his common-law liability, the burden is on him to show compliance with the statute.[78]

Where the innkeeper has complied with statutes providing for a limitation of liability and the guest has not, so that the innkeeper is no longer liable as an insurer but only for the default or negligence of himself or his servants, the burden of proving default or negligence rests on the guest.[79] So, too, where the action is based on alleged negligence of the innkeeper, the burden of proof is on the guest to make out his case of negligence and loss resulting from such negligence.[80]

Where the action is predicated on a bailment, it is held, in accordance with the modern rule governing bailments generally, that proof of delivery of the property to the innkeeper and his failure on demand to return it or to account for its loss makes out a prima facie case of liability[81] and casts on him the burden of explaining the loss.[82] Strictly speaking, defendant in such case has the burden of going forward with the evidence rather than the burden of proof,[83] which remains with plaintiff.[84] The rule is applicable at least where the bailment is one for hire,[85] or a gratuitous bailment.[86] Unexcused delay on the part of plaintiff in making inquiries concerning his property and its whereabouts may be sufficient evidence of contributory negligence to throw on him the burden of proving actual negli-

74. Ill.—Beard v. Haskell Park Bldg. Corporation, 248 Ill.App. 467.
N.Y.—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
Tex.—Washington v. Ravel, Civ.App., 14 S.W.2d 367.

Special contract

The innkeeper has the burden of showing the assent of the guest to a special contract limiting his liability.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S. 2d 498, 173 Misc. 604.

75. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S. W. 555, 206 Ky. 494.
Md.—Roueche v. Hotel Braddock, 165 A. 891, 164 Md. 620.
Mich.—Davis v. Cohen, 235 N.W. 173, 174, 253 Mich. 330, citing **Corpus Juris.**
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 813, quoting **Corpus Juris**—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 828, 134 Neb. 137, 115 A.L.R. 1078, quoting **Corpus Juris.**
N.M.—Landrum v. Harvey, 234 P. 310, 311, 30 N.M. 359, citing **Corpus Juris.**
N.Y.—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
Okl.—Ketchum v. Gordon, 298 P. 605, 151 Okl. 240.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.
32 C.J. p 560 note 29.

76. Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
Md.—Roueche v Hotel Braddock, 165 A. 891, 164 Md. 620.
Mich.—Davis v. Cohen, 235 N.W. 173, 253 Mich. 330.
Minn.—Knutson v. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., 279 N.W. 714, 202 Minn. 642.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 813, quoting **Corpus Juris**—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 828, 134 Neb. 137, 115 A.L.R. 1078, quoting **Corpus Juris.**
N.M.—Landrum v. Harvey, 234 P. 310, 311, 30 N.M. 359, citing **Corpus Juris.**
N.Y.—Faucett v. Nichols, 64 N.Y. 377—Rawn v. 14 East Sixtieth St. Hotel Corporation, 213 N.Y.S. 333, 126 Misc. 247.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 560 notes 29, 30.

77. U.S.—Jefferson Hotel Co. v. Warren, N.Y., 128 F. 565, 63 C.C.A. 193.
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807, 813, quoting **Corpus Juris.**

78. Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., supra, quoting **Corpus Juris**—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 828, 134 Neb. 137, 115 A.L.R. 1078, quoting **Corpus Juris.**
Wash.—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.
32 C.J. p 560 note 32.

79. U.S.—Elcox v. Hill, Ill., 98 U. S. 218, 25 L.Ed. 103—Becker v. Haynes, C.C.Mass., 29 F. 441.
Me.—Burnham v. Young, 72 Me. 273.

80. Ark.—New York Hotel Co. v. Palmer, 251 S.W. 34, 158 Ark. 598.

81. Ill.—Miles v. International Hotel Co., 124 N.E. 599, 289 Ill. 320, reversing 211 Ill.App. 323.
N.Y.—Gardner v. Roosevelt Hotel, 32 N.Y.S.2d 208, 263 App.Div. 268, reversing 28 N.Y.S.2d 78, 176 Misc. 546, reversing 24 N.Y.S.2d 261, 175 Misc. 610, appeal denied 34 N.Y. S.2d 133, 263 App.Div. 953.
Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
Tex.—Baird v. Williams, Civ.App., 56 S.W.2d 893.

82. Ill.—Miles v. International Hotel Co., 124 N.E. 599, 289 Ill. 320, reversing 211 Ill.App. 323.
N.Y.—Gardner v. Roosevelt Hotel, 32 N.Y.S.2d 208, 263 App.Div. 268, reversing 28 N.Y.S.2d 78, 176 Misc. 546, reversing 24 N.Y.S.2d 261, 175 Misc. 610, appeal denied 34 N.Y. S.2d 133, 263 App.Div. 953.

83. Ill.—Miles v. International Hotel Co., 124 N.E. 599, 289 Ill. 320, reversing 211 Ill.App. 323.

84. Ark.—Andrews v. Southwestern Hotel Co., 44 S.W.2d 675, 184 Ark. 982.

85. Tenn.—Smith v. Noe, 19 S.W.2d 245, 159 Tenn. 498.
32 C.J. p 560 note 40.

86. Ill.—Miles v. International Hotel Co., 124 N.E. 599, 289 Ill. 320 reversing 211 Ill.App. 323.

gence on the part of defendant.[87] Where plaintiff, not a guest or lodger, deposited property with the clerk of a lodginghouse keeper, he has the burden of proving that the act of the clerk in accepting the deposit was within his authority.[88] Sometimes the courts decline to indulge in presumptions as to the value of the property.[89]

A roomer in a private home has the burden of showing the negligence of the owner of the house as a condition to recovery for the loss of his property,[90] since negligence on the part of the landlord is not implied from the mere loss of property from the room.[91]

(2) Admissibility, Weight, and Sufficiency

The admissibility and weight and sufficiency of evidence are determined by the rules applied to civil actions generally.

The rules of evidence obtaining in civil cases generally are applicable in determining the admissibility,[92] as well as the weight and sufficiency,[93] of evidence in an action against an innkeeper to recover for the loss of, or injury to, the property of a guest.

e. Trial and Judgment

Matters arising on the trial of actions involving an innkeeper's liability for loss of, or damage to, the property of a guest are governed by the rules applicable to other civil actions.

In accordance with general rules, questions of law are for the court[94] while questions of fact are to be submitted to the jury for determination[95] under proper and appropriate instructions by the court,[96] provided there is sufficient evidence to re-

87. N.Y.—Giblyn v. Hanf, 126 N.Y.S. 581.

88. N.Y.—Muhlhauser v. Dwyer, 184 N.Y.S. 635.

89. Ill.—Miles v. International Hotel Co., 124 N.E. 599, 289 Ill. 320, reversing 211 Ill.App. 323.
32 C.J. p 560 note 45.

90. Okl.—Kee v. Bethurum, 293 P. 1084, 146 Okl. 237.

91. Okl.—Kee v. Bethurum, supra.

92. Ill.—Coulson v. Wenzel Hotels, Inc., 248 Ill.App. 540—Hall v. Hotel Sherman Co., 236 Ill.App. 386.
Mass.—Berkshire Woollen Co. v. Proctor, 7 Cush. 417.
32 C.J. p 560 note 47.

Evidence held inadmissible
Tex.—Dallas Hotel Co. v. Richardson, Civ.App., 276 S.W. 765.
32 C.J. p 560 note 47 [b].

93. **Evidence held sufficient**
(1) In general.
Ill.—Burton v. Drake Hotel Co., 237 Ill.App. 76.
La.—Babin v. Thormander, App., 167 So. 241.
Mass.—Robinson v. Weber Duck Inn Co., 1 N.E.2d 27, 294 Mass. 75.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807.
N.M.—Landrum v. Harvey, 234 P. 310, 30 N.M. 359.
N.Y.—Honig v. Riley, 216 N.Y.S. 158, 217 App.Div. 570, affirming 213 N.Y.S. 380, 126 Misc. 320, which affirmed 209 N.Y.S. 233, 124 Misc. 809, reversed on other grounds 155 N.E. 65, 244 N.Y. 105.
Pa.—Franchinia v. Palumbo, 79 Pa. Super. 234.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.
32 C.J. p 561 note 48 [b].

(2) To show relationship of innkeeper and guest.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Slater v. Landes, 172 N.Y.S. 190.

(3) To show that plaintiff was negligent.—New York Hotel Co. v. Palmer, 251 S.W. 34, 158 Ark. 598.

Evidence held insufficient
(1) In general.
Cal.—Providence Washington Ins. Co. v. Hotel Marysville, App., 140 P.2d 698.
Fla.—Kloeppel v. Bradford, 182 So. 839, 133 Fla. 695.
La.—Alex W. Rothschild & Co. v. Lynch, 129 So. 725, 171 La. 114—Babin v. Thormander, App., 167 So. 241.
Mich.—Davis v. Cohen, 235 N.W. 173, 253 Mich. 330.
N.Y.—Gardner v. Roosevelt Hotel, 32 N.Y.S.2d 208, 263 App.Div. 268, reversing 28 N.Y.S.2d 78, 176 Misc. 546, reversing 24 N.Y.S.2d 261, 175 Misc. 610, appeal denied 34 N.Y.S. 2d 133, 263 App.Div. 953—Lane v. Hotel Investors, 29 N.Y.S.2d 364, reversing 25 N.Y.S.2d 300—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121.
Okl.—Oklahoma City Hotel Co. v. Levine, 116 P.2d 997, 189 Okl. 331.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.
32 C.J. p 561 note 48 [c].

(2) To show negligence of guest.
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807.
N.Y.—Hart v. Mills Hotel Trust, 258 N.Y.S. 417, 144 Misc. 121.

(3) To show negligence of defendant.
Ark.—New York Hotel Co. v. Palmer, 251 S.W. 34, 158 Ark. 598.
La.—Robbins v. Pontchartrain Apartments, 143 So. 263, 175 La. 278.
Miss.—Edwards Hotel Co. v. Terry, 187 So. 518, 185 Miss. 824.
N.Y.—Mason v. Hotel Grand Union, 41 N.Y.S.2d 309.
32 C.J. p 561 note 48 [c] (3).

(4) To show compliance with statutes limiting liability.—Featherstone v. Dessert, 22 P.2d 1050, 173 Wash. 264—Gillett v. Waldorf Hotel Co., 241 P. 14, 136 Wash. 615.

94. Tenn.—Smith v. Noe, 19 S.W. 2d 245, 159 Tenn. 498.

95. U.S.—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829.
Ark.—New York Hotel Co. v. Palmer, 251 S.W. 34, 158 Ark. 598.
Mass.—Robinson v. Weber Duck Inn Co., 1 N.E.2d 27, 294 Mass. 75.
Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 828, 134 Neb. 137, 115 A.L.R. 1078.
N.H.—Campbell v. Portsmouth Hotel Co., 20 A.2d 644, 91 N.H. 390, 135 A.L.R. 1196.
Tex.—Smith v. Robinson, Civ.App., 300 S.W. 651.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.
32 C.J. p 561 note 49.

96. Tex.—Smith v. Robinson, Civ. App., 300 S.W. 651.
32 C.J. p 561 note 50.

Instructions held erroneous
Ky.—Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 267 S.W. 555, 206 Ky. 494.
32 C.J. p 561 note 50 [a].

Instructions held not erroneous.
N.Y.—Honig v. Riley, 213 N.Y.S. 380, 126 Misc. 320, affirming 209 N.Y.S. 233, 124 Misc. 809, affirmed 216 N.Y.S. 158, 217 App.Div. 570, reversed on other grounds 155 N.E. 65, 244 N.Y. 105.
Pa.—Mathis v. Off, 8 Pa.Dist. & Co. 6.
32 C.J. p 561 note 50 [b].

quire their submission.[97] Particular questions of fact to be determined by the jury include such questions as the negligence of defendant,[98] the contributory negligence of plaintiff,[99] whether plaintiff was a guest,[1] whether the delivery of the property was made to the innkeeper or his servant in the capacity of his public calling as such,[2] whether the property lost was stolen from the hotel room,[3] and such matters of fact as require solution in order to determine whether the case comes within a statute, or an exception thereto, providing for a limitation of liability.[4]

Judgment. The judgment must conform to the pleadings and findings.[5]

§ 22. Injury to Person

a. General rules
b. From defective premises or appliances
c. From fire

a. General Rules

The keeper of an inn, lodging house, or restaurant, while not an insurer of the safety of guests, must exercise at least ordinary or reasonable care to keep them from injury. An innkeeper's liability for failure in this respect extends to acts committed by his servants in the course of their employment and to acts of other guests or of strangers, and may extend to injuries received by persons other than guests.

While an innkeeper is not an insurer of the safety of his guests,[6] and has been said not to be absolutely liable for injuries suffered by them,[7] it is his duty to take at least ordinary or reasonable care of their persons, so that they may not be injured while in the inn by want of such care on his part,[8] provided

97. Neb.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.
Tex.—Dallas Hotel Co. v. Raitman, Civ.App., 59 S.W.2d 943.
32 C.J. p 561 note 51.
Evidence held sufficient to submit to jury
Neb.—Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 9 N.W.2d 807.
32 C.J. p 561 note 51 [a].

98. Cal.—Hummingbird v. Schurich, 68 P.2d 319, 24 Cal.App.2d Supp. 757.
Minn.—Knutson v. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., 279 N.W. 714, 202 Minn. 642.
Tex.—Dallas Hotel Co. v. Davison, Com.App., 23 S.W.2d 708, reversing Dallas Hotel Co. v. Davidson, Civ. App., 12 S.W.2d 633.
32 C.J. p 561 note 52.

99. U.S.—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829.
Tex.—Driskill Hotel Co. v. Anderson, Civ.App., 19 S.W.2d 216.
32 C.J. p 561 note 53.

1. U.S.—Freudenheim v. Eppley, C.C.A.Pa., 88 F.2d 280.

2. Mass.—Mason v. Thompson, 9 Pick. 280, 20 Am.D. 471.
32 C.J. p 556 note 50.

3. U.S.—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829.

4. U.S.—Heinz v. Leeds & Lippincott Co., supra.
Okl.—Ketchum v. Gordon, 298 P. 605, 151 Okl. 240.
Wash.—Goodwin v. Georgian Hotel Co., 84 P.2d 681, 197 Wash. 173, 119 A.L.R. 788.
32 C.J. p 561 note 54.

5. Tex.—Bristol Hotel Co. v. Pearce, Civ.App., 93 S.W.2d 188—Galveston Hotel Co. v. Goggan, Civ.App., 253 S.W. 694.

6. U.S.—**Baker v. Dallas Hotel Co.**, C.C.A.Tex., 73 F.2d 825—De Honey v. Harding, C.C.A.N.D., 300 F. 696—Dove v. Lowden, D.C.Mo., 47 F. Supp. 546.
Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182—Schlemmer v. Stokes, 117 P.2d 396, 47 Cal.App.2d 164—Adams v. Dow Hotel, 76 P.2d 210, 25 Cal.App.2d 51.
Ga.—Holloman v. Henry Grady Hotel Co., 156 S.E. 275, 42 Ga.App. 347.
Iowa.—Walker v. Roosevelt Hotel Co., 241 N.W. 484, 214 Iowa 1150—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.
Kan.—Parker v. Kirkwood, 8 P.2d 340, 134 Kan. 749.
Ky.—Sidebottom v. Aubrey, 101 S.W.2d 212, 267 Ky. 45—Ledington v. Williams, 78 S.W.2d 790, 257 Ky. 599—Burgauer v. McClellan, 265 S.W. 439, 205 Ky. 51.
La.—Williams v. Mayer, App., 4 So.2d 71—Wilson v. Iberville Amusement Co., App., 181 So. 817.
Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.
Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712—Burnison v. Souders, 35 S.W.2d 619, 225 Mo. App. 1159.
Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797.
N.Y.—Owen v. Straight, 269 N.Y.S. 868, 239 App.Div. 622—Barry v. Merriman, 214 N.Y.S. 66, 215 App. Div. 294.
Ohio.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.
Okl.—Mayo Hotel Co. v. Danciger, 288 P. 309, 143 Okl. 196.
Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.
Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249—Tamres v. Reed, 165 A. 538, 109 Pa.Super. 28—Manchester v. Barnett, 27 Pa.Dist. & Co. 75, 28 Berks Co. 131—Neagley v. Cassone, 10 Pa.Dist. & Co. 632, 12 Lehigh Co.L.J. 290.
R.I.—Ziegler v. Providence Biltmore Hotel Co., 195 A. 397, 59 R.I. 326.
Tex.—Hays v. The Texan, Inc., Civ. App., 174 S.W.2d 1006—Texas Hotel Co. of Longview v. Cosby, Civ. App., 131 S.W.2d 261, 262, error dismissed, judgment correct, quoting **Corpus Juris**—Montfort v. West Texas Hotel Co., Civ.App., 117 S.W.2d 811, error refused—Crockett v. Troyk, Civ.App., 78 S.W.2d 1012—Baugh v. McCleskey, Civ.App., 292 S.W. 950.
Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.
W.Va.—Early v. Lowe, 195 S.E. 352, 119 W.Va. 690—Hunn v. Windsor Hotel Co., 193 S.E. 57, 119 W.Va. 215.
32 C.J. p 561 note 56.
At common law
(1) At common law "a hotel keeper was not liable as an insurer of . . . [his guest's] personal safety."—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 47, 224 App. Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

(2) But it has been said, as dictum, that "at common law the innkeeper was the absolute insurer of the person . . . of his guests."—Epp v. Bowman-Biltmore Hotels Corporation, 12 N.Y.S.2d 384, 385, 171 Misc. 338.

7. Cal.—Wallace v. Speier, App., 140 P.2d 900.

8. U.S.—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661—Dove v. Lowden, D.C.Mo., 47 F. Supp. 546—De Honey v. Harding, C.C.A.N.D., 300 F. 696.
Cal.—Wallace v. Speier, App., 140 P.2d 900—Adams v. Dow Hotel, 76

they make no unreasonable use of the premises,[9] and he is liable for injury to a guest resulting from his negligence.[10] According to some authorities, the responsibility of the innkeeper is limited to the exercise of reasonable care,[11] and his liability has been said not to rise as high as that of a common carrier to its passengers;[12] but other authorities hold him to the exercise of a very high degree of care,[13] and it has been held that one entering a hotel is entitled to expect that far greater preparations to secure his safety will be made than one entering a private building.[14] What constitutes reasonable care depends on the circumstances of the particular case.[15]

In particular circumstances, an innkeeper has been held not liable for injuries to a guest on the theory of nuisance.[16]

From acts of servants. A hotel keeper has been held to a very high degree of care to protect guests

P.2d 210, 25 Cal.App.2d 51—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.

Iowa.—Walker v. Roosevelt Hotel Co., 241 N.W. 484, 214 Iowa 1150—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.

Kan.—Parker v. Kirkwood, 8 P.2d 340, 134 Kan. 749.

Ky.—Sidebottom v. Aubrey, 101 S.W.2d 212, 267 Ky. 45—Cumberland Hotel Operating Co. v. Hartman, 94 S.W.2d 637, 641, 264 Ky. 300, citing **Corpus Juris.**

La.—De Latour v. Roosevelt Hotel, App., 1 So.2d 353.

Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.

Neb.—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797.

N.Y.—Berry v. Merriman, 214 N.Y.S. 66, 215 App.Div. 294—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App.Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597.

Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.

Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249.

Tex.—Texas Hotel Co. of Longview v. Cosby, Civ.App., 131 S.W.2d 261, 262, error dismissed, judgment correct, quoting **Corpus Juris.**

Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.

W.Va.—Early v. Lowe, 195 S.E. 852, 119 W.Va. 690.

32 C.J. p 562 note 57.

At common law

N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

"There is at common law an implied warranty in favor of the guest, arising out of his contractual relation, that the hotel keeper has exercised the care and has not omitted to do those things that are reasonably necessary for his protection and safety."—Owen v. Straight, 269 N.W. 868, 870, 239 App.Div. 622.

Ordinary occupation

"His liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation fraught with no extraordinary danger."—Neagley v. Cassone, 10 Pa.Dist. & Co. 632, 634, 12 Lehigh Co.L.J. 290.

Duty to child

Innkeeper must consider whether premises present any reasonably avoidable dangers to child guest, and is bound to exercise ordinary care to keep child from harm; standard of care required of innkeeper to child guest is conduct of ideal person of ordinary prudence.—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825.

9. Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.

10. Neb.—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797—Strahl v. Miller, 151 N.W. 952, 97 Neb. 820, Ann.Cas.1917A 141, affirmed 36 S.Ct. 147, 239 U.S. 426, 60 L.Ed. 364.

Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.

Liability with respect to food see Food § 61.

Connection of negligence with injury

For such negligence to be actionable it must have been in connection with the circumstances producing the guest's injury.—Hays v. The Texan, Inc., Tex.Civ.App., 174 S.W.2d 1006—Montfort v. West Texas Hotel Co., Tex.Civ.App., 117 S.W.2d 811, error refused—Baugh v. McCleskey, Tex.Civ.App., 292 S.W. 950.

Failure to supply key

Innkeepers were not liable to guest for injuries received by guest while attempting to enter inn through window because of failure to supply guest with key to premises.—Gumbart v. Waterbury Club Holding Corporation, D.C.Conn., 27 F.Supp. 228.

11. Ky.—Burgauer v. McClellan, 265 S.W. 439, 205 Ky. 51.

Tex.—Montfort v. West Texas Hotel Co., Civ.App., 117 S.W.2d 811, error refused.

32 C.J. p 562 note 58.

12. Pa.—Manchester v. Barnett, 27 Pa.Dist. & Co. 75, 28 Berks Co. 131.

13. La.—Wilson v. Iberville Amusement Co., App., 181 So. 817.

32 C.J. p 562 note 59.

"The great weight of the authorities is to the effect that, instead of an innkeeper's liability being restricted to ordinary care, it is fixed at a 'very high degree of care.' "—Mayo Hotel Co. v. Danciger, 288 P. 309, 311, 143 Okl. 196.

14. N.Y.—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App. Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597.

15. Cal.—Wallace v. Speier, App., 140 P.2d 900.

Iowa.—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.

Ky.—Sidebottom v. Aubrey, 101 S.W. 2d 212, 267 Ky. 45.

Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.

N.Y.—Barry v. Merriman, 214 N.Y.S. 66, 215 App.Div. 294.

Tex.—Texas Hotel Co. of Longview v. Cosby, Civ.App., 131 S.W.2d 261, error dismissed, judgment correct.

Care commensurate with probable dangers

(1) "The defendant was obliged to exercise a degree of care commensurate or proportionate to the probable dangers that might result from the lack of such care."—Parsons v. Dwight State Co., 17 N.E.2d 197, 198, 301 Mass. 324, 118 A.L.R. 1099.

(2) "What is required is a degree of care commensurate to the risk; i. e., that to be expected from an ordinarily prudent man in the same or similar circumstances."—Gustafson v. Arthur L. Roberts Hotel Co., 261 N.W. 447, 449, 194 Minn. 575.

16. **Entry by window**

Innkeepers were not liable on theory of nuisance for injuries received by guest in fall while attempting to enter inn through open window under which there was drop of twenty-five feet to floor of unlighted gymnasium, in absence of showing of legal right of guest to enter by window, or that innkeepers knew, or should have known, that persons without invitation or license used window for entrance.—Gumbart v. Waterbury Club Holding Corporation, D.C. Conn., 27 F.Supp. 228.

against assaults, insults, and negligent acts of servants employed by him;[17] but other authority requires only ordinary[18] or reasonable[19] care. Some of the authorities liken the liability of an innkeeper for torts of his servants to that of the liability of a carrier of passengers for the acts of its servants;[20] but other authorities, while conceding the similarity of the liabilities, consider that the limits are not the same,[21] or hold that an innkeeper is not under the duty to exercise as high a degree of care as a carrier,[22] and the stringent rule requiring carriers to protect passengers from all tortious acts of employees has been held inapplicable to innkeepers.[23] The innkeeper is under obligation to protect his guests from danger from his servants, when it is reasonably within his power to do so,[24] and is under an implied duty and obligation knowingly to select only such employees as are suitable to look after the safety and comfort of his guests and not commit acts of violence against them, so far as is reasonably within his power so to choose employees.[25]

The general rule that a master is liable for the tortious acts of his servant, committed while the servant was engaged in the execution of some matter which was within the real or apparent scope of the duties intrusted to him, even though he acted wantonly or maliciously, has been applied to innkeepers;[26] and a servant's neglect is chargeable to the innkeeper, for the latter's duty of care is not delegable.[27] Conversely, the innkeeper is not liable to a guest for a personal injury resulting from an assault and battery committed,[28] or other act done,[29] by a servant while acting outside the scope of his employment. Where injuries are suffered in an affray away from the hotel, an innkeeper is liable only if the fight is a continuation of one initiated on the innkeeper's property.[30]

In some circumstances the relation of master and servant has been held not to exist.[31]

From acts or condition of other guests or strangers. The innkeeper must protect his guest, while in the inn, against injury at the hands of third persons whether they are guests or strangers, where it is within his power or that of his servants to do so;[32] and his obligation is not met by merely

17. Okl.—Mayo Hotel Co. v. Danciger, 288 P. 309, 143 Okl. 196.

18. Ky.—Ledington v. Williams, 78 S.W.2d 790, 257 Ky. 599.

19. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.

20. Okl.—Mayo Hotel Co. v. Danciger, 288 P. 309, 143 Okl. 196.
32 C.J. p 562 note 63.

21. U.S.—Clancy v. Barker, Neb., 131 F. 161, 66 C.C.A. 469, 69 L.R.A. 653.
N.Y.—Barry v. Merriman, 214 N.Y.S. 66, 215 App.Div. 294.

22. Ky.—Ledington v. Williams, 78 S.W.2d 790, 257 Ky. 599.

23. Cal.—Rahmel v. Lehndorff, 76 P. 659, 142 Cal. 681, 100 Am.S.R. 154, 65 L.R.A. 88.

24. Ky.—Ledington v. Williams, 78 S.W.2d 790, 257 Ky. 599.

25. Ky.—Ledington v. Williams, supra.

26. Conn.—Scheer v. Arrigoni, 150 A. 702, 111 Conn. 726.
Ill.—Buckley v. Edgewater Beach Hotel Co., 247 Ill.App. 239.
Mo.—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941.
Neb.—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797—Strahl v. Miller, 151 N.W. 952, 97 Neb. 820, Ann.Cas. 1917A 141, affirmed 36 S.Ct. 147, 239 U.S. 426, 60 L.Ed. 364.
32 C.J. p 562 note 61.

Elevator operator; substitute

Showing operation of elevator in hotel established prima facie relationship of master and servant between owner of hotel and operator; substitute placed temporarily in charge of hotel elevator by operator having authority to use substitute became during that time servant of hotel owner.—Schide v. Gottschick, 43 S.W.2d 777, 329 Mo. 64.

Masseur

Hotel was held not relieved from liability for injuries caused by negligent act of masseur in its employment on ground that masseur was independent contractor, where employment was admitted in hotel's pleadings and no request was made for issue of fact as to whether masseur was an employee, since nothing precluded a masseur from being an employee.—Tetting v. Hotel Pfister, 266 N.W. 249, 221 Wis. 141.

27. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

28. Dak.—Curtis v. Dinneen, 30 N.W. 148, 4 Dak. 245, appeal dismissed 9 S.Ct. 798, 131 U.S. 435, 33 L.Ed. 223.
Ill.—Buckley v. Edgewater Beach Hotel Co., 247 Ill.App. 239.
Ky.—Ledington v. Williams, 78 S.W. 2d 790, 257 Ky. 599.

Retention of employee as acquiescence

Retaining hotel officer, employed to maintain order, after assault on guest does not show acquiescence in assault.—Buckley v. Edgewater Beach Hotel Co., 247 Ill.App. 239.

29. U.S.—Clancy v. Barker, Neb., 131 F. 161, 66 C.C.A. 469, 69 L.R.A. 653.
Ky.—Ledington v. Williams, 78 S.W. 2d 790, 257 Ky. 599.

30. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.

31. **Physician**

Hotel corporation was not liable for negligent treatment of injured guest by physician having office in hotel building and recommended by hotel employees, in absence of allegations that he was employed by, or represented, hotel company, or that latter was negligent in recommending him, there being no relation of master and servant.—Barry v. Merriman, 214 N.Y.S. 66, 215 App.Div. 294.

32. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.
Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.
Wash.—Gurren v. Casperson, 265 P. 472, 473, 147 Wash. 257, quoting **Corpus Juris.**
32 C.J. p 562 note 67.
Liability of innkeeper for vicious acts of guest's dog see Animals § 165.

Assault after complaint to clerk

Hotel proprietors were liable for assault made on guest by intoxicated guest after notice to clerk that such guest was annoying her.—Gurren v. Casperson, 265 P. 472, 147 Wash. 257.

warning the guest.[33] Thus, an innkeeper has been held liable to a guest contracting a contagious disease for failure to warn him of the presence on the premises of a person having the disease.[34] On the other hand, no negligence can be imputed to an innkeeper for failing to anticipate a misuse by a guest of an article of common use.[35]

Liability to persons other than guests. Injury to persons other than guests from defective premises or appliances is considered infra subdivision b of this section.

An innkeeper who becomes aware of the existence of a nuisance on his premises has the duty to exercise ordinary or reasonable care to abate it,[36] and is liable to strangers for injuries resulting from his negligent failure to do so;[37] likewise, he must protect strangers from acts done by his guests while in the inn, where he has knowledge of their intended conduct.[38] However, an innkeeper is not liable to a stranger for personal injury resulting from the act of a guest where neither he nor his agents knew, or by the exercise of reasonable care could have known, that the manner and behavior of the guest were such as to indicate to a man of average prudence that the guest might commit acts which would naturally result in injury to others;[39] thus, he is not responsible for the consequences of his guest's willful act in throwing articles to the street unless he could prevent it.[40]

An invitee of a hotel guest may recover damages for assault and battery by its agents in ejecting him,[41] or by a third person whose aid the agents accepted,[42] and he need not prove malice.[43]

An innkeeper is not the insurer of the safety of licensees,[44] nor does the law impose on him any general duty to afford complete protection to a licensee;[45] but he must not injure him willfully or by his active negligence or that of an employee acting within the scope of his employment.[46]

Liability of keeper of lodging house or restaurant. It has been said that the liability of a lodging house keeper for personal injuries to a lodger is the same as that of an innkeeper.[47] A restaurant keeper has been required to exercise reasonable care to protect his patrons from injury,[48] and has been held liable for injury to a patron resulting from the negligence of a waiter in causing hot coffee to be spilled on the patron,[49] or for injury from the use of excessive force by an employee in ejecting a patron,[50] or for injury to a patron who was attacked when he attempted to leave the restaurant because of delay in serving his order;[51] and it seems that a restaurant keeper is liable for injury to one patron at the hands of another patron where he had notice through the continued offensive, boisterous, and unlawful conduct of the latter patron, and, after being so notified and warned, made no effort to protect the injured patron.[52]

b. From Defective Premises or Appliances

(1) In general
(2) Injury to persons other than guests
(3) Contributory negligence and assumption of risk

(1) In General

An innkeeper must exercise ordinary or reasonable

33. Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.

34. Iowa.—Gilbert v. Hoffman, 23 N.W. 632, 66 Iowa 205, 55 Am.R. 263.

35. N.Y.—Polsey v. Waldorf-Astoria, 222 N.Y.S. 273, 220 App.Div. 613.

Massive floor lamp
N.Y.—Polsey v. Waldorf-Astoria, supra.

36. Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.

Throwing of objects from windows by guests.—Gore v. Whitmore Hotel Co., supra.

37. Mo.—Gore v. Whitmore Hotel Co., supra.

38. Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.

39. Pa.—Wolk v. Pittsburgh Hotels Co., supra.
32 C.J. p 562 note 69.

Corpus Juris quoted in considering liability of truck operator or owner for negligence in connection with misconduct of invitees.—Agsten v. Lemma, 193 S.E. 545, 547, 119 W.Va. 330.

40. Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A. L.R. 1081.

41. Mo.—Livesay v. Ambassador Operating Co., App., 92 S.W.2d 961.

Absence of physical injury
Jerking and pushing such invitee constituted assault and battery, even though invitee sustained no physical injury.—Livesay v. Ambassador Operating Co., supra.

42. Mo.—Livesay v. Ambassador Operating Co., supra.

Third person acting in self-defense
However, hotel whose agents were ejecting invitee's guest was held not liable for injuries inflicted on guest by third person who struck guest in necessary defense of third person's own person.—Livesay v. Ambassador Operating Co., supra.

43. Mo.—Livesay v. Ambassador Operating Co., supra.

44. La.—Comfort v. Monteleone, App., 163 So. 670.

45. La.—Comfort v. Monteleone, supra.

46. La.—Womack v. Hotel Frances, App., 151 So. 128.

47. N.Y.—Thomas v. Wollcott, 180 N.Y.S. 798.

48. Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.

49. N.Y.—Epstein v. Childs Co., 157 N.Y.S. 210.

50. N.J.—Fuller v. State Cafeteria, 130 A. 4, 3 N.J.Misc. 759.
Exclusion after acceptance generally see supra § 9.

51. La.—Hooper v. Caldarera, App., 164 So. 441.

52. N.Y.—Molloy v. Coletti, 186 N.Y.S. 730, 114 Misc. 177.
32 C.J. p 562 note 72.

care to keep his buildings, premises, and appliances, or at least those parts of the premises which his guests are invited, or may reasonably be expected, to use, reasonably safe for their use; and if his negligence in this respect is the proximate cause of a guest's injury, he is liable.

It is the duty of an innkeeper, hotel keeper, or keeper of a lodging house,[53] or the keeper of a

53. U.S.—Hotel Dempsey Co. v. Teel, C.C.A.Ga., 128 F.2d 673, stating Georgia law—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253, stating Iowa law—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825, 827, citing **Corpus Juris**—Nettles v. Emerick, D.C.Pa., 22 F.Supp. 441.

Cal.—Wallace v. Speier, App., 140 P.2d 900—Schlemmer v. Stokes, 117 P.2d 396, 47 Cal.App.2d 164—Adams v. Dow Hotel, 76 P.2d 210, 25 Cal.App.2d 51—Robertson v. Weingart, 267 P. 741, 744, 91 Cal.App. 715, citing **Corpus Juris.**

D.C.—Berghman v. Dufresne, 24 F.2d 280, 58 App.D.C. 15.

Ga.—Holloman v. Henry Grady Hotel Co., 156 S.E. 275, 42 Ga.App. 347.

Ill.—Pollard v. Broadway Central Hotel Corporation, 187 N.E. 487, 353 Ill. 312, reversing 269 Ill.App. 77.

Iowa.—Van Heukelom v. Black Hawk Hotels Corporation, 270 N.W. 16, 22, 222 Iowa 1033, citing **Corpus Juris**—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.

La.—De Latour v. Roosevelt Hotel, App., 1 So.2d 353.

Mo.—Marden v. Radford, 84 S.W.2d 947, 953, 229 Mo.App. 789, citing **Corpus Juris**—Stein v. Buckingham Realty Co., 60 S.W.2d 712, 713, citing **Corpus Juris.**

Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.

Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402.

Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429—Manchester v. Barnett, 27 Pa.Dist. & Co. 75, 28 Berks Co. 131—Neagley v. Cassone, 10 Pa.Dist. & Co. 632, 12 Lehigh Co.L.J. 290.

Tex.—Morten Inv. Co. v. Jordan, Civ. App., 57 S.W.2d 887, reversed on other grounds Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37.

Utah.—Carpenter v. Syrett, 104 P.2d 617, 619, 99 Utah 208, citing **Corpus Juris.**

W.Va.—Early v. Lowe, 195 S.E. 852, 853, 119 W.Va. 690, quoting **Corpus Juris.**

32 C.J. p 562 note 73.

Test of care

"In determining whether or not a sufficient degree of care was exercised in . . . [maintaining a stairway], its conformity to custom or usage is a proper test to be applied, provided only that the construction of the stairway was not inherently dangerous."—Stein v. Buckingham Realty Co., Mo.App., 60 S.W.2d 712, 713.

Ingress and egress; passageways

(1) An innkeeper's duty to use reasonable care for guests' safety extends to public passageways and exits.—Early v. Lowe, 195 S.E. 852, 119 W.Va. 690—Hunn v. Windsor Hotel Co., 193 S.E. 57, 58, 119 W.Va. 215, citing **Corpus Juris.**

(2) Innkeeper for hire must provide guest with reasonably safe means of ingress and egress.

Ill.—Pollard v. Broadway Central Hotel Corporation, 187 N.E. 487, 353 Ill. 312, reversing 269 Ill.App. 77.

La.—Williams v. Mayer, App., 4 So.2d 71.

(3) "The obligation of the hotel proprietor includes particularly the duty to provide safe arrangements for the entrance and departure of people."—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 207, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App.Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597.

Window grills

"The failure to have protecting grills at the windows is not negligence. . . . No law and no custom requires them."—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825, 827.

Floors

(1) The fact that tile floor in hotel lavatory was hard and smooth, like all floors of similar construction, was of itself not negligence on the part of hotel proprietor.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.

(2) A floor that is suitable for dancing may not for that reason be said to be dangerous so as to render hotel liable for injuries sustained by an ordinary guest in fall thereon.—Heim v. Deshler-Wallick Hotel Co., Ohio App., 41 N.E.2d 580.

(3) Scrubbing of hotel floor at three o'clock in the morning with water and cleansing compound was held not negligence so as to render hotel company, or company by whom scrubbing was done under contract, liable for injuries to guest slipping on floor.—Walker v. Broad & Walnut Corporation, 182 A. 643, 320 Pa. 504.

(4) Maintenance of highly polished or oiled floors is not negligence.—Stout v. Hamilton Court Corporation, 21 Pa.Dist. & Co. 588.

(5) Mere slipperiness of lodging house kitchen floor, on which tenant fell, did not establish negligence of landlord. Comparison afforded by testimony that floor was polished like ordinary hospital corridors and so far as slipperiness was concerned that it was in about the same condition as the linoleum on the court room floor did not establish a basis on which to find negligence of landlord; and where there was no contention that floor was improperly constructed or out of repair or that wax applied was unfit or improper for use, unless jury were warranted in finding that wax was improperly applied, tenant failed to establish a breach of any duty of landlord.—Kay v. Audet, 28 N.E.2d 462, 306 Mass. 337.

Ceilings

Operation of hotel with ceilings in such condition that they would be likely to fall as result of ordinary vibrations caused by activities of hotel guests, or passing street cars or automobiles, would constitute negligence, as respects innkeeper's liability to guest for injuries by falling plaster.—Mintzer v. Wilson, 68 P.2d 370, 21 Cal.App.2d 85.

Steps; stairs; stairways

(1) Guest injured by tripping on metal strip tacked on edge of step of hotel stairs was held not entitled to recover from hotel owner, in absence of evidence of defective construction or negligent maintenance.—Sams v. Hotel Raleigh, 172 S.E. 371, 205 N.C. 758.

(2) The existence of a slight difference in floor levels in different parts of a hotel which the public are invited to enter does not in itself constitute negligence.—Kelley v. Luke, 299 N.W. 593, 140 Neb. 283.

(3) The fact that there was a six- or seven-inch step which invitee was required to ascend and descend in going to and from a lavatory in a hotel was not of itself evidence of want of due care on part of hotel proprietor.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.

(4) Hotel was not charged with furnishing perfect or fool-proof steps, but duty toward patron was only to provide steps which could be descended in safety by the exercise of ordinary care; and hotel was not chargeable with negligence because it provided its patrons with marble steps and because it did not cover the marble with mats or other nonslip material, in absence of showing that marble was so slick that it could not be walked over in perfect safety with use of ordinary care or a showing that there was any foreign substance or cleaning

restaurant[54] and, likewise, according to the decisions on the question, it is the duty of the

fluid on it, to make it unusually slippery.—De Latour v. Roosevelt Hotel, La.App., 1 So.2d 353.

(5) Hotel keeper owes guests duty to use reasonable care to keep stairways safe for their use.

Mo.—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712.

N.J.—Abt v. Leeds & Lippincott Co., 162 A. 525, 109 N.J.Law 311.

(6) Hotel keeper was held, as matter of law, not liable for injuries to guest slipping on waxed wooden stairs, where there was no evidence that stairs were improperly constructed or improperly waxed, or out of repair.—Abt v. Leeds & Lippincott Co., supra.

(7) Hotel patron's fall on stairs was not, of itself, evidence of hotel company's negligence in allegedly permitting the stairs to remain in a slippery and dangerous condition; he was not entitled to recover notwithstanding stairs may have been slippery, in absence of proof that a foreign substance had rendered them dangerous, that the dangerous condition remained long enough to give the company reasonable notice, actual or constructive, of its existence, that company, after such notice, negligently failed to remove the danger or warn the guest of its presence, and that such dangerous condition was the proximate cause of the injuries; and company was not charged with notice that marble stairs were unsafe or dangerous merely because they had become allegedly wet from having been walked on by people coming from outside where it was raining, nor did such fact alone establish reasonable notice to company of its existence and danger therefrom.—Ziegler v. Providence Biltmore Hotel Co., 195 A. 397, 59 R.I. 326.

(8) "The absence of handrails from an ordinary interior stairway, walled on both sides, is not actionable negligence."—Wallimaa v. Maki, 204 N.W. 25, 163 Minn. 352, 41 A. L.R. 965.

Water fixtures

(1) An innkeeper not having actual knowledge of defect in handle of hot-water faucet of bathtub had duty of making careful and frequent inspections of bathroom in a careful endeavor to discover any defective condition that would cause an injury to a guest.—Adams v. Dow Hotel, 76 P. 2d 210, 25 Cal.App.2d 51.

(2) Innkeeper cannot escape liability to a guest for injuries sustained as result of defect in a water fixture by mere fact that originally fixture was properly installed, since innkeeper must use reasonable care to guard against wear and tear of ordinary use or time alone.—Wallace v. Speier, Cal.App., 140 P.2d 900.

(3) Hotel owner was bound to exercise care to maintain mixing valve of shower bath in a safe and suitable condition for use of guests; and the mere fact that steam and hot water came from shower used by guests warranted a finding that owner was negligent in failing to discover defective condition of shower and remedy the defect or withdraw shower bath from use or to notify those entitled to use it of the danger.—Parsons v. Dwight State Co., 17 N.E. 2d 197, 301 Mass. 324, 118 A.L.R. 1099.

(4) Hotelkeeper owed guest duty to have exercised such care in maintenance of plumbing fixtures that guest could use them in ordinary way without danger; and the fact that hotelkeeper continued to maintain porcelain faucet handles after safer metal handles had been devised would not warrant a finding of negligence so as to render him liable for injuries sustained by guest as result of cutting his hand when porcelain handle broke, in absence of showing that a reasonably prudent hotelkeeper would have known that use of porcelain handles unreasonably subjected guests to danger and that metal handles were not only available but also safer.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.

Presence of ordinary rubbish or supplies

(1) Mere presence of boxes and such rubbish as would ordinarily accumulate about hotel basement was held not to show negligence of innkeeper toward guest.—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.

(2) The keeping of floor polish, floorsweep, and "trash" in hotel closet is not sufficient to charge hotel management with negligence, in absence of evidence as to whether materials were inflammable, as to what "trash" consisted of, as to whether materials were kept in containers, and as to whether they were placed near an open flame.—Texas Hotel Co. of Longview v. Jones, Tex.Civ.App., 131 S.W.2d 265—Texas Hotel Co. of Longview v. Cosby, Tex.Civ.App., 131 S.W.2d 261, error dismissed, judgment correct.

Revolving door

Where an extraordinary number of people in a gay, hilarious, and carousing mood took possession of main lobby of a hotel, the hotel management could readily anticipate that the revolving door would not only be subjected to excessive use, but also that it would be likely to receive rough usage and unseemly abuse, as respects hotel's liability for injuries sustained by sixty-three-year-old woman who was injured when two young persons gave an extra hard push to revolving door through which she was passing.—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App. Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597.

Placing cuspidors in public room of hotel was held not negligence as to guest whose ankle was cut thereby.—Kopelson v. New York Hotel Statler Co., 227 N.Y.S. 281, 131 Misc. 525.

Shuffle board

In determining whether shuffle board on which hotel guest slipped and was injured while using it as a sidewalk was safe, shuffle board was required to be considered with reference to purpose for which it was built. The fact that surface of shuffle board built on hotel lawn flush with ground level was too smooth for safe use as sidewalk did not disclose a "structural defect;" and where guest, after rain, used as a sidewalk a shuffle board which was constructed for game purposes, in absence of showing that deposits of dirt, leaves, and other debris on surface of board, which combined with smooth character of surface to cause a slippery condition, had existed long enough to constitute notice to hotel proprietor of such dangerous condition, shuffle board was not a "trap."—Kuhlman v. Vandercook, 6 N.W.2d 235, 241 Wis. 418.

Maintenance of circular platform about four inches in height in front of door leading from hotel lobby into coffee shop did not constitute negligence rendering operator of hotel liable for injuries sustained by guest who fell in passing from lobby into coffee shop.—Kelley v. Luke, 299 N.W. 593, 140 Neb. 283.

Multiple dwelling law was intended for the protection of life of occupants of building, and its breach creates a liability per se in favor of those injured thereby.—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997.

54. Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.

Mass.—Del Rosso v. F. W. Woolworth Co., 200 N.E. 277, 293 Mass. 424—O'Leary v. Smith, 150 N.E. 878, 255 Mass. 121.

Pa.—Luckhurst v. Gimbel Bros., Inc., 38 Pa.Super. 281.

Patron is an invitee

Conn.—Johnson v. Pulidy, 165 A. 355, 116 Conn. 443.

Mat

Restaurant owner was held not liable for injuries sustained by patron

keeper of a boarding house,[55] to keep his buildings, premises, and appliances in a condition reasonably safe for the use of his guests, or at least those parts of the buildings and premises which they are invited, or may reasonably be expected, to use,[56] and he is obligated to use ordinary or reasonable care to accomplish this;[57] the guest is entitled to rely on, or assume, the performance of this duty,[58] and a violation of such duty constitutes negligence.[59] The duty of maintaining safe premises and appliances cannot be delegated to another, even though the latter is a proper person, so as to avoid responsibility; the innkeeper is liable if the guest is injured by his delegate's negligence.[60]

Thus there is a duty to exercise ordinary or reasonable care to keep the hallways, passageways, and stairways reasonably well lighted[61] and free

who jumped and fell when a rat came from kitchen and ran under patron's table, where evidence did not show that restaurant owner had not attempted to keep premises free from rats and did not show whether rat in question came recently on the premises.—Del Rosso v. F. W. Woolworth Co., 200 N.E. 277, 293 Mass. 424.

55. Mo.—Rumann v. Montfort, 153 S.W. 1063, 168 Mo.App. 523.
32 C.J. p 564 note 8.

56. Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Colo.—Rudolph v. Elder, 95 P.2d 827, 730, 105 Colo. 105, citing **Corpus Juris.**
Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
Ky.—Cumberland Hotel Operating Co. v. Hartman, 94 S.W.2d 637, 641, 264 Ky. 300, citing **Corpus Juris.**

Direction by another's employee as limitation

A voluntary direction given to hotel guest by employee of independently-operated garage near hotel that guest should return to hotel by rear entrance and take first door to the left after entering rear passageway was not a "legal invitation" and hence no limitation on any existing invitation by operators of hotel to use the rear passageway could arise therefrom, although evidence thereof was pertinent in considering alleged contributory negligence of guest causing her to fall into freight elevator shaft adjacent to the rear entryway.—Rudolph v. Elder, 95 P. 2d 827, 105 Colo. 105.

57. U.S.—Hotel Dempsey Co. v. Teel, C.C.A.Ga., 128 F.2d 673, stating Georgia law—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A. Iowa, 119 F.2d 253, stating Iowa law—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661.
Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.
Ill.—Pollard v. Broadway Central Hotel Corporation, 187 N.E. 487, 353 Ill. 312, reversing 269 Ill.App. 77.
Iowa.—Bell v. Daugherty, 200 N.W. 708, 199 Iowa 412, 37 A.L.R. 154.
Mass.—Del Rosso v. F. W. Woolworth Co., 200 N.E. 277, 293 Mass. 424.
Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.
Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.
W.Va.—Early v. Lowe, 195 S.E. 852, 119 W.Va. 690.

"He is not an insurer of the safety of the premises nor of the hotel equipment."—Topley v. Zeeman, 13 P.2d 666, 667, 216 Cal. 182.

Cleaning room

Proprietor of hotel is bound to use due care to have room therein thoroughly cleaned after its occupants have left hotel, and before its assignment to incoming guests; and where hotel failed thoroughly to clean room before assignment to incoming guest, and guest stepped on needle lying on floor, hotel was held liable.—Nelson v. Ritz-Carlton Restaurant & Hotel Co., 157 A. 133, 9 N. J.Misc. 1240.

Swimming pool

The proprietor of a summer hotel who maintained a swimming pool for the use of guests did not have "an absolute duty to maintain the pool in a reasonably safe condition," but "only the duty to exercise ordinary care in the maintenance of the pool."—Bristol v. Ernst, 27 N.Y. S.2d 119, 120, 261 App.Div. 713.

58. U.S.—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825—Nettles v. Emerick, D.C.Pa., 22 F.Supp. 441.
Cal.—Shattuck v. St. Francis Hotel and Apartments, 60 P.2d 855, 7 Cal.2d 358.
Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400.
D.C.—Berghman v. Dufresne, 24 F.2d 280, 58 App.D.C. 15.
Pa.—Manchester v. Barnett, 27 Pa. Dist. & Co. 75, 28 Berks Co. 131.
Tex.—Morten Inv. Co. v. Jordan, Civ. App., 57 S.W.2d 887, reversed on other grounds Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37.
"When one goes to a hotel the very thing he bargains for is the use of safe premises."—Cumming v. Allied Hotel Corporation, Mo.App., 144 S.W.2d 177, 181.

Passageways

"Ordinarily a guest or patron may rely upon the safety of passageways which he is invited to use."—Fort Dodge Hotel Co., of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253, 257.

Side entrance

Where hotel porch was provided with side entrance in addition to main or front entrance, guests using side entrance could rely on the implied assurance of hotel that it had provided reasonably safe facilities for their use. "Upon approaching and entering a public place the patron is not necessarily required to take the better of two entrances, so long as the one taken does not present such obvious hazards as would deter an ordinarily prudent person from attempting it under the circumstances."—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 777, 45 N.M. 50.

59. U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253.

Hotel as incidental business

Property owner is liable for guest's falling into open ditch that crossed pathway, notwithstanding running hotel was incidental to main business.—Allingham v. Long-Bell Lumber Co., 241 P. 298, 136 Wash. 681.

60. N.Y.—Stott v. Churchill, 51 N.E. 1094, 157 N.Y. 692, affirming 36 N. Y.S. 476, 15 Misc. 80.
32 C.J. p 564 note 7.

61. Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
Ky.—Burgauer v. McClellan, 265 S.W. 439, 205 Ky. 51.
La.—Williams v. Mayer, App., 4 So. 2d 71.
Tex.—Morten Inv. Co. v. Jordan, Civ. App., 57 S.W.2d 887, reversed on other grounds Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37.
However, failure of restaurant owner to have light in stairway leading to basement has been held not negligence.—Brown v. Berles, 208 N. W. 461, 234 Mich. 353.

Measure of duty

"Defendant's duty to furnish light was to be measured by the danger to be encountered if the stairway was not reasonably illuminated."—Stein v. Buckingham Realty Co., Mo. App., 60 S.W.2d 712, 714.

Effect of statute

(1) Leaving hall unlighted, in vio-

of obstructions or hazards.[62]

Apart from cases in which a breach of warranty of fitness of the premises for use is found,[63] an innkeeper is liable for an injury to a guest, claimed to arise from defective premises or appliances, where, and only where, his negligence in this respect is the proximate cause of the injury,[64] provided the guest at the time is in a place where he has a right, and is reasonably expected, to go;[65] an injury to a guest while in a place where he has no right, and cannot reasonably be expected, to go is not one which the innkeeper could reasonably have anticipated, and there is no liability.[66] The innkeeper's liability has been limited to injuries resulting from defects in the premises which are known to him or which in the exercise of reasonable care he would discover;[67] and he has been said to be chargeable with all injuries occurring to his guests from latent defects in the premises.[68]

The foregoing rules have been applied in cases involving unguarded stairways,[69] and have been ap-

lation of statute, has been held negligence per se.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.

(2) Statute regulating hotels and describing duties and powers of hotel inspector had no substantial bearing on cause of action for injuries to hotel guest falling down unguarded stairway because of insufficient lighting in hallway.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.

62. U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253, stating Iowa law.
Ky.—Burgauer v. McClellan, 265 S. W. 439, 205 Ky. 51.
La.—Williams v. Mayer, App., 4 So. 2d 71.

Notice of obstruction

Hotel company owed duty to give adequate notice and warning of laundry cart's presence in hotel hallway to all persons who might collide therewith; persistent use of cart in hotel hallways by laundry company's employee was notice of laundry company's method in using cart to hotel roomer as well as hotel company sued by him for injuries from tripping over cart.—Walker v. Roosevelt Hotel, 241 N.W. 484, 214 Iowa 1150.

63. Cal.—Shattuck v. St. Francis Hotel and Apartments, 60 P.2d 855, 857, 7 Cal.2d 358.

"The fact that the word 'warrant' was not used in the conversation between the manager of the hotel and the plaintiff is an immaterial matter."—Shattuck v. St. Francis Hotel and Apartments, supra.

Effect of inspection by guest

That guest who was injured when folding bed in apartment collapsed inspected room and its furnishings before renting room is insufficient to relieve owners from liability for breach of hotel manager's warranty of fitness for use.—Shattuck v. St. Francis Hotel and Apartments, supra.

64. U.S.—Gumbart v. Waterbury Club Holding Corporation, D.C. Conn., 27 F.Supp. 228.
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
Ga.—Home Owners Loan Corporation v. Brazzeal, 9 S.E.2d 773, 62 Ga.App. 683.
Ill.—Pollard v. Broadway Central Hotel Corporation, 187 N.E. 487, 353 Ill. 312, reversing 269 Ill.App. 77.
Kan.—Criswell v. Bankers Mortg. Co., 278 P. 722, 128 Kan. 609.
Minn.—Judd v. Landin, 1 N.W.2d 861, 211 Minn. 465—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267—Gustafson v. Arthur L. Roberts Hotel Co., 261 N.W. 447, 194 Minn. 575.
Miss.—Rose v. Rather, 199 So. 299, 190 Miss. 105.
Pa.—Walker v. Broad & Walnut Corporation, 182 A. 643, 320 Pa. 504—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.
W.Va.—Early v. Lowe, 195 S.E. 852, 853, 119 W.Va. 690, quoting **Corpus Juris.**
32 C.J. p 562 note 73, p 563 note 74.

Failure to comply with statutory safety requirements, while constituting negligence, imposes no liability unless it was the proximate cause of the guest's injury.
Cal.—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442.
Ky.—Petty's Adm'r v. Smith, 163 S.W.2d 16, 291 Ky. 42—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36 and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.
Minn.—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.
N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N. Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.
Pa.—Neagley v. Cassone, 10 Pa.Dist. & Co. 632, 12 Lehigh Co.L.J. 290.

65. Ky.—Cumberland Hotel Operating Co. v. Hartman, 94 S.W.2d 637, 264 Ky. 300.
W.Va.—Early v. Lowe, 195 S.E. 852, 853, 119 W.Va. 690, quoting **Corpus Juris.**
32 C.J. p 563 note 75.

66. Ky.—Cumberland Hotel Operating Co. v. Hartman, 94 S.W.2d 637, 264 Ky. 300.

67. Cal.—Crawford v. Pacific States Savings & Loan Co., 71 P.2d 333, 22 Cal.App.2d 448.
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
R.I.—Ziegler v. Providence Biltmore Hotel Co., 195 A. 397, 59 R.I. 326.

Rule not strictly applied

"The general rule is that the owner of property is liable for injuries resulting from defects or conditions known to the owner and not known to the invitee or licensee, but that rule should not be applied in strictness where the relationship of innkeeper and guest exists, especially where . . . it was not only the duty of the innkeeper to use ordinary care in inspecting its rooms, but the evidence shows it assumed such duty and had a rule that the rooms be inspected and the lights tried by the maids and bellboys before turning them over to guests."—Cumming v. Allied Hotel Corporation, Mo.App., 144 S.W.2d 177, 181.

Glass on stair

In action for injuries a guest sustained in stepping on a drinking glass and falling down stairs, an inference that failure to discover and remove glass was due to want of proper care was not justified, in the absence of evidence as to who placed glass on stairs, how long glass had been there, or as to failure of innkeeper properly to inspect premises. —Montfort v. West Texas Hotel Co., Tex.Civ.App., 117 S.W.2d 811, error refused.

68. Cal.—Mintzer v. Wilson, 68 P. 2d 370, 21 Cal.App.2d 85.

69. Ala.—West v. Thomas, 11 So. 768, 97 Ala. 622.
Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
La.—Williams v. Mayer, App., 4 So. 2d 71.
Minn.—Judd v. Landin, 1 N.W.2d 861, 211 Minn. 465.

plied in cases involving unlighted,[70] or defective[71] stairways, unguarded or defectively guarded elevator shafts,[72] defective railings[73] or air-shaft gates,[74] unguarded openings in platforms of fire escapes,[75] defective[76] or insecurely or unsafely fastened[77] window screens, defective chairs,[78] unsafe heating appliances,[79] and an unsafe room in which the guest was placed.[80]

Maintenance and operation of elevator. The proprietor of a hotel operating an elevator therein for the transportation of his guests from one floor to another is bound to use at least ordinary care in the maintenance and operation of the elevator,[81] and a high,[82] or the highest,[83] degree of care has been required. Indeed, it is held that he is bound to use the same care and diligence for the safety of his guests while in the elevator as is required of a carrier of passengers by other means,[84] and that he is required to exercise extraordinary diligence for the safety of his guests while they are getting on, riding on, or getting off the elevator.[85] This rule of diligence is not limited to the actual technical operation of the machine, but includes such examination, inspection, and repair of its physical and mechanical parts as is necessary to keep and maintain it in a fit and proper condition for safe operation.[86] Failure to maintain safety gates in violation of a statute has been declared negligence per se;[87] but in particular circumstances failure to furnish elevator service has been held not negligence as a matter of law.[88]

Intervening force. Although an innkeeper was negligent in failing to keep his premises in a safe condition, he is not liable for an injury to a guest where an independent and intervening force or power, such as the act of another guest, was sufficient of itself to cause the injury and hence was the proximate cause thereof;[89] but he is liable where the intervening force was insufficient of itself to cause the injury and would not have caused it save for the defective condition of the premises.[90]

Liability of persons in particular relations. The lessee of a building who conducts a hotel therein has been held liable for a defective condition of the building or its appliances which causes injury to a guest,[91] and under some statutory language the

Wis.—Burling v. Schroeder Hotel Co., 291 N.W. 810, 235 Wis. 403.

70. Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
La.—Williams v. Mayer, App., 4 So. 2d 71.
32 C.J. p 563 note 77.

71. La.—Williams v. Mayer, supra.

72. Colo.—Rudolph v. Elder, 95 P. 2d 827, 105 Colo. 105.
32 C.J. p 563 note 78.

73. Cal.—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715.
D.C.—Berghman v. Dufresne, 24 F. 2d 280, 58 App.D.C. 15.
Neb.—Omaha Hotel Ass'n v. Walters, 36 N.W. 561, 23 Neb. 280.

74. Cal.—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715.

75. Cal.—Marr v. Whistler, 193 P. 600, 49 Cal.App. 364.
32 C.J. p 563 note 80.

76. Ala.—Dye-Washburn Hotel Co. v. Aldridge, 93 So. 512, 207 Ala. 471.

77. Ala.—Dye-Washburn Hotel Co. v. Aldridge, supra.

78. Colo.—Burchmore v. Antlers Hotel Co., 130 P. 846, 54 Colo. 314.
Pa.—Luckhurst v. Gimbel Bros., Inc., 38 Pa.Super. 281.

79. Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.

80. N.C.—Patrick v. Springs, 70 S. E. 395, 154 N.C. 270, Ann.Cas.1912A 1209.

Reason for rule

"Such a matter is peculiarly within the knowledge, control, and power of the innkeeper."—Crockett v. Troyk, Tex.Civ.App., 78 S.W.2d 1012, 1014.

81. N.J.—McCracken v. Meyers, 68 A. 805, 75 N.J.Law 935, 16 L.R.A., N.S., 290.

Blind person

Hotel operating passenger elevator and blind guest had mutual duty to exercise greater care to avoid injury to such guest than would be needed for guests who are not blind. —Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.

82. Utah.—Gardner v. Newhouse Realty Co., 267 P. 186, 71 Utah 460.

83. Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.
Ohio.—McDowell v. Rockey, 167 N. E. 589, 32 Ohio App. 26.

84. Mo.—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941.
Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.
Ohio.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.
32 C.J. p 563 note 86.

85. Ga.—Bullard v. Rolader, 110 S. E. 16, 152 Ga. 369, affirming 107 S.E. 548, 26 Ga.App. 742.
32 C.J. p 563 note 87.

Providing safe means for leaving

Stopping of elevator by operator at floor and opening doors was invitation to hotel guest to leave elevator; and operator had duty to place elevator in such position that guest had reasonably safe means of leaving it, and, if operator failed to do so, he was negligent, and guest could recover for injuries caused by stumbling over shaft wall.—Jenkins v. Missouri State Life Ins. Co., 69 S. W.2d 666, 334 Mo. 941.

86. Ga.—Bullard v. Rolader, 107 S. E. 548, 26 Ga.App. 742, affirmed 110 S.E. 16, 152 Ga. 369.

87. Ohio.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.

88. Tex.—Robinson v. Gunter Hotel Corporation, Civ.App., 173 S.W.2d 318, error refused.

89. Ala.—Dye-Washburn Hotel Co. v. Aldridge, 93 So. 512, 207 Ala. 471.

90. Mass.—Promisel v. Hotels Statler Corporation, 189 N.E. 804, 286 Mass. 15.
32 C.J. p 563 note 90.

Fall of flower box

Where spectator in hotel balcony inadvertently shoved flower box resting without attachment or guard rail on edge of floor of balcony and box fell to main floor injuring plaintiff who was attending dance, hotel was held liable for injury as against contention that spectator's negligence was proximate cause of injury, since hotel was put on notice that precarious position of box endangered safety of persons on main floor.—Darrah v. Wilkinsburg Hotel Co., 178 A. 669, 318 Pa. 511.

91. Ga.—Home Owners Loan Corporation v. Brazzeal, 9 S.E.2d 773, 62 Ga.App. 683.

owner in fee and his lessee have been held jointly and severally liable;[92] but where the action is based on a breach of the owner's statutory duty with respect to the building, and not on a breach of a common-law duty, there is no liability on his lessee.[93] A bank operating a hotel as trustee under a trust deed has been held liable for negligence,[94] as has also its president in immediate control of the hotel;[95] and the manager of a hotel has been held liable for injuries caused by defects in the premises, regardless of who owns or constructed the building.[96]

(2) Injury to Persons Other than Guests

An innkeeper owes to persons properly invited to the premises, as by guests, the duty of maintaining the premises in reasonably safe condition and of exercising ordinary or reasonable care to protect them from injury; but this duty does not extend to a mere licensee or a trespasser. An innkeeper must use ordinary or reasonable care to keep the building from being a source of danger to persons using the adjacent streets.

While an innkeeper is not the insurer of those visiting his guests,[97] he owes at all times to persons properly invited to the hotel, by guests or otherwise, the duty of maintaining his premises in a reasonably safe condition,[98] and of exercising ordinary or reasonable care to protect such persons while in the hotel and in the part thereof open to the public from personal injury through his negligence;[99] and it has been said that he ordinarily owes to a guest of his guest the same degree of care as to such guest himself.[1] An invitee has a right to assume that proper care was exercised.[2]

Elevator

Ga.—Bullard v. Rolader, 110 S.E. 16, 27 Ga.App. 365, affirmed 107 S.E. 548, 152 Ga. 369.

92. Minn.—Judd v. Landin, 1 N.W. 2d 861, 211 Minn. 465.

93. N.Y.—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997.

94. Ky.—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304.

95. Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36, and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.

96. Okl.—Seay v. Plunkett, 145 P. 496, 44 Okl. 794.

97. La.—Williams v. Mayer, App., 4 So.2d 71.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

98. Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400.
Iowa.—Van Heukelom v. Black Hawk Hotels Corporation, 270 N.W. 16, 22, 222 Iowa 1033, citing **Corpus Juris.**
Ky.—Seelbach, Inc. v. Mellman, 170 S.W.2d 18, 293 Ky. 790.
La.—Williams v. Mayer, App., 4 So. 2d 71.
Mass.—Sterns v. Highland Hotel Co., 29 N.E.2d 721, 307 Mass. 90.
Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69.
Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.
Pa.—Parsons v. Drake, 32 A.2d 27, 347 Pa. 247.
32 C.J. p 563 note 96.

Hallways

Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

Failure to keep lights in passageway held negligence per se.—Allred v. Orth, 274 P. 955, 206 Cal. 494.

Slippery stairways

That stairways in public places such as hotels are frequently smooth and somewhat slippery does not mean that the public are required to use them at their own risk, regardless of the care exercised by them in such use or the apparent possibility of using them safely by the use of proper care.—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal.App.2d 450.

Revolving door; absence of attendant

The maintenance of a standard revolving door at floor level approximately four and one half inches higher than the sidewalk and with a step extending five and one half inches past the rubber strips on the four panels of door when they were at right angles with the sidewalk, was not negligence on part of owner of hotel and did not render hotel liable to invitee for injuries sustained in fall on leaving hotel through revolving door; and the fact that owner had no attendant at door was not evidence of his negligence.—Sterns v. Highland Hotel Co., 29 N.E. 2d 721, 307 Mass. 90.

99. Cal.—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal.App.2d 450.
Mass.—Sterns v. Highland Hotel Co., 29 N.E.2d 721, 307 Mass. 90.
Miss.—Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483.
Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.
32 C.J. p 563 note 97.

"The owner or proprietor of a hotel likewise extends an implied invitation to guests specifically invited by tenants to come into the building, and therefore must extend to them the standard of care required for invitees."—Holm v. Investment & Securities Co., 79 P.2d 708, 711, 195 Wash. 52.

Care of injured person

"It was the duty of the hotel company to use reasonable care to see that one injured on its premises and by the operation of its business receives prompt and proper care and treatment to the end that his injuries, however occasioned, may not be aggravated by unnecessary and avoidable delay or inattention. Such care must be commensurate with the facilities available to the party charged and with the needs of the party injured, and such duty is heightened once the injured party is taken in charge by the other."—Meador v. Hotel Grover, 9 So.2d 782, 785, 193 Miss. 392.

1. Cal.—Borgnis v. California Oregon Power Co., 258 P. 394, 84 Cal. App. 465.

2. Mich.—Keech v. Clements, 5 N.W. 2d 570, 303 Mich. 69.

Correction of condition

In action by invitee of a hotel for injuries received when she slipped on waxed, uncarpeted, tile stairway, use of the stairs in view of her knowledge in the past of the slippery condition did not constitute contributory negligence as a matter of law, since the invitee had the right to assume that hotel in exercise of ordinary care for the safety of its invitees would discover and remove the danger.—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal.App. 2d 450.

Warning

"Defendant's duty to the plaintiff was to exercise reasonable care to keep its premises in a reasonably safe condition for her use according to the invitation, or, at least, to warn her against any dangers attendant upon such use that were not known to her or obvious to an ordinarily intelligent person, and either were known or, in the exercise of reasonable care, should have been known to the defendant."—Sterns v.

This duty has been held not to obtain so as to render the innkeeper liable where the injury to the invitee was due to a patent defect[3] or structural insecurity[4] in the premises or equipment of the hotel.

The duty to keep the premises in repair does not extend to a mere gratuitous licensee;[5] the only duty owed by an innkeeper or lodging house keeper to a trespasser or mere licensee is not to injure him willfully or wantonly or by active negligence,[6] and he is not liable to him for negligence in failing to keep the premises in good repair.[7] The duty to keep in repair does not extend to a person who, although invited to the hotel by a guest, loses the position of an invitee and becomes a trespasser or mere licensee, as where he enters or remains in the hotel for an unlawful or improper purpose,[8] or where, going beyond the scope and purpose of the invitation, he goes into some portion of the premises not covered by the invitation, or to which there is no reason to expect him to go;[9] but where the unlawful purpose is known to defendant's servant in charge, the rule as to trespassers does not apply.[10]

The duty of exercising care in the maintenance and operation of a passenger elevator is owed by the innkeeper to every person having lawful business on the premises, whether guest, visitor, or otherwise.[11]

Persons using streets; fall of objects from windows. An innkeeper is bound to use ordinary or reasonable care to maintain the building in such condition that it is not a source of danger to persons using the streets adjacent thereto,[12] but he is not an insurer in this respect.[13] To sustain a recovery for injuries from an object alleged to have fallen from the window or window sill of an inn, there must be some causal connection between such fall and the acts of the innkeeper or of persons for whose acts he may be held responsible.[14] The innkeeper's responsibility for acts of permanent guests rises no higher than that of a landlord who rents his building as an apartment house; he is not required to contract with such a guest against the latter's placing articles on window sills, in order to be relieved of liability. With respect to premises occupied by transient guests, an innkeeper is under no duty to inspect window sills to see whether objects are placed there, and is not liable for injury from the fall of objects so placed unless he knew, or should have known, of such placement and of the danger, and failed to take immediate steps to remove the danger.[15]

Highland Hotel Co., 29 N.E.2d 721, 722, 307 Mass. 90.

3. Cal.—Goldstein v. Healy, 201 P. 462, 187 Cal. 206.

Defect held not patent

Cal.—Allred v. Orth, 274 P. 955, 956, 206 Cal. 494.

Guest's knowledge not imputed to visitor

"To charge the invitee, who was totally unfamiliar with the premises, with the knowledge which the guest who resided therein possessed of said premises, would be a distortion of legal principles."—Allred v. Orth, supra.

4. Cal.—Goldstein v. Healy, 201 P. 462, 187 Cal. 206.

5. Pa.—Parsons v. Drake, 32 A.2d 27, 347 Pa. 247.

Permission to view parade

That persons not connected with a hotel or its guests had been permitted to view parades from a hotel balcony did not alter status of plaintiffs as "gratuitous licensees" so as to entitle them to recover from hotel owners for injuries sustained when floor of balcony on which plaintiffs were standing to view a parade gave way.—Parsons v. Drake, supra.

6. Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.

La.—Williams v. Mayer, App., 4 So. 2d 71.

32 C.J. p 563 note 91.

7. Fla.—Noyes v. Fisher, 159 So. 666, 118 Fla. 494.

Mass.—Rathgeber v. Kelley, 13 N.E. 2d 1, 299 Mass. 444.

N.Y.—Morrison v. Hotel Rutledge Co., 193 N.Y.S. 428, 200 App.Div. 636.

Promise to repair was gratuitous, and its nonperformance imposed no liability on operator of lodging house.—Rathgeber v. Kelley, 13 N.E. 2d 1, 299 Mass. 444.

8. La.—Williams v. Mayer, App., 4 So.2d 71.

N.C.—Jones v. Bland, 108 S.E. 344, 182 N.C. 70, 16 A.L.R. 1383.

9. Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.

32 C.J. p 563, note 3.

10. Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.

11. N.J.—McCracken v. Meyers, 68 A. 805, 75 N.J.Law 935, 16 L.R.A., N.S., 290.

Utah.—Gardner v. Newhouse Realty Co., 267 P. 186, 71 Utah 460.

12. Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 907, 230 Iowa 739.

13. Iowa.—Kapphahn v. Martin Hotel Co., supra.

Reasonably foreseeable act; reasonable prudence

In action against hotel operators for injuries to infant struck by window screen which fell when hotel guest attempted to raise it, it was not reasonably foreseeable that guest, in looking for parade, would raise screen out of guides, which could not be done by holding onto handles, and would apply outward pressure necessary to dislodge screen; defendants' acts would be gauged "by the reasonably prudent person rule."—Kapphahn v. Martin Hotel Co., supra.

14. Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.

Screen

Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 230 Iowa 739.

15. Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.

Placement by occupants of apartments

Fact that bottles were placed on window sill by occupants of apartments was held not sufficient to charge proprietor with notice as to windows of transient guests.—Wolk v. Pittsburgh Hotels Co., supra.

(3) Contributory Negligence and Assumption of risk

Contributory negligence or assumption of risk may bar recovery by a guest or other person against an innkeeper for injuries claimed to result from a defect in the building, premises, or appliances.

A guest or other person has the duty of exercising ordinary or reasonable care for his own safety, or care commensurate with the danger,[16] particularly where a defect in the building, premises, or appliances of an inn or restaurant is an obvious one, or is known to him;[17] and where he is guilty of contributory negligence, he cannot recover from the innkeeper[18] or restaurant keeper.[19] Voluntary assumption of risk may also bar recovery.[20] The guest has been said to assume the risk of patent defects;[21] but a guest using ordinary care may, it is held, recover from an innkeeper for injuries resulting from the latter's negligence in allowing a defect, even though the guest knew of it.[22] It has been held that a guest assumed the risk of injury where, after having been in the hotel for such a length of time that he knew, or had an opportunity to know, of the alleged defects which he claims was the cause of his injury, he voluntarily elected to remain;[23] but a guest does not, by voluntarily taking a room in a building not having safeguards as required by statute, assume the risk of the owner's negligence in failing to comply with the statute.[24]

Under some circumstances a guest or lodger is deemed guilty of contributory negligence in using a dark or unlighted stairway[25] or in using a

16. U.S.—De Honey v. Harding, C.C.A.N.D., 300 F. 696.
Iowa.—Walker v. Roosevelt Hotel Co., 241 N.W. 484, 214 Iowa 1150.
La.—De Latour v. Roosevelt Hotel, App., 1 So.2d 353.
Mo.—Gray v. Levy, 48 S.W.2d 20, 226 Mo.App. 991.
Neb.—Kelley v. Luke, 299 N.W. 593, 140 Neb. 283.
Pa.—Walker v. Broad & Walnut Corporation, 182 A. 643, 320 Pa. 504—Stout v. Hamilton Court Corporation, 21 Pa.Dist. & Co. 588.
Va.—Baker v. Butterworth, 89 S.E. 849, 119 Va. 402, L.R.A.1916F 1287.
"Special care" not required.—Adams v. Mohican Hotel, 200 A. 836, 838, 124 Conn. 400.
Use of stairway instead of elevator held not negligence.—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal. App.2d 450.
Claim of care as mere conclusion
Plaintiff's testimony that she was very careful about walking up and down the steps was but the statement of a legal conclusion and insufficient to negative contributory negligence.—Seelbach, Inc. v. Mellman, 170 S.W.2d 18, 293 Ky. 790.
Guest in state of voluntary intoxication is to be judged by the same standard of conduct and held to the same degree of care as a sober man in like circumstances.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.

17. Ga.—Vaissiere v. J. B. Pound Hotel Co., 190 S.E. 354, 184 Ga. 72, affirming J. B. Pound Hotel Co. v. Vaissiere, 187 S.E. 279, 54 Ga.App. 162.
Ky.—Seelbach, Inc. v. Mellman, 170 S.W.2d 18, 293 Ky. 790.
Mo.—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.
Pa.—Levitt v. B/G Sandwich Shops, 144 A. 71, 294 Pa. 291.
S.D.—Harris v. Midwest Oil Co. of South Dakota, 292 N.W. 397, 67 S.D. 300.
Wash.—Viles v. Thunborg, 2 P.2d 666, 164 Wash. 190.
32 C.J. p 564 note 11.
Contributory negligence as matter of law
That guest suing for injuries from fall on hotel stairs knew of defect in steps does not make her contributorily negligent as matter of law, if she exercised care which a reasonably prudent person would exercise, under like circumstances.—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.

18. Cal.—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442.
Ga.—Vaissiere v. J. B. Pound Hotel Co., 190 S.E. 354, 184 Ga. 72, affirming J. B. Pound Hotel Co. v. Vaissiere, 187 S.E. 279, 54 Ga.App. 162.
Iowa.—Walker v. Roosevelt Hotel Co., 241 N.W. 484, 214 Iowa 1150.
Ky.—Petty's Adm'r v. Smith, 163 S.W.2d 16, 291 Ky. 42—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304.
Minn.—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.
Mo.—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941—Gray v. Levy, 48 S.W.2d 20, 226 Mo.App. 991—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.
Pa.—Walker v. Broad & Walnut Corporation, 182 A. 643, 320 Pa. 504.
S.D.—Harris v. Midwest Oil Co. of South Dakota, 292 N.W. 397, 67 S.D. 300.
Wash.—Viles v. Thunborg, 2 P.2d 666, 164 Wash. 190.
32 C.J. p 564 note 12.
Fire see infra subdivision c of this section.
Guest's blindness was fact which jury was required to consider in deciding question of his contributory negligence in stepping through partially open door of passenger elevator in hotel.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.
Failure to use handrails held contributory negligence as matter of law.—Seelbach, Inc., v. Mellman, 170 S.W.2d 18, 293 Ky. 790.
Proceeding in darkness
Plaintiff proceeding at ordinary pace in utterly strange locus in dark was held contributorily negligent, precluding recovery for injuries sustained, in falling into entranceway to hotel basement.—Erickson v. McKay, 242 N.W. 133, 207 Wis. 497.

19. Minn.—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.
Pa.—Levitt v. B/G Sandwich Shops, 144 A. 71, 294 Pa. 291.

20. W.Va.—Hunn v. Windsor Hotel Co., 193 S.E. 57, 58, 119 W.Va. 215, citing **Corpus Juris.**
Test of conduct
"In considering his conduct [to determine whether plaintiff assumed risk], the plaintiff is to be judged by the conduct of the ordinary man similarly situated."—McFadden v. Bancroft Hotel Corporation, 46 N.E. 2d 573, 576, 313 Mass. 56.
Doctrine held inapplicable
Ky.—Seelbach, Inc., v. Mellman, 170 S.W.2d 18, 293 Ky. 790.

21. Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182.

22. Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.

23. Wash.—Glass v. Colman, 45 P. 310, 14 Wash. 635.

24. Miss.—Jabour v. McKnight, 111 So. 370, 145 Miss. 885.

25. Me.—Cook v. McGillicuddy, 75 A. 338, 106 Me. 119.
N.Y.—Thomas v. Wolcott, 180 N.Y.S. 798.
Contributory negligence as matter of law
Hotel guest, hurrying from her room diagonally across corridor, paying no attention to where she was going and not using her senses.

dark or unlighted passageway,[26] as in instances where lighted stairways,[27] or the means of providing light,[28] are available to him. On the other hand, it is held that a guest cannot be charged with contributory negligence or assumption of risk merely because he uses a darkened stairway where the elevator is out of commission and the stairway is the only means available for passing between his room and the ground floor,[29] or where, on instructions from an employee, he uses an insufficiently lighted hallway, but exercises care;[30] and contributory negligence[31] and assumption of risk[32] have been found absent in other circumstances. A guest's instinctive choice of hazards, representing the exercise of his best judgment in seeking to escape danger, cannot be deemed contributory negligence, even if he erred in his choice.[33] Where the guest is in a dangerous predicament as a result of his own fault, whatever duty of the innkeeper then arises depends on his knowledge, actual or imputed, of the situation; in such case, the negligence of the guest must have spent its force and terminated so as to cease to be a proximate cause of his injury, before the innkeeper may be held liable for any subsequent neglect or nonfeasance, as distinguished from malfeasance or affirmative acts on his part.[34]

c. From Fire

An innkeeper's duty to exercise reasonable care to prevent injury to his guests applies in the event of fire; thus, on discovery of a fire, he must reasonably warn guests, and he is liable for injuries resulting from his failure to comply with statutes or ordinances as to fire.

An innkeeper's duty to exercise reasonable care of the persons of his guests, so as to avoid injury, applies to the outbreak of fire on the premises,[35] although contributory negligence on the part of the guest may relieve the innkeeper of liability.[36] Thus the latter has been required, on the discovery of a fire, seasonably to warn the guest[37] and call the fire department,[38] the duty to warn not arising until the hotel keeper knows about the fire;[39] but a hotel keeper has been held not negligent in failing to assure a guest of his safety, so as to prevent

and stepping into a darkened stairway located about seven inches from the intersection of corridors, was held contributorily negligent as matter of law.—De Honey v. Harding, C.C.A.N.D., 300 F. 696.

26. N.Y.—Dailey v. Distler, 100 N.Y.S. 679, 115 App.Div. 102.
Va.—Baker v. Butterworth, 89 S.E. 849, 119 Va. 402, L.R.A.1916F 1287.

27. N.Y.—Thomas v. Wollcott, 180 N.Y.S. 798.

28. Me.—Cook v. McGillicuddy, 75 A. 378, 106 Me. 119.
32 C.J. p 564 note 18.

29. Wash.—Ritter v. Norman, 129 P. 103, 71 Wash. 563, 43 L.R.A.,N.S., 657.

30. Ohio.—Chardon Lakes Inn Co. v. MacBride, 10 N.E.2d 9, 56 Ohio App. 40.

31. Cal.—Wallace v. Speier, App., 140 P.2d 900.
Kan.—Bradley v. Allis Hotel Co., 109 P.2d 165, 153 Kan. 166.
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.
Wash.—Allingham v. Long-Bell Lumber Co., 241 P. 298, 136 Wash. 681.
32 C.J. p 562 note 67 [b].

32. N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.

33. N.Y.—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997.

34. Or.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.

35. Tex.—Texas Hotel Co. of Longview v. Cosby, Civ.App., 131 S.W. 2d 261, error dismissed, judgment correct.

Watchman's negligent failure to discover fire is chargeable to owners.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

36. Cal.—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442.
Ky.—Petty's Adm'r v. Smith, 163 S.W.2d 16, 291 Ky. 42—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304.
Neb.—Strahl v. Miller, 151 N.W. 952, 97 Neb. 820, Ann.Cas.1917A 141, affirmed 36 S.Ct. 147, 239 U.S. 426, 60 L.Ed. 364.

Choice of hazards
In action for death of a lodger arising out of fire, act of lodger in jumping from second-story room was an instinctive choice of hazards which represented exercise of his best judgment, and could not be deemed contributory negligence, even if he erred in his choice.—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997.

37. Ala.—West v. Spratling, 86 So. 32, 204 Ala. 478.
Neb.—Stewart v. Weiner, 187 N.W. 121, 108 Neb. 49.
Tex.—Texas Hotel Co. of Longview v. Cosby, Civ.App., 131 S.W.2d 261, error dismissed, judgment correct.
W.Va.—Stewart v. Raleigh County Bank, 2 S.E.2d 274, 121 W.Va. 181.
Statutory requirement of notice see supra § 7.

"In case of danger from fire . . . it is his duty to give a guest such warning as a reasonable, prudent person would give under like or similar circumstances, taking into consideration the extent of the fire, the size of the building, and the equipment of the hotel installed for the safety and protection of his guests."—Parker v. Kirkwood, 8 P. 2d 340, 342, 134 Kan. 749.

Ordinary care must be exercised to warn the guest.—Smith v. The Texan, Inc., Tex.Civ.App., 180 S.W.2d 1010; distinguishing Hays v. The Texan, Inc., Civ.App., 174 S.W.2d 1006.

Watchman's negligent failure to warn sleeping guests was chargeable to owners.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

Place of origin of fire
Operator of hotel has duty in case of fire to warn guests after fire has been discovered by him or his employees, even though fire originates in room occupied by guest, and not in room that is under control of operator, unless he has not sufficient time so to do.—Smith v. The Texan, Inc., Tex.Civ.App., 180 S.W.2d 1010.

38. Tex.—Smith v. The Texan, Inc., supra—Texas Hotel Co. of Longview v. Cosden, Civ.App., 131 S.W. 2d 261, error dismissed, judgment correct.

39. Ohio.—Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.

injury suffered in fleeing from supposed danger,[40] and negligence in delaying a guest's departure during a fire is not actionable where it is not the proximate cause of his injury.[41]

The mere fact that a hotel is not fireproof will not support a claim of negligence.[42] When the duty to provide fire escapes or other safeguards against fire is imposed by statute or ordinance, as considered supra § 7, a failure in that respect renders the innkeeper liable to any guest who may be injured in consequence thereof,[43] but not to a guest whose injury is not proximately caused by such failure;[44] and it has been held that a guest will not be charged with waiving the provisions of the statute or ordinance by remaining in the hotel with knowledge of the lack of fire escapes,[45] although there is authority to the contrary.[46] Compliance by a hotel owner with a statute requiring fire escapes has been held to absolve him from negligence in not providing means of escape in addition to those required;[47] but by other authority a hotel keeper has been held not acquitted of a charge of common-law negligence in failing to provide sufficient exits by compliance with a statute imposing minimum requirements below which negligence per se arises.[48]

In the absence of a statute or ordinance making it a duty to provide fire escapes, liability for personal injuries caused by fire can be predicated only on negligence in the occurrence of the fire and the attendant circumstances;[49] likewise, where there is no duty to furnish fire-fighting equipment, the fact that such equipment is furnished, but is not kept in usable condition, is not negligence.[50] Without reference to statute or ordinance, the innkeeper has been held to have the duty of seeing to it that access to the fire escape is unobstructed and unhindered.[51]

§ 23. —— Actions

The rules governing civil actions generally, and, in particular, those governing actions involving negligence, apply in actions against innkeepers.

Although it has been held that a guest who is injured in an inn may maintain an action against the innkeeper for breach of an implied contract to keep his premises reasonably safe, or sue him ex delicto,[52] the action is usually in tort.[53] Where a complaint charged negligence and breach of warranty, dismissal of the cause as to negligence, from which dismissal no appeal was taken, does not relieve defendants from liability for breach of warranty.[54]

It has been held that a guest cannot maintain a joint action on the case against a hotel corporation and its officer for an assault by the latter.[55]

Survival of an action against an innkeeper or restaurant owner is considered in Abatement and Revival § 145 f.

Pleading. In an action against an innkeeper to recover damages for death or personal injury, the declaration, petition, or complaint must state a cause of action[56] by alleging the existence, at the

40. Iowa.—Bell v. Daugherty, 200 N. W. 708, 199 Iowa 412, 37 A.L.R. 154.

41. N.Y.—Walker v. Posner, 299 N. Y.S. 499, 252 App.Div. 382.

42. Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

43. Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36 and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.
Miss.—Jabour v. McKnight, 111 So. 370, 145 Miss. 835.
N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N. Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.
32 C.J. p 564 note 24.
Risk not assumed
A guest does not, by voluntarily taking a room in a building not equipped with fire escapes as required by statute, assume the risk of the owner's negligence in failing to comply with the statute.—Jabour v. McKnight, 111 So. 370, 145 Miss. 835.

44. Cal.—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442.
Ky.—Petty's Adm'r v. Smith, 163 S. W.2d 16, 291 Ky. 42—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304.
Pa.—Neagley v. Cassone, 10 Pa.Dist. & Co. 632, 12 Lehigh Co.L.J. 290.
32 C.J. p 564 note 24 [a].

45. Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 472, 162 Wash. 289, 77 A.L.R. 1258, citing **Corpus Juris.**
32 C.J. p 564 note 25.

46. N.Y.—Armaindo v. Ferguson, 55 N.Y.S. 769, 37 App.Div. 160.
Tex.—Radley v. Knepfly, Civ.App., 124 S.W. 447, affirmed 135 S.W. 111, 104 Tex. 130.

47. Tex.—Baugh v. McCleskey, Civ. App., 292 S.W. 950.

48. Ohio.—Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.

49. N.Y.—Acton v. Reed, 93 N.Y.S. 911, 104 App.Div. 507.
32 C.J. p 565 note 27.

50. Tex.—Smith v. The Texan, Inc., Civ.App., 180 S.W.2d 1010—Hays v. The Texan, Inc., Civ.App., 174 S.W.2d 1006.

51. Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249.

52. Me.—Norcross v. Norcross, 53 Me. 163.
N.Y.—Schell v. Vergo, 4 N.Y.S.2d 644, 166 Misc. 839.

53. Mo.—Stanley v. Bircher, 78 Mo. 245.
N.Y.—People v. Willett, 26 Barb. 78, 6 Abb.Pr. 37, 15 How.Pr. 210.
Form of action against innkeepers generally see Actions § 49 e (6).

54. Cal.—Shattuck v. St. Francis Hotel and Apartments, 60 P.2d 855, 7 Cal.2d 358.

55. Ill.—Buckley v. Edgewater Beach Hotel Co., 247 Ill.App. 239.

56. Ga.—Hendricks v. Jones, 111 S. E. 81, 28 Ga.App. 335.
32 C.J. p 565 note 33.

time of the injury, of the relation of innkeeper and guest[57] or of such other relation as imposed on defendant the duty of exercising care for the safety of plaintiff;[58] negligence on the part of defendant;[59] the causal connection between that negligence and plaintiff's injury;[60] and agency for defendant.[61] Less particularity is required in the complaint where the facts stated in it are such that defendant, from their nature and his relation to them, has full information concerning them.[62]

Plaintiff's pleading need not negative defenses,[63] such in some jurisdictions as contributory negligence;[64] but where it shows on its face that plaintiff, with full knowledge of the unsafe condition, did not exercise ordinary care, it is subject to demurrer.[65] Immaterial and prejudicial allegations are subject to exception.[66]

A petition alleging acts of concurring negligence by the owner and the lessee of a hotel, which acts concurred in causing the injury, has been held not demurrable for misjoinder of parties[67] or causes of action.[68]

Issues, proof, and variance. Where plaintiff has alleged a specific act of negligence, he is necessarily confined to proof of such alleged negligence as a basis for recovery;[69] but an immaterial variance between the pleading and proof will not itself defeat recovery.[70] Where plaintiff alleges that the hotel's construction is inherently dangerous and unusual, evidence to show that it is not unusual, by showing the similar construction of other hotels, is within the issues raised by plaintiff;[71] and other

Cause of action held stated

Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.

La.—Williams v. Mayer, App., 4 So. 2d 71.

Miss.—Meador v. Hotel Grover, 9 So. 2d 782, 193 Miss. 392.

Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.

Pa.—Tyson v. Plymouth Country Club, 41 Pa.Dist. & Co. 116, 57 Montg.Co. 140.

W.Va.—Early v. Lowe, 195 S.E. 852, 119 W.Va. 690.

Cause of action held not stated

U.S.—Gumbart v. Waterbury Club Holding Corporation, D.C.Conn., 27 F.Supp. 228.

Ga.—Avary v. Anderson, 120 S.E. 683, 31 Ga.App. 402.

N.Y.—Percival v. Hirzler, 5 N.Y.S. 2d 197, 254 App.Div. 822, motion granted 17 N.E.2d 462, 279 N.Y. 612, affirmed 19 N.E.2d 920, 280 N.Y. 511.

Tex.—Hays v. The Texan, Inc., Civ. App., 174 S.W.2d 1006.

Justiciable issue held sufficiently presented in action against hotel company and its elevator operator for death of one injured while riding in elevator, by allegations as to defendants' neglect of duty to give or procure medical aid and comfort to injured man.—Meador v. Hotel Grover, 9 So.2d 782, 193 Miss. 392.

Uncertainty held fatal

Utah.—Pennock v. Newhouse Realty Co., 93 P.2d 482, 97 Utah 408.

Amendment may be permitted in a proper case.—Tyson v. Plymouth Country Club, 41 Pa.Dist. & Co. 116, 57 Montg.Co. 140.

57. Allegations held sufficient

"Being entertained as a guest at defendant's inn" sufficiently alleges defendant to be an innkeeper.—Norcross v. Norcross, 53 Me. 163.

58. Cal.—Goldstein v. Healy, 201 P. 462, 187 Cal. 206.
32 C.J. p 565 note 35.

59. Ga.—Holloman v. Henry Grady Hotel Co., 156 S.E. 275, 42 Ga.App. 347.
Tex.—Smith v. The Texan, Inc., Civ. App., 180 S.W.2d 1010.
32 C.J. p 565 note 36.

Allegations held material

Tex.—Smith v. The Texan, Inc., supra.

Allegations held too general

Tex.—Baugh v. McCleskey, Civ.App., 292 S.W. 950, 951.

Pleading held insufficient

Ga.—Vaissiere v. J. B. Pound Hotel Co., 190 S.E. 354, 184 Ga. 72, affirming J. B. Pound Hotel Co. v. Vaissiere, 187 S.E. 279, 54 Ga.App. 162—Holloman v. Henry Grady Hotel Co., 156 S.E. 275, 42 Ga.App. 347.
Tex.—Hays v. The Texan, Inc., Civ. App., 174 S.W.2d 1006.

60. Or.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.

Allegations held sufficient

Cal.—Goldstein v. Healy, 201 P. 462, 187 Cal. 206—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App. 2d 446.

Allegations held insufficient to raise issue

Allegations that there was an obstruction, namely, a radiator, in front of the window leading to the fire escape, and that said window was stuck and could not be opened, were insufficient, in absence of allegation that guest killed in hotel fire made any effort to use fire escape, to raise any issue of proximate cause of the guest's death.—Smith v. The Texan, Inc., Tex.Civ.App., 180 S.W. 2d 1010.

61. Actual or ostensible agency

Since a hotel's liability to guest for injuries resulting from negligent repair of dress by valet shop employees would be the same irrespective of distinctions between actual and apparent or ostensible agency, guest could plead both actual and ostensible agency in her petition, and either would support judgment.—Bradley v. Allis Hotel Co., 109 P.2d 165, 153 Kan. 166.

62. Pa.—Tyson v. Plymouth Country Club, 41 Pa.Dist. & Co. 116, 57 Montg.Co. 140.
32 C.J. p 565 note 38.

63. Cal.—Goldstein v. Healy, 201 P. 462, 187 Cal. 206.

64. Cal.—Goldstein v. Healy, supra.
Va.—Baker v. Butterworth, 89 S.E. 849, 119 Va. 402, L.R.A.1916F 1287.

65. Ga.—Avary v. Anderson, 120 S.E. 683, 31 Ga.App. 402—Hendricks v. Jones, 111 S.E. 81, 28 Ga.App. 335.
Va.—Baker v. Butterworth, 89 S.E. 849, 119 Va. 402, L.R.A.1916F 1287.

Contributory negligence and assumption of risk held not shown by allegations.—Early v. Lowe, 195 S.E. 852, 119 W.Va. 690.

66. Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

Allegations as to fire-hazardous materials entering into construction of hotel were held immaterial.—National Hotel Co. v. Motley, supra.

67. Ga.—Home Owners Loan Corporation v. Brazzeal, 9 S.E.2d 773, 62 Ga.App. 683.

68. Ga.—Home Owners Loan Corporation v. Brazzeal, supra.

69. Iowa.—Johnson v. Lincoln Hotel Co., 177 N.W. 550, 189 Iowa 291.

Matters to be proved

Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 230 Iowa 739.
Ky.—Ledington v. Williams, 78 S.W.2d 790, 257 Ky. 599.

70. Ala.—West v. Spratling, 86 So. 32, 204 Ala. 478.
32 C.J. p 565 note 43.

71. U.S.—MacLaughlin v. Hull, C.C.A.Wash., 87 F.2d 641.

evidence has likewise been held to be within the issues made by the pleadings.[72]

Presumptions and burden of proof; res ipsa loquitur. One suing an innkeeper for personal injuries resulting from negligence has the burden of establishing defendant's negligence, as in failing to exercise reasonable care to keep the premises in a safe condition,[73] or in failing to comply with a statute or ordinance as to safeguards,[74] and of proving that the negligence charged,[75] or the claimed violation of such statute or ordinance,[76] was the proximate cause, or a cause, of the injury; and defendant claiming that plaintiff waived compliance with the statute has the burden of proof.[77] Under general rules as to the burden of proof of contributory negligence accepted in the particular jurisdiction, the burden may[78] or may not[79] be on defendant to prove contributory negligence.

The mere occurrence of a fire in a hotel does not give rise to a presumption of negligence on the part of the hotel keeper;[80] and the same has been said as to the mere occurrence of an accident to a guest.[81]

Where plaintiff alleges specific acts of omission or commission, he cannot rely on the doctrine of res ipsa loquitur.[82] However, an innkeeper is said to fall within the rule of res ipsa loquitur,[83] and, in circumstances in which the rule is applicable, he has the burden of explaining the accident and of showing facts relieving him of liability.[84] Thus, in par-

72. Impaired vision and hearing after accident
Evidence of plaintiff guest's impaired vision and hearing after fall was, under expert evidence attributing such impairment to nervous shock, within the issues made by the complaint, alleging shock and disturbance of nervous system, and denial of such allegation for lack of information.—Hall v. Bakersfield Community Hotel Corporation, 125 P.2d 889, 52 Cal.App.2d 158.

73. U.S.—Ennis v. Bridger, D.C.Pa., 41 F.Supp. 672, affirmed, C.C.A., 129 F.2d 1019.
Cal.—Schlemmer v. Stokes, 117 P.2d 396, 47 Cal.App.2d 164.
Iowa.—Johnson v. Lincoln Hotel Co., 177 N.W. 550, 189 Iowa 291.
Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.
N.Y.—Polsey v. Waldorf-Astoria, 222 N.Y.S. 273, 220 App.Div. 613.
Ohio.—Walker v. Toledo Hotel Co., 17 N.E.2d 422, 59 Ohio App. 229.
Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.
Time of discovering fire; delay in calling fire department
Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.
Glass on stairs; act of servants
Tex.—Montfort v. West Texas Hotel Co., Civ.App., 117 S.W.2d 811, error refused.
Fall of screen
Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 230 Iowa 739.
Exact defect causing injury
Hotel guest, injured by collapse of bed, need not produce testimony pointing out exact defect in bed which caused it to collapse.—Tamres v. Reed, 165 A. 538, 109 Pa.Super. 28.

74. Wash.—Evans v. Saran, 128 P.2d 763, 14 Wash.2d 533.

75. Tex.—Montfort v. West Texas Hotel Co., Civ.App., 117 S.W.2d 811, error refused.

76. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.
Wash.—Evans v. Saran, 128 P.2d 763, 14 Wash.2d 533.

77. N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

78. Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36 and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.
Mass.—Parsons v. Dwight State Co., 17 N.E.2d 197, 301 Mass. 324, 118 A.L.R. 1099.
Mo.—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.
Assumption of risk
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.
N.Y.—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574.

79. Iowa.—Walker v. Roosevelt Hotel Co., 241 N.W. 484, 487, 214 Iowa 1150.

80. Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249.
Tenn.—Weeks v. McNulty, 48 S.W. 809, 101 Tenn. 495, 70 Am.S.R. 693, 43 L.R.A. 185.
Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

81. Ill.—Elliott v. Congress Hotel, 41 N.E.2d 330, 314 Ill.App. 287.
"Burden of explanation"
Hotel guest's showing of manner in which injury from collapse of bed occurred would not cast "burden of explanation" of accident on hotel keeper.—Tamres v. Reed, 165 A. 538, 539, 109 Pa.Super. 28.

82. Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.
Iowa.—Van Heukelom v. Black Hawk Hotels Corporation, 270 N.W. 16, 22, 222 Iowa 1033, quoting **Corpus Juris**—Johnson v. Lincoln Hotel Co., 177 N.W. 550, 189 Iowa 291.
Allegations held general
U.S.—Nettles v. Emerick, D.C.Pa., 22 F.Supp. 441.
Cal.—Mintzer v. Wilson, 68 P.2d 370, 21 Cal.App.2d 85.

83. Fla.—Reichenbach v. New Alamac Hotel Corporation, 194 So. 250, 141 Fla. 797.

84. U.S.—Nettles v. Emerick, D.C. Pa., 22 F.Supp. 441.
Cal.—Mintzer v. Wilson, 68 P.2d 370, 21 Cal.App.2d 85.
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
Fla.—Reichenbach v. New Alamac Hotel Corporation, 194 So. 250, 141 Fla. 797.
Iowa.—Van Heukelom v. Black Hawk Hotels Corporation, 270 N.W. 16, 22, 222 Iowa 1033, quoting **Corpus Juris.**
Pa.—Manchester v. Barnett, 27 Pa. Dist. & Co. 75, 28 Berks Co. 131. 32 C.J. p 565 note 50.
Fire
N.Y.—Owen v. Straight, 269 N.Y.S. 868, 239 App.Div. 622.
Corpus Juris statement cited in connection with applicability of res ipsa loquitur doctrine in action for physician's malpractice.—Gebhardt v. McQuillen, 297 N.W. 301, 308, 230 Iowa 181.

ticular circumstances a prima facie case of negligence has been held made out by proof that plaintiff was injured by the fall of a ceiling, or a part thereof,[85] an elevator,[86] a window shade,[87] or the upper portion of a folding bed,[88] or by reason of the defective working of a faucet,[89] or by falling down an elevator shaft,[90] as where the shaft adjoined the lobby and the door to it had been left open on a dark day,[91] or where the door had a defective lock;[92] but in other cases the doctrine of res ipsa loquitur has been held inapplicable,[93] as where there is no evidence as to how the accident occurred,[94] or where the injury was due at least partly to the act of an independent contractor's employee.[95]

A presumption has been indulged that a guest used due and ordinary care to avoid injury,[96] and that a guest endangered by fire promptly took advantage of whatever means he saw available to reach a place of safety;[97] and it will not be presumed that a guest intentionally remained in the building with knowledge of the presence of a fire.[98] It will be assumed that defendant knew of the dim lighting of a portion of the premises,[99] and that snow will track into a vestibule and, unless removed, become slushy.[1]

Admissibility of evidence. In actions involving innkeepers, particular evidence sought to be introduced has variously been held admissible[2] or inadmissible.[3]

Weight and sufficiency of evidence. In particular cases, evidence has been held sufficient to sustain a verdict or judgment for plaintiff,[4] to show,

85. Cal.—Mintzer v. Wilson, 68 P.2d 870, 21 Cal.App.2d 85.
32 C.J. p 565 note 46.

86. Ga.—Bullard v. Rolader, 107 S.E. 548, 26 Ga.App. 742, affirmed 110 S.E. 548, 152 Ga. 369.
32 C.J. p 565 note 47.

87. U.S.—Hotel Dempsey Co. v. Teel, C.C.A.Ga., 128 F.2d 673, stating Georgia law.

88. Pa.—Lyttle v. Denny, 71 A. 841, 222 Pa. 395, 128 Am.S.R. 814, 20 L.R.A.,N.S., 1027, 15 Ann.Cas. 924.

89. Pa.—Manchester v. Barnett, 27 Pa.Dist. & Co. 75, 28 Berks Co. 131.

90. Iowa.—Van Heukelom v. Black Hawk Hotels Corporation, 270 N.W. 16, 22, 222 Iowa 1033, quoting **Corpus Juris.**

91. N.C.—Jones v. Bland, 108 S.E. 344, 182 N.C. 70, 16 A.L.R. 1383.

92. Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.

93. **Fall of bottle from hotel window**
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.

Fire
(1) Doctrine did not apply where hotel caught fire and guest was injured when dropping from window —Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.

(2) It was so held where fire allegedly originated in porter's closet under exclusive control of hotel agents and employees.—Texas Hotel Co. of Longview v. Cosby, Tex.Civ.App., 131 S.W.2d 261, error dismissed, judgment correct—National Hotel Co. v. Motley, Tex.Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

Falls
(1) Doctrine was held inapplicable to injuries to hotel guest falling when heel caught in stairway carpet.—Hoffman v. Shad, 224 N.Y.S. 722, 221 App.Div. 668.

(2) Doctrine was held inapplicable to injuries to hotel guest falling while attempting to reach allotted place at table on platform.—Rose v. Adelphia Hotel, 149 A. 644, 300 Pa. 1.

(3) Where a guest stepped on a drinking glass and fell down stairs, doctrine was not applicable in the absence of proof that glass was used by innkeeper in the operation of its business, or evidence indicating by whom glass was used or how it got on stairs.—Montfort v. West Texas Hotel Co., Tex.Civ.App., 117 S.W.2d 811, error refused.

(4) Where an invitee in hotel fell from lavatory into anteroom and suffered injury, doctrine did not apply.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.

Collapse of chair
Fla.—Reichenbach v. New Alamac Hotel Corporation, 194 So. 250, 141 Fla. 797.

Cutting hand on faucet handle
Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.

Insect bite
Ohio.—Cunningham v. Neil House Hotel Co., App., 33 N.E.2d 859.

94. Iowa.—Boles v. Hotel Maytag Co., 265 N.W. 133, 221 Iowa 211.

95. Iowa.—Boles v. Hotel Maytag Co., supra.

96. Cal.—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715.

97. Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249.

98. Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36, and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.

99. Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69.

1. Mich.—Keech v. Clements, supra.

2. U.S.—MacLaughlin v. Hull, C.C.A.Wash., 87 F.2d 641.
N.Y.—Owen v. Straight, 269 N.Y.S. 868, 239 App.Div. 622.
32 C.J. p 565 note 52 [a].

Absence of complaints
U.S.—MacLaughlin v. Hull, C.C.A. Wash., 87 F.2d 641.

Similar physical arrangements in other hotels
U.S.—MacLaughlin v. Hull, supra.

Custom as to use of passageway
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.

Presence of safety doors on elevator
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

3. Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
32 C.J. p 565 note 52 [b].

Falls by others
N.J.—Crouse v. Stacy-Trent Co., 164 A. 294, 110 N.J.Law 124.

Prior fire
Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

4. U.S.—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661.
Kan.—Parker v. Kirkwood, 8 P.2d 340, 134 Kan. 749.
La.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.
Minn.—Green v. Elgin Hotel Co., 295 N.W. 905, 209 Minn. 178.
Neb.—Stewart v. Weiner, 187 N.W. 121, 108 Neb. 49.
N.J.—Nelson v. Ritz-Carlton Restaurant & Hotel Co., 157 A. 133, 9 N.J.Misc. 1240.

or support a finding, that defendant was the operator or owner of the hotel,[5] that defendant exercised due care,[6] that he was guilty of negligence or did not exercise ordinary or reasonable care,[7] that he failed to maintain the premises or appliances in reasonably safe condition,[8] that he exercised due care to do so,[9] that plaintiff was guilty of contributory negligence,[10] that the accident occurred in a particular manner,[11] that defendant's negligence was the proximate cause of plaintiff's injury,[12] that defendant gave guests reasonable warning of fire,[13] that neither guests[14] nor the fire department[15] were notified of a fire until a certain period had elapsed after an employee knew of it, that failure to warn deceased of a fire was the proximate cause of his death,[16] that the violation of statutes relating to the prevention of fires was the proximate cause of the injury,[17] that failure to provide adequate fire escapes was not the proximate cause of death,[18] that failure to close an elevator door was negligence contributing to the happening of the accident,[19] or that decedent was familiar with the condition of the building as to fire escapes,[20] and as to other matters.[21]

In other cases, evidence has been held insufficient to sustain or justify a verdict or judgment for plaintiff,[22] to show, or sustain a finding, that defendant was guilty of negligence or failed to use reasonable care,[23] that plaintiff's injury was caused by defend-

N.Y.—Meyer v. Weller Hotel Corporation, 33 N.Y.S.2d 450, 263 App. Div. 1026—Bernucci v. Marfre Holding Corporation, 14 N.Y.S.2d 304, 171 Misc. 997—Amsterdam v. Hotel Astor, 224 N.Y.S. 273, 130 Misc. 656.

Okl.—Seay v. Plunkett, 145 P. 496, 44 Okl. 794.

Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429—Kalo & Sullivan v. William Penn Hotel Co., 86 Pa.Super. 359.

5. Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.

Circumstantial evidence; quantum of proof required

In guest's action against hotel company for injuries, direct proof of ownership and operation of the hotel by defendant was not necessary, but such fact could be proved by circumstantial evidence; where lack of ownership and operation of hotel by defendant was not specifically asserted as a defense and a general denial only was interposed, very slight proof was sufficient to establish fact of ownership and operation by defendant, since such facts were peculiarly within defendant's knowledge.—Payant v. Corpus Christi Plaza Hotel Co., Tex.Civ.App., 149 S.W.2d 665, error dismissed, judgment correct.

Lease and rent receipts to another, from defendant were held not conclusive.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.

6. Neb.—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797.

7. Cal.—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App.2d 446.

Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400.

Ga.—Hooks v. Sanford, 116 S.E. 221, 29 Ga.App. 640.

Minn.—Green v. Elgin Hotel Co., 295 N.W. 905, 209 Minn. 178.

N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.

Tex.—Crockett v. Troyk, Civ.App., 78 S.W.2d 1012.

8. Cal.—Wallace v. Speier, App., 140 P.2d 900—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715.

Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400.

Dangerous and improperly lighted steps

N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.

Obstruction of only way to escape from fire

Wash.—Moore v. Dresden, 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

9. Cal.—Adams v. Dow Hotel, 76 P.2d 210, 25 Cal.App.2d 51.

10. Cal.—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442.

Ky.—Petty's Adm'r v. Smith, 163 S.W.2d 16, 291 Ky. 42.

Wis.—Burling v. Schroeder Hotel Co., 291 N.W. 810, 235 Wis. 403.

Twenty per cent of total causal negligence

Wis.—Burling v. Schroeder Hotel Co., supra.

11. Cal.—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715.

12. Cal.—Hall v. Bakersfield Community Hotel Corporation, 125 P.2d 889, 52 Cal.App.2d 158—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App.2d 446.

Pa.—Ritchey v. Cassone, 145 A. 822, 296 Pa. 249.

Tex.—Crockett v. Troyk, Civ.App., 78 S.W.2d 1012.

13. Neb.—Stewart v. Weiner, 198 N.W. 159, 111 Neb. 797.

14. Kan.—Parker v. Kirkwood, 8 P.2d 340, 134 Kan. 749.

15. Kan.—Parker v. Kirkwood, supra.

16. Ala.—West v. Spratling, 86 So. 32, 204 Ala. 478.

17. Ky.—Louisville Trust Co. v. Morgan, 203 S.W. 555, 180 Ky. 609, 7 A.L.R. 396.

18. Tex.—Radley v. Knepfly, Civ. App., 124 S.W. 447, affirmed 135 S.W. 111, 104 Tex. 130.

19. Mass.—Bechtold v. Rae, 120 N.E. 377, 231 Mass. 151.

20. Tex.—Radley v. Knepfly, Civ. App., 124 S.W. 447, affirmed 135 S.W. 111, 104 Tex. 130.

21. **Nuisance**

Evidence that during convention numerous objects, including bags containing water, were thrown from hotel was held to sustain finding that nuisance existed, as regards hotel's liability to pedestrian whom others, seeking to avoid one of such bags, pushed against taxicab, that innkeeper "was aware of the creation and maintenance of the nuisance, and that damage was likely to result therefrom," and that hotel failed to exercise reasonable care to identify wrongdoers.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 117, 229 Mo.App. 910.

Injury in prosecution of proprietor's business

Evidence that hotel manager voluntarily responded to guest's complaint to clerk with opprobrious words, followed by assault and battery, authorized inference that injury was committed in prosecution of proprietor's business.—Hooks v. Sanford, 116 S.E. 221, 29 Ga.App. 640.

22. U.S.—Dove v. Lowden, D.C.Mo., 47 F.Supp. 546.

La.—De Latour v. Roosevelt Hotel, App., 1 So.2d 353.

N.Y.—Jean v. Algonquin Hotel Co., 15 N.Y.S.2d 759, 258 App.Div. 127.

Pa.—Ferguson v. Sturch, 61 Pa.Super. 516.

Tex.—Texas Hotel Co. of Longview v. Weir, Civ.App., 116 S.W.2d 1169, error refused.

23. Cal.—Schlemmer v. Stokes, 117 P.2d 396, 47 Cal.App.2d 164.

Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 230 Iowa 739.

Mass.—Kay v. Audet, 28 N.E.2d 462, 306 Mass. 337.

Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.

ant's negligence,[24] that there was a dangerous defect on the premises,[25] that a dangerous condition was the cause of the accident,[26] that defendant knew, or in the exercise of reasonable care should have known, of a dangerous condition in the premises,[27] that those responsible for the management of the hotel permitted a fire to start,[28] that the hotel was of a certain area, so as to require a certain number of fire escapes,[29] that an article of furniture was so topheavy that it could be easily toppled over,[30] to show contributory negligence on the part of plaintiff,[31] negligence in leaving the door of an elevator shaft unlocked and open,[32] or an implied invitation to a guest to enter an elevator,[33] and as to other matters.[34]

Questions of law and fact. The determination of the factual questions presented by conflicting testimony is for the jury.[35] Questions of fact include the following: Negligence of defendant or his servants;[36] plaintiff's contributory negligence or

N.Y.—Dinegar v. Sweeney, 300 N.Y.S. 1202, 253 App.Div. 781, affirmed 17 N.E.2d 452, 279 N.Y. 591—Walker v. Posner, 299 N.Y.S. 499, 252 App.Div. 382.

Falls by others

The testimony of two witnesses that they slipped on the rug on which plaintiff also slipped is not sufficient proof of defendant's negligence.—Stout v. Hamilton Court Corporation, 21 Pa.Dist. & Co. 588.

24. U.S.—Ennis v. Bridger, D.C.Pa., 41 F.Supp. 672, affirmed, C.C.A., 129 F.2d 1019.

25. N.Y.—Hoffman v. Shad, 224 N.Y.S. 722, 221 App.Div. 668.

26. Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.
N.Y.—McGinn v. Shelter Island Heights Ass'n, 23 N.Y.S.2d 336, 260 App.Div. 938, reargument denied 24 N.Y.S.2d 1008, 260 App.Div. 1019, appeal denied 31 N.E.2d 517, 285 N.Y. 857.

27. Mass.—O'Leary v. Smith, 150 N.E. 878, 255 Mass. 121.
N.Y.—Dinegar v. Sweeney, 300 N.Y.S. 1202, 253 App.Div. 781, affirmed 17 N.E.2d 452, 279 N.Y. 591.

28. Tex.—National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

29. Tex.—Texas Hotel Co. of Longview v. Wier, Civ.App., 116 S.W.2d 1169, error refused.

30. N.Y.—Polsey v. Waldorf-Astoria, 222 N.Y.S. 273, 220 App.Div. 613.

31. Cal.—Allred v. Orth, 274 P. 955, 206 Cal. 494—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal.App.2d 450.
Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36, and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.

32. Iowa.—Johnson v. Lincoln Hotel Co., 177 N.W. 550, 189 Iowa 291.

33. Mo.—Gray v. Levy, 48 S.W.2d 20, 226 Mo.App. 991.

34. **Posting of diagrams**
N.Y.—Acton v. Reed, 93 N.Y.S. 911, 104 App.Div. 507.

Cause of fall of elevator
Minn.—Burr v. Curtis Hotel Co., 186 N.W. 302, 151 Minn. 200.

Fall of bottle from window
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.

35. Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

36. U.S.—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825.
Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App.2d 446.
Conn.—Johnson v. Pulidy, 165 A. 355, 116 Conn. 443.
Ill.—Elliott v. Congress Hotel, 41 N.E.2d 330, 314 Ill.App. 287.
Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69—McLeod v. Savoy Hotel Co., 255 N.W. 308, 267 Mich. 352.
Minn.—Green v. Elgin Hotel Co., 295 N.W. 905, 209 Minn. 178.
Mo.—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712—Burnison v. Souders, 35 S.W.2d 619, 225 Mo. App. 1159.
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.
N.Y.—Jean v. Algonquin Hotel Co., 7 N.Y.S.2d 412, 255 App.Div. 279—Friedman v. Shindler's Prairie House, 230 N.Y.S. 44, 224 App.Div. 232, affirmed Miller v. Shindler's Prairie House, 166 N.E. 329, 250 N.Y. 574, and followed in 230 N.Y.S. 876, 224 App.Div. 772, affirmed 166 N.E. 329, 250 N.Y. 574—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App.Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597—Amsterdam v. Hotel Astor, 224 N.Y.S. 273, 130 Misc. 656.
Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402—Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.
Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429—Tamres v. Reed, 165 A. 538, 109 Pa.Super. 28.
Tex.—Crockett v. Troyk, Civ.App., 78 S.W.2d 1012.
32 C.J. p 566 note 56.

Decision within trial judge's "sound discretion"
Cal.—Wallace v. Speier, App., 140 P.2d 900, 903—Adams v. Dow Hotel, 76 P.2d 210, 212, 25 Cal.App.2d 51.

Evidence held to warrant submission of question to jury
U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253—Nettles v. Emerick, D.C.Pa., 22 F.Supp. 441.
Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.
Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56—Promisel v. Hotels Statler Corporation, 189 N.E. 804, 286 Mass. 15—Sheridan v. Hotels Statler Co., 185 N.E. 33, 282 Mass. 456.
Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69—Yarington v. Huck, 187 N.W. 298, 218 Mich. 100.
Mo.—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712.
Neb.—Stewart v. Weiner, 187 N.W. 121, 108 Neb. 49.
N.J.—Crouse v. Stacy-Trent Co., 164 A. 294, 110 N.J.Law 124.
N.Y.—Owen v. Straight, 196 N.E. 395, 267 N.Y. 453, reversing 275 N.Y.S. 1000, 242 App.Div. 892, and reargument denied 198 N.E. 395, 268 N.Y. 544—Schubart v. Hotel Astor, 8 N.Y.S.2d 567, 255 App.Div. 1012, affirming 5 N.Y.S.2d 203, 168 Misc. 431, and affirmed 22 N.E.2d 167, 281 N.Y. 597.
Tex.—Payant v. Corpus Christi Plaza Hotel Co., Civ.App., 149 S.W.2d 665, error dismissed, judgment correct.
Utah.—Gardner v. Newhouse Realty Co., 267 P. 186, 71 Utah 460.

Evidence held insufficient to warrant submission to jury
Cal.—Fuller v. Vista Del Arroyo Hotel, 108 P.2d 920, 42 Cal.App.2d 400.
Mass.—Kay v. Audet, 28 N.E.2d 462, 306 Mass. 337.
N.C.—Schwingle v. Kellenberger, 8 S.E.2d 913, 217 N.C. 577.
Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.
Tex.—Texas Hotel Co. of Longview

exercise of due care,[37] or his assumption of risk;[38] proximate cause;[39] the sufficiency of an intervening force, of itself, to cause the injury;[40] the unsafe or defective condition of the premises or of appliances,[41] and, according to the judicial deci-

v. Cosby, Civ.App., 131 S.W.2d 261, error dismissed, judgment correct —National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

When question of law

"The . . . [question] of negligence . . . [is] ordinarily . . . [a question] of fact for the jury, and it is only when the evidence is such that all reasonable minds would reach the same conclusions that . . . [it becomes a question] of law for the court."—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253, 257.

Blind guest

Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.

Discoverability of defect

In action against innkeeper for injuries sustained when plaintiff fell from a horse because of an allegedly defective stirrup fastener, it was the province of the jury to determine whether the defect could have been discovered by a reasonable examination, but it was the court's duty in the first instance to determine whether there was sufficient evidence to warrant the submission of that question to the jury.—Ennis v. Bridger, D.C.Pa., 41 F.Supp. 672, affirmed, C.C.A., 129 F.2d 1019.

Evidence of stalling and sticking of elevator, without other evidence, was held insufficient to require submission of an issue of negligence.—Payant v. Corpus Christi Plaza Hotel Co., Tex.Civ.App., 149 S.W.2d 665, error dismissed, judgment correct.

Mere maintenance of marble stairway, fan-shaped at turn, was held not to authorize submission of question of negligence in such respect to jury, although such stairs required greater care on part of user than wooden or carpeted stairway.—Stein v. Buckingham Realty Co., Mo.App., 60 S.W.2d 712.

37. U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825.
Cal.—Hall v. Bakersfield Community Hotel Corporation, 125 P.2d 889, 52 Cal.App.2d 158—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App.2d 446—Boyd v. Gogna, 60 P.2d 521, 16 Cal.App.2d 442—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
Conn.—Adams v. Mohican Hotel, 200 A. 336, 124 Conn. 400—Johnson v. Pulidy, 165 A. 355, 116 Conn. 443—Scheer v. Arrigoni, 150 A. 702, 111 Conn. 726.
D.C.—Berghman v. Dufresne, 24 F.2d 280, 58 App.D.C. 15.
Ill.—Pollard v. Broadway Central Hotel Corporation, 187 N.E. 487, 353 Ill. 312, reversing 269 Ill.App. 77.
Kan.—Criswell v. Bankers' Mortg. Co., 278 P. 722, 128 Kan. 609.
Mass.—Parsons v. Dwight State Co., 17 N.E.2d 197, 301 Mass. 324, 118 A.L.R. 1099.
Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69—McLeod v. Savoy Hotel Co., 255 N.W. 308, 267 Mich. 352—Brown v. Berles, 208 N. W. 461, 234 Mich. 353.
Minn.—Green v. Elgin Hotel Co., 295 N.W. 905, 209 Minn. 178—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.
Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.
N.Y.—Richards v. Olsen, 21 N.Y.S.2d 371, 259 App.Div. 1112, reargument denied Richards v. Olson, 22 N.Y.S. 2d 536, 260 App.Div. 828.
Ohio.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.
Tex.—Morten Inv. Co. v. Jordan, Civ. App., 57 S.W.2d 887, reversed on other grounds Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37.
Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52—Allingham v. Long-Bell Lumber Co., 241 P. 298, 136 Wash. 681.
32 C.J. p 566 note 57.

Evidence held to warrant submission of question to jury

Cal.—Sommerfield v. Miratti, 121 P. 2d 746, 49 Cal.App.2d 450.
Ky.—Petty's Adm'r v. Smith, 163 S. W.2d 16, 291 Ky. 42.
Mass.—Sheridan v. Hotels Statler Co., 185 N.E. 33, 282 Mass. 456.
Mich.—Keech v. Clements, 5 N.W.2d 570, 303 Mich. 69.
Mo.—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712.
N.J.—Crouse v. Stacy-Trent Co., 164 A. 294, 110 N.J.Law 124.
Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402.
Tex.—Wilkerson v. Brin, Civ.App., 268 S.W. 1010.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

When question of law

"The . . . [question] of . . . contributory negligence . . . [is] ordinarily . . . [a question] of fact for the jury, and it is only when the evidence is such that all reasonable minds would reach the same conclusions that . . . [it becomes a question] of law."—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253, 257.

Blind guest

Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.

38. Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182.
Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56.
Minn.—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.

Evidence held to warrant submission of question to jury

Cal.—Sommerfield v. Miratti, 121 P. 2d 746, 49 Cal.App.2d 450.

39. Cal.—Parker v. Manchester Hotel Co., 85 P.2d 152, 29 Cal.App.2d 446.
Mich.—McLeod v. Savoy Hotel Co., 255 N.W. 308, 267 Mich. 352.
Mo.—Stein v. Buckingham Realty Co., App., 60 S.W.2d 712.
N.Y.—Meyer v. Weller Hotel Corporation, 33 N.Y.S.2d 450, 263 App. Div. 1026—Spear v. Koshelle, 269 N.Y.S. 391, 150 Misc. 305.
Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.
Wis.—Burling v. Schroeder Hotel Co., 291 N.W. 810, 235 Wis. 403.
32 C.J. p 566 note 58.

Evidence held to warrant submission of question to jury

Cal.—Ingledue v. Davidson, 283 P. 837, 102 Cal.App. 697.

Evidence held insufficient to warrant submission to jury

Cal.—Fuller v. Vista Del Arroyo Hotel, 108 P.2d 920, 42 Cal.App.2d 400.
Ky.—Turner v. Taylor's Adm'x, 90 S. W.2d 73, 262 Ky. 304.
Tex.—Texas Hotel Co. of Longview v. Jones, Civ.App., 131 S.W.2d 265 —Texas Hotel Co. of Longview v. Cosby, Civ.App., 131 S.W.2d 261, error dismissed, judgment correct —National Hotel Co. v. Motley, Civ.App., 123 S.W.2d 461, error dismissed, judgment correct.

40. Ala.—Dye-Washburn Hotel Co. v. Aldridge, 93 So. 512, 207 Ala. 471.

41. Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177 —Stein v. Buckingham Realty Co., App., 60 S.W.2d 712—Burnison v. Souders, 35 S.W.2d 619, 225 Mo. App. 1159.
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.

sions on the question, plaintiff's[42] or defendant's[43] knowledge thereof; the requirements for due care beyond the statutory minimum;[44] defendant's performance or breach of his duty seasonably to warn a guest of a fire,[45] or of his statutory duty to provide fire escapes[46] or proper lighting;[47] whether a guest was warned of a fire in time to permit his escape;[48] whether an employee delayed in notifying the fire department after receiving notice of a fire;[49] existence of relationship of master and servant;[50] existence of actual or ostensible agency;[51] the competency of an elevator operator;[52] negligence in failing to equip an elevator with safety devices;[53] credibility of witnesses;[54] identity of deceased;[55] the inference to be drawn from the application of the doctrine of res ipsa loquitur;[56] the sufficiency of evidence to overcome the inference of negligence established by such application;[57] and other matters.[58]

In particular circumstances, the state of the evidence has been held[59] or held not[60] to justify tak-

N.Y.—Richards v. Olsen, 21 N.Y.S. 2d 371, 259 App.Div. 1112, reargument denied Richards v. Olson, 22 N.Y.S.2d 536, 260 App.Div. 828.
Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402.
Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.
32 C.J. p 566 note 60.

Evidence held insufficient to warrant submission to jury
D.C.—Kenney v. Washington Properties, 128 F.2d 612, 76 U.S.App.D.C. 43, 146 A.L.R. 1.

42. Evidence held to warrant submission of question to jury
Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182—Sommerfield v. Miratti, 121 P.2d 746, 49 Cal.App.2d 450.

43. U.S.—Baker v. Dallas Hotel Co., C.C.A.Tex., 73 F.2d 825.
32 C.J. p 566 note 61.

Evidence held to warrant submission of question to jury
Cal.—Sommerfield v. Miratti, 121 P. 2d 746, 49 Cal.App.2d 450.

44. Ohio.—Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.

45. Ala.—West v. Spratling, 86 So. 32, 204 Ala. 478.
Tex.—Smith v. The Texan, Inc., Civ. App., 180 S.W.2d 1010.

46. Ala.—West v. Spratling, 86 So. 32, 204 Ala. 478.
Mo.—Burt v. Nichols, 173 S.W. 681, 264 Mo. 1, L.R.A.1917E 250.

47. Utah.—Carpenter v. Syrett, 104 P.2d 617, 99 Utah 208.

48. Kan.—Parker v. Kirkwood, 8 P. 2d 340, 134 Kan. 749.

49. Kan.—Parker v. Kirkwood, supra.

50. Mo.—Schide v. Gottschick, 43 S. W.2d 777, 329 Mo. 64.

51. Evidence held to warrant submission of question to jury
Kan.—Bradley v. Allis Hotel Co., 109 P.2d 165, 153 Kan. 166.

52. Evidence held to warrant submission of question to jury.—McLeod v. Savoy Hotel Co., 255 N.W. 308, 267 Mich. 352.

53. Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

54. Ky.—Pirtle's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 541, 241 Ky. 455, followed in Taylor's Adm'x v. Hargis Bank & Trust Co., 44 S.W.2d 549, 241 Ky. 36, and Pirtle's Adm'r v. Hargis Bank & Trust Co., 49 S.W.2d 1002, 243 Ky. 752.
Minn.—Burr v. Curtis Hotel Co., 186 N.W. 302, 151 Minn. 200.
Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

55. Evidence held to warrant submission of question to jury
Mo.—Burt v. Nichols, 173 S.W. 681, 264 Mo. 1, L.R.A.1917F 250.

56. U.S.—Hotel Dempsey Co. v. Teel, C.C.A.Ga., 128 F.2d 673, stating Georgia law.

57. Cal.—Mintzer v. Wilson, 68 P.2d 370, 21 Cal.App. 85.
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
Ohio.—Fineberg v. Lincoln-Phelps Apartment Co., 9 N.E.2d 1011, 55 Ohio App. 402.

58. Status as licensee or business visitor
Cal.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.
Pa.—Parsons v. Drake, 32 A.2d 27, 347 Pa. 247.

Falls by other persons
Mo.—Burnison v. Souders, 35 S.W.2d 619, 225 Mo.App. 1159.

Use of particular portion of premises
Whether operators of hotel might reasonably have expected guest to use the rear entryway, whether bellboy had advised guest to use it, and whether bellboy was authorized to give guest such advice, were questions for the jury.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.

Character and manner of occurrence of explosion
Tex.—Crockett v. Troyk, Civ.App., 78 S.W.2d 1012.

Appearance of color contrast in dim light
Mo.—Cumming v. Allied Hotel Corporation, App., 144 S.W.2d 177.

Instability of lamp
N.Y.—Polsey v. Waldorf-Astoria, 222 N.Y.S. 273, 220 App.Div. 613.

Possibility of preventing accident
Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.

Statement as warranty
Cal.—Shattuck v. St. Francis Hotel and Apartments, 60 P.2d 855, 7 Cal.2d 358.

Operation of hotel by defendant
Pa.—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429.
Tex.—Payant v. Corpus Christi Plaza Hotel Co., Civ.App., 149 S.W.2d 665, error dismissed, judgment correct.

59. U.S.—Sweeny v. Sears, C.C.A. Me., 111 F.2d 124.
D.C.—Kenney v. Washington Properties, 128 F.2d 612, 76 U.S.App.D. C. 43, 146 A.L.R. 1.
Ga.—Castleberry v. Fox, 113 S.E. 110, 29 Ga.App. 35.
Iowa.—Kapphahn v. Martin Hotel Co., 298 N.W. 901, 230 Iowa 739.
Ky.—Seelbach, Inc. v. Mellman, 170 S.W.2d 18, 293 Ky. 790—Turner v. Taylor's Adm'x, 90 S.W.2d 73, 262 Ky. 304.
Mass.—Kay v. Audet, 28 N.E.2d 462, 306 Mass. 337—O'Leary v. Smith, 150 N.E. 878, 255 Mass. 121.
Neb.—Pierce v. Burlington Transp. Co., 297 N.W. 656, 139 Neb. 423.
N.C.—Schwingle v. Kellenberger, 8 S. E.2d 918, 217 N.C. 577.
Or.—Doherty v. Arcade Hotel, 134 P.2d 118, 170 Or. 374.

60. Cal.—Topley v. Zeeman, 13 P.2d 666, 216 Cal. 182.
Conn.—Johnson v. Pulidy, 165 A. 355, 116 Conn. 443.
D.C.—Berghman v. Dufresne, 24 F.2d 280, 58 App.D.C. 15.
Kan.—Bradley v. Allis Hotel Co., 109 P.2d 165, 153 Kan. 166.
Ky.—Petty's Adm'r v. Smith, 163 S. W.2d 16, 291 Ky. 42.
Mass.—McFadden v. Bancroft Hotel Corporation, 46 N.E.2d 573, 313 Mass. 56—Promisel v. Hotels Statler Corporation, 189 N.E. 804, 286 Mass. 15.
Mich.—McLeod v. Savoy Hotel Co., 255 N.W. 308, 267 Mich. 352—Yarington v. Huck, 187 N.W. 298, 218 Mich. 100.

ing the case from the jury, as by the direction of a verdict. Thus, it is error to take the case from the jury where plaintiff is entitled to the benefit of the doctrine of res ipsa loquitur.[61]

Instructions. In actions involving innkeepers, the propriety of instructions has been adjudicated with respect to duty to keep premises safe,[62] mere accident as cause of injury,[63] proximate cause,[64] installation or operation of elevator,[65] an ordinance regulating fire escapes,[66] liability of an innkeeper for assault by an employee,[67] contributory negligence on the part of plaintiff,[68] and other matters.[69] Where several persons are sued for injuries sustained by a guest, each of defendants is entitled to a charge that would permit the jury to absolve from liability those who were not responsible for plaintiff's injuries.[70]

§ 24. Injury to Business

While a guest may be liable to the hotelkeeper for injury to the latter's business by permitting offensive conditions constituting a nuisance to exist in his room, he is not liable if the injury is not the proximate result of the acts done or permitted.

While a guest who knowingly permits offensive conditions constituting a nuisance to continue in the rooms hired by him and under his control, thereby causing other guests to leave the hotel and deterring still other persons from becoming guests, may be liable to the hotel keeper for the injury to the latter's business,[71] he is not liable for mere passiveness with regard to such conditions where they exist outside of the rooms under his control,[72] nor is

Minn.—Jewell v. Blanchett Inv. Co., 271 N.W. 461, 199 Minn. 267.
N.J.—Crouse v. Stacy-Trent Co., 164 A. 294, 110 N.J.Law 124—Nelson v. Ritz-Carlton Restaurant & Hotel Co., 157 A. 133, 9 N.J.Misc. 1240—Fuller v. State Cafeteria, 130 A. 4, 3 N.J.Misc. 759.
N.Y.—Owen v. Straight, 269 N.Y.S. 868, 239 App.Div. 622.
Ohio.—Mitchell v. Hotel Berry Co., 171 N.E. 39, 34 Ohio App. 259.
Tex.—Payant v. Corpus Christi Plaza Hotel Co., Civ.App., 149 S.W.2d 665, error dismissed, judgment correct—Wilkerson v. Brin, Civ.App., 268 S.W. 1010.
Utah.—Gardner v. Newhouse Realty Co., 267 P. 186, 71 Utah 460.

61. Cal.—Mintzer v. Wilson, 68 P. 2d 370, 21 Cal.App.2d 85.

62. Instructions held proper or erroneously refused
Colo.—Rudolph v. Elder, 95 P.2d 827, 105 Colo. 105.
N.Y.—Bristol v. Ernst, 27 N.Y.S.2d 119, 261 App.Div. 713—Jean v. Algonquin Hotel Co., 15 N.Y.S.2d 759, 258 App.Div. 127.
Or.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.
Pa.—Parsons v. Drake, 32 A.2d 27, 347 Pa. 247.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

Instructions held erroneous
N.Y.—Bristol v. Ernst, 27 N.Y.S.2d 119, 261 App.Div. 713.
Utah.—Pennock v. Newhouse Realty Co., 93 P.2d 482, 97 Utah 408.

Charge held adequate
N.Y.—Hurley v. Wyckoff, 13 N.Y.S. 2d 891, 257 App.Div. 1032, transferred, see 11 N.Y.S.2d 878, 257 App. Div. 875.

Prejudicial error held not shown
N.Y.—Hoffman v. Shad, 224 N.Y.S. 722, 221 App.Div. 668.

63. Instruction held proper
Ill.—Elliott v. Congress Hotel, 41 N. E.2d 330, 314 Ill.App. 287.

64. Instruction held erroneously refused
N.Y.—Jean v. Algonquin Hotel Co., 15 N.Y.S.2d 759, 258 App.Div. 127.

Instruction held erroneous
Or.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.

65. Instructions held proper or not erroneous
Mo.—Jenkins v. Missouri State Ins. Co., 69 S.W.2d 666, 334 Mo. 941.
Utah.—Sutton v. Otis Elevator Co., 249 P. 437, 68 Utah 85.
Wash.—Holm v. Investment & Securities Co., 79 P.2d 708, 195 Wash. 52.

66. Instruction held proper
Cal.—Marr v. Whistler, 193 P. 600, 603 Cal.App. 364.

67. Instructions held proper
Mo.—Livesay v. Ambassador Operating Co., App., 92 S.W.2d 961.

Instructions held erroneous
Ky.—Ledington v. Williams, 78 S.W. 2d 790, 257 Ky. 599.
Mo.—Livesay v. Ambassador Operating Co., App., 92 S.W.2d 961.
Okl.—Mayo Hotel Co. v. Danciger, 288 P. 309, 143 Okl. 196.

68. Instruction held erroneously refused
N.Y.—Jean v. Algonquin Hotel Co., 15 N.Y.S.2d 759, 258 App.Div. 127.

Instructions held erroneous or properly refused
U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253—MacLaughlin v. Hull, C. C.A.Wash., 87 F.2d 641.
N.M.—Snodgrass v. Turner Tourist Hotels, 109 P.2d 775, 45 N.M. 50.
Or.—Scholl v. Belcher, 127 P. 968, 63 Or. 310.

69. Definition of "stairway"
In action by inn luncheon guest for injuries sustained in fall on steps leading to platform at entrance of dining room, instruction defining "stairway" as a series of steps ascending or descending to different level, and charging that if steps involved constituted stairway within State Housing Act, failure of innkeeper to maintain handrails as required by law was negligence, it was held not error as charging that steps involved constituted stairway.—McStay v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 43 P.2d 560, 5 Cal.App.2d 595.

Abatement of nuisance
In action against hotel by pedestrian whom others pushed against taxicab when seeking to avoid bag containing water which, among numerous other objects, was thrown from hotel during three-day convention, instruction that repeated falling of objects from building into streets, interfering with use thereof on numerous occasions, constitutes public nuisance, was held not improper, although unnecessary, since under both parties' evidence court could have told jury that public nuisance existed; instruction authorizing recovery on finding that hotel's negligent failure to abate nuisance caused injury was held sufficient, and such instruction, together with instruction that repeated falling of objects into streets constitutes public nuisance, was not objectionable as departing from theory of negligence pleaded in petition.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.

70. Mich.—Toutloff v. King, 5 N.W. 2d 542, 302 Mich. 689.

71. U.S.—Parkes v. Seasongood, C.C. R.I., 152 F. 583.
Injury to good name of hotel, boarding or lodging house as nuisance, see the C.J.S. title Nuisances § 19, also 46 C.J. p 680 note 96.

72. U.S.—Parkes v. Seasongood, supra.
32 C.J. p 566 note 65.

he liable for an injury to the hotel keeper's business which is not the proximate result of the acts done or permitted by him.[73]

§ 25. Wrongful Entry of Guest's Room

After a guest has been assigned to a room he is entitled to its exclusive occupancy for all lawful purposes subject only to the right of the innkeeper to enter the room at proper times for proper purposes; and for any wrongful invasion of this right of privacy the innkeeper is liable in damages.

An innkeeper is bound to respect and give reasonable attention to the privacy of a guest,[74] and after a person has been received as a guest and assigned to a room he is entitled to the exclusive use thereof[75] for all proper and lawful purposes,[76] and at all times until it is vacated[77] on his ceasing to be a guest.[78] The right of the guest is subject only to the right of the innkeeper, his agents and servants, to enter the room at proper times for proper purposes,[79] as when necessary in the proper and reasonable discharge of their duties,[80] either in the course of the general conduct of the inn[81] or on the happening of some unanticipated, controlling emergency;[82] and these entries by the innkeeper and his employees must be at such times and in such manner as are consistent with the rights of the guest.[83]

There is a right on the part of the guest to decent, respectful, and considerate treatment at the hands of the innkeeper and his servants,[84] and a corresponding obligation on the part of the innkeeper that neither he nor his servants shall abuse or insult the guest or indulge in any speech or conduct that may unnecessarily subject him to physical discomfort or distress of mind.[85] Hence, where the innkeeper, his servants, or persons under his control or acting under his orders, without justification or excuse, enter the room of a guest while it is occupied by him and make unfounded charges of immorality against him, or engage in other speech or conduct that is abusive, insulting, or wanting in ordinary respect and decency, the guest has a right of action against the innkeeper,[86] which he may enforce by an action either in contract or in tort,[87] and may recover such damages as will compensate him for the injuries which are the direct effects of the wrongful acts,[88] including damages not only for the unwarranted disturbance of his right of privacy,[89] but also for the injury to his feelings resulting from the humiliation,[90] for physical ills and pains which were caused by the wrongs[91] or

73. U.S.—Parkes v. Seasongood, supra.
32 C.J. p 566 note 66.

74. N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.
32 C.J. p 567 note 78.

75. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 28, 214 Ala. 396, citing **Corpus Juris.**
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.
32 C.J. p 566 note 68.

76. Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499.
N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.

77. Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499.

78. N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.

79. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 28, 214 Ala. 396, citing **Corpus Juris.**
Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.
32 C.J. p 566 note 73.

80. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.
32 C.J. p 566 note 74.

81. La.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.
Pa.—Wolk v. Pittsburgh Hotels Co., 131 A. 537, 284 Pa. 545, 42 A.L.R. 1081.
32 C.J. p 566 note 75.

82. N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.
32 C.J. p 567 note 76.

83. Mont.—Jones v. Shannon, 175 P. 882, 55 Mont. 225.
N.Y.—De Wolf v. Ford, 86 N.E. 527, 193 N.Y. 397, 127 Am.S.R. 969, 21 L.R.A.,N.S., 860, reversing 104 N.Y.S. 876, 119 App.Div. 808.

84. U.S.—Emmke v. De Silva, C.C.A. Mo., 293 F. 17.
Mo.—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910.
32 C.J. p 567 note 79.

85. U.S.—Emmke v. De Silva, C.C.A. Mo., 293 F. 17.
32 C.J. p 567 note 80.
Liability of innkeeper for assault and battery see supra § 22.

86. U.S.—Emmke v. De Silva, supra.
La.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.
32 C.J. p 567 note 81.
Innkeeper's suspicion no defense
Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.

87. U.S.—Emmke v. De Silva, C.C.A. Mo., 293 F. 17.
32 C.J. p 567 note 82.

88. Wis.—Meshane v. Second St. Co., 222 N.W. 320, 197 Wis. 382.
32 C.J. p 567 note 83.
Punitive damages were held not recoverable for acts of hotel detective in pushing guest aside when opening door to her room.—Meshane v. Second St. Co., 222 N.W. 320, 197 Wis. 382.
Damages held excessive
La.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.
N.Y.—Hurd v. Hotel Astor Co., 169 N.Y.S. 359, 182 App.Div. 49.

89. Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499.

90. U.S.—Emmke v. De Silva, C.C.A. Mo., 293 F. 17.
32 C.J. p 567 note 85.
Punitive damages
Pa.—Kalo & Sullivan v. William Penn Hotel Co., 86 Pa.Super. 359.

91. N.Y.—Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 228 N.Y. 106, affirming 168 N.Y.S. 131, 181 App.Div. 61.
32 C.J. p 567 note 86.

were the direct effects of the mental distress and anguish,[92] and also for any unlawful restraint of his liberty.[93] On the other hand, there can be no recovery where the incident which is the subject of the action was brought about solely by the violation by plaintiff and her husband of a reasonable rule or regulation adopted by defendant.[94]

The rulings on such matters as the pleadings,[95] issues, proof, and variance,[96] evidence,[97] and trial[98] in actions of this nature are in accord with those made in civil actions generally.

Inferences from register. The proprietor of a hotel is charged with knowledge of the sex and identity of guests assigned to particular rooms;[99] he is not justified in intruding on their privacy by assuming, contrary to the fact, that they are not registered,[1] or by drawing false inferences from the character of their signatures on the register.[2] However, he is not put on notice, by their names on the register, of the relation existing between two guests registering on different days and assigned to different rooms.[3]

§ 26. Compensation and Lien

a. Right and liability in general
b. Securing and enforcing right

a. Right and Liability in General

An innkeeper can charge only a reasonable compensation and he must usually perform his whole obligation before being entitled to it.

An innkeeper may charge for entertaining a guest at rates made by the innkeeper,[4] or by agreement of the parties,[5] or, in the absence of agreement, reasonable compensation.[6] An undertaking to board and lodge a guest implies an engagement to pay the usual and reasonable attentions to his health and comfort without extra charge therefor,[7] but not to provide the services of a nurse in a severe and protracted illness.[8]

Before being entitled to compensation the innkeeper or boardinghouse keeper must perform his whole obligation.[9] If the obligation is to furnish both room and board, the innkeeper cannot recover compensation, although he furnishes the room, if he has failed to provide proper board,[10] but, although the innkeeper is forbidden by law to recover for liquor he has furnished to his guest, he may nevertheless recover the amount due for board.[11] Under some circumstances, compensation may be recovered for a period of time when the guest was not present, as where the guest had made a contract for a definite time,[12] or where he was temporarily absent and a rule of the innkeeper provides for a reasonable charge in such cases.[13] However, where a guest is removed from the premises by the innkeeper,[14] or where a guest or boarder leaves an inn, because of its unsanitary condition, although under an agreement to remain,[15] the innkeeper may recover only for the time of the actual occupancy of the guest or boarder, and of course a boardinghouse keeper cannot recover compensation for a period of time after he has closed the house, even on a contract for board covering that period.[16]

By statute in some jurisdictions, unless a person is an innkeeper, he cannot recover for entertain-

92. N.Y.—Boyce v. Greeley Square Hotel Co., supra.

93. Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499.

94. N.Y.—Hurd v. Hotel Astor Co., 169 N.Y.S. 359, 182 App.Div. 49.

95. La.—Moody v. Kenny, 97 So. 21, 153 La. 1007, 29 A.L.R. 474.
32 C.J. p 567 note 90.

96. N.Y.—Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 228 N.Y. 106, affirming 168 N.Y.S. 191, 181 App.Div. 61.
32 C.J. p 567 note 91.

97. Wis.—Meshane v. Second St. Co., 222 N.W. 320, 197 Wis. 382.
32 C.J. p 567 note 92.

Admissibility
Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.

Evidence held sufficient
U.S.—Emmke v. De Silva, C.C.A.Mo., 293 F. 17.
Ga.—Newcomb Hotel Co. v. Corbett, 108 S.E. 309, 27 Ga.App. 365.

98. Ala.—Dixon v. Hotel Tutwiler Operating Co., 108 So. 26, 214 Ala. 396.
32 C.J. p 567 note 93.

Instructions
Ala.—Dixon v. Hotel Tutwiler Operating Co., supra.
Pa.—Kalo & Sullivan v. William Penn Hotel Co., 86 Pa.Super. 359.

99. Ga.—Newcomb Hotel Co. v. Corbett, 108 S.E. 309, 27 Ga.App. 365.

1. Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499.

2. Ga.—Newcomb Hotel Co. v. Corbett, 108 S.E. 309, 27 Ga.App. 365.

3. N.Y.—Hurd v. Hotel Astor Co., 169 N.Y.S. 359, 182 App.Div. 49.
32 C.J. p 567 note 97.

4. Pa.—Whalley v. Toddington, 13 Phila. 2.
32 C.J. p 568 note 99 [a].
Statutory regulation of rates, or posting thereof see supra § 5.

5. Pa.—Shoemaker v. Beaver, 42 Leg.Int. 511.
32 C.J. p 568 note 1.

6. Ga.—Baldwin v. Webb, 49 S.E. 265, 121 Ga. 416.
Ky.—Kemper v. Asher's Adm'x, 114 S.W.2d 525, 272 Ky. 461.

7. Del.—Kennard v. Hobson, 6 Del. 36.

8. Del.—Kennard v. Hobson, supra.

9. N.Y.—Wilson v. Martin, 1 Den. 602.

10. N.Y.—Wilson v. Martin, supra.

11. Pa.—Chase v. Burkholder, 18 Pa. 48—Scattergood v. Waterman, 2 Miles 323.

12. La.—Donlin v. Pierce, 133 So. 178, 16 La.App. 24.
32 C.J. p 568 note 11.

13. N.Y.—Smith v. Keyes, 2 Thomps. & C. 650.

14. Cal.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

15. Me.—Williams v. Sweet, 110 A. 316, 119 Me. 228, 10 A.L.R. 121.
32 C.J. p 568 note 13.

16. N.Y.—Kohn v. Geist, 168 N.Y.S. 21.

ment furnished in the absence of an express agreement for compensation.[17]

b. Securing and Enforcing Right

(1) Innkeepers

(2) Boardinghouse and lodginghouse keepers

(1) Innkeepers

(a) Actions

(b) Lien

(a) Actions

An innkeeper may enforce his charges by an action in the proper form.

An innkeeper may enforce his charges by an action in the proper form.[18] Where the action is brought on the implied promise of the guest, the innkeeper must prove the reasonable value of the entertainment furnished,[19] and, under some statutes, he must also prove his status as an innkeeper.[20] In such action, the guest may recoup the value of goods lost from his rooms.[21] The rulings on such matters as the pleadings,[22] evidence,[23] and trial[24] in actions of this nature are in accord with those made in civil actions generally.

(b) Lien

aa. In general

bb. Duration

cc. Property covered

dd. Charges secured

ee. Care and use of property detained

ff. Enforcement

aa. In General

Both at common law and under modern statutes an innkeeper is entitled to a lien on the effects of his guests for the reasonable charges for their entertainment.

Both at common law,[25] and under statutory provisions,[26] an innkeeper is entitled to a lien on the effects of guests for the amount of the reasonable charges for their entertainment. This extraordinary privilege corresponds to, and is concurrent with, the extraordinary liabilities which the law imposes on the innkeeper.[27] The lien is not created by a contract, but by law;[28] the innkeeper, being obliged by law to receive the guest, as considered

17. Ky.—Rice v. Meade, 272 S.W. 415, 209 Ky. 173—Snowden v. Snowden, 96 S.W. 922, 29 Ky.L. 1112—Ramsey v. Keith, 76 S.W. 142, 25 Ky.L. 582.

18. Me.—Williams v. Sweet, 110 A. 316, 119 Me. 228, 10 A.L.R. 121.
32 C.J. p 568 note 20.
Enforcement of lien see infra subdivision b (1) (b) ff of this section.

Rent represented by note
Where owner of apartment building accepted from occupants of apartment a note payable in one year in payment of rent arrearage, owner in action to recover possession of premises could not, before note became payable, recover judgment for amount of rent represented by note.—Roberts v. Casey, 93 P.2d 654, 36 Cal.App.2d Supp. 767.

19. N.Y.—Roche v. Road Drivers' Ass'n, 96 N.Y.S. 205.

20. Ky.—Rice v. Meade, 272 S.W. 415, 209 Ky. 173—Snowden v. Snowden, 96 S.W. 922, 29 Ky.L. 1112—Ramsey v. Keith, 76 S.W. 142, 25 Ky.L. 582.

21. Mass.—Burbank v. Chapin, 2 N.E. 934, 140 Mass. 123.
Liability of innkeeper for loss of guest's goods generally see supra §§ 12–21.

22. Tex.—McDaniel v. Turner, Civ. App., 269 S.W. 496.

23. Ill.—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64.
32 C.J. p 568 note 21 [a].

Exhibits
Pa.—Hotel Redington v. Guffey, 25 A.2d 773, 148 Pa.Super. 502.

24. **Questions for jury**
Mass.—Barclay Park Corporation v. Bancroft, 43 N.E.2d 1, 311 Mass. 747.
Tex.—Jordan v. Junkin, Civ.App., 83 S.W.2d 1045.

25. Ala.—Ruff v. Hanson, 133 So. 716, 222 Ala. 676.
Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 511, 205 Iowa 736, 56 A.L.R. 1098, citing **Corpus Juris.**
Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 550, 247 Mich. 226, quoting **Corpus Juris.**
32 C.J. p 568 note 25.

26. Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 511, 205 Iowa 736, 56 A.L.R. 1098, citing **Corpus Juris.**
N.Y.—In re Aldrich's Estate, 233 N.Y.S. 676, 133 Misc. 715.
32 C.J. p 569 note 26.

Apartment hotel
(1) May be within the statutes.—McMann v. Beaux Arts Apartments, 262 N.Y.S. 342, 146 Misc. 833.

(2) However, such a statute has been held inapplicable when the apartment was occupied under a yearly lease creating the relation of landlord and tenant.—Kuszewska v. Steiger Hotel Operating Co., 272 N.Y.S. 659, 152 Misc. 80, affirmed 279 N.Y.S. 733, 244 App.Div. 709.

A hospital is not entitled to an innkeeper's statutory lien under such a statute.—Hull Hospital v. Wheeler, 250 N.W. 637, 216 Iowa 1394.

Statutes held not invalid
Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.
Mo.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 332 Mo. 749, transferred, see Lines Music Co. v. Holt, App., 48 S.W.2d 92, and dissenting opinion 61 S.W.2d 326, 332 Mo. 749.

27. Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 550, 247 Mich. 226, quoting **Corpus Juris.**
Mo.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 33, 332 Mo. 749, quoting **Corpus Juris,** transferred, see Lines Music Co. v. Holt, App., 48 S.W.2d 92, and dissenting opinion 61 S.W.2d 326, 332 Mo. 749.
32 C.J. p 569 note 27.

28. Ala.—Semple School for Girls v. Yielding, 80 So. 158, 16 Ala.App. 584.
Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.
Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 550, 247 Mich. 226, quoting **Corpus Juris.**
Mo.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 33, 332 Mo. 749, quoting **Corpus Juris,** transferred see Lines Music Co. v. Holt, App., 48 S.W.2d 92, and dissenting opinion 61 S.W.2d 326, 332 Mo. 749.

supra § 9, is given the lien by the law as a protection.[29] Consequently an innkeeper may maintain his lien even against a guest who is not legally capable of making a binding contract.[30]

It is essential to the existence of the lien that the goods on which it is claimed should have been brought to the inn by a person coming in the character of a guest,[31] but it is not necessary that the guest should in all cases be the owner of the goods, as considered infra subdivision b (1) (b) cc of this section.

bb. Duration

Where the lien of an innkeeper has once attached to the goods of a guest, it ordinarily continues until the innkeeper voluntarily surrenders them to the guest or the debt is satisfied.

Where the lien of an innkeeper has once attached to the goods of a guest, it continues wherever they may be taken by the innkeeper,[32] even though they are taken by him into another state, the laws of which would not create such a lien.[33] Although it has been held that the innkeeper may allow the guest to take the property temporarily without parting with his lien,[34] ordinarily the lien is at an end when the innkeeper voluntarily delivers the goods to the guest,[35] and he cannot afterward retake the property or assert the lien,[36] unless he was induced to give up the goods by fraud,[37] in which case he may recover them and the lien will again attach.[38] However, the surrender of the property to a prosecuting attorney for use as evidence does not constitute a loss of the lien, since it would be presumed that his custody was lawful and the surrender was involuntary.[39]

The lien is of course destroyed by payment or satisfaction of the debt,[40] or, it is held, where the guest has a right of set-off equaling or exceeding the amount of the charges covered by the lien;[41] but the lien is not lost by the innkeeper suing the guest and attaching the goods held.[42] However, an existing lien for accrued rent is not waived by the acceptance of a guest's check in payment for current rent,[43] or by the grant of more than the usual time to pay the bill[44] in the absence of evidence warranting such an inference.[45] It has also been held that the lien is not waived or lost by a failure to assert it on refusing to deliver the goods to a chattel mortgagee when possession was demanded under the mortgage,[46] or by a promise to send home the subject of the lien, where the consideration therefor is void.[47]

cc. Property Covered

The lien of an innkeeper extends generally to all property brought by the guest to the inn, including property not belonging to the guest when the innkeeper was either ignorant of the true ownership or knew that the guest had lawful possession of it.

While the lien of an innkeeper extends generally to all property, and each article thereof, brought by the guest to the inn,[48] it cannot be exercised over the person of the guest.[49]

29. Ala.—Semple School for Girls v. Yielding, 80 So. 158, 16 Ala.App. 584.
Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 511, 205 Iowa 736, 56 A.L.R. 1098, citing **Corpus Juris.**
Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 550, 247 Mich. 226, quoting **Corpus Juris.**

30. Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, supra, quoting **Corpus Juris.**
Mo.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 33, 332 Mo. 749, quoting **Corpus Juris,** transferred see, Lines Music Co. v. Holt, App., 48 S.W.2d 92, and dissenting opinion 61 S.W.2d 326, 332 Mo. 749.
32 C.J. p 569 note 32.

31. Colo.—Wall v. Garrison, 19 P. 469, 11 Colo. 515.
32 C.J. p 569 note 33.
Lien on goods of boarder see infra subdivision b (2) (b) of this section.
Lien for care of horses
Mich.—Elliott v. Martin, 63 N.W. 525, 105 Mich. 506, 55 Am.S.R. 461.
32 C.J. p 569 notes 36, 37.

32. N.H.—Jaquith v. American Express Co., 60 N.H. 61.

33. N.H.—Jaquith v. American Express Co., supra.

34. Tenn.—Caldwell v. Tutt, 10 Lea 258, 43 Am.R. 307.

35. Ga.—Brown v. Harmon, 1 S.E.2d 33, 59 Ga.App. 373—Turner v. Priest, 171 S.E. 881, 883, 48 Ga.App. 109, citing **Corpus Juris.**
32 C.J. p 569 note 42.

36. Ga.—Brown v. Harmon, 1 S.E.2d 33, 59 Ga.App. 373—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.
32 C.J. p 569 note 43.

37. Wis.—Manning v. Hollenbeck, 27 Wis. 202.

38. Wis.—Manning v. Hollenbeck, supra.

39. Ohio.—M. & M. Hotel Co. v. Nichols, App., 32 N.E.2d 463.

40. Colo.—Hanlin v. Walters, 34 P. 686, 3 Colo.App. 519.

41. Colo.—Hanlin v. Walters, supra.

42. W.Va.—Lambert v. Nicklass, 31 S.E. 951, 45 W.Va. 527, 72 Am.S.R. 828, 44 L.R.A. 561.

43. Colo.—Davis v. Brinkhouse Hotel Co., 219 P. 1074, 74 Colo. 199.

44. N.Y.—People, on Complaint of Klamt v. Loeffler, 276 N.Y.S. 698, 153 Misc. 781.

45. N.Y.—People, on Complaint of Klamt v. Loeffler, supra.

46. N.Y.—Corbett v. Cushing, 4 N.Y.S. 616, 15 Daly 170.

47. Me.—Danforth v. Pratt, 42 Me. 50.

48. Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 550, 247 Mich. 226, quoting **Corpus Juris.**
32 C.J. p 570 note 59.
Property exempt from execution as subject to innkeeper's lien see Exemptions § 89.
Automobile has been held not baggage within a lien statute although kept in the hotel garage.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
Horses employed in transporting mails
U.S.—U. S. v. Barney, D.C.Md., 24 F. Cas.No.14,525, 3 Hughes 545, 2 Wheel.Cr. 513.

49. N.Y.—Grinnell v. Cook, 3 Hill 485, 38 Am.D. 663.
32 C.J. p 570 note 61.

Except in jurisdictions where the rule has been modified or abrogated by statute,[50] the rule at common law and under some statutes is that the lien of an innkeeper may attach to goods which are not the property of the guest but which were brought by him to the inn and were received by the innkeeper in his capacity as such without knowledge of their true ownership[51] or with knowledge that while the title is in another, yet that the guest as agent, servant, or otherwise, is in lawful possession thereof.[52] The rule has been applied even to stolen property,[53] and to property, such as pianos, which a traveler does not ordinarily carry with him as a part of his luggage.[54] On the other hand, where goods are brought to the inn with notice or knowledge on the part of the innkeeper that they are the property of a third person, no lien attaches,[55] except under a statute extending the lien to property under the control of a guest,[56] but even under such statutes it has been held that the lien does not extend to stolen property.[57]

Persons not guests or not chargeable. The right of an innkeeper to a lien does not extend to the property of persons who are not guests of the inn,[58] and where a person goes to an inn under such circumstances that he is not chargeable because the bill is to be paid by another, the goods of the guest who is not chargeable cannot be held on lien.[59]

dd. Charges Secured

The lien operates to secure the payment of the charges for whatever the guest has ordered and the innkeeper has furnished, including reasonable expenditures in keeping the property held under the lien.

The innkeeper's lien operates to secure the payment of the charges for whatever the guest has ordered and the innkeeper has furnished,[60] and where the keeping of the property held under the lien involves expense, the lien covers reimbursement of reasonable expenditures in that respect.[61] However, it has been held that an innkeeper has no lien for storage charges incurred in caring for deceased tenant's property.[62] Also, an innkeeper has no lien for money loaned to his guest, unless the guest is an infant and the money borrowed by him was expended for necessaries.[63]

ee. Care and Use of Property Detained

The innkeeper must take due care of the goods he holds on lien.

An innkeeper holding goods on lien is bound to take due care of the goods, which has been said to be extraordinary care when he is holding them by an innkeeper's lien.[64] He may make reasonable use of the property, if such use is beneficial to the owner, as for instance in the case of live animals, but in that case he is bound to account for the value of the use.[65] It has been held that the principles of

50. Cal.—Rudolph Wurlitzer Co. v. Farb, 6 P.2d 358, 120 Cal.App.Supp. 773.
32 C.J. p 570 notes 66, 67.

51. Ill.—Baldwin Piano Co. v. Congress Hotel, 243 Ill.App. 118.
Ohio.—M. & M. Hotel Co. v. Nichols, 32 N.E.2d 463, 467, quoting **Corpus Juris.**
32 C.J. p 570 note 68.

In Missouri

(1) An early statute was held to limit the lien in favor of innkeepers to the property belonging to a guest. —Mercer v. Lowery, 181 S.W. 1050, 193 Mo.App. 106—Wyckoff v. Southern Hotel Co., 24 Mo.App. 382.

(2) However, a later statute, covering to some extent the same subject matter, was held to extend the right to a lien so that it exists practically as it does at common law, and since the statute is no broader than the common law, it was held not invalid.—L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 332 Mo. 749, transferred, see Lines Music Co. v. Holt, App., 48 S.W.2d 92, and dissenting opinion L. E. Lines Music Co. v. Holt, 61 S.W.2d 326, 332 Mo. 749.

52. Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.
32 C.J. p 570 note 69.

Salesman's samples

Ill.—National Malted Food Corporation v. Crawford, 254 Ill.App. 415.

53. Ky.—Black v. Brennan, 5 Dana 310.
32 C.J. p 570 note 70.

54. Ill.—Baldwin Piano Co. v. Congress Hotel, 243 Ill.App. 118.
32 C.J. p 570 note 71.
Priority between chattel mortgage lien and innkeeper's lien see Chattel Mortgages § 302.

55. N.C.—Pate Hotel Co. v. Blair, 177 S.E. 330, 207 N.C. 464.
32 C.J. p 571 note 72.

56. Iowa.—Brown Shoe Co. v. Hunt, 72 N.W. 765, 103 Iowa 586, 64 Am. S.R. 198, 39 L.R.A. 291.
Ohio.—M. & M. Hotel Co. v. Nichols, App., 32 N.E.2d 463, 467, quoting **Corpus Juris.**

Construction of statute

Ohio.—M. & M. Hotel Co. v. Nichols, App., 32 N.E.2d 463.

57. Ohio.—M. & M. Hotel Co. v. Nichols, App., 32 N.E.2d 463.

58. Iowa.—Brin v. Sidenstucker, 8 N.W.2d 423, 145 A.L.R. 359.

Person in company of guest

The innkeeper has no right to detain the baggage of a person in the company of the guest who is in default.—Kennedy v. Muller, 1 Wkly. N.C., Pa. 445.

59. N.J.—Baker v. Stratton, 19 A. 661, 52 N.J.Law 277.
32 C.J. p 571 note 75.

Husband and wife

Where a wife, or the husband and wife, are accorded accommodation at an inn, but the contract is made with, or credit is extended to, the husband alone, the goods of the wife are not subject to the lien.—Mercer v. Lowery, 181 S.W. 1050, 193 Mo. App. 106, 109—32 C.J. p 571 note 73.

60. Pa.—Maddox v. Cambridge Springs Co., 11 Pa.Dist. 358, 26 Pa. Co. 356.
32 C.J. p 571 note 78.

61. Ky.—Black v. Brennan, 5 Dana 310.
32 C.J. p 571 note 79.

62. N.Y.—In re Aldrich's Estate, 233 N.Y.S. 676, 133 Misc. 715.

63. Ky.—Watson v. Cross, 2 Duv. 147.

64. Colo.—Dutton Hotel Co. v. Fitzpatrick, 193 P. 549, 69 Colo. 229.
32 C.J. p 571 notes 86, 87.

65. Vt.—Alvord v. Davenport, 43 Vt. 30.

the law of bailment, as they apply to negligent breach of duty arising out of an implied contract of bailment, discussed in Bailments § 26, are not affected by the statutory lien given to innkeepers,[66] and a hotel selling property of a guest under its lien has been held liable for other property of the guest which was not offered for sale, was not returned to the guest, and had disappeared.[67]

ff. Enforcement

At common law an innkeeper cannot sell or pledge property held by him under a lien, the proper procedure being by a bill in equity to foreclose it, but under statutes various methods of enforcing the lien have been provided.

At common law an innkeeper cannot sell[68] or pledge[69] property held by him under a lien. The proper method of enforcing the lien, in the absence of statute, is by a bill in equity to foreclose it; and on such a bill the court may order the sale of the goods.[70] The bill or petition must state facts sufficient to entitle plaintiff to a lien,[71] including an allegation that he is the keeper of an inn, hotel, or tavern.[72] The lien may be set up in answer to a suit in replevin brought by the owner of the goods.[73]

Under statute. The ineffectiveness of the innkeeper's lien for the purpose of enforcing his charges against delinquent guests has been remedied by statutes authorizing the sale of goods held under such a lien.[74] The methods of enforcing the lien vary according to the provisions of the particular statute,[75] and such statutes have been held, sometimes by virtue of express provision therein, not to preclude any other existing remedy for the enforcement of innkeepers' liens.[76] Although stolen property brought to an inn by a guest may be subject to the innkeeper's lien, such property is not within the provision of a statute giving innkeepers power to sell under their lien,[77] and under some statutes, if property subject to the lien does not belong to the guest it cannot be sold summarily after notice, but only on execution to satisfy a judgment for the hotel charges.[78]

(2) Boardinghouse and Lodginghouse Keepers

(a) Actions

(b) Lien

(a) Actions

The rules applicable in civil actions generally apply in actions by a boardinghouse keeper to recover for board and lodging.

In an action by a boardinghouse keeper to recover for board and lodging, it is essential to a recovery that plaintiff prove the amount which the accommodations furnished were reasonably worth,[79] or the usual and customary rates charged by plaintiff,[80] or an express agreement by defendant to pay a certain rate.[81] General rules apply to issues, proof and variance,[82] and evidence[83] in such actions.

(b) Lien

Boardinghouse and lodginghouse keepers had no lien at common law but many modern statutes give them this privilege and provide suitable means of enforcement.

At common law, the keepers of boardinghouses, lodginghouses, and like establishments, as well as innkeepers, who with regard to particular patrons occupy the position of keepers of boardinghouses or lodginghouses not being subject to the extraordinary liabilities imposed on innkeepers, are not entitled to the corresponding privilege of a lien on the effects of their boarders or lodgers,[84] but the tendency of modern legislation has been to extend this privilege, and a lien is now given by statute in

66. N.C.—Wells v. West, 194 S.E. 313, 212 N.C. 656.

67. N.Y.—Lane v. Hotel Investors, 25 N.Y.S.2d 300, reversed on other grounds 29 N.Y.S.2d 364.

68. Mo.—Case v. Fogg, 46 Mo. 44.
32 C.J. p 571 note 90.

69. Mich.—People v. Husband, 36 Mich. 306.

70. N.Y.—Fox v. McGregor, 11 Barb. 41.
32 C.J. p 571 note 92.

71. Ky.—Southwood v. Myers, 3 Bush 681.

72. Ky.—Southwood v. Myers, supra.

73. Iowa.—Pollock v. Landis, 36 Iowa 651.

74. Pa.—Gump v. Showalter, 43 Pa. 507.
32 C.J. p 571 note 97.

75. Cal.—Rudolph Wurlitzer Co. v. Farb, 6 P.2d 358, 120 Cal.App.Supp. 773.
32 C.J. p 571 note 1.

76. Mich.—Polk v. Melenbacker, 99 N.W. 867, 136 Mich. 611.

77. Pa.—Gump v. Showalter, 43 Pa. 507.

78. Cal.—Rudolph Wurlitzer Co. v. Farb, 6 P.2d 358, 120 Cal.App. Supp. 773.
Right of owner to assert claim
Cal.—Rudolph Wurlitzer Co. v. Farb, supra.

79. Ga.—Baldwin v. Webb, 49 S.E. 265, 121 Ga. 416.

80. Ga.—Baldwin v. Webb, supra.

81. Ga.—Baldwin v. Webb, supra.

82. Minn.—Doyle v. Swanson, 288 N. W. 152, 206 Minn. 56.

83. Ky.—Kemper v. Asher's Adm'x, 114 S.W.2d 525, 272 Ky. 461.
Presumption exists that boarder has agreed to pay regular and established rate of boardinghouse which has for some time been in existence.
—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 212.
Weight and sufficiency
La.—Donlin v. Pierce, 133 So. 178, 16 La.App. 24.
Miss.—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 212.

84. Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.
32 C.J. p 572 note 7.

many jurisdictions to the keepers of such houses,[85] and such statutes have been held constitutional,[86] except in so far as they attempt to confer a lien on the property of a third person.[87]

In order for the lien to attach, the person claiming it must be within the class of persons named in the statute,[88] and the person for whom the accommodations are furnished must be a boarder or lodger,[89] but it has been held immaterial whether the boarder is transient or permanent.[90] The statutory lien for board will not be extended to cover charges other than board.[91] The lien attaches as soon as the services are performed, although payment may be postponed by agreement until a future day.[92] It not only includes the right of detention of the property,[93] but the lien is lost if the boardinghouse keeper parts with his possession of it.[94] Also, it has been held that the lien of a boardinghouse keeper is released on tender of the amount due for board.[95]

Property of third person. Usually,[96] but not always,[97] the lien is limited, either by the terms or construction of the statute, to the property of the boarder or lodger and cannot be exercised on property of a third person brought to the house by the boarder or lodger as his own property. However, an existing lien on the property of a boarder is not terminated by a sale of the property by the boarder to a third person; it may operate to secure charges for board subsequently furnished while the property remains in the house and until notice of the sale is given the boardinghouse keeper.[98]

Property of married woman. A boardinghouse keeper has no lien on the effects of a wife, for a debt contracted by her husband alone for her or their board,[99] but the rule is otherwise where credit was extended to the wife,[1] or where by statute her property is chargeable with expenses of the family.[2] It has even been held that a pledge by a wife of her separate property for a board debt due from her husband for the board of both does not create a boardinghouse keeper's lien but gives rise at most to an equitable lien or charge on the property, which must be declared and enforced by an equitable action or counterclaim.[3]

Enforcement. The statutes usually provide a mode or modes of enforcing the lien given to boardinghouse keepers,[4] and, while it has been held that, where an adequate mode of enforcing it is prescribed, such mode of enforcement is exclusive of all others,[5] it has also been held that the same remedies afforded innkeepers are extended to keepers of boardinghouses.[6]

85. Conn.—Carroll v. Cooney, 163 A. 599, 116 Conn. 112.
Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.
La.—Davis v. Nicholson, App., 153 So. 340.
Mich.—Brams v. Briggs, 260 N.W. 785, 272 Mich. 38.
32 C.J. p 572 note 9.
Purpose of statute
Ala.—Ruff v. Hanson, 133 So. 716, 222 Ala. 676.
Construction of statute
Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.

86. Tenn.—Nance v. O. K. Houck Piano Co., 155 S.W. 1172, 128 Tenn. 1, Ann.Cas.1914D 834.

87. N.Y.—Van Laar v. Marchesini, 175 N.Y.S. 456, 107 Misc. 186.

88. Minn.—State v. Bowman, 279 N. W. 214, 202 Minn. 44.
32 C.J. p 572 note 13—8 C.J. p 1132 note 14 [f].
Statutes creating innkeepers' liens as inapplicable to warehousemen see the C.J.S. title Warehousemen and Safe Depositaries § 63, also 67 C. J. p 548 notes 68, 69.

89. Cal.—Roberts v. Casey, 98 P.2d 654, 36 Cal.App.2d Supp. 767.
Conn.—Carroll v. Cooney, 163 A. 599, 116 Conn. 112.
Iowa.—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 218 N.W. 510, 205 Iowa 736, 56 A.L.R. 1098.
Mich.—Brams v. Briggs, 260 N.W. 785, 272 Mich. 38.
32 C.J. p 572 note 14.
Pupil in a boarding school as guest or boarder within the statutory definition see C.J.S. title Schools and School Districts § 9, also 56 C.J. p 175 note 69.

90. N.Y.—Stewart v. McCready, 24 How.Pr. 62.

91. N.H.—Cross v. Wilkins, 43 N.H. 332.
32 C.J. p 572 note 16.

92. Mass.—Smith v. Colcord, 115 Mass. 70.

93. Ala.—Ruff v. Hanson, 133 So. 716, 222 Ala. 676.
Purpose of detention
The keeper of a boardinghouse does not in that capacity have a valid statutory lien on the property of a deceased boarder where in the first instance he held the property and claimed a lien, not for the purpose of securing payment for accommodations furnished, but rather for the purpose of withholding the property for the benefit of decedent's children.—Matter of Stiens, 113 N.Y.S. 1105, 60 Misc. 631.

94. Ga.—Brown v. Harmon, 1 S.E.2d 33, 59 Ga.App. 373—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.

95. N.Y.—Braun v. Eckstein, 128 N. Y.S. 1077.

96. Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.
32 C.J. p 572 note 20.

97. Pa.—Singer Mfg. Co. v. Flennigan, 7 Pa.Co. 45.

98. Mass.—Bayley v. Merrill, 10 Allen 360.

99. N.J.—Baker v. Stratton, 19 A. 661, 52 N.J.Law 277.
Wis.—Chickering-Chase Bros. Co. v. White, 106 N.W. 797, 127 Wis. 83.
30 C.J. p 923 note 84.

1. N.Y.—Birney v. Wheaton, 2 How. Pr.,N.S., 519.

2. Colo.—McDonnell v. Solomon, 170 P. 951, 64 Colo. 226.

3. Wis.—Chickering-Chase Bros. Co. v. White, 106 N.W. 797, 127 Wis. 83.

4. Ga.—Turner v. Priest, 171 S.E. 881, 48 Ga.App. 109.

5. Mo.—Coates v. Acheson, 28 Mo. App. 255.

6. Ala.—Ruff v. Hanson, 133 So. 716, 222 Ala. 676.

IV. OFFENSES

§ 27. By Innkeepers

Various acts or conduct on the part of innkeepers constitute penal offenses.

At common law, in addition to creating a right of action for damages, as considered supra § 10, the wrongful refusal by an innkeeper to entertain a traveler is a public offense for which the innkeeper may be indicted and fined,[7] and various laws have been enacted making certain acts or conduct by innkeepers a penal offense.[8] Thus, illegally keeping a public house without a license, or other breach of a public regulation by an innkeeper, is generally a penal offense,[9] and the punishment may be inflicted as often as the offense is repeated.[10]

It is no defense to a prosecution for keeping an inn without a license that defendant was ignorant of the fact that he had no license,[11] or, it is held, that he is merely the manager rather than the proprietor,[12] but it is a defense that he is a mere servant or agent.[13] However, the conviction of defendant for operating a rooming house without a license cannot be sustained when the undisputed evidence discloses that the house was operated by his wife in her name.[14] The fact that an innkeeper is not licensed is not a defense to a prosecution for exacting more than the established rates.[15]

An indictment drawn substantially in the language of the statute which embraces in its terms the material ingredients of the offense is sufficient.[16]

Hotel runners. Under a statute penalizing the diversion or attempt to divert any traveler or other person to another hotel, guilt is established when it is shown that there has been an attempt to divert.[17]

§ 28. By Guests, Boarders, or Lodgers

In some jurisdictions it is an offense for a person, with intent to defraud, to obtain accommodation at a public house without paying therefor, or to obtain credit by false pretenses, or to abscond or secretly remove his baggage without paying his bill.

In a number of jurisdictions it is made an offense by statute for a person, with the intent to defraud, to obtain food, lodging, or other accommodation at an inn, hotel, boardinghouse, rooming house, or restaurant without paying therefor, or to obtain credit by the use of false pretenses, or, after obtaining credit, to abscond without paying the charges against him.[18] While the validity of these statutes has been upheld[19] as not creating imprisonment for debt,[20] yet, being penal in their nature, they are subject to strict construction,[21] and will not be applied to persons, acts, or omissions not coming within their terms.[22]

A mere failure, refusal, or inability to pay does not constitute the offense contemplated by the statutes;[23] there must be an intent to defraud[24] existing at the time the board or other accommodation

7. Ky.—Watson v. Cross, 2 Duv. 147. 32 C.J. p 573 note 33.

8. Wash.—State v. Thomas, 287 P. 667, 156 Wash. 583.

Zoning laws

N.J.—Benequit v. Borough of Monmouth Beach, 13 A.2d 847, 125 N. J.Law 65.

Recovery of penalty

Some statutes provide that penalties may be recovered by overseers of the poor against innkeepers for nonobservance of the provisions of the statutes.—Olp v. Leddick, 14 N. Y.S. 41—32 C.J. p 573 note 36.

Statute invalid

A statute that provides for the imprisonment of a hotelkeeper for refusal to pay inspection fees is unconstitutional, as authorizing imprisonment for debt.

Iowa.—Hubbell v. Higgins, 126 N. W. 914, 148 Iowa 36, Ann.Cas. 1912B 822.

Wash.—State v. McFarland, 110 P. 792, 60 Wash. 98, 140 Am.S.R. 909.

9. R.I.—State v. Barrett, 38 A. 949, 20 R.I. 313.
32 C.J. p 573 note 34.

10. Me.—State v. Johnson, 65 Me. 362.

11. Ky.—Commonwealth v. Keathley, 82 S.W. 232, 26 Ky.L. 493.
32 C.J. p 573 note 39.

12. Ala.—Winter v. State, 30 Ala. 22.

13. Mass.—Commonwealth v. Lavery, 37 N.E. 884, 158 Mass. 13.
32 C.J. p 573 note 41.

14. Ga.—Jones v. City of Atlanta, 122 S.E. 642, 32 Ga.App. 40.

15. N.C.—State v. Wynne, 8 N.C. 451.

16. R.I.—State v. Barrett, 38 A. 949, 20 R.I. 313.
32 C.J. p 573 note 38.

17. N.Y.—People v. Boord, 23 N.Y. S.2d 792, 260 App.Div. 681, affirmed 35 N.E.2d 195, 285 N.Y. 806.

Entrapment

N.Y.—People v. Boord, supra.

18. Ark.—Garrett v. State, 275 S.W. 902, 169 Ark. 527.
N.C.—State v. Barbee, 122 S.E. 753, 187 N.C. 703.
32 C.J. p 573 note 43.

19. Ind.—Clark v. State, 84 N.E. 984, 171 Ind. 104, 16 Ann.Cas. 1229.
32 C.J. p 574 note 44.

20. Ala.—Ex parte King, 15 So. 524, 102 Ala. 132.
Minn.—State v. Benson, 10 N.W. 471, 28 Minn. 424.

21. Ill.—Hutchinson v. Davis, 58 Ill. App. 358.
N.C.—State v. McRae, 86 S.E. 1039, 170 N.C. 712.

22. Miss.—Robinson v. State, 100 So. 377, 135 Miss. 774, followed in McLendon v. State, 123 So. 852.
N.Y.—Cooper v. Schirrmeister, 26 N. Y.S.2d 668, 176 Misc. 474.
32 C.J. p 574 note 47.

Persons obtaining lodging for others

Ark.—Garrett v. State, 275 S.W. 902, 169 Ark. 527.

23. Miss.—Robinson v. State, 100 So. 377, 135 Miss. 774, followed in McLendon v. State, 123 So. 852.
N.C.—State v. Barbee, 122 S.E. 753, 187 N.C. 703.
32 C.J. p 574 note 48.

24. Miss.—Easterling v. State, 194 So. 289—Robinson v. State, 100 So. 377, 135 Miss. 774, followed in McLendon v. State, 123 So. 852.
N.C.—State v. Barbee, 122 S.E. 753, 187 N.C. 703.
Pa.—Commonwealth v. Cooper, 47 Dauph.Co. 249.
32 C.J. p 574 note 49.

is obtained;[25] and where false representations are relied on as the inducement for the furnishing of board, they must have been made before, rather than after, the board was obtained,[26] and must have been the means of obtaining it.[27]

Under some statutes it is a separate offense for a guest, boarder, or lodger secretly or surreptitiously to remove his baggage from the hotel, inn, boardinghouse, or lodginghouse where he is stopping without paying or satisfying the charges against him.[28] The object of these statutes is to protect the lien of the keeper of the house,[29] and an intent to defraud is not an element of the offense.[30] Where the baggage is openly removed, although the removal is not seen by the innkeeper or his servants, the offense is not committed.[31]

The indictment or complaint must state the elements of the offense under the statute,[32] but it need not allege that the board obtained was of any value,[33] or negative matters of defense.[34] Some statutes make certain acts prima facie evidence of an intent to defraud, such as refusal to pay on demand,[35] or surreptitious removal of baggage.[36] In some jurisdictions, in order to support a conviction there must be a showing that a copy of the law, printed in distinct type, was posted in the lobby, waiting room, or place most frequented by guests.[37]

§ 29. By Licensing Officials

Members of a licensing board are answerable criminally for a corrupt exercise of their power.

The members of a licensing board are answerable criminally for a corrupt exercise of their power to grant or refuse a license to an innkeeper.[38]

INNOCENCE. The absence of guilt.[1] While it has been said that there may be some ambiguity as to what the word means, innocence cannot be asserted of an action which violates existing law.[2]

It is the opposite of "guilt" see 39 C.J.S. p 416 note 39.

INNOCENT. Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections;[3] free from legal or specific wrong;[4] not injurious.[5]

Specifically, in construing maximum price regulations, the word "innocent," as applied to changes in manufacturing formulæ or to methods of manufacture, has been said to mean such changes or methods as do not result in circumvention or evasion of the established maximum price.[6]

Innocent purchaser. One who by an honest contract or agreement purchases property or acquires an interest therein, without knowledge or means of knowledge sufficient to charge him in law with notice of any infirmity in law in the title of the seller;[7] one who pays, or obligates himself to pay, the full purchase price of property to the vendor, with no notice of any claim or right to the property in another;[8] a person who purchases without notice, actual or constructive, of any infirmity, and pays a valuable consideration and acts in good faith.[9]

25. N.Y.—People v. Nicholson, 55 N.Y.S. 447, 25 Misc. 266.

26. Ala.—Chauncey v. State, 80 So. 403, 130 Ala. 71, 89 Am.S.R. 17.
Mo.—State v. Tull, 42 Mo.App. 324.

27. Ala.—Chauncey v. State, 80 So. 403, 130 Ala. 71, 89 Am.S.R. 17.
Mo.—State v. Kingsley, 18 S.W. 994, 108 Mo. 135—State v. Tull, 42 Mo. App. 324.

28. N.C.—State v. Hill, 81 S.E. 408, 166 N.C. 298.
32 C.J. p 574 note 53.

29. Ind.—State v. Engle, 58 N.E. 698, 156 Ind. 339.

30. N.C.—State v. Engle, supra—State v. Hill, 81 S.E. 408, 166 N.C. 298.

31. Ill.—Hutchinson v. Davis, 58 Ill.App. 358.

32. Miss.—Easterling v. State, 194 So. 289—Robinson v. State, 100 So. 377, 135 Miss. 774, followed in McLendon v. State, 123 So. 852.
32 C.J. p 574 note 54.

Indictment or information held sufficient
Kan.—State v. Ainsworth, 72 P.2d 962, 146 Kan. 665.
Mo.—State v. Turnidge, App., 93 S.W.2d 1031.
Pa.—Commonwealth v. Cooper, 47 Dauph.Co. 249.

33. Minn.—State v. Benson, 10 N.W. 471, 28 Minn. 424.

34. Mo.—State v. Turnidge, App., 93 S.W.2d 1031.

35. Ark.—Garrett v. State, 275 S.W. 902, 169 Ark. 527.
Pa.—Commonwealth v. Berryman, 72 Pa.Super. 479.

36. Ark.—Garrett v. State, 275 S.W. 902, 169 Ark. 527.
Mo.—State v. Turnidge, App., 93 S.W.2d 1031.
Pa.—Commonwealth v. Berryman, 72 Pa.Super. 479.

37. Ga.—Phillips v. State, 147 S.E. 777, 39 Ga.App. 540.

38. N.Y.—People v. Jones, 54 Barb. 311.

1. Black L.D.

2. U.S.—Shevlin-Carpenter Co. v. Minnesota, Minn., 30 S.Ct. 663, 666, 218 U.S. 57, 54 L.Ed. 930.

3. Black L.D.

4. Century D.

5. Eng.—Macfarlane v. Taylor, L.R. 1 H.L.Sc. 245.

6. U.S.—Brown v. Mars, Inc., C.C.A. 135 F.2d 843, 849.

7. Kan.—Burdg v. Scott, 208 P. 662 673, 111 Kan. 610.
32 C.J. p 575 note 9.

8. Mont.—Gallatin Valley Nat. Bank v. Ingle, 164 P. 535, 537, 53 Mont. 414.

9. N.C.—Lockridge v. Smith, 173 S.E. 36, 40, 206 N.C. 174.
Essential elements
(1) To constitute an innocent purchaser, there must be a purchase without notice, actual or construc-

It is a term analogous to "bona fide purchaser," defined in 11 C.J.S. p 389 note 64–p 390 note 89, and to "holder in due course," discussed in Bills and Notes § 301 et seq. For references to particular applications or specific uses of the phrase see 32 C.J. p 574 note 8 and consult the Descriptive-Word Index.

Other phrases employing the word are set out in the note.[10] Still other phrases as to which more recent adjudications have not been found see 32 C.J. p 575 notes 10–17.

INNOCENTLY. Artlessly; blamelessly; guilelessly; guiltlessly; harmlessly; in an innocent man-

tive, of the outstanding claim urged against the thing purchased, and there must have been the payment of a valuable consideration.—Lipsitz v. Rice, Tex.Civ.App., 233 S.W. 594, 597.

(2) "To constitute . . . [an innocent purchaser] three elements . . . [are] essential—valuable consideration, absence of notice, and good faith."—Houston Oil Co. v. Hayden, 135 S.W. 1149, 1152, 104 Tex. 175.

(3) "To be an innocent purchaser, the vendee, must, in good faith, pay a valuable consideration without notice of outstanding legal or equitable rights."

Mont.—Degenhart v. Cartier, 192 P. 259, 260, 58 Mont. 245.

Tex.—Tate v. Kramer, 23 S.W. 255, 257, 1 Tex.Civ.App. 427.

Held "innocent purchaser"

(1) One who acquired special improvement bonds after repeated inquiry by himself and former owners relative to future payment.—Prange v. City of Marion, 48 N.E.2d 980, 991, 319 Ill.App. 136.

(2) One who acquires title from the survivor of the community with the apparent legal title in fee simple to the land without notice of another's equitable rights therein, and without notice of facts sufficient to put him on inquiry.—Ashcroft v. Fleming, Tex.Civ.App., 168 S.W.2d 304, 308.

(3) Purchaser of oil and gas leasehold estate from a widow as community survivor, without notice of a claim that the land had been purchased with separate funds of the deceased husband.—Boyd v. Orr, Tex. Civ.App., 170 S.W.2d 829, 833.

(4) Where check representing proceeds of life policy was indorsed to insured's employer which executed its check to beneficiary after deducting insured's debt to employer, the employer thereby became an "innocent purchaser for value".—Renchie v. John Hancock Mut. Life Ins. Co., Tex.Civ.App., 174 S.W.2d 87, 90.

(5) Where grantee in security deed, under exercise of power of sale, became purchaser at such sale and failed to record sale, and thereafter grantee entered into a parol agreement of tenancy with original grantor who remained in actual possession, and grantor while thus in possession cut timber on the land and disposed of it to a third person who had no notice of sale under the power, such third person was an "innocent purchaser for value."—Beavers v. Reynolds Bros. Lumber Co., 24 S.E.2d 813, 814, 68 Ga.App. 858.

Held not "innocent purchaser"

(1) One who acquires title to certain lands by conveyance in consideration of love and affection from his mother is not an innocent purchaser, where such lands belonged to the community of his father and mother, and he had already inherited his father's interest subject to a parol trust therein.—Eaton v. Husted, Tex., 172 S.W.2d 493, 500.

(2) One who purchases at a voluntary sale from his debtor, and pays no money, but credits the amount of the consideration on a pre-existing debt, is not a bona fide purchaser for value.—Lipsitz v. Rice, Tex.Civ.App., 233 S.W. 594, 597.

(3) One who takes title with knowledge that another has an interest in the property.—Harper v. Davis, 172 S.W.2d 445, 447, 294 Ky. 603.

(4) "The purchaser at a sheriff's sale is not an innocent purchaser. He knows the limitations on the sheriff's power, and buys what the sheriff can sell, and no more." Brewer v. Warner, 182 P. 411, 413, 105 Kan. 168, 5 A.L.R. 385.

(5) Subsequent purchaser of a mortgage note which had been extinguished by payment made by a volunteer.—Reichwein v. McCarthy, 50 N.E.2d 440, 320 Ill.App. 238.

(6) Where evidence showed that defendant seeking to establish a trust in land was living on the land at time plaintiff acquired title thereto, plaintiff was not an "innocent purchaser".—Cluck v. Sheets, Tex. Civ.App., 171 S.W.2d 857, 860.

(7) Where owner of refreshment stand, by arrangement with chairman of property committee, moved stand to county land to try out location and thereafter realty was purchased by another who had observed stand on realty, such purchaser was not an "innocent purchaser" for value without notice of understanding between owner of stand and county.—Welter v. Capponi, 9 N.W.2d 115, 116, 242 Wis. 625.

10. Phrases construed

(1) "Innocent agent" see Criminal Law § 84 b, also 32 C.J. p 574 notes 5, 6.

(2) "Innocent and injured party."—Jones v. Jones, 235 S.W. 481, 482, 208 Mo.App. 632. See also Divorce § 123, as to plaintiff's burden of showing status as innocent and injured party.

(3) "Innocent and virtuous woman," within abduction statute, see Abduction § 12.

(4) "Innocent conveyance," a technical term in the English law of conveyancing used to designate such conveyances as may be made by a leasehold tenant without working a forfeiture.—Black L.D.

(5) "Innocent holder for value" affected by mistaken certification of check by bank see Banks and Banking § 376 a.

(6) "Innocent misrepresentation" see such C.J.S. titles as Contracts §§ 147–152, 160; Deeds §§ 56, 57; Fraud § 24; Guaranty § 32; Insurance § 473, also 32 C.J. p 1286 note 36–p 1290 note 72, §§ 476, 477, also 1 C.J. p 421 note 91–p 423 note 17, §§ 487–490, also 26 C.J. p 154 note 61–p 156 note 83, and §§ 595–607, also 37 C.J. p 449 note 6–p 470 note 19; Landlord and Tenant § 223, also 35 C.J. p 1160 note 82–p 1163 note 65; Mortgages § 141, also 41 C.J. p 433 note 20–p 435 note 47; Release § 26, also 53 C.J. p 1216 note 53–p 1217 note 59; Sales § 37, also 55 C.J. p 121 note 27–p 122 note 35; Subscriptions § 8, also 60 C.J. p 961 notes 15, 16; Vendor and Purchaser §§ 55–61, also 66 C.J. p 567 note 22–p 583 note 36, § 67, also 66 C.J. p 602 note 75–p 606 note 13; and consult the Descriptive-Word Index.

(7) "Innocent party" in divorce suit as entitled to preference in awarding custody of child see Divorce § 309 e.

(8) "Innocent possession," as not convertible in legal terminology with "lawful possession."—Milligan v. Brooklyn Warehouse & Storage Co., 68 N.Y.S. 744, 749, 34 Misc. 55.

(9) "Innocent suitors," authorized by statute to recover damages for personal injuries from sellers of intoxicating liquors held not to include automobile accident victims who had repeatedly purchased drinks for the driver and thus contributed to his intoxication from which their injuries resulted.—Pearson v. Renfro, 50 N.E.2d 598, 600, 320 Ill.App. 202.

(10) "Innocent wife," in connection with amount awarded for permanent alimony, see Divorce § 236 a.

ner.[11] The term has been distinguished from "knowingly."[12]

INNOMINATE. In the civil law, not named or classed; belonging to no specific class, hence ranking under a general head.[13]

"Innominate contracts" see Contracts § 10 in Pocket Parts.

INNONIA. In old English law, a close or inclosure.[14]

IN NOSTRA LEGE UNA COMMA EVERTIT TOTUM PLACITUM.[15]

INNOTESCIMUS. Latin, literally "We make known." A term formerly applied to letters patent, derived from the emphatic word at the conclusion of the Latin forms. It was also a species of exemplification of charters of feoffment or other instruments not of record.[16]

INNOVATE. To change or alter, by introducing something new; to remodel; to revolutionize.[17]

INNOVATION. A change effected by innovating; a change in customs, something new, and contrary to established customs, manners, or rights.[18]

In Scotch law, the exchange of one obligation for another, so as to make the second obligation come in the place of the first, and be the only subsisting obligation against the debtor.[19]

IN NOVO CASU, NOVUM REMEDIUM APPONENDUM EST.[20]

INNOXIARE. In old English law, to purge one of a fault and make him innocent.[21]

INNS OF CHANCERY and **INNS OF COURT.** See Inn ante p 1125 note 46, p 1126 note 47.

IN NUBIBUS. See In 42 C.J.S. p 490 note 17.

INNUENDO. In its general sense, it has been said to mean acts done by hinting, by insinuation, by intimation.[22]

More specifically, or technically, a clause in the declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.[23]

The term has been distinguished from "averment" see 7 C.J.S. p 1308 note 64.

In indictments and informations generally see Indictments and Informations § 106; and in slander or libel cases see the C.J.S. title Libel and Slander § 3, also 36 C.J. p 1148 notes 9–28, § 162, also 37 C.J. p 22 note 6–p 26 note 38, § 174, also 37 C.J. p 41 notes 10–17, § 295, also 37 C.J. p 147 note 79–p 148 note 89.

IN NULLO EST ERRATUM. See In 42 C.J.S. p 490 notes 18, 19.

IN OBSCURA VOLUNTATE MANUMITTENTIS FAVENDUM EST LIBERATI.[24]

IN OBSCURIS INSPICI SOLERE QUOD VERISIMILIUS EST, AUT QUOD PLERUMQUE FIERI SOLET.[25]

IN OBSCURIS QUOD MINIMUM EST SEQUIMUR.[26]

IN ODIUM SPOLIATORIS OMNIA PRÆSUMUNTUR.[27]

INOFFICIOSUM. Latin, in the civil law, contrary to natural duty or affection; inofficious.[28]

11. Webster Int.D.

Phrase construed

"Acted innocently."—Christie v. Cooper, 1900, 2 Q.B. 522, 528—32 C.J. p 575 note 18 [a].

12. Mo.—Cheffer v. Eagle Discount Stamp Co., 156 S.W.2d 591, 595, 348 Mo. 1023.
35 C.J. p 918 note 64.

13. Black L.D.

14. Black L.D.

15. A maxim meaning "In our law, one comma upsets the whole plea."—Tayler L. Gloss.

16. Black L.D.

17. Tex.—Kemper v. State, 138 S.W. 1025, 1041, 63 Tex.Cr. 1.

18. Tex.—Kemper v. State, supra.

19. Black L.D.

20. A maxim meaning "A new remedy is to be applied to a new case."—Black L.D.

21. Black L.D.

22. Ga.—Jones v. Poole, 8 S.E.2d 532, 534, 62 Ga.App. 309.

23. Bouvier L.D.

Purpose

"The office of an innuendo is to declare what the words meant to those to whom they were published."—Washer v. Bank of America Nat. Trust & Savings Ass'n, 136 P.2d 297, 301, 21 Cal.2d 822.

24. A maxim meaning "Where the expression of the will of one who seeks to manumit a slave, is obscure, liberty is to be favored."—Black L.D.

25. A maxim meaning "Where there is obscurity, we usually regard what is probable or what is generally done."—Bouvier L.D.

Similarly rendered

"In obscure cases, we usually look at what is most probable, or what most commonly happens."—Black L.D.

26. A maxim meaning "In obscure or doubtful cases, we follow that which is the least."—Black L.D.

27. A maxim meaning "All things are presumed against a wrong-doer."—Bouvier L.D.

Applied in State v. Crowell, 50 S.W. 893, 894, 149 Mo. 391, 73 Am.S.R. 402—32 C.J. p 576 note 37 [a].

Similarly rendered

"To the prejudice (in condemnation) of a despoiler, all things are presumed; every presumption is made against a wrongdoer."—Black L.D.

28. Black L.D.

INOFFICIOUS. Unnatural.[29]

INOFICIOSIDAD. In Spanish law, anything done contrary to a duty or obligation assumed, or in opposition to natural affection or pity, the word being applied particularly in matters relating to wills and testaments, donations or gifts, dower and the like,[30] any or all of which may be subject to revocation or reduction when they affect injuriously the rights of creditors or heirs.[31]

IN OMNI ACTIONE UBI DUÆ CONCURRUNT DISTRICTIONES, VIDELICET IN REM ET IN PERSONAM, ILLA DISTRICTIO TENENDA EST QUÆ MAGIS TIMETUR ET MAGIS LIGAT.[32]

IN OMNIBUS. See In 42 C.J.S. p 490 note 20.

IN OMNIBUS CAUSIS PRO FACTO ACCIPITUR ID, IN QUO PER ALIUM MORÆ SIT, QUO MINUS FIAT.[33]

IN OMNIBUS CONTRACTIBUS, SIVE NOMINATIS, SIVE INNOMINATIS, PERMUTATIO CONTINETUR.[34]

IN OMNIBUS FERE MINORI ÆTATI SUCCURITUR.[35]

IN OMNIBUS [FERE] PŒNALIBUS JUDICIIS, ET ÆTATI ET IMPRUDENTIÆ SUCCURRITUR.[36]

IN OMNIBUS IMPERATORIS EXCIPITUR FORTUNA, CUI IPSAS LEGES DEUS SUBJECIT.[37]

IN OMNIBUS OBLIGATIONIBUS, IN QUIBUS DIES NON PONITUR, PRÆSENTI DIE DEBETUR.[38]

IN OMNIBUS QUIDEM, MAXIME TAMEN IN JURE, ÆQUITAS SPECTANDA SIT.[39]

IN OMNI RE NASCITUR RES QUÆ IPSAM REM EXTERMINAT.[40]

INOPERATIVE. Not active, not operative, producing no effect;[41] lacking in operation or effect; destitute of result; ineffectual;[42] the commonly understood meaning of the word is that a thing is not in effect.[43]

It has been held synonymous with "void."[44]

INOPPORTUNE. At the wrong time; unseasonable in time.[45]

INOPS CONSILII. Latin, destitute of counsel; without legal counsel. The term is applied to the acts or condition of one acting without legal advice, as a testator drafting his own will.[46]

29. N.J.—In re Willford, Prerog., 51 A. 501, 502.
"Inofficious will" see the C.J.S. title Wills § 1, also 32 C.J. p 576 note 40 and 68 C.J. p 412 notes 27, 28.

30. Escriche Diccionario.

31. Black L.D.

32. A maxim meaning "In every action where two distresses concur, that is in rem and in personam, that is to be chosen which is most dreaded, and which binds most firmly."—Black L.D.

33. A maxim meaning "In all causes, that is taken for a fact in which, by means of another, there may be a hindrance to prevent its being done."—Morgan Leg.Max.
Applied in The Palo Alto, D.C.Me., 18 F.Cas.No.10,700, 2 Ware 344, 349, 6 N.Y.Leg.Obs. 262.

34. A maxim meaning "In all contracts, whether nominate or innominate, an exchange [of value, i. e., a consideration] is implied."—Black L. D.
Slightly different rendition
"In all agreements, whether it is named or not, an exchange is comprised."—Tayler L. Gloss.

35. A maxim meaning "In all cases aid is given to minors."—Morgan Leg.Max.

36. A maxim meaning "In nearly all penal judgments, immaturity of age and imbecility of mind are favored."—Black L.D.
Similarly rendered
"In all trials for penal offences, allowance is made for youth and lack of discretion."—Bouvier L.D.

37. A maxim meaning "God subjects in all things, the fortunes of emperors to the laws of the land."—Peloubet Leg.Max.

38. A maxim meaning "In all obligations in which a date is not put, the debt is due on the present day; the liability accrues immediately."—Black L.D.
Similarly rendered
"In all obligations, when no time is fixed for the performance, the thing is due immediately."—Bouvier L.D.

39. A maxim meaning "In all things, but especially in law, equity is to be regarded."—Black L.D.

40. A maxim meaning "In every thing, the thing is born which destroys the thing itself."—Bouvier L. D.
Similarly rendered
"In everything there arises a thing which destroys the thing itself; everything contains the element of its own destruction."—Black L.D.

41. Webster New Int.D.

42. N.Y.—In re Merritt's Will, 14 N. Y.S.2d 103, 107, 171 Misc. 812.
Phrase construed
"Inoperative or invalid," referring to a patent, construed as meaning failing to secure to the inventor the monopoly of his actual invention.—American Automotoneer Co. v. Porter, Mich., 232 F. 456, 459, 146 C.C.A. 450.

43. Ala.—Brand v. State, 6 So.2d 446, 447, 242 Ala. 15.

44. Vt.—Merrill v. Englesby, 28 Vt. 150, 157.

45. Ill.—Pennsylvania Co. v. Sloan, 17 N.E. 37, 41, 125 Ill. 72, 8 Am.S. R. 337.

46. Black L.D.
Phrase applied
(1) To an Indian.—Hastings v. Farmer, 4 N.Y. 293, 299.
(2) Applied in other cases.—Poor v. Considine, Ohio, 6 Wall., U.S., 458, 481, 18 L.Ed. 869—32 C.J. p 576 note 55.

IN ORDER. See In 42 C.J.S. p 479 note 21.

INORDINATUS. An intestate.[47]

INORGANIC DUST. Mineral dust; it comes from rock, coal, and other minerals, and is often referred to as "silica;" the breathing of it is harmful, and may cause chronic bronchitis and other respiratory diseases, since it sticks, does not dissolve, and irritates.[48]

It is distinguished from "organic dust."[49]

IN OTHER WORDS. See In 42 C.J.S. p 479 notes 23, 24.

IN PAIS. See In 42 C.J.S. p 488 notes 84, 85.

IN PAPER. See In 42 C.J.S. p 483 note 82(36).

IN PARI CAUSA POSSESSOR POTIOR HABERI DEBET.[50]

IN PARI CAUSA POTIOR EST CONDITIO POSSIDENTIS.[51]

IN PARI DELICTO. See In 42 C.J.S. p 490 note 21–27.

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS (ET POSSIDENTIS).[52]

IN PARI MATERIA. See In 42 C.J.S. p 490 notes 28, 29.

INPENY and OUTPENY. In old English law, a customary payment of a penny paid on entering into, and going out of, a tenancy.[53]

IN PERICULO QUI ETIAM TUTUS CAVET SETINUS EST.[54]

IN PERPETUAM REI MEMORIAM. See In 42 C.J.S. p 490 note 30.

IN PERPETUITY. In its broad general sense see In 42 C.J.S. p 483 note 82 (37) and in its legal sense see the C.J.S. title Perpetuities § 1, also 48 C.J. p 933 note 1–p 934 note 11.

IN PERSON. See In 42 C.J.S. p 479 notes 25–31.

47. Black L.D.

48. Miss.—Meridian Grain & Elevator Co. v. Jones, 169 So. 771, 176 Miss. 764.

49. Miss.—Meridian Grain & Elevator Co. v. Jones, supra.

50. A maxim meaning "In an equal cause he who has the possession should be preferred."—Black L.D.

Maxim paraphrased

"When two parties have equal rights, the advantage is always in favor of the possessor."—Bouvier L. D., citing Broom Leg.Max. p 714.

51. A maxim meaning "In an equal case (i. e., where the claimants are in a similar position), the possessor is in the better position."—Trayner Leg.Max.

More specifically

"In a case of equal or mutual fault the condition of the party in possession is the better one."—Black L.D.

52. A maxim meaning "In a case of equal or mutual fault between two parties, the condition of the party defending [or in possession] is the better one."—Black L.D.

Other forms of the maxim

(1) In pari delicto, melior est conditio possidentis.—Keel v. Larkin, 3 So. 296, 298, 83 Ala. 142, 3 Am.S.R. 702—32 C.J. p 576 note 63—1 C.J. p 958 note 39 [a] (1).

(2) "In pari delicto melior est conditio defendentis," that is, where both parties are equally at fault, the condition of the defendant [or possessor] is best.—Eidson v. Maddox, 24 S.E.2d 895, 897, 195 Ga. 641.

(3) "In pari delicto potior est conditio possidentis" means when each party is equally in fault, the law favors him who is actually in possession, that is, the parties will be left where they are.—Reaves Lumber Co. v. Cain-Hurley Lumber Co., 279 S.W. 257, 258, 152 Tenn. 339.

Similarly rendered

(1) "Among those in equal wrong the situation of the defendant is the stronger."—Norris v. York, 185 P. 43, 44, 105 Kan. 448.

(2) "Where both parties are equally in fault, the condition of the defendant is preferable."—Bouvier L. D.

(3) "Where parties are equally involved in an unlawful agreement the law will not interpose to grant relief to either of them but will leave them where it found them."—McGhee's Adm'r v. Elcomb Coal Co., 156 S.W.2d 868, 869, 288 Ky. 540.

(4) "Where the wrong of the one party equals that of the other, the defendant is in the stronger position."—Van Antwerp v. Van Antwerp, 5 So.2d 73, 79, 242 Ala. 92.

(5) The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains. The maxim is: "In pari delicto potior est conditio defendentis."—Byers v. Byers, 25 S.E.2d 466, 470, 223 N.C. 85.

Discussion of the maxim

(1) "The maxim, 'In pari delicto potior est conditio defendentis' is but a corollary to the general rule 'Ex dolo malo non oritur actio,' and it neither limits nor controls it."—Stewart v. Wright, Mo., 147 F. 321, 340, 77 C.C.A. 499. See also 33 C.J.S. p 117 note 93.

(2) It is a maxim long established and constantly acted upon by courts both of law and equity and is a complement of the other well known maxim: "Ex turpi causa actio non oritur."—Eidson v. Maddox, 24 S.E. 2d 895, 897, 195 Ga. 641.

(3) It is a maxim of public policy equally respected in courts of law and courts of equity.—Baldwin v. Campfield, 8 N.J.Eq. 891, 899.

(4) "It is impossible to apply the rule in pari delicto potior est conditio possidentis, where there has been in fact no delictum at all."—Scheuerman v. Scheuerman, 8 Alta. L. 417, 422.

Maxims applied or explained

U.S.—Randall v. Howard, Md., 2 Black 585, 588, 17 L.Ed. 269—Hannay v. Eve, Ga., 3 Cranch 242, 246, 2 L.Ed. 427.

Ill.—Miller v. Marckle, 21 Ill. 152, 154.

Ky.—McGhee's Adm'r v. Elcomb Coal Co., 156 S.W.2d 868, 869, 288 Ky. 540.

N.C.—Byers v. Byers, 25 S.E.2d 466, 470, 223 N.C. 85.

32 C.J. p 576 note 63 [b], p 577 note 64 [d]—1 C.J. p 958 note 39 [a].

See generally Contracts §§ 272–278, and Equity §§ 94–99.

53. Black L.D.

54. A maxim meaning "He is most free from danger who, even when safe, is on his guard."—Morgan Leg. Max.

IN PERSONAM. See Actions §§ 12 (5), 52.

IN PLACE. See the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 744 notes 16-28.

IN PŒNALIBUS CAUSIS BENIGNIUS INTERPRETANDUM EST.[55]

IN POSSESSION. See In 42 C.J.S. p 483 note 82 (38), (39).

IN PRÆPARATORIIS AD JUDICIUM FAVETUR ACTORI.[56]

IN PRÆSENTIA MAJORIS CESSAT POTENTIA MINORIS.[57]

IN PRÆSENTIA MAJORIS POTESTATIS, MINOR POTESTAS CESSAT.[58]

IN PRETIO EMPTIONIS ET VENDITIONIS NATURALITER LICET CONTRAHENTIBUS SE CIRCUMVENIRE.[59]

IN PROPRIA CAUSA NEMO JUDEX.[60]

IN PURSUANCE OF. See In 42 C.J.S. p 479 note 32-p 480 note 36.

INQUEST. In its broadest sense a term including any judicial inquiry, but more generally confined to an inquiry by jury.[61] The most familiar use of the word is to designate the inquiry by a coroner into the causes of death, whether sudden, violent, or in prison.[62] The term "inquest," however, is sometimes used to signify the jury itself before whom the question is brought,[63] and may then be defined as a body of men appointed by law to inquire into certain matters;[64] but the finding of such men on an investigation is also called an inquest,[65] or an "inquisition," hereinafter defined.

In a narrower, and somewhat different sense, it means sometimes the trial of the issue of fact where the plaintiff alone introduces testimony, the defendant usually not appearing.[66]

Phrases. The word occurs in phrases, elsewhere discussed, as indicated in the note.[67]

INQUILINATO. In Spanish law, tenancy, the right acquired by the lessee in the house occupied under the lease; also the lease contract itself and the rental provided therein.[68]

INQUILINO. In Spanish law, the occupying lessee of a house.[69]

INQUILINUS. In Roman law, a tenant; one who hires and occupies another's house; but particularly a tenant of a hired house in a city, as distinguished from "colonus," the hirer of a house or estate in the country.[70]

INQUIRE. To make investigation concerning; to search for; to seek.[71]

55. A maxim meaning "In penal cases, the more favorable interpretation is to be made."—Bouvier L.D.
Applied in Daniel v. Vaccaro, 41 Ark. 316, 331.
Similarly rendered
"In penal causes or cases, the more favorable interpretation should be adopted."—Black L.D.

56. A maxim meaning "In things preceding judgment the plaintiff is favored."—Black L.D.

57. A maxim meaning "In presence of the greater the power of the inferior ceases."—Broom Leg.Max.

58. A maxim meaning "In the presence of the superior power, the inferior power ceases."—Black L.D.

59. A maxim meaning "In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other."—Black L.D.

60. A maxim meaning "No one can be judge in his own cause."—Black L.D.

61. N.Y.—People v. Coombs, 55 N.Y.S. 276, 284, 36 App.Div. 284.
Broad signification
Where the procedure of the particular court has some reference to peculiar jurisdictions not of the common law, the term "inquest" is to be taken as a term of larger signification than in the common-law courts.—Matter of Hermann, 145 N.Y.S. 291, 298, 83 Misc. 283.

62. Bouvier L.D.
See also Coroners §§ 13-27.

63. Ga.—Davis v. Bibb County, 42 S.E. 403, 405, 116 Ga. 23.

64. U.S.—Geiger v. U. S., Md., 162 F. 844, 845, 89 C.C.A. 516.
"Summoning an inquest"
Phrase held to mean "summoning a jury."—Davis v. Bibb County, 42 S.E. 403, 405, 116 Ga. 23.

65. Black L.D.

66. N.Y.—Haines v. Davis, 6 How. Pr. 118, 119.
In New York the name is also given to a species of proceeding under the state practice, allowable where the defendant in a civil action has not filed an affidavit of merits or verified his answer. In such case the issue may be taken up out of its regular order, on plaintiff's motion, and tried without the admission of any affirmative defense.—Black L.D.

67. **Phrases elsewhere discussed**
(1) "Coroner's inquest" see Coroners §§ 13-27.
(2) "Grand inquest" see Grand Juries § 1 a note 2.
(3) "Inquest before grand jury" see Grand Juries §§ 37-44.
(4) "Inquest of damages" see Damages § 163 et seq.
(5) "Inquest of office" see Escheat § 8.

68. Escriche Diccionario.

69. Escriche Diccionario.

70. Black L.D.

71. Century D.
Phrases construed
(1) "Inquire and report," words long used in England and in this country as a formula for a reference to a master in chancery to obtain and report information to the court.—Austin v. Ahearne, 61 N.Y. 6, 12.
(2) "Inquire into the circumstances," as importing a judicial investigation of the questions of fact.—Matter of Gill, 88 N.Y.S. 466, 467, 95 App.Div. 174.
(3) "Inquiring into and reporting," as meaning gathering information and distributing it.—U. S. Fidelity

INQUIRENDO. An authority given to some official person to institute an inquiry concerning the crown's interests.[72]

INQUIRY. The usual literary meaning of the word is question, query, or request for information;[73] also defined as investigation into facts, causes, effects, and relations generally; research.[74]

It has been distinguished from "claim" see 14 C.J.S. p 1185 note 79.

INQUISICION. In Spanish law, generally the judicial investigation of crime; and specifically the ecclesiastical tribunal established in Spain to investigate and punish heresy and other offenses against the faith. The Royal Decrees of 1820 and 1834 abolished it.[75]

INQUISIDOR. In Spanish law, an inquisitor, the ecclesiastical judge of the tribunal of the "inquisición" who took cognizance of causes relating to the faith, and anciently the investigating or examining judge of any court who, as a matter of course, conducted investigations of crime and examinations of criminals.[76]

INQUISITIO. In old English law, an inquisition or inquest.[77]

INQUISITION. Examination; inquiry; investigation; the act of inquiring.[78] In its broadest sense, the term includes any judicial inquiry, but is more generally confined to an inquiry by jury.[79]

In practice, an inquiry or inquest; particularly, an investigation of certain facts made by a sheriff, together with a jury impaneled by him for the purpose;[80] a finding of facts by a jury;[81] the instrument of writing on which their decision is made is also called an inquisition.[82]

In common-law courts an "inquisition" is often synonymous with "trial;" but where reference is made to a jurisdiction other than the common law the terms may have a larger signification than in the common-law courts.[83]

INQUISITOR. A designation applied to sheriffs, coroners super visum corporis, and the like, who have power to inquire into certain matters.[84]

In ecclesiastical law, the name of an officer who is authorized to inquire into heresies, and the like, and to punish them; a judge.[85]

IN QUO QUIS DELINQUIT, IN EO DE JURE EST PUNIENDUS.[86]

IN RE. See In 42 C.J.S. p 491 note 33.

IN REBUS MANIFESTIS ERRAT QUI AUCTORITATES LEGUM ALLEGAT; QUIA PERSPICUA VERA NON SUNT PROBANDA.[87]

IN REBUS NOVIS CONSTITUENDIS EVIDENS ESSE INUTILES DEBET, UT RECEDATUS AB EO JURE, QUOD DIU ÆQUAM VISUM EST.[88]

& Guaranty Co. v. Commonwealth, 118 S.W. 1000, 1001, 133 Ky. 740.

72. Black L.D.

73. Md.—Reiser Co. v. Baltimore Radio Show, 181 A. 465, 468, 169 Md. 306.

74. Standard D.

Phrases construed

(1) "Inquiry into title" construed as including an effort to show a cessation of the use of the property for the purposes for which it was conveyed and hence to establish reverter as provided in the deed.—Boutwell v. Board of Education of Escambia County, Ala., 12 So.2d 349, 350.

(2) "Reasonable inquiry," as requiring that information be sought from persons known by the person seeking such information to be reliable, or, if unknown, from persons identified and approved by some reliable person known to be reliable.—Julian v. Daniel, 95 S.E. 907, 908, 175 N.C. 549—52 C.J. p 1186 note 8.

(3) "Writ of inquiry," a writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation.—Black L.D. See also Damages § 171.

(4) Other phrases as to which more recent adjudications have not been found see 32 C.J. p 578 notes 93–97.

75. Escriche Diccionario.

76. Escriche Diccionario.

77. Black L.D.

78. Ind.—Carver v. Louthain, 38 Ind. 530, 547.

Inquisition in lunacy see the C.J.S. title Insane Persons §§ 14–34, also 32 C.J. p 634 note 57–p 652 note 7.

79. Del.—Phillips v. Vessells, 126 A. 51, 2 W.W.Harr. 490.

80. Black L.D.

81. N.Y.—Newton v. Mutual Ben. L. Ins. Co., 15 Hun 595, 597.

82. Black L.D.

83. N.Y.—Matter of Hermann, 145 N.Y.S. 291, 298, 83 Misc. 383.

In England

"There were in England two kinds of inquisitions, where the crown is concerned—one of instruction, or information, and the other of intitling."—Eppes v. Cralle, 1 Munf. 258, 266, 15 Va. 258, 266.

84. Black L.D.

85. Black L.D.

86. A maxim meaning "In whatever thing one offends, in that is he rightfully to be punished."—Black L.D.

More freely rendered

"One who fails to perform the duties of his office ought to be punished, in that office."—Rapalje & L. L. D.

87. A maxim meaning "He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved."—Bouvier L.D.

Applied in Jeffrey's Case, 5 Coke 66b, 67a, 77 Reprint 155.

Similarly expressed

"In clear cases, he mistakes who cites legal authorities; for obvious truths are not to be proved." The maxim is "applied to cases too plain to require the support of authority; 'because,' says the report, 'he who endeavors to prove them obscures them.' "—Black L.D.

88. A maxim meaning "In settling new matters, the utility must be

IN REBUS QUÆ SUNT FAVORABILIA ANIMÆ, QUAMVIS SUNT DAMNOSA REBUS, FIAT ALIQUANDO EXTENSIO STATUTI.[89]

IN RE COMMUNI MELIOR EST CONDITIO PROHIBENTIS.[90]

IN RE COMMUNI NEMINEM DOMINORUM JURE FACERE QUICQUAM, INVITO ALTERO, POSSE.[91]

IN RE COMMUNI POTIOR EST CONDITIO PROHIBENTIS.[92]

IN RE DUBIA BENIGNIOREM INTERPRETATIONEM SEQUI, NON MINUS JUSTIUS EST, QUAM TUTIUS.[93]

IN RE DUBIA MAGIS INFICIATIO QUAM AFFIRMATIO INTELLIGENDA.[94]

IN RE LUPANARI, TESTES LUPANARES ADMITTENTUR.[95]

IN REM. See Actions §§ 1 a (6), 52.

IN REM ACTIO EST PER QUAM REM NOSTRAM QUÆ AB ALIO POSSIDETUR PETIMUS, ET SEMPER ADVERSUS EUM EST QUI REM POSSIDET.[96]

IN REM SUAM TUTOR FIERI NON POTEST AUCTOR.[97]

IN RE OBSCURA MELIUS EST FAVERE REPETITIONI QUAM ADVENTITIO LUCRO.[98]

IN RE PARI, POTIOREM CAUSAM ESSE PROHIBENTIS CONSTAT.[99]

IN RE POTIOREM CAUSAM ESSE PROHIBENTIS CONSTARE.[1]

IN RE PROPRIA INIQUUM ADMODUM EST ALICUI LICENTIAM TRIBUERE SENTENTIÆ.[2]

IN REPUBLICA MAXIME CONSERVANDA SUNT JURA BELLI.[3]

IN RESTITUTIONEM, NON IN PŒNAM, HÆRES SUCCEDIT.[4]

IN RESTITUTIONIBUS BENIGISSIMA INTERPRETATIO FACIENDA EST.[5]

IN RESTRAINT OF TRADE. See generally the C.J.S. titles Contracts §§ 238–258; Corporations § 189 c (7); Injunctions §§ 84, 138–149; and Monopolies § 15 et seq, also 41 C.J. p 99 note 6 et seq.

IN REX NON POTEST CONJUNCTIM TENERE CUM ALIO.[6]

INROLL and INROLLMENT. See 30 C.J.S. p 257 notes 14–20.

very apparent in order to justify a departure from laws long acquiesced in as salutary."—Morgan Leg.Max.

89. A maxim meaning "In things that are favorable to the spirit, though injurious to things, an extension of the statute should sometimes be made."—Black L.D.

90. A maxim originating in the Roman law and meaning "In common property the condition of the one prohibiting is the better."—Gulf Refining Co. v. Carroll, 82 So. 277, 278, 145 La. 299.

91. A maxim originating in the Roman law and meaning "One coproprietor can exercise no authority over the common property against the will of the other."—Gulf Refining Co. v. Carroll, 82 So. 277, 278, 145 La. 299.

92. A maxim meaning "In a partnership the condition of one who forbids is the more favorable."—Black L.D.

93. A maxim meaning "In a doubtful case, to follow the milder interpretation is not the less more just than it is the safer course."—Bouvier L.D.

94. A maxim meaning "In a doubtful matter, the denial or negative is to be understood, or regarded, rather than the affirmative."—Black L.D.

95. A maxim meaning "In a matter concerning a brothel, prostitutes are admitted as witnesses."—Black L.D.

Applied or explained in Van Epps v. Van Epps, 6 Barb., N.Y., 320, 324.

96. A maxim meaning "The action in rem is that by which we seek our property which is possessed by another, and is always against him who possesses the property."—Black L.D.

97. A maxim meaning "A tutor cannot act, or transact for his own behoof."—Trayner Leg.Max.

98. A maxim meaning "In an obscure case it is better to favor repetition than adventitious gain."—Morgan Leg.Max.

99. A maxim meaning "In a thing equally shared by several, it is clear that the party refusing to permit the use of it has the better cause." It is applied to partnerships, where one partner has a right to withhold his assent to the acts of his copartner.—Black L.D.

Applied in Griswold v. Waddington, 16 Johns., N.Y., 438, 491.

Similarly rendered

"Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger."—Bouvier L.D.

1. A maxim meaning "A better cause in the matter is found to exist on the part of the person defending."—Taylor L. Gloss.

2. A maxim meaning "It is extremely unjust that any one should be judge in his own cause."—Black L.D.

3. A maxim meaning "In the state, the laws of war are to be especially upheld."—Black L.D.

Applied in Tyler v. Pomeroy, 8 Allen, Mass., 480, 484.

4. A maxim meaning "The heir succeeds to the restitution, not the penalty." That is to say: "An heir may be compelled to make restitution of a sum unlawfully appropriated by the ancestor, but is not answerable criminally, as for a penalty."—Black L.D.

5. A maxim meaning "The most benignant interpretation is to be made in restitutions."—Black L.D.

6. A maxim meaning "One king can not hold conjointly with another."—Morgan Leg.Max.

INSACULACION. In Spanish law, a mode of selecting by lot certain judicial, and other, officials, by drawing the names from a sack, vase, or other suitable receptacle.[7]

INSANE. See Insane Persons § 2.

Phrases employing the word and discussed elsewhere are referred to in the note.[8]

INSANELY. See Insane Persons § 2.

7. Escriche Diccionario.

8. **Phrases discussed elsewhere**
(1) "Insane asylum" see Asylums § 1.
(2) "Insane delusions" see the C. J.S. titles Criminal Law § 60; Insane Persons § 2, also 32 C.J. p 605 note 73—p 608 note 6; and Wills § 18, also 68 C.J. p 433 note 95—p 437 note 20.
(3) "Insane impulse" see Insane Persons § 2.
(4) "Insane irresistible impulse" as affecting the responsibility for, or the capacity to commit, crime see Criminal Law § 61.

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